Scritti di diritto privato europeo ed internazionale

EU (AND) PRIVATE INTERNATIONAL LAW. SOCIETAL CHANGES AND LEGAL CHALLENGES

edited by

BETTINA HEIDERHOFF, ILARIA QUEIROLO

EDITORIALE SCIENTIFICA

SCRITTI DI DIRITTO PRIVATO EUROPEO
ED INTERNAZIONALE

Collana diretta da Ilaria Queirolo e Alberto Maria Benedetti

30

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ED INTERNAZIONALE

ESSAYS IN EUROPEAN AND INTERNATIONAL PRIVATE LAW

BETTINA HEIDERHOFF, ILARIA QUEIROLO (edited by)

EU (and) Private International Law. Societal Changes and Legal Challenges

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EDITORIALE SCIENTIFICA
NAPOLI

This volume has been published with the financial support of the University of Genoa (Department of Law, Department of Political and International Science; Office for international activities; Phd Programmes in Law, and in Political Science).

© 2024 Editoriale Scientifica srl
Via San Biagio dei Librai 39
Palazzo Marigliano
80138 Napoli
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ISBN 979-12-5976-936-7

SCRITTI DI DIRITTO PRIVATO EUROPEO ED INTERNAZIONALE
Essays in European and International Private Law

Diritto privato, diritto europeo e diritto internazionale rivelano intrecci via via più significativi, chiamando docenti e studiosi dei diversi settori a confrontarsi e a collaborare sempre più intensamente. Da tale proficua osmosi scientifica origina la collana "*Scritti di diritto privato europeo ed internazionale*", con la quale si persegue l'obiettivo di raccogliere opere scientifiche – a carattere monografico e collettaneo – su temi di attualità in un'ottica interdisciplinare ed in una prospettiva di valorizzazione della stretta connessione tra le discipline coinvolte. Tale obiettivo trova un riscontro nelle specifiche competenze dei Direttori e dei membri del Comitato scientifico.

In "*Scritti di diritto privato europeo ed internazionale*" sono pubblicate opere di alto livello scientifico, anche in lingua straniera, per facilitarne la diffusione internazionale. I Direttori approvano le opere e le sottopongono a referaggio con il sistema del "doppio cieco" ("*double blind peer review process*"), nel rispetto dell'anonimato sia dell'autore, sia dei due revisori.

I revisori rivestono o devono aver rivestito la qualifica di professore ordinario nelle università italiane o una qualifica equivalente in istituzioni straniere. Ciascun revisore formula una delle seguenti valutazioni: a) pubblicabile senza modifiche; b) pubblicabile previo apporto di modifiche; c) da rivedere in maniera sostanziale; d) da rigettare. La valutazione tiene conto dei seguenti criteri: i) significatività del tema nell'ambito disciplinare prescelto e originalità dell'opera; ii) rilevanza scientifica nel panorama nazionale ed internazionale; iii) attenzione alla dottrina e all'apparato critico; iv) adeguato aggiornamento normativo e giurisprudenziale; v) rigore metodologico; vi) proprietà di linguaggio e fluidità del testo; vii) uniformità dei criteri redazionali. Nel caso di giudizio discordante fra i due revisori, la decisione finale è assunta di comune accordo dai Direttori, salvo casi particolari ove venga nominato tempestivamente un terzo revisore. Le schede di referaggio sono conservate in appositi archivi.

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PREFACE

The goal of the Series of Essays '*Scritti di diritto privato europeo ed internazionale*' is to disseminate the results of academic research at European and international level, and to contribute to the national and international scientific debate, with methodological rigor and openness to multi and intra-disciplinary approaches.

The *PEPP Programme*, which brings together PhD Candidates from different EU Member States to attend four seminars of advanced learning in a Programme in European Private Law for Postgraduates (PEPP), and the '*Series*', due to their common aims, have long established a cooperation in the dissemination of research studies.

This *Volume* comprises contributions from Lecturers and PhD Candidates who participated in the 2022-2023 PEPP Session, coordinated by the University of Münster along with the Katholieke Universiteit Leuven; the University of Zagreb; the University of Cambridge; the Bucerius Law School; the Max-Planck-Institute for Comparative and International Private Law; the University of Genova; the University of Silesia in Katowice; the University of Wroclaw; the Jagiellonian University in Kraków; the University of Maribor, and the University of Valencia.

The works of the Authors focus on their own research topics, connected to various aspects of contract law, international and EU commerce, private international law, successions and human rights. All contributions address most urgent issues in laws, many of them being devoted to the matter of regulation of new technologies or recent social developments.

All contributions were subject to a double-blind referee procedure.

Bettina Heiderhoff
Ilaria Queirolo
February 2024

PIERANGELO CELLE

DIRECT ACTION AGAINST THE LIABILITY INSURERS AND PRIVATE INTERNATIONAL LAW

CONTENTS: 1. Direct action against the liability Insurers – 2. The issue of the law applicable to direct action – 3. Jurisdiction issues for direct action.

1. *Direct action against the liability Insurers*

Liability insurance protects the Insured financially if the Insured is responsible in tort or in contract for a damage caused to a third party[1]. Generally speaking, the party who suffered damages as a result of the actions or omissions of the Insured acts against the latter to establish liability on the basis of the legal regime (contract or tort) applicable to the relationship between them; in turn, the Insured has a right, based on the insurance contract, to claim an indemnity against the Insurers. In most cases, the insurance indemnity is then paid to the Insured, which uses such funds to settle the claimant, but in some cases it is a policy requirement that the Insured pays the claimant first, and then obtains the reimbursement from the Insurers[2].

When a liability insurance exist, there is usually no direct legal connection between the liability Insurers of the party responsible for the damage and the damaged party, unless expressly provided for by the law. However, the possibility for the damaged party to obtain the indemnity directly from the Insurers has several self-evident advantages. This possibility simplifies the procedural steps required to put the indemnity into the hands of the damaged party, avoiding to pass through the Insured; this is beneficial not only in termed of ease, speed and costs, but also it reduces the possibility that the insurance indemnity, when in the hands of the Insured, is attached by other creditors of the latter, thus depriving the damaged party of it.

[1] R.M. MERKIN KC, *Colinvaux's Law of Insurance*, 2023, p. 321 ff.; M. ROSSETTI , *Il diritto delle assicurazioni*, III, Padova, 2013, p. 2 ff.

[2] S.J HAZELWOOD, *P&I Clubs: law and practice*, London, 2000, p. 351.

The possibility to establish a legal connection between the damaged party and the liability Insurers of the party responsible for the damage is also to be understood in the context of the role of liability insurance as a matter of policy. Liability insurance is stipulated primarily to protect the Insured from the financial consequences of damages caused by their activity to third parties. However, the existence of such liability insurance can be made relevant also for the purpose of protecting the position of the damaged party, thus reducing the relevance of the financial situation of the Insured responsible for the damage: since the liability insurance is functionally linked to the purpose of indemnifying the third damaged party, the likelihood to recover the damage is no longer dependant of the financial situation of the Insured, but is secured by the Insurers themselves, whose financial situation is usually sound, being regulated by the law governing insurance business activity[3].

Such functional connection may be established by the law adopting different legal regime. A first case may be that the law may give to the Insured the right to make the Insurers pay the insurance indemnity directly to the third damaged party: for example, art. 1917, second paragraph, Italian Civil Code provides that "*L'assicuratore ha facoltà, previa comunicazione all'assicurato, di pagare direttamente al terzo danneggiato l'indennità dovuta, ed è obbligato al pagamento diretto se l'assicurato lo richiede*"[4].

Another possibility is that the third damaged party may benefit of a charge over the insurance monies, this securing its right to have such money used to satisfy its claim as preferred vis-à-vis other potential creditors of the Insured: for example, art. 2767 Italian civil code provides that "*Nel caso di assicurazione della responsabilità civile, il credito del danneggiato per il risarcimento ha privilegio sull'indennità dovuta dall'assicuratore*"[5].

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[3] R. THOMAS , *Third Party Direct Rights of Action against Insurers under UK Law and International Maritime Liability Conventions*, in A. BASU BAL, T. RAJPUT, G. ARGUELLO, D. LANGLET (eds), *Transport, Trade and Environment in Perspective*, Leiden, 2023, p. 686.

[4] "*The Insurers has the right, upon notice to the insured, to pay the indemnity due directly to the danaged third party, and is obliged to pay directly if the Insured requests it*"; M. ROSSETTI, *Il diritto delle assicurazioni*, cit., p. 52 ff.

[5] "*In the case of civil liability insurance, the claim of the damaged party for compensation has priority over the compensation owed by the Insurers*"; M. ROSSETTI *Il diritto delle assicurazioni*, cit., p. 95 ff.

Finally, the damaged party may be vested by the law with the right to sue directly the Insurers of the party who caused the damage and to obtain the indemnity, the so called "direct action"[6]. With such direct action, the damaged party benefits from the fact that usually the Insurers are more solvent and more easily attachable than the party responsible for the damage.

The functional legal connection is even more relevant when the existence of the liability insurance is mandatory by law[7]. In fact, the fundamental scope of mandatory insurance is the protection of the interests of third parties, by virtue of their being part of a class of persons exposed to the risks generated by the activity of the Insured. The rationale is that the negative externalities caused by the activity should be borne by the party engaged in the activity itself and that third parties who are at risk of being damaged by the activity should be protected against the risk the party engaged in the activity being not financially capable to indemnify the damages caused by the activity.

By establishing a mandatory insurance the cost of the negative externalities caused by the activity is borne by the Insured by way of payment of the insurance premiums and parties who are at risk of being damaged are protected against the risk the of the liable party being not financially capable to indemnify the damages caused by the activity, since they can obtain the indemnity directly from the liability Insurers, whose activity is specifically regulated by the law to secure its financial capability.

If the primary object of mandatory insurance and direct action is the protection of damaged parties, it is arguable that the latter should be secured in their expectation that in case of damages they will receive the indemnity directly from the Insurers.

This means that there is a strong policy rationale for the public control both of the terms of the mandatory insurance cover and of the solvency of the Insurers which undertake such covers. In addition, the damaged party should be protected protection against the

[6] For a recent comprehensive study of the direct action in the context of Italian law see M. TURCI, *L'azione diretta tra unità e molteplicità*, in *Osservatorio del diritto civile e commerciale*, 2, 2023, p. 301 ff.

[7] R. CAVALLO BORGIA, *L'assicurazione obbligatoria della responsabilità civile*, in M. FRANZONI (ed), *Trattato della responsabilità civile*, III, Milano, 2007, p. 307ff.

risk of defensive counter-measures by Insurers, particularly when based on terms of the contract with the Insured or on the conduct of the Insured to which the third party was not privy.

2. *The issue of the law applicable to direct action*

The issue of the law governing direct action against the liability Insurers may be put in the context of either the law governing the insurance contract, or the law governing the action of the damaged party against the Insured[8].

In most cases, the starting point of the analysis is that the proper law of the direct action against the liability Insurers should be closely linked to the legal basis of the functional connection established by the law between the third damaged party and the liability Insurers of the party who caused the damage.

The law may construe the direct action by making the third damaged party an assignee of the rights of the Insured under the liability insurance policy, so that such direct action is based on the insurance contract itself and therefore should be governed by the same law. This is the position adopted, for example, in UK by the Third Parties (Rights against Insurers) Act 2010, where it is clear that "*the Act does not create new rights, but transfers the rights that arise under the contract of insurance which relate to the Insured's liability to the third party*"[9]. As a result, when dealing with conflicts of law issues related to direct action, English Court usually apply the law governing the contract of insurance[10].

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[8] In general see R.A. ANDERSON, M.S. RHODES, L.R. RUSS, T.F. SEGALLA, *Couch on insurance*, Toronto, 2014; J. BURLING, K. LAZARUS, *Research Handbook on International Insurance Law and Regulation*, Cheltenham, 2011; J. BASEDOW, J. BIRDS, M. A. CLARKE, H. COUSY, H. HEISS, , *Principles of European Insurance Contract Law*, Munich, 2009; G. BEITZKE, *Les obligations deélictuelles en droit international privé*, in *Recueil des Cours*, 1965, II, p. 128; O. KAHN-FREUND, *Delictual liability and the Conflict of Laws*, in *Recueil des Cours*, 1968, II, p. 155.

[9] R. THOMAS, *Third Party Direct Rights of Action against Insurers under UK Law and International Maritime Liability Conventions*, cit., p. 689 ff.; M. A. CLARKE, *The Law of Insurance Contracts*, Oxfordshire, 2009.

[10] See for example Court of Appeal, *Containerships Denizcilik Nakliyat Ve Ticaret A.S. (v Shipowners' Mutual Protection and Indemnity Association (Luxembourg)*, [2016] EWCA Civ 386, in www.bailii.org.

On the other hand, direct action may be construed as a legal right granted directly by the law to the third damaged party as a tool to secure their own right to be indemnified for the damage caused by the Insured, so that such direct action should be governed by the same law governing the right to be indemnified[11].

For example, art. 9 of the Hague Convention on the law applicable to traffic accidents (1971) provides that the damaged party is vested with the right of direct action if the law governing the responsibility arising from the traffic accident (based on tort) provides for it. However, it is significant that if that law provides no right of direct action, such a right may nevertheless be granted if it is provided, among others, by the law governing the contract of insurance[12].

A similar approach is adopted by Regulation 864/2007 on the law applicable to non-contractual obligations (Rome II): art 18 provides that the damaged party may bring the claim directly against the Insurers of the liable party if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides[13].

As a result, or the basis of the Rome II regulation, the right of direct action exists if it is contemplated for either by the law applicable to the non-contractual liability or by the law applicable to the insurance contract, the choice being clearly dictated by the aim to protect the interests of the damaged party, giving them the benefit of the most favourable legal regime in terms of direct action[14].

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[11] Cfr. F. SEATZU, *Insurance in Private International Law: A European Perspective*, London, 2003, p. 120ff. ; P. CELLE, *I contratti di assicurazione grandi rischi nel diritto internazionale privato*, Padova, 2000, p. 244 ff.

[12] A. MALATESTA, *The law applicable to traffic accidents*, in A. MALATESTA (ed) *The Unification of Choice of Law Rules on Torts and Other NonContractual Obligations in Europe*, Padova, 2006, p. 96 ff.

[13] U. P. GRUBER, *Art. 18*, in G.P CALLIES (ed) *The Rome Regulations (Rome I and II): Commentary on the European Rules for Conflicts of Law*, Alphen aan den Rijn, 2015; H. HEISS, *Art. 18*, in U. MAGNUS, P. MANKOWSKY (eds), *European Commentaries on Private International Law*, Rome II Regulation, Koln, 2019.

[14] See Judgment of the Court (First Chamber) of 9 September 2015 Eleonore Prüller-Frey v Norbert Brodnig and Axa Versicherung AG C-240/14, and, in addition to Authors mentioned at note 13, M. FALLON, *Commentaire de la proposition pour une Convention européenne sur la loi applicable aux obligations non contractuelles*, in *Revue belge de droit international*, 1997, p. 696.

However, liability insurance may cover not only the tort liability of the Insured for damages caused to third parties, but also the liability in contract related to the business activity of the Insured; in some case, the insurance cover may even contemplate both kind of liability. A typical example is the liability of the carrier for damages caused to passengers in the course of the transport, which – depending on the law applicable to the contract of transport - may result in claims for death or personal injury brought in tort and/or in contract.

When the liability of the Insured towards the damaged party is based in contract, art. 18 of Rome II regulation does not apply and there is no express provision corresponding to such article in Rome I Regulation. However, it must be considered that the protection of the victim by granting the right to direct action is usually justified as a part of the general aim to protect the damaged party and therefore it is arguable that the rationale of the alternative connection contemplated in art. 18 of Rome II regulation could apply also in the context of contractual liability, for a number of concurring reasons.

First of all, the parallelism between Rome I and Rome II would suggest the need of a coordinated approach to the issue of the right to direct action, without distinguishing whether the underlying liability is contractual or non-contractual, since in both cases the law governing the liability does assert the need for protection of the damaged party by granting such right. In addition, in some cases the legal regime gives to the damaged party the possibility to act both in tort and in contract, so that it would be difficult to explain why the same damaged party might have a direct action against the liability Insurers of the liable party only where the liability of the latter is considered as non-contractual; this is especially the case when the legal regime applicable to the claim is the same irrespective of whether the action is brought in tort or in contract.

As a result, it is arguable that in Rome I Regulation the right of direct action against the liability Insurers should be regulated in the same way as in art. 18 Rome II Regulation, so that the right of direct action would exists when such right is granted by either the proper law of the insurance contract, or the proper law of the contract on

the basis of which the liability is to be established, determined according to Rome I regulation[15].

A different issue is which law governs the content of the obligation of the Insurers, when facing such direct action; in fact, it should be considered that the liability Insurers is responsible within the terms of the insurance contract stipulated by the party liable for the damage, which provides for the term and conditions on which the indemnity is liquidated. For example, the liability insurance may provide for a limit to the amount of the indemnity and, if the actual damage is above such limit, the Insurers does not cover the excess.

In this connection, it is clear that, whilst the existence and extent of the liability of the Insured towards the damaged party is to be determined on the basis of the law governing such liability (i.e., in the context of non-contractual obligations under Rome II regulation, by art. 4 et ss.) and whilst the right of the damaged party to act is governed by art. 18 of Rome II regulation, the extent of the Insurers obligation to indemnified depends on the terms of the insurance contract and therefore is to be ascertained in the context of such contract and its governing law[16].

This is established in the jurisprudence of the European Court of Justice[17], in which a clear distinction is made between the right of the damaged party to act against the liability Insurers (which may be governed pursuant art. 18 of the Rome II regulation by the law applicable to the liability in tort ascertained under art. 4 et ss. Of Rome II regulation) and the content of the obligation of the Insurers to indemnify the damaged party acting directly against them, which remains governed by the law applicable to the insurance contract ad per the applicable rules of Rome I regulation (art. 7 ss.)[18].

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[15] P. CELLE, *Jurisdiction and conflict of law issues between contracts of transport and insurance*, in S.M. CARBONE (ed), *Brussels Ia and Conventions on Particular Matters The case of transports*, Roma, 2017 p. 215.

[16] A. DICKINSON, *The Rome II Regulation: The Law Applicable to Non-contractual Obligations*, Oxford, 2008, p. 610 ff.

[17] Judgment of the Court (First Chamber) of 9 September 2015 Eleonore Prüller-Frey v Norbert Brodnig and Axa Versicherung AG C-240/14,; Judgment of the Court (Fourth Chamber) of 21 January 2016 "ERGO Insurance" SE v "If P&C Insurance" AS and "Gjensidige Baltic" AAS v "PZU Lietuva" UAB DK, Joined Cases C-359/14 and C-475/14 .

[18] H. HEISS, Art. 7, in U. MAGNUS, P. MANKOWSKI (eds), European Commentaries on Private International Law, Rome I Regulation, Koln, 2017; F. SEATZU, *Insurance in Private*

The above however comes with an some important qualifications: since the right of the damaged party to act is granted by the law (in hypothesis, the law governing the underlying tort liability) as a matter of policy and with the aim to better protect the victim, such purpose should not be frustrated by the liability Insurers by way of inserting into the insurance contract clauses which prevent or make it more difficult for the damaged party to exercise their right of direct action, even though such clauses might be valid under the law governing the insurance contract[19].

For example, the European Court of Justice has clearly stated that whilst it is true that the right of the damaged party to seek compensation for damages by way of direct action against the the Insurers of the person liable for such compensation does not affect the obligations based on the insurance contract in question, the law applicable to such insurance contract as a result of a choice of law clause stipulated between the Insured and the Insurers may not affects such right and therefore it cannot prevent the exercise of direct action on the basis of the law applicable to the non-contractual obligation[20].

In practice, it might be not easy to distinguish between such clauses: for example, in a French decision it has been accepted that when the same event causes damages to different parties, the rules of the law governing the insurance contract for cases when the total of the claims brought by different damaged parties is above the limit of the total indemnity to be paid under the contract of insurance apply[21], even though in the context of direct actions it could be argued

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International Law, cit.; X. E. KRAMER, *The New European Conflict of Law Rules on Insurance Contracts in Rome I: a complex compromise*, in *ICFAI University Journal of Insurance Law*, 2008; F. FALCONI, *La legge applicabile ai contratti di assicurazione nel regolamento Roma I*, Milano, 2015; G. PIZZOLANTE, , *Contratti di assicurazione*, in F. SALERNO, P. FRANZINA (eds.), *Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali («Roma I»)*, in *Le Nuove Leggi Civili Commentate*, 2009, p. 750 ff.

[19] For an analysis of English cases where clauses frustrating the direct action of the damaged party against the liability Insurers have been upheld by Courts on the basis of the law governing the contract of insurance see R. THOMAS, *Third Party Direct Rights of Action against Insurers under UK Law and International Maritime Liability Conventions*, cit.

[20] See Judgment of the Court (First Chamber) of 9 September 2015 Eleonore Prüller-Frey ,case C-240/14.

[21] Cour de Cassation, 18th December 2019, 18-14.827 18-18.709, in legifrance.gouv.fr.

that the opposability of payments already made by the liability Insurers to other damaged parties (thus reducing the amount available to other claimants) is an aspect of the right to act and should be governed by the law applicable to the direct action itself.

A second important qualification concerns the case when the liability insurance is compulsory. This is a special situation under Rome I regulation, according to which (art. 7.4) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the State that imposes such an obligation, irrespective of the law otherwise applicable to the contract of insurance itself. The paramount importance of the interest of the State which imposes the compulsory insurance is reinforced by the possibility for such State to derogate to the general rules and to apply the law of the State that imposes the obligation to take out insurance to such insurance contracts[22].

A frequent feature of compulsory insurance is that the right of direct action is granted to the damaged party, which logically flows for the aim of establishing such mandatory obligation to stipulate the liability cover: in such cases, the existence of the compulsory insurance and the right of direct action form part of the same legal regime to give a specific and strengthened protection to the damaged party. In such circumstances, when establishing a mandatory insurance regime with the right of direct action, it is arguable that the law governing the obligation to take out insurance would be prima facie applicable to decide if the right of direct action exists and which terms of the insurance cover are opposable to the damaged party.

A special situation is resulting from the fact that several international Conventions require the stipulation of liability insurance covering the liability for activity of ships regulated by those Conventions[23]. The general scheme adopted in such regulations is rather

[22] See authors at note 17.

[23] For example, International Convention on civil liability for oil pollution damage (as amended by the Protocol of 1992, signed at Brussels on 29 November 1969 and 27 November 1992 respectively), art VII; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (as amended by the Protocol of 2010, signed at London on 3 May 1996 (35 ILM 1406) and

similar and the main features are that the stipulation of the insurance cover must be made compulsory by the contracting states for the ships flying their own flag pursuant to the terms of the Convention, but contracting states must also ensure the compliance of the insurance requirements in respect of any ship, wherever registered, entering or leaving a port in its territory.

As a result, if the State of the flag of the ship is party to the Convention, it is the law of such State which imposes the obligation to take out the mandatory insurance; but when the ship flies the flag of a non-contracting State, it is the law of the port State which makes the stipulation of the insurance compulsory, being it a condition for the authorisation granted to the ship to enter the port. In the latter case, it is the law of the port State which becomes relevant to the purposes of art. 7.4 Rome I regulation.

In addition, the international Convention provides that both some terms of the insurance cover (eg the minimum amount for which the cover must be stipulated), and some aspects of the legal regime applicable to the insurance contract (e.g. the effects of the termination of the contract) are mandatory as set out by the Convention, so that under art. 7.4 such terms are applicable irrespective of the law governing the contract of insurance itself; whilst on the other hand other terms are expressly left by the Conventions to the law of the state of the vessel's flag and are therefore outside the scope of application of art. 7.4 Rome I regulation.

Since the aim of the Convention is to protect the damages party, they also grant them the direct action against the compulsory Insurers and regulate the regime of the defences which can be raised by the latter against such a claim is set out by the Convention itself (eg the opposability of the limitation of liability in the case of willful

30 April 2010 respectively, not yet in force), art 12; Bunker Convention (International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage, IMO Doc LEG/CONF 12/19, 40 ILM 1406), art 7; 2002 Protocol the Athens Carriage of Passengers Convention (2002 Protocol of 19 November 2002 to amend the Athens Convention relating to the Carriage of Passenger and their Luggage by Sea, 1974 (PAL PROT 2002), IMO Doc.: LEG/CONF 13/20), art 4bis; see also the amendments to the Code implementing Regulations 2.5 and 4.2 and appendices of the Maritime Labour Convention of 23 February 2006 (official text available on the website of the International Labour Organisation <www.ilo.org>, accessed on 26 February 2014), adopted by the Special Tripartite Committee on 11 April 2014 and approved at the 103th Conference on 11 June 2014).

misconduct by the assured), all such aspects falling within the scope of application of the law of the State which set for the obligation to take out the insurance[24].

3. *Jurisdiction issues for direct action*

According to Brussels Ibis Regulation (art. 11) an Insurers domiciled in a Member State may be sued in the courts of the Member State in which he is domiciled; in another Member State, in the case of actions brought by the policyholder, the Insured or a beneficiary, in the courts for the place where the claimant is domiciled; or if he is a co-Insurers, in the courts of a Member State in which proceedings are brought against the leading Insurers. An Insurers who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State. In respect of liability insurance or insurance of immovable property, under art. 12 of the same Regulation the Insurers may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are covered by the same insurance policy and both are adversely affected by the same contingency. Pursuant art. 13 of Brussels Ibis regulation, such rules apply also to actions brought by the injured party directly against the Insurers, where such direct actions are permitted.

It is clear that the actual existence of the right of direct action must be established on the basis of the applicable law and it is independent from the criteria adopted to establish jurisdiction; on the other hand, it is significant that the jurisdiction in case of direct action is set out by the regulation in the context of the general rules concerning jurisdiction in insurance matters.

The rule on jurisdiction of Brussels Ibis regulation matter have the primary aim to serve the internal market, avoiding forum shopping and discrepancies in the approach to conflict matters among

[24] P. Celle, *Marine insurance*, in J. Basedow, G. Ruhl, F. Ferrari, P. De Miguel Asensio (eds), *Encyclopedia of Private International Law*, Cheltenham, 2017, II, p. 1208 ff.

different Member States' Courts. This general goal also applies to the specific provisions concerning the contract of insurance, yet the special rules set out for insurance matters are also intended to grant a special protection to the party contracting with the Insurers, i.e. the policy-holder, the beneficiary, and the Insured under the insurance policy[25].

The European Court of Justice has recognized this protection as a legitimate general goal which support the adoption of an autonomous system for the conferral of jurisdiction in matters of insurance[26]; so that these special rules deviate in part from the general criteria in establishing jurisdiction[27], since the matter relating to insurance is characterised by an imbalance between the parties[28] and the scope of the special regime is to correct it by enabling the weaker party to benefit from private international law rules which are more favourable to its interests[29].

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[25] S.M CARBONE, C.E TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale. Il regolamento UE n. 1215/2012*, Torino, 2016, p. 177 ff.; H. HEISS, *Jurisdiction in matters relating to insurance*, in U. MAGNUS, P. MANKOWSKY (eds), *Brussels Ibis Regulation*, Koln, 2016, p. 497; H. GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe. Matières civile et commerciale*, Paris, 2015, p. 345ff.; G. MAYR, F. PESCE, *Osservazioni preliminari capo II sezione 3, artt. 8 - 14*, in T. SIMONS, R. HAUSMANN, I. QUEIROLO (eds), *Regolamento «Bruxelles I». Commentario al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, München, 2012, p. 323 ff.; R. COX, L. MERRET, M. SMITH, *Private International Law of Reinsurance and Insurance*, London, 2006, p. 137 ff.; S. SEATZU, *Insurance in Private International Law: A European Perspective*, cit., p. 45 ff.; for a critique of the international private law regime applicable to insurance contracts see S. DOMINELLI, *Party Autonomy and Insurance Contracts in Private International Law*, Roma, 2016, p. 445 ff.

[26] Judgment of the Court (Second Chamber) of 12 May 2005, *Société financière et industrielle de Peloux v Axa Belgium and others,* Case C-112/03, ECLI:EU:C:2005:280.

[27] Recital 18 of Brussels Ibis regulation states that in relation to insurance the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules. For the evolution of the international private law regime applicable to the contracts of insurance X.E. KRAMER, *Conflict of Laws on Insurance Contracts in Europe: The Rome I Proposal - Towards Uniform Conflict Rules for Insurance Contracts?,* in M.L. HENDRIKSE, J.G.J. RINKES (eds), *Insurance and Europe*, Paris, 2007, p. 85 ff.

[28]Judgment of the Court (First Chamber) of 26 May 2005, *GIE Réunion européenne and Others v Zurich España e Société pyrénéenne de transit d'automobiles,* Case C-77/04, ECLI:EU:C:2005:327.

[29] Judgment of the Court (Third Chamber) of 17 September 2009, *Vorarlberger Gebietskrankenkasse v WGV-Schwäbische Allgemeine Versicherungs AG*, 08, Case C-347/08, ECLI:EU:C:2009:561.

This approach has an impact of the construction of art. 13 of Brussels Ibis regulation, as shown by the jurisprudence of the European Court of Justice on it.

First of all, as mentioned, according to art. 13 in respect of liability insurance, the Insurers may, if the law of the court permits it, be joined in proceedings which the injured party has brought against the Insured, yet the general criteria for insurance matters shall apply to actions brought by the injured party directly against the Insurers, where such direct actions are permitted. If the law governing such direct actions provides that the policyholder or the Insured may be joined as a party to the action, the same court shall have jurisdiction over them[30].

The rationale for such provisions is the goal to protect the injured party, whose position is equated to that of the Insured, so that the Court has stated that "*to deny the injured party the right to bring an action before the courts for the place of his own domicile would deprive him of the same protection as that afforded by the regulation to other parties regarded as weak in disputes in matters relating to insurance and would thus be contrary to the spirit of the regulation*"[31].

Being this the reason for the special rules, it is not surprising that the Court has rejected the efforts to expand the application of art. 13 in cases where the interests of a weak party were not at stake. For example, it has refused to apply art. 13 where in the case of a dispute between a professional operator which has acquired by assignment a claim originally held by a damaged party against a liability Insurers and the latter, thus in such case the jurisdiction for direct action against the Insurers falls within the general rules for tort actions, the

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[30] H. HEISS, *Jurisdiction in matters relating to insurance*, cit., p. 497 ff.; H. GAUDEMET-TALLON, *Compétence et exécution des jugements en Europe. Matières civile et commerciale*, cit, p. 350 ff.

[31] Judgment of the Court (Second Chamber) of 13 December 2007, *FBTO Schadeverzekeringen NV v Jack Odenbreit,* Case C-463/06where the earlier decisons Judgment of the Court (Third Chamber) of 14 July 1983, *Gerling Konzern Speziale Kreditversicherung and Others,* Case 201/82, ECLI:EU:C:1983:217 *;* Judgment of the Court (Sixth Chamber) of 13 July 2000, *Group Josi,* Case C-412/98, ECLI:EU:C:2000:399 , and Judgment of the Court (Second Chamber) of 12 May 2005, *Société financière et industrielle de Peloux,* Case C-112/03, ECLI:EU:C:2005:280are mentioned. More recent cases stating the same rationale are MMA IARD, C-340/16, Balta, C-803/18.

reason being that such professional operator could not benefit of the protection vis-à-vis the Insurers, being not a weak party[32].

It also not surprising that, whilst art. 13 favours the consolidation of the action against the liability Insurers to the action between the damaged party and the responsible party, the same is not true when the damaged party tries to consolidate the action against the liable party to the direct action against the liability Insurers in the for a provided for art. 13.

As stated by the Court, whilst actions in insurance matters are characterised by the imbalance between the parties, which art. 13 aims to correct, such an imbalance "*is generally absent where an action does not concern the Insurers, in relation to whom both the Insured and the injured person are considered to be weaker*", so that when an action for damages has been brought by the damaged person directly against an Insurers the court seised cannot rely on that provision to take jurisdiction over the action of the damaged party against the Insured, unless it is the Insurers who join the latter into the proceedings[33].

On the other hand, the Court has adopted a very strong stance against the efforts of liability Insurers to deprive the damaged party of their right to start the direct action against such liability Insurers in the for a provided for by art. 13 Brussels Ibis regulation.

In respect of choice of forum clauses stipulated in the insurance contract, the Court has argued that they are not valid if in conflict with the provisions of article 13 Brussels I *bis* regulation, which is basically based on the same rationale for which – as seen above - the

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[32] Judgment of the Court (Third Chamber) of 20 May 2021, , *CNP spółka z ograniczoną odpowiedzialnością,* Case C-913/19, ECLI:EU:C:2021:399; Judgment of the Court (Eighth Chamber) of 31 January 2018, *Paweł Hofsoe*, Case C-106/17, ECLI:EU:C:2018:50; Judgment of the Court (Eighth Chamber) of 21 October 2021, *T.B., D sp. Zoo***,** Case C-393/20, ECLI:EU:C:2021:871.

[33] Judgment of the Court (Eighth Chamber) of 9 December 2021, *Seguros Catalana Occidente,* C-708/20, ECLI:EU:C:2021:986; the Court stresses that "*allowing the injured person to bring an action against the Insured on the basis of Article 13(3) of Regulation No 1215/2012 would amount to circumventing the rules of that regulation concerning jurisdiction in matters of tort or delict, as defined in Section 2 of Chapter II thereof. Each injured person could then bring an action against the Insurers on the basis of Article 13(2) thereof in order to benefit from the more favourable provisions of Articles 10 to 12 of that regulation in order, subsequently, to bring an action against the Insured, as a third party to those proceedings, on the basis of Article 13(3) thereof*".

choice of law clauses stipulated into the insurance contract cannot deprive the damaged party of the right of direct action granted by the law governing the underlying liability of the Insured towards the latter[34]. In fact, the position of the damaged party cannot be affected by a jurisdiction clause stipulated between the Insured and the Insurers, since they are not privy to such contractual relationship[35].

In fact, the extension of the binding effect of the jurisdiction clauses to the damaged party would jeopardise the aim of the whole regime applicable to direct action in Brussels I*bis* regulation, that is to protect the weaker party, by depriving them of the special for a which are provided for by art 13.

This approach has been confirmed more recently, where the Court has argued that – in the light of the above principles concerning jurisdiction clauses - "*to avoid that right of the victim being undermined, a court other than that already seised of that direct action should not declare itself to have jurisdiction on the basis of such an arbitration clause*", the aim being to guarantee the protection of the damaged party parties vis-à-vis the Insurers concerned[36].

A special situation arises when the right of direct action is granted by an international Convention[37], ratified by the European Union or only by Member States, which also provides for the jurisdiction criteria to be used in case of direct actions falling within the scope of

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[34] Judgment of the Court (Eighth Chamber) of 13 July 2017, *Assens Havn v Navigators Management (UK) Limited, Case C-368/16,* ECLI:EU:C:2017:546; see L. IDOT, *Opposabilité d'une clause attributive de juridiction en matière d'assurances*, in Europe, 2017, 391, p. 47; P. MANKOWSKI, *Eine Gerichtsstandsvereinbarung im Haftpflichtversicherungsvertag entfaltet keine Derogationswirkung gegen des geschädigten Direktkläger*, in *Praxis des internationalen Privat- und Verfahrensrechts*, 2018, p. 233.

[35] For the same reasons for which a jurisdiction clause is not applicable to the beneficiary of the cover; see Judgment of the Court C-112/03, *Société financière etindustrialle du Peloux* commented by HEUZE', *in Revue critique de droit international privé,* 2005, p.762.

[36] Judgment of the Court (Grand Chamber) of 20 June 2022, *London Steam-Ship Owners' Mutual Insurance Association Limited,* C-700/20, ECLI:EU:C:2022:488; see R. ARENAS GARCIA , *Arbitraje y jurisdicción en el espacio judicial europeo. A propósito de la Sentencia del Tribunal de Justicia (Gran Sala) de 20 de junio de 2022, London Steam-Ship Owners' Mutual Insurance Association*, in *Revista de Derecho Comunitario Europeo*, 2022, p. 1043; D. HASCHER, *Arbitrage international - Arbitrage et règlement Bruxelles I*, in *Journal du droit international,* 2023, p. 215; HESS, *Arbitration and the Brussels I bis Regulation: London Steam-Ship Owners' Mutual Insurance Association*, in *Common Market Law Review*, 2023, p. 533.

[37] See above note 22.

application of the Convention itself, which may be dissimilar to the criteria adopted by art. 13 of Brussels I Regulation.

In this connection, generally speaking art. 67 Brussels I*bis* regulation provides it does not prejudice the application of the provisions which, in particular matters, govern the jurisdiction, recognition and enforcement of decisions and which are contained in Union acts or in harmonized national legislation implementing such acts. According to the doctrine, the rationale of the rule is that these instruments must be considered as *lex specialis* with respect to the regulation itself, which as such cannot interfere with their application. This approach is shared by the Court of Justice itself, which - for example, in terms of the relationship between Regulation (EC) no. 40/1994 on community trademarks and the Regulation (EC) 44/2001) on jurisdiction rules - had the opportunity to recognize the nature of *lex specialis* to the rules contained in the act of secondary law in the particular matter with respect to the general provisions on jurisdiction of regulation 44/2001[38].

However, the term "Union acts" used in the art. 67 of Brussels I*bis* regulation could refer not only to acts of secondary law adopted by the European Union, but also to other sources of binding rules for it which have the same nature of *lex specialis* with respect to the regulation, such as for example international Conventions ratified by the European Union.

In order to verify whether and to what extent the art. 67 applies to uniform law Conventions on international transport, which include provisions on jurisdiction or the recognition and enforcement of sentences, it is necessary to establish whether such Conventions refer to a "particular matter", according to the scope which this term is used in regulation[39].

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[38] Judgment of the Court (Fourth Chamber), 5 June 2014, *Coty Germany GmbH c. First Note Perfumes NV*, Case C-360/12, ECLI:EU:C:2014:1318; see also Judgment of the Court (Second Chamber) of 13 July 2017 , *Bayerische Motoren Werke AG c. Acacia Srl,* Case C-433/16, ECLI:EU:C:2017:550; Judgment of the Court (Second Chamber) of 18 May 2017, *Hummel Holding A / S c. Nike Inc. e Nike Retail B.V.*, Case C-617/15, ECLI:EU:C:2017:390.

[39] See for example Judgment of the Court (Grand Chamber) of 4 May 2010, *TNT Express Nederland BV c. AXA Versicherung AG*, Case C-533/08, ECLI:EU:C:2010:243 ; Judgment of the Court (Third Chamber), 19 December 2013*, Nipponkoa Insurance Co. (Europe) Ltd c. Inter-Zuid Transport BV*, Case C-452/12, ECLI:EU:C:2013:858; in general

Furthermore, it must be ascertained whether such Conventions can be considered to have the same legal status as the legislative instruments mentioned in the art. 67 of the Brussels Ibis regulation. In this connection, the Court of Justice general position is that the international treaties stipulated by the Union in the exercise of its external competence must be considered as forming an integral part of Union law, so that when the relevant international treaty has been signed by the Union, it becomes part integral to the legal order of the European Union and, therefore, can be interpreted and applied by the Court as part of Union law[40].

Consequently, it can be argued that, when the European Union is a signatory party to an international treaty by virtue of the exercise of its external competence, such an international agreement should be regarded as having the same legal status as an act of the Union for the purposes of applying the art. 67 of Brussels Ibis regulation, i.e. having the same character of *lex specialis* with respect to the latter, so that if the international Convention has special jurisdiction rules concerning the direct action against the liability Insurers brought by the damaged party in matters falling within the scope of application of the Convention, such rules would apply instead of art. 13 of Brussels Ibis regulation. However, it should be noted that, so far, the Court has not made this approach explicit[41].

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see C.E. TUO, *Regolamento Bruxelles I e Convenzioni su materie particolari: tra obblighi internazionali e primauté del diritto dell'Unione europea*, in *Rivista di diritto internazionale privato e processuale*, 2011, p. 377 ff.

[40] Judgment of the Court (Fourth Chamber) of 9 July 2020, *SL c. Vueling Airlines SA*, Case C-86/19, ECLI:EU:C:2020:538; Judgment of the Court (Fourth Chamber) of 19 December 2019, *GN c. ZU*, Case C-532/18, ECLI:EU:C:2019:1127 ; Judgment of the Court (Third Chamber) of 12 April 2018, *Finnair Oyj c. Keskinäinen Vakuutusyhtiö Fennia*, Case C-258/16, ECLI:EU:C:2018:252; Judgment of the Court (Third Chamber) of 6 May 2010, *Axel Walz c. Clickair SA*, Case C-63/09, ECLI:EU:C:2010:251; Judgment of the Court (Fourth Chamber) of 10 July 2008, *Emirates Airlines - Direktion für Deutschland c. Diether Schenke*, Case C-173/07, ECLI:EU:C:2008:400; Judgment of the Court (Grand Chamber) of 10 January 2006, *International Air Transport Association c. Department for Transport*, Causa C-344/04, ECLI:EU:C:2006:10; in general see F. CASOLARI, *L'incorporazione del diritto internazionale nell'ordinamento dell'Unione europea*, Milano, 2008.

[41] Indeed, when the Court was asked to decide which rules of jurisdiction apply to actions which partly fall within the scope of the Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999 and partly within the scope of application of Regulation (EC) No. 261/2004 of the European Parlia-

On the other hand, when the international Convention has been ratified by Member states, but not by the European Union, according to the interpretation given by the Court on the general issue of the relationship between the Brussels regime on jurisdiction and international Conventions under art. 71[42], the rules governing jurisdiction laid down in the specialised Conventions have, in principle, the effect of precluding the application of provisions of that regulation relating to the same question[43]. However, the Court affirmed that the application, in relation to matters governed by specialised Conventions, of the rules provided for by those Conventions cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the EU[44].

Where the criteria for jurisdiction set out in the international Convention correspond to that provided for by Brussels Ibis Regulation or grant additional fora which the damaged party, as well as the liability Insurers, are able to clearly identify in a manner consistent with the objective of legal certainty, it is arguable that the criteria of the Convention may apply[45].

On the contrary, if the special criteria set out in the international Convention would substantially deprive the injured party of the right

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ment and of the Council of 11 February 2004, which establishes common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellation or long delay, stated that "*article Article 67 and Article 71(1) of Regulation No 1215/2012 allow the application of rules on jurisdiction relating to particular matters which are contained respectively in Union acts or in Conventions to which Member States are contracting parties. Since air transport constitutes such a particular subject, the rules on jurisdiction provided for by the Montreal Convention must be able to apply within the regulatory context introduced by the latter*", thus avoiding to clarify whether art. 67 or art. 71 applies; see Judgment of the Court (First Chamber) of 7 November 2019, *Adriano Guaitoli c. EasyJet*, Case C-213/18, ECLI:EU:C:2019:927, and L. IDOT, *Règlement «Bruxelles I bis» - Articulation avec la Convention de Montréal*, in *Europe*, 2020, p. 36.

[42] L. CARPANETO, *On collisions and Interactions between EU Law and International Transport Conventions, in* S.M. CARBONE (ed), *Brussels Ia and Conventions on particular matters*, cit., p. 33 and the Authors mentioned at note 24.

[43] Judgment of the Court (Grand Chamber) of 4 May 2010, *TNT Express Nederland BV v AXA Versicherung AG*, Case C-533/08, ECLI:EU:C:2010:243.

Judgment of the Court (Third Chamber),19 December 2013, *Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV*, Case C-452/12, ECLI:EU:C:2013:858.

[45] Judgment of the Court (First Chamber), 4 September 2014, *Nickel & Goeldner Spedition GmbH v 'Kintra' UAB*, Case C-157/13,ECLI:EU:C:2014:2145.

to file the action according to the special criteria of jurisdiction expressly provided for by the Brussels Ibis regulation to implement the general goal of protection of such injured party, it is arguable that such incompatibility between the international Convention jurisdiction rules and Brussels Ibis objectives might result in the disapplication of such criteria and the application of art. 13[46].

[46] It should be noted that the opposing view (i.e. that the jurisdiction criteria provided for the direct action by the specialised Convention derogate to the criteria of the Brussels regulations) is held in Italy by Cass. 9 marzo 2915 n. 4686, in *Diritto dei trasporti*, 2016, p. 215 with the comment of P. ZAMPELLA, *Vigenza e sfera di applicazione della Convenzione di Bruxelles del 1952 sulla giurisdizione civile in materia di urto fra navi*, p. 220; and in France see P. DELEBEQUE, *Action directe de la victime contre l'assureur responsabilité de l'armateur: la clause de compétence du contrat d'assurance est-elle opposable au demandeur*, in *Droit Maritime Francais*, 2015, p. 124.

CHIARA CELLERINO

THE *ROCKHOPPER* CASE AND THE DESTINY OF ISDS IN THE EU ENERGY SECTOR

CONTENTS: 1. Introduction - 2. The Rockhopper case: setting the factual and normative scene - 3. The Rockhopper award in the merits – 4. A critical appraisal through the lenses of Italian law: legitimate interests vs individual rights - 5. On the rejection of the police power doctrine - 6. ISDS vs. green energy policies in the EU: what destiny for the ECT?

1. *Introduction*

On 23 August 2022 the ICSID Tribunal established on the basis of the Energy Charter Treaty in the *Rockhopper v. Italy* case awarded EUR 182 million damages to the claimant for failure of the Italian State to grant an application for exploitation activities in the marine site of "Ombrina Mare". More precisely, the denial of the application for a production concession resulted from the passage of the *legge* no. 208/2015 (budget Law 2016), which confirmed the ban of exploitation activities for "*off shore liquid and gas hydrocarbons*" in waters within 12 miles of the coastline. Despite Italy's withdrawal from the ECT as of 1st January 2016, the dispute falls within the scope of application of the 20 years sunset clause provided for by art. 47(3) ECT, for investments made prior to withdrawal.[1] The award sparked several critical reactions, pointing to the lack of consideration of environmental a climate change issues within the balancing of interests drawn by the Tribunal. The introductory remarks of the award seem to anticipate such criticisms, by reassuring that «*the Tribunal appreciates and is acutely sensitive to the fact that there are strongly-held environmental, civic and political views about offshore production in Ombrina Mare. However, the outcome*

[1] Italy notified the Depository of its withdrawal on 31 December 2014. According to the one year notice period provided for by art. 47(2) ECT, withdrawal became effective on 1st January 2016 and the sunset clause will end on 1st January 2036. The sunset clause covers investment made before withdrawal, including during the notice period.

of this case passes no judgment whatsoever on the legitimacy or validity of those views». In this regard, the attempt of the Tribunal to draw a distinction between the «*environmental debate, which is of a civic or political character»* and the *«legal issue at hand, namely, whether compensation is due to a foreign investor in respect of its investment, based on specific international criteria as contained in a treaty to which Italy was, at the material time, a contracting party»* may not be particularly persuasive.[2]

Rather, it seems that environmental issues, including action undertaken to face climate change, while certainly being subject to political and civil society debate in Italy, were directly incorporated into the legal questions raised by the dispute, considering in particular that they underpinned the enactment of the *legge* no. 208/2015. A different balance could probably have been found, through the solution of the very legal questions addressed in the award, between the economic interests of the investor and the interest of Italy to pursue fundamental non-economic public (and global) goals, such as the environment and sustainability choices. This could have occurred at several stages of the reasoning on the merits, in particular with reference, at least, to the following points: the qualification of Italian State conduct as "direct expropriation", the rejection of the police power doctrine and the amount of damages awarded to the investor.

[2] See ICSID, Award of 23 August 2022, *Rockhopper Italia S.p.A et al. v. Italy*, ICSID case no. ARB/17/14, par. 10: *«The Tribunal appreciates and is acutely sensitive to the fact that there are strongly-held environmental, civic and political views about offshore production in Ombrina Mare. However, the outcome of this case passes no judgment whatsoever on the legitimacy or validity of those views. In particular, the Tribunal is at pains to point out that this award is not a "victory" for one side or the other in that environmental debate, which is of a civic or political character, but rather addresses the legal issue at hand, namely, whether compensation is due to a foreign investor in respect of its investment, based on specific international criteria as contained in a treaty to which Italy was, at the material time, a contracting party. As is discussed and analysed later in this Award, the material factual circumstances which have led to the final result of this arbitration are both specific and discrete from the environmental considerations which have been argued before the Tribunal».*

Leaving aside the jurisdictional issues based respectively on the *intra*-EU jurisdictional objection[3] and the *fork-in-the-road* objection[4], both rejected by the Tribunal, purpose of this paper is to provide a critical analysis of the core questions on the merits, with particular reference to (i) the qualification of the conduct of Italy as a direct expropriation and (ii) the rejection of the police power doctrine. Some more general considerations are then drawn on other aspects of the case, showing the problematic relationship between international investment law - including investor/State dispute settlement (ISDS) provided for by relevant international investment Treaties - and the role of the State in the achievement of environmental goals, as mandated by fundamental international and EU commitments.[5] It is argued that, by providing a text-book example of the above-mentioned problems in a sector which is highly implicated in climate change mitigation strategies, such as the energy one, the award may turn out as the best argument in the hands of ISDS opponents, as the recent developments relating to the destiny of the Energy Charter Treaty seem to confirm.

2. *The Rockhopper case: setting the factual and normative scene*

The facts of the case and the main tenets of the award are widely known.[6] Suffice here to briefly recall some elements of the dispute relevant to our purposes.

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[3] The objection is based on the lack of Tribunal jurisdiction as a matter of EU law, due to the incompatibility of Member States consent to arbitrate intra-EU disputes with the principle of autonomy of EU law and with the principle of mutual trust among them, as stated in Judgement of the Court of Justice, 6 March 2018, case C-284/16, *Achmea v. Slovak Republic* and Judgment of the Court of Justice, 2 September 2021, Case C-741/19, *République of Moldova v Komstroy LLC.*

[4] The objection was based on the fact that Rockhopper had challenged before Italian Administrative Courts the decision of the Italian Ministry of Environment to require an Environmental Impact Authorisation, as a matter of supervened regulation. This triggered, according to Italy, the fork in the road clause contained in art. 26(2) ECT.

[5] Reference is made to commitments undertaken under the Parise Agreement on Climate Change, within the Eu Green Deal, as well as relevant provision of the

[6] *Ex pluribus*, T. MARZAL, *Polluter doesn't pay: The Rockhopper v. Italy award*, in *EJIL Talk!*, 19 January 2023, ; P. MAZZOTTI, *Rockhopper v. Italy and the tension between ISDS and Climate policy*, in *Volkerrechtsblog*, 21.12.2022, https://voelkerrechtsblog.org/de/rockhopper-v-italy-and-the-tension-between-isds-and-climate-policy/;

Mediterranean Oil and Gas Plc ("MOG") and its wholly owned subsidiary Medoilgas Italia S.p.A. (formerly, Intergas Più s.r.l.), held the permit, issued from the competent Italian Ministry to their predecessors in 2005, to explore the marine site of "Ombrina Mare", off the Italian Coast of Abruzzo.[7] In 2008 the exploration activities confirmed the existence of the oil reservoir and the companies applied for an exploitation concession, in accordance with the two-stage authorisation process in those years provided for by the applicable Italian law.[8] This request met strong oppositions from local communities, on mixed environmental grounds concerning risks to marine environment, and impact on fishing and tourism activities of the Region. The protests raised to national debate and, following also the *Deepwater Horizon* accident in the Gulf of Mexico in 2010, Legislative decree no. 128/2010, amending art. 6 of Legislative Decree 128/2010 ("Environmental Code")[9], introduced a ban to oil drilling activities in protected marine and coastal areas, in marine areas within 12 nautical miles from the external perimeter of protected areas, as well as in marine areas within 5 nautical miles from the Italian baseline. The ban was established "*for the purposes of protecting the environment and the ecosystem*",[10] and would apply to pending authorization, including the Ombrina Mare one, which was located around 6 and 7 nautical miles from the base-line, but within 12 nautical miles from the external perimeter of a protected area in the region.[11]

In 2012, however, the Italian Government amended again art. 6 of the Environmental Code, extending the ban to drilling activities within 12 nautical miles of the base-line or protected areas, and

No trivelle, Italia condannata a pagare 190 milioni per il blocco di Ombrina, in *Il Sole 24 ore*, 24 August 2022; J. MOULDS, *Outrage as Italy faces multimillion pound damages to UK oil firm*, in *The Guardian*, 25 July 2021.

[7] The permit was originally obtained in 2005 by an Italian company subsequently acquired by MOG.

[8] See Law no. 239/2004, art. 1, parr. 77-78.

[9] Legislative Decree no. 128/2010, art. 1, par. 3.

[10] Environmental Code, art 6, as amended by Legislative Decree 128/2010, Art. 6, par. 17.

[11] See Ministero dell'Ambiente e della tutela del territorio e del mare, Parere 541 del 7.10.2010, http://va.mite.gov.it

granting a (retroactive) exemption from the mentioned ban to applications for production concessions that were under review at the time Decree no. 128/2010 came into force.[12] It is relevant to highlight that, according to the facts agreed upon by the Parties of the dispute, «*one of the stated purposes of Decree 83/2012, which was set out in the accompanying Government report, was to avoid contingent litigation that would follow from permit holders such as* [the predecessors of] *Rockhopper Italia who would understandably seek compensation for the denial of their legal rights"*.[13] This shows that, in this case, a regulatory chill derived from the availability of ISDS to foreign investors, to the extent that the Italian legislator decided to postpone the effects of environmental standards to such investors, for the fear of ISDS.

As a consequence, the Ombrina Mare procedure was resumed, together with the local communities' protests against it. For the sake of completeness, the above-mentioned exemption came with a price for the industry, in that the royalty rates in favour of the State were increased from 7% to 10% for gas and from 4% to 7% for oil, with a view to address environmental externalities: the increase would be reallocated to specific income components of the budgets of two Ministries for «*the full performance, respectively, of activities aimed at monitoring and countering marine pollution and activities for the supervision and control of the safety, also environmental, of offshore exploration and production plants*".[14]

Furthermore, pursuant to a new regime applicable to off-shore structures,[15] the Italian Ministry of the Environment and Protection of Land and Sea required MOG Italia to apply for an Integrated Environmental Authorisation (*Autorizzazzione integrata ambientale – AIA*, hereinafter also "IEA") as a precondition for the signing off of the Environmental Impact Assessment (*Valutazione di impatto ambientale -VIA*, hereinafter also "EIA") on the project. The request was challenged by MOG before Italian administrative courts. On 17

[12] Law Decree no. 83/2012, art. 35.

[13] See Award, p. 31, par. 101 and footnote 16.

[14] Environmental Code, art. 6, as amended by Law Decree no. 83/2012.

[15] Law Decree no. 5/2012, converted in Law 4 April, 2012, no. 35, amending Annex VIII of the Environmental Code.

April 2014, the Lazio Regional Administrative Tribunal rejected the claim.[16] As a result, MOG Italia had to apply for an IEA.

In this regulatory context, in August 2014 Rockhopper Exploration took over MOG and Medoil Gas Italia, changing their names to Rockhopper Mediterranean and Rockhopper Italia, respectively. This gave birth to the investment for which protection is sought under the ECT in the case at stake.

After the positive completion of the EIA procedure on 7 August 2015, Rockhopper filed an application for the final grant of the concession on 14 August 2015 to the Ministry of Economic development. However, the Italian administration failed to act in the following days and months. Arguably, as Claimant observes, the delay was also due to the political turmoil surrounding the legal regime of marine extraction authorizations in Italy. More precisely, in the wake of the adoption of Law Decree no. 133/2014, converted in Law 11 November 2014, no. 164 (so called "*decreto Sblocca-Italia*") relating to other strategic reforms of Italian extraction industry, ten Italian Regions, supported by environmental civil society movements and associations, proposed an abrogative referendum, targeting *inter alia* the above-mentioned provision granting exemption to pending authorizations.[17] Before the referendum took place, in consideration of the stance taken by a large share of Italian Regions, and with a view to avoid the referendum, the exemption was repealed by *Legge* no. 208/2015 (budget law 2016).[18] This obviated the referendum question, which was hence dropped. Soon after, the Italian Ministry of economic development notified Rockhopper the final rejection of its application for production authorization with Letter dated 29 January 2016. Rockhopper filed a request for arbitration to ICSID against Italy on 14 April 2017. In particular, Claimant asked compensation of €281,675,391 million, including lost profits, for viola-

[16] Regional Administrative Tribunal of Lazio, no. 4123/2014, confirmed in appeal by Council of State, n. 943/2016.

[17] For a full account of referendum questions, see *No alle trivelle dello sblocca Italia, avanti coi quesiti referendari*, https://www.carteinregola.it/index.php/40072/?utm_source=rss&utm_medium=rss&utm_campaign=40072

[18] Law no. 208/2015, art. 239.

tion of art. 10.1 ECT (Fair and equitable treatment standard, hereinafter "FET", and prohibition of unreasonable and discriminatory measures) and art. 13 ECT (prevention from unlawful expropriation).

3. *The Rockhopper award in the merits*

After dismissing the jurisdictional objections raised by Italy, the Tribunal found that Respondent had directly expropriated Rockhopper investment without compensation in violation of art. 13 ECT. This rendered unnecessary to address other claims, in particular violation of FET. The latter would probably result groundless in any case, as the individual opinion by Arbitrator Pierre-Marie Dupuy, nominated by Respondent, tried to explain.[19] According to his opinion, «[*i]t would have been almost impossible to conclude, on the basis of the elements of the case, that Rockhopper could reasonably and legitimately expect a positive response from the Italian authorities to its application for an operating permit. The Respondent was able to demonstrate efficiently that no promise had ever been made by its administration to the investor to that effect, especially since, as confirmed by the Italian Council of State itself, the granting of an* exploration *permit by a company in no way entailed in domestic law the automatic granting of an* exploitation *permit»*. Quite puzzling is however how the grant of the same permit, which could not, according to Arbitrator Pierre Marie Dupuy, be reasonably expected by the Claimant under the FET test, became, in the award, the object of a full right vested on the Claimant and expropriated by the Respondent. An expropriation which, in any case, although qualified as "direct", did not bring any transfer of property in favour of the State.[20]

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[19] Individual Opinion by professor Pierre-Marie Dupuy, *Rockhopper Italia S.p.A et al. v. Italy*, ICSID case no. ARB/17/14, par 2.

[20] See, for example, on the point, Award of 16 December 2003, *Nykomb v. Latvia,* Case No. 118/2001, where the Arbitral Tribunal concluded that the loss of the economic value of the investment did not, by itself, constitute an expropriation because the State did not take possession of the enterprise or its assets, or interfere with the shareholders' rights or management control. See also Award of 21 January 2016, *Charanne v. Spain,* Case No 062/2012, were it was held that Spain's modification of the photovoltaic incentive regime

The award finds that the approval of the EIA in August 2015 bestowed a legal right of Rockhopper to obtain the production concession within a certain period of time. This arguably follows in particular by the application of art. 16 of Decree of the President of the Republic 18 April 1994, No. 484, according to which «*[t]he Ministry within fifteen days from the receipt of the environmental compatibility decree by the Ministry of the environment, issues the decree for the award of the production concession*».[21] The applicability of the mentioned provision was debated among the parties, in particular due to the subsequent developments in the Italian legislation, which may have repealed it implicitly.[22] However, the Tribunal found that the provision was still in force at the time of the procedure and «*the (temporal) Rubicon was indeed crossed once the Respondent issued its Decree on 7 August 2015 and the Claimants lodged their application on 14 August 2015. At that latter moment, as a matter of the Tribunal's appreciation and factual findings of Italian law, the Claimants held a right to be granted the production concession. This was no mere hope or aspiration; the legal right to be granted such a concession was then irrevocably in train as a matter of Italian law as it then stood*». Such presumed "legal right" was deemed expropriated by the decision of Italian Administration to reject the application in January 2016, pursuant to the supervened enactment of the above-mentioned *Legge* no. 208/2015.[23]

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did not amount to an indirect expropriation, as indirect expropriation implies a substantial effect on the property rights of the investor.

[21] Translation reported from the Award, and verified by the Author.

[22] In any case, as prof. Picozza clarified its testimony, should the provision not apply, reference should be made to L. 241/1990, which sets a general 30 days term for public administration to act.

[23] Award, par. 149 "*The Tribunal has taken the greatest care possible to ensure that a full, thorough and fair consideration has been given to the competing viewpoints, both in its extensive deliberations on the issue, and also reflected in the fullest opportunity afforded to both sides to cross and re-examine both witnesses. Ultimately, as with any contested matter of material and predicate importance, the Tribunal must decide by reference to that which has been persuasive. In this case, as discussed and analysed above, the Tribunal is persuaded that Decree 484 was in force at the relevant time.*

150. This finding has the factual consequence, in the Tribunal's view, that the (temporal) Rubicon was indeed crossed once the Respondent issued its Decree on 7 August 2015 and the Claimants lodged their application on 14 August 2015. At that latter moment, as a matter of the Tribunal's appreciation and factual findings of Italian law, the Claimants held a right to be granted the production concession. This was no mere hope or aspiration;

The award further rejects the police power doctrine invoked by the Respondent in connection with the application of the precautionary principle. As known, the doctrine, purports that *bona fide*, non-discriminatory regulation adopted in the public interest may exempt State from responsibility for unlawful expropriation of foreign investments. Although applied by some Tribunals, the status of the doctrine under international law is debated.[24] The Tribunal seems to refuse its application, to the extent that the only conditions taken into account for the possible exemption from State responsibility are those provided for under art. 13 ECT, including in particular (i) the public interest purpose of the measures and (ii) the payment of prompt compensation. The Tribunal easily and correctly finds that compensation had not been paid, this sufficing to declare the (presumed) taking unlawful. Yet, it further observes that, after the EIA was approved in August 2015, Italy could no longer rely on the precautionary principle, invoking additional environmental reasons to justify the rejection. As a consequence, «*the more likely reason for the position taken by the Respondent culminating in the letter of 29 January 2016 is the political and civic engagements as discussed earlier*».[25] Whether this excludes, in the reading of the Tribunal, the exercise of public policy powers (for environmental reasons) by Italy is not clear.

4. *A critical appraisal through the lenses of Italian law: legitimate interests vs individual rights*

For an Italian lawyer, the finding of a legal right to the grant of a concession for cultivation of hydrocarbons, in a situation like the one at stake, is perplexing for several reasons. This does not mean that

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the legal right to be granted such a concession was then irrevocably in train as a matter of Italian law as it then stood".

[24] For a full account of the doctrine e related arbitral practice, see, *ex multis*, C. TITI, *Police Powers Doctrine and International Investment Law*, in F. FONTANELLI, A. GATTINI, A. TANZI (eds), *General Principles of Law and International Investment Arbitration*, Leiden, 2018, p. 323; O.E. BULUT, *Drawing boundaries of police powers doctrine: a balanced framework for investors and states*, in *Journal of International Dispute Settlement*, 2022, 13, p. 583.

[25] Award, par. 198.

Respondent's delays in the conclusion of the procedure met good administration standard, nor that it was lawful. Indeed, irrespective of whether the (in any case, non-peremptory) terms provided under Italian administrative law are reasonable for issuing such a permit, failure to act in due time amounts to a violation of legal provisions, and remedies exist to force the Administration to act within time-limits and, possibly, obtain compensation for suffered losses. Surprisingly, Rockhopper did so by commencing proceedings before Lazio Administrative Court on 30 December 2015, when it was however too late, as the mentioned *Legge* no. 208/2015 had already passed.[26]

But it seems a step too far to state that the legitimate interest of the applicant in having a lawful and timely conclusion of the procedure turns into a legal right (even an internationally protected one) to have the concession granted. This is unlikely to be so, at least, until the Public administration is required to exercise discretionary powers, as the case seems to be, according also to the very clear statements contained in the EIA Decree of 7 August 2015.[27] Indeed, additional legal obstacle could in principle still interfere with the grant of the concession, taking into account that the meeting among the public administrations involved (so-called *conferenza di servizi*) still had to be convened and could originate further prescriptions on the project.[28] Interpreting the law in a different way would be equal to assume that the EIA Decree is valid also as a concession title. This is clearly wrong under law applicable to the procedure.

This element is central, and lies at the very core of the distinction, under Italian law, between a legitimate interest (*interesse legittimo*)

[26] Due to delays of the Administration, on 30 December 2015, Rockhopper commenced legal proceedings before the Lazio Administrative Court seeking an order that the Ministry of Economic Development grant the production concession and, in the absence of such a grant, to appoint an external commissioner to take the decision in lieu of that Ministry. Such proceedings however are initiated after the enactment of Legge no 208/2015, which led to the subsequent rejection of the application. Yet, they were relied upon by the Tribunal as evidence of Rockhoppers right.

[27] D.M. 7 agosto 2015, n. 172, available at https://va.mite.gov.it/it-IT/Oggetti/Documentazione/2026/3943, p. 8, last two paragraphs, referring to the work of the decisive service conference still to be held, following further authorizations to be obtained by the applicant.

[28] On the same point, G. PARDI, *Rockhopper v. Italia: sul contrasto ancora irrisolto tra tutela dell'ambiente e interessi degli investitori*, in *Federalismi.it*, 28 giugno 2024, p. 145.

and a subjective right (*diritto soggettivo*). They are both protected under the law, but the former is an advantage subject to the exercise of authoritative power of the Administration in the public interest. With respect to such a legal position, the individual is not entitled to full protection, but is only entitled to have a judicial scrutiny on the legitimacy of the exercise of such power by the public administration: thus, it is a "mediated" protection.[29] Indeed, a legitimate interest cannot be expropriated (albeit it can be violated) by the State.

It is true that, at that point of the procedure, the discretion left to the Ministry of Economic Development was probably limited to remaining aspects relating to the technical and economic capability of the Applicant (see para. 157 ff.). Yet, it can hardly be said that the no discretion was left to the Italian Public administration, at least as regards the cost-effectiveness of the project. The reported correspondence exchanged among the parties between November and December 2015 seems to confirm this assessment. In this respect, one should also add that the exercise of public powers comes with the obvious obligation to apply relevant laws in force at the time of the decision, in accordance with the principle *tempus regit actum*. *Quid iuris* if, for example, *legge* no. 208/2015 had passed after the EIA was issued, but before the 15 or, more likely, 30 days term for public administration to act?

The slippery slope on which the Tribunal ventured in this respect seems confirmed by the unconvincing arguments used to support it. According to the Tribunal, «*the Claimants' conduct from August 2015 right up to 30 December 2015 […] demonstrates that they were a party clearly understanding themselves to be possessed of such a right …In particular, the Claimants' engagement with the Respondent insofar as matters such as complying with requests for information, demanding an extension of the exploration permit lest its validity expired before the grant of the production concession, and (perhaps this is quite illuminating) ultimately bringing proceedings*

[29] Recently, Council of State, 3.10.2022, n. 8434/2022. See also, on a similar distinction, but with a different outcome as regards the case of public administration powers curtailed within the limits of application of precise legal provisions, Cass. 29 September 2022, n. 28429; Cass., S.U., n. 23436/2022.

seeking an order compelling such a grant, are individually and collectively indicative of a party conducting itself in a consistent manner; that manner is consistent with a party believing itself to have a right to be granted a production concession… The factual consequence of all of the foregoing is that before the formal denial by the Respondent of the production concession application, the Claimants had an undoubted right to be granted such a concession in respect of the Ombrina Mare field». However, the individual belief to possess a right does not bring such a right into existence, unless the law so provides. As explained above, this was not the case. Rather, the evidence mentioned by the Tribunal seems to show that some activity (and exercise of power) was still due on the side of the Italian Administration before a final decision could be taken as regards the grant of the concession.

All the above is without prejudice to the possibility of the Claimant to seek the reimbursement of some (emerging) costs, through the activation of national legal remedies against the conduct of the Italian Administration.

5. *On the rejection of the police power doctrine*

Coming now to the rejection of police power doctrine, we tend to agree with the idea that, at some point in time, environmental issues needed to be defined within the procedure, and this moment probably came with the approval of the EIA. However, the consequence drawn by the Tribunal from such a finding is misleading. In particular, the enactment of *legge* no. 208/2015 addressed wider environmental concerns than the EIA did and applied the precautionary principle to a different and more general issue, namely the legality *ex ante* of any drilling activity within 12 miles of the base-line. Such a choice pertains to sovereign energy and sustainability choices, and was inspired both to the precautionary principle, and to long term climate change mitigation strategies,[30] as compelled by EU and international law commitments. The same environmental concerns raised by the political and civil "engagements" referred to by the

[30] Award, par. 109.

Tribunal resulted in a law passed by the Italian Parliament. The two elements are therefore closely related. The rejection of the concession was nothing else than an act of application of a *bona fide* regulatory measure adopted, on non-discriminatory basis, in the public interest, following civil society mobilization. Once again, the Tribunal's argument seems to miss the point, or elude it. Accepting and applying the police power doctrine could have probably changed the outcome of the case.

In conclusion, despite the declared effort of the Tribunal to take «*the greatest care possible to ensure that a full, thorough and fair consideration has been given to the competing viewpoints*»,[31] it seems that it was persuaded only by those submitted by the Claimant.

The award of Euro 184 million for allegedly lost – but more likely hoped for – profits, in the face of a legitimate regulatory activity of Italy aimed at the protection of the environment, is quite disappointing for Italian tax payers, and not only.[32] The amount of awarded damages remain significantly lower than that claimed by Rockhopper (Euro 273 million), and yet significantly higher (more than five times) than the value of the initial investment made by Rockhopper to acquire MOG Italia (36 million).[33]

The Tribunal may have wished to justify the outcome of the case on philosophical grounds by affirming that «[*t*]*here is no uniquely 'right' answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as 'wrong'*».[34] However, Tribunals are required to do choices relating the application of the law in specific cases. Indeed some "choices" are perceived as more "wrong" than others. This is, in our perspective, one of them.

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[31] Award, par. 149.

[32] On the criteria used for the calculation of damages, T. MARZAL, *Polluter doesn't pay*, cit.

[33] Rockhopper acquired MOG for 36 million Euros, including 12 million cash held by MOG, while costs for exploration activities between 2005 and 2008 amounted to 18 million Euros. Respondent's position was that damages should only be based on acquisition market price, depriced of 63% due to decline of oil industry, for a total amount of 13 million.

[34] Award, par. 190(3).

6. *ISDS vs. green energy policies in the EU: what destiny for the ECT?*

The *Rockhopper* case clearly shows that ISDS is capable not only to influence the activity of national legislators (so called "regulatory chill" effect), pushing them to avoid or postpone the effects of environmental legislation, as occurred with regard to exceptional regime for pending applications enacted by Italy in 2012 (*supra*, § 2), but also to drive up the costs of the energy transition for States.[35] At Italian level, within the reorganization of the energy policy in compliance with EU law sustainability requirements, an attempt is made to discharge costs deriving from regulatory changes on the industry, by raising the administrative fees on hydrocarbon activities, with a view to set up a fund to edge, inter alia, against potential litigation. [36] Yet, as a matter of policy, more structural solutions may need to be found.

In this regard, some argue that the cause of the arbitrations like the present one is rooted in years of a «*somewhat confused energy policy, incapable of a long-term predictability*», something that is quite important in a sector where huge investments are expected to earn profits over a long period of time.[37]

Whether or not Italian approach to energy policy is to be blamed, one should recall that the public (and political) debate relating to the transition to renewable sources of energy as a matter of climate

[35] These two elements are acknowledged, inter alia, by the Intergovernmental Panel on Climate Change (IPCC), *Mitigation of Climate Change - Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, 2022, https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf, and correctly denounced in the literature, inter alia, by T. L. BERGE, A. BERGER, *Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity*, in *Journal of international dispute settlement*, 2021, 12, p. 1; K. TIENHAARA, *Regulatory chill in a warming world, The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, in *Transnational environmental law*, 2018, p. 229.

[36] D.R. DI BELLA, J. GALVEZ, *Oil Gas: Is Italy Doing It Wrong All Over Again?*, in *Kluwer Arbitration Blog*, 2019, https://arbitrationblog.kluwerarbitration.com/2019/03/13/oil-gas-is-italy-doing-it-wrong-all-over-again/. See Law Decree No. 135/2018 converted into Law No. 11/2019. Article 11-ter of the Law 11/2019 is going to increase the administrative fees on hydrocarbon activities by 25 times as of 1 June 2019, with a view to set up a fund to edge against potential investment arbitrations.

[37] D.R. DI BELLA, J. GALVEZ, *Oil Gas: Is Italy Doing It Wrong All Over Again?*, cit.

change mitigation, has been going on for, at the very least, around 15 years now.[38] On its side, the European Union has issued several public documents on the topic and Directive 2018/2001, replacing former Directive 2009/28, set a binding regime for Member States as regard renewable energies targets, based on their respective renewable energies potential.[39] Member States are now required to shape long term energy plans according to Regulation UE/2018/1999.[40]

The publicity of the above-mentioned debate is meant to provide certainty to policy makers and investors, avoiding that choices made today lock in existing emissions levels. In this regard, suffice here to mention that the regulatory risk at the time of Rockhopper investment was quite predictable, considering also that the Italian halt to drilling activities, whether it was wise or not, dates back to 2010.

It is true that the sector is sensitive to geopolitical turmoil, as the current war in Ukraine is showing. A certain revival of traditional energy sources (oil and gas), at least in the short term, is recorded

[38] A reference in point is, *inter alia*, the signature of the 2005 Kyoto Protocol, then replaced by the 2015 Paris agreement on Climate change, and the connected 2015 UN Agenda 2030. 2015 UN Agenda 2030 - goal 7 refers to the need to ensure access to affordable, reliable, sustainable and modern energy for all – including increase the share of renewable energy global consumption. The 2015 Paris Agreement on Climate change set the binding obligation to keep the global temperature increase to well below 2°C and pursue efforts to keep it to 1.5°C, leaving however the States parties free to determine how to achieve such goals in accordance with their respective national plans, based also on the different renewable energy potentials of each country. The EU legislation and policy implements these objective and sometimes unilaterally raises the standards.

[39] See Directive (EU) 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources, which replaced former Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC. See also the EU Green Deal objective to decarbonise EU's energy system and achieve carbon neutrality by 2050.

[40] Regulation (EU) 2018/1999 of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, art. 14; for Italy, see *Piano nazionale integrato per l'energia e il clima (PNIEC)*, adopted by the Ministry of Environment and Energy security in 2020 and updated in June 2023, available at https://www.mase.gov.it/comunicati/clima-energia-il-mase-ha-trasmesso-la-proposta-di-pniec-alla-commissione-ue.

also at Italian level, in order to protect national strategic interests.[41] However, in the long run, energy security requires further independence and diversification of energy sources and this will entail also the progressive replacing of legacy fuels (such as coal, oil, and, to a lesser extent, gas) by renewable energy sources, in compliance with EU energy policy goals, ex art. 194 TFEU, and laws. In this context, and save contingent needs, the long-term promotion of renewable energies, in compliance with international and EU law commitments to tackle climate change, is going to meet also national strategic interests. The conundrum outlined above is well reflected in Communication of the European Commission "Repower EU", adopted to reduce dependence on Russian fossil fuels and speed up the green transition.[42] In particular, the Communication promotes support (including financial support) to three, mutually beneficial, lines of action: energy savings, diversification of energy supplies, and accelerated roll-out of renewable energy to replace fossil fuels in homes, industry and power generation. No doubts, therefore, that Member States are required to be in full control of their national energy policies and to undertake a well-planned long-term "green approach" to it.

In light of the regulatory and policy context described above, the "splendid isolation" of investment law and arbitration from national, EU and (other domains of) international law, as emerging from cases like this, may not be the wisest choice to allow ISDS to survive the changing landscape. Besides reforms of relevant investment treaties currently pursued at several levels, more accommodating interpretations techniques, which characterize certain arbitration cases, may represent a better way to enable ISDS to navigate the seas of a "warming world".[43] Evolution history teaches that creatures incapa-

[41] Law 5 December 2022, no. 187, enacting urgent measures to protect national interest in strategic sectors, including financial support to fossil fuels energy producers facing hardships due to EU sanctions regime; see also Law Decree, 18 November 2022, no. 176 (so called "aiuti-*quarter"*), reopening certain frozen concessions for drilling activities, in order to ensure energy supply for national industry at certain prices.

[42] Communication from the Commission Joint European Action for more affordable, secure and sustainable energy, COM(2022)108, 8.3.2022.

[43] The term is borrowed by K. TIENHAARA, *Regulatory chill in a warming world*, cit. A good example of an interpretative approach inspired to art. 31.2 of the Vienna Convention

ble of adaptation risk extinction. The destiny of the ECT, as emerging from the proposal of the European Commission, on 7th July 2023, for a collective withdrawal from the Treaty by EU, Euratom and its Member States, seems to confirm the rule.[44] After the failure of the modernization process,[45] the outcome of the *Rockhopper* case may have contributed to accelerate this choice. Certainly, it did not help to postpone it.

An application for annulment of the award is now pending under art. 52 of the ICSID Convention. Without prejudice to the merits of the request, on 11 July 2023, the ICSID *ad hoc* Committee decided to lift the provisional stay of enforcement, subject to the establishment by Rockhopper of escrow arrangements agreed with Italy, in order to mitigate risk of non-recoupment of assets in case of annulment of the Award.[46] Yet, from an EU law perspective, it is not a secret that the *intra*-EU jurisdictional objection may, *inter alia*, result successful, should the case be brought before national courts in

on the Laws of Treaties is offered by Award 16 June 2022, *Green Power K/S and Obton A/S v. Spain*, SCC Case No. V 2016/135, which acknowledges the relevance of international obligations stemming from the TEU and TFEU on member States of the European Union, with regard to the Jurisdiction of investment tribunals established through international treaties among the Member States.

[44] Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty, COM(2023)447, 7.7.2023.

[45] Since 2018, the Energy Charter Treaty has been subject to a revision process, calling for a modernisation of its provision, with a view to align them to EU law, notably on investment policy and energy and climate goals. After "agreement in principle" was found on modernisation among the parties to the Treaty, in 2022, the Commissions proposed an EU position on the ECT amendments, to be taken on behalf of the European Union in the 33rd meeting of the Energy Charter Conference, see Proposal for a Council decision on the position to be taken on behalf of the European Union in the 33rd meeting of the Energy Charter Conference, COM(2022) 521, 5.10.2022. Amendments proposed included, *inter alia*, a carve out of investment protection for all new investments in fossil fuels, carbon capture utilization and storage in the EU, the update of investment protection clauses in order to safeguard the right to regulate in the public interest, protection against frivolous claims and mailbox companies claims, as well as an express exclusion of ISDS for intra-EU disputes (in accordance with *Achmea* e *Komstroy*, cit.). Member States did not find the necessary majority to adopt the Commission proposal due to the abstention of a blocking minority of four Member States (France, Spain, Germany and the Netherlands) and, without a Union position, the modernization process was taken off the agenda.

[46] Update on Arbitration, Stay of enforcement to be lifted once Rockhopper puts in place relevant escrow arrangements, https://www.investegate.co.uk/announcement/rns/rockhopper-exploration--rkh/update-on-arbitration/7629613, 13 July 2023.

the enforcement phase, at least if such courts are those of the Member States of the EU. The clash among legal orders is possibly going to display further consequences in other phases of the case.

SIMONE CARREA

THE CRITERION OF HABITUAL RESIDENCE IN EU PRIVATE INTERNATIONAL LAW: OLD AND NEW QUESTIONS

CONTENTS: 1. Introduction. – 2. The criterion of habitual residence in EU private international law regulations: a summary overview. – 3. Reasons for the success of the criterion of habitual residence. – 4. Interpretation and application of the criterion of habitual residence. – 5. Application of the criterion of habitual residence: the relevant elements to assess habitual residence. – 6. Can one person have multiple habitual residences for the purposes of the application of the same legal instrument? – 7. The position of the case law of the European Court of Justice on the issue. – 8. Can different instruments give relevance to different moments with a view to determining habitual residence of a same person? – 9. Is it possible for a person not to have any habitual residence?

1. *Introduction*

The concept of habitual residence is widely employed by EU private international law as a criterion for the identification of both the competent jurisdiction and the applicable law.

While it is a shared view (confirmed by the case-law of the European Court of Justice) that habitual residence should be interpreted in an autonomous manner (being a notion belonging to EU law), a uniform definition of this concept is lacking, since the assessment of the habitual residence of a person (or, more precisely, the identification of the elements that are relevant for such an assessment) depends on the applicable legal instrument.

The flexibility of the criterion at issue, on the one hand, and the uncertainties surrounding its practical application, on the other hand (to be basically seen as two sides of a same coin) have therefore required a constant interpretative guidance on the part of the European Court of Justice.

In light of the above, the present contribution will firstly attempt to provide i) a summary overview of the legal instruments where the criterion of habitual residence is employed (§ 2); ii) a brief consid-

eration of the reasons underlying the inclination of EU private international law towards the criterion of habitual residence (§ 3); iii) some interpretative guidelines for the definition of the criterion at issue (§ 4) and iv) an (inevitably incomplete) catalogue of the factual elements that might come to relevance with a view to practically identifying the habitual residence of a person (§ 5).

Hence, on the basis of such premise, regard will be had to more specific issues (relating to the application of the criterion of habitual residence) which have been recently addressed by the case-law of the European Court of Justice. More precisely, in the final part of the present contribution it will be inquired v) whether a same person can have different habitual residences (§§ 6-7-8) and vi) whether it is possible for a person to have no habitual residence in any State (§ 9).

2. *The criterion of habitual residence in EU private international law regulations: a summary overview*

The criterion of habitual residence, developed in the context of the Hague Conference of Private International Law[1], has been massively employed also by EU private international law.

As a matter of fact, while habitual residence has been (and still is) only marginally relevant within the Brussels regime, concerning jurisdiction and recognition and enforcement of judgments in civil and commercial matters[2] (where both the scope of application *ratione personarum* and the general criterion are designed around the notion of domicile), the instruments subsequently introduced by the European Union significantly relied on such criterion.

[1] Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, entered into force on 1st May 1995.

[2] Reference should be made in this regard to a) the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters in *OJ* L 299, 31.12.1972 (Brussels Convention); b) the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ* L 339, 21.12.2007 (Lugano Convention); c) Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in *OJ* L 12, 16.1.2001; d) 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 (recast), in *OJ* L 351, 20.12.2012.

2.1. *Divorce, legal separation and marriage*

More specifically, as far as divorce, legal separation and marriage annulment are concerned, the general criterion of jurisdiction is designed around the current habitual residence of both spouses (art. 3(a)i) of Regulation 2019/1111)[3], the former habitual residence of both spouses insofar as one of them still resides there (art. 3(a)ii), the habitual residence of the respondent (art. 3(a)iii), the habitual residence of any of the spouses in case of a joint application (art. 3(a)iv), the habitual residence of the applicant if he or she resided there for at least a year immediately before the application was made (art. 3(a)v) or the habitual residence of the applicant if he or she resided there for at least six months immediately before the application was made and is a national of the Member State in question (art. 3(a)vi).

With regard to the law applicable to divorce and legal separation - which is the object of the enhanced cooperation established through Regulation 1259/2010[4] – the spouses may agree to designate, among others, the law of the State where the spouses are habitually resident at the time of the agreement (art. 5(a) Regulation 1259/2010) or the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time of the agreement (art. 5(b) Regulation 1259/2010), while – in the absence of a choice according to art. 5 of the Regulation – divorce and legal separation shall primarily be subject to the law of the State where the spouses are habitually resident at the time the court is seised or, failing that, where the spouses were last habitually resident, provided that the period of residence did not end more than one year before the court was seised and one of the spouses still resides in that State[5].

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[3] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) in *OJ* 2.7.2019 L 178.

[4] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, in *OJ* L 343, 29.12.2010.

[5] In case the criteria laid down by art. 8(a) and (b) fail to apply, divorce and legal separation shall be subject to the law of the State of which both spouses are nationals at the time the court is seised (art. 8(c)) or, failing that, the *lex fori* shall apply (art. 8(d)).

2.2. *Matrimonial property regimes*

As far as the matter of matrimonial property regimes is concerned – which is the object of the enhanced cooperation established through Regulation 2016/1103[6] - the criterion of habitual residence is relevant both for the purposes of jurisdiction and the applicable law.

With regard to jurisdiction, it has to be mentioned that, on the one hand, several rules of Regulation 2016/1103 make reference to other EU legal instruments which are based on the criterion of habitual residence. For instance, where a court of a Member State is "*seised in matters of the succession of a spouse pursuant to Regulation 650/2012*", the courts of that State shall have jurisdiction to rule also on matters concerning the matrimonial property regime arising in connection with that succession (art. 4, dealing with jurisdiction in the event of the death of one of the spouses)[7].

On the other hand, in the other situations (art. 6), jurisdiction to rule on a matter of the spouses' matrimonial property regime shall lie with the courts of the Member State where the spouses are habitually resident at the time the court is seised (art. 6(a)) or, failing that, where the spouses were last habitually resident, insofar as one of them still resides there at the time the court is seised (art. 6(b)) or, failing that, where the respondent is habitually resident at the time the court is seised (art. 6(c)).

With reference to the applicable law, according to art. 22 of Regulation 2016/1103, spouses are entitled to designate the law of the State where at least one of them is resident at the time of the agreement[8], while in the absence of a choice-of-law agreement, the law of

[6] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, in *OJ* L 183, 8.7.2016.

[7] See also art. 5 of the Regulation, dealing with jurisdiction in cases of divorce, legal separation or marriage annulment.

[8] See art. 22(1)a of the Regulation. As an alternative – according to art. 22(1)b of the Regulation – spouses can also designate "*the law of a State of nationality of either spouse or future spouse at the time the agreement is concluded*". The criteria employed by Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships in *OJ* L 183, 8.7.2016 tend

the State of the spouses' first common habitual residence after the conclusion of the marriage shall primarily apply (art. 26).

2.3. *Parental responsibility*

In the area of parental responsibility, habitual residence of the child is the general jurisdictional criterion (art. 7 of Regulation 2019/1111), while habitual residence of the holders of parental responsibility or the former habitual residence of the child are relevant for establishing a substantial connection of the child with a Member State, thus making its courts eligible for a choice of court agreement (art. 10 of Regulation 2019/1111).

2.4. *Maintenance obligations*

With regard to matters relating to maintenance obligations, the criterion of habitual residence is relevant for identifying both the competent jurisdiction and the applicable law.

More precisely, habitual residence of the defendant (art. 3(a) of Regulation 4/2009[9]) or of the creditor (art. 3(b) of Regulation 4/2009) are two of the general criteria of jurisdiction laid down by Regulation 4/2009. At the same time, the parties are only entitled to make a choice of court agreement designating, among others, the court or the courts of a Member State in which one of the parties is habitually resident (art. 4(a) of Regulation 4/2009) and, in the case of maintenance obligations between spouses or former spouses, the court or the courts of the Member State where they had their last common habitual residence for a period of at least one year (art. 4(c)ii of Regulation 4/2009).

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to mirror those of Regulation 2016/1103, with the remarkable difference that – in the absence of a choice-of-law agreement – the law applicable to the property consequences of registered partnerships shall be the law of the State under whose law the registered partnership was created.

[9] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations in *OJ* L 7, 10.1.2009.

Maintenance obligations are, as a general rule, governed by the law of the State of the habitual residence of the creditor, due to the reference made by art. 15 of Regulation 4/2009 to the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations[10].

2.5. *Succession*

In the matter of succession, the habitual residence of the deceased at the time of death is relevant both for determining the competent jurisdiction (art. 4 of Regulation 650/2012) and the applicable law (art. 21)[11].

2.6. *Non-contractual and contractual obligations*

The importance of the criterion of habitual residence, as it is well known, is not confined to the area of family and personal relations, but it extends also to the matter of contractual and non-contractual obligations. As a matter of fact, in the context of Regulation 593/2008[12], in the absence of a choice of law by the parties, the criterion of habitual residence is employed both by the general rule provided by art. 4 (with specific regard to the habitual residence of the party required to effect the characteristic performance of the contract) as well as by several special rules, such as art. 5 (contracts of carriage), art. 6 (consumer contracts) and art. 7 (insurance contracts).

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[10] Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, entered into force on 1st August 2013. According to art. 3 of the Protocol "[m]*aintenance obligations shall be governed by the law of the State of the habitual residence of the creditor, save where this Protocol provides otherwise. In the case of a change in the habitual residence of the creditor, the law of the State of the new habitual residence shall apply as from the moment when the change occurs"*.

[11] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, in *OJ* L 201, 27.7.2012

[12] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in *OJ* L 177, 4.7.2008.

Habitual residence is (marginally but still) relevant also in the area of non-contractual liability, where the general rule provided by art. 4, par. 1, of Regulation 864/2007[13] – failing a choice of law of the parties – designates as applicable the law of the country in which the damage occurs (*lex loci damni*). However, according to art. 4, par. 2, of the Regulation, where the person claimed to be liable and the person sustaining the damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply[14].

2.7. *Other regulations*

Both Regulation 1896/2006, creating a European order for payment procedure[15] and Regulation 861/2007, establishing a European Small Claims Procedure[16], despite not employing habitual residence as a jurisdictional criterion, use the criterion of habitual residence with a view to defining their scope of application. As a matter of fact, both instruments purport to apply to cross-border cases, which are defined as cases in which "*at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised*" (art. 3 of both regulations).

2.8. *The "expansion" of the criterion of habitual residence in the case-law of the European Court of Justice*

Finally, one remarkable (we should say "non-legislative") application of the habitual residence criterion – which enables to appreciate the relevance that such connecting factor has grown to develop

[13] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in *OJ* L 199, 31.7.2007.

[14] In the context of Rome II Regulation, the criterion of habitual residence also comes to relevance with regard to product liability (art. 5(1)a), unjust enrichment (art. 10, par. 2), *negotiorum gestio* (art. 11, par. 2), *culpa in contrahendo* (art. 12(2)b).

[15] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, in *OJ* L 399, 30.12.2006.

[16] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, in *OJ* L 199, 31.7.2007.

in the context of EU private international law – might be found in the case-law of the European Court of Justice and, more specifically, in the *e-Date* judgment of 25th October 2011[17].

As it is well known, such case dealt with the application of art. 5(3) of Regulation 44/2001 (now art. 7(2) of Regulation 1215/2012), providing a special rule concerning "*matters relating to tort, delict or quasi-delict*", according to which the defendant might be sued in the courts for the place "*where the harmful event occurred or may occur*" (so called *locus commissi delicti*). The European Court of Justice, throughout its case-law, has offered an extensive interpretation of such criterion, which – in cases of "complex torts" (where the action giving rise to the damage and the damages are situated in different States) – is held to include both the place where the event giving rise to the damage took place (*locus actus*) and the place(s) where the damages occurred (*locus* or *loci damni*).

As a general rule, there is, however, a relevant difference between a) the competence of the court seised according to the *locus actus* criterion, which is entitled to decide upon the totality of the damages suffered and b) the competence of the court(s) of the different *loci damni*, which can only decide with regard to the portion of damages suffered by the victim in the territory of each State.

It is in this latter connection that – in the absence, in the wording of the relevant provisions, of any reference to the notion of habitual residence – an exception was recognised by the case-law of the European Court of Justice with regard to the violation of personality rights occurring in the cyber context (*e.g.* online defamation). As a matter of fact, in this regard, the Court held that the special features of the situation at hand (the universal distribution of the content, the impossibility to quantify the distribution of the damage throughout the different States from which the content can be accessed, together with the seriousness of the damage suffered by the victim of the defamation)[18] called for an "adaptation" of the *locus commissi delicti*

[17] ECJ, Grand Chamber, judgment of 25th October 2011, joined cases 509/09 and 161/10 *eDate Advertising GmbH e a. contro X e Société MGN Ltd,* ECLI:EU:C:2011:685.

[18] See par. 45 of the judgment, where the Court observes that "*the placing online of content on a website is to be distinguished from the regional distribution of media such as printed matter in that it is intended, in principle, to ensure the ubiquity of that content*". Indeed, such *"content may be consulted instantly by an unlimited number of internet users*

criterion, as a consequence of which the person who considers that his or her rights have been infringed should have the option of bringing an action for liability, in respect of all the damage caused also before the courts of the Member State in which the centre of his or her interests is based (a *forum* that - being seised according to the *locus damni* criterion - should theoretically have jurisdiction only with regard to the portion of damage occurring in the territory of the *forum*).

Indeed, in the Court's view, "[t]*he place where a person has the centre of his interests corresponds in general to his habitual residence*", although "*a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State*"[19].

3. *Reasons for the success of the criterion of habitual residence*

The analysis conducted in the previous paragraph shows that EU private international law deploys the criterion of habitual residence in different contexts and for different purposes (criterion of jurisdiction, criterion for the identification of the applicable law, relevant element for determining the scope of application of certain instruments) and such criterion is so much embedded in the framework of EU private international law that the European Court of Justice, as shown by the *e-Date* judgment, uses it – also in the absence of specific provisions – to complete and develop such framework.

The reasons for the success of the criterion of habitual residence have been inquired into by legal doctrine and appear to be manifold[20].

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throughout the world, irrespective of any intention on the part of the person who placed it in regard to its consultation beyond that person's Member State of establishment and outside of that person's control".

[19] See par. 49.

[20] See *ex plurimis* R. LAMONT, *Habitual Residence and Bruxelles II bis: Developing Concepts for European Private International Family Law*, in *Journal of Private International Law*, 2007, pp. 261 ff. ; C. RICCI, *Habitual Residence as a Ground of Jurisdiction in Matrimonial Disputes: from Brussels II-bis to Rome III*, in A. MALATESTA, S. BARIATTI, F.

First of all, habitual residence, as a connecting criterion, is defined by private international law rules, so much so that – in the context of EU private international law – it has to be interpreted and applied as an autonomous notion[21] of EU law, not influenced by the internal laws of the different Member States. On the contrary, citizenship (and to a certain extent also domicile) are "external" to the private international law framework and determined by national laws.

As a matter of fact, the criterion of citizenship has to be interpreted and qualified exclusively on the basis of the determinations made by the State whose citizenship is concerned.

At the same time, the criterion of domicile is heavily influenced by internal laws, although it would not be impossible, for a harmonized instrument of private international law, to give an autonomous definition of it. Indeed, the analysis of Regulation 1215/2012 – in the context of which the criterion of domicile is central both for defining the scope of application and for allocating jurisdiction – reveals that an autonomous definition of domicile has been offered, but only with regard to companies and other legal persons or associations[22], while – as a general rule – in order to determine if a party

POCAR (eds.), *The External Dimension of EC Private International Law in Family and Succession Matters*, Padova, 2008, pp. 207 ff.; E. DI NAPOLI, *A place called home: il principio di territorialità e la localizzazione dei rapporti familiari nel diritto internazionale privato post–moderno*, in *Riv. dir. int. priv. e proc.* 2013, p. 899 ff.; M.-P. WELLER, B. RENTSCH, *'Habitual Residence': A Plea for 'Settled Intention'*, in S. LEIBLE (ed.), *General Principles of European Private International Law*, Alphen aan den Rijn, 2016, p. 171 ff.; A. DUTTA, *Domicile and Habitual Residence*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (eds.), *Encyclopedia of Private International Law*, Cheltenham, 2017, p. 555 ff.; A. LIMANTE, *Establishing Habitual Residence of Adults under the Brussels IIa Regulation: Best Practices from National Case-law*, in *Journal of Private International Law* 2018, p. 160 ff.; P. FRANZINA, *Sangue, suolo e cultura: declinazioni dell'idea di appartenenza nel diritto internazionale privato*, in *Diritti umani e diritto internazionale*, 2019, p. 85 ff.; C. RICCI, *Habitual Residence as a Ground of Jurisdiction in Matrimonial Disputes Connected with EU: Challenges and Potential*, in *Civil Procedure Review*, 2020, pp. 151 ff.

[21] See *infra* § 4.

[22] See art. 63: "*For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business*".

is domiciled in any Member State whose courts are seised of a matter, the court is required to apply its internal law[23].

In this connection, it has therefore been accurately pointed out that private international law – when using the criterion of citizenship (but the same remark might also apply, to a certain extent, to the criterion of domicile) – ends up "uncritically" accepting and acknowledging solutions that have been developed outside of its perimeter[24].

Secondly, habitual residence is a factual (more than a legal or formal) criterion, which enables the court to more accurately measure the proximity of an individual with a certain legal system, by taking into account all the different elements pertaining to each situation. This obviously marks another significant difference from the criterion of citizenship, whose attribution depends instead on the formal criteria employed by the laws of each State[25], which sometimes give relevance to elements that – depending on the features of each situation – might not necessarily show any real and effective connection of the person to the State in question.

One might recall in this regard that a person could have acquired, through the *ius sanguinis* criterion, the citizenship of a State that never even visited and whose language he or she ignores. Similarly, the notion of domicile, despite being more flexible than the criterion of citizenship, tends – depending on the content of the relevant pro-

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[23] Art. 62: "*In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State*".

[24] P. FRANZINA, *Sangue, suolo e cultura: declinazioni dell'idea di appartenenza nel diritto internazionale privato*, cit., p. 86.

[25] Private international law rules – when giving relevance to the criterion of citizenship – tend to refrain from any inquiry into the effectiveness of the citizenship or the mode of its acquisition, except in cases of multiple citizenships, where an assessment has to be made with a view to selecting the citizenship to which the rule of private international law should give precedence. In this regard, for instance, art. 19, par. 2, of Law no 218/1995 (Reform of the Italian system of private international law) provides, as a general rule, that – in cases of multiple citizenships – regard should be had to the citizenship of the State with which the person in question is more closely connected (unless one of the citizenships is the Italian one, which should be given preference in any case).

visions – to be more narrowly focused on specific elements pertaining to the person concerned (such as the center of the person's economic interests) or to be heavily influenced by legal presumptions (such as those giving relevance to the domicile of other family members)[26].

Thirdly, the accurateness of the habitual residence criterion in determining the connection of the individual concerned with a certain legal system goes hand in hand with and is closely related to its flexibility in acknowledging the changes that might affect his or her position. As a matter of fact, habitual residence tends to be more easily affected (than citizenship or domicile) by the behavior and by the life choices of the person in question.

One might compare, in this regard, the length and the complexity of the procedures required in most States to acquire citizenship with the relative easiness of any change of habitual residence, which can be triggered by the modification of elements (*in primis* the physical presence in a certain territory and the life choices underlying such presence) that the individual concerned is in the position to affect and impact[27]. In this perspective, the individualistic approach which lies at the basis of the option for the habitual residence criterion has been properly emphasized in opposition to the nationalistic character of the citizenship criterion[28], which is instead based on the idea that the identity of an individual is determined by his or her belonging to a certain political entity and that such "belonging" follows the individual concerned (and is therefore perpetuated) even when the person decides to rescind any substantial connection with it.

Finally, from a more general point of view, it should be highlighted that – through the option for the criterion of habitual residence (especially as opposed to the criterion of citizenship) – private international law rules manage to ensure that the same rules apply (with regard to sensitive personal issues such as marriage, divorce, adoption, *etc*.) to communities living in the same territory, irrespective of the national belonging of the persons forming that community

[26] P. FRANZINA, *Sangue, suolo e cultura: declinazioni dell'idea di appartenenza nel diritto internazionale privato*, cit., p. 89.

[27] See *infra* § 5.

[28] P. FRANZINA, *Sangue, suolo e cultura: declinazioni dell'idea di appartenenza nel diritto internazionale privato*, cit., p. 88.

as well as aside from the enjoyment of political rights, thus fostering integration and cohesion of the group of persons living in the territory of the State[29].

4. *Interpretation and application of the criterion of habitual residence*

Providing a definition of the notion of habitual residence is not an easy task. As Advocate General Warner rightly put it in the opinion delivered in the *Jean-Louis Delvaux v Commmission of the European Communities* case[30] (dealing with the notion of habitual residence for the purposes of the recognition of expatriation allowance in favor of an employee of the Commission): "*habitual residence is, rather like an elephant, easier to recognize than to define*". So much so that the same Advocate General did not feel "*called upon to attempt a definition of it*" in the case at hand and only observed, in very broad and general terms, that "*in order to ascertain whether a person has been habitually resident in a particular place during a particular period, one must ascertain to what extent he has been present during that period and then ascertain the reason or reasons for that presence*".

The analysis of the case-law of the European Court of Justice seems to confirm, also from an empirical point of view, that habitual residence is indeed easier to recognize than to define. As a matter of fact, despite the massive presence of the criterion of habitual residence within the private international law instruments of the European Union, there is a relatively small number of cases dealing with the actual definition of such notion. It appears that national courts – even in the absence of a clear-cut definition[31] – manage to identify

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[29] P. FRANZINA, *Sangue, suolo e cultura: declinazioni dell'idea di appartenenza nel diritto internazionale privato*, cit., p. 94.

[30] Opinion of Mr Advocate General Warner delivered on 3 February 1976 in Case 42-75, *Jean-Louis Delvaux v Commission of the European Communities*, ECLI:EU:C:1976:13.

[31] Some regulations provide only limited scope definitions of the concept of habitual residence. Art. 19 of Regulation 593/2008, for instance, defines habitual residence with regard to companies and bodies, corporate or unincorporated, as "*the place of central administration*" and, with regard to natural persons acting in the course of their business, as

the habitual residence of the persons concerned, so much so that most preliminary references by national courts to the European Court of Justice do not deal with the definition of habitual residence, but rather with the consequences of its initial determination by the referring court.

The somewhat elusive character of the notion of habitual residence (together with the absence of a normative definition of such notion) does not appear to be accidental. As a matter of fact, already in 1998, the Borrás report (concerning the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters)[32], mentioned that although the possibility of including a provision determining habitual residence was discussed, "*in the end it was decided not to insert any specific provision on the matter*", although "*particular account was taken of the definition given on numerous occasions by the Court of Justice, i.e. 'the place where the person had established, on a fixed basis, his permanent or habitual center of interests, with all the relevant facts being taken into account for the purpose of determining such residence'*"[33].

Moreover, also in the study more recently commissioned by the European Parliament's Committee on Legal Affairs, "*A European Framework for private international law: current gaps and future perspectives*"[34], it is clearly stated that, however critical the definition of the concept of habitual residence might prove, "*it would be incorrect to describe the reference to 'habitual residence' as a gap*". On the contrary, "[i]*t is generally accepted that the concept of 'habitual residence' in private international law must be flexible" with*

their "*principal place of business*" (art. 23 of Regulation 864/2007 introduces a similar provision).

[32] Explanatory Report on the Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters (approved by the Council on 28 May 1998) prepared by Dr Alegría Borrás Professor of Private International Law University of Barcelona in *OJ* C 221, 16.7.1998, p. 27.

[33] Par. 32.

[34] V. LAZIĆ, R. BLAUWHOFF, X. KRAMER, M. DE ROOIJ, L. FROHN, "*A European Framework for private international law: current gaps and future perspectives*", Brussels, 2012, accessible at the following link: https://op.europa.eu/en/publication-detail/-/publication/8fbef805-9e8e-11e5-8781-01aa75ed71a1.

a view to taking into account "all circumstances specific to each individual case'"". The same Study recognizes, nonetheless, that "*the flexibility that is so greatly appreciated for one-off, atypical cases, becomes a complicating factor when the number of cases of a similar type increases*"[35].

All the above said (and despite the lack of a precise definition), some general interpretative guidelines might be gathered from the case-law of the European Court of Justice, of which careful account should be taken before moving on to consider the more specific issues analyzed in the next paragraphs.

In this regard, it has first to be mentioned that habitual residence represents an autonomous notion of EU law, as repeatedly confirmed by the European Court of Justice. As a matter of fact, "*it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question*"[36]. In this connection, the Court observed that "[t]*he concept of 'habitual residence' is used in articles of Regulation No 2201/2003 which do not contain any express reference to the law of the Member States*" and is "*therefore necessary to define that concept, peculiar to EU law, in the light of the context of the regulation's provisions and the objective pursued by it*"[37].

A second fundamental point established by the case-law of the European Court of Justice, is that the concept of habitual residence, despite being present in a significant number of EU regulations[38] and despite corresponding to an autonomous notion of EU law, does not necessarily have the exact same meaning in the context of every legal instrument and its practical application may vary according to the person whose habitual residence is concerned.

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[35] See page 27.

[36] ECJ, First Chamber, judgment of 17th October 2018, case C-393/18 PPU, *UD v XB*, Judgment of the Court (First Chamber) of 17 October 2018, ECLI:EU:C:2018:835, par. 46.

[37] See par. 47.

[38] See § 2.

As a matter of fact, every attempt to describe the notion of habitual residence (by the European Court of Justice or by the relevant regulations themselves) is almost invariably accompanied by the condition that the relevance of such description is confined to the application of the legal instrument at hand and is based on its specific aims and context.

For instance, recital 23 of Regulation 650/2012 (concerning the matter of succession), on the one hand, provides some useful guidelines as to the identification of habitual residence, by stating that "[i]*n order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence*". On the other hand, the same recital clearly specifies that "[t]*he habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation*", therefore implying that the identification of habitual residence for the purposes of other regulations might follow different rules and criteria.

In this regard, also the European Court of Justice – in the course of the interpretation of Regulation 2201/2023 (concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility) – considered that "*the articles of the Regulation which refer to 'habitual residence' make no express reference to the law of the Member States for the purpose of determining the meaning and scope of that concept*" and inferred from this that "*its meaning and scope must be determined in the light of the context of the Regulation's provisions and the objective pursued by it*". On the basis of such methodological premise, the Court then gave relevance to "*the objective stated in recital 12 in the preamble to the Regulation, that the grounds of jurisdiction established in the Regulation are shaped in the light of the*

best interests of the child, in particular on the criterion of proximity"[39].

At the same time, the determination of habitual residence – even in the context of the application of the same Regulation – can significantly vary according to the person whose habitual residence is concerned. In this regard, it might be interesting to compare the reasoning of the Court in the already mentioned *Mercredi* case[40] with the decision of the *IB v FA* case[41]. Indeed, both judgments dealt with the application of Regulation 2201/2003. In *Mercredi*, however, the Court had to identify the court provided with jurisdiction, according to the Regulation, in matters of parental responsibility over a child of few months, while in *IB v FA* the dispute concerned jurisdiction to hear a divorce application.

In the *Mercredi* case, the Court placed great emphasis – for the purposes of identifying the habitual residence according to art. 8 and 10 of Regulation 2201/2003 – upon the closest family relations of the child. Indeed, the Court observed that "[a]*s a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of*"[42]. In this perspective, the younger the person is, the more habitual residence will depend upon his or her family connections. As a matter of fact, "[a]*n infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment. In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant*"[43].

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[39] ECJ, First Chamber, judgment of 22nd December 2010, case C-497/10, *Barbara Mercredi v Richard Chaffe*, ECLI:EU:C:2010:829, par. 46.

[40] See *supra* footnote 39.

[41] ECJ, Third Chamber, judgment of 25th November 2021, case C-289/2020, *IB v FA*, ECLI:EU:C:2021:955.

[42] See par. 54.

[43] See par. 55.

On the contrary, the relevant elements for assessing habitual residence of an adult for the purposes of art. 3 of Regulation 2201/2003 are significantly more diversified, since – as observed by the Court in the *IB v FA* case – "*unlike a child, particularly an infant, whose environment is, as a general rule, a family environment* (…) *the environment of an adult is necessarily more varied, composed of a significantly wider range of activities and diverse interests, concerning, inter alia, professional, sociocultural and financial matters in addition to private and familial matters*"[44].

At the same time, determination of habitual residence for the purposes of a divorce application is in its turn influenced by the objectives pursued by Regulation 2201/2003 in this connection, which, obviously, are not centered around the best interest of the child, but privilege the facilitation of "*applications for the dissolution of matrimonial ties*", pursued "*by establishing flexible conflict of law rules and by protecting the rights of the spouse who, following a marital crisis, has left the Member State of common habitual residence*"[45].

5. *Application of the criterion of habitual residence: the relevant elements to assess habitual residence*

In the previous paragraph an attempt was made to provide some general interpretative and applicative guidelines concerning the criterion of habitual residence. The above remarks, however, appear to confirm the elusive character of such criterion, which – although corresponding to an autonomous notion of EU law – lacks a clear-cut definition and does not even necessarily have the same meaning within the different instruments of EU private international law.

Nonetheless, such elusiveness of the notion of habitual residence (which poses the most significant hurdles as far as any definitory attempt is concerned) can be seen as an advantage in terms of flexibility and, in most cases, does not substantially hinder the identification of habitual residence by national courts.

[44] See par. 56.
[45] See par. 56.

In this perspective, with a more practical approach, it seems now useful – after having defined and described the notion of habitual residence in general terms – to try and identify the facts of the case that each court should look at in the application of the habitual residence criterion.

As a matter of fact, in this regard, the case-law of the European Court of Justice has provided over time a list of elements that could be considered with a view to determining habitual residence. While it is worth mentioning such elements, it is essential to remind that a) they are not exhaustive and b) there is no established order or hierarchy among them, since – as previously highlighted – habitual residence is a flexible notion that the competent court needs to assess, on a case-by-case basis, by having regard to the specific circumstances of the situation at hand.

For the purposes of a closer analysis, it seems useful to firstly dwell further upon the literal wording of the criterion, which is formed by a noun (residence) and an adjective (habitual).

The term residence suggests that – in order for a person to be habitually resident in a State – a certain degree (or a certain amount) of physical presence of the individual concerned in the territory of that State is necessary. Therefore, it is well established that, on the one hand, the mere intention of a person to move to or to reside in the territory of a State does not qualify as residence; on the other hand, in light of the substantial (as opposed to formal) character of the notion at issue, residence only needs to be assessed from a factual point of view, without any inquiry into its lawfulness[46].

Nonetheless, physical presence (although necessary) is not sufficient to establish habitual residence. This perhaps obvious remark can be confirmed, also at the normative level, by comparing the general rule of jurisdiction in matters of parental responsibility laid down by art. 7 of Regulation 1111/2019 (which – as already considered – is based on the criterion of the habitual residence of the child) with the residual rule established by art. 11 of the same Regulation, according to which "[w]*here the habitual residence of a child cannot*

[46] C. Ricci, *Habitual Residence as a Ground of Jurisdiction in Matrimonial Disputes Connected with EU: Challenges and Potential*, cit., p. 174.

be established (…), *the courts of the Member State where the child is present shall have jurisdiction*".

Indeed, the suggested comparison shows that the mere "presence" of a person (which is a necessary element for establishing habitual residence), if considered alone, would only attest a lesser degree of connection of the person with the territory (so much so that the criterion of physical presence is residually applied in cases where it is not possible to determine the habitual residence of the child).

Once established that a person, due to his or her physical presence in the territory of a certain State, can be qualified as a resident of that State, the habitual character of such residence needs to be assessed. In this regard, a wide series of elements might be taken into account, such as, for instance, the duration of the presence in the territory of a certain State, the frequency and regularity of such presence as well as its reasons, the existence of (movable or immovable) assets, the degree of social integration of the person in that territory, the place of residence of the family of the individual concerned, the localization of his or her professional interests, the quality and quantitative degree of the administrative connections of the person at hand with the territorial State (health care, social services, school, *etc*.).

The above list is, however, by no means exhaustive and – based on the analysis conducted in the previous paragraphs – it should also be added that there is no fixed order or hierarchy according to which such elements should be assessed and weighed. Their relevance will have to be evaluated by the competent court on a case-by-case basis and shall significantly depend upon the personal situation of the individual at hand as well as upon his or her lifestyle. Indeed – as it has already been mentioned – most of the elements listed above will, for instance, not even be taken into account when assessing the situation of a child (all the more so if very young, such as an infant), whose habitual residence (in the absence of any meaningful "direct" connection) will have to be determined ("indirectly") by having regard to the connections of his or her caregiver.

At the same time, when analyzing the position of an adult, the weight of the above listed elements (and perhaps also the relevance of further elements that might not have been mentioned) will depend upon the features of each specific situation. By way of example, it

can be easily supposed that family relations should weigh more for the purposes of determining the habitual residence of a stay-at-home parent than the habitual residence of a professional, single and without children.

6. *Can one person have multiple habitual residences for the purposes of the application of the same legal instrument?*

After having provided – within the limitations imposed by the elusiveness of the notion at issue – a general definition of the criterion of habitual residence as well as a (non-exhaustive) list of the elements that should be taken into account in its application, it is now time to address the more recent questions that have been hinted at in the title of the present contribution, by starting to inquire whether a same person could have multiple habitual residences for the purposes of the application of the same legal instrument.

Before analyzing the relevant recent judgments of the European Court of Justice, it might be useful to further reason about the literal meaning of habitual residence, since the wording of the criterion would not of itself appear to prevent a same person from having more than one habitual residence.

Indeed, it is well established that a person can have more than one residence[47], being sufficient, for that purpose, to identify an adequately stable connection of such person with the territory of more than one State. An individual, for instance, might have a permanent home in two different States, one where his or her economic and professional interests are located and the other where all of his or her family resides.

It has therefore to be determined whether the adjective "habitual" necessarily implies the uniqueness of the residence which should come to relevance for the purpose of the application of private international law rules or if, on the contrary, a "plural" or "multiple" habituality is conceivable. In this regard, the literal and ordinary mean-

[47] In the *IB v FA* case (*supra* footnote 41) the ECJ recognized that in principle "*it cannot be ruled out that a spouse may have several residences at the same time*" (par. 51).

ing of "habitual", whose etymology evokes the concept of a recurring (not necessarily exclusive) behavior, does not seem to necessarily suggest that there can only be one habitual residence. Indeed, in the common language, one could say, for instance, that "John habitually plays tennis and soccer" or that "the violinist habitually performs in Italy and France", without concluding that one activity should take precedence over (and exclude) the other.

In other words, once established that a same person can by all means have more than one "residence", it does not appear that – at least if account is taken only of the literal wording – the adjective "habitual" should function as a "tie-breaker" concept, by selecting, in cases of multiple residences, the "prevailing" one.

A careful consideration of the function of the criterion of habitual residence as well as of its rationale, however, might lead to a partially different conclusion. Indeed, as considered above[48], habitual residence is a connecting criterion which is widely employed by EU private international law instruments both for identifying the competent jurisdiction and for determining the applicable law, two "areas" which should be separately considered for the present purposes.

As far as jurisdiction is concerned, the designation – through the applicable connecting criterion – of multiple alternative *fora* is not inconceivable. Indeed, on the one hand, such multiple designation is envisaged by several rules of jurisdiction. To mention just one example, art. 3 of Regulation 1111/2019 provides that "[i]*n matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State: (a) in whose territory: (i) the spouses are habitually resident, (ii) the spouses were last habitually resident, insofar as one of them still resides there, (iii) the respondent is habitually resident, (iv) in the event of a joint application, either of the spouses is habitually resident, (v) the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made, or (vi) the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is a national of the Member State in question; or (b) of the nationality of*

[48] See *supra sub* § 2 the overview of the instruments that employ the connecting factor of habitual residence.

both spouses". In this case, a plurality of alternative competent courts is designated through a plurality of connecting criteria.

On the other hand, the same connecting criterion might designate a plurality of *fora*. This happens, for instance, with the criterion of nationality in cases where the person or the persons concerned have more than one nationality and the relevant private international law rule does not provide any criterion for selecting the prevailing nationality.

As a matter of fact, in the *Hadadi* case[49], dealing with art. 3(1)b, of Regulation 2201/2003 (currently art. 3(1)b of Regulation 1111/2019) – according to which "[i]*n matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State* (…) *of the nationality of both spouses*" – the Court excluded that only one nationality (the "more effective" one) should be taken into account for the purposes of identifying the competent jurisdiction.

On the contrary, the Court observed that "*the system of jurisdiction established by Regulation No 2201/2003 concerning the dissolution of matrimonial ties is not intended to preclude the courts of several States from having jurisdiction. Rather, the coexistence of several courts having jurisdiction is expressly provided for, without any hierarchy being established between them*"[50]. As a consequence, "*pursuant to Article 3(1)(b) of Regulation No 2201/2003, the courts of a number of Member States can have jurisdiction where the individuals in question hold several nationalities*"[51].

Therefore, at least for the purpose of jurisdiction (and especially in the lack of any provision expressly requiring that each connecting criterion leads to a singular designation), there would be no logical reason to rule out the possibility of a multiple habitual residence.

The function of the connecting factor in the context of conflict-of-laws instruments (devoted to the identification of the applicable law) calls, instead, for a different conclusion. Indeed, while the designation, by a private international rule of jurisdiction, of multiple

[49] ECJ, Third Chamber, judgment of 16th July 2009, case C-168/08, *Laszlo Hadadi (Hadady) v Csilla Marta Mesko, épouse Hadadi (Hadady)*, ECLI:EU:C:2009:474.

[50] See par. 49.

[51] See par. 56.

fora is not particularly problematical (since the rules on *lis pendens* can adequately manage the situations where more than one *forum* is seised with regard to the same dispute), the identification, by a conflict-of-law provision, of a plurality of laws would probably preclude the court from determining the law according to which the dispute should be decided.

Therefore, in cases where a same connecting criterion leads to a multiple designation, the need emerges for a "tie-breaker" rule allowing to select only one of the designated laws. In this regard, art. 19 of the Italian law of private international law, for instance, provides, as a general rule, that – in cases of multiple citizenships – regard should be had to the one of the State with which the person is more closely connected[52].

In the same logic, in cases where the relevant criterion is habitual residence and the individual concerned habitually resides in more than one State, courts would need to select only one residence for the purpose of identifying the applicable law and it seems that it is this very practical demand that might have turned the concept of "habituality" in a "tie-breaker" rule (beyond what would appear to be required from a strictly literal reading of the connecting factor)[53].

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[52] See footnote 25.

[53] In a totally different context, also in the area of international taxation it is possible to have cases of multiple residences, whenever a taxpayer is resident in more than one State. In this regard, it should be mentioned that international tax conventions tend to define the notion of residence by relying on the legal categories accepted within each legal system. Art. 4, par. 1, of the Model Tax Convention on Income and on Capital adopted by the OECD (https://www.oecd.org/ctp/treaties/articles-model-tax-convention-2017.pdf), for instance, provides that "[f]*or the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature*".

It is interesting to observe, however, that – since the purpose of the residence criterion, in the fiscal context, is that of identifying the State supposed to exercise the taxation power upon the situation concerned (and in order to avoid double taxation, only one State, as a general rule, is supposed to exercise such power) – there are several "tie-breaker" rules aimed at determining the "prevailing" residence. Art. 4, par. 2, of the Model Convention provides in this connection that "[w]*here by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows: a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests); b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either*

7. *The position of the case law of the European Court of Justice on the issue*

The last remark finds support in the decision of the European Court of Justice in the *E.E.* case[54], dealing with the succession of a Lithuanian citizen habitually living in Germany but still showing several relevant ties to Lithuania[55].

In this case, the European Court of Justice concluded that "*the habitual residence of the deceased must be established by the authority dealing with the succession, by way of an overall assessment of the circumstances of the case in point, in a single Member State*"[56]. Indeed, in the Court's view, "*an interpretation of the provisions of Regulation No 650/2012, according to which the habitual residence of the deceased at the time of his or her death could be established in several Member States, would lead to a fragmentation of the succession, given that that residence is the condition for the purposes of applying the general rules set out in Articles 4 and 21 of that regulation, under which both the jurisdiction of the courts to adjudicate on a succession as a whole and the law applicable pursuant to that regulation, which is intended to govern a succession as a whole, are determined in relation to that residence*"[57].

State, he shall be deemed to be a resident only of the State in which he has an habitual abode; c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national; d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement".

[54] ECJ, First Chamber, judgment of 16th July 2020, case C-80/19, *Proceedings brought by E. E.*, ECLI:EU:C:2020:569.

[55] See par. 32, where the relevant factual circumstances of the case are summarized as follows: "*a Lithuanian national whose habitual place of residence on the day of her death was possibly in another Member State, but who in any event had never severed her links with her homeland, and who, inter alia, had drawn up, prior to her death, a will in Lithuania and left all of her assets to her heir, a Lithuanian national, and at the time of the opening of the succession it was established that the entire estate comprised immovable property located solely in Lithuania, and a national of that other Member State surviving his spouse expressed in clear terms his intention to waive all claims to the estate of the deceased, did not take part in the court proceedings brought in Lithuania, and consented to the jurisdiction of the Lithuanian courts and the application of Lithuanian law*".

[56] See par. 40.

[57] See par. 41. In this regard, it should however be mentioned that the unity of the succession is not an absolute principle according to the case-law of the European Court of

The European Court of Justice subsequently reached the same conclusion also in a different case, *IB v FA*[58], specifically dealing with the application of the habitual residence criterion for the purpose of identifying the competent jurisdiction according to art. 3 of Regulation 2201/2003, concerning divorce and legal separation. The spouse in question had several and relevant ties both i) with France (where he had worked for years, had a stable and permanent basis and a social life) and ii) with Ireland (where his family lived). Thus, the question arose whether it was "*permissible to conclude, in accordance with and for the purposes of the application of Article 3 of Regulation No 2201/2003*" that he was "*habitually resident in two Member States*" so that "*the courts of those two States have equal jurisdiction to rule on the divorce*"[59].

The Court answered in the negative on several grounds. More specifically, after recalling that habitual residence is an autonomous notion of EU law, which should be given a uniform interpretation in line with the objectives of the applicable legal instrument, the Court mentioned five different reasons why a same person could only have one habitual residence (so that – in cases of multiple residences – a choice should always be made in order to identify the "prevailing" or, we could say, the "more habitual" one).

Firstly – the Court observed – from a literal point of view, Regulation 2201/2003 always refers to the concept of habitual residence using the singular and never envisages that a same person might have several different habitual residences[60]. In this regard, it has to be said, however, that this is certainly true, but not decisive, since the Regulation also refers to the nationality in the singular, although – as already mentioned – the nationality criterion could actually designate more than one *forum*.

Justice. Regard might be had in this regard to the recent case ECJ, Third Chamber, judgment of 12th October 2023, case C-21/22, *OP v Notariusz Justyna Gawlica*, ECLI:EU:C:2023:766, where the Court stated that such principle "*is not absolute*" (par. 34) and "*the EU legislature expressly intended to comply, in certain specific cases, with the split model of succession that could be implemented in relations with certain third States*" (par. 36).

[58] See *supra sub* footnote 41.

[59] See par. 23.

[60] See par. 40.

Secondly, according to the Court, "*the use of the adjective 'habitual' indicates that the residence must have a certain permanence or regularity and that the transfer of a person's habitual residence to a Member State reflects the intention of the person concerned to establish there the permanent or habitual centre of his or her interests*"[61]. It could be objected, nonetheless, that the concepts of permanence and regularity do not necessarily have to point to a singular residence. All the more so in cases where the interests of the individual at issue are "split" between different countries.

Thirdly, in the Court's view, "*to accept that a spouse may be habitually resident in several Member States at the same time would be liable to undermine legal certainty, by making it more difficult to determine in advance which courts have jurisdiction to rule on the dissolution of matrimonial ties and by making it more difficult for the court seised to determine whether it has jurisdiction*", thus hindering the free movement of persons, which is one the objectives pursued by the rules on jurisdiction at issue[62]. In this regard, however, one could counterargue that – while the possibility of multiple competent *fora* is expressly envisaged by the Regulation (and therefore is presumably consistent with its fundamental objectives) – in situations where a certain person has two permanent and regular residences, taking them both into account for the purposes of identifying the competent jurisdiction would probably be far better (from the point of view of legal certainty) than forcing the national court to "break the tie" and choose among them, since such a choice might not be easily foreseeable by the parties.

Moreover – and this is the fourth argument laid down by the Court – "*the interpretation of the rules on jurisdiction set out in Article 3(1)(a) of Regulation No 2201/2003 has consequences which go beyond the dissolution of matrimonial ties as such*", since, for instance, "*both Article 3(c) of Regulation No 4/2009 and Article 5 of Regulation 2016/1103 refer to the jurisdiction established in Article 3(1)(a) of Regulation No 2201/2003 and provide that, in proceedings for the dissolution of matrimonial ties, the court seised is to have ancillary*

[61] See par. 41.
[62] See par. 46.

jurisdiction to rule on certain matters relating to maintenance obligations and the matrimonial property regime"[63]. This is a non-argument since it is certainly true that the court provided with jurisdiction in matrimonial matters might have ancillary jurisdiction with regard to connected issues, but it is not clear why – in light of this statement – habitual residence should be exclusive.

Fifthly and finally, the Court excludes that the above considerations could be called into question by the interpretation of Article 3(1)(b) of Regulation No 2201/2003 adopted in the *Hadadi* case[64], since the connecting factor of nationality "*was not limited to their 'effective nationality'*"[65]. Nonetheless – one could object – the same could be argued with regard to the literal wording of the habitual residence criterion. Indeed, if a) "habitual" means "regular" and b) from a literal point of view, a same person could habitually reside in two different State, the establishment of a "tie breaker" criterion comparable to the "*effective nationality*" would have required a different drafting such as "*more habitual residence*" or "*prevailing habitual residence*" (which however was not provided for in the relevant provisions).

In light of the above, the arguments laid down by the European Court of Justice in support of the exclusive character of the habitual residence criterion are far from straightforwardly convincing. Nonetheless, the conclusion reached by the Court is perfectly acceptable and shareable from the practical point of view, since – although the interpretation of such connecting factor is not supposed to necessarily have the same meaning according to different instruments[66] (so that a different notion could have theoretically been accepted for the purpose of rules on jurisdiction, on the one hand, and on the applicable law, on the other hand) – allowing habitual residence to be exclusive or non-exclusive depending on the applicable EU regulation might have been too big a divergence to be accepted within the

[63] See par. 47–48.

[64] Where Court accepted that the courts of several Member States may have jurisdiction where the persons concerned have several nationalities. See footnote 49.

[65] See par. 49–50.

[66] See *supra* § 4.

same notion (especially in cases where the habitual residence criterion is used, within the same regulation, both for the purposes of jurisdiction and applicable law).

8. *Can different instruments give relevance to different moments with a view to determining habitual residence of a same person?*

A connected question to the one discussed in the previous paragraphs is whether different instruments could give relevance to different moments in time with a view to determining the habitual residence of a same person. If this was the case, it would appear as though a same individual could have different habitual residences depending on the applicable regulation. In reality, however, the person in question would only have one habitual residence at a time, so that the conclusions reached by the European Court of Justice in the case-law considered above would remain unchallenged.

This very peculiar situation was considered by the European Court of Justice in the *W.J. v L.J. and J.J.* case[67], whose fundamental facts can be summarized as follows. Two Polish nationals who were resident in the United Kingdom since 2012 (where they carried on a professional activity) had two children in 2015 and 2017, both with Polish and British nationality. During 2017 the mother travelled to Poland with the two children and she informed the father of her intention to remain there with them on a permanent basis. The father, at that point, lodged a complaint for the return of the children, while the children (represented by the mother) brought an action against the father before the Polish court for monthly maintenance payments.

Polish courts, on the one hand, ordered the father to make monthly payments to each of the children pursuant to Polish law (law of the habitual residence of the children). On the other hand, they ordered the mother to surrender the children to the father, on the grounds that they were being wrongfully retained in Poland and their

[67] ECJ, Fourth Chamber, judgment of 12th May 2022, case C-644/20, W. *J. v L. J. and J. J.*, ECLI:EU:C:2022:371.

habitual residence immediately before their wrongful retention was in the United Kingdom.

The mother, however, did not return the children within the prescribed period and the attempts to locate them had not been successful as at the date on which the reference for a preliminary ruling was lodged by the Polish court seised with an appeal brought by the father against the maintenance order.

In its preliminary reference the Polish court considered that, according to art. 3(2) of the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (referred to by art. 15 of Regulation 4/2009), Polish law could be applied to the issue of maintenance obligations only insofar as the children could be considered as habitually resident in Poland. At the same time, the national court noted, however, that art. 10 of Regulation 2201/2003 precludes, in principle, jurisdiction in matters of parental responsibility from being transferred to the State in which the child would have his or her new habitual residence, if such transfer is the consequence of a wrongful removal or retention of the child. Therefore, if account had to be taken of art. 10 of Regulation 2201/2003, the law applicable to maintenance obligations could not be Polish law, but the law of the United Kingdom, *i.e.* the State where the children had their habitual residence prior to their wrongful retention in Poland.

In light of the above, the referring court asked the European Court of Justice to clarify whether the wrongfulness of the retention of the children in Poland and the consequent order of return to the United Kingdom could prevent them from acquiring habitual residence in Poland for the purposes of the identification of the law applicable to maintenance obligations.

The European Court of Justice answered in the negative, pointing out that – as far as the literal wording of the relevant provisions is concerned – "*there is no reason, given the silence of the legislation, for interpreting Article 3 of the Hague Protocol in the light or on the basis of the provisions of Article 10 of Regulation No 2201/2003*" [68].

[68] See par. 71. See also par. 72: "*the Court has held that the special jurisdiction provided for in Article 10 of Regulation No 2201/2003 must be interpreted restrictively and therefore does not permit an interpretation that goes beyond the situations explicitly envisaged by that regulation*".

Furthermore, this conclusion is supported also by the rationale underlying the identification of the law applicable to maintenance obligations on the basis of the habitual residence of the creditor, "*it being understood that the law of the habitual residence of the maintenance creditor appears in principle to be the law most closely connected with that creditor's situation and to be the best adapted to govern the specific problems which he or she may encounter*"[69], since it allows to determine the "*existence and amount of the maintenance obligation by taking account of the 'legal and factual conditions of the social environment in the country where the creditor lives and engages in most of his or her activities'*"[70].

Conclusively, going back to the initial question, the consequence of the European Court of Justice's interpretation is that the considered children would appear to have two different habitual residences: one for the purpose of the wrongful removal proceedings (in the United Kingdom) and a different one for the purpose of the maintenance obligations proceedings (in Poland). This conclusion, however, only seemingly challenges the findings reached in the previous paragraphs, being the outcome of an exceptional rule (art. 10 of Regulation 2201/2003) preventing the current habitual residence of the children (acquired as a result of the wrongful removal or retention) to be taken into account (to the benefit of the previous habitual residence) with a view to determining jurisdiction in matters of parental responsibility.

In other words, the two children whose position was considered in the *W.J. v L.J. and J.J.* case initially had their habitual residence in the United Kingdom and later acquired habitual residence in Poland. However, for the purpose of the wrongful retention proceedings regard should exceptionally be had to the habitual residence prior to the wrongful retention (in the United Kingdom), while, for the purpose of the maintenance obligations proceedings, the current habitual residence (in Poland) should be taken into account.

Therefore, habitual residence is in this case actually the same for the same persons and at the same time, but the relevant moments at

[69] See par. 64.
[70] See par. 65.

which habitual residence has to be assessed might be different according to the applicable regulations.

9. *Is it possible for a person not to have any habitual residence?*

After having inquired whether a same person could have more than one habitual residence, it could be interesting to determine whether it is possible for a person not to have any. This question might come to relevance where the individual concerned resides (*i.e.* lives and, we might say, "physically exists") in different States, but does not have any permanent or regular ties with any of such States.

In these situations – one could ask – should the connecting factor be interpreted as conferring jurisdiction to the courts (or designating the law) of the State with which the ties (however feeble) are stronger? Or should we conclude that the person in question has no habitual residence at all if a minimum "threshold" of habituality has not been reached?

Also in this regard, it might be useful to start with an analysis of the literal wording of the criterion, which – as already considered – is formed by the noun "residence" as well as by the adjective "habitual". This (again) obvious remark clearly reveals that habituality is a necessary requirement so that habitual residence has to be something more than mere residence, thus requiring a certain degree of permanence and regularity.

In this very respect, the European Court of Justice, in the *W. J. v L. J. and J. J.* case, which was already considered above, clearly stated that "*it should first of all be pointed out that the use of the adjective 'habitual' makes it possible to infer that the residence must display a sufficient degree of stability, to the exclusion of a temporary or occasional presence*"[71].

From this premise seems to follow that the criterion of habitual residence might not necessarily always work (in the sense that it does not invariably lead to a designation of the competent jurisdiction or of the applicable law).

[71] See par. 63.

So much so that some private international law instruments specifically make room for such possibility by introducing specific fall-back rules. Art. 11 of Regulation 1111/2019, for instance, provides that "[w]*here the habitual residence of a child cannot be established and jurisdiction cannot be determined on the basis of Article 10, the courts of the Member State where the child is present shall have jurisdiction*" (par. 1). The same rule also applies to "*refugee children or children internationally displaced because of disturbances occurring in their Member State of habitual residence*" (par. 2). This means that not every person can necessarily be found to be "habitually resident" in a certain State for the purposes of EU private international law regulations.

In light of the above considerations, it appears that habituality of residence (*i.e.* the duration, permanence and regularity of the stay of one person in a given country, to be assessed on the basis of the elements considered in the previous paragraphs) is not only a "tie-breaker" rule, that applies – in cases of multiple residences – to determine which residence is the "more habitual". Habituality also represents, first and foremost, a minimum threshold that needs to be satisfied for the criterion to be successfully applied with a view to designating the applicable law or the competent jurisdiction.

This conclusion poses, however, a significant challenge: in case the person concerned does not have any habitual residence, what connecting factor should be applied instead? The answer to such question necessarily depends upon the specific solutions accepted within each regulation.

More specifically, some regulations have a fall-back rule in place to cover this very situation. Art. 11 of Regulation 1111/2019 (providing for the application of the mere residence criterion in case of children that do not have any habitual residence) has already been mentioned.

Also art. 8 of Regulation 1259/2010 seems to adequately cope with the impossibility to determine the habitual residence of the spouses. Indeed – failing the application of the criteria provided by art. 8(a) (current habitual residence) and 8(b) (former habitual residence) – the criterion of common nationality applies (art. 8(c)) and, failing even that, the *lex fori* can come to the rescue (art. 8(d)).

In the same perspective, art. 4, par. 4, of Regulation 593/2008 provides that "[w]*here the law applicable cannot be determined pursuant to paragraphs 1 or 2*" – which mainly gives relevance to the habitual residence of the party required to effect the characteristic performance – "*the contract shall be governed by the law of the country with which it is most closely connected*".

A fall-back rule, however, cannot be found in every EU private international law instrument. In the matter of succession, for instance, Regulation 650/2012 provides a subsidiary criterion and a *forum necessitatis* as far as the identification of the competent jurisdiction is concerned. As a matter of fact, according to art. 10 of the Regulation, where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located will be provided with jurisdiction if the further conditions laid down by the provision are met. Art. 11, then, provides that where no court of a Member State has jurisdiction pursuant to the Regulation, the courts of a Member State may, on an exceptional basis, rule on the succession if proceedings cannot reasonably be brought in the third State with which the case is closely connected.

As far as the identification of the applicable law is concerned, on the contrary, the general rule laid down by art. 21, absent a choice of law pursuant to art. 22, provides for the application of the law of the State in which the deceased was habitually resident at the time of death (par. 1), unless it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State of habitual residence (par. 2). There is, however, no provision – such as art. 4, par. 4, of Regulation 593/2008 – addressing the cases where the applicable law cannot be determined according to the previous paragraphs.

This apparent lacuna leaves the interpreter with two possible choices. A first possibility would be to apply art. 21, par. 2, of the Regulation as a fall-back rule, thus leaving to the court the identification of the State with which the deceased was "more closely connected". This conclusion, although very convenient from a practical perspective, faces two main objections. On the one hand, from a literal point of view, art. 2, par. 2, makes reference to situations where

the deceased is more closely connected with a State other than the State of habitual residence, therefore suggesting that – for such a rule to apply – an initial finding of habitual residence is required[72]. On the other hand, recital 25 of the Regulation expressly states that "*manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex*".

These two objections, nonetheless, might be countered by observing, first, that in the cases at issue, the court would not resort to the manifestly closer connecting criterion due to a mere "complexity" in the identification of the habitual residence of the deceased, but rather because of an impossibility of such identification. Secondly – one could argue – if the manifestly closer connection criterion can override the designation of the applicable law made according to the general rule (habitual residence of the deceased), why could such criterion not be applied in cases where the general rule does not "work" due to the impossibility of identifying the habitual residence of the deceased?

Even more so, considering that the second alternative option to deal with the situations at hand would be to "soften" the criterion of habitual residence with a view to making it designate the place where the deceased was more physically present (although not habitually) at the time of death. This option however – which would basically amount to transforming the criterion from "habitual" to "less occasional" residence – presents more undesirable and "systematical" implications than the first solution, since it would impact (although exceptionally) upon a fundamental and substantial feature of the notion of habitual residence; a notion that, as seen, may vary in some respects according to the applicable regulation, as well as depending on the individual concerned in each specific case, but corresponds in its core to an autonomous concept of EU private international law.

[72] The fact that, in the context of Regulation 593/2008, the closest connection clause (art. 4, par. 3) and the fall-back rule (art. 4, par. 4) are two separate rules might further support such objection.

MARIA ELENA DE MAESTRI

EFFECTIVENESS IN PROTECTING FINANCIAL SERVICES' CONSUMERS

CONTENTS: 1. Introduction. – 2. The interpretation of the notion of consumer. – 3. National judges' discretionary power in the light of effectiveness. – 4. Effectiveness and procedural autonomy of the Member States. – 5. Conclusive remarks.

1. *Introduction*

The protection of consumers offered by EU law is one of the highest in the world and is felt as necessary to grant the realization of the single market and to the enhancement of mutual trust among the Member States. The intervention of the European legislator dates back to the Seventies, and it has developed to a multi-level regulatory field, where the substantive protection of the weaker parties comes along with the private international law uniform regulation and the adoption of common rules concerning jurisdiction in cross-border litigation.

Having in common the aim of the intervention, however the competence of the EU in judicial cooperation has been exercised mainly through regulations, thus providing for a uniform legal framework directly applicable and enforceable within all EU territory, while the substantive rules defining the legal protection of the consumer towards the professional have been set in directives, the transposition of which has been influenced by the national legal system of the Member States, who maintained a (increasingly smaller) discretional margin for national adaptation.

One of the pillars of substantive protection is Directive 93/13/EEC[1], which aims to protect (EU) consumers from unfair terms and conditions which could be included in a contract of adhesion stipulated with a professional for the provision of goods and services. The aim is to avoid that contractual clauses not individually negotiated cause a significant imbalance to the detriment of the

[1] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, p. 29.

weakest party in the relationship, an objective which entails the need for a deep exam of all the elements constituting the contract, including the wording of the clauses which, if drawn up in written form, must be clear and understandable. This requirement is understood as the suitability of the clauses to bring out, in a transparent way for the consumer, the set of rights and obligations that arise from the contract for him. If, by virtue of the provisions of the Directive, the national judge deems the unfairness of a clause, it has to be removed from the contract, leaving the validity of the transaction as a whole where this is possible.

Although the normative framework, and its inspiring principles, dates back in time, its concrete application is still raising interpretative doubts before national courts, which file multiple referrals before the CJEU whenever a new type of contract becomes frequent and/or a national law with relevant relapses over consumers is enacted. The advent of new technologies, the frequent use of financial instruments, such as loans and mortgages, together with the economical crisis of the past years, are all relevant elements which increased national litigation in B2C contracts and the subsequent preliminary rulings' decisions concerning the interpretation of EU consumer law[2].

The recent case-law of the Court of Justice shows that the principle of effectiveness plays an essential role in ensuring the proper application of Eu standards of protection, namely having it been used by the Court for i) the interpretation of the notions used by EU derivative legislation and the coordination of the different levels of reg-

[2] In particular, interpretative doubts have raised on articles 6 and 7 of Directive 93/13. Article 6 provides that "*Member States shall provide that unfair terms contained in a contract concluded between a consumer and a professional do not bind the consumer, under the conditions established by their national laws, and that the contract remains binding on the parties according to the same terms, provided that it can exist without unfair clauses*", and therefore asks Member States to put in place adequate mechanisms (in compliance with the principles of equivalence and effectiveness) to ensure that any unfair clauses inserted in contracts concluded with consumers do not bind the latter. Article 7 instead underlines the dissuasive effect that must permeate national legislation, specifying that "*Member States, in the interests of consumers and professional competitors, shall ensure that adequate and effective means are provided to stop the insertion of unfair terms in contracts stipulated between a professional and consumers*".

ulation; ii) the interpretation of the duties and rights enshrined in directives as well as the subsequent legitimacy of national laws; iii) the elaboration of further duties relying upon national judges, considered as the first level of EU enforcing mechanisms; iv) the balance between the need for consumers' protection, procedural autonomy of the Member States and other principles acknowledged both at the national and Eu level (i.e. *res iudicata*).

2. *The interpretation of the notion of consumer*

The common assumption that justifies the application of the special rules is always the qualification of the contractual case as a hypothesis worthy of particular protection, due to the subjective and objective elements that characterize it. Thus, if from the objective point of view that each piece of legislation identifies the characteristics that the case must present to justify a regulatory scheme different from that general legal framework envisaged at European or national level[3]. On the subjective side, the notion of "*consumer*" takes on primary importance, transversally with respect to material law and private international law, as outlined and interpreted by the Court of Justice of the European Union[4].

[3] For example, see the Directives on unfair clauses and on contracts concluded outside of commercial premises, which identify some factual elements the existence of which is necessary to grant the protection provided therein

[4] See cfr. BISPING C., *Mandatorily protected: the consumer in the European conflict of laws*, in *European Review of Private Law*, 4, 2014, p. 513 ss.; BARIATTI S., *Riflessioni sull'applicazione extra-territoriale delle norme relative ai servizi finanziari: dal caso Morrison al Dodd-Franck Act e oltre*, in *Dir. comm. int.*, 2012, p. 423 ff.; CALLIESS G.P., *Article 6 Rome I Regulation*, in *Rome Regulations. Commentary*, (2ª ed.), eds. ID., Kluwer Law International, 2015, p. 154 ff.; CARBONE S.M., *Derivati finanziari e diritto internazionale privato e processuale: alcune considerazioni*, in *Dir. comm. int.*, 2000, p. 3 ff.; CARTWRIGHT P., *Understanding and protecting vulnerable financial consumers*, in *Journal of Consumer Policy*, 2015, n. 38, p. 119 ff.; GARCIMARTIN ALFEREZ F.J., *The Rome I Regulation: exceptions to the rule on consumer contracts and financial instruments*, in *Journal of Private International Law*, 2009, p. 85 ff.; LONG J., *Navigating the maze: reviewing the information disclosure requirements in the financial services* acquis, in *European Business Law Review*, 2008, p. 485 ff.; MALAGUTI M.C., *Brevi riflessioni sui moderni criteri di unificazione alla luce della disciplina dei titoli detenuti presso intermediari*, in VENTURINI G., BARIATTI S. (eds), *Nuovi strumenti del diritto internazionale privato. Liber Fausto Pocar*, Milano, 2009, p. 627 ff.; SCHWARTZE A., PESCE F., *Articoli 15-17*, in HAUSMANN R., SIMONS T., QUEIROLO I. (a cura di), *Regolamento Bruxelles I. Commento al regolamento (CE)*

Even if the notion of consumer is present in many areas of the Union's regulatory activity, its exact contours are not defined by primary law and its usefulness as a category to identify certain subjects is not monolithic, but rather different in each of the relevant secondary law instruments: this is an operational and dynamic notion, which must be defined with reference to the content of the regulatory act in question and independently of the applicable national law.

Thus, for example, art. 3 of Directive 93/13 defines as "*consumer*" any natural person who concludes a contract with a professional acting for purposes which do not fall within the framework of his professional activity. In a similar way, art. 17, paragraph 1 of the Brussels I bis Regulation[5] refers this notion to a person who acts "*for a purpose which can be regarded as being outside his trade or profession*", exclusively contemplating the case of the private final consumer, not engaged in commercial or professional activities that require the conclusion of the specific contract in question, who establishes a contractual relationship with a professional. Again, art. 6 of Rome I Regulation[6], concerning the law applicable to contractual obligations, limits its scope of application to contracts concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional).

Although the similarity of the definitions referred to, their interpretation is not necessarily uniform, since the Court of Justice has specified that each Union act relating to consumer protection is characterized by its own purposes which influence the meaning and scope of the notions used and taken into consideration from time to

44/2001 e alla Convenzione di Lugano, Monaco di Baviera, 2012, p. 352 ff.; VILLATA F., *Gli strumenti finanziari nel diritto internazionale privato*, Padova, 2008; VILLATA F., *La legge applicabile ai "contratti dei mercati regolamentati" nel regolamento Roma I*, in VENTURINI G., BARIATTI S. (eds), *Nuovi strumenti del diritto internazionale privato. Liber Fausto Pocar*, Milano, 2009, p. 967 ff.; WAUTELET P., *Rome I et les consommateurs de produits et services finaciers*, in *European Journal of Consumer Law*, 2009, p. 775 ff.

[5] 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 (recast), OJ L 351, 20.12.2012, p. 1.

[6] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.

time. Therefore, the interpreter will have to take into account a more or less broad notion depending on the objective pursued by the act they are called to apply. Starting from the Schrems case[7], the Court seems to open up to a coordination between the private international law rules and those of substantial protection, where it specifies that the coordination is needed in order to guarantee compliance with the objectives pursued by the Union legislator in the sector of consumer contracts as well as the coherence of Union law, also clarifying that this operation must be assessed on a case-by-case basis by the judge, in light of the factual and legal elements of each case.

The jurisprudential line of interpretation of this notion, which concerns the rules of the various EU instruments aimed at identifying the key elements of the figure of the consumer contractor, is more extensive than ever and has recently been enriched by the two Personal Exchange and Petruchovà rulings[8]. These decisions deal, in particular, with the questions of: i) the features that the activity carried out by the consumer must have to qualify it as such and ii) the relationships between the different EU sources offering protection to consumers.

In both cases the Court established that the qualities that must be possessed by a natural person in order to be qualified as a consumer on the basis of the Brussels I bis Regulation concern first of all the conclusion of the contract outside the exercise of the professional activity, and therefore for personal needs, a circumstance which must be assessed with reference to the purpose of each contract, regardless of the subjective situation in which the interested party (of no relevance being the knowledge that the latter has by reason of their professional activity). Furthermore, neither the huge profit that can derive from a provision of services (*i.e.* earnings from online poker or those deriving from financial transactions) Nor the regularity with which the consumer carries out said activity, a characteristic which would only become relevant if the judge, from examining all

[7] Judgment of the Court (Third Chamber) of 25 January 2018 Maximilian Schrems v Facebook Ireland Limited, case C-498/16.

[8] Judgment of the Court (Sixth Chamber) of 10 December 2020 A. B. and B. B. v Personal Exchange International Limited, case C-774/19, Judgment of the Court (First Chamber) of 3 October 2019 Jana Petruchová v FIBO Group Holdings Limited, case C-208/18.

the elements at his disposal, found an encroachment on the "professionalism" of the activity.

The first case concerned Personal Exchange International Limited (PEI), a commercial company based in Malta operating in the sector of online gambling services to, *inter alia*, Slovenia. The general conditions of the contract for the provision of services signed by the appellants at the time of registration on the site contained a "choice of forum" clause, providing for the appointment of the Maltese judges as being competent for the disputes arising from the contract. This circumstance was however ignored at the time of the filing the action against the Maltese company to obtain the repayment of an amount of money blocked, according to the appellants, without just cause. The dispute was therefore established before the Slovenian authorities due to the location in that State of the domicile of the plaintiff, who - according to the plaintiff plea - could be classified as a consumer on the basis of the rules contained in the Brussels I bis Regulation.

The defendant contested the competence of the Slovenian judge, pointing out that the plaintiff was a professional poker player and therefore could not avail themselves of the protections offered by EU law to consumers. The referring judge therefore asked the Court of Justice to rule on the characteristics required by art. 15 of the Brussels I bis Regulation in order to apply the special rules concerning jurisdiction over consumer contracts.

The second case concerned a natural person domiciled in the Czech Republic (Ms Petruchovà) who concluded a framework agreement with a financial intermediation company (FIBO) under Cypriot law. This agreement was to be followed by multiple contracts stipulated between the same parties in order to obtain a profit on the difference in exchange rates applicable to the purchase and sale of currency. A choice of forum clause was included within the framework agreement, identifying the Cypriot authority as the competent judge for any dispute between the parties. Following a purchase transaction which caused a loss to Ms Petruchovà, she brought FIBO to court before the authorities of the Czech Republic, alleging a delay in the execution of the sale transaction, a delay which would have been the reason of the applicant's loss of profit. The judge of

first instance declined its jurisdiction, denying Ms Petruchovà the status of consumer on the basis of two reasons: i) when the plaintiff acted on the markets to make a profit and had been informed of the risks associated with the operations carried out in accordance with Directive 2004/39, she lost her status of being a consumer; ii) according to the Czech judge, financial instruments are excluded from the scope of application of art. 17 of the Brussels I bis Regulation, since the latter has to be interpreted in accordance with the Rome I Regulation, which in its art. 6 provides for similar private international law protection for consumers, however excluding financial instruments from its scope of application. The order of the court of first instance was confirmed on appeal, giving rise to the appeal to the Supreme Court of the Czech Republic which then made the preliminary reference in question. The Supreme Court therefore asked the Court of Justice whether a natural person who acts on the financial markets through an intermediary can be classified as a consumer and, as such, enjoys the protection granted by Brussels I bis special rules.

The CJEU underlines that the *ratio* for the limited scope of application of the Rome I Regulation, which excludes financial instruments, is to be found in the need to implement a balance between two opposing interests, but equally worthy of protection, with a view to the creation of the common market. On the one hand, the need to protect the consumer of financial services *viz* the intermediary, due to the information asymmetry and the different contractual power that characterizes this relationship, and, on the other hand, the need to protect the stability of the market by limiting the fragmentation of the regulatory law that would derive from the application of the special rule under study.

Despite recitals 7 and 24 of the Rome I Regulation are clear in affirming the complementary relationship between the Rome I and the Brussels I bis Regulations, with reference to contracts relating to financial instruments the different approach that characterizes the two regulatory instruments clearly emerges. The Court then returns to the need to identify the objective pursued by the European legislator in order to interpret the notions contained in each piece of leg-

islation, clarifying that in no case can the need for coherence between EU law acts lead to interpreting a provision in a meaning that is foreign to the objectives of the regulatory text in which it is inserted.

The more extensive protection offered to consumers with respect to the identification of the competent judge, protection which, as mentioned, has no exceptions for disputes relating to financial instruments, is justified on the basis of the desire to attribute jurisdiction to the Union judges whenever the consumer is habitually resident in a Member State: in this way the application of EU substantive rules for the protection of consumers (including financial services) is guaranteed through the relevant uniform or minimum harmonization provisions, as well as through overriding mandatory provisions.

In consideration of all of the above, the exclusion from the scope of application of art. 6 Rome I of financial instruments does not assume, according to the Court, any relevance to deny the qualification of a person as a "consumer" for the purposes and effects of the articles from 17 to 19 of the Brussels I bis Regulation.

It is therefore the principle of effectiveness that should guide the interpreter in defining a consumer for the application of the special regime sorted out to mitigate the imbalance towards the professional. And it is once again the same principle that leads the coordination between the diversified legal acts (providing for substantive or for private international law protection) adopted by the EU in order to protect the weaker party.

3. *National judges' discretionary power in the light of effectiveness*

One of the most debated issues regarding the application of the Directive on unfair terms concerns the limits in the assessment of unfairness. If no doubts arise when the consumer contends the legitimacy of a contractual term before the court, a circumstance which requires the judge to verify its compliance with the Directive's obligations, more critical issues exist i) when the consumer raises doubts about a contractual term which appears legitimate while other clauses, not mentioned in the plea, could be classified as abusive or ii) where a dispute is raised by the consumer (or the professional) for

an alleged non-fulfilment of the contractual obligations (or for any other reason that goes beyond the unfairness of the contractual terms) and incidentally the legitimacy of other contractual clauses pursuant to Directive 93/13 is examined. In the absence of a specific *petitum*, the question is whether, how and within which limits, the seized court can or must verify the conformity of the contract with the provisions of the Directive (or, better said, with the national rules with which its transposition into national legal system was carried out).

The Directive does not include any provision harmonizing the procedural rules of the Member States by introducing the duty for the national judges to evaluate *ex officio* the compatibility of the contractual terms with the EU legal framework, and in the absence of uniform EU regulatory intervention the principle of procedural autonomy of the Member States applies, within the boundaries set by the principles of equivalence and effectiveness[9]. In short terms, these principles end up constituting reference parameters for national procedural laws, which must therefore be suitable for safeguarding the substantive rights guaranteed by substantive European Union law. In this field of analysis attention has then to be paid to the suitability of national rules which provide for the detection of unfair terms at the request of a party to protect the consumer.

The Court of Justice found a normative basis for the exegesis of the Directive to infer the existence of an obligation, of EU origin (and therefore incumbent on all national legal systems of the Member States), that imposes judges to detect by their own initiative the unfairness of a contractual clause. Indeed, Article 7 of the Directive

[9] Judgment of the Court (Second Chamber) of 13 October 2016 Prezes Urzędu Komunikacji Elektronicznej and Petrotel sp. z o.o. w Płocku v Polkomtel sp. z o.o., case C-231/15; writing at para 23: "*In the absence of EU rules governing the matter, it is, generally, for the Member States, in the exercise of their procedural autonomy and subject to compliance with the requirements arising from the principles of equivalence and effectiveness, to lay down the procedural rules applicable to an appeal such as that at issue in the main proceedings*"; see also Judgment of the Court (Grand Chamber) of 13 March 2007 Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern, case C-432/05. In legal scholarship see CANNIZZARO E., *Effettività del diritto dell'Unione e rimedi processuali nazionali*, in *Diritto dell'Unione europea*, 2013, p. 665 ff.; MC KENDRICK J., *Modifying Procedural Autonomy: Better Protection for Community Rights*, in *European Rev. Private Law*, 2000, p. 565 ff.; KAKOURIS C.N., *Do the Member States Possess Judicial Procedural "Autonomy"?*, in *Common Market Law Rev.*, 1997, p. 1389 ff.

provides that "*Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers*": it is therefore sufficient to state that the *ex officio* detection of the abusive nature of the contractual clauses has a dissuasive effect capable of limiting the inclusion of unfair terms in consumer contracts to impose Member States to attribute such a task to their judges[10].

However, the *ex officio* initiative is subject to the limits dictated by the parties' allegations: if the judge has the burden of finding the balance between the contracting parties also through the analysis of the fairness of the contractual terms, this task can only be exercised i) if one of the parties begins the dispute before a national judicial authority and ii) if the requested authority is provided with information, both factual and legal elements , necessary to evaluate the contract as a whole.

This assumption, while on the one hand protecting the consumer as a weak party in the relationship, on the other risks going beyond the boundaries of two cornerstone principles of EU member States: the dispositive principle and the prohibition of *ultra petita* rulings.

It is again the CJEU that intervened with an attempt to establish the balance-point between the powers of the national judges and the protection of the consumers, thus specifying the boundaries of the task devolved to the judicial authority in the sense that in any case "*the effectiveness of the protection cannot go so far as to ignore or exceed the limits of the object of the dispute*"[11].

Therefore, if the judge must not limit their investigation only to the clauses referred to in court, the *ex officio* examination cannot go beyond the clauses connected to the object of the dispute as defined by the parties in their pleas. It is sufficient that the parties' allega-

[10] Judgment of the Court of 27 June 2000 Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98), Joined cases C-240/98 to C-244/98. See FENOLL J.N., *I poteri d'ufficio del giudice nazionale ed europeo*, in *Riv. Trim. Dir. Proc. Civ.*, 4, 2109, p. 1223.

[11] Judgment of the Court (Third Chamber) of 11 March 2020 Györgyné Lintner v UniCredit Bank Hungary Zrt, case C-511/17.

tions give rise to a doubt regarding the legitimacy of a clause connected to the subject matter of the dispute to allow the judge to start a further investigation. It is up to the national judge to establish how to interpret the relationship between the clauses contended before the court and the other contractual terms, always respecting the principles of effectiveness and equivalence mentioned above. It is true that if the intent of the EU legislator is to protect the consumer, the notion of "clause connected to the subject of the dispute" will probably be interpreted extensively by the Court of Justice, deeming national practice that requires strict elements of connection illegitimate, conversely expanding the judge's investigative power if, once again, it is necessary to pursue the objectives of the Directive in an effective manner.

Moving to the assessment on the merits of the unfairness of contractual clauses pursuant to Directive 93/13, the activity of the judge has to be led by the effectiveness principle, since the CJEU has stated that courts have a duty to verify that the correct balance between the parties of the contract is preserved, evaluating the concrete terms of the relationship between the professional and the consumer.

The Court has already had the opportunity to specify that the judge seized with reference to a contractual case involving a consumer must undertake a process of analysis of the case divided into 4 phases: i) verification of the existence of mandatory rules in the legal system whose law is applicable to the contract (or in that of the State of habitual residence of the consumer, in application of article 6 of the Rome I Regulation which provides for its relevance even when the choice of the law regulating the contract locates the relationship in a different legal order); ii) verification of the existence of an individual negotiation on the clause whose unfairness is discussed, since the consumer protection rules have reason to protect him as a weaker party only when the clause has been drawn previously and unilaterally by the professional, in particular in the context of an adhesion contract where the consumer has consequently not been able to exercise any influence on its content: iii) attributability/inherence/relevance of the clause to the main object of the contract or to the equalization between price and service, since in this case the legitimacy review of the judicial authority would be limited

to the hypothesis in which the clause was not drafted in a clear and understandable way for the consumer; iv) substantive phase, in which the judge carries out a real content check regarding the unfairness of the clause in relation to the imbalance caused to the detriment of the consumer and with reference to the rules otherwise applicable under national law[12].

In this perspective, the notion of "substantial clarity of the agreements" requested by the Directive entails i) information duties imposed upon the professional even where not directly sanctioned by the dispositive law, ii) a considerable effort of the judicial authority in evaluating the factual and legal circumstances existing at the time of the conclusion of the contract. Only if, from the set of contractual clauses and from the aforementioned circumstances, an imbalance between the rights and obligations of the parties to the detriment of the consumer emerges, or there is a national law which stiffens the provisions of the Directive in the sense of normatively providing for their illegitimacy, the court will be able consider the clause as abusive and therefore invalid.

It remains to be assessed what are the consequences deriving from the declaration of unfairness of a clause contained in a consumer contract. First of all, it is appropriate to point out that if the European regulation is essentially aimed at protecting the weaker party of the contractual relationship due to the information asymmetry that characterizes the relationship between the parties, once the consumer has been made aware of the consequences of his expression of will they would remain free to choose (at this point consciously) how to exercise their negotiating autonomy, thus being able to decide to bind themselves to the clause that burdens them with obligations or risks greater than those of the professional. Consumer protection cannot go so far as to consider him incapable of exercising his ability to act

[12] Judgment of the Court (Second Chamber) of 20 September 2017 Ruxandra Paula Andriciuc and Others v Banca Românească SA, case C-186/16; for a comment see ALESSANDRI D., *Dalla Corte di Giustizia un "test" per valutare l'assoggettabilità delle clausole contrattuali al sindacato di abusività*, in *Corr. giur.*, 2018, fasc. 6, p. 750 ff.; CASTELLANO GARCÌA A., *Incertitumbre jurìdica de la valoraciòn de la abusividad de la clàusula de ripercusiòn de gastos al prestatario*, in *Rivista di Diritto bancario*, 2020, p. 143 ff.; PAGLIANTINI S., *La trasparenza consumistica tra "dottrina" della Corte ed equivoci interpretativi*, in *Eur. dir. priv.*, 2019, p. 651 ff.

and deprive him of the possibility to decide. This assumption is even more acceptable when considering that, as previously stated, the same person who in a certain situation would be classified as a "consumer" according to European Union law, could play the role of a professional in another contractual relationship[13].

If, however, the consumer is informed by the national judge of the fact that the clause enforced through the judicial action, or other clause connected to the subject of the dispute, has characteristics such as to fall within the scope of application of the Directive and it creates a significant imbalance to their detriment, and they decide to invoke its abusive nature, article 6 of the Directive provides that the said clause does not bind the consumer, under the conditions established by the law regulating the contract, and that the contract remains binding for the parties according to the same terms, provided that it can exist without the unfair term.

The unfair clause must therefore be considered as if it had never existed, so as not to produce any effect on the consumer and restore the legal and factual situation in which he would have found himself in its absence. However, it should be remembered that Directive 93/13 itself refers to the national laws of the Member States to define the methods and consequences of this declaration of invalidity, in compliance with the principle of national procedural autonomy which, as already highlighted, must be exercised in compliance with the principles of equivalence and effectiveness of consumer protection granted by European Union law[14].

Once again, EU law recognizes to the judge who declares the unfairness of the clause a key role in the contractual relationship, since he is required to evaluate whether the contract can continue to exist even without the unfair clause or, on the contrary, the declaration of

[13] Judgment of the Court (Fourth Chamber) of 4 June 2009 Pannon GSM Zrt. v Erzsébet Sustikné Győrfi, case C-243/08.

[14] Judgment of the Court (Grand Chamber) of 21 December 2016 Francisco Gutiérrez Naranjo v Cajasur Banco SAU, Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA), Banco Popular Español SA v Emilio Irles López and Teresa Torres Andreu, Joined cases C-154/15 and C-307/15, for a comment see MORLANDO F., *Gli effetti della dichiarazione giudiziale di abusività* , in *Diritto Civile*, 2018, p. 29 ff.; CAPOBIANCO A., *Non vincolatività della clausole abusive ed ingiusta limitazione nel tempo della loro inefficacia: le clausole* floor *al vaglio della Corte di Giustizia*, in *Jus Civile*, 2017, 6, p. 675 ff.

unfairness leads to the nullity of the whole contract, due to the objective essential nature of the contested clause.

Private law literature accessed the first option, interpreting article 6 of Directive 93/13 as codifying a necessary partial nullity rule, which limits the intervention of the third party (the judge) to the minimum protection of the weaker party, to be achieved through the detection of unfairness of the clause, the establishment of the cross-examination on the point and the declaration of possibly consequent invalidity, without therefore allowing any integration of the contract through national rules for the exercise of equity by the judge[15]. An exception to this principle would be the case of a nullity detrimental to the consumer, which would occur when it would cause the entire contract to become invalid to the detriment of the weaker party of the relationship. The reason behind this derogation is based on the same rule of the Directive that denies the possibility to integrate the contract: the essential purpose of the EU provisions on the consequences deriving from the inclusion of unfair terms in B2C contracts is the deterrent function that they exercise towards professionals who include such clauses in their models. This function would be compromised if the parties, on the one hand, were confident in a possible replacement of the clause if considered unfair, and, on the other, were not allowed to replace the unfair clause with a national provision of a supplementary nature to avoid the nullity of the whole contract, with a view to the power of substantial re-balance between the rights and obligations of the contracting parties conferred on the judge by the same Directive.

Hence the principle of effectiveness has been used by the CJEU as an interpretative tool capable to fill the gaps left by the Directive, considering the aims of the European intervention protecting consumers. But this is not the only way to employ the principle, since the Court has further demonstrated its capacity to be a useful tool in interpreting national rules implementing EU obligations as well as

[15] See PAGLIANTINI S., *I mutui indicizzati e il mito di un consumatore "costituzionalizzato": la "dottrina" della Corte di Giustizia da Arpàd Kàsler a Dziubak*, in *Nuove leggi civ. comm.*, 2019, p. 1263 ff.; Judgment of the Court (First Chamber), 14 June 2012 Banco Español de Crédito, SA v Joaquín Calderón Camino, case C-618/10; Judgment of the Court (Fourth Chamber), 30 April 2014 Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt, case C-26/13.

in reducing the spaces left to the national regulation, such as the procedures established for the enforcement of the rights and obligations.

4. *Effectiveness and procedural autonomy of the Member States*

The principle of procedural autonomy of the Member States has been consolidated in the European system starting from the well-known Rewe ruling of 1976[16], in which the Court of Justice ruled that "*... in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law*", thus attributing to the national judge the role of "judge of first instance" of the law of the European Union. This principle, also understood as a logical consequence of the derived competences of the Union, does not, however, constitute a sphere of total freedom for the Member States, free from Eurocentric considerations, but rather a field of action removed from the direct intervention of the EU legislator within which each Member State exercises a legislative discretion functional to the pursuit of the objectives of the Union itself[17].

From this perspective, the national implementation of the principle of the authority of *res judicata* has been brought to the attention of the Court of Justice several times due to possible conflicts with

[16] Judgment of the Court of 16 December 1976 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland, Case 33-76.

[17] GIAVAZZI M., *L'effetto preclusivo del giudicato: la Corte di giustizia chiarisce il proprio pensiero. L'autonomia procedurale non è dunque un paradiso perduto*, in *Dir. Ue*, 2015, p. 237; IERMANO A., *I principi di equivalenza ed effettività tra autonomia procedurale e "limiti" alla tutela nazionale*, in *Dir. Ue*, 2019, p. 525; ROMITO A.M., *La tutela giurisdizionale nell'Unione europea tra effettività del sistema e garanzie individuali*, *Collana di studi sull'integrazione europea*, Bari, 2015, spec. pp. 62-75; CANNIZZARO E., *Effettività del diritto dell'Unione e rimedi processuali nazionali*, in *Dir. Ue*, 2013, p. 659; VITALE G., *Diritto processuale nazionale e diritto dell'Unione europea. L'autonomia procedurale degli Stati membri in settori a diverso livello di "europeizzazione", Giurisdizioni internazionali e diritto internazionale*, Catania, 2010, p. 11 ss.; GALETTA D.U., *L'autonomia procedurale degli Stati membri dell'Unione europea: Paradise Lost?*, Torino, 2009.

the preliminary ruling mechanism and for its suitability of limiting the effectiveness of European Union law, that is – as seen - a relevant principle in the application of EU legislation with direct and non-direct effect.

In its judgments, the Court of Justice of the EU had the opportunity to specify that *res iudicata* is relevant also for EU law, which includes among its objectives the need to ensure both the stability of law and a good administration of justice. Given the multiple objectives of EU action and competences, it is however fundamental to balance this principle with the other principles that guide the exercise of the EU competences together with the mechanisms of protection offered by the treaties and by secondary legislation.

Thus, if on the one hand the Court admitted a referral for a preliminary ruling even when the request had been presented in the context of ancillary proceedings for the payment of costs, since the main proceedings in which the legal act of the Union had to be applied were already closed with a judgement no longer subject to appeal, in other cases, on the merits, the CJEU excluded the possibility to overcome the internal *res judicata*. In particular, the Court denied that Directive 93/13 should be interpreted in the sense of imposing on the judge the *ex officio* evaluation of the legitimacy of an arbitration clause contained in a contract when the definitive arbitration award was released and not challenged by the losing party in due time; the Court specified that in the absence of uniform EU legislation on the matter, the methods of implementing the principle of *res judicata* fall within the competence of the internal legal system of the Member States on the basis of the principle of procedural autonomy[18]. Therefore, EU law does not require a national judge to disapply the internal procedural rules which attribute *res judicata* to a decision, even when this would remedy a violation of a EU law provision. However, this mechanism entails a further step to allow Member States' legislation being considered lawful: the respect of the principles of effectiveness and equivalence. With specific reference to the

[18] Judgment of the Court (Fourth Chamber) of 7 April 2022, EL and TP v Caixabank SA, case C-385/20. National procedural rules, in particular, must not be structured in such a way as to make the exercise of the rights conferred by EU law impossible or excessively difficult in practice (principle of effectiveness), nor be less favorable than those which concern similar situations within the national legal order (principle of equivalence).

principle of effectiveness, the Court underlined the need to examine the role of the contested national rule in the whole procedure, having particular regard to the principles that are the basis of the national judicial system, such as, for example, the adversarial principle , the right to defence and legal certainty. Therefore, whenever the consumer is a party in an arbitration proceeding, where their rights to defense are respected and the possibility of appeal is introduced within reasonable deadlines, there are no reasons for disapplication of the *res iudicata* rule[19].

Recently the CJEU had the chance to deepen the relationship between the *res iudicata* principle as enforced in national legal systems and the effectiveness principle as a tool which grants that rights and obligations introduced by the Unfair Terms Directive are effectively applied throughout Europe.

First of all, the CJEU focused on the need for national appellate courts to apply by themselves the Directive even when the unfair term was not challenged before the first instance Court and the consumer was no longer able to appellate. This case concerned a thirty-year mortgage loan contract with a fixed rate for the first year and a variable rate starting from the second year, in which a minimum rate clause of 3% was inserted. By virtue of this clause, Unicaja Banco SA had calculated the payment of the monthly installments in 2009 as an exception to the Euribor rate, which had fallen considerably that year. In 2016 the borrower brought legal proceedings before the Spanish Court of Valladolid requesting the recovery of the undue amount in relation to the unfairness of the minimum rate clause included in the contract. The Tribunal accepted the request, recognizing the unfairness of the minimum rate clause due to lack of transparency and condemned the bank to reimburse the amounts unduly received starting from 2013 (and not from 2009 as requested by the plaintiff), since in that year the Spanish Supreme Court issued a judgment limiting in time the effects of the declaration of nullity of the minimum rate clauses. The Bank appealed against this ruling,

[19] Judgment of the Court (First Chamber) of 6 October 2009 Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira, case C-40/08. See SCHEBESTA H., *Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom*, in *European Review of Private Law*, 18 (4), 2010, p. 847 ff.

arguing that in accordance with the judgment of the Supreme Court, also the expenses he was convicted to pay should be subject to the same time limitation.

The appellate Court accepted the referral in relation to the calculation of costs without however modifying the first instance judgment in terms of the restorative effects of the declaration of nullity of the minimum rate clause. The borrower challenged the judgment before the Supreme Court, by reason of the case-law of the CJEU which declares national judgments limiting the restorative effects of a declaration of nullity of a contractual clause to be in conflict with EU law (Unfair Terms Directive).

In its judgment of 17 May 2022, the Court reiterates that the procedural mechanisms aimed at implementing the rights guaranteed by EU fall, although not directly provided for at EU level, within the competences of the Member States, which exercise procedural autonomy in compliance with the principles of effectiveness and equivalence. In relation to the principle of effectiveness, the Court highlights how its compliance must be assessed by the seized judge taking into consideration the role of the contested provision in the context of the entire procedure in which it is placed and the key principles of the relevant legal system, even if this can not however compensate the complete passivity of the consumer concerned, whose protection is not absolute. In the case at stake, however, the Court underlined that the passivity of the consumer (who did not challenge the first instance judgment before the appellate Court) was justified by the fact that the CJEU judgment declaring the national practice illegitimate was not yet issued. It is therefore believed that the instruments of national law which prevent the consumer from asserting their rights during appeal, due to the expiry of the appeal deadlines, are such as to make it impossible or excessively difficult to protect the rights attributed to him by the Directive, with the consequence that the judge of appeal must be able to raise, even by himself, a plea relating to the violation of Article 6 of the Directive on unfair terms by ordering the full refund of the amount unduly paid.

Some other cases decided by the CJEU related to the application of the protections offered by the Directive in enforcement procedures based on a title issued following an injunction procedure,

where the unfairness of any clause of the contract giving rise to the obligations between the parties was not raised in the previous steps on the merits.

One of these preliminary rulings arose from an Italian case; it concerned enforcement of an injunction order become final due to the debtor's failure to appeal. In this case, the unfairness of a clause contained in the loan contract, was raised for the first time by the judge of the enforcement, who offered the consumer the remedies granted by Directive 93/13. This option was opposed by the bank, which raised the final character of the injunction, that gave the right for execution by virtue of the principle of legal certainty. Likewise, in the second of the joined cases, the assessment of unfairness of a clause contained in a guarantee contract was raised before the enforcement judge in the context of real estate expropriation proceedings based on a final injunction order. In this case, the consumer's inaction in the previous procedural phases was justified by the uncertainty on the qualification of the guarantor as a consumer, a necessary condition to admit him to the protection offered by the Directive on unfair terms. The Court, once again, recalls the need to balance the interests of the consumer, in this case the guarantor, with the principle of legal certainty, a proceeding to be carried out in light of the principles of equivalence and effectiveness. Precisely this last principle leads the Court to recall how the procedural autonomy of Member States cannot deprive the weak party of the substantive rights recognized to him by EU legislation, which is the reason why it is necessary to censure a national legislation that precludes the judge of the enforcement procedure from assessing the unfairness of a clause if the judge of the proceeding on the merits has not mentioned in its judgment the necessary control over the contract clauses.

The national judge, therefore, is not only obliged to verify *ex officio* the compliance of a B2C contract with the provisions of Directive 93/13, but also to provide adequate information (about the verification carried out and the outcome) to the consumer, since only in this case the weaker party would actually have at his disposal the procedural tools that the national law provides for effective protection.

The EU approach towards the procedural autonomy of the Member States has gone under a relevant evolution variations over time: if in the 1980s the Court left ample space for the national judge, it subsequently proceeded to insert minimum procedural guarantees and, where deemed necessary to implement the rights affirmed by community rules, uniform European procedures.

The case law inherent to the application of consumer protection directives demonstrates an approach oriented towards the protection of the weaker party of the relationship also in the interpretation of the principle of procedural autonomy, where through the principles of effectiveness and equivalence the national authorities must disapply national procedural rules capable of limiting or denying the rights that European provisions guarantee to the consumer.

With specific reference to the principle of *res iudicata*, it is appropriate to note that the Court is consistent in considering this rule as a fundamental instrument suitable for guaranteeing legal certainty both with reference to the European protection system and within the procedural rules in force in several Member States. It is also clear that the balance required between this and other values worthy of protection (including primarily the effectiveness of European law) must lead to a limitation (if not exclusion) of the relevance of the intangibility of decisions only in exceptional cases, where the objective pursued by the European rule can not be achieved in any other way[20].

[20] It is true, however, that in the evolutionary process that leads to the examined judgments the Court of Justice modifies its legal reasoning from examining whether the principle of effectiveness allows an interpretation of the principle of res judicata compatible with European law, to identify the elements that must guide the national judge in balancing the effectiveness of European law with the principle of legal certainty. This change of direction leads us to frame the debate no longer as an identification of the limits imposed on the principle of procedural autonomy, but instead as the search for a balance between two principles of equal importance in the legal order of the EU. In this sense see BEYSEN E., TRSTENJAK V., *European consumer protection law: Curia semper dabit remedium?*, in *CMLR*, 48 (1), 2011, p. 95 ff.; TURMO A., *National* res judicata *in the European Union: Revisiting the tension between the temptation of effectiveness and the acknowledgement of domestic procedural law*, in *CMLR*, 58, 2021, p. 361 ff.; KORNEZOV A:, *Res judicata of national judgments incompatible with EU Law: Time for a major rethink?*, in *CMLR*, 51, 2014, p. 809.

5. *Conclusive remarks*

From the above it emerges that effectiveness is no longer only a limit to national implementation of European legislation without direct effect in the field of consumers' protection, it has evolved into a principle that leads the action of national courts in interpreting their legal acts in conformity with the objectives of the EU action. The relapses of this assumption has also invaded the freedom traditionally left to States in the procedural implementation of EU obligations, asking the national authorities to grant effective application of the protective means introduced by a directive even if in contrast with the procedural rules set within the national legal order.

A clear example of the relevant repercussions of this approach can be found in a judgment released by the Italian Corte di Cassazione in April 2023[21].

The case originated with reference to a guarantee contract signed by a woman (guarantor) with a bank for the obligations assumed by a company. Faced with the company's default and the unsuccessful enforcement of the guarantee, the credit institution obtained an injunction against the guarantor. The order was not opposed and the creditor started a real estate expropriation procedure. After the sale of the property, the judge of the enforcement filed a distribution plan, to which the debtor opposed by reason of the non-existence of the credit because of the nullity of the title, since it was issued by a territorially incompetent judge (not being the judge of the consumer). Notwithstanding these complaints, the distribution plan was declared enforceable.

The debtor lodged an opposition against the order reiterating the nullity of the enforceable title but the judged rejected the challenge considering the time-limit expired. The debtor then lodged an extraordinary appeal to the Court of Cassation deducing the violation and/or incorrect interpretation of Directive 93/13 and art. 19 of the TEU, with reference to the principle of effectiveness of consumer protection, questioning the impossibility, in case of an unopposed

[21] Corte di Cassazione, Sezioni Unite, sentenza n. 9479, 6 April 2023, ECLI:IT:CASS:2023:9479CIV.

injunction, of a second official control in the enforcement phase on the unfairness of the contractual clauses.

The Court, recalling the aforementioned case-law of the CJEU, addressed the case dictating some principles related to the injunction procedure that are suitable to make the principle of effectiveness of consumers' protection concretely operational both in its negative form (overcoming obstacles to the full realization of rights and freedoms) and active form (identification of measures and remedies suitable for the full expansion of the protection of rights and freedoms).

Precisely, in application of the judgments of the CJEU, the Italian Supreme Court sets additional procedural rules amending the procedure identified and legally provided by the civil procedure code for injunction, in order to ensure the fair and effective protection of the consumer. The steps introduced by the Court ask the judge of the monitory proceeding to introduce necessary motivation on the assessment of the fairness of the contract clauses, but also introduces obligations to grant the weaker party an adequate protection even when such duties are not respected and the final order is enforceable (i.e. a special deadline to file an opposition within the enforcement phase).

STEFANO DOMINELLI

'ANIMALS' AS 'GOODS': A NEO-CULTURAL IMPERIALISM IN CROSS-BORDER TRADE LAW

CONTENTS: 1. Introduction: 'animal welfare law and rights' and 'environmental law' – same premises, different evolutions. – 2. Cultural identity of Member States and the (limited) compliance with the law on the modalities for the production of foie gras. – 3. Opposing cultural identities between Member States: the right to free movement of animal-derived products. – 4. 'Animals' as 'goods': a neo-cultural imperialism in cross-border trade law.

1. *Introduction: 'animal welfare law and rights' and 'environmental law' – same premises, different evolutions*

The ideas of those who, over the course of time[1], have dealt with the subject matter of a general capacity of law for animals and non-humans *lato sensu* are now also reflected, to an admittedly still limited extent, in international law and EU law. The multiplicity (*rectius*, significant diversity) of visions of national legal systems has not yet allowed for the establishment of sufficiently shared approaches and domestic regulatory models to the extent that one can even speak of an international law in the making. Nonetheless, a

[1] Cf in particualr S. CASTIGNONE, *Introduzione*, in S. CASTIGNONE (ed), *I diritti degli animali*, Bologna, 1985, p, 9, and S. CASTIGNONE, L. LOMBARDI VALLAURI (eds), *La questione animale*, Milano, 2012. See also I. FANLO CORTÉS, P. DONADONI (eds), *Ambiente, animali e umani: il pensiero bioetico di Silvana Castignone*, Milano, 2018; C.D. STONE, *Should Trees Have Standing? Towards Legal. Rights for Natural Objects*, in *Southern California Law Review*, 1972, p. 450; M. WARNOCK, *Should trees Have Standing?*, in *Journal of Human Rights and the Environment*, 2012, p. 56; N. NAFFINE, *Legal Personality and the Natural World: On the Persistence of the Human Measure of Value*, in *Journal of Human Rights and the Environment*, 2012, p. 68; L. CODE, *Ecological Responsibilities: Which Trees? Where? Why?*, in *Journal of Human Rights and the Environment*, 2012, p. 84; for further references, see S. DOMINELLI, *Per un 'diritto degli animali' e 'della natura' tra scetticismo ed adesione a modelli normativi antropocentrici: riflessioni di diritto internazionale (pubblico e privato)*, in *Rivista giuridica dell'ambiente*, 2023, p. 5.

'global animal law'[2], which can offer uniform solutions to cross-border phenomena such as the protection of animals or entire species threatened with extinction, appears to be much needed.

However, although in the author's opinion, "law" does not necessarily contain intrinsic limits to the creation of a general capacity of law for non-human beings[3], *i.e.* their possibility of being direct holders of rights and obligations (without being a mere object of protection mediated by legal norms that condition human activities[4]), it seems appropriate and opportune here to make a fundamental conceptual distinction. There is a non-negligible difference whenever similar but not identical aspects are juxtaposed, as we reasonably tend to do at the dawn of a new analysis. 'Environment' and 'animals', although obviously interrelated, have already led to different lines of development, both in domestic and international law. The 'law of the environment' (environmental law), albeit with obvious difficulties and with the apparent limits to the effectiveness of norms, has been strongly affirmed at every level and, in an attempt to strengthen it methodologically and methodically, it has been 'integrated' with and from various spheres, first and foremost that of the protection of fundamental rights[5]. The individual and coordi-

[2] A. PETERS, *Introduction to Symposium on Global Animal Law (Part I): Animals Matter in International Law and International Law Matters for Animals*, in *AJIL Unbound*, 2017, p. 252, at p. 254. Cf also L. MINGARDO, *Il diritto animale globale come categoria giuridica emergente*, in *Journal of Ethics and Legal Technologies*, June 2023, p. 3.

[3] In detail, S. DOMINELLI, *Per un 'diritto degli animali' e 'della natura' tra scetticismo ed adesione a modelli normativi antropocentrici: riflessioni di diritto internazionale (pubblico e privato)*, cit.

[4] See A. PETERS, *The Importance of Having Rights*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2021, p. 7, writing at p. 8: '*You are prohibited by law from scribbling on the painting of Mona Lisa. However, Mona Lisa has no right not to be scribbled upon. She cannot have such a right because she is no person in terms of the law but only a thing*'. From an historical perspective, and referring to slaves, see V. KURKI, *Animals, Slaves, and Corporations: Analyzing Legal Thinghood*, in *German Law Journal*, 2017, p. 1069, at p. 1082, and there fn 50, commenting Section XXVIII of the South Carolina Slave Code del 1740, argues that an indirect protection might amount to 'having rights' following Bentham's "*interest theory of rights*". More recently, on animals as things under German and Polish law, see M. LUBELSKA-SAZANÓW, *Animals as Specific Objects of Obligations under Polish and German Law*, Göttingen, 2020.

[5] F. MARONGIU BUONAIUTI, *L'incidenza della disciplina della giurisdizione nelle azioni nei confronti delle società multinazionali per danni all'ambiente sul diritto di accesso alla giustizia*, in *Ordine internazionale e diritti umani*, 2023, p. 635; P. IVALDI, *European Union,*

nated practice of States shows a convergence of interests, particularly when it comes to containing the negative effects of global warming. A tendency of convergence of interests that translates into the adoption of legally binding regulations, even if only possibly at a programmatic level, in international law. It is not surprising, therefore, that several international conventions on environmental issues exist today, which have been more or less ratified by States, and that

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Environmental Protection and Private International Law: Article 7 of Rome II Regulation, in *The European Legal Forum*, 2013, p. 137; P. DE VILCHEZ, A. SAVARESI, *The Right to a Healthy Environment and Climate Litigation: A Game Changer?*, in *Yearbook of International Environmental Law*, 2021, p. 3; L. HEINÄMÄKI, *Reports – General Developments – Human Rights and the Environment*, in *Yearbook of International Environmental Law*, 2021, p. 33; S. MARINO, *La 'Climate Change Litigation' nella prospettiva del diritto internazionale privato e processuale*, in *Rivista di diritto internazionale privato e processuale*, 2021, p. 898; C. MASIERI, *La 'Law of Torts' alla prova dei cambiamenti climatici*, in *Rivista giuridica dell'ambiente*, 2022, p. 457; G. PULEIO, *La crisi climatica di fronte alla Corte europea dei diritti dell'uomo*, in *Contratto e impresa. Europa*, 2022, p. 611; E. VANNATA, *Environmental Solidarity in the Area of Freedom, Security and Justice. Towards the Judicial Protection of (Intergenerational) Environmental Rights in the EU*, in *Freedom, Security & Justice*, 2022, p. 266; F. GALLARATI, *Il contenzioso climatico di tono costituzionale: studio comparato sull'invocazione delle costituzioni nazionali nei conteziosi climatici*, in *BioLaw Journal - Rivista di BioDiritto*, 2022, p. 157; F. MUNARI, *Public e Private enforcement del diritto ambientale dell'Unione*, in *Atti convegni AISDUE*, Gennaio 2023, 1, p. 1; P. LOMBARDI, *Ambiente e generazioni future: la dimensione temporale della solidarietà*, in *federalismi.it*, 2023, 1, p. 86; F.-J. LANGMACK, *Remedies for Climate Change – A Decisive Push Towards Paris?*, in *Netherlands Yearbook of International Law 2021*, 2023, p. 19; B. MAYER, *The Judicial Assessment of States' Action on Climate Change Mitigation*, in *Leiden Journal of International Law*, 2022, p. 801; ID, *International Advisory Proceedings on Climate Change*, in *Michigan Journal of International Law*, 2023, p. 41; ID, *Prompting Climate Change Mitigation Through Litigation*, in *International and Comparative Law Quarterly*, 2023, p. 233; S. SENGUPTA, *Climate Change, International Justice and Global Order*, in *International Affairs*, 2023, p. 121; F. MUNARI, L. SCHIANO DI PEPE, *Tutela transnazionale dell'ambiente*, Bologna, 2012; F. MUNARI, *Tutela internazionale dell'ambiente*, in AA.VV., *Istituzioni di diritto internazionale*, Torino, 2021, p. 497; B. MAYER, *Interpreting States' General Obligations on Climate Change Mitigation: A Methodological Review*, in *Review of European, Comparative & International Environmental Law*, 2019, p. 107; L. SCHIANO DI PEPE, *Cambiamenti climatici e diritto dell'Unione europea. Obblighi internazionali, politiche ambientali e prassi applicative*, Torino, 2012, and L. CALZOLARI, *Il contributo della Corte di giustizia alla protezione e al miglioramento della qualità dell'aria*, in *Rivista giuridica dell'ambiente*, 2021, p. 803. For further references, see S. DOMINELLI, *'Einmal ist keinmal'. L'insostenibile leggerezza degli obblighi di diritto internazionale in tema di climate change mitigation nella prospettiva di una proliferazione delle azioni giudiziarie pubbliche e private*, in *Rivista giuridica dell'ambiente*, 2023, p. 899.

international customs, unwritten rules of a general nature[6], such as the 'precautionary approach' or the 'polluter pays principle'[7], have even developed. Similarly, also in the wake of the renewed vigour that environmental protection is finding in international law, it is not surprising that many States, in domestic law, have provided for specific disciplines or even constitutional norms for environmental protection, as in Italy[8]. Even more so, and this time with some astonishment, some legal systems have revolutionised the methodology and basis of this new protection. In some States, certain specific components of the environment, namely rivers or lagoons, have been elevated from their traditional status of *res* to autonomous subjects of law, thus endowed with a general capacity of law[9].

It is precisely on this point, on a widespread convergence (at least) of interests, that 'animal law', an expression used here in an atechnical sense to identify the set of rules that form the so-called 'animal welfare law', differs from environmental law and climate change law. If it is in fact true that in particular for the latter there are principles shared by several legal systems, which can therefore determine an evolution of international law, the same cannot be said in relation to how the individual-animal relationship is understood by different legal systems and, therefore and consequently, the nor-

[6] P.-M. DUPUY, G. LE MOLI, J.E. VIÑUALES, *Customary International Law and the Environment*, in L. RAJAMANI, J. PEEL (eds), *The Oxford Handbook of International Environmental Law*, Oxford, 2021, p. 385.

[7] P.-M. DUPUY, *Overview of the Existing Customary Legal Regime Regarding International Pollution*, in D. BARSTOW MAGRAW (eds), *International Law and Pollution*, Philadelphia, 1991, p. 61, and S. ATAPATTU, *Emerging Principles of International Environmental Law*, Ardsley, 2006.

[8] Legge costituzionale 11 febbraio 2022, n. 1, Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente, in GU Serie Generale n. 44 del 22-02-2022.

[9] See in New Zealand, Te Urewera Act 2014, Public Act 2014 No 51, art. 11, online; and Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Public Act 2017 No 7, art. 14, online, on which *amplius* M. KRAMM, *When a River Becomes a Person*, in *Journal of Human Development and Capabilities*, 2020, p. 307. In Spain, on Mar Menor, see Ley 19/2022, de 30 de septiembre, para el reconocimiento de personalidad jurídica a la laguna del Mar Menor y su cuenca, in «BOE» núm. 237, de 3 de octubre de 2022, p. 135131. Cf with similar case law developed solutions, T-622-16 Corte Constitucional de Colombia, decision 10 November 2016, online, at p. 7, writing that '*Se reconoce al río Atrato, su cuenca y afluentes como una entidad sujeto de derechos a la protección, conservación, mantenimiento y restauración a cargo del Estado y las comunidades étnicas*'.

mative importance that non-human beings can possibly assume. Evidently, complex cultural, sociological, ethical-moral, economic and religious reflections contribute to distinguishing, positively or negatively, the value of animal welfare, preventing the affirmation of universally shared principles and rules. A tension of values that has already emerged in the case law, for example, with respect to the issue of the ritual slaughter of animals. As is well known, according to some religions, 'food', in order to be consumed, must be 'processed' in line with certain techniques, perceived by others as excessively painful for the 'product' – *i.e.* the animal[10]. It is not surprising, therefore, that State practice is not uniformly developed in a specific sense to the point of leading to the adoption of universal standards[11]. This is not to say, of course, that there have been no such attempts. It is simply that the absence of agreement has led to their failure, as was the case with the proposal for an 'umbrella' treaty on animal protection put forward in 1988 by the Committee for the Convention for the Protection of Animals, or with the UNESCO Declaration for Animal Rights[12] proclaimed in 1978 and remaining (relegated) in the

[10] V. ECJ 17 December 2020, Centraal Israëlitisch Consistorie van België e.a., Case C-336/19, ECLI:EU:C:2020:1031, on which see A. DIETZ, *Die praktische Konkordanz beim Schächten im Spannungsfeld zwischen Religionsfreiheit und Tierschutz: Anmerkung zu EuGH, Urt. v. 17.12.2020, C-336/19*, in *Die öffentliche Verwaltung*, 2021, p. 585; E.Z. GRANET, *"As I have Commanded Thee": Flemish Decrees and CJEU Jurisprudence Put Religious Slaughter under the Knife*, in *European Law Review*, 2021, p. 380; Y. NAKANISHI, *Case C-336/19 Centraal Israëlitisch Consistorie van België: Animal Welfare and Freedom of Religion*, in *Maastricht Journal of European and Comparative Law*, 2021, p. 687; S. WEDEMEYER, *Neue Entwicklungen des pluralen Grundrechtsschutzes im europäischen Mehrebenensystem?: Anmerkung zum Urteil des EuGH (GK) v. 17.12.2020, Rs. C-336/19 (Centraal Israëlitisch Consistorie van België)*, in *Europarecht*, 2021, p. 732; S. WATTIER, *Ritual Slaughter Case: The Court of Justice and the Belgian Constitutional Court Put Animal Welfare First*, in *European Constitutional Law Review*, 2022, p. 264, and F. MAOLI, *Tutela degli animali e libertà religiosa: sull'interpretazione normativa di precetti religiosi nel quadro degli scambi commerciali transfrontalieri*, in *Rivista giuridica dell'ambiente*, 2022, p. 1111.

[11] D. FAVRE, *An International Treaty for Animal Welfare*, in D. CAO., S. WHITE (eds), *Animal Law and Welfare – International Perspectives*, Cham, 2026, p. 87.

[12] Universal declaration of animal rights (15 October 1978), proclaimed in Paris the 15th of October 1978 at the UNESCO headquarters. In the scholarship, see J.M. NEUMANN, *The Universal Declaration of Animal Rights or the Creation of a New Equilibrium between Species*, in *Animal Law Review*, 2012, p. 91, at p. 102.

realm of soft law. Even more recently, the UN Convention on Animal Health and Protection (UNCAHP)[13], proposed in 2018 by a group of animal law experts, has not yet found the necessary consensus in the UN General Assembly for its formal adoption.

In short, despite common premises and destinies, 'environmental law' seems to be on an accelerated regulatory track compared to that sector that is certainly emerging, animal welfare law, but which still does not translate into 'animal law'. A difference not only in terminology, but in method, substance and approach[14]. Assuming the existence of an 'animal right' would mean supporting the possibility for animals to have autonomous rights - no matter how difficult and complex it might be to ensure their jurisdictional protection. To speak of 'animal welfare', on the other hand, presupposes an adherence to the classical anthropocentric model, where the human being is at the centre of the regulatory system (and the animal is their property), albeit evidently 'contaminated' by values of a different kind, on the basis of which specific treatment of goods and products is envisaged in order to protect human (or consumer) sensibilities[15]. In other words, therefore, in international law, the subject of animal protection can only be approached from 'classical' angles, such as, for example, the law of transnational trade. However, it seems appropriate to anticipate how, in reality, the level of animal welfare protection is significantly higher in EU law than in international law.

[13] See E. VERNIERS, S. BRELS, *UNCAHP, One Health, and the Sustainable Development Goals*, in *Journal of International Wildlife Law & Policy*, 2021, p. 38.

[14] On the differences between '*animal welfare law*' and '*animal rights law*', C.R. SUNSTEIN, *Introduction: What Are Animal Rights?*, in C.R. SUNSTEIN, M.C. NUSSBAUM (a cura di), *Animal Rights: Current Debates and New Directions*, Oxford, 2004, p. 3, and D. FAVRE, *Animal Law. Welfare, Interests, Rights*, Aspen, 2019.

[15] Cf P. DONADONI, *Animali, senzienza e specismo nella disciplina giuridica sovranazionale europea*, in *Boletín Mexicano De Derecho Comparado*, 2022, p. 61, at p. 71.

There are numerous regulations in EU law dedicated to the protection of farm animals[16], *i.e.* to the protection of animal dignity at various stages of the food production chain[17] or other human processes - such as animal experimentation[18]. A body of legislation that implements the principle of the protection of animals as sentient beings mentioned in primary law as early as Declaration No. 24 annexed to the Maastricht Treaty and now fully enshrined in Article 13 of the Treaty on the Functioning of the European Union[19]. The role assumed by the Union in environmental matters *lato sensu* cannot be doubted, just as the importance it has assumed over time as an international actor. A role that translates into a potential to influence the choices of other legal systems which, when compared to that cultural

[16] Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes, in OJ L 221, 8.8.1998, p. 23; Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves, in OJ L 10, 15.1.2009, p. 7, as amended; Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs, in OJ L 47, 18.2.2009, p. 5, as amended; Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens, in OJ L 203, 3.8.1999, p. 53, as amended; Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, in OJ L 182, 12.7.2007, p. 19, as amended.

[17] Council Regulation (EC) No 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No 1255/97, in OJ L 3, 5.1.2005, p. 1, as amended, and Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, in OJ L 303, 18.11.2009, p. 1.

[18] Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products (recast), in OJ L 342, 22.12.2009, p. 59, as amended, and Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes, in OJ L 276, 20.10.2010, p. 33, as amended.

[19] According to which '*In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage*'. In the scholarship, see F. BARZANTI, *La tutela del benessere degli animali nel Trattato di Lisbona*, in *Il diritto dell'Unione europea*, 2013, p. 49; T. SCOVAZZI, *Articolo 13 TFUE*, in F. POCAR, M.C. BARUFFI (eds), *Commentario breve ai Trattati dell'Unione europea*, Padova, 2014, p. 177; D. RYLAND, *Taking Stock of Art. 13 TFEU in EU Agriculture: Reading Art. 13 as a Whole*, *in European Papers*, 2023, p. 191, and E. PSYCHOGIOPOULOU, *Unravelling the Complexities of the Horizontal Clauses of Arts 8-13 TFEU: An Explanation of the Special Section*, in *European Papers*, 2023, p. 221.

plurality of approaches to human and animal relations mentioned above, highlights the germ of potential failure inherent in the universality of morally sensitive solutions. Globally identical specific rules could be branded, and indeed already have been, as neo-imperialistic[20] or culturally[21] neo-colonialistic in nature. The potential risk of seeing a new imposition of values and norms by some States on others cannot be omitted nor ignored, since this element has, in fact, contributed to the failure of international law on which EU law has been grafted with (some) claims to standardisation of values in the area of farm animal welfare.

2. *Cultural identity of Member States and the (limited) compliance with the law on the modalities for the production of foie gras*

The need to balance the rules adopted to protect animal welfare and other values in the European Union does not end with the well-known issue of ritual slaughter. Even in recent times, *foie gras* has raised public debates[22]. The product is the result of force-feeding ducks and geese, whose livers would become a sought-after dish, considered by many to be a form of cruelty, to the point of banning its national production. This is the case, for example, in Italy, where as of 1 January 2004[23], the use of force-feeding for ducks and geese is prohibited. A position evidently not shared by France, where the

[20] M. COHEN, *Animal Colonialism: The Case of Milk*, in A. PETERS (ed), *Studies in Global Animal Law*, Berlin, 2020, p. 35, at p. 37, and A. PETERS, *Toward International Animal Rights*, in *ibidem*, p. 109, at p. 115.

[21] On neo-colonialism in international law, wherby the very same concept of 'sustainable development' still postulates the predominancy of 'humans', see J. GILBERT, E. MACPHERSON, E. JONES, J. DEHM, *The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda*, in *Netherlands Yearbook of International Law 2021*, 2023, p. 47, a p. 50.

[22] European Parliament, Committee on petitions, Notice to Members, *Petition 0656/2012 by Wolfgang Freudendorfer (German), on banning the sale of foie gras in the EU*, 27.11.2012, available online.

[23] Decreto legislativo 26 marzo 2001, n. 146, Attuazione della direttiva 98/58/CE relativa alla protezione degli animali negli allevamenti, in GU n. 95 del 24-4-2001, Allegato b, par. 19.

product in question '*fait partie du patrimoine culturel et gastronomique protégé ...*'[24].

The production of *foie gras* does not, of course, take place in an absolute regulatory vacuum; however, the margin of discretion enjoyed by States in the implementation of existing supranational regulations is highly debated. At the level of the Council of Europe, there is an international convention, ratified by all EU Member States and by the European Union itself[25], specifically dedicated to the protection of farm animals[26]. The treaty applies to the feeding, care and housing of animals kept for the production of foods (art. 1). There are no specific rules in the text authorising or prohibiting the production of *foie gras*, but some provisions lay down general rules which would seem to exclude its compatibility with the text. According to art. 3 of the treaty, each animal must be fed a diet appropriate to its needs; even more clearly, according to art. 6, no animal must be nourished in such a way as to cause it unnecessary suffering or harm. Directive 98/58/EC, which constitutes the implementation of the obligations of the treaty by the European Union, and which, as a secondary law instrument, is particularly strong also in terms of possible legal reactions in the event of violation by the Member States, lays down substantive rules that largely overlap. Compared to the convention, however, the directive specifies its scope of application more precisely, providing in art. 1 that the text does not apply to animals intended to take part in 'cultural activities' - an expression that should be understood in the sense of animals taking part in exhibitions and competitions. Similarly, in accordance with its nature as an act intended to harmonise the law of the Member States, and given the objective of protecting the welfare of animals, the directive, in art. 10(2), allows the Member States concerned to adopt national measures of greater protection. In other words, the European level of protection is merely a minimum standard, which each

[24] Code rural et de la pêche maritime, Section 3: La production et la commercialisation de certains produits animaux, Article L654-27-1.

[25] 78/923/EEC: Council Decision of 19 June 1978 concerning the conclusion of the European Convention for the protection of animals kept for farming purposes, in OJ L 323, 17.11.1978, p. 12.

[26] European Convention for the protection of animals kept for farming purposes, Strasbourg, 10 March 1976, in ETS No. 087.

legal system may increase in accordance with national cultural sentiment. On a first reading of the relevant texts, therefore, it would seem legitimate to conclude that force-feeding procedures aimed at affecting the liver are incompatible with the principles of animal welfare and, in particular, with the rule of adequate nutrition and the prohibition of causing unnecessary suffering. However, the answers to the question of *foie gras* production found internationally are (completely) opposite.

At the level of EU law, the *Scientific Committee on Animal Health and Animal Welfare*, in a 1998 report, did not conclude in favour of banning the production of *foie gras*[27]. While not denying the violent nature of force-feeding and the physical and mental damage it can cause to geese and ducks, the Committee urged Member States to research alternative production methods that could lead to the same product with less sacrifice to animal interests, pointing out that '*If there are no alternatives to foie gras production using force feeding, a ban on force feeding would affect all or most of the jobs in the industry, whether or not imports were also banned. It would also likely affect French consumer's behaviour and favour the development of parallel markets. Changes in legislation might encourage the development of alternative products involving better welfare*'[28]. In other words, and even more clearly according to the Scientific Committee, '*Since foie gras needs to be produced in order to satisfy the consumers' demand, it is important to produce it in conditions that are acceptable from the welfare viewpoint and do not cause undue suffering*'[29]. In even more direct terms, market demands justify a cruel method of production against which States have a 'research' obligation to determinate whether and to what extent it can be made 'more humane'.

[27] *Welfare Aspects of the Production of Foie Gras in Ducks and Geese, Report of the Scientific Committee on Animal Health and Animal Welfare, Adopted 16 December 1998*, available online.

[28] *Welfare Aspects of the Production of Foie Gras in Ducks and Geese*, cit., p. 65.

[29] *Welfare Aspects of the Production of Foie Gras in Ducks and Geese*, cit., p. 66.

The following year, in 1999, the *Standing Committee of the Strasbourg Convention* also intervened on the subject with a recommendation[30]. Here, the Standing Committee also did not introduce a ban on the production of *foie gras*, merely reiterating the need for States parties to search for possible alternative methods. However, art. 24(2) of the Recommendations introduces a geographical and temporal limit to the possibility of producing *foie gras*. Assuming the incompatibility of the practice of force-feeding with the convention, even if partly justifiable, according to the Standing Committee '*Until new scientific evidence on alternative methods and their welfare aspects is available, the production of foie gras shall be carried out only where it is current practice and then only in accordance with standards laid down in domestic law*'. The reference to 'current practices', evidently, shifts the balancing focal point from the merely economic factor to that of the protection of cultural tradition, be it national or local. It is only with respect to this value, therefore, that the protection of animal interests can yield, thus admitting a practice that, in other areas, would instead be illegitimate.

In spite of those who would like to see more 'animal-friendly' solutions, the balancing point reached in the past does not seem to have changed. In 2012, the European Commission, in its response to an individual petition communicated to the European Parliament, returned to the subject, without reaching any different solutions[31]. According to the Commission, which, moreover, in the opinion of the writer, correctly reconstructs the state of the art, '*The ... recommendations* [of the Standing Committee of the Strasbourg Convention] *do not prohibit the production as such of foie gras from geese and ducks. On the contrary, they explicitly recognise the legality of the production of foie gras as such and impose only certain obligations on countries where it is authorised, namely the obligation, among*

[30] Standing Committee of the European Convention for the Protection of Animals Kept for Farming Purposes, *Recommendation concerning muscovy ducks (cairina moschata) and hybrids of muscovyand domestic ducks (anas platyrhynchos) adopted by the Standing Committee on 22 June 1999*, entered into force on 22nd December 1999, available online.

[31] See European Parliament, Committee on petitions, Notice to Members, *Petition 0656/2012 by Wolfgang Freudendorfer (German), on banning the sale of foie gras in the EU*, 27.11.2012, cit.

others, to promote research into animal welfare aspects and into alternative methods that exclude gavage. The recommendations also stipulate that, pending new scientific data on alternative methods and animal welfare aspects, the production of foie gras should be restricted to areas where it is traditional and provided that the standards laid down in national legislation are met'. Similarly, and even more recently, the European Parliament itself, in February 2022, did not consider the practice defined as 'gobbling' by the same Commission to be contrary to EU law. According to the Parliament[32], '*the production of foie gras is based on breeding procedures that respect animal welfare criteria, given that it is an extensive form of production, mainly involving family farms, where the birds spend 90% of their lives outdoors and where the fattening phase, which lasts between 10 and 12 days on average with two meals a day, respects the animals' biological parameters*'.

From an ethical-moral point of view, it may be disappointing that regional international law and, consequently, EU secondary law do not place a limit on the practice of force-feeding ducks and geese. Especially if one considers how the element of cultural protection, which is certainly important, is not directly based on the text of the Strasbourg Convention nor Directive 98/58/EC, but rather on the recommendations of the Standing Committee, which should limit itself to drawing up detailed provisions for the application of the principles of the treaty, and not also introduce significant exceptions to its scope of application[33]. The question remains, however, whether a limitation on the production of *foie gras* cannot also be found in another legal basis, *i.e.* directly in the founding treaties. More in detail, according to art. 13 TFEU, '*In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member*

[32] European Parliament resolution of 16 February 2022 on the implementation report on on-farm animal welfare (2020/2085(INI)), available online, point 32.

[33] European Convention for the protection of animals kept for farming purposes, cit., art. 9.

States relating in particular to religious rites, cultural traditions and regional heritage'. According to some scholars, the rule, which has become a parameter for the legitimacy of secondary legislation[34], would not, or should not, allow for a relativisation of protection in the specific case of *foie gras*[35], especially where common national sentiment evolves over time and the rule in question is merely invoked to 'safeguard' past and now obsolete prerogatives. However, the rule does not condition the existence of a cultural tradition on a kind of preventive 'validation' by the Union. On the contrary, the norm appears so structurally weak that it has been described as a 'self-defeating norm', such is the margin of discretion and vagueness[36]. This does not mean, of course, that no form of control can be exercised at EU level: the Court of Justice of the European Union could be requested on whether and to what extent the production of *foie gras*, in a given case, is or is not compatible with principles or rules of European Union law. Should the Court be requested to rule on the matter, the first question would be to determine "who" can determine the existence of a cultural tradition that EU law must respect. In a similar context, the Court of Justice of the European Union, with reference to the 'Wild Birds' Directive[37], has emphasised how, even if one accepts that hunting respects national cultural requirements (art. 2), the traditional nature of a trapping method (in particular, with glue) is not sufficient in itself to demonstrate the absence of a satisfactory alternative solution[38]. Taking into account such a case law, it would seem it is for the Member States to determine in the first instance the existence of a cultural tradition relevant to art. 13 TFEU, leaving it to the Court of Justice to ascertain

[34] Judgment of the Court (Grand Chamber) of 26 February 2019, Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation and Others, Case C-497/17, ECLI:EU:C:2019:137.

[35] A. PETERS, *Ein Weihnachtsgeschenk für Enten und Gänse: Die vollständige Ächtung von Foie gras*, in *Völkerrechtsblog*, 22.12.2021.

[36] T. SCOVAZZI, *Articolo 13 TFUE*, cit., p. 179. Cf also M. KOTZUR, *Art. 13 AEUV*, in GEIGER R., D.-E. KHAN, M. KOTZUR, L. KIRCHMAIR (hrsg), *EUV AEUV Kommentar*, München, 2023, p. 259, at p. 260, rn. 3.

[37] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, in OJ L 20, 26.1.2010, p. 7, as amended.

[38] Judgment of the Court (First Chamber) of 17 March 2021, Association One Voice and Ligue pour la protection des oiseaux v Ministre de la Transition écologique et solidaire, Case C-900/19, ECLI:EU:C:2021:211, para. 44.

whether or not this unilateral determination is compatible with EU law. In its assessment, then, the Court could weigh, on the one hand, the actual fulfilment of the obligations to search for alternative methods of producing *foie gras* imposed by international and EU law on States, and, on the other hand, verify that a cultural tradition of a Member State is not instrumentalised for the sole purpose of justifying an exception to the rules on the protection of animal welfare.

3. *Opposing cultural identities between Member States: the right to free movement of animal-derived products*

If regional international law and EU law do not appear to have developed incisive instruments to date to prevent the production of *foie gras* by Member States that (legitimately) protect their cultural traditions and values, the issue of the free movement of such products in the internal market consequently arises. As is well known, art. 34 TFEU prohibits quantitative restrictions on imports and all measures having equivalent effect. Under the specific focal lens of the present study, one could imagine at least two different approaches adoptable by Member States promoting a different perspective on animal welfare and the production of *foie gras*. Firstly, a Member State could ban the import of the product, with no exceptions whatsoever. Secondly, a Member State could make the production and marketing of the product conditional on some sort of animal welfare certification regarding the use of less invasive alternative production techniques. In the first case, it would probably be a quantitative restriction on imports, which is always prohibited[39], while in the second case, it would be a 'measure having equivalent effect' capable of affecting the conduct of traders and consumers[40]. A production certificate, qualifying as an indiscriminately applicable 'technical regulation', would, however, fall under the Cassis de Dijon jurisprudence of the Court of Justice. According to this approach, absent common rules on production, it is for the Member States to

[39] See already Judgment of the Court of 12 July 1973, Riseria Luigi Geddo v Ente Nazionale Risi, Case 2-73, ECLI:EU:C:1973:89, para. 7.

[40] Judgment of the Court of 24 November 1982, Commission of the European Communities v Ireland, Case 249/81, ECLI:EU:C:1982:402, para. 28.

adopt relevant rules; possible obstacles to the right to free movement resulting from lack of harmonisation are accepted in so far as they are necessary to meet imperative requirements relating, in particular, to the effectiveness of fiscal supervision, the protection of public health, fair trading and consumer protection[41]. Hence, a Member State wishing to introduce specific rules on the production of *foie gras*, thereby restricting the marketing on its territory of foreign products that do not comply with domestic technical rules, must prove that the rules in question apply indiscriminately; that there is no harmonisation rules at the EU law level; that an overriding national interest is protected and that the measures comply with the requirement of proportionality.

It is evident that art. 34 TFEU, also as interpreted by the Court of Justice over time, does not offer particularly useful tools to those Member States that wish to 'react' to the production of *foie gras* in the internal market. The prohibition of quantitative restrictions on imports is traditionally considered absolute in the context of the specific rule in question, and measures of equivalent effect that are indiscriminately applicable impose a particularly qualified and difficult burden of proof on the Member State concerned. Suffice it to mention, by way of example, that the German import ban on certain alcoholic beverages, dealt with in the Cassis de Dijon case, did not stand the test of the protection of imperative interests because Germany had not succeeded in proving how the import ban on light alcoholic beverages could have protected public health when people can themselves lower the alcohol level of spirits already on the market by adding other substances[42]. Although the protection of farm animals is certainly a relevant value, the 'imperativeness' benchmark imposed by the Cassis jurisprudence seems to be difficult to meet, especially where the protection of (eco-sensitive) consumers could be realised through a product labelling requirement that ensures that people can avoid buying products that are morally unacceptable to them.

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[41] In these very terms, Judgment of the Court of 20 February 1979, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, Case 120/78, ECLI:EU:C:1979:42, para. 8 ff.

[42] *Ibidem*, para. 11.

More room for intervention might be granted by art. 36 TFEU, according to which restrictive measures may be '*justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants* [… unless they are] *a means of arbitrary discrimination or a disguised restriction on trade between Member States*'. The rule, which is applicable irrespective of the discriminatory nature of the measure in question, constitutes an exception to the free movement of goods and must therefore be interpreted in a non-extensive way[43]. Two in particular are the (imperative) interests of art. 36 TFEU that could possibly be invoked by a Member State wishing to restrict imports of *foie gras*. The first ground to justify an exception to the general rule could be the protection of public morality. This ground has been validly invoked, for example, to justify bans on the import of obscene materials prohibited in the individual Member State[44]. According to the Court, it is in principle up to each Member State to determine the imperatives of public morality within its territory according to its own scale of values and in the form it chooses[45]. However, a public morality can only be found in so far as that system not only prohibits importation, but also and equally prohibits production and marketing within its territory[46]. Thus, a Member State that were to prohibit the production, marketing and importation of *foie gras* could, in the first instance, defend the measure by invoking the protection of public morality under art. 36 TFEU. It is certainly not easy to determine whether and to what extent such a defence could succeed in proceedings before the Court of Justice. One might, in fact, ask what the benchmark is in this case. If the Member State wants to protect animal welfare, why not also ban the domestic production and international trade of poultry or other animals without adequate living space? Why should public morality end only in the suffering of two species that, as the European Parliament points out, live adequately

[43] Judgment of the Court of 25 January 1977, W. J. G. Bauhuis v The Netherlands State, Case 46-76, ECLI:EU:C:1977:6, para. 12/15.

[44] See Judgment of the Court of 14 December 1979, Regina v Maurice Donald Henn and John Frederick Ernest Darby, Case 34/79, ECLI:EU:C:1979:295.

[45] In these terms, *ibidem*, para. 15.

[46] Judgment of the Court (Fourth Chamber) of 11 March 1986, Conegate Limited v HM Customs & Excise, Case 121/85, ECLI:EU:C:1986:114, para. 16.

for 90% of their lives, while other animals live in cages or crates for their entire existence? Since art. 36 TFEU is an exception to the general rule, it should be the Member State concerned that should answer these questions and bear the burden of proof.

The second potentially relevant, but certainly no less problematic ground for derogation could be the 'protection of health and life of humans and animals' in art. 36 TFEU. Although Member States remain free to determine their domestic animal health policy, they have the burden of proving that their rules do not constitute arbitrary discrimination or a disguised restriction on trade[47] - both of which are prohibited by the same provision. Restrictions on imports based on the protection of animal health have been considered legitimate where the Member State in question had the objective, which could not be pursued by any other suitable means, of protecting the survival of entire local species, more particularly local bees that would be replaced by other species as a result of the introduction of other bees[48]. On the contrary, the refusal of some Member States to export animals to other Member States because the latter would not guarantee adequate living conditions for the animals, living conditions in any case harmonised by EU law, did not pass the scrutiny of art. 36 TFEU and the protection of animal health[49]. In other words, the higher standard of protection that a Member State may possibly develop unilaterally cannot be imposed (or super-imposed) on other Member States that comply with minimum requirements of EU law. Union law which, on the *foie gras* point, imposes, to date, an obligation of alternative research and a ban on 'new' areas invoking the cultural exception to Directive 95/58/EC.

On a broader perspective, confirming a potential 'difficulty' in invoking grounds that could justify a restriction on trade in *foie gras*, Article XXb of the General Agreement on Tariffs and Trade (GATT

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[47] In this sense, M. MIGLIAZZA, *Art. 36 TFUE*, in F. POCAR, M.C. BARUFFI (eds), *Commentario breve ai Trattati dell'Unione europea*, Padova, 2014, p. 251, at p. 259.

[48] Judgment of the Court (Fifth Chamber) of 3 December 1998, Criminal proceedings against Ditlev Bluhme, Case C-67/97, ECLI:EU:C:1998:584, para. 33 ff.

[49] Judgment of the Court of 19 March 1998, The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd, Case C-1/96, ECLI:EU:C:1998:113, para. 47 ff.

Agreement 1947), which would allow States to take measures 'necessary to protect human, animal or plant life or health', has not been applied to date[50].

4. *'Animals' as 'goods': a neo-cultural imperialism in cross-border trade law*

It emerges from the above how the interaction of international regional law and EU law, while promoting approaches that enhance the protection of animal welfare, have not only a distinctly anthropocentric vocation, but even still a strongly mercantilist matrix. Economic considerations, as seen, led the Scientific Committee on Animal Health and Animal Welfare in 1998 to not rule out the legitimacy of *foie gras* production techniques. Considerations that evidently inspired the following year's recommendations of the Standing Committee of the Strasbourg Convention, which, in a balancing act, nevertheless introduced a requirement of local cultural tradition to justify practices that would otherwise not be compatible with the conventional regime.

Such is the mercantilistic inspiration that not only do the relevant rules not prohibit Member States the traditional production of *foie gras*, but those States that, on the other hand, take a different cultural view and promote a new individual-animal relationship, may have little instrument to limit imports from other Member States. While some scholars[51] maintain that Member States should be free to set restrictions on imports of the product in question in order to protect their own culture, the (certainly not recent) position of the European Commission[52] in its response to the above-mentioned petition appears diametrically opposed. According to the Commission, in a certainly laconic expression, '*a ban on the sale of foie gras between Member States would not be in line with the EU Treaties*'.

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[50] A. PETERS, *Animals in International Law*, in *Recueil des Cours*, Tome 410, 2020, p. 95, at p. 298.

[51] A. PETERS, *Ein Weihnachtsgeschenk für Enten und Gänse: Die vollständige Ächtung von Foie gras*, cit.

[52] European Parliament, Committee on petitions, Notice to Members, *Petition 0656/2012 by Wolfgang Freudendorfer (German), on banning the sale of foie gras in the EU*, 27.11.2012, cit.

In the author's opinion, the solution is not necessarily a foregone conclusion and could not be correctly found except in the light of the particularities of the individual case and the individual legislation. The limits to the import ban, as briefly mentioned, are not few nor easy to justify. Evidently, the protection of such an interest would impose measures beyond the mere ban on the importation of *foie gras* and, thus, could be arbitrary or unjustified. It is true that, as noted, the Commission's position is neither recent nor adequately motivated. It would certainly be a mistake to ignore the social, moral and regulatory developments that have characterised the protection of animal welfare in recent years. The introduction, as in Italy, of specific constitutional regulations on the protection of animals certainly cannot, and must not, remain without consequences. However, if this common feeling on the matter is indeed developing and translating into legislative reforms, it seems that unilateralism of protection, from which the need for coordination between legal systems in an integrated market derives, is not the best way to regulate the matter. It should be regional international law and EU law to clearly establish either a ban on the production of *foie gras* or a clear right to ban its import for those States that also ban all domestic production. Of course, the recent position of the European Parliament leaves very little hope for such a legislative intervention. Not only does the February 2022 Resolution of the European Parliament[53] confirm the legitimacy of force-feeding animals, but it even rules out that these are contrary to animal welfare because of their brevity. In other words, according to the European Parliament, *foie gras* does not raise any problems since '*production* [...] *is based on farming procedures that comply with animal welfare criteria*'.

Such institutional 'attachment' to *foie gras* production raises obvious perplexities. One might wonder, in fact, why animal suffering 'gives way' when 'competing' with (European) cultural traditions in the present case, and prevails, instead, over (some) religious traditions. As is well known, secondary legislation requires the stunning

[53] European Parliament resolution of 16 February 2022 on the implementation report on on-farm animal welfare (2020/2085(INI)), cit., point 32.

of animals to be slaughtered, with an exception for religious rituals[54]. The Flanders Region in Belgium introduced electrocution stunning in the context of ritual slaughter, and the Court of Justice intervened on the matter, concluding that secondary law and art. 13 TFEU do not preclude the imposition of (certain) limits on ritual slaughter. In this sense, one might wonder why in 2020 the Court of Justice 'accepted' the proportionality of an animal welfare measure limiting the fundamental rights of at least two religions[55] while, clearly, the economic and cultural facts of some limited, predominantly French, areas where traumatic production techniques are followed are simply ignored, to the point of denying their painful nature and affirming their compatibility with animal welfare. In other words, one might wonder whether the 'European tradition' is privileged over other traditions that would also like to be protected. In short, it seems that the subject of *foie gras* and the protection of animals in general go far beyond what they might represent at first glance; it is on this new terrain that society's next great cultural encounters and clashes may take place in the future, with respect to which even the law will have to take a clear stand at some point.

In conclusion, one only has to wonder whether this future position might not be taken by the Court of Justice of the European Union; should it indeed be seised and have the opportunity to decide on the compatibility of *foie gras* production with Union law, there might, perhaps, be some margin to justify, at least, the ban on imports imposed by other Member States. The protection of fundamental values that the Union promotes has, in the past, justified a national compression of fundamental freedoms: in the Omega case, for instance, the public policy exception of art. 36 TFEU and the protection of human dignity did justify a ban on imports of laser gaming weapons locally imposed in Germany. The European Union is certainly an order that protects and promotes many values. Should a Member State claim to have actually developed a fundamental value of animal protection, not only could the Court of Justice protect it, but also

[54] Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing, cit., art. 4(4).

[55] Judgment of the Court (Grand Chamber) of 17 December 2020, Centraal Israëlitisch Consistorie van België e.a. and Others, Case C-336/19, ECLI:EU:C:2020:1031, para. 58 ff.

act as a sounding board in promoting and legitimising a new human-animal relationship.

FRANCESCA MAOLI

PARTY AUTONOMY IN SUCCESSION MATTERS AND THE INTERPLAY BETWEEN EU PIL AND INTERNATIONAL CONVENTIONS: SOME REFLECTION ON THE CJEU'S DECISION IN *OP*

CONTENTS: 1. Introduction. – 2. The issues brought to the attention of the CJEU in the case C-21/22. – 3. The relevant legal framework: party autonomy in the Succession Regulation and the interplay between the latter and international conventions to which Member States are already party. – 4. The first question: the Succession Regulation allows a third-country national to choose the law applicable to their succession. – 5. The second question: Succession Regulation, bilateral agreements and the possibility to choose the applicable law. – 6. Concluding remarks.

1. *Introduction*

The development of a European Union's legislative package in the field of judicial cooperation in civil matters has reached its highest peaks in the recent years. The coordination among Member States as concerns transnational jurisdiction, conflict of laws' common rules and, most importantly, the recognition and enforcement of decisions and authentic instruments in the European judicial space now covers almost all the areas of civil law[1]. While this system certainly needs to be perfectioned in some parts and has resulted in a "multi-speed" Europe in cases where enhanced cooperation was necessary (for instance, in certain matters of family law)[2], it has also

[1] For an overview see *ex multis* MOSCONI F., CAMPIGLIO C., *Diritto internazionale privato e processuale*, I, 2022, p. 27.

[2] Reference is made to Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation), in OJ L 343, 29.12.2010, p. 10; Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, in OJ L 183, 8.7.2016, p. 1; Council Regulation Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, in OJ L 183, 8.7.2016, p. 30. On the institute of enhanced cooperation, with particular reference to EU judicial cooperation in civil matters, see POCAR F., *Brevi note sulle cooperazioni rafforzate e il diritto internazionale privato*, in

shown some attractiveness from the point of view of non-EU countries, as well as the recognized role of the EU in the global scenario while negotiating international PIL conventions. As concerns the latter, the privileged setting is the Hague Conference of Private International Law, to which the EU is a member from 3 April 2007[3].

This phenomenon can be appreciated from different points of view: i) the interests of third States in concluding PIL agreements with the EU – as happened, for instance, in civil and commercial matters with the establishment of the Lugano Convention between the EU and the EFTA States[4]; ii) a reflection on the potentialities of the EU law in regulating PIL aspects involving the relationships between Member States and third countries[5]; iii) the need for EU instruments to coordinate with international PIL conventions to which Member States are parties[6].

Rivista di diritto internazionale privato e processuale, 2011, p. 297; BÖTTNER R., *The Instrument of Enhanced Cooperation: Pitfalls and Possibilities for Differentiated Integration*, in *European Papers*, 2022, p. 1145; PEERS S., *Enhanced Cooperation: the Cinderella of Differentiated Integration*, in DE WITTE B. , VOS E., OTT A. (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law*, Cheltenham, 2017, p. 76; KUIPERS J., *The Law Applicable to Divorce as Test Ground for Enhanced Cooperation*, in *European Law Journal*, 2012, p. 201; FIORINI A., *Harmonizing the Law Applicable to Divorce and Legal Separation—Enhanced Cooperation as the Way Forward?*, in *International and Comparative Law Quarterly*, 2010, p. 1143; FERACI O., *Sul ricorso alla cooperazione rafforzata in tema di rapporti patrimoniali fra coniugi e fra parti di unioni registrate*, in *Rivista di diritto internazionale*, 2016, p. 529; WYSOCKA-BAR A., *Enhanced cooperation in property matters in the EU and non-participating Member States*, in *ERA Forum*, 2019, p. 187.

[3] Council Decision 2006/719/EC of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law, in OJ L 297, 26.10.2006, p. 1. On this topic FRANZINA P., *L'adesione della Comunità europea alla Conferenza dell'Aja di diritto internazionale privato*, in *Rivista di diritto internazionale*, 2007, p. 440; KUIPERS J., *The European Union and the Hague Conference on Private International Law – Forced Marriage or Fortunate Partnership?*, in DE WAELE H., KUIPERS J. (eds), *The European Union's Emerging International Identity*, Leiden/Boston, 2013, p. 159; SCHULZ A., *The Accession of the European Community to the Hague Conference on Private International Law*, in *International and Comparative law Quarterly*, 2007, p. 939.

[4] See the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano II Convention), in OJ L 339, 21.12.2007, p. 3.

[5] See the contributions in FRANZINA P. (ed), *The External Dimension of EU Private International Law after Opinion 1/13*, Cambridge, 2017.

[6] See *ex multis* QUEIROLO I., ESPINOSA CALABUIG R., GIORGINI G.C., DOLLANI N., TUO C.E., CARPANETO L., DOMINELLI S., *Brussels I bis Regulation and special rules: opportunities to enhance judicial cooperation*, Rome, 2021; DE MIGUEL ASENSIO P.A., *International Conventions and European Instruments of Private International Law: Interrelation*

The need for the EU to carry on those reflections, with particular reference to the last-mentioned matter, has recently emerged in the field of *mortis causa* successions. In particular, the issue has concerned the decision of the Court of Justice of the European Union (CJEU) in the case C-21/22[7], addressing the application of the Regulation EU No. 650/2012 (hereinafter, also Succession Regulation)[8] to third State's nationals, where an agreement is in place between the Member State concerned, whose judicial authorities have been seized, and the third State in question.

and Codification, in DE MIGUEL ASENSIO P.A., BERGÈ J.-S., *The Place of International Agreements and European Law in a European Code of Private International Law*, Frankfurt am Main, 2011, p. 185.

[7] Judgment of the Court (Third Chamber) of 12 October 2023, OP v Notariusz Justyna Gawlica, Case C-21/22. For a comment on the decision, see A. WYSOCKA-BAR A., *The Court of Justice on Succession Regulation and Third State Nationals*, in *EAPIL Blog*, 26 October 2023, available at https://eapil.org/2023/10/26/the-court-of-justice-on-succession-regulation-and-third-state-nationals/. A similar question was submitted to the CJEU by a polish notary, but the request for a preliminary ruling was declared manifestly inadmissible because the referring authority could not be classified as a "court or tribunal" within the meaning of Article 267 TFEU: see the Order of the Court (Sixth Camber) of 1 September 2021, OKR, Case C-387/20.

[8] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, in OJ L 201, 27.7.2012, p. 107. The legal literature on the Succession Regulation is vast. For essential references, please see BARIATTI S., VIARENGO I., VILLATA F.C. (eds), *EU Cross-Border Succession Law*, Cheltenham, 2022; BONOMI A., WAUTELET P. (eds), *Le droit européen des successions. Commentaire du Reglement n° 650/2012 du 4 julliet 2012*, Brussels, 2013; CALVO CARAVACA A.-L., DAVÌ A., MANSEL H.-P., *The EU Succession Regulation: A Commentary*, Cambridge, 2016; DAMASCELLI D., *Diritto internazionale privato delle successioni a causa di morte*, Milano, 2012; DAVÌ A., ZANOBETTI A., *Il nuovo diritto internazionale privato europeo delle successioni*, Torino, 2014; FRANZINA P., LEANDRO A. (eds), *Il diritto internazionale privato europeo delle successioni* mortis causa, Milano, 2013; FUMAGALLI L., *Il sistema italiano di diritto internazionale privato e processuale e il regolamento (UE) n. 650/2012 sulle successioni: spazi residui per la legge interna?*, in *Rivista di diritto internazionale privato e processuale*, 2016, p. 779; LAGARDE P., *Les principes de bases du nouveau règlement européen sur les successions*, in *Revue critique du droit international privè*, 2012, p. 691; PAMBOUKIS H.P., *EU Succession Regulation No 650/2012*, München, 2017.

2. *The issues brought to the attention of the CJEU in the case C-21/22*

The case under examination concerned a Ukrainian national, OP, habitually residing in Poland, where she co-owned an immovable property. With the desire to plan her future succession, OP asked a Polish notary to draw up a notarial will, in which she wanted to choose Ukrainian law as applicable to her succession. The notary refused to allow the designation of the applicable law, on the basis of a bilateral agreement in force between Poland and Ukraine since 1993[9]. In fact, Article 37 of the aforementioned agreement did not provide for the possibility to choose the law applicable to the succession, limiting itself to indicate objective connecting factors[10].

As a consequence, OP brought the case before the *Sąd Okręgowy w Opolu* (Regional Court of Opole, Poland), arguing that the notary had failed to apply the correct discipline to her notarial deed. More specifically, OP contended that Article 37 of the Bilateral Agreement was no longer applicable after the entry into force of the Succession Regulation. Notably, the applicant argued that Article 22 of the Regulation allows "a person" to choose the law of his or her country as the law applicable to their succession. Referring to Article 75 of the Regulation, it was maintained that its purpose is to preserve the conformity of the EU instrument with the obligations arising from agreements concluded by the Member States with third States. In so far as the Bilateral Agreement does not govern the choice of

[9] Agreement of 24 May 1993 between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters (hereinafter, also 1993 Bilateral Agreement).

[10] Article 37 of the 1993 Bilateral Agreement: "*Legal relationships in matters relating to the succession of movable property shall be governed by the law of the Contracting Party of which the deceased was a national at the time of his or her death. Legal relationships in matters relating to the succession of immovable property shall be governed by the law of the Contracting Party in the territory of which that property is situated. (...)*". A similar situation concerns the 1868 Swiss-Italian Consular Treaty, which still governs succession matters for Italians living in Switzerland and Swiss citizens living in Italy: *Convention d'établissement et consulaire entre la Suisse et l'Italie*, concluded on 22 July 1868 and entered into force on 1° May 1868. See BALLARINO T., PRETELLI I., *Una disciplina ultracentenaria delle successioni*, in *Rivista ticinese di diritto*, 2014, p. 889; ROMANO G.P., *Remarks on the Impact of the Regulation No 650/2012 on the Swiss-EU Successions*, in *Yearbook of Private International Law*, 2015/2016, p. 253.

succession law, OP submitted that the application of Article 22 of the Succession Regulation was not incompatible with that agreement.

The *Sąd Okręgowy w Opolu* decided to stay the proceedings and to submit a reference for a preliminary ruling to the CJEU, raising two distinct questions:

"*(1) Must Article 22 [of Regulation No 650/2012] be interpreted as meaning that a person who is not a citizen of the European Union is entitled to choose the law of his or her native country as the law governing all matters relating to succession?*

(2) Must Article 75, in conjunction with Article 22, of Regulation No 650/2012 be interpreted as meaning that, in the case where a bilateral agreement between a Member State and a third [State] does not govern the choice of law applicable to a case involving succession but indicates the law applicable to that case involving succession, a national of that third [State] residing in a Member State bound by that bilateral agreement may make a choice of law?".

The case that originated the question to the CJEU is relatively straightforward in its factual terms. Nevertheless, it is particularly relevant not only in consideration of the large number of Ukrainian citizens residing in Poland, but also because it raises complex issues of coordination as concerns the scope of application of the Succession Regulation *vis a vis* disputes involving the legal system of third States[11].

3. *The relevant legal framework: party autonomy in the Succession Regulation and the interplay between the latter and international conventions to which Member States are already party*

Before commenting the CJEU's approach on the subject matter, a brief reference should be made to the relevant legal framework.

[11] See SROKOWSKA A., *Choice of Law of Succession (Professio Juris Successoria) in the Light of the Regulation EU No 650/2012: Case Study – Analysis of the Preliminary Ruling in the Case C-21/22*, in *International Law Quarterly*, 2022, p. 116.

The Succession Regulation applies to successions by reason of death – as autonomously defined in Article 3[12] – of persons who die on or after 17 August 2015, even if the dispute is instituted later[13]. It binds all EU Member States except Ireland and Denmark[14]. The Regulation is structured as to operate also in context where third countries are involved. For instance, this may happen because the deceased was a citizen of a third State or some of the assets are localized outside the EU[15].

The Regulation is inspired by several fundamental principles[16]. While achieving the objective of making it easier for citizens to organize their succession in advance, the Regulation also intends to balance party autonomy with the need to protect the interests of the other persons involved (such as close relatives)[17]. For this reason,

[12] According to Article 3, para. 2, lett. a) of the Regulation, "*succession*" means "*succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession*".

[13] Succession Regulation, Article 83, para. 1.

[14] By virtue of Protocol No. 21 annexed to the TFEU on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, in OJ C 326, 26.10.2012, p. 295, and Protocol No. 22 annexed to the TFEU on the position of Denmark, in OJ C 326, 26.10.2012, p. 299.

[15] The latter hypothesis comprehends successions whose assets are localized in Ireland or Denmark, which are to be considered "third States" for the purposes of the Succession Regulation. See BARIATTI S., *The EU Succession Regulation and Third Countries*, in BARIATTI S., VIARENGO I., VILLATA F.C. (eds), *EU Cross-Border Succession Law*, cit., p. 87, p. 89; BONOMI A., *Introduction*, in BONOMI A., WAUTELET P. (eds), *Le droit européen des successions. Commentaire du Reglement n° 650/2012 du 4 julliet 2012*, Brussels, 2013, p. 30.

[16] CLERICI R., *I principi del diritto internazionale privato europeo delle successioni*, in PALCHETTI P. (ed), *L'incidenza del diritto non scritto sul diritto internazionale ed europeo*, Napoli, 2016, p. 241.

[17] On the topic see BARIATTI S., *Volontà delle parti e internazionalità del rapporto giuridico: alcuni sviluppi recenti nella giurisprudenza della Corte di giustizia sui regolamenti europei in materia di diritto internazionale privato*, in *Rivista di diritto internazionale privato e processuale*, 2019, p. 513 ff.; BONOMI A., *Article 22. Choix de loi*, in BONOMI A., WAUTELET P. (eds), *Le droit européen des successions,* cit., p. 297; CAMPIGLIO C., *La facoltà di scelta della legge applicabile in materia successoria*, in *Rivista di diritto internazionale privato e processuale*, 2016, p. 925; CARPANETO L., *Autonomia privata e relazioni familiari nel diritto dell'Unione europea*, Roma, 2020, p. 151; DAMASCELLI D., *Diritto internazionale privato delle successioni a causa di morte*, cit., p. 99; GRIECO C., *Il ruolo dell'autonomia della volontà nel diritto internazionale privato delle successioni transfrontaliere*, Milano, 2019, p. 119; JAYME E., *Party Autonomy in International Family and Succession Law: New Tendencies*,in *Yearbook of Private*

according to Article 22, the deceased can choose the law applicable to their succession, departing from the law of the last habitual residence[18]: however, the choice is limited to the law of the State whose nationality they possessed at the time of the choice or at the time of death. In this way, a qualified connection between the deceased and the chosen law is ensured. At the same time, legal certainty should be granted to all the actors involved in the same succession[19].

Another founding principle of the Regulation is the one of unity of the succession[20]. This means that, in the logic of the EU lawmaker, the applicable law should govern all the matters pertaining to a given succession, without distinction between immovable and movable property and regardless of their location[21]. Accordingly, there should be only one judicial authority in the EU who holds jurisdiction with reference to the same succession[22]. Indeed, the only exception to the unity of jurisdiction is provided for in Article 12 of the Regulation: when the estate includes assets located in a third State, the court seized (at the request of one of the parties) can abstain from ruling on one or more of those assets if it considers that

International Law, 2009, p. 1; VIARENGO I., *Planning Cross-Border Successions: the Professio Iuris in the Succession Regulation*, in *Rivista di diritto internazionale privato e processuale*, 2020, p. 559; ID., *Applicable Law: Choice of Law*, in BARIATTI S., VIARENGO I., VILLATA F.C. (eds), *EU Cross-Border Succession Law*, cit., p. 132; RE J., *Pianificazione successoria e diritto internazionale privato*, Padova, 2020, p. 103; VASSILAKAKIS E., *La* professio iuris *dans les successions internationales*, in ANCEL B., AUDIT B., BALLARINO T. (eds), *Le droit international privè: esprit et méthodes. Méelanges en l'honneur de Paul Lagarde*, Paris, 2005, p. 805.

[18] Succession Regulation, Article 21, recitals 23 and 24.

[19] See also Succession Regulation, recital 38.

[20] Succession Regulation, Article 21, para. 1, and recital 42.

[21] See DAVÌ A., ZANOBETTI A., *Il nuovo diritto internazionale privato europeo delle successioni*, cit., p. 7; DAVÌ A., *Introduction*, in CALVO CARAVACA A.-L., DAVÌ A., MANSEL H.-P. (eds), *The EU Succession Regulation*, cit., p. 3, p. 37; ID., *Introduzione al regolamento europeo sulle successioni*, Napoli, 2019, p. 62; FRANZINA P., *Ragioni, valori e collocazione sistematica della disciplina internazionalprivatistica europea delle successioni* mortis causa, in FRANZINA P., LEANDRO A. (eds), *Il diritto internazionale private europeo delle successioni* mortis causa, cit., p. 1, p. 8.

[22] See Succession Regulation, Article 4, referring to the succession "*as a whole*".

its decision will not be recognized or declared enforceable in that country[23].

With reference to coordination with international conventions, focusing only on those aspects that are relevant to the present discussion, Article 75, para. 1, establishes that the Succession Regulation shall take a step back on the issues which are covered by an international agreement to which one or more Member States are party, which was already in force (for the Member States concerned) at the time of the adoption of the Regulation[24]. Therefore, the latter will not affect the application of the aforementioned treaties: the authority of a Member State, which is bound by one of those international instruments, will apply the rules on jurisdiction, applicable law and recognition/enforcement of judgments contained therein to situations falling within their scope. However, para. 1 must be read in conjunction with para. 2, according to which the Regulation "*shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation*".

4. *The first question: the Succession Regulation allows a third-country national to choose the law applicable to their succession*

The first preliminary question submitted by the domestic court has been reframed by the CJEU. In essence, the issue concerned the possibility, for a third-country national residing in a Member State,

[23] The rationale of Article 12 is to take into account the tendency of some States to establish exclusive jurisdiction over property (in particular, real estate) located on their territory, with the consequence that these jurisdictions often refuse to recognize and enforce foreign judgments concerning such property.

[24] See A. BONOMI, *Article 75*, in BONOMI A., WAUTELET P. (eds), *Le droit européen des* successions, cit., p. 835; FRIMSTON R., *A practical guide to the EU Succession Regulation*, Minehead, 2020, p. 185; ZANOBETTI A., *Article 75*, in CALVO CARAVACA A.-L, DAVÌ A., MANSEL H.-P. (eds), *The EU Succession Regulation*, cit., p. 831 ff. For a focus on the importance of the provision for the Polish legal system, see RYLSKI P., *The Influence of Bilateral Treaties with Third States on Jurisdiction and Recognition of Decisions in Matters on Succession — Polish Perspective*, in *Problemy Prawa Prywatnego Międzynarodowego*, 2020, p. 91.

to choose the law of that third State as the law governing their succession as a whole.

This issue was relatively straightforward to solve: the CJEU answered in the affirmative on the basis of the wording of Article 22 of the Succession Regulation[25]. The provision refers to any "person", without making any distinction between nationals of Member States of the European Union and third-country nationals[26].

This solution was also reinforced by the fact that the Regulation foresees the possibility that the choice by the *de cuius* may also result in the application of the law of a third State: in fact, Article 20 provides that the law designated by the Regulation is to apply whether or not it is the law of a Member State. Indeed, should the law of a third country be applicable, the CJEU is well aware that regard must be made to the *renvoi* rules laid down by the PIL rules of that State. However, recital 57 of the Regulation makes it clear that *renvoi* should be excluded where the deceased has chosen the law applicable to their succession[27].

Lastly, as another element in favor of the possibility of a "extra-EU" choice of law, the Court has mentioned Article 5 of the Regulation, according to which choice-of-court agreements concluded by the heirs are only possible where the law chosen by the deceased to govern their succession is the law of a Member State[28]. A provision which is mirrored in Article 6 as concerns the declining of jurisdiction[29].

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[25] Judgment of the Court (Third Chamber) of 12 October 2023, OP v Notariusz Justyna Gawlica, Case C-21/22, para. 24.

[26] The same consideration is made by the CJEU as concerns recital 38 of the Succession Regulation, according to which "*this Regulation should enable citizens* [and not only EU citizens, *ndr*] *to organize their succession in advance by choosing the law applicable to their succession*".

[27] Judgment of the Court (Third Chamber) of 12 October 2023, OP v Notariusz Justyna Gawlica, Case C-21/22, para. 21.

[28] On the discipline of jurisdiction in the context of the Succession Regulation, other than the legal literature already cited, see QUEIROLO I., *Jurisdiction in Succession Matters: General Rules and Choice of Court*, in in BARIATTI S., VIARENGO I., VILLATA F.C. (eds), *EU Cross-Border Succession Law*, cit., p. 219.

[29] Judgment of the Court (Third Chamber) of 12 October 2023, OP v Notariusz Justyna Gawlica, Case C-21/22, para. 22.

5. *The second question: Succession Regulation, bilateral agreements and the possibility to choose the applicable law*

Moving on to examine the second question raised by the referring court, the CJEU focused on the core controversial issue, regarding the coordination between the Succession Regulation and bilateral agreements to which Member States were already party before the entry into force of the EU discipline.

In particular, in the case at hand, the 1993 Bilateral Agreement between Poland and Ukraine did not take any position on the possibility to choose the law applicable to the succession, being silent on the matter and only providing objective connecting factors. Therefore, the issue was whether OP could choose Ukrainian law as applicable to her succession in accordance with Article 22 Succession Regulation, in the form of a will drafted by a notary in Poland. As a consequence, it was necessary to consider the interplay between Articles 22 and 75 of the Succession Regulation, the latter governing the relationship between the Regulation and existing international conventions. More specifically, in the case at hand the relevant provision was Article 75, para. 1, stating that the Regulation "*shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of this Regulation and which concern matters covered by this Regulation*".

The CJEU concluded that, in principle, Article 75 of the Succession Regulation does not preclude a national of that third State, residing in a Member State, from not being able to choose the law of that third State to govern his or her succession as a whole: this may be the case if a bilateral agreement, concluded between the Member State and the third State concerned before the adoption of that regulation, designates the law applicable to succession and does not expressly provide for the possibility of choosing another law[30].

The CJEU has started with recalling its consolidated approach when interpreting EU rules similar to Article 75 of the Succession Regulation: in fact, the provision at hand is not an isolated example

[30] Judgment of the Court (Third Chamber) of 12 October 2023, OP v Notariusz Justyna Gawlica, Case C-21/22, para. 38.

in the EU instruments on judicial cooperation in civil and commercial matters, a similar logic being present many other regulations[31].

Accordingly, taking inspiration from its previous case-law, the CJEU decided to adopt an approach based on the objectives and principles governing the Succession Regulation. In fact, the Court sustained that "*the article governing, within the EU legal act at issue, the relationship between that act and international conventions cannot have a scope which conflicts with the principles underlying the legislation of which it forms part*"[32]. In support of this argument, the Court made explicit reference to the reasoning adopted with reference to Article 71 of the Brussels I Regulation: in *TNT Express Nederland*[33], the Court had recalled that the provision could not be interpreted in the sense to allow the application of a convention, where the latter would lead to results which are incompatible with the objectives of EU law[34].

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[31] See Articles 71 and 73, para. 3, of 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 (recast)(Brussels I bis), in OJ L 351, 20.12.2012, p. 1 (with similar provisions already to be found in Article 57 of the 1968 Brussels Convention and in Article 71 of the Brussels I Regulation); Article 25, para. 1, of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), in OJ L 177, 4.7.2008, p. 6; Article 28, para. 1, of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), in OJ L 199, 31.7.2007, p. 40; Article 69, para. 1, of Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in OJ L 7, 10.1.2009, p. 1.

[32] Judgment of the Court (Third Chamber) of 12 October 2023, OP v Notariusz Justyna Gawlica, Case C-21/22, para. 29.

[33] Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08. On the decision see MAGRONE M.E., *Trasporto merci: Convenzione ad hoc applicabile solo se prevedibile e in grado di limitare liti parallele*, in *Guida al Diritto*, 2010, 21, p. 96; KUIJPER P.J., *The Changing Status of Private International Law Treaties of the Member States in Relation to Regulation No. 44/2001 - Case No. C-533/08, TNT Express Nederland BV v. AXA Versicherung AG*, in *Legal Issues of Economic Integration*, 2011, p. 89; TUO C.E., CARPANETO L., *Connections and Disconnections Between Brussels Ia Regulation and International Conventions on Transport Matters*, in *Zbornik Pravnog fakulteta u Zagrebu*, 2016, p. 141.

[34] Similarly, see Judgment of the Court of 22 September 1988, Ministère public v Gérard Deserbais, Case 286/86, para. 18; Judgment of the Court of 6 April 1995, Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities, Joined Cases C-241/91 P and C-242/91 P, para. 84; Judgment of the Court (Fourth Chamber) of 22 October 2009, Irène Bogiatzi, married name Ventouras v Deutscher Luftpool and Others, Case C-301/08, para. 19; Judgment of the Court (Third

On those premises, the CJEU has examined the founding principles of the Succession Regulation, making important clarifications. Firstly, according to the Court, party autonomy is not a cornerstone of the instrument under consideration[35]. In fact, as observed by the Advocate General in his Opinion[36], the freedom to choose the law applicable to the succession plays a limited role in the Regulation, representing a derogation from the general rule contained in Article 21.

Secondly, the Court went on to examine the principle of the single estate, concerning the unitary nature of the succession for the purpose of jurisdiction and applicable law. Indeed, this feature is characterized as a backbone of the Succession Regulation[37]. However, this does not mean that the principle is absolute, or is to be applied in rigid terms[38]. In fact, there are some provisions in the Succession Regulation departing from the unitary treatment of the estate: among others, Article 12, para. 1, provides that the court detaining jurisdiction according to the Regulation is entitled to refrain from ruling on property forming part of the estate which is situated in a third country.

In the light of the above, provided that the CJEU is only called to interpret the Succession Regulation, the conclusion was in the sense that Article 75, para. 1, does not preclude the application of a bilateral agreement concluded between a Member State and a third State before the adoption of the Regulation, where the agreement in question excludes the right of a third-country national to choose the law applicable to his or her succession.

Chamber), 19 December 2013, Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV, Case C-452/12, para. 36.

[35] Judgment of the Court (Third Chamber) of 12 October 2023, OP v Notariusz Justyna Gawlica, Case C-21/22, para. 33.

[36] Opinion of Advocate General Campos Sánchez-Bordona delivered on 23 March 2023, Case C-21/22, OP, para. 58.

[37] See also the previous CJEU case-law: Judgment of the Court (Second Chamber) of 12 October 2017, Proceedings brought by Aleksandra Kubicka, Case C-218/16, para. 43); Judgment of the Court (Second Chamber) of 21 June 2018, Proceedings brought by Vincent Pierre Oberle, Case C-20/17, para. 54-56; Judgment of the Court (Fifth Chamber) of 7 April 2022, V A and Z A v TP, Case C-645/20, para. 38; Judgment of the Court (First Chamber) of 9 September 2021, Proceedings brought by UM, Case C-277/20, para. 33.

[38] Judgment of the Court (First Chamber) of 16 July 2020, Proceedings brought by E. E., Case C-80/19, para. 69.

6. *Concluding remarks*

The decision of the CJEU is to be welcome in the part in which it recognized the intent of the EU lawmaker to preserve the operativity of international conventions to which Member States were already party before the adoption of the Succession Regulation. This approach is compatible with Article 351 TFEU, which preserves the effects of international treaties concluded by the Member States before their accession to the EU[39].

At the same time, as observed by the Advocate General in his Opinion[40], the application of the CJEU's case law on coordination provisions contained in other instruments (namely, the 1968 Brussels Convention, the Brussels I Regulation and the Brussels I bis Regulation)[41] was not straightforward.

Limiting the analysis to the provisions of Brussels I bis Regulation, to which the CJEU's case-law on the preceding instruments also applies, some brief considerations should be made. According to Article 71 of the Brussels I bis Regulation, the latter "*shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments*"[42]. Therefore, the provi-

[39] On Article 351 TFEU, as essential references, see CANNIZZARO E., *Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case*, in *Yearbook of European Law*, 2009, p. 596; KLABBERS J., *Moribund on the Fourth of July? The Court of Justice on Prior Agreements of the Member States*, in *European Law Review*, 2001, p. 187; ID., *Treaty Conflict and the European Union*, Cambridge, 2010; MANZINI P., *The Priority of Pre-existing Treaties of EC Member States within the Framework of International Law*, in *European Journal of International Law*, 2001, p. 781; PANTALEO L., *Member States Prior Agreements and Newly EU Attributed Competence: What Lesson from Foreign Investment*, in *European Foreign Affairs Review*, 2014, p. 307; SALUZZO S., *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi*, Torino, 2018, p. 115; SANDRINI L., *Lo* status *degli accordi internazionali stipulati dagli Stati membri dell'Unione europea, tra giurisprudenza recente e nuove soluzioni normative*, in *Diritto pubblico comparato ed europeo*, 2013, p. 824; ID., *Articolo 351 TFUE*, in POCAR F., BARUFFI M.C. (eds), *Commentario breve ai Trattati dell'Unione europea*, cit., p. 1554.

[40] Opinion of Advocate General Campos Sánchez-Bordona delivered on 23 March 2023, Case C-21/22, OP, para. 38 ff.

[41] See *supra*, note 30.

[42] On the provision, as well as on the corresponding provisions in the 1968 Brussels Convention and in the Brussels I Regulation, see MANKOWSKI P., *Article 71*, in MAGNUS

sion makes reference to international conventions that are specialized by reason of their subject matters. It is informed by the *lex specialis* principle, giving precedence to the international convention. This rule also applies when the issue under consideration concerns the relationships between EU Member States, and no third country is involved in that specific case. In that context, the main *rationale* is to preserve the effects of those agreements in the light of their specialized scope of application[43].

It is on Article 71 that the CJEU has made, *inter alia*, two important statements. Firstly, when a convention that is specialized by reason of its subject matter lacks a specific solution to a particular problem and that solution is provided in the EU legislation, the Member States are to apply the latter. This position can be inferred from the *Tatry* judgment[44]. Secondly, other than having a "filling-

U., MANKOWSKI P. (eds), *Brussels Ibis Regulation*, Köln, 2016, p. 1044; BELMONTE A., *Sul coordinamento tra l'art. 57 della Convenzione di Bruxelles del 1968 e le altre convenzioni disciplinanti la competenza giurisdizionale*, in *Giustizia civile*, 2005, p. 586; CARBONE S.M., *La nuova disciplina comunitaria relativa all'esercizio della giurisdizione e il trasporto marittimo*, in *Rivista di diritto internazionale privato e processuale*, 1988, p. 633; BORRÁS A., DE MAESTRI M.E., *Articolo 71*, in SIMONS T., HAUSMANN R., QUEIROLO I. (eds), *Regolamento Bruxelles I. Commento al Regolamento (CE) 44/2001 e alla Convenzione di Lugano*, Munich, 2012, p. 938; VASSALLI DI DACHENHAUSEN T., *I rapporti tra Convenzione di Bruxelles con le altre convenzioni sulla competenza giurisdizionale e l'esclusione delle sentenze in materia civile e commerciale*, in *Jus*, 1990, p. 119. See also the contributions in CARBONE S.M. (ed), *Brussels Ia and Conventions on Particular Matters. The case of Transports*, Rome, 2017.

[43] Article 71 Brussels I bis Regulation is further specified by Article 73, para. 3, which applies to "*bilateral conventions and agreements between a third State and a Member State*", concluded before the entry into force of the Brussels I Regulation (or before the accession of the Member State concerned to the EU). Also in this case, the international agreement prevails over the Regulation. On the different disconnection clauses in the Brussels I bis Regulation, reference is made to QUEIROLO I., TUO C.E., CELLE P., CARPANETO L., PESCE F., DOMINELLI S., *Art. 67 Brussels I bis Regulation: An Overall Critical Analysis*, in QUEIROLO I., ESPINOSA CALABUIG R., GIORGINI G.C., DOLLANI N., TUO C.E., CARPANETO L., DOMINELLI S., *Brussels I bis Regulation and special rules: opportunities to enhance judicial cooperation*, Rome, 2021, p. 13, p. 22.

[44] Judgment of the Court of 6 December 1994, The owners of the cargo lately laden on board the ship "Tatry" v the owners of the ship "Maciej Rataj", Case C-406/92, para. 25: "*That being its purpose, Article 57 must be understood as precluding the application of the provisions of the Brussels Convention solely in relation to questions governed by a specialized convention. A contrary interpretation would be incompatible with the objective of the Convention which, according to its preamble, is to strengthen in the Community the legal protection of persons therein established and to facilitate recognition of judgments in order*

the-gap" function, the EU instrument cannot be superseded in its fundamental aims and goals, which cannot be compressed by any international convention (see, in particular, the *TNT* judgment)[45]. This means that the application of the latter cannot compromise the principles informing the Regulation under consideration[46].

In the light of the above, Article 75 of the Succession Regulation does not seem to find an exact correspondence in Article 71 of the Brussels I bis Regulation. In fact, the first mentioned provision applies to any convention governing aspects which are already covered by the Succession Regulation. It does not refer to conventions that are specialized by reason of their subject matters: its *ratio* and aims are different and are rather inspired by avoiding that Member States would breach of international obligations concluded with third States. In fact, under international treaty law[47], States cannot invoke their domestic legislative evolution to justify the breach of a convention[48].

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to secure their enforcement. In those circumstances, when a specialized convention contains certain rules of jurisdiction but no provision as to lis pendens or related actions, Articles 21 and 22 of the Brussels Convention apply". On the decision, see *ex multis* BRIGGS A., *The Brussels Convention tames the Arrest Convention*, in *Lloyd's Maritime and Commercial Law Quarterly*, 1995, p. 161; HARTLEY T.C., *Admiralty Actions under the Brussels Convention*, in *European Law Review*, 1995, p. 409.

[45] Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08.

[46] Judgment of the Court (Grand Chamber) of 4 May 2010, TNT Express Nederland BV v AXA Versicherung AG, Case C-533/08, para. 49: "*While it is apparent from the foregoing considerations that Article 71 of Regulation No 44/2001 provides, in relation to matters governed by specialized conventions, for the application of those conventions, the fact remains that their application cannot compromise the principles which underlie judicial cooperation in civil and commercial matters in the European Union, such as the principles, recalled in recitals 6, 11, 12 and 15 to 17 in the preamble to Regulation No 44/2001, of free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimization of the risk of concurrent proceedings, and mutual trust in the administration of justice in the European Union*". See also the Judgment of the Court (Third Chamber), 19 December 2013, Nipponkoa Insurance Co. (Europe) Ltd v Inter-Zuid Transport BV, Case C-452/12, para. 36 ff.

[47] As codified in the Vienna Convention on the Law of the Treaties, done at Vienna on 23 May 1969 and entered into force on 27 January 1980, in UN Treaty Series, vol. 1155, p. 331.

[48] Article 27 of the Vienna Convention on the Law of Treaties: "*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*".

For those reasons, and coming back to the *OP* judgment, the CJEU's case-law concerning Article 71 of the Brussels I bis Regulation did not seem to be automatically transposable to Article 75 of the Succession Regulation. The Advocate General as well was doubtful on the possibility to infer, from the previous CJEU's case-law, the ruling according to which "*the application of international conventions by the Member States [is] conditional on their application not compromising 'the principles which underlie judicial cooperation in civil and commercial matters in the European Union'*"[49]. Indeed, although this aspect is not always clear-cut, the *TNT* and *Nipponkoa* decisions seem to be limited to relations between Member States, or at least within the European judicial space[50].

Nevertheless, the Advocate General did not exclude that a "compatibility test" of this kind may be applied in the context of civil and commercial matters, including within the Succession Regulation[51]. This is the approach that has been adopted by the CJEU in the judgment under examination: although the reference to the *TNT* ruling might not be appropriate, the Court has stated that the application of Article 75 of the Regulation, in the part in which it gives precedence to an international convention between a EU Member State and a third country, cannot have the effect to undermine the principles underlying the Regulation itself[52].

In this specific case, the CJEU proceeded to examine the treaty in question (the 1993 Bilateral Agreement between Poland and Ukraine), concluding that it was not in conflict with – or abstractly capable of undermining – the principles of the Succession Regulation, even if it excluded the possibility for the testator to choose the law applicable to their succession. In the light of the above, the CJEU correctly did not interpret the 1993 Bilateral Agreement: it did not say that, indeed the latter precluded the choice of law. It was left for

[49] Opinion of Advocate General Campos Sánchez-Bordona delivered on 23 March 2023, Case C-21/22, OP, para. 40.

[50] Opinion of Advocate General Campos Sánchez-Bordona delivered on 23 March 2023, Case C-21/22, OP, para. 41.

[51] Opinion of Advocate General Campos Sánchez-Bordona delivered on 23 March 2023, Case C-21/22, OP, para. 45.

[52] Judgment of the Court (Third Chamber) of 12 October 2023, OP v Notariusz Justyna Gawlica, Case C-21/22, para. 29.

the domestic court to analyze the Agreement and decide on the matter.

On the other hand, the judgment abstractly admits the possibility that an international convention, which binds Member States and third countries, might be incompatible in its effects with the objectives of the Succession Regulation. In that case, the latter should take precedence. The consequences of this approach are not negligible. In fact, the decision under examination seems to impose to the judicial authority of Member States a duty to apply the Succession Regulation *instead* of an international convention, every time the latter risks to put in danger the founding principles of the EU legislation. This means that, when there is a conflict between the two sources of law – to which the country in question is equally bound – the consequence is to put in the Member State in the dilemma whether to breach EU law or international law. For this reason, it would have been important for the CJEU to specify that domestic authorities should conduct a careful evaluation, before deciding not to apply an international agreement: only serious and exceptional violations of the fundamental principles of the regulation should justify such a position.

On this aspect, there is a specific observation of the Advocate General that it is worth of particular attention: the Opinion states that "*before giving precedence to the EU rules, it will be necessary to determine whether, in complying with those rules, that Member State is jeopardizing the balance of obligations and rights laid down in the Convention for both parties*"[53]. This consideration (which is not to be found in the judgment of the CJEU) suggests that, when an international convention is incompatible with the founding principle of the EU instrument under consideration, the domestic court would have to consider the consequences stemming from the disapplication of the treaty, from the point of view of the relationship between the Member State and the third State(s) concerned.

[53] Opinion of Advocate General Campos Sánchez-Bordona delivered on 23 March 2023, Case C-21/22, OP, para. 48.

FRANCESCO GALLARATI

FROM INTERGENERATIONAL THEORY TO PRACTICE: THE RIGHTS OF PRESENT AND FUTURE GENERATIONS IN CLIMATE LITIGATION

1. *Ethics and law in the face of the perfect storm*

Climate change is not just an environmental problem; it is, in all likelihood, the greatest problem of justice of our time. Indeed, it involves so many interconnected ethical and legal issues as to be qualified as a "perfect moral storm"[1]. On the one hand, climate change raises questions of intragenerational justice, insofar as its consequences affect most severely those people who contributed least to causing it. On the other hand - and this is what this paper focuses on - it raises fundamental questions of intergenerational justice[2]: the greenhouse gas emissions that are responsible for it, indeed, remain trapped in the atmosphere for decades or even centuries, and so project their effects onto subsequent generations. The latter thus suffer the consequences of global warming, without having enjoyed, at least directly, the benefits generated by the emissions[3].

[1] GARDINER S.M., *A Perfect Moral Storm: The Ethical Tragedy of Climate Change*, Oxford, 2011. The essential elements of this reflection were already anticipated by the same author in ID, *A Perfect Moral Storm: Climate Change, Intergenerational Ethics and the Problem of Moral Corruption*, in *Environmental Values*, 3, 2006, p. 397 ff. In the following notes, particular reference will be made to the latter contribution.

[2] For an in-depth illustration of the intergenerational justice issues raised by climate change, see LAWRENCE P., *Justice for Future Generations. Climate Change and International Law*, Cheltenham, 2014; SHUE H., *Changing images of climate change: human rights and future generations*, in *Journal of Human Rights and the Environment,* 5, 2014, p. 50 ff.

[3] Indeed, it should not be forgotten that present generations benefit from the greenhouse gases emitted in the past, as these have helped raise their living standards. Similarly, future

The difficulties in addressing climate change from an ethical perspective are ultimately due to the temporal dispersion of the causes and effects of global warming[4]. Indeed, the consequences of climate actions (or inactions) occur over time: the global warming that is already taking place is a consequence of emissions released by past generations. Therefore, if humanity stopped emitting Co2 into the atmosphere, it would suffer immediate losses, in terms of higher energy costs and changes in lifestyle, but it would not reap any immediate benefits, as the effects of climate change would continue. In contrast, if humanity remained inert, it would continue to enjoy its ordinary way of life, while the negative consequences of its inaction would be deferred over time. This dissociation between causes and effects thus generates a formidable incentive for inaction[5].

Even more problematic, from a moral standpoint, is the ripple effect that any failure to act triggers, due to the incremental nature of climate change. As each new CO2 particle released into the atmosphere is added to those released in the past, the inaction of one generation does not merely postpone the problem, but contributes to exacerbating it. Thus, as a result of the previous generation's inaction, the next generation finds itself in an even more ethically difficult situation, since as the problem worsens, the costs of action and, therefore, the incentive to inaction increase[6].

To translate these considerations into legal terms, one needs to consider that the relationship between climate change and human rights is not unilateral, but two-sided[7] : on the one hand, global

generations will benefit in part from the effects of Co2 emissions produced by present generations. The fact that these benefits are disproportionately distributed among the peoples of the earth, as well as within national societies, raises issues of intragenerational justice, which are beyond the scope of this contribution.

[4] This distinctive feature of the climate issue has been highlighted among others in Italian scholarship by CARDUCCI M., *Cambiamento climatico (diritto costituzionale)*, in *Dig. disc. pubbl.*, 2021, p. 52 ff.; A. D'ALOIA, *Bioetica ambientale, sostenibilità, teoria intergenerazionale della Costituzione*, in *BioLaw Journal*, 2, 2019, p. 648.

[5] It is what Stephen Gardiner calls "The Problem of Intergenerational Buck Passing": GARDINER S.M., *Protecting future generations: intergenerational buck-passing, theoretical ineptitude and a brief for a global core precautionary principle*, in TREMMEL J.C. (ed), *Handbook of Intergenerational Justice*, Cheltenham, 2006, p. 148 ff.

[6] *Ibid*, 405.

[7] Cf. PEDERSEN O.W., *The Janus-Head of Human Rights and Climate Change: Adaptation and Mitigation*, in *Nordic Journal of International Law*, 2011, p. 403 ff.

warming results in the violation of many fundamental rights, such as the right to life, health, water, and so on; on the other hand, climate action limits the enjoyment of those fundamental rights and freedoms that, in non-fully decarbonized societies, involve the release of Co2[8].

At present, global warming causes the violation of the fundamental rights of millions of people and, according to the scenarios described by the IPCC, the situation is set to worsen in the coming years, regardless of the countermeasures taken by the current generation[9]. In this context, adopting ambitious climate policies would mean restricting citizens' freedoms in the present without the prospect of reaping any benefits in the near future. On the other hand, inaction by today's decision-makers exposes those of tomorrow to the alternative between adopting even more radical restrictions on fundamental freedoms or passing the problem on to the next generation[10].

How to break this perverse mechanism before it leads humanity to a climate ecatombe?

Moral philosophy has long sought to provide answers to problems of intergenerational justice in general[11] and those related to climate justice in particular[12] . These philosophical debates have also influenced legal scholarship, finding an echo in international law studies

[8] The rights and freedoms that depend on greenhouse gas emissions are not only economic freedoms, but also those very rights that are directly affected by climate change: consider, for example, the devastating consequences that an absolute and immediate ban on the use of fossil fuels would produce in terms of the availability of basic necessities such as food and medicine.

[9] See IPCC, *AR6 Synthesis Report: Climate Change* 2023, published in March 2023 and freely available at www.ipcc.ch.

[10] GARDINER S.M., *A Perfect Moral Storm,* cit., p. 405 ff.

[11] An early treatment of the intergenerational question from an ethical perspective can be found in RAWLS J., *A Theory of Justice*, Cambridge, 1971, p. 284 ff. But the first accomplished formulation of an intergenerational ethics is by JONAS H., *Das Prinzip Verantwortung: Versuch einer Ethik für die technologische Zivilisation*, Frankfurt, 1979.

[12] See the writings collected in GARDINER S.M., CANEY S., JAMIESON D., SHUE H.,(eds), *Climate Ethics: Essential Readings*, Oxford, 2010; as well as the essays by PAGE E.A., *Climate Change, Justice and Future Generations*, Cheltenham, 2006; POSNER E.A., WEISBACH D., *Climate Change Justice*, Princeton, 2010; SHUE H., *Climate Justice: Vulnerability and Protection*, Oxford, 2016.

since the late 1980s[13]. More recently, constitutional law scholarship has also taken an interest in these issues[14] , prompted by the introduction of intergenerational concepts such as 'sustainability' or 'future generations' into numerous constitutions[15]. However, the theories advanced in this field, no matter how refined and rigorous, necessarily resolved into theoretical speculation, given the lack of positive data with which to test the findings of such elaborations.

Today it is possible to take this discourse a step further. Indeed, recent years have witnessed a wide spread of climate litigations around the world, many of which featuring intergenerational arguments. Of particular interest from this perspective are the so-called "*youth-led"* climate litigations, i.e. those brought by young people or children, either in their own name or via organizations representing their interests, for the purpose of denouncing violations of their rights due to climate change[16].

In this paper I do not intend to conduct an analytical survey of these litigations, which have already been the subject of several studies[17]. Instead, what I aim to do is to ascertain whether and how the

[13] Numerous authors have declined ethical issues related to intergenerational responsibility from the perspective of international environmental law. In addition to the work of Edith Brown Weiss, to which we will return at length *infra*, see LAWRENCE P., *Justice for Future Generations*, cit.; HISKES R.P., *The human right to a green future: environmental rights and intergenerational justice*, Cambridge, 2009.

[14] In Italian constitutional scholarship an essential reference are the works of BIFULCO R., *Diritto e generazioni future. Problemi giuridici della responsabilità intergenerazionale*, Milan, 2008; and D'ALOIA A., *Generazioni future (diritto costituzionale)*, in *Enc. diritto*, Annali IX, 2016, p. 337 ff.; as well as the collection of writings edited by the two authors: BIFULCO R., D'ALOIA A. (eds), *Un diritto per il futuro. Teorie e modelli dello sviluppo sostenibile e della responsabilità intergenerazionale*, Naples, 2008. More recently, see the monographic books by PORENA D., *Il principio di sostenibilità. Contributo allo studio di un programma costituzionale di solidarietà intergenerazionale,* Turin, 2017; BARTOLUCCI L., *La sostenibilità del debito pubblico in Costituzione. Procedure euro-nazionali di bilancio e responsabilità verso le generazioni future*, Padua, 2020; PALOMBINO G., *Il principio di equità generazionale. La tutela costituzionale del futuro*, Florence, 2022.

[15] GROPPI T., *Sostenibilità e costituzioni: lo Stato costituzionale alla prova del futuro*, in *Dir. Pubbl. comp. eur.*, 1, 2016, p. 43 ff.

[16] For a definition of youth-led climate litigation, see DONGER E., *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, in *Transnational Environmental Law*, 2, 2022, p. 269-270.

[17] In addition to the already cited paper by DONGER E., *Children and Youth,* cit., see also SLOBODIAN L., *Defending the Future: Intergenerational Equity in Climate Litigation*, in *The Georgetown Environmental Law Review*, 32, 2020, p. 569 ff.; PARKER L. ET AL.,

theoretical reconstructions developed in the ethical and legal literature have been implemented in the decisions adopted by the courts dealing with these disputes. The hypothesis I put forward is that in the comparative scenario the courts have espoused different - in some ways opposing - understandings of the principles of intergenerational justice, reflecting the anthropocentric or ecocentric visions adopted by the respective legal systems with regard to the relationship between humans and the environment.

To advance this thesis, in the following paragraphs I will first outline some of the main models of response to intergenerational problems theorized in the ethical and legal literature, focusing in particular on the doctrine of *planetary rights* elaborated by Edith Brown Weiss[18] and the doctrine of the *chain of obligations* formulated by Axel Gosseries[19] (section 2). Next, I will analyze in depth two emblematic cases of climate litigation, in which some aspects of the above theories seem to have been transposed: the case of the Amazon in Colombia and the *Neubauer* case in Germany (section 3). Finally, I will explain why I believe that the approach of the German Constitutional Court, based on the intertemporal protection of fundamental freedoms, represents an effective response to the transgenerational problems raised by climate change (section 4).

2. *Theoretical models of intergenerational justice compared*

The scholarly literature on intergenerational responsibility and future generations is so vast that it is not possible here to give even

When the Kids Put Climate Change on Trial: Youth-Focused Rights-Based Climate Litigation around the World, in *Journal of Human Rights and the Environment*, 13, 2022, p. 64 ff.; SULYOK K., *A rule of law revolution in future generations' litigation - intergenerational equity and the rule of law in the Anthropocene* in *re:constitution Working Papers*, *Forum Transregionale Studien*, 14, 2023; SPENTZOUN D., *Climate change litigation as a means to address intergenerational equity and climate change*, in *Queen Mary Law Journal*, 2, 2021, p. 153 ff.

[18] WEISS E.B., *In Fairness to Future Generations. International Law, Common Patrimony and Intergenerational Equity*, Tokyo, 1989.

[19] GOSSERIES A., *On future generations' future rights*, in *The Journal of Political Philosophy*, 2008, p. 446 ff. Some elements of this theory had already been enunciated by the same author in GOSSERIES A., *Penser la justice entre générations*, *De l'affaire Perruche à la réforme des retraites*, Paris, 2004.

a summary account of it. I will therefore simply outline a few issues that are indispensable for the purpose of this paper, as they bring out the distinctive elements of the two theoretical models of response that are intended to be analyzed here. These issues can be summarized in the following two questions: who are future generations? (par. 2.1); by what title are we obligated to them? (par. 2.2).

2.1. *Who are the future generations?*

A first difficulty encountered in addressing, from a legal perspective, the issue of intergenerational responsibility, is the definition of the concepts of 'present' and 'future' generations. In fact, generations do not succeed to one another in a linear fashion, but overlap, so that at each historical moment at least two successive generations coexist[20]. Moreover, the very idea of clearly distinguishing one generation from the next is illusory, since what occurs in social reality, rather than an orderly succession, is an uninterrupted flow of generations[21] .

What, then, should be meant by 'present' and 'future' generations in the context of a theory of intergenerational responsibility?

Some authors, aware of the ambiguities inherent in these concepts, have proposed limiting the addressees of intergenerational obligations to those who are not yet born at the time they are referred to[22]. Such an approach, however, while it may have merits from a philosophical point of view, does not seem acceptable from a legal perspective. Indeed, it is hard to see why an intertemporal obligation (e.g., the obligation to achieve climate neutrality by 2050) should not apply to all persons who will be alive in the future, but only to those who have not yet been born at the time the obligation is recognized. This would amount to clear unequal treatment, based on a purely accidental factor (whether or not one is born at the time the obligation is affirmed). Besides, climate litigations show that, in

[20] On this concept, see GOSSERIES A., *On future generations' future rights*, cit., p. 455 ff.

[21] See CANEY S., *Justice and Posterity*, in KANBUR R., SHUE H. (eds), *Climate Justice: Integrating Economics and Philosophy*, Oxford, 2018, p. 160-161.

[22] TREMMEL J.C., *A Theory of Intergenerational Justice,* London, 2009, p. 19 ff.

most cases, it is young people or children who have enforced the intertemporal obligations incumbent on policymakers, sometimes explicitly acting on behalf of (as part of) future generations[23]. Therefore, for the purposes of this paper, it can be assumed that the addressees of intergenerational obligations are all those who will live into the future, regardless of whether or not they are born at the time these obligations are asserted.

Another issue associated with intergenerational justice is whether the obligations of the present generations are addressed only to the nearest generations or also to more distant ones. In support of limiting the subjective scope of intertemporal duties to the nearest generations, some authors point out that only with the latter do present generations entertain an emotional and moral bond and that only of them can we imagine with sufficient accuracy the desires and needs[24]. These theses, though, when viewed from the legal perspective, do not seem acceptable. The different gradations of affective intensity that bind subsequent generations, while relevant from a moral point of view, do not seem capable of delimiting the legal scope of intergenerational obligations: these, in fact, from the moment they are legally affirmed, necessarily extend to all successive generations, regardless of when they come into existence. Indeed, all attempts to identify objective criteria to temporally delimit the scope of intergenerational duties, and thus to justify discrimination among members of successive generations, rely on questionable parameters. For example, with reference to climate change, Simon Caney has proposed that the duration of each generation's duties should extend as long as the effects of its actions endure[25]; which, however, given that some GHG remain in the atmosphere for hundreds of thousands of years, is de facto equivalent to saying "forever".

[23] Emblematic in this regard is the *Generaciones Futuras* litigation settled by the Supreme Court of Colombia in 2018, to which we will return *infra*.

[24] Also on these positions is SPADARO A., *L'amore dei lontani: universalità e intergenerazionalità dei diritti fondamentali fra ragionevolezza e globalizzazione*, R. BIFULCO, A. D'ALOIA (eds), *Un diritto per il futuro,* cit., p. 72 ff.

[25] CANEY S., *Justice and Posterity,* cit., p. 163.

2.2. *Intergenerational rights or duties?*

What has been argued so far – namely, that intergenerational responsibility concerns all those who will live into the future, regardless of the time of their coming into being – is shared by both theories under examination here[26], which is why up to this point it has not been deemed useful to introduce a distinction.

The paths diverge, instead, when investigating the legal basis of intergenerational duties, that is, by what legal title present generations are obligated to future ones. On this point, the numerous doctrines advanced in legal scholarship can be divided into two categories, depending on whether they configure future generations as holders of rights, or affirm the existence of duties of present generations towards future ones, but without attributing correlative rights to the latter.

The two theories considered below offer an exemplification of these two distinct theoretical approaches, one recognizing future generations as planetary rights holders (Section 2.2.1), the other depicting intergenerational responsibility as a chain of obligations between successive generations (Section 2.2.2).

2.2.1. *The theory of planetary rights*

Theories involving the attribution of subjective rights in favor of future generations have attracted great attention and garnered numerous proselytes in the legal literature[27].

Despite their popularity, these theories have always been confronted with non-easy-to-solve theoretical issues, mainly pertaining to the objections of non-existence and non-identity. The first of these

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[26] See especially WEISS E.B., *In Fairness to Future Generations,* cit., p. 97.

[27] Among the earliest and best known voices in favor of recognizing rights in the head of future generations, see ELLIOT R., *The Rights of Future People*, in *Journal of Applied Philosophy*, 6, 1989, p. 159 ff.; FEINBERG J., *The Rights of Animals and Unborn Generations*, in PARTRIDGE E. (ed), *Responsibilities to Future Generations: Environmental Ethics*, Buffalo, 1981, p. 139 ff.; PARTRIDGE E., *On the Rights of Future Generations*, in SCHERER D. (ed), *Upstream/downstream: Issues in Environmental Ethics*, Philadelphia, 1990.

objections is based on the assumption that persons belonging to future generations cannot hold rights in the present because they do not yet exist; that is, they will hold rights when they are born, but since it is not possible to predict if and when this will happen, they cannot be considered rights-holders in the present[28]. The second objection, which is based on the paradox formulated by Derek Parfit, is to deny that future people can resent the actions of present generations, because without those same people would never be born. Parfit's argument is based on the premise that present actions affect the identity of individuals who will live in the future, so that even an irresponsible decision by a previous generation can never be deemed to violate the rights of the members of subsequent generations, since, in its absence, those same individuals would not exist[29].

Proponents of the theories of the rights of future generations have responded to these objections through diverse and articulate arguments. Here I will focus on the doctrine of *planetary rights*, formulated by American jurist Edith Brown Weiss in her 1989 essay *In Fairness to Future Generations*[30] and later taken up in subsequent writings[31] .

Brown Weiss affirms that any theory of intergenerational justice must be based on two orders of relationships: our relationship with other generations of our species and our relationship with the natural system of which humans are a part[32]. Building on these premises, the author qualifies the planet as the common heritage of all humankind and argues that each generation is, at the same time, the custodian (*trustee*) and beneficiary of natural resources[33]. More precisely, this theory claims that each generation is the holder of a set of planetary rights and obligations, consisting on the one hand of the right to receive the planet in no worse condition than the previous generation

[28] The best known formulation of this objection is due to BECKERMAN W., PASEK J., *Justice, Posterity and the Environment*, Oxford, 2001; BECKERMAN W., *The Impossibility of a Theory of Intergenerational Justice*, in TREMMEL J.C. (ed), *Handbook of Intergenerational Justice*, cit., p. 53 ff.

[29] PARFIT D., *Reasons and Persons,* Oxford, 1987.

[30] WEISS E.B., *In Fairness to Future Generations*, cit.

[31] WEISS E.B., *Our Rights and Obligations to Future Generations for the Environment*, in *American Journal of International Law*, 84, 1990, p. 198 ff.

[32] WEISS E.B., *Our Rights and Obligations,* cit., p. 199.

[33] E WEISS E.B., *In Fairness to Future Generations,* cit., p. 17.

and, on the other hand, the obligation to preserve it so that subsequent generations can also benefit from the same opportunities as previous ones[34] .

The distinguishing feature of this doctrine is that the rights affirmed therein are not individual rights[35], but *group* rights, that is, rights that belong collectively to each generation, regardless of the number and identity of the individuals composing it[36]. These rights therefore do not concern relations between individuals of different generations, but between the various generations that make up the human community[37].

The collective nature of planetary rights allows this theory to avoid incurring the objections of non-existence and non-identity, since the recognition of these rights prescinds from the possibility of identifying their holders[38] . However, this same fact makes it hard to extend this conception to liberal legal systems, such as the European ones, where rights are traditionally conceived as individual claims that can be enforced by determined subjects. Conversely, this theory is compatible with a communitarian view of rights[39] or even with the attribution of rights to nonhuman subjects[40].

2.2.2. *The chain of obligations theory*

A different approach to the issue of intergenerational responsibility is taken by those theories that affirm the existence of obligations of present generations to future ones, without attributing to the latter

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[34] *Ibid*, p. 95.

[35] It should be noted, however, that, according to the author, these planetary rights, when held by living subjects, as part of the present generation, translate into individual rights, which can be enforced individually by their respective holders. Cf. WEISS E.B., *In Fairness to Future Generations,* cit., p. 97.

[36] *Ibid*, p. 96.

[37] *Ibid*.

[38] Thus WEISS E.B., *Our Rights and Obligations,* cit., p. 205.

[39] We refer to the current of thought aimed at configuring collective rights in the head of entire peoples or even the whole of humanity. To this category several authors, including in Italian scholarship, trace environmental rights. See S. RODOTÀ, *Il diritto di avere diritti*, Bari, 2015, p. 81.

[40] See in this sense also D'ALOIA A., *Generazioni future,* cit., p. 365.

any rights towards the former. These theories are based on the assumption that not all obligations presuppose the existence of a right, and that it is possible to assert the existence of an obligation without the identity of the relevant beneficiary being known. While having the merit of not incurring the ethical-legal problems inherent in the attribution of rights to future subjects, these theories are subject to a different order of criticism, because of the lesser moral and legal force generally associated with the category of duties. Indeed, it is often advanced in legal literature that rights possess greater symbolic relevance and that their violation is usually followed by the activation of more effective remedies[41]. Hence the attempt by some authors to develop a theory that, while not incurring the ethical-legal problems underlying the attribution of (individual or collective) rights to future subjects, does not abandon the symbolism and legal toolkit proper to fundamental rights.

One of the most persuasive approaches of this kind is the "chain of obligations" theory, formulated by Richard Howarth in 1992[42] and refined by Axel Gosseries in 2008[43]. This theory is based on the assumption that generations do not succeed linearly, but overlap, so that at any given time at least two successive generations coexist. Given this premise, this theory suggests that each generation has an obligation toward the next generation with which it overlaps and that, conversely, each generation has a right toward the previous one[44].

Schematically, let us assume that generation A overlaps with generation B, and that generation B overlaps with generation C, but that generations A and C do not even partially overlap[45]. In such situation, the non-existence and non-identity objections prevent the attribution of rights to generation C vis-à-vis generation A, since, for the entire existence of the latter, the members of generation C will

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[41] WEISS E.B., *In Fairness to Future Generations,* cit., p. 101.

[42] HOWARTH R.B., *Intergenerational justice and the chain of obligation*, in *Environmental Values*, 1, 1992, p. 133 ff.

[43] GOSSERIES A., *On future generations' future rights*, cit., p. 446 ff.

[44] GOSSERIES A.,, *On future generations' future rights,* cit., p. 463.

[45] For similar schematizations, see BOS G., *A chain of status. Long-term responsibility in the context of human rights*, in BOS G., DÜWELL M. (eds), *Human Rights and Sustainability. Moral responsibilities for the future*, Abingdon, 2016, p. 108.

not be born[46]. However, nothing precludes giving generation B an intergenerational right toward generation A, since the members of generation B are not future subjects, but are flesh-and-blood persons[47].

This way, at first glance, the temporal extension of intergenerational obligations might appear to be limited to the life of the immediately succeeding generation, thus leaving unprotected those issues whose effects propagate beyond the duration of a human lifetime[48]. However, the theory under consideration responds to this objection through what Gosseries calls the "transitive strategy"[49]. This strategy consists in giving members of generation B the right to demand of A not only that it fulfills its duties to B, but also that it does not act in such a way as to make it impossible or excessively difficult for B to fulfill its duties to C. In this way, through a chain of transgenerational obligations, the members of the younger generation are given the power to ensure that present generations fulfill their obligations even to remote generations[50].

This theory differs substantially from the one set forth above for at least three reasons: first, it does not configure intergenerational rights as belonging to an indefinite collectivity, but rather as individual rights attributed to the members of each generation. Secondly, it does not attribute rights to unborn individuals, but to real persons, who acquire them at the moment of birth. Lastly, this theory does not require each generation to transmit the planet (at least) in the condition in which it received it, but seeks to achieve an equitable distribution of the burdens arising from intergenerational obligations, so that each generation can fulfill its duties without being forced to endure excessive restrictions in the enjoyment of its own rights[51].

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[46] A. GOSSERIES, *On future generations' future rights,* cit., p. 462.

[47] Cf. HOWARTH R.B., *Intergenerational justice,* cit., p. 135.

[48] A typical example is that of nuclear waste, which can produce negative effects even a considerable time after it was generated.

[49] GOSSERIES A., *On future generations' future rights,* cit., p. 461 ff.

[50] HOWARTH R.B., *Intergenerational justice,* cit., p. 135.

[51] GOSSERIES A., *On future generations' future rights,* cit., p. 462-463.

3. *From Theory to Climate Litigation*

As noted above, climate litigation provides a good viewpoint for assessing the practical implications of different theoretical models of intergenerational justice. In this section, I will focus on two climate cases in which the theories just exposed seem to have found concretization: the Colombian case *Generaciones Futuras v Minambiente* (para. 3.1) and the German case *Neubauer* (para. 3.2).

3.1 *The Amazon case (Colombia)*

The first case[52], settled by the Supreme Court of Colombia in 2018, was initiated by an *acción de tutela* (a form of *amparo*) brought by a group of young people aged between 7 and 25, who alleged that their constitutional rights had been violated as a result of the Colombian state's failure to fulfill its national and international commitments to reduce deforestation in the Amazon.

The ruling has had great resonance in legal literature[53], especially in the part where it recognized the Colombian Amazon as a "subject of rights"[54]. For the purposes of this paper, however, we are interested in focusing on the parts of the judgment in which the Court addressed the issue of the rights of future generations. To be true, this issue had not been raised by the plaintiffs, who had made their arguments according to a rather usual pattern in *youth-led* climate litigations. Indeed, they claimed that, because of their young age, they expected to spend the central part of their lives in the period between 2041 and 2070, when, according to scientific evidence, the average temperature in Colombia is expected to rise by more than 1.5°C. They therefore claimed that the Colombian state, by failing

[52] Suprema Corte de Justicia, STC4360-2018, *Generaciones Futuras v Minambiente*.

[53] Among many commentaries on this ruling, see ACOSTA ALVARADO P.A., RIVAS-RAMIREZ D., *A Milestone in Environmental and Future Generations' Rights Protection: Recent Legal Developments before the Colombian Supreme Court*, in *Journal of Environmental Law*, 3, 2018, p. 519 ff.; PELIZZON A., *An Intergenerational Ecological Jurisprudence: The Supreme Court of Colombia and the Rights of the Amazon Rainforest*, in *Law, Technology and Humans*, 2020, p. 33 ff.

[54] Section 14.

to take adequate steps to counter Amazon deforestation, was contributing to the violations of fundamental rights to which they would be exposed in the future as a result of climate change[55].

In its decision, the Court departed from the plaintiffs' argumentative pattern, to focus instead on the question of the configurability of future generations' rights under Colombian Constitution[56]. This reasoning is framed by the Court as part of a radical critique addressed to the "anthropocentric and selfish" model of liberal constitutionalism[57], to which it opposes the ecocentric "ideology"[58] underlying the new model of "ecological constitution"[59] espoused by the Colombian legal system. Within this framework, the rights of future generations are conceived as part of a broader process that aims to extend the scope of protection of fundamental rights. Indeed, for the Court, rights should not be limited to protecting individuals, but must extend to all people living on the planet as well as the "unborn"[60].

Especially noteworthy is the section of the judgment in which the Colombian Supreme Court, with strikingly similar words to those employed by Edith Brown Weiss in the above-cited essay[61], identifies the foundation of the rights of future generations, on the one hand, in the "ethical duty of solidarity of the species" and, on the other, in the "intrinsic value of nature," of which future generations are part[62]. From this dual connection the Court derives a legal rights-duties relationship between generations, whereby present generations are charged with obligations to "care and custody of natural goods and the future human world"[63], while future generations are entitled with the right "to benefit from the same environmental conditions enjoyed by us"[64].

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[55] The plaintiffs' arguments are set out in paragraph 2 of the judgment.

[56] In truth, the solution of this issue was not necessary for the decision, since, according to the judgment, the plaintiffs were entitled to sue on their own behalf for the violation of their own fundamental rights.

[57] Section 4.

[58] Section 5.

[59] Section 7.

[60] Section 5.2.

[61] WEISS E.B., *Our Rights and Obligations,* cit., 199.

[62] Section 5.3.

[63] *Ibid.*

[64] Section 5.2.

As for the legal nature of these rights, the Court is clear in tracing them to the category of "collective rights"[65] . In fact, in the case at hand, the Court recognizes the violation of the plaintiffs' rights, but not as individuals so much as part of a broader community that includes "all the inhabitants of the national territory, both for present and future generations"[66], and within a relationship of solidarity that extends to "all the populations of the globe, including ecosystems and all living beings"[67].

In sum, the view adopted by the Colombian Supreme Court has several points of contact with the planetary-rights theory exposed above. First of all, the foundation of intergenerational responsibility is, in both conceptions, identified in a dual relationship of solidarity (i) between the generations of the human species and (ii) between humans and nature. This results in an intergenerational legal relationship, in which future generations are entitled with the collective right to benefit from the same environmental conditions enjoyed by present generations and, conversely, the latter are charged with obligations to care for and preserve the planet for the benefit of future generations.

Compared to the theory put forward by Edith Brown Weiss in 1989, the arguments adopted, thirty years later, by the Colombian Supreme Court are characterized by a more markedly ecocentric attitude, which is the product of the cultural context of recent years' Latin American constitutionalism. Elements of ecocentrism, however, were not absent in the thinking of the American jurist, who in some points of her theory referred to obligations that existed independently of a human counterpart[68]. Therefore, it does not seem incorrect to say that the theory of planetary rights contained in itself the seeds for an ecocentric reading of intergenerational relations, which in the Columbian judgment found fulfillment.

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[65] Section 8.
[66] Section 11.
[67] Section 11.3.
[68] See WEISS E.B., *In Fairness to Future Generations,* cit., p. 23.

3.2. *The Neubauer case (Germany)*

The second case being examind is the landmark decision of the German Federal Constitutional Court issued in March 2021, in the *Neubauer* case, which ruled that the Federal Climate Act (KSG) was partially unconstitutional[69]. The ruling is well known and has been the subject of extensive commentary[70]. Here, I will focus specifically on those aspects pertaining to intergenerational responsibility.

It seems to me that the reasoning of the Bundesverfassungsgericht, regarding the relationship between present and future generations, can be summarized in four basic propositions: 1) Future generations do not hold fundamental rights; 2) The state is charged with protective obligations (also) towards future generations; 3) The burdens associated with the fulfillment of intergenerational obligations must be distributed equally among generations; 4) An unequal distribution of these burdens results in an anticipated impairment of the future enjoyment of the rights of present generations.

1) The first assumption is reiterated in several points of the judgment: a first time in section 109, where the Court - after stating that the plaintiffs are entitled to bring the action because they are "presently" (*gegenwärtig*) affected in their fundamental rights[71] - specifies that "the plaintiffs are not asserting the rights of unborn persons or even entire generations, neither of whom enjoy subjective fundamental rights" but rather "are invoking their own fundamental rights"[72].

The Court then returns to the point in section 146, where it states that the duty to protect life and bodily integrity flowing from Article 2(2) GG "has a solely objective dimension because future generations – either as a whole or as the sum of individuals not yet born – do not yet carry any fundamental rights in the present"[73].

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[69] Bundesverfassungsgericht (BVerfG), Beschluss des Ersten Senats, March 24, 2021, 1 BvR 2656/18-1BvR78/20-1BvR96/20-1BvR288/20, published on April 29, 2021.

[70] For some early comments from German doctrine, see the discussion "Der Klimabeschluss des BVerfG," sponsored by verfassungsblog.de, available at https://verfassungsblog.de/category/debates/der-klimabeschluss-des-bverfg/.

[71] Section 108.

[72] Section 109.

[73] Section 146.

2) While the Court denies the possibility of conferring fundamental rights on future generations, either as individuals or as "groups", it shows no reticence in affirming the existence of a state duty to protect future generations. Indeed, the Court acknowledges in several points of its judgment the existence of such a duty, the basis of which is found in the duties of protection inherent in the objective dimension of Article 2(2) GG[74] and in Article 20a GG[75].

3) While the two propositions examined so far are in line with the previous case-law of the German Constitutional Court, it is in the last two propositions that the landmark implications of this decision become apparent. With the third proposition, in particular, the Court delivers an innovative interpretation of the principle of proportionality, which it declines for the first time in intergenerational terms. Indeed, the Court asserts that the burdens associated with the fulfillment of intergenerational obligations must be distributed equitably between generations and cannot be unilaterally passed on to the future, lest the principle of proportionality be violated[76]. This leads the Court to conclude that "one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom"[77].

4) Most importantly, it is the fourth and final proposition that introduces an element of rupture with the Court's previous case-law, whose future implications may extend far beyond the environmental field. The Court, in fact, after rejecting the exceptions of unconstitutionality of the KSG for violation of the duties of protection set forth in Sections 2(2) and 14 GG, goes on to review the legitimacy of the same Act with respect to the defensive right to freedom protected by Section 2(1) GG. This shift allows the court to assess the legitimacy of the measure in light of the (far more restrictive) test for defensive rights. We are not here to examine the perplexities that this operation

[74] *Ibid.*
[75] Section 193.
[76] Section 192
[77] Section 192.

has aroused in German scholarship[78]. For the purposes of this paper, however, it is worth noting that to achieve such result the Court introduced two concepts hitherto unknown to German dogmatics.

The first concept is that of the "advanced interference-like effect" (*eingriffsähnliche Vorwirkung*)[79], which consists in devising an infringement of a fundamental freedom when a given action (or inaction) in the present makes it inevitable that measures restrictive of that same freedom will be taken in the future in order to fulfill the constitutional obligations incumbent on the state[80].

The second innovation is to configure fundamental rights as an "intertemporal guarantees of freedoms" (*Intertemporale Freiheitssicherung*)[81]: according to this new conception, fundamental rights require the state to safeguard freedoms "over time" (*über die Zeit*) and to proportionally distribute the opportunities associated with freedom among generations[82]. Hence, where the legislature shifts the burdens of reducing Co2 emissions to the future, this results in an anticipated violation of those fundamental freedoms whose exercise involves the emission of Co2, which will undergo severe restrictions in the future in order to fulfill the constitutional obligation to achieve climate neutrality[83].

To conclude, it is important to emphasize that the intergenerational obligation to safeguard freedom over time, which the Court derives from Article 2(1) GG, does not – unlike the protective duties arising from Articles 2(2) and 20a GG - have an objective nature, but a subjective one[84]. This means that the affirmation of such an

[78] Several authors have raised concerns about the BVerfG's use of the *Elfes* doctrine to assert, through the direct constitutionality appeal, the violation of the protection mandate affirmed by Article 20a GG, thereby "subjectivizing" an obligation that, under German constitutional law, is objective in nature. In this sense, see MÖLLERS C., WEINBERG N., *Die Klimaschutzentscheidung des Bundesverfassungsgerichts*, in *Juristen Zeitung*, 76, 2021, p 1069 ff.

[79] Section 183.

[80] Section 187.

[81] Section 182 ff.

[82] Section 183.

[83] Section 243.

[84] See Leitsatz No. 4 of the ordinance: "In their subjective dimension, fundamental rights – as intertemporal guarantees of freedom – afford protection against the greenhouse gas reduction burdens imposed by Art. 20a of the Basic Law being unilaterally offloaded onto the future".

obligation corresponds to the recognition of a subjective right upon specific persons. These persons, for the reasons stated above, are not members of future generations, who under German Basic law do not have rights, but rather individuals belonging to the present generation, whose future enjoyment of fundamental rights is at risk[85].

4. *Future rights of present generations: a new paradigm of intergenerational justice?*

The solution indicated by the German Federal Constitutional Tribunal represents, in my opinion, an effective and "exportable" model of response to the problems of intergenerational justice.

In structural terms, it reproduces some of the elements characterizing the "chain of obligations" theory analyzed earlier. Indeed, it is based on a clear distinction between the living members of present generations, to which the claimants belong, and the unborn: the latter are addressees of obligations, but do not hold in the present any rights either as individuals or as groups. On the contrary, members of the present generation are currently holders of fundamental rights whose scope of protection extends to future enjoyment. This enables the members of the present generations, especially the younger ones, to demand the fulfillment of intertemporal obligations by activating fundamental rights protection remedies.

These remedies, for their part, while focused on the future rights of present generations, also provide indirect protection for future people[86]. In fact, under the transitive principle mentioned earlier, the state is not only obligated to safeguard the right of members of current generations to continue to enjoy their freedoms over time, but

[85] As noted by German scholarship, ultimately, the issue of intergenerational justice is of secondary importance in the Court's argument, which instead bases its decision on the future impairment to the plaintiffs' rights. See SINDER R., *Anthropozänes Verfassungsrecht als Antwort auf den anthropogenen Klimawandel*, in *Juristen Zeitung*, 76, 2021, p. 1078 ff.; BECKMANN M., *Das Bundesverfassungsgericht, der Klimawandel und der "intertemporale Freiheitsschutz,"* in *UPR Umwelt- und Planungsrecht*, 7, 2021, p. 241 ff.; LENZ S., *Der Klimabeschluss des Bundesverfassungsgerichts - Eine Dekonstruktion*, in *Der Staat*, 61, 2022, p. 99 ff.

[86] MINNEROP P., *The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court*, in *Journal of Environmental Law*, 34, 2022, p. 158 ff.

also to act in such a way that, in order to fulfill their duties to subsequent generations, they will not be forced to endure disproportionate restrictions on their freedoms in the future. In this way, through such a chain of obligations, the interests of even remote future generations could acquire legal representation in the present time in the form of a future projection of the rights of younger generations[87].

In conclusion, this model seems apt to achieve many of the results pursued by the theory of the rights of future generations, without incurring the theoretical and practical criticalities that have always accompanied this latter category.

From a theoretical point of view, this solution does not meet the objections of "non-existence" and "non-identity," since it does not grant rights to unborn subjects or indeterminate collectivities, but to real persons. From a practical standpoint, it can help mitigate the problem of standing, as the intertemporal claims at issue can be asserted by living persons, provided they can demonstrate an "advanced interference-like effect" on the future enjoyment of their fundamental rights. At the same time, it can help resolve some of the ambiguities surrounding the notions of "rights" of future generations, namely the need to establish which rights future generations are entitled to and what their interests may be. Indeed, according to this theory, the 'rights of future generations' would ultimately consist in the future projection of the rights of present generations.

It could be argued that, instead of abandoning the individualistic approach that characterizes the Western legal tradition and that, according to many, is the deep cause of environmental deterioration, this theory projects the same anthropocentric view into the future. Without entering into the anthropocentrism/ecocentrism debate - which is beyond the scope of this contribution - it should be considered that environmental problems such as climate change require immediate decisions with a much closer time horizon than might have appeared in the past. It may be that, in the long run, ecocentric legal concepts - such as planetary rights - will prove more effective; what is certain, however, is that to take root in liberal countries they would require a radical shift in constitutional paradigms, which at the mo-

[87] Cf. BOS G., *A chain of status*, cit., p. 116.

ment seems far off. The new conception that emerges from the decision of the German Constitutional Court, on the other hand, does not question the basic postulates of liberal constitutionalism, but aims to reinterpret them in the light of intergenerational responsibility; and, for this reason, it appears realistically reproducible even in those systems which identify human dignity as the axiological foundation of every fundamental right.

JASMIEN DEKLERCK

DOMESTIC ADOPTION AS AN ALTERNATIVE CARE INSTRUMENT: A CASE LAW ANALYSIS OF THE EUROPEAN COURT OF HUMAN RIGHTS

1. *Introduction*

Children have the right not to be separated from their parents against their will unless it is absolutely necessary in the best interests of the child. Additionally, children have the right to protection from all forms of violence, abuse and neglect.[1] Hence, when the original parents cannot provide sufficient protection, an out-of-home placement of the child may be needed. Once it becomes evident that long-term out-of-home placement is appropriate because return within the original parents' care proves impossible, a wide array of policies and practices regarding long-term youth care exists. These may take the form, amongst others, of guardianship, long-term or permanent foster care placement, or placement in residential institutions.[2] Some

[1] Art. 9 and 19 Convention on the Rights of the Child, 7 March 1990, E/CN.4/RES/1990/74; COMMITTEE ON SOCIAL AFFAIRS, HEALTH AND SUSTAINABLE DEVELOPMENT, *Striking a Balance between the best interests of the child and the need to keep families together,* 6 July 2018, Doc. 14568.

[2] PALACIOS J., BRODZINSKY D.M., JOHNSON D.E., MARTÍNEZ-MORA L., SELWYN J., ADROHER S., GROTEVANT H.D., JUFFER F., MUHAMEDRAHIMOV R.J., SIMMONDS J., TARREN-SWEENEY M., *Adoption in the Service of Child Protection: An International Interdisciplinary Perspective*, in *American Psychological Association*, 2019, p. 61.

States also have forced adoption from youth care embedded in their alternative care systems. This is the legal adoption of a child without the consent of its parents.[3]

In the context of forced adoption from youth care, a tension between different interests and rights arises from the triangular relationship between the child, the original parents, and the factual caretakers or potential (prospective) adopters. States are consequently faced with the task of finding a balance among these different interests within this triangular relationship. This exercise takes place within the broader discussion of when, how quickly and how intensively States may intervene in existing family life to protect the child.[4]

On several occasions, the European Court of Human Rights (ECtHR) has reviewed cases related to forced adoption from youth care within the framework of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[5] (ECHR). Article 8 ECHR incorporates the right to respect for family life and private life. According to the Court the mutual enjoyment by the parents and child of each other's company constitutes a fundamental element of family life.[6] When a right to respect for family life is established, States Parties have both a negative and positive obligation to ensure this mutual enjoyment.[7] However, restrictions

[3] See SENAEVE P., *Actuele problemen aangaande de burgerrechtelijke regeling van de adoptie*, in SENAEVE P. (ed), *Actuele vraagstukken van interlandelijke en inlandse adoptie en van verlatenverklaring*, Leuven, 1995, p. 164, no. 314.

[4] BRUNING M., *Noot onder Strand Lobben e.a. t. Noorwegen*, in *European Human Rights Cases*, 2019, p. 678; DEKLERCK J., *Gedwongen adoptie als een jeugdhulpinstrument – impliciete voorkeur van het EHRM voor de bestendiging van de oorspronkelijke gezinsbanden?*, in *Tijdschrift voor Jeugd en Kinderrechten*, 2022, p. 249.

[5] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, *CETS* No.005.

[6] ECtHR 8 July 1987, no. 9749/82, W./United Kingdom, §59; ECtHR 24 February 1995, no. 16424/90, McMichael/United Kingdom, §86.

[7] RAINEY B., WICKS E., OVEY C., *Jacobs, White & Ovey: The European Convention on Human Rights,* New York, 2017, pp. 370-374, and pp. 376-386; BREEN C., KRUTZINNA J., LUHAMAA K., SKIVENES M., *Family Life for Children in State Care: An Analysis of the European Court of Human Rights' Reasoning on Adoption Without Consent*, in *The International Journal of Childrens Rights*, 2020, p. 721.

on Article 8 ECHR are possible if they are provided for by law, pursue a legitimate aim and are necessary in a democratic society.[8]

The purpose of this chapter is to examine the Court's reasoning in cases where a child has been placed in alternative care, and national authorities deem adoption appropriate due to the absence of any prospect for reunification with the original parents. The relevance of this case law analysis is twofold. First, the international human rights framework regarding alternative care formed by the United Nations Convention of the Rights of the Child (UNCRC)[9] allows considerable leeway for interpretation concerning when and how forced adoption from youth care is justified.[10] Hence, the judgments and the factors considered by the Court can serve as guidelines for interpreting certain relevant articles of the UNCRC. Indeed, all European contracting parties to the ECHR are also parties to the UNCRC.[11] In addition, the terms and concepts used by UNCRC must be interpreted in light of the views in a contemporary democratic society.[12] As a result, the ECtHR increasingly refers to the UNCRC and its accompanying general commentaries.[13] A second reason lies in the enforcement mechanisms of the ECHR.[14] The lack

[8] SMIS S., VAN LAETHEM K., JANSSENS C., MIRGAUX S., *Handboek van Mensenrechten,* Antwerpen, 2011, p. 233.

[9] The international human rights framework regarding alternative care is also shaped by *e.g.*, the General Commentaries of the United Nations Committee on the Rights of the Child, and the United Nations Guidelines for the Alternative Care of Children, the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children.

[10] SLOAN B., *Conflicting Rights: English Adoption Law and the Implementation of the UN Convention of the Rights of the Child*, in *Child and Family Law Quarterly*, 2013, p. 46.

[11] United Nations Treaty Collection, *Chapter IV HUMAN RIGHTS. 11. Convention on the Rights of the Child*, https://web.archive.org/web/20200908154226/https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed 19 February 2024).

[12] HAECK Y., VANDE LANOTTE J., *Handboek EVRM. Deel 1. Algemene beginselen,* Antwerpen, 2005, p. 192, no. 12.

[13] *E.g.*, ECtHR 20 November 2017, no. 37283/13, Strand Lobben and Others/Norway, §116; ECtHR (Grand Chamber) 10 December 2021, no. 15379/16, Abdi Ibrahim/Norway, §157; VERTOMMEN E., *Balancing the Rights of Parents and Child in Case of Non-Compliance with Contact Arrangements: A Case Law Analysis,* in BOELE-WOELKI B., MARTINY D. (eds), *Pluralism and Diversity of Family Relations in Europe,* Antwerpen, 2019, pp. 177-178.

[14] HAECK Y., VANDE LANOTTE J., *Handboek EVRM. Deel 1. Algemene beginselen,* cit., p. 10, no. 11.

of available remedies at the international human rights level, is disappointing.[15] Considering the individual right of complaint[16], the ECHR constitutes one of the most powerful instruments in the international and European arena.[17]

More specifically, this analysis aims to reveal the procedural and substantive factors that the Court takes into account when assessing the decisions of national authorities. Additionally, the analysis examines the way the Court balances the interests and rights of the original parents, the (prospective) adoptive parents, the foster carers and the child.[18]

In what follows, we first lay out the general characteristics of the case law analysis (section 2). Subsequently, we outline the general principles set forth by the ECtHR with regard to forced adoption from youth care. In this part, we also focus on the scope of review the Court employs (section 3). Following that, we discuss the specific procedural and substantive law elements enshrined in Article 8 ECHR (section 4). We conclude with a critical note concerning the consequences of the Court finding a violation of Article 8 ECHR (section 5).

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[15] KILKELLY U., *The Child and the European Convention on Human Rights*, Vermont, 1999, p. 295.

[16] FENTON-GLYNN C., *Children and the European Court of Human Rights*, Oxford, 2021, p. 3.

[17] FERRER RIBA J., *Principles and Prospects for a European System of Child Protection*, in *InDret*, 2010, p. 12.

[18] This case law analysis builds on, but distinguishes itself through its comprehensive character from already published case law analyses regarding forced adoption from youth care or the broader topic of out-of-home placements. See BREEN C., KRUTZINNA J., LUHAMAA K., SKIVENES M., *Family Life for Children in State Care: An Analysis of the European Court of Human Rights' Reasoning on Adoption Without Consent,* cit., pp. 715-747; BRUNING M., VAN DER ZON K., *Uithuisplaatsing van kinderen. Europese controverse en de rol van het EHRM,* in *NTM/NJCM-Bull,* 2022, pp. 3-21; FENTON-GLYNN C., *Children and the European Court of Human Rights,* cit., pp. 357-370; STEUNPUNT TOT BESTRIJDING VAN ARMOEDE, BESTAANSONZEKERHEID EN SOCIALE UITSLUITING, *Cahier rechtspraak nr. 2. Het behoud van de band tussen ouder en kind bij plaatsing. Onderzoek van de rechtspraak van het EHRM betreffende artikel 8 EVRM,* 2021, https://armoedebestrijding.be/wp-content/uploads/2021/04/Cahier-Plaatsing-Link-NL-april-2021.pdf (accessed 19 February 2024).

2. *General Characteristics of the Analysed Cases*

The relevant ECtHR case law was retrieved using the HUDOC database.[19] In the initial stage, the cases were filtered for "judgments", "(Article 8) Right to respect for private and family life" and "(Article 8-1) Respect for family life". Simultaneously, various keywords were entered into the database. For the first query, we used the term "foster care". This resulted in 76 cases. The second search using the keyword "foster home" rendered 75 results. A third search with the term "adoption" produced 970 hits. Subsequently, the cases underwent a quick revision. No time restrictions were applied to determine whether and, if so, how the Court's case law has evolved regarding the acceptance of forced adoption from youth care. Cases concerning stepparent adoption, the revocation of adoption, and out-of-home placements in the broad sense were excluded. Only the cases concerning forced adoption from youth care were selected. This led to a final number of 47 relevant cases. Two cases appeared before both the Chamber and the Grand Chamber.[20] Six cases were addressed in one judgment because the Court deemed it appropriate to examine them jointly in a single judgment.[21] 17 cases involved dissenting and/or concurring opinions. In 25 cases, only the original mother filed the petition with the ECtHR, while in seven cases, the original father initiated the case. Both parents submitted the petition in nine cases. In one case, the foster carer, who was also the prospective adopter, filed the petition. In five cases, the grandparents petitioned either alone or with the original parent(s). In nine cases, the petitioner also filed the petition on behalf of the child in question. Additionally, in *Strand Lobben and Others v. Norway, Clemeno and Others v. Italy and Barnea and Caldararu v. Italy,* petitions were

[19] This database provides access to the case law of the European Court of Human Rights (i.e., cases discussed by the Grand Chamber, the Chamber and the Committee). See ECHR, *Hudoc. European Court of Human Rights*, https://www.echr.coe.int/en/knowledge-sharing (accessed 5 April 2024).

[20] ECtHR 20 November 2017, no. 37283/13, Strand Lobben and Others/Norway; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway; ECtHR 17 December 2019, no. 15379/16, Abdi Ibrahim/Norway; ECtHR (Grand Chamber) 10 December 2021, no. 15379/16, Abdi Ibrahim/Norway.

[21] See ECtHR 12 September 2023, nos. 39769/17, 9167/18, 48372/18, 38097/19, 45985/19, 58880/19, K.F. and Others/Norway, §2.

filed in the name of the siblings of the child in question.[22] Moreover, in *Clemeno and Others v. Italy,* three aunts and four maternal uncles also petitioned.[23]

In most cases, the complaint's subject matter revolved around the forced adoption of the child or the placement order facilitating the child's adoption. Frequently complaints also included issues related to the deprivation of parental responsibilities, the termination or restriction of contact rights or the lack of steps taken by the national authorities with regard to reuniting the family. In 37 out of the 47 cases, the Court established a violation of Article 8 ECHR.

3. *General Principles and Scope of Review with Regard to Forced Adoption from Youth Care*

The Court invariably starts its review by highlighting a number of general principles that apply in disputes regarding issues of out-of-home placements, deprivation of parental responsibilities and forced adoption from youth care. In the section on general principles, the Court also sets out the scope of its review.

While the general principles serve as guidelines in assessing whether the national procedures and decisions that led to the adoption of the disputed measures are in line with Article 8 ECHR, the scope of review serves as a delineation of which national procedures, decisions and phases the Court will take into consideration. Not all general principles were always addressed in every case.

3.1. *General Principles*

Firstly, the State has a positive obligation to ensure effective respect for family life. Indeed, the Court always departs from the as-

[22] ECtHR 21 October 2008, no. 19537/03, Clemeno and Others/Italy, §1; ECtHR 22 June 2017, no. 37931/15, Barnea and Caldararu/Italy, §1; ECtHR 20 November 2017, no. 37283/13, Strand Lobben and Others/Norway, §1.

[23] ECtHR 21 October 2008, no. 19537/03, Clemeno and Others/Italy, §1.

sumption that the best interests of the child (initially) lie with maintaining ties with their original family.[24] This entails that the State must act in such a way that the ties between the child and the original parents can develop. It must also take appropriate measures to reunite the original parents and the child concerned.[25] The Court further states that given the advantage of the national authorities' direct contact with the persons concerned it is not the role of the Court to substitute the national authorities in the exercise of their child protection responsibilities.[26] Consequently, the Court limits its task to *reviewing* decisions under the Convention.[27] In principle, the Court also gives the authorities a wide margin of appreciation in assessing the need to place a child in care. However, the extent of the margin of appreciation must always be proportionate to the seriousness of the consequences and the relevance of the interests at stake. Administrative or judicial decisions limiting or depriving the parental responsibilities or restricting contact between children and their parents

[24] FENTON-GLYNN C., *Children and the European Court of Human Rights,* cit., p 357. See *e.g.*, ECtHR 13 December 2022, no. 48321/20, V.Y.R. and A.V.R./Bulgaria, §77: "*In particular, the Court has held that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit*".

[25] *E.g.*, ECtHR 8 July 1987, no. 9840/82, B./United Kingdom, §61; ECtHR 21 October 2008, no. 19537/03, Clemeno and Others/Italy, §41; ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §§74-75; ECtHR 10 April 2012, no. 59819/08, K.A.B./Spain, §95; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §205; ECtHR 17 December 2019, no. 15379/16, Abdi Ibrahim/Norway, §53; ECtHR 10 March 2020, no. 39710/15, Pedersen and Others/Norway, §60; ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §§36-37; ECtHR 14 January 2021, no. 21052/18, Terna/Italy, §60; ECtHR 1 April 2021, no. 70896/17, A.I./Italy, §86; ECtHR 20 January 2022, no. 60083/19, D.M. and N./Italy, §73.

[26] ECtHR 7 August 1996, no. 24/1995/530/616, Johansen/Norway, §64; ECtHR 16 July 2002, no. 56547/00, P., C. and S./United Kingdom, §115; ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §81; ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §§75 and 94; ECtHR 18 June 2013, no. 28775/12, R.M.S./Spain, §70; ECtHR 16 February 2016, no. 72850/14, Soares de Melo/Portugal, §90; ECtHR 20 November 2017, no. 37283/13, Strand Lobben and Others/Norway, §110; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §144; ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §83.

[27] *E.g.*, ECtHR 7 August 1996, no. 24/1995/530/616, Johansen/Norway, §55; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §144; ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §83; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §210; ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §43.

will be subjected to stricter scrutiny.[28] Additionally, the margin of appreciation diminishes with the duration of the placement: the longer the measures last, the greater the risk of alienating the child or curtailing the family ties, and consequently, the narrower the margin of appreciation granted.[29] Furthermore, the national authorities must strike a fair balance between the conflicting interests of the child, and those of the other relevant parties. In this balancing exercise the national authorities must give particular weight to the interests of the child which, depending on their nature and seriousness, may outweigh those of *e.g.*, the original parents.[30] For example, the original parents are not entitled to obtain such measures that would harm the child's health and development.[31] The Court also consistently stresses that care decisions and removals must be temporary. As a result, the national authorities have a positive obligation to ensure that all procedures and decisions follow the principle of consistency with the ultimate aim of family reunification.[32] However,

[28] *E.g.*, ECtHR 7 August 1996, no. 24/1995/530/616, Johansen/Norway, §64; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §145; ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §83; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §211; ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §40; ECtHR 22 December 2020, no. 64639/16, M.L./Norway, §§81 and 89; ECtHR 1 April 2021, no. 70896/17, A.I./Italy, §§88-89; ECtHR 20 January 2022, no. 60083/19, D.M. and N./Italy, §76.

[29] ECtHR 8 July 1987, no. 9749/82, W./United Kingdom, §62; ECtHR 12 July 2001, no. 25702/94, K. and T./Finland, §155; ECtHR 13 March 2012, no. 4547/10, Y.C./United Kingdom, §137; ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §§78 and 80; ECtHR 20 November 2017, no. 37283/13, Strand Lobben and Others/Norway, §104; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §145; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §211; ECtHR 17 December 2019, no. 15379/16, Abdi Ibrahim/Norway, §55; ECtHR 13 December 2022, no. 48321/20, V.Y.R. and A.V.R./Bulgaria, §77.

[30] *E.g.*, ECtHR 7 August 1996, no. 17383/90, Johansen/Norway, §78; ECtHR 16 November 1999, no. 31127/96, E.P./Italy, §62; ECtHR 16 July 2002, no. 56547/00, P., C. and S./United Kingdom, §117; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §206; ECtHR 17 December 2019, no. 15379/16, Abdi Ibrahim/Norway, §54; ECtHR 10 March 2020, no. 39710/15, Pedersen and Others/Norway, §61; ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §37; ECtHR 14 January 2021, no. 21052/18, Terna/Italy, §61; ECtHR 1 April 2021, no. 70896/17, A.I./Italy, §§87 and 92; ECtHR 20 January 2022, no. 60083/19, D.M. and N./Italy, §74.

[31] ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §79; ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §83.

[32] ECtHR 7 August 1996, no. 17383/90, Johansen/Norway, §78; ECtHR 16 November 1999, no. 31127/96, E.P./Italy, §64; ECtHR 16 July 2002, no. 56547/00, P., C. and

this is a mere obligation of means in which the best interests of the child play a decisive role. When a considerable period of time has elapsed since the child was initially placed in the care of the authorities, a child's interest in not having its actual family situation changed again may outweigh the parents' interest in seeing their family reunited.[33] The Court merely asks the national authorities to take all necessary steps that can reasonably be expected to facilitate the reunification of the child with its parents.[34] However, in *Barnea and Caldararu v. Italy,* the Court stressed that effective respect for family life requires that the future relations between the original parents and the child be regulated on the basis of *all* relevant factors, and not merely by the passage of time.[35] Lastly, the Court regularly stresses that far-reaching measures, such as the denial of contact rights, the deprivation of parental responsibilities and forced adop-

S./United Kingdom, §117; ECtHR 21 October 2008, no. 19537/03, Clemeno and Others/Italy, §48; ECtHR 18 June 2013, no. 28775/12, R.M.S./Spain, §71; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §146; ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §85; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §208; ECtHR 10 March 2020, no. 39710/15, Pedersen and Others/Norway, §60; ECtHR 20 January 2022, no. 60083/19, D.M. and N./Italy, §73.

[33] ECtHR 12 July 2001, no. 25702/94, K. and T./Finland, §155; ECtHR 21 October 2008, no. 19537/03, Clemeno and Others/Italy, §48; ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §88; ECtHR 30 November 2017, no. 37283/13, Strand Lobben and Others/Norway, §71; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §150; ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §86.

[34] ECtHR 12 July 2001, no. 25702/94, K. and T./Finland, §155; ECtHR 21 October 2008, no. 19537/03, Clemeno and Others/Italy, §49; ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §88; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §§208-209; ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §38.

[35] ECtHR 22 June 2017, no. 37931/15, Barnea and Caldararu/Italy, §86. In the case at hand, the appellate court had decided in an initial decision that returning within the care of the original family was the best option for the daughter. However, the social services did not follow that decision, which led to an extension of the daughter's placement in the foster home and new proceedings on disqualification. The appellate court overturned these decisions, but, unlike its first ruling, decided to leave the child with the foster family in light of the child's proper integration and the time that had elapsed in the meantime, namely six years. See also ECtHR 8 July 1987, no. 10496/83, R./United Kingdom, §70: "*[A]n effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere effluxion of time.*"; ECtHR 10 April 2012, no. 59819/08, K.A.B./Spain, §96; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §212.

tion from youth care, are only justified when exceptional circumstances, motivated by an overriding requirement pertaining to the best interests of the child, are present.[36] In the case of forced adoption there should be no real prospect of rehabilitation or family reunification and permanent placement in a new family should be in the child's best interests.[37] In *Soares de Melo v. Portugal,* the Court made clear that materialistic arguments do not qualify as "exceptional". Poverty alone cannot be equated with neglect and should under no circumstances serve as the sole reason for separating children from their parents.[38]

3.2. *Scope of Review*

For a long time, the Court applied a strict limitation regarding the scope of review. It only declared itself competent to examine the procedures, circumstances and decisions directly related to the subject matter of the complaints.[39] However, since *Strand Lobben and*

[36] See, inter alia, ECtHR 7 August 1996, no. 17383/90, Johansen/Norway, §78: "*such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests*". See also, *e.g.*, ECtHR 16 July 2002, no. 56547/00, P., C. and S./United Kingdom, §118; ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §81; ECtHR 20 November 2017, no. 37283/13, Strand Lobben and Others/Norway, §106; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §147; ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §86; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §§207 and 209; ECtHR 10 March 2020, no. 39710/15, Pedersen and Others/Norway, §61; ECtHR 20 January 2022, no. 60083/19, D.M. and N./Italy, §74; ECtHR 12 September 2023, nos. 39769/17, 9167/18, 48372/18, 38097/19, 45985/19, 58880/19, K.F. and Others/Norway, §9.

[37] ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §88; ECtHR 22 December 2020, no. 64639/16, M.L./Norway, §89.

[38] ECtHR 16 February 2016, no. 72850/14, Soares de Melo/Portugal, §§106-111. In this case, the mother's refusal to be sterilised, even though this was a condition of the protection agreement, also did not qualify as exceptional. See also DAVID V., *ECtHR condemns the punishment of women living in poverty and the 'rescuing' of their children*, 17 March 2016, https://strasbourgobservers.com/2016/03/17/ecthr-condemns-the-punishment-of-women-living-in-poverty-and-the-rescuing-of-their-children/ (accessed 19 February 2024).

[39] ECtHR 8 July 1987, no. 9840/82, B./United Kingdom, §58; ECtHR 8 July 1987, no. 9580/81, H./United Kingdom, §66; ECtHR 8 July 1987, no. 9276/81, O./United Kingdom, §51; ECtHR 8 July 1987, no. 10496/83, R./United Kingdom, §62; EHRM 8 July 1987, no. 9749/82, W./United Kingdom, §57: "*[...] the latter is not in the circumstances competent to examine or comment on the justification for such matters as the taking into public care*

Others v. Norway (Grand Chamber), the Court has made it a habit to *ex officio* extend the scope of review of the investigation.[40] In this case, the Court stated for the first time that it was incumbent on the Court to have regard, to some degree, to the earlier proceedings and decisions which are not part of the subject of the complaint in order to be able to review the procedures and decisions underlying the subject of the complaint.[41] In *e.g., Pedersen and Others v. Norway,* the procedures and decisions that were not the subject of the complaint were even decisive for concluding that the national authorities were responsible for the family breakdown; indeed, the national authorities had failed to fulfil their obligation to take measures leading to family reunification.[42]

4. *Procedural and Substantive Law Elements Enshrined in Article 8 ECHR*

Whereas in all judgments the Court accepted that the first two conditions for a valid exception to Article 8 ECHR were met, the

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or the adoption of the child or the restriction or termination of the applicant's access to him".

[40] ECtHR 17 December 2019, no. 15379/16, Abdi Ibrahim/Norway, §61; ECtHR 10 March 2020, no. 39710/15, Pedersen and Others/Norway, §66; ECtHR 22 December 2020, no. 64639/16, M.L./Norway, §84: "*the Court [...] notes that although the matter before it relates to the proceedings in which the domestic authorities decided to replace foster care with adoption, it is nonetheless incumbent on the Court to place those proceedings into context, which inevitably means that it must to some degree have regard to the earlier proceedings and decisions [...]. The Court's consideration of the reasons cited for the measures brought before it must also be conducted in the light of the case as a whole*."; ECtHR 13 December 2022, no. 48321/20, V.Y.R. and A.V.R./Bulgaria, §57.

[41] In the present case, the applicants claimed that the refusal to terminate child's public care, the first applicant's disqualification from parental responsibility for the child and the permission to the foster carers to adopt the child violated their right to respect for family life (see ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §140 and §148).

[42] ECtHR 10 March 2020, no. 39710/15, Pedersen and Others/Norway, §§66-68: "*While, in the absence of any complaint by the applicants regarding the initial placement order and the decision of the domestic authorities not to lift the care order, the Court cannot examine and rule on these issues separately [...], it must nevertheless assess the case and the proceedings as a whole [...]. In order to consider those proceedings correctly, the Court has to put them into their context, which inevitably means to some extent having regard to the related proceedings concerning public care and contact restrictions*". In this case, the contact rights were far too limited from the outset.

difficulty lied with the third condition, i.e., "necessary in a democratic society". In the context of forced adoption from youth care, the Court's approach to determining whether the interference is "necessary in a democratic society" lacked a certain transparency. The Court used several techniques throughout the cases analysed.[43] However, in *Y.C. v. the United Kingdom,* the Court explicitly stated the following: "*[I]n assessing whether an interference was 'necessary in a democratic society', two aspects of the proceedings require consideration. First, the Court must examine whether, in the light of the case as a whole, the reasons adduced to justify the measures were "relevant and sufficient"; second, it must be examined whether the decision-making process was fair and afforded due respect to the applicant's rights under Article 8 of the Convention […]*".[44]

In this judgment, the Court made a clear distinction between, on the one hand, the obligation requiring that the reasons provided to justify the measures taken are relevant and sufficient, and, on the other hand, the obligation that the decision-making process is carried out fairly and with respect for the rights of the applicants under Article 8 ECHR. This distinction coincides with the distinction between the substantive law and procedural law elements enshrined in Article 8 ECHR.

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[43] See *e.g.* ECtHR 16 February 2016, no. 72850/14, Soares de Melo/Portugal, §97 in which the Court does not focus on the existence of "relevant and sufficient" reasons, but rather on the right balance of interests: "*la question qui se pose est donc celle de savoir si les mesures étaient "nécessaires dans une société démocratique" pour atteindre le but légitime poursuivi dans les circonstances particulières de l'affaire; plus particulièrement, il s'agit de savoir si l'application faite en l'espèce des dispositions législatives a ménagé un juste équilibre entre l'intérêt supérieur de l'enfant et les autres intérêts concurrents en jeu*". In ECtHR 18 June 2013, no. 28775/12, R.M.S./Spain, §82 the Court stated the following: "*The crucial question in the present case is thus whether the national authorities took all the necessary and appropriate measures that could reasonably be expected of them to ensure that the child could lead a normal family life within her own family, before placing her with a foster family with a view to her adoption*". Here, the Court considered whether the national authorities had taken all the necessary and appropriate measures that could reasonably be expected of them to ensure that the child could return to a normal family life within its own family. The same standard was applied in ECtHR 16 July 2015, no. 9056/14, Akinnibosun/Italy, §64 and ECtHR 13 October 2015, no. 52557/14, S.H./Italy, §43. See also VAN DER ZON K.A.M., *Pleegrechten voor kinderen. Een onderzoek naar het realiseren van de rechten van kinderen die in het kader van een ondertoezichtstelling in een pleeggezin zijn geplaatst,* Den Haag, 2020, p. 72.

[44] ECtHR 13 March 2012, no. 4547/10, Y.C./United Kingdom, §133.

4.1. *Procedural Law Elements Enshrined in Article 8 ECHR*

The case law rendered two overarching procedural elements taken into account by the ECtHR when assessing whether the decision of the national authorities regarding the forced adoption from youth care is in conformity with Article 8 ECHR. These were the involvement of the original parents and the use of evidence and information in the decision-making process.

4.1.1. *Involvement of the Original Parents in the Decision-Making Process*

In cases concerning deprivation of parental responsibilities, forced adoption and/or the restriction or denial of contact rights, the original parents must have been involved in the decision-making process, seen as a whole. This involvement, considering the particular circumstances of the case and notably the serious nature of the decisions to be made, should be to a degree sufficient to provide them with the requisite protection of their interests, and ensuring they had the opportunity to present their case.[45] First, national authorities should ensure that the original parents can express their views and interests and give them due consideration during the decision-making process. Second, the original parents should have timely recourse to the legal remedies available to them.[46]

More specifically, the Court looks at whether the applicants were given full opportunity to present their case.[47] Was there any possibility of appeal or review?[48] The Court also considers whether the applicants were given the opportunity to be legally represented.[49] Other elements the Court verifies are whether the applicants' inter-

[45] ECtHR 13 December 2022, no. 48321/20, V.Y.R. and A.V.R./Bulgaria, §78.

[46] ECtHR 8 January 2013, no. 37956/11, A.K. and L./Croatia, §63; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §212.

[47] ECtHR 8 July 1987, no. 9749/82, W./United Kingdom, §63; ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §75; ECtHR 13 March 2012, no. 4547/10, Y.C./United Kingdom, §138; ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §87.

[48] ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §152.

[49] ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §152.

ests were sufficiently protected, i.e. was there a balanced and reasonable consideration of each person's respective interests[50], and whether the applicants were aware of the consequences of certain decisions. For example, did the applicants know that the deprivation of parental responsibilities would result in the revocation of the right to consent to the adoption of the child?[51] In addition, the Court attaches importance to the requirement of a thorough examination of the entire family situation and all possible factors. This implies, firstly, that all possible avenues and options must be examined and decisions must be comprehensively reasoned. Furthermore, it also includes the obligation of a proper follow-up.[52] National authorities have an obligation to thoroughly examine the entire family situation in the light of a whole range of factors, and more specifically those of a factual, psychological, material and medical nature, in order to make a balanced and reasonable assessment of each person's respective interests.[53]

4.1.2. *Use of Evidence and Information in the Decision-Making Process*

i. Expert Opinions: General

Throughout its review, the Court regularly referred to expert opinions that played a role in the national proceedings.[54] In *A.I. v. Italy*, the Court (Grand Chamber), while referring to *Sommerfeld v. Germany*[55], stated that, in principle, it is up to the national authorities

[50] ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §152.

[51] ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §98.

[52] ECtHR 13 March 2012, no. 4547/10, Y.C./United Kingdom, §§138-139.

[53] ECtHR 13 March 2012, no. 4547/10, Y.C./United Kingdom, §138. See also ECtHR 20 November 2017, no. 37283/13, Strand Lobben and Others/Norway, §107; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §148; ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §87; ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §41; ECtHR 27 May 2021, no. 54978/17, Jessica Marchi/Italy, §87.

[54] See, inter alia, ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §98; ECtHR 18 June 2013, no. 28775/12, R.M.S./Spain, §83; ECtHR 1 April 2021, no. 70896/17, A.I./Italy, §99.

[55] ECtHR (Grand Chamber) 8 July 2003, no. 31871/96, Sommerfeld/Germany, §71.

to decide on the necessity of expert reports.[56] However, this statement requires some nuance. Indeed, upon examination of the selected cases, it appears that the Court attaches importance to the substantiation of certain arguments by referring to expert opinions.[57] For example, in *Omorefe v. Spain,* the Court held that national authorities cannot base their care decisions on a mere alleged lack of parental competence and affection of the original parents towards their child. These defects should be evidenced by psychological reports and independent research.[58] In *D.M. and N. v. Italy,* the Court found that the national courts had deprived the applicant of the opportunity to challenge the social services' allegations and findings regarding the child's alleged sexual assault.[59] In this case, no expert had been appointed to assess the parenting skills or psychological profile of the original mother. Similarly, the national courts had not deemed it necessary to organise an expert examination of the alleged sexual assault referred to on the basis of circumstantial evidence by the social services.[60] In *E.H. v. Norway,* the Court concluded that basing decisions on the premise that adoption against the parent's wishes is generally in the child's best interests to the extent that individual assessments of the child's and the parents' situation take a secondary role, introduces an approach that seems inherently at odds with the proportionality requirement. In this case, the City Court had deemed

[56] ECtHR 1 April 2021, no. 70896/17, A.I./Italy, §99. See also ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §213: "*It would be going too far to say that domestic courts are always required to involve a psychological expert on the issue of awarding contact to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned*."

[57] ECtHR 16 November 1999, no. 31127/96, E.P./Italy, §67; ECtHR 18 June 2013, no. 28775/12, R.M.S./Spain, §83; ECtHR 16 February 2016, no. 72850/14, Soares de Melo/Portugal, §§115-116; ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §§52-56; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §224; ECtHR 20 January 2022, no. 60083/19, D.M. and N./Italy, §83. In *Strand Lobben and Others v. Norway*, the Grand Chamber stated that despite the fact that the vulnerability of the child in question had been a central reason for the initial decision to place him in foster care, that vulnerability had not been assessed in sufficient detail. In addition, the authorities should also have examined why that vulnerability of the child still existed despite the fact that he had been living in a foster home since the age of three weeks.

[58] ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §§52-56.

[59] ECtHR 20 January 2022, no. 60083/19, D.M. and N./Italy, §86.

[60] ECtHR 20 January 2022, no. 60083/19, D.M. and N./Italy, §83.

it unnecessary to commission an updated expert report in the course of the adoption proceedings, and proceeded merely on the basis of "general research and knowledge".[61]

Second, expert opinions can also serve as evidence that the national authorities did not take all the measures that could reasonably be expected of them. Namely, in certain cases the Court invoked expert opinions to show that there were no "exceptional" circumstances present justifying a forced adoption from youth care.[62] This occurred in, *e.g.*, *S.H. v. Italy*, where the expert opinion listed alternative solutions, such as implementing a targeted programme of social assistance, to address the challenges arising from the parent's health condition.[63]

Lastly, the Court relies on expert opinions to establish that no violation of Article 8 ECHR occurred.[64] In the case of *S.S. v. Slovenia,* the Court found that the national authorities had not been unreasonable in their decision to deprive the mother of her parental responsibilities. The expert reports stated that the applicant was incapable of caring for her child. More specifically, a psychiatric expert had found that, despite treatment, the mother would never be able to care for her child. The mother had diminished empathy and a limited understanding of her child's needs. Moreover, contact with the mother was stressful for the child, and no emotional bond between the child and the mother existed.[65]

ii. Expert Opinions: Quality Requirements

In certain cases, the Court has attached importance to the quality of the expert reports.[66] In *Strand Lobben and Others v. Norway,* the

[61] ECtHR 25 November 2021, no. 39717/19, E.H./Norway, §§24 *juncto* 40.

[62] ECtHR 13 October 2015, no. 52557/14, S.H./Italy, §52; ECtHR 22 June 2017, no. 37931/15, Barnea and

Caldararu/Italy, §§68-71 and §76.

[63] ECtHR 13 October 2015, no. 52557/14, S.H/Italy, §52.

[64] ECtHR 7 August 1996, no. 24/1995/530/616, Johansen/Norway, §§71-73; ECtHR 9 June 1998, no. 40/1997/824/1030, Bronda/Italy, §61; ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §97.

[65] ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §97.

[66] ECtHR 16 February 2016, no. 72850/14, Soares de Melo/Portugal, §115; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway,

Grand Chamber ruled that the decision-making process had not been conducted in such a way that all the views and interests of the mother had been duly taken into account. It referred to the fact that the psychologists' reports were already two years old. Hence, the report did not cover the evolution of the situation since 2010.[67] In *Akinnibosun v. Italy,* the Court delved further into the requirements that expert opinions should meet. In this case, only reports from social services, documenting observations of the father solely upon his arrival in Italy in 2009 and during his single meeting with his child, were submitted. Moreover, the reports largely referred to allegations of the child's foster family and were mostly based on indirect observation. This infrequency in conducting observations, the subjectivity of the allegations made by the child's foster family, and the national authorities' refusal to commission an additional expert opinion on the father's caregiving abilities resulted in a violation of Article 8 ECHR.[68]

4.2. *Substantive Law Elements Enshrined in Article 8 ECHR*

In addition to the procedural elements, Article 8 ECHR also contains substantive law elements that the national authorities must consider when deciding in the context of forced adoptions from youth care. Those substantive law elements must show that the reasons justifying the measures taken were relevant and sufficient. Four overarching substantive elements were identified, i.e. the determination and consideration of the best interests of the child, behaviour of the original parents, obligations and conduct of the State, and post-adoption contact with the original family.

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§222; ECtHR 1 July 2021, no. 64789/17, F.Z./Norway, §55. In *Soares de Melo v. Portugal,* the Court assessed the negative that the national courts had relied mainly on the reports of the bodies that had assisted the applicant in previous years. Updated, independent psychological research to assess the applicant's care capacity and maturity or a study of the children were not considered necessary.

[67] ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §225.

[68] ECtHR 16 July 2015, no. 9056/14, Akinnibosun/Italy, §§70-73.

4.2.1. *Determination and Consideration of the Best Interests of the Child*

The national authorities must strike a fair balance between the conflicting interests of the child, the original parents and public policy. In this balancing exercise, particular weight must be given to the child's best interests. Hence, the determination and observance of the best interests of the child is an unavoidable task of the national authorities.

However, the best interests of the child are an open standard, which makes it a difficult concept to define in absolute terms. In *Neulinger and Shuruk v. Switzerland,* the Court (Grand Chamber) emphasised their dual nature; children have both an interest in maintaining ties with the original family and being able to develop in a stable, healthy and safe environment.[69] Additionally, the Court does, in principle, not indicate whether adoption or long-term foster care are more in the best interests of the child.[70] In *Y.C. v. the United Kingdom,* the Court explicitly set out the factors that are relevant in assessing the best interest of the child: "*The identification of the child's best interests and the assessment of the overall proportionality of any given measure will require courts to weigh a number of factors in the balance. The Court has not previously set out an exhaustive list of such factors, which may vary depending on the circumstances of the case in question. However, it observes that the considerations listed in section 1 of the 2002 Act [...] broadly reflect*

[69] ECtHR (Grand Chamber) 6 July 2010, no. 41615/07, Neulinger and Shuruk/Switzerland, §136.

[70] ECtHR 16 July 2002, no. 56547/00, P., C. and S./United Kingdom, §136; ECtHR 10 March 2020, no. 39710/15, Pedersen and Others/Norway, §65; ECtHR 22 December 2020, no. 64639/16, M.L./Norway, §88. However, see ECtHR 28 October 2010, no. 52502/07, Aune/Norway, §§70-71 where the Court considered that the child would either stay in foster care or be adopted. Given, *inter alia*, its vulnerability and need for security, and the fact that adoption would prevent any conflicts, the Court found no violation of Article 8 ECtHR. See also ECtHR 7 August 1996, no. 24/1995/530/616, Johansen/Norway, §80: "*it was crucial that she lives under secure and emotionally stable conditions. The Court sees no reason to doubt that the care in the foster home had better prospects of success if the placement was made with a view to adoption*" and ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §157 where the Court accepted the Norwegian courts' contention that adoption offered the child the advantage of safety and security over placement in permanent foster care.

the various elements inherent in assessing the necessity under Article 8 of a measure placing a child for adoption. In particular, it considers that in seeking to identify the best interests of a child and in assessing the necessity of any proposed measure in the context of placement proceedings, the domestic court must demonstrate that it has had regard to, inter alia, the age, maturity and ascertained wishes of the child, the likely effect on the child of ceasing to be a member of his original family and the relationship the child has with relatives".[71]

Consequently, the age, the maturity of the child, the child's identified wishes, the likely impact of the measures on the child and the relationship the child has with the original family are important factors in determining what constitutes the child's best interests. However, in the analysed cases these five factors were not always addressed equally.

i. An Individualised Approach of the Specific Vulnerability and Needs of the Child?

The Court emphasizes that, in interpreting the child's best interests, the national authorities should consider the specific vulnerability and needs of the child.[72] However, there is no consistent pattern discernible in the Court's analysed jurisprudence regarding the manner in which national authorities can ascertain these factors. In *R. and H. v. the United Kingdom*, *Strand Lobben and Others v. Norway (1st instance)* and *Mohamed Hasan v. Norway,* the Court accepted an individualised approach in assessing the needs and vulnerability of the children.[73] The Court accepted that the needs and interests of children, even (half-)siblings from the same original family, can vary greatly according to their age. Therefore, national authorities were allowed to make different decisions regarding the care of all the children involved in a specific case.[74] In contrast, the Court (Grand

[71] ECtHR 13 March 2012, no. 4547/10, Y.C./United Kingdom, §135.

[72] ECtHR 28 October 2010, no. 52502/07, Aune/Norway, §§70-71.

[73] ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §86; ECtHR 20 November 2017, no. 37283/13, Strand Lobben and Others/Norway, §§113-114; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §158.

[74] ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §86.

Chamber) took a different stance in *Pontes v. Portugal* and *Strand Lobben and Others v. Norway*. In these cases, the Court did not accept that the needs and interests of children from the same original family could vary that greatly.[75] In *Pontes v. Portugal,* four siblings were placed in public care. While the three elder siblings were placed together in a foster home, the youngest child was placed in a separate home at the age of two years. Despite the return of the three elder siblings within the care of their original parents after a certain period, the national authorities decided to place the youngest sibling for adoption. However, the Court was not persuaded that the child in question showed a greater vulnerability than its siblings. All siblings shared a common requirement for a stable environment conducive to their development, a fact acknowledged by the authorities as something the original parents could offer.[76]

Proven vulnerability of the child does also not automatically equate to the presence of exceptional circumstances. In *M.L. v. Norway,* for example, the Court did not question the national authorities' finding that the girl was vulnerable, but it also did not accept that this immediately demonstrated that the situation was so exceptional that it justified the severing of all ties between the original parent and the daughter.[77]

ii. Relationship between the Child and the Original Family

When a child has a poor bond or no bond with the original parents, but developed such a strong, socio-affective bond with the foster carers/(prospective) adopters that removal from the factual environment would be detrimental to the child, the Court accepts that the child's best interests may lie in the severing of the legal ties with the original family and creating new ones with the foster carers/(prospective) adopters. Hence, where the social ties between an original parent and a child are and have been very limited, this may affect the degree of protection given by the Court to the right to respect for

[75] ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §§96-97; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §§219 and 224-225.

[76] ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §§5-13 and 96-97.

[77] ECtHR 22 December 2020, nr. 64639/16, M.L./Norway, §90.

family life.[78] National authorities should, however, always evaluate whether preserving of any form of attachment to or contact with the original parents align with the best interests of the child.[79]

iii. Child's Rights to Identity

The child's right to identity[80] or knowledge about its roots is not often included as an argument in the Court's assessment. In instances where it did arise, it revolved around the *cultural* identity of the parents (and the child).[81] Nonetheless, it was never treated as a decisive factor. In *Pedersen and Others v. Norway,* the Court, contrary to the national courts which did mention the importance of the cultural links with the original parents, did not consider this a decisive element.[82] In *Mohamed Hasan v. Norway,* the Court merely noted that the national authorities had discussed the consequences of their decisions regarding the children's cultural background, but the Court itself took no stance.[83] In *Abdi Ibrahim v. Norway,* no initial emphasis was placed on the importance of the ethnic and cultural background of both the applicant and the child.[84] The Grand Chamber, however, posed the preservation of the child's ties to its cultural and

[78] ECtHR 16 July 2002, no. 56547/00, P., C. and S./United Kingdom, §118; ECtHR 28 October 2010, no. 52502/07, Aune/Norway, §69; ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §88; ECtHR 20 November 2017, no. 37283/13, Strand Lobben and Others/Norway, §123; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §161.

[79] ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §59.

[80] This right is enshrined in articles 7 and 8 of the United Nations Convention on the Rights of the Children. It is also implicitly contained in article 8 ECHR. See DECORTE E., *Een kinderrechtenconforme benadering van toegang tot afstammingsinformatie voor donorkinderen,* in *Tijdschrift voor Jeugd en Kinderrechten*, 2021, p. 12-18.

[81] The Court does not address the possible importance of not severing the original ties or having continued contact with the original parents for the preservation and further development of the child's identity in the broad sense.

[82] In this case, the mother had a Filipino background. Therefore, the Constitutional Court had held that the post-adoption contact rights of the original parents (set at two hours every two years) would ensure that the child was not cut off from its roots and ethnic background. See ECtHR 10 March 2020, no. 39710/15, Pedersen and Others/Norway, §§32 and 70.

[83] ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §158.

[84] ECtHR 17 December 2019, no. 15379/16, Abdi Ibrahim/Norway, §64.

religious origins as an interest of the original mother, but not as an interest of the child itself.[85]

iv. Child's Relationship with its Siblings

In very few cases, the Court explicitly addressed the importance of maintaining the relationship between the child in question and its siblings. In *Aune v. Norway,* the Court only mentioned the importance of contact with the child's original brother in brackets: "*A particular issue arose with regard to contact: whilst it was undisputed that contact between A and the applicant (and his brother) was desirable, in the event of adoption the applicant would no longer have a legal right of contact with A*".[86]

In the few cases in which the Court explicitly refers to the relationship with the original siblings, it usually considers this relationship as a partial element of the fulfilment of the child's best interests.[87] In *Pontes v. Portugal,* it was held that not only the child's final and irreversible removal from its original parents, but also from its siblings, could be contrary to the best interests of the child.[88] Also, in *A.I. v. Italy* the Court emphasised the placement of the children in two different families, preventing them from maintaining fraternal ties. The breaking up of not just the original family, but also the siblings, was not in the best interests of the children.[89]

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[85] ECtHR (Grand Chamber) 10 December 2021, no. 15379/16, Abdi Ibrahim/Norway, §161.

[86] ECtHR 28 October 2010, no. 52502/07, Aune/Norway, §74.

[87] ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §98; ECtHR 13 October 2015, no. 52557/14, S.H./Italy, §56: "*Moreover, the three children were placed in three different foster families, such that not only the family but also the children were split up*."; ECtHR 16 February 2016, no. 72850/14, Soares de Melo/Portugal, §114: "*La Cour observe de surcroît que les six enfants effectivement placés l'ont été dans trois institutions différentes, ce qui faisait obstacle au maintien des liens fraternels. Cette mesure a donc provoqué non seulement l'éclatement de la famille, mais aussie celui de la fratrie, et est allée à l'encontre de l'intérêt supérieur des enfants*."; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §158: "*[The Court] is also satisfied that the domestic authorities had regard to individual factors relating to each child, such as their age and maturity, and observes that they discussed the effects of the decisions with regard to A and B's cultural background and their relationship with relatives.*"; ECtHR 1 April 2021, no. 70896/17, A.I./Italy, §101.

[88] ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §98.

[89] ECtHR 1 April 2021, no. 70896/17, A.I./Italy, §101. In *A.I v. Italy,* the separation of the children to be adopted by two different families formed the subject of the petition.

4.2.2. *Behaviour of the Original Parents*

In striking a fair balance between the relevant interests, the national authorities not only have to take into account the child's best interests, but also the interests of the relevant parties. Throughout the analysis it became clear that the Court often (merely) identifies the original parents as the other relevant party.

In achieving this equitable balance between all the different interests, the time the child has spent in the care of the authorities plays a role. When a significant period of time has elapsed since the child's initial placement out of home, the child's interest in not having its *de facto* family situation modified, may outweigh the parents' interest in family reunification.[90] This assessment does require certainty that the child's interests lie in a permanent placing in another family rather than in the reunification with its original family.[91]

i. Current and Future Capacities of the Original Parents

The Court gives weight to the arguments of the national courts and the assessments in the expert opinions regarding the present and future capacities of the original parents to raise the child in a manner that is both materially and emotionally adequate. If a parent suffers from a mental illness, or has a drug or alcohol addiction, and that illness or addiction results in, for example, the parent missing certain contact sessions, the Court is more likely to assume that the original parents' interests (*e.g.*, having their child returned to their care, or not substituting adoption for foster care), must give way to the child's interest in stability and continuity in its upbringing.[92]

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[90] ECtHR 12 July 2001, no. 25702/94, K. and T./Finland, §155; ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §88; ECtHR 13 March 2012, no. 4547/10, Y.C./United Kingdom, §141; ECtHR 20 November 2017, no. 37283/13, Strand Lobben and Others/Norway, §109; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §150; ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §§86 and 101.

[91] ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §88. See also ECtHR 12 July 2001, no. 25702/94, K. and T./Finland, §155; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §§208- 209.

[92] See, *e.g.*, ECtHR 28 October 2010, no. 52502/07, Aune/Norway, §§65-66. In this case, the parents were struggling with drug problems. The Court accepted therefore that it was indisputable that A would have to stay permanently with its foster family. The Court

In *R. and H. v. the United Kingdom,* the Court accepted that the timeframe for dealing with the father's alcohol problem was too long, the chances of sobriety too uncertain and the possibility of relapsing too great. Thus, the Court acknowledged that the child's best interests lay in adoption.[93] Within the case of *S.S. v. Slovenia,* the Court ruled that the national authorities' decision to deprive the mother of her parental responsibilities in order to create the possibility of the daughter's adoption was not "unreasonable". Given the mother's diagnosis of paranoid schizophrenia, there was no realistic possibility that the mother would resume the care of her daughter. Moreover, the visitation sessions were received negatively by the daughter, and there was no emotional bond between the mother and the child.[94] In *A.I. t. Italy*, however, the Court pointed out that the national authorities should have assessed certain care practices in light of a possibly different African culture and a different parent-child attachment model. These insights could have led to the national authorities attributing less serious consequences to certain conduct.[95] Hence, the Court considers a different cultural background, with the prevalence of different views of parenting and behaviour towards the child, as a mitigating factor.

ii. Will and Ability of the Original Parents to Learn and Improve

To determine the weight to be attached to the interests of the original parents, the Court also takes into account their will and the ability to learn and improve. This ability is partly related to the current and future abilities of the original parents. However, while the latter is an established fact based on the experts' and national authorities' estimation of the original parents' intellectual or emotional capacities, the parents can still work on the former.

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stated that it therefore only had to address whether it was "necessary" to replace foster care with the more far-reaching measures of deprivation of parental authority and allowing adoption. See also ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §97.

[93] ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §§78 and 85.

[94] ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §§97-98.

[95] ECtHR 1 April 2021, no. 70896/17, A.I./Italy, §104. The Court also emphasized that the national authorities had not taken into account this different cultural background in their assessment, *despite* it being clearly emphasized in the expert opinion.

To assess the ability and will of the original parents to learn and improve, the Court looks, for example, at the original parents' inclination to cooperate with social services and to accept their support.[96] When an original parent remarries and has a second child who can stay within the parental care, the Court also regards this positively.[97] Moreover, in *A.I. v. Italy,* the Court found that the national authorities should have taken into account that the original mother, as a victim of trafficking, was in a vulnerable situation.[98] In *R.M.S. v. Spain,* the Court negatively assessed the insufficient weight given by the national authorities to the parent's financial improvement.[99]

iii. Risk of Contestation?

National authorities sometimes argue that adoption carries less risk of contestation by the original parents. Therefore, adoption provides stability, continuity and security for the child. Additionally, adoption reduces the potential for further conflicts between the original parents (and the further family) and the factual caregivers of the child.

The Court tends to not always give the same weight to these arguments. In *Aune v. Norway,* the Court saw no harm in the argument that the child's best interest lay in adoption, rather than long-term foster care, due to the presence of a latent conflict between the original parents and the foster carers. Indeed, this latent conflict was particularly pernicious for the child given its particular vulnerability and need for security.[100] The Court took the same stance in *Strand Lobben and Others v. Norway (1st instance)*. Here, it accepted that avoiding further very strong emotional reactions of the child to the behaviour of the original mother and the possibility of an ongoing fight were important elements in favour of adoption.[101] In contrast, the

[96] ECtHR 13 March 2012, no. 4547/10, Y.C./United Kingdom, §146; ECtHR 13 October 2015, no. 52557/14, S.H./Italy, §53; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §223.

[97] ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §§219-220.

[98] ECtHR 1 April 2021, no. 70896/17, A.I./Italy, §102.

[99] ECtHR 18 June 2013, no. 28775/12, R.M.S./Spain, §90.

[100] ECtHR 28 October 2010, no. 52502/07, Aune/Norway, §70.

[101] ECtHR 20 November 2017, no. 37283/13, Strand Lobben and Others/Norway, §127.

Court completely dismissed these arguments before the Grand Chamber Case *Strand Lobben and Others v. Norway*. The Court held that national authorities cannot object to parents invoking the legal remedies available to them to obtain family reunification with their child.[102] The case *M.L. v. Norway* confirmed this view. The Court held that in certain situations, due to the particular circumstances of a case, repeated court proceedings may harm the child and should therefore be taken into account. However, the mere exercise of legal remedies by an original parent cannot automatically be considered a factor in favour of adoption. If necessary, national law may regulate the restriction of useless or harmful use of remedies by original parents as a procedural matter under national law.[103] The Court reasserted this perspective in *E.H. v. Norway* by expressing certain reservations regarding the emphasis on the need to pre-empt the original father from resorting in future to legal remedies by which to have the contact rights with the child revised or to have the child return; an original parent's exercise of judicial remedies cannot automatically count as a factor in favour of adoption.[104]

4.2.3. *Obligations and Conduct of the State*

Far-reaching alternative care measures, such as deprivation from parental responsibilities or forced adoption from youth care, are only justified when the State has taken all measures that could reasonably be expected of its national authorities and the State itself is not the cause of the need for far-reaching care measures.[105]

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[102] ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §§212 and 223.

[103] ECtHR 22 December 2020, no. 64639/16, M.L./Norway, §95. See also ECtHR 17 December 2019, no. 15379/16, Abdi Ibrahim/Norway, §§58 and 64; ECtHR (Grand Chamber) 10 December 2021, no. 15379/16, Abdi Ibrahim/Norway, §§147, 154 and 161-162. There the Court could not accept the argument that adoption would make the conflicts between the foster carers and the original mother regarding the child's designated religion and culture impossible. According to the Court, this could not serve as a decisive argument in favour of adoption.

[104] ECtHR 25 November 2021, no. 39717/19, E.H./Norway, §42.

[105] ECtHR 18 June 2013, no. 28775/12, R.M.S./Spain, §82; ECtHR 16 July 2015, no. 9056/14, Akinnibosun/Italy, §64; ECtHR 13 October 2015, no. 52557/14, S.H./Italy, §43.

i. Obligations of the State

The Court must be satisfied that exceptional circumstances justified the care measures concerning the child. The national authorities have the obligation to prove that they carried out a careful assessment of the impact of the proposed care measure on the original parents and the child. They must also have taken into account the possible alternatives before implementing the measures.[106] In this regard, the Court often stresses that the role of social services is to help people in difficulty who are insufficiently familiar with how the system works. Social services should guide those people and provide advice on the different types of social benefits available (*e.g.* getting social housing) or on other possible ways to overcome their difficulties.[107] Vulnerable people deserve special attention and increased protection.[108] Moreover, the national authorities are obliged to thoroughly evaluate the measures taken at certain points in time to verify whether the situation of the original family has improved or not.[109] Lastly, an obligation of means exists for the State to find foster carers/(prospective) adopters with the same religious background as the original parent(s).[110]

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[106] ECtHR 16 July 2002, no. 56547/00, P., C. and S./United Kingdom, §116; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §211.

[107] ECtHR 18 June 2013, no. 28775/12, R.M.S./Spain, §§85-86; ECtHR 21 January 2014, no. 33773/11, Zhou/Italy, §§58-59; ECtHR 16 July 2015, no. 9056/14, Akinnibosun/Italy, §82; ECtHR 13 October 2015, no. 52557/14, S.H./Italy, §54; ECtHR 22 June 2017, no. 37931/15, Barnea and Caldararu/Italy, §72; ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §59.

[108] ECtHR 16 February 2016, no. 72850/14, Soares de Melo/Portugal, §107; ECtHR 22 June 2017, no. 37931/15, Barnea and Caldararu/Italy, §72; ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §59.

[109] ECtHR 22 December 2020, no. 64639/16, M.L./Norway, §93 where the Court assessed it negatively that it had received no evidence whether the national authorities had taken any concrete steps to reconsider the very restrictive access arrangement between the applicant and its daughter.

[110] See ECtHR (Grand Chamber) 10 December 2021, no. 15379/16, Abdi Ibrahim/Norway, §§158-161. In this case, the mother was of Somali origin. When her son was placed out of home, the mother had requested a placement either with Norwegian relatives of Somali origin or in a Somali or Muslim foster family. Eventually the son was placed in long-term foster care with a Christian family. Although the Court decided that Article 8 ECHR, interpreted in the light of Article 9 ECHR, had been violated, the placement in a Christian foster family did not constitute an element for deciding a violation. The efforts made by the

In *R. and H. v. the United Kingdom,* the Court viewed positively the consideration of the national authorities regarding a possible placement with the maternal grandmother. In this case, this was not possible because there were suspicions that the maternal grandfather, who was living together with the grandmother, had inappropriately touched one of his own daughters. The grandfather also refused to participate in the "kinship assessment"[111].[112] Contrarily, in *R.M.S. v. Spain* the Court judged that the situation could have been remedied with less drastic measures than forced adoption or out-of-home placements. In this case, the youngest daughter had been placed out of home because of the mother's then difficult financial situation, but not due to a lack of educational or emotional support.[113]

The importance the Court attaches to the role of the social services is exemplified in, amongst others, *Soares de Melo v. Portugal*. In this case, the Court decided that Article 8 ECHR was violated. No "exceptional" circumstances justified the forced adoption from youth care. The national authorities had not taken all the measures that could reasonably be expected of them. The mother's poverty served as one of the overriding reasons for placing the children. The mother had ten children whom she had to raise alone. She lived on a monthly child allowance of 393 euros and depended on food banks and donations. The national authorities had made no attempt to compensate this clear material deficit with additional financial support. Consequently, the mother could not meet the family's basic needs. In addition, the mother could not engage in paid work because she could not cover the cost of caring for the youngest children. Given that at no time during the proceedings there was evidence of the mother expressing violent behaviour, mistreatment, or sexual abuse towards the children, nor of suffering from emotional deficiencies, health problems or mental disorders, the Court concluded that the

national authorities to find a foster family more in line with the applicant's wishes were deemed sufficient.

[111] A "kinship assessment" is an initial assessment of the surrounding family and friends to determine which members of the family and friend network of a child could potentially care for the child in question. See FAMILY RIGHTS GROUP, *Initial Family and Friends Care Assessment: A Good Practice Guide*, 2017, https://frg.org.uk/policy- and-campaigns/kinship-care/kinship-assessment-guide/ (accessed 19 February 2024).

[112] ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §§11 and 83.

[113] ECtHR 18 June 2013, no. 28775/12, R.M.S./Spain, §§85-86.

national authorities had not considered sufficient alternatives. The particularly strong emotional ties between the mother and her children also proved an important factor for the finding of a violation.[114] By contrast, in *S.S. v. Slovenia,* the Court held that the social services had given sufficient attention and increased protection to the mother. The daughter had been placed in an institution because, at that time, neither the mother, nor any other family member was able to care for the daughter. In addition, the Court stressed that the mother had not inquired after the welfare of the daughter until the daughter was already five months old. Considering the mother's mental history, her erratic travelling from Slovenia to France, and her past history with her older children, the assessment of the national authorities that long-term care, and more specifically adoption, was appropriate was not unreasonable.[115] Also in *V.Y.R. and A.V.R. v. Bulgaria*, the Court decided that no violation of Article 8 ECHR had occurred. The mother suffered from opioid use disorder. She had been taken heroin until she learned that she was pregnant, after which she signed up for methadone treatment.[116] Her daughter was taken into care aged four months when the social services were contacted with concerns about the baby not having enough to eat. After four years, in public care, the national authorities decided to place the child for adoption. They argued that the mother had lost interest in her daughter, and that it was in the child's best interests to be adopted at an early age so she could adapt more easily to a new family.[117] The Court judged that during the initial period following the child's placement in public care, the social services acted with the sufficient care required to preserve the ties between the mother and the child, and to seek the facilitation of the original family's reunification.[118] After the initial period, the mother gradually lost contact with her daughter. However, according to the Court no evidence convincingly showed that the mother had been objectively prevented from maintaining contact

[114] ECtHR 16 February 2016, no. 72850/14, Soares de Melo/Portugal, §§106-111.
[115] ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §92.
[116] ECtHR 13 December 2022, no. 48321/20, V.Y.R. and A.V.R./Bulgaria, §4.
[117] ECtHR 13 December 2022, no. 48321/20, V.Y.R. and A.V.R./Bulgaria, §§10-36.
[118] ECtHR 13 December 2022, no. 48321/20, V.Y.R. and A.V.R./Bulgaria, §85.

with her daughter.[119] The mother seemed to have herself abandoned her requests to re-establish contact, which social services were working on. In view of the above, the Court could not conclude that the national authorities were to be blamed for the breaking of the family ties and the bond between the mother and her child.[120] Hence, a State can remove a child on a permanent basis, provided the national authorities can prove that they have taken appropriate measures to address the relevant issues through targeted social assistance.[121]

ii. Conduct of the State

Contracting States have a positive obligation to take measures to facilitate family reunification. The Court strictly scrutinises all measures restricting access and contact between the original parents and the child.[122] The *rationale* behind this is the decreasing possibility of reuniting the child with its original parents the longer the child remains in the care of social welfare agencies or in foster care.[123] A corollary of this obligation manifests itself in a strict assessment of the argument that the child has no connection with its original parents. If this lack of bond follows from severe restrictions imposed by the State itself at the time of the out-of-home placement, the Court often does not find this a valid or decisive argument.[124] However,

[119] ECtHR 13 December 2022, no. 48321/20, V.Y.R. and A.V.R./Bulgaria, §§86 and 88.

[120] ECtHR 13 December 2022, no. 48321/20, V.Y.R. and A.V.R./Bulgaria, §§90 and 92.

[121] FENTON-GLYNN C., *Children and the European Court of Human Rights*, cit., p. 359.

[122] See, *inter alia*, ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §§90-92; ECtHR 16 February 2016, no. 72850/14, Soares de Melo/Portugal, §§112-114; ECtHR 22 December 2020, no. 64639/16, M.L./Norway, §93.

[123] FERRER RIBA J., *Principles and Prospects for a European System of Child Protection*, cit., p. 20.

[124] ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §§99-100; ECtHR 21 January 2014, no. 33773/11, Zhou/Italy, §54; ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §208; ECtHR 22 December 2020, no. 64639/16, M.L./Norway, §§91-92; ECtHR 1 July 2021, no. 64789/17, F.Z./Norway, §§55-57. See also BRUNING M.R., *M.L. t. Noorwegen (EHRM, nr. 64639/16) – Recht op hereniging illusoir bij direct toewerken naar pleegouderadoptie zonder regelmatig contact*, 15 March 2021, https://www.ehrc-updates.nl/commentaar/211295?skip_boomportal_auth=1 (accessed 19 February 2024).

the Court does accept the lack of bond when this is due to the behaviour of the original parent himself, despite all the efforts and goodwill of the national authorities.[125]

In the case of *S.S. v. Slovenia*, the mother initially had the opportunity to see her child whenever she wanted. When the original mother asked for (even) more extensive contact with her daughter, social services advised her to initiate legal proceedings regarding her contact rights. The applicant did so only two years later, despite much encouragement by the social services. Consequently, the Court found no fault here on the part of the Contracting State.[126] On the contrary, in *E.P. v. Italy,* the Court ruled that the balance between the interests of the child and the original mother was not fairly struck.[127] The lack of bond could not be a valid argument considering that the original mother and the child had not been given a chance to re-establish their ties.[128]

4.2.4. *Post-Adoption Contact with the Original Family*

Currently[129], the Court is more lenient with regard to a legal form of forced adoption whereby the ties with the original family are not completely legally severed.[130] Furthermore, since, *Pedersen and Others v. Norway*, the Court made clear that post-adoption contact alone is not sufficient: the post-adoption contact has to give the child the opportunity to develop a "meaningful relationship" with its original parents.[131] Thereby, it introduced a new qualitative element to

[125] ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §§93-95.

[126] ECtHR 30 October 2018, no. 40938/16, S.S./Slovenia, §§93-95.

[127] ECtHR 16 November 1999, no. 31127/96, E.P./Italy, §69; BREEN C., KRUTZINNA J., LUHAMAA K., SKIVENES M., *Family Life for Children in State Care: An Analysis of the European Court of Human Rights' Reasoning on Adoption Without Consent,* cit., p. 731.

[128] ECtHR 16 November 1999, no. 31127/96, E.P./Italy, §65.

[129] Conversely, ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §87 and ECtHR 28 October 2010, no. 52502/07, Aune/Norway, §§74 and 76-77. In these cases, the Court recognised that post-adoption contact was in the best interests of the child, but did not attach a lot of importance to the legal entrenchment of the original parents' contact rights.

[130] ECtHR 21 January 2014, no. 33773/11, Zhou/Italy, §60; ECtHR 22 December 2020, no. 64639/16, M.L./Norway, §97.

[131] ECtHR 10 March 2020, no. 39710/15, Pedersen and Others/Norway, §111.

the child's right to respect for family life[132] Moreover, the Court considers legally entrenched post-adoption contact important due to the creation of a lasting connection with the original parent's cultural and religious background.[133]

5. *Critical point: Consequences of a Violation of Article 8 ECHR*

It is not yet entirely clear which consequences the Court attributes to the violation of Article 8 ECHR in the context of a forced adoption from youth care. Three cumulative options are available in this context: (1) awarding monetary compensation to those whose Article 8 ECHR rights have been violated under Article 41 ECHR; (2); the designation of individual measures under Article 46 ECHR and (3) ordering measures of a general nature.[134]

5.1. *Monetary Compensation*

According to Article 41 ECHR the Court shall, if necessary, afford just satisfaction to the injured party. This Article solely applies to State Parties of which the internal law of the High Contracting Party only allows partial reparation to be made. Just satisfaction covers both pecuniary and moral damages suffered by the injured party. It also covers the costs and expenses incurred by the injured party in an attempt to prevent the violation, *e.g.*, expenses on legal

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[132] See LUHAMAA K., KRUTZINNA J., *Pedersen et al v. Norway: progress towards child-centrism at the European Court of Human Rights*, 28 May 2020, https://strasbourgobservers.com/2020/05/28/pedersen-et-al-v-norway-progress-towards-child-centrism-at-the-european-court-of-human-rights-2/ ((accessed 19 February 2024): "*This concept introduces a new, qualitative element to the child's right to respect for family life, which we believe has the potential for a significant child-centric shift in the way contact decisions are made and will have significant implications on national child protection agencies' contact practices for children in long-term placements*".

[133] ECtHR 17 December 2019, no. 15379/16, Abdi Ibrahim/Norway, §§59 and 63-64; ECtHR (Grand Chamber) 10 December 2021, no. 15379/16, Abdi Ibrahim/Norway, §§148, 153 and 155.

[134] DEKLERCK J., *Gedwongen adoptie als een jeugdhulpinstrument – impliciete voorkeur van het EHRM voor de bestendiging van de oorspronkelijke gezinsbanden?*, cit., p. 254; LAMBERT ABDELGAWAD E., *The execution of judgments of the European Court of Human Rights*, Strasbourg, 2008, p. 12.

aid and court fees. The Court has a discretionary power in deciding the limits and the specific amount of the "just satisfaction".[135] In the analysed cases only requests for compensation for moral damages and costs and expenses were made. It was notable to observe a significant variation in the amounts awarded for often the same types of facts and violations. Indeed, the amounts for moral damages ranged from 0 euros (when the Court found that the finding of the violation itself was sufficient)[136] to 42.000 euros. The amounts for costs and expenses also differed substantially, ranging from 188 euros to 60.000 euros. The Court has so far only ruled that the finding of a violation in itself was sufficient when the original parents had filed the request for "just satisfaction" also in the name of the child in question.

5.2. *Individual measures*

It is standard practice that in the event of a violation, the respondent State Party must not only pay damages under Article 41 ECHR, but is also obliged to take individual measures to put a stop to the violation found by the Court.[137] This happens under the supervision of the Committee of Ministers. However, it is rather exceptional that the ECtHR also indicates which specific measures should be taken. However, in the context of forced adoption from youth care, the Court does seem to have a tendency to mention specific positive measures under Article 46 ECHR when States Parties leave open the

[135] STEINER E., *Just Satisfaction under Art 41 ECHR: A Compromise in 1950 – Problematic Now*, in FENYVES A., KARNER E., KOZIOL H., STEINER E. (eds), *Tort Law in the Jurisprudence of the European Court of Human Rights. Tort and Insurance Law. TIL 30*, Berlin, 2011, p. 14-15.

[136] ECtHR (Grand Chamber) 10 September 2019, no. 37283/13, Strand Lobben and Others/Norway, §230; ECtHR 10 March 2020, no. 39710/15, Pedersen and Others/Norway, §76; ECtHR 12 September 2023, no. 15784/19, S.S. and J.H./Norway, §21; ECtHR 12 September 2023, no. 9167/18, K.F. and Others/Norway, §19.

[137] *E.g.* ECtHR (Grand Chamber) 13 July 2000, no. 39221/98 en 41963/98, Scozzari and Guinta/Italy, §249; ECtHR 8 April 2004, no. 71503/01, Assanidzé/Georgia, §202; ECtHR 12 May 2005, no. 46221/99, Öcalan/Turkey, §210; ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §107; LAMBERT ABDELGAWAD E., *The execution of judgments of the European Court of Human Rights,* cit., p 10.

possibility of full restoration of the rights[138], or where the forced adoption has not yet been completed[139].[140]

In *Haddad v. Spain*, where the daughter had been placed in pre-adoptive foster care, the Court held that the national authorities had to consider whether some form of contact could be initiated between the father and the child. The most appropriate form of redress would, however, be to ensure that the applicant, as far as possible, is put in the position in which he would have been, had article 8 ECHR not been violated.[141] The Court applied the same reasoning in *Omorefe v. Spain* where the applicant's son had grown up in alternative care from the age of two months.[142] Also in *D.M. en N. v. Italy* the Court indicated certain individual measures; the national authorities had to certainly consider organizing contact sessions between the mother and the child. To this end, the Court referred to the specific circumstances of the present case, the fact that the adoption proceedings were still pending, and the urgent need to put an end to the violation of the applicant's right to respect for their family life.[143]

By concretizing individual measures, the Court seeks to ensure the effective application of the protection contained in Article 8 ECHR. This increases the impact of the Court's decisions and provides the original parents with more concrete means to ensure that the violations of their rights are addressed.[144] By consistently underlining that the national authorities have in principle the freedom to choose the concretization of the individual measures, the Court tries not to undermine the principle of subsidiarity.[145] Moreover, the Court underlines that the best interests of the child, and if applicable,

[138] ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §§70-71.
[139] ECtHR 20 January 2022, no. 60083/19, D.M. and N./Italy, §130.
[140] See also ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §§70-71.
[141] ECtHR 18 June 2019, no. 16572/17, Haddad/Spain, §§79-80.
[142] ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §§70-71.
[143] ECtHR 20 January 2022, no. 60083/19, D.M. and N./Italy, §§94-102.
[144] PATSIANTA K., *D.M. and N. v. Italy: Individual measures in aid of biological parents in adoption proceedings*, 4 April 2022, https://strasbourgobservers.com/2022/04/04/d-m-and-n-v-italy-individual-measures-in-aid-of-biological-parents-in-adoption-proceedings/ (accessed 19 February 2024).
[145] PATSIANTA K., *D.M. and N. v. Italy: Individual measures in aid of biological parents in adoption proceedings*, cit.

the rights acquired in good faith by third parties, serve as limitations.[146] The question arises, however, to what extent the concreteness of individual measures can be reconciled with the best interests of the child. Throughout its jurisprudence the Court has, as seen, consistently stressed the dual nature of the best interests of the child. Children have an interest in maintaining ties with the original family, but also in growing up in a stable, healthy and safe environment.[147] Moreover, the Court accepts that in situations where a child has poor ties or no ties with its original parents, but a strong, socio-affective bond with its foster carers or (prospective) adopters, the child's interests may lie in keeping that bond with the latter. Nonetheless, the Court seems to sometimes forget this dual nature when attaching consequences to a violation of Article 8 ECHR.[148] In, for example, *Haddad v. Spain,* the father had had no contact with his daughter. The daughter had also been merely a year and a half at the time they had last seen each other. Placing the father in the position in which he would have been, had there been no violation of Article 8 ECHR, could have the effect of removing the child from her current family situation in which she had lived for seven years.[149] Similarly, in *Omorefe v. Spain,* the son was almost twelve years old at the time of the publication of the judgment of the ECtHR (i.e. 23 June 2020).[150] In *D.M. and N. v. Italy,* the daughter was already nine years old at

[146] ECtHR 20 January 2022, no. 60083/19, D.M. and N./Italy, §100 referring to the best interests of the child; ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §71 referring to the rights acquired in good faith by third parties.

[147] ECtHR (Grand Chamber) 6 July 2010, no. 41615/07, Neulinger and Shuruk/Switzerland, §136. See *e.g.*, ECtHR 13 March 2012, no. 4547/10, Y.C./United Kingdom, §134; ECtHR 16 July 2015, no. 9056/14, Akinnibosun/Italy, §62; ECtHR 22 June 2017, no. 37931/15, Barnea and Caldararu/Italy, §64.

[148] ECtHR 16 July 2002, no. 56547/00, P., C. and S./United Kingdom, §118; ECtHR 28 October 2010, no. 52502/07, Aune/Norway, §69; ECtHR 31 May 2011, no. 35348/06, R. and H./United Kingdom, §88; ECtHR. 20 November 2017, no. 37284/13, Strand Lobben and Others/Norway, §123; ECtHR 26 April 2018, no. 27496/15, Mohamed Hasan/Norway, §161.

[149] FLORESCU S., *The importance of time in child protection decisions; a commentary on Haddad v Spain*, 2019, https://strasbourgobservers.com/2019/09/12/the-importance-of-time-in-child-protection-decisions-a-commentary-on-haddad-v-spain/ (accessed 19 February 2024).

[150] ECtHR 23 June 2020, no. 69339/16, Omorefe/Spain, §71.

the publication date of the judgment, and had been deemed adoptable for around six years.[151]

Hence, the approach followed in *Pontes v. Portugal* seems to be more in accordance with the dual nature of the child's best interests. Here, the Court decided that, given the considerable time elapsed since the child's removal – namely six years of out-of-home placement and three years of adoption – it was appropriate to leave the decision on the modalities of implementing the judgment to the national authorities.[152] Consequently, this approach creates more room for a situation-specific interpretation of the best interests of the child.[153]

5.3. *Measures of a General Nature*

Sometimes a violation of the Convention is rooted in deficiencies of the national legal order that may affect a large number of individuals. The State Party is in that case obliged to undertake regulatory or policy reforms, or other measures aimed at eliminating those deficiencies (and their consequences).[154] The purpose of these measures of a general nature exists in preventing future similar violations.[155] In the context of the analysed cases, the Court (Grand Chamber) first referred to measures of a general nature in *Abdi Ibrahim v. Norway*. In this case, the mother had asked the Court to impose individual measures under Article 46 ECHR. As a first step, the Court stated that in cases involving care measures, the best interests of the child should be the first consideration in deciding whether individual measures are appropriate under Article 46 ECHR.[156] In

[151] ECtHR 20 January 2022, no. 60083/19, D.M. and N./Italy, §2 *juncto* §32.

[152] ECtHR 10 April 2012, no. 19554/09, Pontes/Portugal, §109.

[153] HAECK Y., VANDE LANOTTE J., *Handboek EVRM. Deel 1. Algemene beginselen,* cit., p. 180, no. 2.

[154] ISSAEVA M., SERGEEVA I., SUCHKOVA M., *Enforcement of the judgments of the European Court of Human Rights in Russia. Recent developments and current challenges, in International Journal of Human Rights*, 2011, p. 68.

[155] ISSAEVA M., SERGEEVA I., SUCHKOVA M., *Enforcement of the judgments of the European Court of Human Rights in Russia. Recent developments and current challenges*, cit., p. 73.

[156] ECtHR (Grand Chamber) 10 December 2021, no. 15379/16, Abdi Ibrahim/Norway, §182.

this case, the child and its adopters also had a family life together. Individual measures could lead to an interference with that family life. Hence, the facts and circumstances relevant to Article 46 ECHR could raise new questions not yet addressed by the merits in the present judgment.[157] Given that Norway had already shown starting legislative efforts to implement the Court's judgments on the different types of care measures[158], the Court found it better to wait for these measures, and deemed it unnecessary to adopt individual measures under Article 46 ECHR.[159]

6. *Conclusion*

We examined the Court's reasoning in the cases where forced adoption from youth care was contemplated or took place. More specifically, the analysis tried to reveal the procedural and substantive factors the Court takes into account when assessing the decisions of national authorities. Additionally, the article shed a light on the way the Court balances the interests and rights of the original parents, the (prospective) adoptive parents, the foster carers and the child. The case law analysis revealed two overarching procedural elements, and four overarching substantive elements. Although all of these elements are important in order for the Court not to find a violation, the Court seemed not to give all of the elements the same weight. Since *Strand Lobben and Others v. Norway,* the Court seems to express an implicit preference for the perpetuation of the original family ties. Forced adoption from youth care does not really fit within that view. This disapproval vis-à-vis adoption translated itself into a far-reaching procedural review in which the Court takes a cautious and critical

[157] ECtHR (Grand Chamber) 10 December 2021, no. 15379/16, Abdi Ibrahim/Norway, §183.

[158] ECtHR (Grand Chamber) 10 December 2021, no. 15379/16, Abdi Ibrahim/Norway, §§62-67: discussions concerning the alternative care system had taken place before the Norwegian Constitutional Court, and the Norwegian Parliament had passed a new Child Welfare Act on 18 June 2021, based on those discussions before the Constitutional Court.

[159] ECtHR (Grand Chamber) 10 December 2021, no. 15379/16, Abdi Ibrahim/Norway, §§184-185.

position towards adoption from youth care.[160] The systematic ex officio expansion of the scope of review helps within this regard. In this way, the Court can verify whether the national authorities have fulfilled their positive duty to take measures to facilitate family reunification. If the lack of bond between the child and the original parents is due to very severe restrictions imposed by the State in the removal, the Court more quickly finds a violation of Article 8 ECHR. Furthermore, the Court pays particular attention to whether the original parents were sufficiently involved in the decision-making process to enable them to protect their interests given the particular circumstances of the case, and in particular the severity of the decisions to be taken. Moreover, the Court attaches importance to the underpinning of arguments with expert opinions. If the State cannot adequately demonstrate the "exceptional circumstances" justifying the placement of a child for adoption, the Court is much more likely to assume that less far-reaching alternatives were available. In contrast, the Court rarely substantially addresses the question if and how adoption as a child protection measure can accommodate the best interests of a child growing up in long-term alternative care. Nevertheless, when the national authorities adequately respect the rights and interests of the original parents from the start of the placement, assisted them with targeted social services, can evidence this with expert opinions, the lack of connection between the child and the original parent is due to a fault of the parents themselves, and adoption is deemed in the child's best interests, the Court still seems to leave a limited space open for the rightful use of forced adoption from youth care, preferably with post-adoption contact. However,

[160] DEKLERCK J., *Gedwongen adoptie als een jeugdhulpinstrument – impliciete voorkeur van het EHRM voor de bestendiging van de oorspronkelijke gezinsbanden?*, cit., p. 252. See also, *e.g.*, BRUNING M., VAN DER ZON K., *Uithuisplaatsing van kinderen. Europese controverse en de rol van het EHRM*, cit., p. 7; ARNARDÓTTIR O.M., *The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance*, in *International Journal of Constitutional Law*, 2017, p. 9; POPELIER P., *The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights*, in POPELIER P., MAZMANYAN A., VANDENBRUWAENE W. (eds), *The Role of Constitutional Courts in Multilevel Governance,* Antwerpen, 2013, p. 249; KLEINLEIN T., *The procedural approach of the European Court of Human Rights: between subsidiarity and dynamic evolution*, in *International & Comparative Law Quarterly*, 2019, p. 91.

the national authorities must make sure not to drop the ball from the very beginning until the very end of the youth protection procedure.[161]

[161] See also DEKLERCK J., *Waar staat mijn huis? Bij wie ben ik thuis? Langdurige uithuisplaatsing*, in *Tijdschrift voor Familie- en Jeugdrecht* 2024, p. 36-37.

ZORAN DIMOVIĆ

UNREVEALING THE NEXUS OF AI, DATA PROTECTION, ELECTRICITY AND LIABILITY: EXPLORING THE INFLUENCES ON TORT LAW WITHIN EU PRIVATE LAW

CONTENTS: 1. Introduction. – 2. AI, Data Protection, Electricity, and Liability within EU tort law framework. — 3. AI-Driven data electrical damages: Liability and Legal Challenges. – 3.1. Liability regimes – 3.2. AI data protection as fundamental right in civil liability. – 3.3. Specific legal challenges – 3.3.1 Causation. – 3.3.2. Wrongfulness and fault. – 3.3.3. Strict liability. – 3.3.4. Product liability. – 4. Data Protection challenges in AI-Powered Electrical Systems. – 4.1. The black-box dilemma. – 5. Conclusion.

1. *Introduction*

The rapid advancement of digital technologies is bringing about profound changes in various aspects of our lives. From our daily routines to the way we conduct business and interact with others, these technologies are reshaping the very fabric of our society. Digital communication, social media, e-commerce, and the rise of digital enterprises are revolutionizing our world, leading to a significant surge in data creation. This ever-expanding pool of data holds immense potential, as it paves the way for novel methods and unprecedented levels of value creation. The impact of this transformation is comparable to the monumental shifts caused by the industrial revolution in the past. As digital technologies continue to evolve, they promise to open up new opportunities, reshape industries, and redefine the way we perceive and engage with the world around us. On the other hand, they also pose risks on slowly developing legislation for protection fundamental rights as rapid changes are overwhelming digital world. As the digital transformation is one of the top EU's priorities[1], which will shape the policies and straighten EU's capabilities in digital technologies, it will also support green transition as

[1] European Union. 2020. Shaping Europe's digital future. KK-03-20-102-EN-C. https://commission.europa.eu/system/files/2020-02/communication-shaping-europes-digital-future-feb2020_en_4.pdf.

declared in the European green deal[2] – roadmap for making EU's economy sustainable by turning climate and environmental challenges into opportunities across the policy areas and making the transition just and inclusive for all. Combined together will help reaching climate neutrality by 2050. Since most important part of digital transformation are data behind it, they have to be processed by algorithms and/or artificial intelligence (henceforth: AI) networks otherwise they are only enormous collection of information without add-on value. Considering named, notable attention in this paper also has to be addressed toward data protection, especially from the perspective of traditional tort law principles as civil liability regimes within nexus of AI regulation and fundamental rights protection, with emphasis on the energy field since the tort law of EU member states is still not unified[3]. Hence common exceptions can be found within the Product Liability Directive (henceforth: PLD)[4], chapter II and articles 4 to 6 and art. 15 under Rome II regulation[5], right to compensation and liability under art. 82 of the General Data Protection Regulation (henceforth: GDPR)[6] and general conditions for imposing administrative fines under art. 83 of GDPR, it is still unshaped and not synchronized on the EU level, especially without touching liability for data misuse and AI accidents and/or damages on the energy field itself.

On an EU level of Member States, it can be generally seen that the laws still do not contain liability rules especially applicable for

[2] European Commission Press Release. December 11, 2019. IP 19-6691..

[3] For more see: HINTEREGGER M., *Principles of European Tort Law: An Objective or Subjective Standard of Fault – Does the Difference Really Matter?*, in *Journal of European Tort Law*, 14(1), 2023, pp. 61-72.

[4] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L 210, 7.8.1985, p. 29), as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999, OJ L 141, 20 4.6.1999. See also infra B.III.6.

[5] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40.

[6] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

usage of AI on the energy field and (mis)usage of enormous data sets. But primary, before going into deeps, we have to delve fundamental definitions and key concepts related to AI, data protection, electricity, and liability within the context of EU tort law and the interplay within them. The definition of AI encompasses the technologies and systems that simulate human intelligence to perform tasks, learn from experience, and make autonomous decisions. This can include machine learning (ML), natural language processing (NLP), and neural networks, among others. Data itself and data with privacy protection refers to the legal framework and principles that govern the collection, processing, and use of personal data. The GDPR in the EU sets the standard for protecting individuals' privacy rights and imposes obligations on entities handling personal data. Electricity, in the context of this paper, pertains to the flow of electric charge and the energy it carries, which powers various devices and systems, mostly smart metering. By its meaning, it's essential to briefly analyze interplay of electricity's role data in the context of AI, as AI systems often rely on electrical power sources, personal data and can, within those, interact with electrical infrastructure. Liability in the context of this paper encompasses the legal responsibility for harm or damage caused by actions, products, or systems, mostly regarding personal data breaches and misusage. Within the scope of AI, data protection, and electricity, liability considerations arise regarding potential damages, data breaches, or other adverse consequences, respectively.

Since digital technologies are rapidly changing and have increasing prevalence on the internal market itself, interplay between AI, data protection, and liability is also notable. The rapid development and deployment of AI systems raise concerns about data protection. Today most data are related to consumers and are stored and processed on central cloud-based infrastructure. By contrast a large share of tomorrow's far more abundant data will come from industry, business, and the public sector, and will be stored on a variety of systems, notably on computing devices working at the edge of the network. AI often requires vast amounts of data to train and operate effectively, which can involve the processing of personal data. En-

suring compliance with data protection laws becomes crucial to safeguard individuals' privacy rights. Additionally, AI systems may rely on electricity to function, making electricity a critical component in the AI ecosystem[7]. Considerations regarding electrical infrastructure, power consumption, and potential risks of electrical accidents and subsequently damages come into play. Furthermore, as AI systems make autonomous decisions and take actions that impact individuals or organizations, questions arise regarding who bears responsibility and liability for any harm caused. Ensuring accountability and addressing potential liability issues within the framework of existing legal principles becomes essential. Overall, understanding the interrelationships and intersections between AI, data protection, electricity, and liability sets the stage for further analysis of their influences on tort law within EU private law. Bearing in mind given above, it is necessary to analyze, how liability for legal damage in AI-driven electrical damages within data protection consideration in AI-powered electrical systems have been shaped up and what its practical implications are.

In the first part of the paper, which mostly address energy field, we analyze the principles, technologies, and legal frameworks associated with AI, data protection, electricity, and liability, with interconnection of tort law framework in EU private law. In the second part we present liability and legal challenges in determining causation, fault, and foreseeability in AI-driven electrical damages regarding personal data protection, especially allocating possible liability between AI developers, users, and other stakeholders. In this part we also consider data protection consideration in AI-powered electrical systems analyzing potential risks to individuals' privacy, including data breaches, unauthorized access, or profiling. It has to be noted that in this part we also analyze product liability in AI-related electrical damages with discussion on the criteria for establishing liability, such as defects in design, manufacturing, or inadequate warnings, and how they apply to AI-related electrical damages. Finally,

[7] For more see TANVEER A., HONGYU Z., BASSAM A., DONGDONG Z., RASIKH T., FASEE U., AHMED S A., SULTAN S. A., *Energetics Systems and artificial intelligence: Applications of industry 4.0*, in *Energy Reports*, 2022(8), pp. 334-361.

we present nuisance claims arising from AI and the electricity exploring private nuisance claims related to AI-generated electrical interference, legal remedies, and defences in such cases. Main focus in this part is on strict liability and AI generated electrical risks. In the concluding section, we present some closing observations regarding the prevailing legal challenges arising from the intersection of AI and tort law within energy field, especially those which are not already pointed out.

2. *AI, Data Protection, Electricity, and Liability within EU tort law framework*

In straightforward terms, AI encompasses technologies that synergize data, algorithms, and computational capabilities. The surge in AI is primarily propelled by advancements in computing and the growing accessibility of data. EU has the opportunity to leverage its technological and industrial prowess, coupled with a robust digital infrastructure and a regulatory framework rooted in fundamental values, to navigate this AI landscape. On the other hand, personal data serves as the foundational element for AI[8]. Anomalies or deficiencies within the dataset utilized for training an AI system can manifest as issues in its ultimate outputs. It's crucial to recognize that the vulnerability of AI systems extends to the integrity of the training data they rely upon. A contemporary software vulnerability regarding personal data known as "data poisoning"[9] emerges when malicious alterations are made to the AI training data. To illustrate, a phishing email might be intentionally marked as authentic within the dataset, potentially allowing similar deceptive emails to evade detection by a spam filter driven by AI trained on the compromised dataset. Hence, the significance of safeguarding the quality and integrity of AI training data (i.e. personal data) should not be underestimated. In a world augmented by AI, cybersecurity, especially for the vital infrastructure supporting this energy domain, becomes an

[8] For more see: YONGJUN X., *Artificial intelligence: A powerful paradigm for scientific research*, in *The innovation*, 2021, 2(4). pp. 1-42.

[9] For more see: SIMMS N., *Data Poisoning: A New Threat to Artificial Intelligence*, in *Mathematics and Computer Science Capstones*, 2023, p. 47.

added focal point. AI essentially functions as a type of software, necessitating a level of security comparable to any other software in terms of its operations and the digital dependencies it relies on. However, the integration of AI also introduces supplementary risks. AI and cybersecurity are integral to the energy field, empowering energy systems to become more efficient, reliable, and resilient. While AI optimizes energy management and grid operations, cybersecurity measures protect against cyber threats and ensure the secure functioning of critical energy infrastructure. As the energy sector continues to evolve, AI and cybersecurity will play increasingly vital roles in shaping a sustainable and secure energy future. Both play critical roles in the energy field, contributing to the optimization, efficiency, and security of energy systems.

As an integral aspect of its digital strategy, EU aims to implement regulations governing AI to foster favourable conditions for the advancement and application of this transformative technology. AI has the potential to yield numerous advantages, including improved healthcare services, enhanced safety and cleanliness in transportation, increased efficiency in manufacturing processes, and cost-effective and sustainable energy solutions. EU is still negotiating first-ever rules for safe and transparent AI[10], among which full ban is set on biometric surveillance (like social credit system in China[11]), emotion recognition and predictive policing. The proposed EU regulation on AI introduces a novel risk-based approach within the EU, but it bears resemblance to existing legal instruments in the field of AI[12]. These developments indicate that a risk-based approach may eventually become the global standard for AI regulation. As mentioned, the EU regulation establishes a classification of AI systems based on

[10] https://www.europarl.europa.eu/news/en/press-room/20230609IPR96212/meps-ready-to-negotiate-first-ever-rules-for-safe-and-transparent-ai.

[11] Initially, there was a belief that the Chinese government was in the process of creating a social credit system, which would assign a numerical score to citizens based on their social behaviours, fiscal activities, and government data. This score would be used to administer punishments and rewards accordingly. However, recent reports indicate that this information is inaccurate. The social credit system in place is actually low-tech and lacks a unified score for citizens. Instead, its primary focus is on addressing issues related to fraudulent and unethical businesses that fail to fulfil debt repayments, financial agreements, or legal contracts.

[12] Mainly on the field of food and chemical industry.

risk levels, forming a "pyramid of criticality" [13]. The lowest tier comprises the majority of existing AI systems, which will be classified as low risk and thus fall outside the scope of the regulation. The next level, "limited risk," will encompass a significant number of systems with minimal obligations, mainly related to providing specific information to users. A smaller subset of AI systems will be categorized as "high risk," subject to various restrictions, on which electricity field belongs. Finally, the top tier comprises prohibited AI systems deemed to carry "unacceptable risks." While the regulation is yet to be passed, there is an urgent need for clear and precise categorization to allow businesses to predict whether their systems will face heavy regulation or remain unregulated. This foresight will help them adapt their plans for the coming years. Consequently, defining risk in the regulation and differentiating the proposed risk levels are critical considerations to address.

As for regulatory framework that address all the topics and interconnections between them, we have to point out base data protection regulation, starting with the strictest GDPR, proposal of e-Privacy regulation[14] (for electronic communications sector) and Data Retention Directive[15] [16]. Furthermore, addressing Recast Directive[17] in a matter of electricity sector, have to be pointed out. None of those addresses AI directly in any aspect but rather indirectly, stemming from its tautological meaning. Firstly, article 6 of GDPR (lawfulness of processing) can be directly applied to AI, hence all AI systems

[13] https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai. [last accessed on 16 August 2023]

[14] Proposal for a regulation concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC. COM(2017) 10 final.

[15] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC. OJ 2006 L 105, p. 54.

[16] Annulled by Judgment of the Court (Grand Chamber), 8 April 2014, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, Joined Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

[17] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast). OJ L 158.

involve the processing of personal data. On this basis GDPR requires that any processing of personal data must have a lawful basis in the means of consent, contractual necessity, compliance with legal obligations, protection of vital interests, the performance of task carried out in the public interest or in the exercise of official authority[18]. Furthermore, transparency and fair processing based on articles 12 – 14 can apply to AI. GDPR emphasizes transparency and right to information. This is important to AI systems, particularly those using ML algorithms, as individuals have the right to know how decisions are made and what criteria is used. AI systems should also adhere to the principle of data minimization by GDPR (article 5), meaning they should only collect and process the personal data that is necessary for the intended purpose. This aligns with GDPR's requirement to limit the processing of personal data to what is strictly necessary, but on the other hand necessity of minimization is not explained, which is a limitation to AI general usage algorithms. As per article 22 of GDPR, it includes specific provisions on automated decision-making, including profiling, which is directly applied to its AI meaning. Individuals have the right not to be subject to decisions based solely on automated processing, including profiling, which significantly affect them. There are exceptions, and individuals have the right to contest such decisions. In relation to AI and liability, it can be found in GDPR article 5 (accountability), explaining that organizations using AI systems are required to demonstrate compliance with GDPR principles. This includes maintaining records of processing activities, implementing data protection by design and by default, and conducting regular assessments of the effectiveness of data processing. Also, AI have to address data security, as AI systems must be implemented with appropriate security measures to protect personal data. This includes both technical and organizational measures to ensure the confidentiality, integrity, and availability of the data. If to go into more specific details on safeguarding data with

[18] For more see DIMOVIĆ Z., *Privacy and Data Protection Concerns in the Regulatory Framework of Slovenian Energy Law*, in *LeXonomica*, 2023, 15(1), pp. 53-76.

mitigation protective measures we would have to use different encryption techniques such as Transport Layer Security (TLS)[19]/Secure Socket Layer (SSL); [20] end-to-end encryption (E2EE);[21] file, disk, database and e-mail protection such as Pretty Good Privacy (PGD)[22] or GNU Privacy Guard (GPG);[23] Virtual Private Network (VPN)[24] encryption; or homomorphic[25] encryption would applicable. When implementing encryption, it's crucial to consider the specific requirements of system, the nature of the data you are protecting, and the potential performance implications. Additionally, keeping encryption algorithms and implementations up to date is essential to address evolving security threats, especially when AI algorithms are involved.

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[19] Transport Layer Security, or TLS, is a widely adopted security protocol designed to facilitate privacy and data security for communications over the Internet. A primary use case of TLS is encrypting the communication between web applications and servers, such as web browsers loading a website. TLS can also be used to encrypt other communications such as email, messaging, and voice over IP (VoIP).

[20] SSL, or Secure Sockets Layer, is an encryption-based Internet security protocol. It was first developed by Netscape in 1995 for the purpose of ensuring privacy, authentication, and data integrity in Internet communications. SSL is the predecessor to the modern TLS encryption used today.

[21] End-to-end encryption (E2EE) is a method of secure communication that prevents third parties from accessing data while it's transferred from one end system or device to another. In E2EE, the data is encrypted on the sender's system or device, and only the intended recipient can decrypt it. As it travels to its destination, the message cannot be read or tampered with by an internet service provider (ISP), application service provider, hacker or any other entity or service.

[22] Pretty Good Privacy (PGP) is an encryption program that provides cryptographic privacy and authentication for data communication. PGP is used for signing, encrypting, and decrypting texts, e-mails, files, directories, and whole disk partitions and to increase the security of e-mail communications.

[23] GnuPG is a complete and free implementation of the OpenPGP standard as defined by RFC4880 (also known as PGP). GnuPG allows you to encrypt and sign your data and communications; it features a versatile key management system, along with access modules for all kinds of public key directories. GnuPG, also known as GPG, is a command line tool with features for easy integration with other applications.

[24] VPN (Virtual Private Network) encryption is extreme math nerd stuff VPN protocols use to encrypt your data. And by “encrypt,” I mean turn it into gibberish nobody who intercepts the data can read.

[25] Homomorphic encryption is the conversion of data into ciphertext that can be analysed and worked with as if it were still in its original form. Homomorphic encryption enables complex mathematical operations to be performed on encrypted data without compromising the encryption.

To delve this also onto energy field, some articles in GDPR and Recast Directive have interactions with data and security protection, starting with recital 32 and article 20 of Recast Directive directly implying those to cybersecurity based on smart metering systems and data communication. Also data management (article 23 of Recast Directive) can be directly applied from article 5 of GDPR, both addressing data minimization, energy data processing and data management. Hawing that in mind, AI algorithms can be law predictable. But on the other hand, balancing between collecting enough data for effective AI processing and minimizing data to respect privacy rights and GDPR principles in unknown to ML devices, and where exactly is intersection of those, and it can't be found in existing regulations, which is serious gap relating to tort. This is also specifically relevant to operations in electricity field and smart metering systems, which can be solely adopted to specific needs of persons, which is based on their gathered personal data. Sector-specific legislation on data access has also been adopted in some fields to address identified market or AI driven failures, such as automotive[26], smart metering information[27], electricity network data[28], or intelligent transport systems[29]. Since al data is mostly wireless, the Digital Content Directive[30] contributed to empowering individuals by introducing contractual rights when digital services are supplied to consumers who provide access to their data.

e-Privacy regulation proposal is closely related to GDPR concerning privacy and data protection, both also from the aspect of liability. Hence this directive directly implies to communication sector and having in mind that internet of things (IoT) smart metering devices communicates over internet or other communication protocols, e-Privacy regulation with all amendments also applies to energy sector. All of those data collecting from IoT is based on ML devices or

[26] Regulation 715/2007 as amended by Regulation 595/2009.

[27] Directive 2019/944 for electricity, Directive 2009/73/EC for gas meters.

[28] Commission Regulation (EU) 2017/1485, Commission Regulation (EU) 2015/703.

[29] Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport, OJ L 207, 6.8.2010, pp. 1–13.

[30] Directive 2010/40/EU of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, PE/26/2019/REV/1, OJ L 136, 22.5.2019, pp. 1–27.

AI algorithms. Liability either for AI driven damages both on general distribution field or smart cities and IoT smart metering devices which collect enormous personal data on the other hand have interconnection in all above given regulation. As for AI related risk, article 45 of Recast Directive include liability of network assets, meaning smart metering and other IoT devices. Also, this article refers to article 49 of GDPR, having in mind liability for each independent system operator and its responsibility for granting and managing third-party access, including the collection of access charges, congestion charges, and payments under the inter-transmission system operator compensation mechanism.

3. *AI-Driven data electrical damages: Liability and Legal Challenges*

As machine learning undergoes continuous evolution, making increasingly intricate decisions based on the data it processes, the potential for unanticipated or adverse outcomes arises due to the absence of human supervision. The automated and artificial nature of AI introduces new complexities in determining liability, a realm traditionally addressed by tort law to adapt to societal changes and technological progress. Historically, courts have employed established analytical frameworks within tort law, applying legal principles to presented facts.

In delving into tort analysis, pivotal questions emerge: Who bears responsibility, and where should liability be assigned in the realm of AI— to the programmer or developer, the user, or the technology itself? How might the standard of care or principles of negligent design evolve with AI's autonomous decision-making capability? If AI is considered an agent of the developer, does the developer bear vicarious liability for AI-induced negligence? The prevalent tort, negligence, centres on establishing whether a party owes a duty of care, breaches the standard of care, and causes damages through that breach. Central to negligence is the concept of reasonable foreseeability, where the test assesses whether a reasonable person could predict the general consequences of their conduct without hindsight. As AI systems move away from conventional algorithms and coding,

they may exhibit behaviours unforeseen not only by their creators but entirely unforeseeable. The lack of foreseeability raises concerns about liability, potentially leaving no party accountable for unforeseeable results that could harm others. The expectation is that the legal system would respond to prevent such outcomes.

Assigning liability in the event of failure or harm caused by an AI system poses significant challenges. For instance, if an AI system responsible for overseeing a power grid triggers a blackout, ascertaining whether the responsibility lies with the developers of the AI, the energy company utilizing the technology, or the users contributing data becomes a complex task. Enforcing liability rules in GDPR, Recast Directive and e-Privacy regulation, with connection to AI (which is solely on predefined human basis), is in that matter of great importance. Meaning which dictate how compensation for damage caused by human activities or goods is handled under the law, as it becomes especially intricate in the realm of AI, the IoT, and robotics. This complexity has hindered the trust of both EU citizens and businesses in AI technologies. Despite the general acknowledgment among European consumers of the potential usefulness of AI applications in their daily lives, these applications are viewed as risky, consequently diminishing the likelihood of widespread adoption[31]. National liability rules provide various avenues for victims to seek compensation. One approach involves making a claim based on a person's conduct, known as "fault-based liability", which typically necessitates demonstrating damage, the liable person's fault, and the causal link between the fault and the damage. Alternatively, victims can pursue a claim for damage suffered regardless of fault through "strict liability" rules. In this case, liability is assigned for the relevant risk without the requirement to prove fault. Under such national rules, victims often only need to demonstrate that the risk associated with the person identified by law as liable has materialized (e.g., the energy operator benefiting from an

[31] For more see: European Commission, Directorate-General for Justice and Consumers, *Behavioural study on the link between challenges of artificial intelligence for Member States' civil liability rules and consumer attitudes towards AI-enabled products and services: final report*, 2022. JUST/2020/RCON/FW/CIVI/0065.

activity posing a risk to the public). In parallel Product Liability Directive PLD applies. PLD establishes harmonized no-fault (strict) liability frameworks at the EU level for claims involving damage to consumers due to product defects. This PLD directive is applicable to a broad spectrum of products, ranging from raw materials to AI-driven devices. It outlines uniform regulations wherein the producer, and in certain instances the supplier or seller, is deemed responsible for damage caused by a defect in their product. The injured party is required to demonstrate the damage, the defect, and the causal connection between the two. According to the Product Liability Directive PLD[32], victims can seek compensation for personal injury or damage to consumer property resulting from a defective product for a period of up to 10 years after the product enters the market[33].

Apart from this legislation, the harmful effects of the operation of AI technologies can be compensated under existing "traditional" laws on damages in contract and in tort in each member state. This applies to all fields of application of AI and other AI systems. The challenges presented by AI and contemporary digital ecosystems, characterized by factors such as opacity like "black-box effect"[34], complexity, and partially autonomous and unpredictable behaviour, remain consistent regardless of the deployment context. On a slightly more specific level, potential risks associated with AI often tend to categorize themselves into two primary dimensions: "safety risks" and "fundamental rights risks". These dimensions represent the adverse aspects of the high expectations associated with AI and the promises made by developers and implementers of the technology. This involves the anticipation that AI will contribute to improving health, saving lives, addressing climate concerns, facilitating better decision-making, promoting fairness, and fostering the development of a more advanced and equitable society.

[32] See European Commission, Directorate-General for Justice and Consumers, *Behavioural study on the link between challenges of artificial intelligence for Member States' civil liability rules and consumer attitudes towards AI-enabled products and services: final report*, 2022. JUST/2020/RCON/FW/CIVI/0065.

[33] *ibid.*

[34] Black box is any AI system whose inputs and operations aren't visible to the user or another interested party. A black box, in a general sense, is an impenetrable system. Black box AI models arrive at conclusions or decisions without providing any explanations as to how they were reached.

Broadly, domestic tort laws typically incorporate a primary rule, or rules, establishing fault-based liability with a wide-ranging application. These laws are often supplemented by more specific regulations that either modify the foundations of fault-based liability, especially in terms of burden of proof, or institute liability independent of fault, commonly known as strict or risk-based liability. The latter encompasses various forms, varying in the scope of the rule, conditions of liability, and burden of proof. Many liability regimes also include the concept of liability for others, often referred to as vicarious liability. However, these frameworks may not consistently yield satisfactory results. Moreover, due to substantial disparities among the tort laws of member states, case outcomes may differ based on the jurisdiction. The PLD's experience highlights that attempt to bridge such differences by harmonizing specific aspects of liability law may not always achieve the desired level of outcome uniformity. As we enter the era of the fifth industry, technological advancements are poised to rapidly transform various sectors, notably the energy sector, unveiling new algorithms during the policy development process. In the evolution of modern energy landscapes, the integration with industry 4.0 to meet industry 5.0 standards introduces the concept of "man and machine", manifested in collaborative robots so called "cobots"[35]. These cobots, distinguished from traditional robots, possess kinematic and dynamic capabilities, allowing them to autonomously collaborate with humans[36]. This development aims to facilitate agile and resilient integration of systems and society with intelligent technologies. The integration of ML and AI regarding processing personal data in electrical systems plays a crucial role in advancing the monitoring, control, operation, and integration of extensive renewable energy sources. These technologies are instrumental in handling uncertainties, addressing instability, adapting to

[35] A collaborative robot, also known as a cobot, is an industrial robot that can safely operate alongside humans in a shared workspace.

[36] For more see: ROSSATO C., PLUCHINO P., CELLINI N., JACUCCI G., SPAGNOLLI A., GAMBERINI L , *Facing with Collaborative Robots: The Subjective Experience in Senior and Younger Workers* , in *Cyberpsychology Behav. Soc. Netw.*, 2021, 24, pp. 349–356.

dynamic conditions, and managing the intricacies of smart grids[37]. However, a notable challenge in incorporating AI into energy systems pertains to data privacy and security. It is imperative to safeguard sensitive information and data generated by energy systems from unauthorized access, use, or disclosure. This involves protecting data against cyber threats and ensuring compliance with GDPR. Upholding the highest standards of data security is paramount to the successful and responsible implementation of AI in energy systems.

While AI has the potential to bring about considerable benefits, enhancing the safety of products and processes, it also carries the risk of causing harm[38]. This harm can manifest in both tangible forms, affecting the safety and health of individuals, including instances of loss of life and property damage, and intangible forms, such as privacy infringement, constraints on the right to freedom of expression, violations of human dignity, and discrimination in areas like employment access. The focus of a regulatory framework should be on minimizing a broad spectrum of risks associated with potential harm, with particular emphasis on mitigating the most significant ones. The primary risks associated with AI use revolve around the application of regulations intended to safeguard fundamental rights, encompassing the protection of personal data, privacy, and prevention of discrimination. Additionally, concerns related to safety and liability play a crucial role in navigating the risks posed by AI technologies. Firstly is data interoperability and quality. Data interoperability and quality, as well as their structure, authenticity and integrity are key for the exploitation of the data value, especially in the context of AI deployment. Data producers and users have identified significant interoperability issues which impede the combination of data from different sources within sectors, and even more so between sectors. The application of standard and shared compatible formats

[37] For more see: Dobbe R., Hidalgo-Gonzales P., Karagiannopoulos S., Henriquez-Auba R., Hug G., Callaway D.S, Tomlin C.J, *Learning to Control in Power Systems: Design and Analysis Guidelines for Concrete Safety Problems* in *Electrical power system review*, 2020, p. 189.

[38] For more see: Ahamad S.F., Han H., Alam M.M., Khairul Rehmat M., Irshad M., Arraño-Muñoz M., Ariza-Montes A., *Impact of artificial intelligence on human loss in decision making, laziness and safety in education,* In *Humanities and social sciences communications*, 2023(10), p. 311.

and protocols for gathering and processing data from different sources in a coherent and interoperable manner across sectors and vertical markets should be encouraged through the rolling plan for ICT standardisation[39] and (as regards public services) a strengthened EIF[40].

In instances where things go awry, and crucial interests or rights, such as physical well-being or life itself, are violated, both as individuals and as a society, our desire extends beyond comprehending the events and their causes. We seek to ascertain whether the harm resulted from wrongful behaviour, and if so, whether such behaviour lacks justification or excuse. In the event that the wrongdoing proves unjustifiable, we aspire to see the responsible party held accountable, sanctioned, or potentially subjected to punishment. In essence, this involves evaluating culpability or blameworthiness. The centuries-long philosophical discourse on free will has centred on the question of whether attributions of culpability are meaningful, often framed within the context of causal determinism (raising questions about blaming one another if all actions are causally determined by prior physical and mental events) or, more broadly, in consideration of human behaviour shaped by (neuro)scientific knowledge (prompting inquiries into the moral culpability remaining if human actions are entirely explicable through behavioural, social, or neuroscience). AI significantly contributes to reshaping that phenomena, enhancing their visibility. The incorporation of AI and data-driven ML into decision-making introduces a noteworthy element of technical opacity and a lack of explainability. This presents a challenge for individuals to meet the traditional conditions for moral and legal culpability, such as intention, foreseeability, and control.

3.1. *Liability regimes*

The responsibility for damages resulting from data breaches based on AI, IoT and especially on energy/electrical fields, personal data misuse incidents from smart meter systems or smart cities,

[39] https://digital-strategy.ec.europa.eu/en/library/rolling-plan-ict-standardisation.
[40] https://ec.europa.eu/isa2/eif_en ; see: COM(2017)134 final.

which are mostly driven by AI, falls under a specialized liability framework, Recast Directive. However, it is crucial to note that the Recast Directive primarily standardizes liability insurance coverage rather than the broader concept of civil liability itself[41]. Consequently, individual member states maintain authority over the regulation of tortious liability in accidents involving AI-driven electricity data damages, with their discretion constrained by the overarching effectiveness principle of the Recast Directive or GDPR. These regulations typically attribute liability to the owner or keeper of distribution system or smart metering devices owner. It's worth noting that certain systems permit direct claims against the insurer, independent of any other party's liability. The suitability of current liability frameworks for AI-driven electrical data breaches is a subject of debate, particularly in jurisdictions employing fault-based liability systems. This debate is evident in Slovenia[42], which utilizes fault-based liability broadly, and limited to specific circumstances like shortcomings. Additionally, in certain instances, specific types of damages may be subject to fault-based liability.

As already said, in September 2022, the EC introduced two corrective directives — the AI Liability Directive[43] and the PLD[44] — with the objective of aligning tort law with the unique attributes of accidents stemming from AI systems. Tort law addresses actions or oversights leading to harm or injury, for which the court imposes liability, serving as a pivotal mechanism for addressing losses or harm resulting from accidents, be they physical, financial, reputational, or emotional[45]. Through tort-based legal proceedings, victims

[41] For more see ERIXON F., *The Proposal to Revise the Product Liability Directive: A Call for More Facts and Evidence*, in *European centre for international political economy*, 2023, ECIPE workshop, pp. 1-6.

[42] For more see DIMOVIĆ Z., *Privacy and Data Protection Concerns in the Regulatory Framework of Slovenian Energy Law*, in *LeXonomica*, 2023, 15(1), pp. 53-76.

[43] European Commission. Proposal of the European Parliament and of the council on adapting non-contractual civil liability rules to artificial intelligence. COM(2022) 496 final, Brussels, 28. 9. 2022.

[44] European Commission. Proposal of the European Parliament and of the council on liability for defective products. COM(2022) 495 final, Brussels, 28. 9. 2022.

[45] For more see VESUDEVAN A., *Who Is Liable for AI-Driven Accidents? The Law Is Still Emerging,* in *Centre for international governance innovation*, 2023. [available at https://www.cigionline.org/articles/who-is-liable-for-ai-driven-accidents-the-law-is-still-emerging/]

of accidents can seek financial redress for harm arising from intentional conduct or the failure to fulfil a duty of care. In scenarios involving AI-driven electrical damages, the tort of negligence is often not applicable. Establishing negligence requires the plaintiff to prove causation, meaning they must demonstrate that the defendant's actions or omissions directly caused the injury. However, the viability of this test has been brought into question in the context of AI driven electrical systems. This doubt stems from the inherent opacity of their internal decision-making processes and the complex distribution of responsibility among various actors, entities, and automated processes involved in the development and deployment of AI systems into smart cities or IoT smart metering devices.

Existing national liability frameworks, especially those grounded in fault-based principles, are ill-equipped to address claims of liability arising from damage caused by AI-enabled products and services. Under these regulations, claimants must establish a wrongful action or omission by an identifiable individual responsible for the harm. The unique attributes of AI, marked by complexity, autonomy, and black-box effect, pose challenges, making it arduous or excessively costly for claimants to pinpoint the responsible party and satisfy the prerequisites for a successful liability claim[46]. Specifically, when seeking compensation, claimants may face exorbitant initial expenses and encounter markedly prolonged legal proceedings, creating a substantial disparity compared to cases not involving AI. Consequently, the prospect of formidable costs and protracted legal processes may dissuade victims from pursuing compensation altogether. These apprehensions have also found resonance in the resolution of the European Parliament (EP) on artificial intelligence in a digital age[47].

In the event of a person initiating a claim, national courts, confronted with the distinctive features of AI, may adjust the application of existing rules on a case-by-case basis to arrive at a fair outcome

[46] For more see BUITEN M., *The law and economics of AI liability*, in *Computer Law & Security Review,* 2023, 48, pp. 1-20.

[47] European Parliament resolution of 3 May 2022 on artificial intelligence in a digital age (2020/2266(INI)).

for the victim. However, this adaptive approach introduces legal uncertainty. Businesses may encounter challenges in foreseeing how prevailing liability rules will be interpreted, making it difficult to evaluate and insure their liability exposure. This uncertainty is amplified for businesses engaged in cross-border trade, as it spans diverse jurisdictions. Small and medium-sized enterprises (henceforth SMEs), lacking in-house legal expertise or substantial capital reserves, are expected to be particularly impacted. Recognizing that various member states are contemplating, and in some cases actively planning, legislative measures regarding civil liability for AI, it is anticipated that without EU intervention, member states will individually modify their national liability frameworks to address AI challenges in the field of electricity. This would lead to further fragmentation and heightened costs for businesses operating across the EU. It has to be pointed out that subsidiarity rule, based on art. 114 TFEU[48], can't be achieved on EU base. The proliferation of divergent national regulations poses a threat to legal certainty and cohesion, hindering the seamless deployment of AI-enabled products and services throughout the internal market. Such legal ambiguity would disproportionately impact companies engaged in cross-border activities, necessitating additional legal information and representation, elevating risk management costs, and resulting in lost revenue. In the absence of harmonized EU rules for compensating damage caused by AI systems, providers, operators, and users, as well as injured individuals, would grapple with 27 distinct liability regimes, fostering varying levels of protection and distorting competition among businesses from different member states. The implementation of harmonized measures at the EU level holds the potential to significantly enhance the conditions for the widespread adoption and advancement of AI technologies within the internal market. This can be achieved by averting fragmentation and augmenting legal certainty, thereby diminishing uncertainties surrounding stakeholders' liability exposure. Furthermore, only cohesive EU intervention can consistently generate the desired impact of fostering consumer trust in AI-enabled products and services, mitigating liability gaps associated

[48] Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

with the unique characteristics of AI across the internal market. This approach ensures a uniform (minimum) standard of protection for all victims, individuals, and companies alike, promoting consistent incentives to prevent harm and uphold accountability.

3.2. *AI Data protection as fundamental right in civil liability*

The intricacies of AI systems pose challenges in determining liability, given the multitude of actors involved in their development and deployment, spanning hardware manufacturers, software developers, and data trainers. This intricate web of contributors often results in a diffusion of responsibility, commonly known as the "problem of many hands"[49], leading to scenarios where accountability for harm is elusive, with potential consequences of no one or only the actor with the lowest position in the chain of command being held liable. Crucially, the discourse on legal responsibility for AI accidents should not unfold in isolation. Instead, it is imperative to adapt tort law, the traditional cornerstone of accident litigation, to incentivize producers, manufacturers, and users to prioritize the creation of safer AI products and empower victims of AI accidents to seek compensation. The EU, as a trailblazer in legal advancements, offers valuable insights for other jurisdictions seeking to navigate the complexities of the digital age. Noteworthy among these advancements is the easing of the burden of proof on victims and facilitating their access to evidence. Ensuring justice and accountability for victims of AI accidents is fundamental to the responsible development and deployment of AI. These objectives can only be realized through addressing the legal intricacies associated with the rapid evolution of this technology.

The utilization of AI has the potential to impact the foundational values of the EU and give rise to violations of fundamental rights[50],

[49] For more see: DE SIO S.F, MECACCI G., *Four Responsibility Gaps with Artificial Intelligence: Why they Matter and How to Address them,* in *Philosophy & Technology journal*, 34, 2021, p. 1057-1084.

[50] Council of Europe research shows that a large number of fundamental rights could be impacted from the use of AI, https://rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5.

encompassing freedoms such as expression and assembly, human dignity, non-discrimination based on various factors, protection of personal data and privacy[51], the right to an effective judicial remedy, a fair trial, and consumer protection. These risks can arise from deficiencies in the overall design of AI systems, including issues related to human oversight, or from the utilization of data without rectifying potential biases. For instance, if an AI system is trained predominantly on data from one gender, such as men, it may yield suboptimal results when applied to the other gender, namely women. AI's expanded capacity to perform tasks previously reserved for humans means that citizens and legal entities increasingly find themselves subject to decisions made by or with the assistance of AI systems.

Understanding and challenging these decisions can be challenging due to their complexity. Furthermore, AI introduces heightened capabilities for monitoring and analyzing individuals' daily habits, raising concerns about potential breaches of EU data protection rules. There is a risk that AI could be employed by state authorities or other entities for mass surveillance, and employers might use it to observe employee behaviour, potentially violating privacy norms. The extensive analysis of data by AI systems poses de-anonymization risks, even in datasets that initially lack personal information. Additionally, online intermediaries employing AI for information prioritization and content moderation can impact rights such as freedom of expression, personal data protection, privacy, and political freedoms[52]. Notably, certain AI algorithms used for predicting criminal recidivism may exhibit gender and racial biases, leading to disparate prediction probabilities for different groups. Similarly, spe-

[51] GDPR and the e-Privacy Directive (new e-Privacy Regulation under negotiation) address these risks but there might be a need to examine whether AI systems pose additional risks.

[52] For more see: TOLAN S., MIRON M., GOMEZ E., CASTILLO C., *Why Machine Learning May Lead to Unfairness: Evidence from Risk Assessment for Juvenile Justice in Catalonia*, Best Paper Award, International Conference on AI and Law, 2019.

cific AI programs for facial analysis may display biases, with accurate gender determination for lighter-skinned men but higher errors when applied to darker-skinned women[53].

Civil liability rules serve a crucial function in facilitating the claiming of compensation by victims of damage, thereby upholding the right to an effective remedy and a fair trial, as enshrined in article 47 of the EU Charter of Fundamental Rights[54] (henceforth Charter). These rules not only incentivize potentially liable parties to prevent harm to avoid liability but also extend to compensating victims for violations of legal interests such as personal dignity, respect for private and family life, the right to equality, and non-discrimination. In tandem with other regulatory and supervisory requirements, such as the AI Act[55], GDPR, Digital Services Act, Recast Directive and EU laws on non-discrimination and equal treatment, this proposal does not establish or harmonize duties of care or liability for entities regulated under these legal acts. Instead, it introduces measures to alleviate the burden of proof for victims pursuing claims based on national law or other EU laws. By complementing these regulatory strands, AI proposal directive proposal safeguards the victim's right to compensation under private law, including compensation for breaches of fundamental rights. By its meaning, art. 1 delineates the subject matter and scope of this Directive, applying specifically to non-contractual civil law claims for damages caused by an AI system under fault-based liability regimes. This includes regimes imposing statutory responsibility for intentional or negligent acts or omissions resulting in harm. Importantly, this AI proposal directive seamlessly integrates with existing civil liability systems, leaving fundamental concepts like "fault" or "damage" untouched, given their varying definitions across member states.

Adopted in conjunction with the revision of the PLD, this AI directive proposal aims to align liability rules with the digital age and

[53] BUOLAMWINI J., GEBRU T., *Proceedings of the 1st Conference on Fairness, Accountability and Transparency*, in PMLR 81, 2018, pp. 77-91.

[54] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

[55] Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM(2021) 206 final.

AI, ensuring coherence between these complementary legal instruments. Concerning damage caused by AI data-based systems, it establishes a foundation for claiming compensation related to the fault stemming from non-compliance with a duty of care under EU or national law. Recognizing the challenge of establishing a causal link between non-compliance and AI system output, a targeted rebuttable presumption of causality is introduced in its article 4(1). The claimant bears the responsibility of proving the fault of the defendant in accordance with applicable EU or national rules.

Articles 4(2) and (3) of AI directive differentiate between claims against providers of high-risk AI systems and users of such systems, aligning with the provisions of the proposed AI Act. Notably, article 4(4) introduces an exception to the presumption of causality for high-risk AI systems if the defendant demonstrates the claimant's reasonable access to evidence and expertise. Conversely, article 4(5) establishes conditions for applying the presumption of causality to non-high risk AI systems, factoring in difficulties arising from characteristics like autonomy and opacity. For cases involving non-professional users, article 4(6) limits the presumption's applicability unless the defendant materially interfered with the AI system's operation conditions or failed to determine them. Lastly, article 4(7) affords the defendant the right to rebut the causality presumption under article 4(1), fostering an effective civil liability framework and incentivizing adherence to expected conduct obligations in AI-related activities.

In the majority of technological ecosystems, particularly those characterized by interconnected devices or programs, specific liability frameworks are often lacking[56]. As a result, the predominant legal structures addressing liability centre around product liability, general principles of tort law (including fault-based liability, the tort of negligence, and breach of statutory duty), and potentially contractual liability. As digital technologies continue to advance and these ecosystems grow in complexity, the application of liability frameworks becomes progressively intricate. A pertinent example is evident in the realm of smart home systems (which is mostly based on gathered

[56] For more see WENDEHORST C., *Strict Liability for AI and other Emerging Technologies,* in *Journal of European Tort Law*, 2020, 11(2), pp. 150-180.

personal data) and networks[57]. If smart home devices exhibit defects upon entering the market, product liability laws would come into play. Moreover, in many jurisdictions, the producer could also be held accountable under general tort law, extending beyond product liability to encompass issues like faulty ancillary digital services, updates, and lapses in product monitoring or surveillance. Furthermore, when damage occurs due to the actions of sellers, installing/configuring service providers, energy suppliers, cloud operators, or other stakeholders within the smart home context, both general tort law and contractual liability may become relevant.

Distinct countries adopt unique approaches to address liability for flawed services but mostly legal systems primarily rely on general provisions related to fault liability or broader tort law concepts, such as the tort of negligence and breach of statutory duty. These provisions typically require evidence of the defendant's failure to meet the necessary standard of care[58].

3.3. *Specific legal challenges*

The primary objective of tort law is to compensate victims for losses (infringement of their data, data breaches, …) that they should not bear entirely, considering a comprehensive evaluation of all relevant interests. However, indemnification under tort law is limited to compensable harm, which refers to damage within a specific range of interests deemed deserving of legal protection[59]. While damages to persons or physical property universally trigger tortious liability, the recognition of pure economic loss of data protection is not universally accepted. For instance, damage caused by self-learning algorithms based on person data (energy distribution) in smart metering home systems may often go uncompensated, as certain legal systems either lack protection for such interests or impose additional

[57] For more see GOTHESEN S., HADDARA M., *Empowering homes with intelligence: An investigation of smart home technology adoption and usage*, *in Internet of things*, 2023, 24(1), pp. 1-18.

[58] In tort law, the standard of care is the only degree of prudence and caution required of an individual who is under a duty of care.

[59] For more see CAPPALLETTI M., *'Risk', Justifying Strict Liability: A Comparative Analysis in Legal Reasoning*, in *Oxford Academic*, 2022, p. 73.

requirements, such as a contractual relationship or a violation of specific rules of conduct.

Furthermore, there is no uniform consensus across EU regarding whether damage to or the destruction of data constitutes a property loss, as some legal systems confine the concept of property to tangible objects, excluding intangibles. Variations also exist in the acknowledgment of personality rights, which can be adversely impacted by AI or ML, particularly if data releases infringe on privacy rights. Nevertheless, in a general sense, the advent of AI and other digital technologies does not fundamentally challenge the established scope of compensable harm. Instead, certain already recognized categories of losses may gain more relevance in future cases compared to traditional tort scenarios. The prerequisite of damage for establishing liability is a flexible concept; the significance of the interest at stake can vary, and the extent of damage to such an interest may fluctuate. This variability may, in turn, influence the overall assessment of whether a tort claim is justified in a particular case.

3.3.1. *Causation*

Establishing liability hinges on the crucial requirement of a causal link between the victim's damage and the defendant's actions. Typically, it falls upon the victim to demonstrate that their damage stems from conduct or risk attributable to the defendant, substantiating this with evidence. However, as the sequence leading to the loss becomes less evident and various factors contribute to the damage, especially those within the defendant's control, proving causation becomes more challenging. But how can data loss be described as damaged goods? In the realm of AI, proving causation is particularly intricate, especially if an algorithm developed by machine learning techniques is involved. Updates and the complex operation of AI systems, dependent on data with potential flaws, further complicate the assessment. Pure economic loss caused by self-learning algorithms, for instance, may remain uncompensated due to differing legal systems and their treatment of such interests.

In cases of strict liability, proving causation may be comparatively more straightforward for the person. Rather than demonstrating misconduct, person must show that the risk triggering strict liability materialized. Yet, the complexities of AI systems, subject to frequent updates and data processing intricacies, present challenges in identifying the origin of flawed code, essential for determining liability. The all-or-nothing dilemma regarding compensation remains a significant concern, but modifications are emerging in EU jurisdictions to ease the burden on persons. Courts may accept *prima facie* evidence in complex scenarios, and some legislators have shifted the burden of proving causation, presuming the defendant caused damage with the opportunity for rebuttal[60]. Proving causation becomes even more complex when alternative causes come into play, a prevalent issue in the interconnected landscape of AI technologies. Existing tort laws in EU handle uncertainties differently, often resulting in joint and several liability when the decisive influence triggering harm is unclear. Modern approaches propose proportional liability, assigning responsibility based on the likelihood that each potential tortfeasor caused the damage.

3.3.2. *Wrongfulness and fault*

As previously mentioned, EU tort laws traditionally operate on a fault-based system, compensating persons when the defendant is responsible for the damage. Blame is typically linked to the deviation from expected conduct by the tortfeasor, necessitating the identification and proof of duties of care. These duties, often shaped by statutory language or reconstructed by the court based on societal beliefs, become challenging to apply in digital technologies, mostly AI. The lack of established models and the potential for autonomous learning make it difficult to measure AI processes against human-centred duties of care.

European legal systems, known for proactive regulation of product and safety requirements, may eventually introduce minimum

[60] For more see: PALLAS LOREN L., REESE R.A., *Prooving infringement: Burdens of proof in copyright infringement litigation*, in *Lewis & Clark law review*, 2019, 23(2), pp. 621-679.

rules to define duties of care relevant for tort law in the face of damage caused by AI and directly on data. Violating statutory or regulatory requirements could trigger liability more easily for victims, shifting the burden of proving fault. However, the absence of such rules initially may take years to address, either through legislation or court developments[61]. Distinguishing legal requirements from industry standards not recognized by lawmakers is crucial, although their relevance in a tort action is weaker. Shifting focus to a software developer doesn't entirely resolve the problem, especially when the software adapts to unforeseen situations. Even if the operation of technology with AI is legally permissible, subsequent independent choices by the AI system may not necessarily be attributable to a flaw in its original design. This raises questions about the choices made during implementation and admission to the market, potentially breaching duties of care applicable to such decisions. Proving fault becomes problematic in the context of damage caused by AI on gathered data. Person must not only identify breached duties of care but also convince the court of the breach by providing evidence of the applicable standard of care and how it was not met. The complexity of circumstances leading to damage makes identifying relevant evidence, such as bugs in intricate software code or examining AI processes, difficult, time-consuming, and expensive.

3.3.3. *Strict liability*

Past twenty years, lawmakers frequently addressed risks associated with AI and other digital technologies in energy field by adopting strict liability, replacing the concept of responsibility for misconduct with liability regardless of fault. This liability was attached to specific risks associated with certain objects or activities deemed permissible, albeit with a residual risk of harm. Historically, such legal shifts were observed in areas like transportation, energy (e.g., nuclear power, power lines, smart metering), and pipelines[62]. Even

[61] For more see: DAHALBERG E., *Legal obstacles in Member States to Single Market rules*, in *European parliament studies,* 2021.

[62] For more see: PASCAL H., *Rule of Law in the Time of War*, in *Revue Européenne du Droit*, 2023, 5(4), pp. 1-124.

earlier, tort laws adapted to heightened risks by easing the burden of proving fault, favouring persons when defendants controlled particular sources of harm, such as devices or defective immovables.

Strict liability frameworks across EU exhibit considerable variation. Some legal systems are restrictive, making limited use of alternative liability regimes and instead expanding fault liability. Others are more generous, incorporating more or less broad general rules of strict liability, typically associated with "dangerous activities". The interpretation of such rules varies among jurisdictions. In certain jurisdictions, strict liability may be triggered by the mere possession of an object, representing a departure from the classic fault requirement. While strict liability offers clear advantages to persons by exempting them from proving wrongdoing within the defendant's sphere, as well as the causal link between such wrongdoing and the loss, it often comes with liability caps or other restrictions. These measures aim to balance the increased liability risk for those benefiting from the technology and are justified as contributing to the insurability of liability risks, as strict liability statutes often mandate adequate insurance coverage.

When contemplating the introduction of strict liability, legislators must consider its potential impact on technological advancement. Concerns may arise about the deterrent effect on technological research if the risk of liability is perceived as a hindrance. However, the chilling effect of tort law is arguably stronger when liability remains entirely unresolved and unpredictable. The introduction of specific statutory solutions can at least provide clarity, delimiting risks and contributing to their insurability.

3.3.4. *Product liability*

The principle of strict producer liability for personal damage and consumer property damage caused by defective products has been integral to the European consumer protection system. The harmonization of strict liability rules has fostered a level playing field for producers across different countries. Despite the implementation of the PLD by all EU member states, complete harmonization of liabil-

ity for defective products is lacking. Besides differences in implementing the directive, member states maintain alternative avenues for compensation alongside the PLD's strict liability for producers. The PLD, based on the technological neutrality principle, holds producers broadly defined along the distribution channel responsible for damage caused by defects in products circulated for economic purposes or in the course of business. While the PLD's interests protected include life, health, and consumer property, some key concepts formulated in 1985 are deemed insufficient for addressing the potential risks posed by AI and new age ML digital technologies. Those technologies, particularly AI systems, challenge key PLD concepts related to product, defect, and producer. The definition of products as movable objects encounters complexities in AI systems where products and services continually interact, blurring the distinction between them. The inclusion of software in the legal concept of a product or product component is debated, especially concerning embedded and non-embedded software, including over-the-air updates or data feeds from outside the European Economic Area.

The concept of defect in the PLD, evaluated based on safety expectations of an average consumer, becomes intricate with interconnected products and systems. The unpredictability of deviations in decision-making paths in sophisticated AI energy IoT systems raises questions about treating such deviations as defects. The PLD's focus on the moment of product circulation limits claims for subsequent updates or upgrades, and the directive lacks provisions for monitoring products post-circulation. The role of the producer in the context of highly sophisticated AI systems is evolving (which energy field is), with potential ongoing control over a product's development through additions or updates. The development risk defence, allowing producers to avoid liability if scientific and technical knowledge at the time of circulation couldn't discover the defect, gains significance with AI-based products. While the PLD regime protects life, health, and consumer property, it remains unclear whether it covers damage to data, as data may not be recognized as an "item of property" within the PLD.

In addition to the previously highlighted challenges within substantive tort law, the practical application of liability frameworks

faces further hurdles in procedural law. Notably, the experience in certain member states, where the burden of proving causation is eased in complex cases like electrical data breaches, suggests that similar leniency could be extended to consumers of AI driven data systems struggling to establish the technology as the actual cause of harm. Nevertheless, such support is likely to vary case by case and certainly across different member states.

Regarding procedural aspects, there might be complications, as well-established concepts in procedural law, such as *prima facie* evidence, may encounter difficulties when applied to situations involving AI technological developments. The resulting disparities in case outcomes due to variations in member states' procedural laws could potentially be mitigated, at least in part, by harmonizing the rules governing the burden of proof, especially regarding personal data and privacy protection.

4. *Data Protection challenges in AI-Powered Electrical Systems*

The magnitude and relative nature of data collection will persistently position privacy as a paramount legal concern for AI users in the future. With AI systems relying on extensive data, the increasing use of data prompts numerous inquiries. Ownership of shared data between AI developers and users, the permissibility of data sale, the necessity of de-identifying shared data to address privacy concerns, and the adequacy of disclosing the intended data use in compliance with legislation all emerge as pivotal questions in the evolving landscape of AI and privacy. The efficacy of AI technology frequently hinges on substantial data sets, giving rise to apprehensions regarding privacy and data security. AI systems, by nature, have the capacity to gather and scrutinize personal data, including sensitive information like biometrics or internet browsing history, posing potential risks if not adequately safeguarded. Consequently, various global laws and regulations have been established to ensure the protection of personal data.

The legal landscape concerning AI technology introduces a notable challenge related to liability and accountability. The autonomy of AI systems in decision-making and actions prompts inquiries into

the responsible party for the outcomes. In different scenarios, determining liability—whether it rests with the product manufacturer, the AI system algorithm, or the personal data owner—becomes a complex issue. With the ongoing evolution and increasing integration of AI into diverse facets of society, there is a pressing need to formulate precise rules and guidelines defining liability and accountability.

The advent of those technologies has led to incremental changes in terms of damage caused, with one notable exception that, while technically gradual, can be deemed disruptive: the heightened significance of damage to data. Actions such as deletion, deterioration, contamination, encryption, alteration, or suppression of data now carry substantial weight, challenging the traditional confines of liability limited to the tangible realm. As our lives and "property" increasingly embrace the digital realm, it becomes inadequate to confine liability solely to physical entities. However, an outright equivalence of data to tangible property in liability matters is also deemed inappropriate. The necessity to articulate this purpose is exemplified in legislation in GDPR. Article 82 of the GDPR explicitly establishes liability for damage caused by violations of its requirements. But in formulating rules related to such conduct, legal frameworks should meticulously consider the omnipresence of data and its status as a valuable asset. While a broad standard prohibiting unauthorized access or modification of data controlled by others could theoretically be introduced, attaching liability for breaches, this approach might lead to excessive liability risks, given the constant interaction with others' data inherent in our daily activities.

All proposed policy alternatives are anticipated to bolster the safeguarding of fundamental rights and freedoms, encompassing privacy, personal data protection, freedom to conduct business, and the protection of property, dignity, and integrity. An illustrative instance of this phenomenon is the manner in which businesses approached compliance with the GDPR. Initially conceived to centre around individuals owning and controlling their data, irrespective of its collection by third parties, and ensuring the protection of private data once consented to by individuals, the regulation is rooted in the right to respect for private and family life as per the European Convention

on Human Rights (henceforth ECHR)[63]. However, many contemporary businesses treat the GDPR merely as an additional compliance burden. As long as users grant permission for data usage and security standards are met, these businesses perceive no need for substantial changes[64]. Instances of businesses genuinely acknowledging users' data ownership are infrequent, and the altered ideology of private data ownership[65] is prone to fading in day-to-day practices.

Effecting fundamental changes within sectors employing (inter)national strategies is challenging, compounded by the lack of sufficiently concrete and pragmatic frameworks tailored for sector-specific implementation. These overarching strategies, addressing various sectors, often fail to focus on sector-specific debates, leaving a regulatory grey zone. The responsibility for filling these gaps, whether borne by the sector or an (inter)national governance institution, remains undefined, contributing to a state of regulatory uncertainty.

In the EU proposed AI Act, an effort is made to enhance regulatory clarity by introducing risk levels in AI implementation, categorizing AI systems as unacceptable risk, high risk, or lower/minimal risk[66]. Regrettably, this categorization proves impractical for the electricity sector. While both unacceptable and high-risk AI systems are meticulously defined, the legislation[67] overlooks lower or minimal risk AI systems. Consequently, in the context of the electricity sector, all AI systems are classified as high-risk due to their potential

[63] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 4 December 2023].

[64] For more see: GREENGARD S., *Weighing the impact of GDPR*, in *Commun ACM*, 2018, 61(16), p. 8.

[65] For more see: CRAWFORD K., *Atlas of AI: the real worlds of artificial intelligence power, politics, and the planetary costs of artificial intelligence*, *New Haven*, 2021, pp. 12-18.

[66] The European Commission is unclear regarding the last category 'lower or minimal risk'. In the draft EU AI Act, this risk-level is seen as one category. In different supportive documents, the European Commission separates lower risk and minimal risk AI systems.

[67] European Commission, Proposal for a regulation of the European parliament and of the council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts, 2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206. Accessed 21 June, 2021.

impact on safety components in the management and operation of heating and electricity. Actors in the electricity sector may argue against their AI systems being intended for safety-critical functions, but control organizations could counter that these systems are intricately linked to such functions, resulting in the classification of all AI systems in the electricity sector as high risk.

Should all AI systems within the electricity sector be classified as high risk, the EU proposed AI Act aims to institute legislative frameworks governing their development and utilization. Nonetheless, the current draft of the Act remains abstract, lacking clarity on sector-specific nuances or even data protection. For instance, it mandates high-risk AI systems to ensure "quality of data sets used, technical documentation and record-keeping, transparency and the provision of information to users, human oversight, and robustness, accuracy and cybersecurity"[68]. Unfortunately, the specifics of these requirements and the responsible entity for verification are unclear. The European Union Agency for the Cooperation of Energy Regulators (ACER) might lack the necessary personnel or expertise to undertake this task, warranting the establishment of a new oversight body. Additionally, determining accountability for providing high-quality data remains an unresolved issue. While the EU AI Act places responsibility on the implementor of AI systems, this approach may be inequitable in the electricity sector. In this context, AI implementors often only collect data, with data production occurring at a lower level—the electricity consumer. The quality of data is contingent on the permissions granted by the electricity consumer to the AI system implementor. Thus, assigning responsibility to the AI implementor for this process may be deemed unjust.

4.1. *The black-box dilemma*

The absence of established AI laws and legal precedents within the current energy smart metering system makes any attempts to assign liability for AI errors irresponsible and uninformed. The acknowledgment that AI's current opaque nature hinders retrospective

[68] *ibid.*

justifications of diagnoses presents a significant challenge to integrating AI into existing liability frameworks. To seamlessly incorporate AI into the existing structure, recourse must be based on traditional tort principles. However, the proclaimed advantage of AI, a key driver for its implementation in data protection, lies in its independence from human presuppositions. Attempts to allocate liability for decisions made by a black box device disrupt concepts of agency, control, and foreseeability. The more autonomy machines achieve, the more precarious the strategy of attributing and distributing legal responsibility for their behaviour to human beings[69].

Examining AI liability within the tort system's predominantly employed intent-based approach raises significant implications: The consequences of the incapacity to comprehend the decision-making process of AI are profound for intent and causation tests, which hinge on evidence of human behaviour. These tests rely on the ability to ascertain facts about foreseeability, causal relationships, planned or expected actions, and even an individual's thoughts or knowledge. If an AI program is a black box, it will generate predictions and decisions akin to humans but without the capacity to articulate its rationale. This also implies that little can be deduced about the intent or conduct of the humans who created or deployed the AI, as they may themselves be unable to foresee the solutions or decisions the AI will arrive at[70].

Applying the tort system to AI not only poses a threat to the justice system but also has far-reaching implications for how society perceives liability in cases without evident intent or causality. A more comprehensive examination of liability sheds light on the challenges posed by the black box dilemma. In instances of AI-related damages, manufacturers are likely to be the primary targets for plaintiffs, given the perceived ease of assigning liability to the entity responsible for programming and disseminating the AI system. As things currently stand with AI diagnostics, manufacturers are better

[69] For more see: CHINEN M.A., *The co-evolution of autonomous machines and legal responsibility,* In *Virginia Journal of Law & Technology,* 2016(20), pp. 338-393.

[70] For more see: ERICKSON B.J., KORTFIATIS P., AKKUS Z., KLINE T.L, *Machine learning for medical imaging*, in *Radio Graphics*, 2017(37), pp. 505-515; BATHAEE Y., *The artificial intelligence black box and the failure of intent and causation*, in *Harvard Law Technologies*, 2018(31), pp. 890-938.

positioned to comprehend the rationale behind the machine's conclusions. When compared to other potential defendants in an energy sector lawsuit, programmer/manufacturers are probably the most adept at analyzing and rectifying causes of errors in IoT.

Even within the subset of programmers specializing in AI deep learning algorithmic models, those qualified to testify as expert witnesses in court would find it challenging to explain an error, particularly in a manner understandable to an average judge or juror. Describing the decision-making process of such a model is essentially a mathematical task. However, for legal professionals, judges, juries, and regulators, an expert might be necessary to articulate the mathematical description. In many instances, even an expert may struggle to elucidate how the model makes decisions or predictions, let alone translate that explanation for a regulator or fact finder[71].

Even if electricians were well-versed in the intricate programming of deep learning AI algorithms, manufacturers will likely take steps to safeguard AI against tampering by treating it as a trade secret. This protection may involve implementing product security measures, asserting copyright and intellectual property protections, and enforcing nondisclosure agreements[72].

Despite the rationale behind holding manufacturers accountable for their products, there are several procedural safeguards (or perceived loopholes) that typically shield manufacturers from lawsuits. Even if courts or legislative actions assign liability to manufacturers, it wouldn't be within a medical malpractice framework. Lawsuits against energy IoT device manufacturers usually don't fall under traditional energy field claims; instead, they are based on defective device design theories that centre around the product's reasonable safety. As discussed earlier, claims of defective design are subject to an entirely different legal and regulatory framework. As the power sector evolves into a more complex environment, intelligent tools like AI become essential for efficiently managing systems and ex-

[71] *Ibid.*

[72] For more see: DAVIES C.R., *An Evolutionary Step in Intellectual Property Rights – Artificial Intelligence and Intellectual Property*, in *Computer Law and Security Report*, 2011 (27), pp. 601-619.

tracting value from the influx of new data. As AI algorithms assimilate this data, it becomes feasible to create more precise smart metering models that incorporate robust data protection procedures.

5. *Conclusion*

As evident, broad AI regulations may lack adequacy. Instead, it is crucial for AI regulation to intertwine with and integrate into the sector-specific regulations of each industry. This approach ensures that overarching visions, strategies, and regulatory proposals are effectively translated into tangible frameworks for a particular sector. Nevertheless, there is uncertainty about whether certain sectors, like the electricity sector, genuinely embrace AI strategies, particularly those outlined in international strategies and regulatory proposals such as those put forth by the EU[73].

Should all AI systems within the electricity sector be categorized as high risk, the EU AI Act holds the promise of instituting a legislative framework governing their development and deployment. Nevertheless, the current draft of the Act remains abstract and lacks specificity on sector-specific matters. For instance, on it's page 4, it mandates high-risk AI systems to ensure the "quality of data sets used, technical documentation and record-keeping, transparency and the provision of information to users, human oversight, and robustness, accuracy and cybersecurity". The precise nature of these requirements and the entity responsible for their verification remain unclear. It raises questions about whether ACER possesses adequate personnel and expertise to fulfil this role, suggesting that the establishment of a new oversight body might be advantageous[74].

Moreover, the responsibility for providing high-quality data within the EU AI Act raises a significant issue. While the Act holds

[73] For more see: DE COOMAN J., *Humpty dumpty and high-risk AI systems: the ratione materiae dimension of the proposal for an EU artificial intelligence act*, in *Mkt competition law review,* 2022(6), p. 49; also VEALE M., BORGESIUS F.Z., *Demystifying the draft EU artificial intelligence act—analysing the good, the bad, and the unclear elements of the proposed approach*, in *Computer law review*, 2021 (22), pp. 97–112.

[74] STAHL B.C., RODRIGUES R. SANTIAGO N., MACNISH K., *A European agency for artificial intelligence: protecting fundamental rights and ethical values,* in *Computer law security review*, 2022(45), p. 105661.

the implementor of AI systems accountable, the electricity sector's AI implementor typically only gathers data. The actual data production occurs at a lower level—the electricity consumer—and relies on the data permissions granted by the consumer to the AI system implementor. Holding the AI implementor solely responsible for this process may be deemed unfair.

The EU AI Act introduces several considerations for AI in the electricity sector, emphasizing the need for quality data collection, cybersecurity, and privacy-preserving measures. However, it leaves out specifics, such as which institute will manage or verify these aspects. This analysis reveals that EU laws, national goals, and sectoral laws related to AI, data protection, energy, and tort law lack harmonization concerning AI development and usage in the electricity system. Examining the specific case of AI in electricity systems, an overlap in legislation is noticeable, particularly in the realm of data gathering and governance. Both proposed legislations emphasize the importance of data quality and transparency. However, divergences arise in their focus on privacy and cybersecurity. While the new energy law for the electricity sector does not delve into AI systems, and the AI EU Act does not concentrate on specific sectors beyond data, the common ground is limited to data discussions, revealing substantial gaps between the different documents.

To enhance individuals' control over their data, there should be additional support for enforcing their rights. Empowering individuals to manage their data at a granular level, through tools like "personal data spaces", can be achieved. This could involve strengthening the portability right under article 20 of the GDPR, granting individuals more control over who accesses and uses machine-generated data. Implementing stricter requirements on interfaces for real-time data access and mandating machine-readable formats for specific products and services, such as data from smart home appliances or wearables, can contribute to this control. Rules for providers of personal data apps or novel data intermediaries may also be considered to ensure their role as neutral brokers, which aligns with the discussions in the mentioned Data Act. The Digital Europe programme is poised to support the development and rollout of "personal data spaces".

While EU legislation remains applicable irrespective of AI involvement, assessing its adequacy for addressing AI-related risks is crucial. The inherent characteristics of AI, such as lack of transparency, pose challenges to enforcing EU and national legislation effectively. The difficulty in identifying and proving potential breaches of laws, including those protecting fundamental rights and attributing liability, necessitates adjustments or clarifications in certain areas of existing legislation to ensure effective application and enforcement. By all given means, this article has delved into numerous challenges facing legislators, businesses, and individuals regarding AI, risk, personal data and privacy protection, especially on the energy field with regard to liability. Key themes examined include the definition and delineation of risk in a legal AI context, the construction of liability for AI systems at the EU level, and the intricate balancing of various societal and individual interests in the AI era. Providing concrete solutions to these challenges at this juncture would be unrealistic, given their dynamic nature and the ongoing evolution of proposed regulations and rules pertaining to AI system liability[75].

Given the dynamic nature of the research field, the primary aim of this paper is to enhance our comprehension of the challenges associated with regulating AI and risks on data and privacy protection in energy field through the lens of traditional tort law. Within this legal framework, two established concepts have been identified to help integrate the AI pyramid of criticality into a more familiar legal context: the negligence assessment within fault-based liability and the concept of strict liability[76]. Both these tort law evaluations encompass various arguments and classifications related to risk. The extensive case law and theoretical works surrounding these concepts offer valuable tools for achieving a balanced approach to harnessing the benefits of AI systems while upholding fundamental rights and ensuring compensation for those who incur losses. As with any societal innovation, new risks emerge, especially in this case, where

[75] For more see: SCHUTTE B., MAJEWSKI L., HAVU K., *Damages Liability for Harm Caused by Artificial Intelligence – EU Law in Flux*, in *Helsinki Legal Studies Research Paper*, 2021.

[76] The issue of assumption of risk will probably become increasingly important as AI regulations and practices become established, but it seems of more of a periphery interest at this phase in development.

they are relatively unknown and possess a broader scope and larger potential impact than in specific areas where strict liability has been previously imposed. Therefore, as illustrated in this article, leveraging familiar legal tools, such as the established and often effective instrument of tort law, is crucial.

CHRISTOPHER REIBETANZ

MEDIATION AND PRIVATE INTERNATIONAL LAW

1. *Introduction*

Mediation as a dispute resolution mechanism is enjoying a "*global blossoming*"[1]. The primary aim of mediation lies in reaching the solution to a conflict without having to resort to arbitral or court proceedings. A third party, a mediator, ideally reconciles the competing needs and interests of the parties in order to generate options and solve problems amicably[2]. In contrast, courts and arbitral tribunals impose binding decisions on the parties' claims and counterclaims[3].

State courts are strictly bound by the dispositive law. This is one of the core differences between mediation and the standard dispute resolution mechanisms[4]. Compared to arbitration, the influence of legal provisions in mediation is weaker. Arbitral boards are obliged to render an enforceable award and can therefore not completely disregard the applicable procedural and substantive law[5].

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[1] ANDREWS N., *Andrews on Civil Processes*, Cambridge, 2019, para. 28.15 (p. 790).

[2] MOORE C., *The Mediation Process*, San Francisco, 2014, pp. 22, 387 ff.

[3] Cf. WEGEN G., BARTH M., WEXLER-UHLICH R., *International Arbitration in Germany*, München/Oxford/Baden-Baden, 2022, Chapter 1, paras. 6, 9 ff. (pp. 3-5); ANDREWS N., *Andrews on Civil Processes*, cit., before para. 28.01 (p. 783).

[4] GENN H., *Judging Civil Justice*, Cambridge, 2010, p. 119.

[5] Cf. THORN K., REIBETANZ C., *Die Stellung der Schiedsgerichtsbarkeit im Rechtsschutzsystem der Europäischen Union*, in VON BAR C., KNÖFEL O., MAGNUS U., MANSEL H.-P., WUDARSKI A. (eds), *Gedächtnisschrift für Peter Mankowski*, Tübingen,

At last, substantive law decides whether a claim of party A against party B exists, regardless of any efforts by a mediator to resolve the conflict amicably. In case the mediation process fails, court proceedings remain the last resort. Hence, there is a considerable indirect influence of substantive law on the mediation process which the parties and the mediator are well advised to bear in mind[6].

In this paper, specific legal issues arising in cross-border situations will be discussed[7]. Which law applies to the mediation agreement between the parties? Are there any peculiarities if the parties opt for institutional mediation, e.g., according to the mediation rules of the International Chamber of Commerce (ICC)? Which law governs contractual claims against a mediator who breaches his duty of confidentiality after the mediation process? These questions have been identified as "*specially complicated*" by some authors in the past[8]. In accordance with the analytical method of private international law[9], I will first identify and distinguish the contractual relationships subordinate to the generic term "mediation" (sub 2.), followed by a discussion of the private international law rules applying to the respective relationships (sub 3.).

2024, *forthcoming*. This is reflected e.g. in the grounds for refusal of recognition and enforcement of arbitral awards in Art. V New York Convention. Even if the parties wish for a decision ex aequo et bono, this must be permitted by the law of the seat of the arbitral tribunal (see e.g. § 1051 (3) German Code of Civil Procedure). Common rules of procedure in arbitration normally contain choice-of-law provisions, which is not the case for rules of mediation, cf. e.g. Article 27 Vienna International Arbitral Centre (VIAC) Rules of Arbitration and Mediation 2021, that applies only to arbitration and does not have a mediation-counterpart.

[6] CALVO CARAVACA A.-L., CARRASCOSA GONZÁLEZ J., *Mediation in Private International Law*, in CALVO CARAVACA A.-L., CARRASCOSA GONZÁLEZ J. (eds), *European Private International Law*, Granada, 2022, para. 1131 (p. 491).

[7] This article focuses on international commercial mediation. The areas of family, consumer and labor mediation are not covered (for the peculiarities of these areas cf. FISCHER J., SCHNEUWLY, A.M., *Alternative Dispute Resolution*, Zürich/St. Gallen, 2021, pp. 302 ff.). Moreover, I will not discuss in-court mediation, which is more closely related to procedural law.

[8] See e.g. ESPLUGUES C., *Mediation*, in BASEDOW J., FERRARI F., RÜHL G., DE MIGUEL ASENSIO P. (eds), *Encyclopedia of Private International Law, Volume 1*, Cheltenham, 2017, p. 1252.

[9] Developed by GOLDSCHMIDT W., *Die philosophischen Grundlagen des internationalen Privatrechtes*, in VON CAEMMERER E. (ed), *Festschrift für Martin Wolff*, Tübingen, 1952, pp. 208 ff.

2. *Legal relationships in the context of mediation*

One can distinguish between the pre-existing relationship between the parties (2.1.), the mediation agreement (2.2), the contract between the parties and the mediator (2.3), the mediation process itself (2.4) and the result of the mediation process, the settlement (2.5)[10]. The aforementioned relationships will be outlined below.

2.1. *Pre-existing relationship between the parties*

The mediation process is always linked to a pre-existing relationship between the parties. In international commercial mediation, this relationship typically derives from a contract between the parties, such as a contract on the sale of goods or services or a partnership agreement.

2.2. *Mediation agreement*

International commercial mediation is based upon a contractual agreement between the parties to resolve (or at least try to resolve) any dispute or conflict before, during or after the performance of the contractual duties through mediation, *i.e.*, supported by a third party (mediator)[11]. The mediation agreement can be included in the written contract between the parties (the so-called mediation clause), or be made separately at a later stage, *e.g.*, when the conflict has already arisen[12].

The mediation agreement, most importantly, obliges the parties to enter into the mediation process. Depending on the applicable sub-

[10] A comparable distinction is made by FISCHER J., SCHNEUWLY A.M., *Alternative Dispute Resolution*, cit., pp. 357 ff.

[11] FRAUENBERGER-PFEILER U., *Zur Wirksamkeit von Mediationsklauseln*, in GARBER T. (ed), *Festschrift Matthias Neumayr, Band 1*, Vienna, 2023, p. 1205.

[12] EIDENMÜLLER H., *Kapitel 4: Rechtsstellung des Mediators*, in EIDENMÜLLER H., WAGNER G. (eds), *Mediationsrecht*, Köln, 2015, para. 11 (pp. 134-5).

stantive law, a legal duty to cooperate may be derived from the mediation agreement[13]. The parties can make stipulations regarding confidentiality, the procedure of the mediation process including the obligation to disclose relevant documents, the obligation to nominate a mediator, or the cost-bearing. Compliance with these duties can be secured by contractual sanctions[14]. If the parties do not make explicit stipulations, the obligations can also result from the dispositive law.

The mediation agreement clarifies the relationship between mediation and litigation and/or arbitration proceedings, either explicitly or, at least, implicitly. Often, the mediation agreement is classified as dilatory waiver of action (*pactum de non petendo*), meaning that court litigation or arbitration is not permitted during the mediation process[15].

Regarding subsequent (public) court proceedings, the parties may restrict evidence and evidence topics, *e.g.*, by stipulating that the mediator must not be named as a witness or that the parties may not produce any documents or statements originating from the mediation process.

The mediation agreement or the governing law can also set out rules concerning the specific claim that is "caught up" in the mediation process. An important aspect concerns limitation. According to Article 8 (1) Mediation Directive[16], the EU member states must ensure that parties who choose mediation to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration by the expiry of limitation or prescription periods during the mediation process. As a matter of fact, German law does not provide

[13] However, one must bear in mind that the mediation process is voluntary and can be ended at any time, cf. e.g. § 2 V 1 German Mediation Act (Germany).

[14] STEFFEK F., *Internationales Recht*, in GREGER R., UNBERATH H., STEFFEK, F. (eds), *Recht der alternativen Konfliktlösung*, München, 2016, para. 6 (p. 445).

[15] BACH I., GRUBER U. P., Germany, in ESPLUGUES C., IGLESIAS J. L., PALAO G. (eds), *Civil and Commercial Mediation in Europe,* Volume I, Cambridge/Antwerp/Portland, 2014, p. 165; for Germany: FISCHER C., *Vertragsbeziehungen in der Mediation (§ 25)*, in HAFT F., VON SCHLIEFFEN K. (eds), *Handbuch Mediation*, München, 2016, para. 25 (pp. 547-8); for Austria: Austrian Supreme Court, 3 Ob 98/22s.

[16] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, in OJ L 136, 24.5.2008, p. 3.

for a specific rule that sets out when exactly the suspension of limitation begins and ends[17]. Therefore, the parties are well-advised to include specific provisions in the mediation agreement regarding the beginning and end of the suspension period, and to defer the claim. Otherwise, the debtor is in default and can be held liable.

In the law of international arbitration, the so-called doctrine of separability ensures that the invalidity of the main contract does not necessarily lead to the invalidity of the arbitration agreement[18]. The rationale of the doctrine of separability also applies to other dispute resolution clauses, *inter alia* mediation agreements. The invalidity of the main contract must not "infect" and consequently obstruct the mediation process[19]. The doctrine should also be applied to mediation agreements[20].

Considering functional parallels between arbitration and mediation, one might also contemplate the "mediationability" of a specific claim, analogous to the arbitrability of the dispute[21]. "Mediationability" could, similarly to arbitrability, decide on whether the parties are allowed to enter into a mediation agreement for the (legal) issue at hand. In the scope of this paper, *i.e.*, commercial mediation, no

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[17] § 203 S. 1 BGB applies, cf. (also for a critical assessment) WAGNER G., *Basic Structures of a German Act on Mediation*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 74 (2010), pp. 799 ff.

[18] ANDREWS N., *Andrews on Civil Processes*, cit., para. 30.37 (p. 848); cf. Article 16 (1) UNCITRAL Model Law on Arbitration.

[19] HAUSER M., *Welches nationale Mediationsrecht ist auf grenzüberschreitende Wirtschaftsmediationen in der Europäischen Gemeinschaft anzuwenden?*, in *Zeitschrift für Schiedsverfahren* 2015, p. 92. The German Federal Court of Justice (BGH) applied the doctrine of separability to conciliation agreements (BGH, 29.10.2008 – XII ZR 165/06, para. 22). The "separability" of international choice-of-court agreements is codified in Article 25 (1) Brussels I bis Regulation (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 (recast), in OJ L 351, 20.12.2012, p. 1).

[20] Under German law, this can be reached by an analogous application of § 1042 (1) 2 German Code of Civil Procedure.

[21] For the issue of arbitrability cf. MISTELIS, L. A., BREKOULAKIS, S. L. (eds), *Arbitrability*, Alphen aan den Rijn, 2009. For the issue of arbitrability in private international law cf. BREKOULAKIS S., *Arbitrability and Conflict of Jurisdictions*, in FERRARI F., KRÖLL S. (eds), *Conflict of Laws in International Commercial Arbitration*, New York, 2019, Chapter 5.

legal provisions prohibiting certain parties from mediating certain subject matters have been found[22].

The mediation agreement fulfills three functions: firstly, setting out the parties' obligation to mediate, secondly, delimiting mediation from litigation/arbitration, and, thirdly, deciding on the fate of the claim and the pre-existing relationship during the ongoing mediation process.

2.3. *Contract(s) with the mediator(s) and/or the mediation institution*

The contract between the parties and the mediator is, by its nature, a multilateral contract[23]. It is the mediator's duty to assist the parties in reaching a settlement[24]. The contract typically contains provisions concerning remuneration and confidentiality as well as the place, time and language of the meetings.

The parties can also appoint more than one mediator (co-mediation)[25]. In this case, the parties will normally conclude separate contracts with each mediator. The contracts are legally independent from one another[26].

In practice, the parties may have agreed to conduct mediation proceedings in accordance with the rules of a dispute resolution institu-

[22] Cf. the national reports by ANDREWS N., *Andrews on Civil Processes*, cit., paras. 29.10 ff. (pp. 816 ff.); ESPLUGUES C., IGLESIAS J.L., PALAO G. (eds), *Civil and Commercial Mediation in Europe*, Volume 1, Cambridge/Antwerp/Portland, 2013. For limitations in other areas of the law, e.g., maintenance obligations or divorce, see CALVO CARAVACA A.-L., CARRASCOSA GONZÁLEZ J., *Mediation in Private International Law*, cit., para. 1132 (p. 491).

[23] DE LOS MOZOS P. O. P., *The Law Applicable to International Mediation Contracts*, in *Revista para el Análisis del Derecho*, 2011, p. 4.

[24] Cf. § 16 Austrian ZivMediatG; § 2 German Mediation Act; Article 7 ICC Mediation Rules; Article 9 VIAC Mediation Rules.

[25] Cf. § 1 (1) German Mediation Act.

[26] WENTZEL C., *Internationale Mediation*, Berlin, 2016, pp. 221 ff.

tion. The ICC Mediation Rules are perhaps the most common example[27]. Many arbitration institutes also provide for mediation rules[28]. The parties conclude a contract with the respective institution. The agreement between the parties and the institution can oblige the institution to support and organize the mediation process, *e.g.* by providing a list of suitable mediators. The contract between the parties and the institution is an additional, independent contract. The parties can also oblige the institution itself to appoint the mediator. In this scenario, the contract between the parties and the institution effectively takes the place of the contract between the mediator and the parties themselves[29]. The contract between the parties and the institution is an intermediate contract.

In conclusion, there may be only one (multilateral) contract between the parties and the mediator. If the parties have agreed to co-mediation or the support by a mediation institution, the situation becomes more complex. In the case of co-mediation, an additional contract comes into play. A similar situation arises in institutional mediation. The institution may, however, even be obliged to appoint the mediator and, from the parties' perspective, assume the mediator's duties.

2.4. *Mediation proceedings*

The mediation process itself is governed by the agreements made between the parties and the mediator. The rules of the proceeding, its venue and language depend on this agreement. The rules of dispute resolution institutes normally set out guidelines for the proceedings.

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[27] The ICC Mediation Rules can be accessed online: https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/mediation/mediation-rules/. See also the Mediation Rules of the Centre de Médiation et d'Arbitrage de Paris (CMAP).

[28] *E.g.* the "Mediationsordnung" of the Deutsche Institution für Schiedsgerichtsbarkeit (DIS), The London Court of International Arbitration (LCIA) Mediation Rules or the VIAC Mediation Rules

[29] HUTNER A., *Das internationale Privat- und Verfahrensrecht der Wirtschaftsmediation*, Tübingen, 2005, pp. 235 ff.

2.5. *Settlement agreement*

If the mediation process is successful, the parties conclude a settlement agreement[30]. This agreement may modify the pre-existing contractual relationship between the parties. Alternatively, the parties may form a new, separate contract[31]. Sometimes the outcome of the mediation process may not even leave room for a legal evaluation[32].

3. *Application of private international law mechanisms*

Which law applies to the different relationships in cross-border situations? This question, pertaining to private international law, will be addressed in the following sections[33].

The pre-existing relationship does not raise any issues of private international law peculiar to the context of mediation. Hence, I will focus on the mediation agreement (3.1), the mediator contract (3.2), and the mediation proceedings (3.3). Additionally, I will discuss the law applicable to settlement agreements and their enforcement, particularly in relation to the Singapore Convention on Mediation, which entered into force in September 2020 (3.4).

[30] Cf. § 2 VI 3 German Mediation Act; Article 8 (1) lit. a ICC Mediation Rules; Article 11 (1.1) VIAC Mediation Rules.

[31] In German law, the settlement agreement resulting from mediation falls under the scope of § 779 German Civil Code, cf. STEFFEK F., *Internationales Recht*, cit., para. 40 (p. 454).

[32] ESPLUGUES C., *Mediation*, cit., p. 1253. An example could be a statement in the mediation agreement that simply acknowledges the opinion or the work of the other party. This acknowledgement has no legal, but potentially high psychological implications.

[33] The issue of "mediationability" in private international law will not be discussed in this paper since, as pointed out above, there are no restrictions on private autonomy in this regard, hence, the question of private international law does not arise.

3.1. *Mediation agreement*

The three functions of the mediation agreement that I have identified above are particularly relevant for the purposes of private international law, as they establish the framework for the following private international law analysis.

3.1.1. *Material obligations of the parties*

The classification of the material obligations of the parties deriving from the mediation agreement is highly disputed. Some authors propose a procedural classification[34]. The procedural character of a mediation agreement is emphasized. It is argued that mediation agreements should be treated analogously to arbitration and choice of court agreements (Article 1 (2) (e) Rome I Regulation[35]). As a result, the Rome I Regulation would not be applicable in this context.

The mediation agreement does indeed have a procedural component, especially if it comprises a dilatory waiver of action, a *pactum de non petendo*. However, compared to arbitration and choice of court agreements, the procedural component is much weaker. The parties can end the mediation process at any time and move forward to litigation/arbitration[36]. Out-of-court mediation and litigation/arbitration are distinct. Thus, the exception in Article 1 (2) (e) Rome I Regulation cannot be applied to mediation agreements by analogy[37].

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[34] HAUSER M., *Welches nationale Mediationsrecht ist auf grenzüberschreitende Wirtschaftsmediationen in der Europäischen Gemeinschaft anzuwenden?*, cit., pp. 93 ff.; HESS B., *Rechtsgrundlagen der Mediation (§ 43)*, in HAFT F., VON SCHLIEFFEN K., *Handbuch Mediation*, München, 2009, paras. 74 ff. (pp. 1082-3).

[35] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, in OJ L 177, 4.7.2008, p. 6.

[36] In contrast, a written arbitration agreement has, in principle, a derogatory effect (cf. Article II New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards); the same is true for choice of court agreements (cf. MAGNUS U., *Article 25*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Brussels Ibis Regulation*, Köln, 2023, paras. 30 ff. (pp. 601 ff.)).

[37] The ECJ frequently stresses that the exceptions in Article 1 (2) of the European regulations must be interpreted narrowly, cf. e.g. Judgment of the Court (Sixth Chamber) of 6 June 2019, Ágnes Weil v Géza Gulácsi, Case C 361/18 para. 44.

In line with the prevailing view in the literature[38], a contractual classification is favored[39]. The main material obligations deriving from the mediation agreement, *e.g.*, the obligation to maintain confidentiality, to nominate a suitable mediator, or to pay the mediator, are freely assumed obligations towards the other party[40]. Applying the *lex fori* in instances of such breaches would result in highly unpredictable outcomes, given the lack of harmonization among the substantial laws of EU member states in this area.[41]. A procedural classification could encourage forum shopping and lead to conflicting judgments within the internal market.

There should be no exception from the contractual classification for the breach of the obligation to engage in mediation proceedings[42]. If a party begins court proceedings in breach of the dilatory waiver of action, the situation is ambiguous. On the one hand, this constitutes a breach of the procedural side of the mediation agreement, and on the other hand of the material contract between the parties. For the purposes of this paper, especially the law applicable to damages claims of the other party is relevant. Applying the *lex fori* would, again, lead to unpredictable results and incentivize forum shopping[43]. Moreover, this situation would prevent the parties from

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[38] ESPLUGUES C., *Civil and Commercial Mediation in the EU after the Transposition of Directive 2008/52/EC*, in ESPLUGUES C. (ed), *Civil and Commercial Mediation in Europe, Volume II*, Cambridge/Antwerp/Portland, 2014, p. 745 with further references for other EU member states; GRUBER U. P., BACH I., *Germany*, in ESPLUGUES C. (ed.), *Civil and Commercial Mediation in Europe, Volume II*, Cambridge/Antwerp/Portland, 2014, pp. 159 ff.; STEFFEK F., *F. Internationales Recht*, cit., para. 6 (pp. 445-6); UNBERATH H., *Internationale Mediation*, in KRONKE H., THORN K. (eds), *Festschrift für Bernd von Hoffmann*, Bielefeld, 2007, p. 504.

[39] HUTNER A., *Das internationale Privat- und Verfahrensrecht der Wirtschaftsmediation*, cit., pp. 38 ff. proposes applying international company law. This is not convincing: In contrast to companies, the parties of mediation do not pursue a *common* goal, but their interests are diametrically opposed. Furthermore, the "seat" of the "company" would be impossible to determine.

[40] Cf. the definition of "contractual obligations" in European PIL according to the ECJ, e.g. Judgment of the Court (First Chamber) of 26 March 2020, Libuše Králová v Primera Air Scandinavia, Case C 215/18, para. 43.

[41] The Mediation Directive does not harmonize these aspects.

[42] Proposed by EIDENMÜLLER H., *Vertrags- und Verfahrensrecht der Wirtschaftsmediation*, Köln, 2001, pp. 56 ff.

[43] STEFFEK F., *Internationales Recht*, cit., para. 9 (p. 446).

mitigating the risk of premature court proceedings by opting for a legal framework with stringent sanctions for such behavior[44].

If the mediation agreement is not concluded between a consumer and a professional and, thus, subject to Article 6 Rome I Regulation, the law governing the mediation agreement must be determined according to Article 4 Rome I Regulation. The mediation agreement is neither listed under Article 4 (1) of the Rome I Regulation, nor is there a "*characteristic performance*" as described in Article 4 (2) of the same regulation. Therefore, the country with which the agreement is most closely connected must be identified, as per Article 4(4) of the Rome I Regulation[45]. All circumstances of the particular case must be taken into account. While the designated location of the mediation sessions may be one factor[46], it is less critical than the "*seat*" of an arbitral board in international arbitration[47]. The seat of the arbitral board plays an important role because of the interplay between arbitration and the procedural law of the *lex loci arbitri*[48]. The seat of mediation has, in principle, no legal implications, and should, thus, only be one of many factors in identifying the closest connection[49]. Most importantly, the law applicable to the main contract between the parties should be considered[50]. Subjecting the mediation agreement to the law governing the main contract is a simple solution which will lead to predictable solutions. This is particularly true for mediation agreements within the main contract (mediation

[44] The procedural law of the lex fori should, however, decide on the procedural consequences of premature actions. For German law, it is argued that the action should be declared inadmissible by the court (UNBERATH H., *Mediationsklauseln in der Vertragsgestaltung*, in *Neue Juristische Wochenschrift*, 2010, pp. 1321 ff.).

[45] UNBERATH H., *Internationale Mediation*, cit., p. 505.

[46] Relevance of this factor is stressed by GRUBER U. P., BACH I., *Germany*, cit., p. 161. The authors want to "transfer the 'arbitration rule' to mediation".

[47] FRAUENBERGER-PFEILER U., *Zur Wirksamkeit von Mediationsklauseln*, cit., p. 1207.

[48] Cf. BONDY C., *Lex Arbitri and the Rules of Procedure*, in KRÖLL S., BJORKLUND A.K., FERRARI F. (eds), *Cambridge Compendium of international commercial and investment arbitration,* Volume 1, Cambridge, 2023, p. 468.

[49] STEFFEK F., *Internationales Recht*, cit., para. 13 (p. 447). For the same reason, the place of mediation does not play a role in the Singapore Convention; mediation settlement agreements under the Convention are "delocalized", cf. STELBRINK J., *Das Singapur-Übereinkommen über Mediation*, Tübingen, 2023, p. 114.

[50] CALVO CARAVACA A.-L., CARRASCOSA GONZÁLEZ J., *Mediation in Private International Law*, cit., para. 1136 (p. 493).

clauses)[51]. If the mediation agreement is made at a later date, the law governing the contract with the mediator or the mediation institution should also be taken into account. If the parties have their habitual residence in the same country, the law of the common habitual residence should regularly apply. Within the limits of Article 3 (3) and (4) and Article 6 (2) Rome I Regulation, the parties are free to choose the applicable law. The parties should consider explicitly extending a choice of law clause for the main contract to the mediation agreement.

Article 9 (1) Rome I Regulation safeguards the applicability of overriding mandatory rules. The impartiality and confidentiality of the mediator are minimum standards set out in the Mediation Directive[52]. Hence, these principles can be found in the law of every EU member state[53]. These minimum standards, which can be classified as overriding mandatory rules[54], are safeguarded within the internal market as per Article 9 (1) of the Rome I Regulation.

3.1.2. *Procedural elements*

The law of the forum (*lex fori*) should govern the procedural elements of mediation agreements. This is particularly true for elements that directly affect potential court proceedings[55]. One example is restrictions of evidence[56]. For instance, parties might agree to exclude the mediator as a witness in subsequent court proceedings. Another example involves a temporary waiver of action. The waiver directly affects the (procedural) admissibility of a court action. Therefore,

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[51] SANDROCK O., *Schadensersatz wegen Verletzung von Mediationsvereinbarungen zwischen deutschen und angelsächsischen Unternehmen*, in BACHMANN B., BREIDENBACH S., COESTER-WALTJEN D., HESS B., NELLE A., WOLF C. (eds), *Festschrift für Peter Schlosser*, Tübingen, 2005, p. 827; STEFFEK F., *Internationales Recht*, cit., para. 14 (p. 447-8).

[52] Cf. Article 1 (b), Article 7 Mediation Directive.

[53] See e.g. §§ 3 I, II, 4 German Mediation Act.

[54] GROSSERICHTER H., *Die Bestimmung des in der Mediation anwendbaren Rechts*, in ARNOLD S., LORENZ S. (eds), *Gedächtnisschrift für Hannes Unberath*, München, 2015, pp. 135 ff.; GRUBER U. P., BACH I., *Germany*, cit., p. 173.

[55] UNBERATH H., *Internationale Mediation*, cit., p. 505.

[56] GROSSERICHTER H., *Kapitel 12: Mediationsverfahren mit Auslandsbezug*, in EIDENMÜLLER H., WAGNER G. (eds), *Mediationsrecht*, Köln, 2015, para. 28 (p. 438).

the effects of such agreements as well as the reaction of the seized court should be governed by the *lex fori*. The law applicable to the contractual elements of the mediation agreement (*lex causae*) governs both the validity and interpretation of the agreement[57].

To prevent forum shopping and the resulting unpredictability in the applicable law concerning the procedural effects of mediation agreements, parties should incorporate a choice-of-court agreement in their contract[58]. Within the internal market, this agreement will be effective as per Articles 25 and 31(2) of the Brussels Ibis Regulation.

3.2. *Contract with the mediator(s)*

The contract between the parties and the mediator constitutes a contract for the provision of services according to Article 4 (1) (b) Rome I Regulation[59]. According to Article 19 (1) of the Rome I Regulation, the law of the country where the mediator has his or her principal place of business applies[60]. As the contract between the parties and the mediator is multilateral, Article 16 of the Rome I Regulation governs recourse claims between the parties.

When the contract with the mediator is closely linked to a mediation agreement containing detailed provisions about the mediator's obligations, the application of the escape clause under Article 4(3) of the Rome I Regulation becomes relevant. Some authors propose to extend the applicable law to the contract with the mediator by means of a secondary connection[61]. However, the law designated by

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[57] HUTNER A., *Das internationale Privat- und Verfahrensrecht der Wirtschaftsmediation*, cit., p. 81; a different view is taken by STEFFEK F., *Internationales Recht*, cit., para. 8 (p. 446).

[58] STEFFEK F., *Internationales Recht*, cit., para. 20 (p. 449).

[59] CALVO CARAVACA A.-L., CARRASCOSA GONZÁLEZ J., *Mediation in Private International Law*, cit., para. 1135 (p. 493); DE LOS MOZOS P.O.P., *The Law Applicable to International Mediation Contracts*, cit., pp. 8 ff.; THORN K., *Artikel 4 Rom I-VO*, in RAUSCHER T. (ed), *EuZPR/EuIPR, Band 3*, Köln, 2023, para. 39 (p. 194); UNBERATH H., *Internationale Mediation*, cit., p. 507.

[60] If the mediator is a company, the place of the central administration applies (Article 19 (1) Rome I Regulation).

[61] Proposed by UNBERATH H., *Internationale Mediation*, cit., p. 507; cf. also THORN K., *Artikel 4 Rom I-VO*, cit., para. 150 (p. 228).

Article 4(1) of the Rome I Regulation should be modified using Article 4(3) only in exceptional circumstances[62]. The deviation is justified when there is a significant and objective link between the contracts. The parties of the mediation agreement and the contract with the mediator are not identical. The *lex contractus* of a contract between A and B can only be extended to a contract between parties A, B and C if there is an objective and close link between the contracts[63]. The mere risk of "*dépéçage*[64]" – the fragmentation of the applicable laws – does not suffice to subject C to the *lex contractus* of a contract concluded between A and B.

A potential use case of the escape clause could be institutional mediation[65]. In this case, the parties have agreed to conduct mediation according to the rules of a mediation service provider. The mediator is appointed either by the parties, or the services provider itself. He or she is bound by the mediation rules the parties agreed upon. The situation is comparable to institutional arbitration. In this case, too, it is proposed to apply the escape clause in Article 4 (3) Rome I Regulation and synchronize the contract with the arbitrator and the arbitration proceedings[66].

In the case of co-mediation, the parties conclude separate contracts with different mediators. The governing law must be determined independently for each contract[67]. The escape clause should again be used only under exceptional circumstances. In all the other cases, the parties must choose the applicable law to synchronize the *leges contractus*.

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[62] Cf. recital (20) Rome I Regulation.

[63] KÖHLER C., *Rom I-VO Art. 4*, in BUDZIKIEWICZ C., WELLER M., WURMNEST W. (eds), *beck-online.GROSSKOMMENTAR, Rom I-VO*, 1.9.2023, paras. 186 ff.

[64] In fact, dépéçage would presuppose a unitary legal relationship, cf. CHESHIRE, NORTH & FAWCETT, *Private International Law*, Oxford, 2017, p. 55.

[65] THORN K., *Artikel 4 Rom I-VO*, cit., para. 150 (p. 226); UNBERATH H., *Internationale Mediation*, cit., p. 507.

[66] SCHÜTZE R., *I. Kapitel: Einleitung*, in SCHÜTZE R. (ed), *Institutionelle Schiedsgerichtsbarkeit*, Köln, 2018, para. 54 (p. 17).

[67] For a different approach see UNBERATH H., *Internationale Mediation*, cit., pp. 507 ff. According to UNBERATH, the applicable law can only be determined for the entirety of all contracts. This seems less appropriate from the point of view of the mediators. However, the approach will rarely lead to results differing from the ones proposed by this paper.

3.3. *Mediation proceedings*

The mediation process is largely at the discretion of the parties. Unlike in arbitration, where the "seat" of the proceedings plays a crucial role, the "seat" in mediation holds lesser significance. Arbitration is normally considered to be a functional equivalent to litigation before national courts. National courts, therefore, support and safeguard arbitration proceedings. The mediation process is independent from such support. The territorial "roots" of the mediation proceedings, the "seat" of the mediation, should, thus, not be relevant in order to determine a law governing the mediation proceedings[68]. Instead, the rules governing the mediation process itself are entirely at the discretion of the parties.

3.4. *Settlement agreement*

3.4.1. *Applicable law*

The settlement replaces, modifies, or supplements the pre-existing contractual relationship of the parties. When the settlement agreement merely modifies the pre-existing contract, the applicable law, in principle, remains unchanged, unless explicitly varied within the modification. If the agreement replaces or supplements the pre-existing relationship, the applicable law must be evaluated separately. If the pre-existing contract is modified, there is in principle no variation in the applicable law. Of course, the modification can include a (new) choice of law, resulting in a change in the applicable law[69]. Significantly altering the characteristic performance of the contract might change its essence, effectively replacing the original contract rather than merely modifying it.

It is, again, proposed to synchronize the *lex contractus* of the settlement agreement with the pre-existing contract by means of Article

[68] A different view is taken by ESPLUGUES C., *Mediation*, cit., p. 1253. For the reduced importance of the "seat" of mediation see above 3.1.1.

[69] According to Article 3 (2) Rome I Regulation, the parties can change the law applicable to the contract at any time.

4 (3) Rome I Regulation (secondary connection)[70]. A direct comparison with a court settlement is not entirely accurate, as the mediation process typically offers parties greater flexibility. The mediation agreement, hence, frequently varies considerably from the pre-existing relationship. However, since the contracting parties are identical, there are less obstacles to a secondary connection as opposed to the contract with the mediator discussed above.

3.4.2. *Enforcement: The Singapore Convention*

Settlement agreements do not qualify as "decisions" under Article 36 Brussels Ibis Regulation since they have not been issued by a court. The Mediation Directive only address enforceability in domestic cases[71]. Thus, there is no "free circulation" of mediation agreements comparable to court decisions within the internal market[72]. Mediation settlement agreements are, generally speaking, simple contracts between the parties[73].

On 20 December 2018, the General Assembly of the United Nations has adopted the United Nations Convention on International Settlement Agreements Resulting from Mediation. In 2021, an amended UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation was adopted[74]. The Singapore Convention's primary goal is to promote the use of mediation in cross-border commercial dis-

[70] THORN K., *Artikel 4 Rom I-VO*, cit., para. 150 (p. 226, at footnote 411).

[71] Cf. Article 6 (4) Mediation Directive.

[72] ESPLUGUES C., IGLESIAS J.L., *Mediation and private international law: improving free circulation of mediation agreements across the EU*, in DIRECTORATE GENERAL OF THE EUROPEAN PARLIAMENT, *The Implementation of the Mediation Directive 29 November 2016*, Brussels, 2016, p. 87.

[73] However, the member states are obliged to grant the possibility of court confirmation of the settlement agreement (homologation) leading to enforceability (Article 6 (1) and (2) Mediation Directive). If the parties make use of this possibility, there is a "judgment", "court settlement" or "authentic instrument" (Article 2 Brussels Ibis Regulation) that can be enforced under Articles 36 ff., 58 Brussels Ibis Regulation.

[74] Resolution A/RES/76/107.

putes and to elevate the status of mediation to that of a reliable alternative dispute resolution tool[75]. The lack of a cross-border mechanism for the legal effects of settlement agreements is said to have a chilling effect on the use of mediation as a dispute resolution mechanism[76]. As of 10 January 2024, there are 55 signatories to the Convention, 13 countries[77] have ratified the Convention. Interestingly, no member state of the EU, nor the EU itself has ratified the Convention[78].

The Singapore Convention applies only to *international* settlement agreements. For this to be the case, the agreement must either be signed by parties who have their place of business in different countries, or, if the parties have their place of business in the same country, the performance of the obligations or the subject matter of the agreement has a strong international element[79]. Hence, the Singapore Convention takes a very different approach from the New York Convention. The latter requires the arbitral award in question to be "made" in a country different from the country in which it is sought to be enforced. Settlement agreements under the Singapore Convention are, thus, delocalized, stateless[80].

International settlement agreements are enforceable according to Articles 3 and 4 Singapore Convention. Enforcement can only be refused on the limited grounds set out in Article 5 Singapore Convention. It has been argued that the ratification of the Singapore Convention by the EU would be advantageous for the internal market[81].

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[75] GRILL A.-K., MARTIN E., *The Impact of EU Law on International Commercial Mediation*, in MATA DONA J. R., LAVRANOS N. (eds), *International Commercial Arbitration and EU Law*, Cheltenham, 2021, para. 20.61 (p. 488); SCHNABEL T., *The Singapore Convention on Mediation*, in *Pepperdine Dispute Resolution Law Journal* 19 (2019), p. 2.

[76] SCHNABEL T., *The Singapore Convention on Mediation*, cit., pp. 2 ff.; STELBRINK J., *Das Singapur-Übereinkommen über Mediation*, cit., p. 102.

[77] Belarus, Ecuador, Fiji, Georgia, Honduras, Japan, Kazakhstan, Nigeria, Qatar, Saudi Arabia, Singapore, Turkey, and Uruguay.

[78] PFEIFFER T., *Das Singapur Übereinkommen und das Internationale Privat- und Prozessrecht der EU*, in *Zeitschrift für Internationales Wirtschaftsrecht*, 2021, p. 209, and STELBRINK J., *Das Singapur-Übereinkommen über Mediation*, cit., pp. 193 ff., convincingly argue that the EU has the exclusive competence to sign the Convention.

[79] Cf. Article 1 Singapore Convention.

[80] STELBRINK J., *Das Singapur-Übereinkommen über Mediation*, Tübingen, 2023, p. 114; SCHNABEL T., *The Singapore Convention on Mediation*, cit., p. 22.

[81] STELBRINK J., *Das Singapur-Übereinkommen über Mediation*, Tübingen, 2023, p. 265; EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE (EUIPO), *Position Paper on the*

Indeed, ratification would harmonize the requirements for the enforcement of settlement agreements as well as the grounds on which enforcement may be refused. This would strengthen the parties' trust in the validity of a settlement agreement and, consequently, promote mediation as a dispute resolution mechanism.

The legal effects of international mediation settlement agreements under the Singapore Convention are quite strong[82]. The agreement is no longer treated as a simple contract between the parties, but as legally binding and potentially enforceable by national authorities.

This seems adequate only if the mediation process the parties have agreed upon is a functional equivalent of court proceedings or arbitration. This is safeguarded by the "requirements for reliance on settlement agreements" in Article 4 Singapore Convention as well as the "grounds for refusing to grant relief" under Article 5 Singapore Convention. With regards to "*mediationability*", Article 5 (2) (b) Singapore Convention adopts a *lex fori* approach: if the subject matter of the dispute is not capable of settlement through mediation under national law, the competent authority may refuse to enforce the agreement. Consequently, the signatory parties to the Singapore Convention can, by their own discretion, decide which types of disputes can be resolved through mediation.

Before the EU ratifies the Singapore Convention, it is crucial to consider its interplay with the Brussels Ibis Regulation, particularly in the context of parallel proceedings. Article 3 (1) Singapore Convention requires each party to the Convention to supply the competent authority to enforce the settlement agreement "in accordance with its rules of procedure and under the conditions laid down in the

Singapore Convention on Mediation, pp. 4 ff.; more hesitant: PFEIFFER T., *Das Singapur Übereinkommen und das Internationale Privat- und Prozessrecht der EU*, cit., p. 209.

[82] Cf. MORRIS-SHARMA N.'s class at *The Hague Academy of International Law's Advanced Course on "Current Trends on International Commercial and Investment Dispute Settlement"* in Hong Kong, summarized by WELLER M., https://conflictoflaws.net/2024/first-edition-of-the-hague-academy-of-international-laws-advanced-course-in-hong-kong-on-current-trends-on-international-commercial-and-investment-dispute-settlement/.

Convention". In European jurisdictions, this will require an exequatur of the agreement by a national court[83]. The exequatur proceeding must not come into conflicts with parallel proceedings before national courts as to the merits of the dispute.

According to Article 12 (4) Singapore Convention, the Convention *"shall not prevail over conflicting rules of a regional economic integration organization"*. Therefore, if a national court of a member state has assumed its competence based upon the Brussel Ibis Regulation, this court is called to decide on the conflict. As long as the proceedings in one member state are ongoing, a court in another member state may not declare a settlement agreement enforceable since this would potentially lead to conflicting judgments within the internal market and, thus, a conflict with the Brussels Ibis Regulation.

Assuming that the Singapore Convention enters into force in the EU, on the other hand, the decision of the court of an EU member state declaring the settlement agreement enforceable would be a decision that could circulate freely within the internal market. Courts of other member states would have to recognize such a decision according to Article 36 (1) Brussels Ibis Regulation. Consequently, a conflict between Article 5 Singapore Convention and Article 45 Brussels Ibis Regulation would arise. The grounds on which the enforcement of a settlement agreement can be refused under Article 5 Singapore Convention are more focused on the mediation agreement and proceedings. However, the European legislator need not add the Singapore Convention to the list of international conventions that are applicable with priority (Article 73 Brussels Ibis Regulation) in order to avoid conflicts between the Convention and Article 45 Brussels Ibis Regulation. The control mechanisms of Article 45 Brussels Ibis Regulation should apply also to court decisions that declare settlement agreements enforceable. They ensure that the exequatur proceeding itself does not violate the *ordre public* of other member states.

[83] PFEIFFER T., *Das Singapur Übereinkommen und das Internationale Privat- und Prozessrecht der EU*, cit., p. 209.

4. *Conclusive Remarks*

The private international side of mediation is not trivial. It is important to differentiate between the several legal relationships in mediation, each governed by distinct principles of private international law. The contract with the mediator falls within the scope of the Rome I Regulation, as do material aspects of the mediation agreement. Procedural aspects of the mediation agreement must be characterized as procedural elements, hence, the *lex fori* applies. If the parties opt for institutional mediation or co-mediation, the situation becomes even more complex, since even more "players" must be considered. The settlement agreement is a new and separate contract. In cross border cases, the parties are well advised to include choice-of-law provisions in their contracts and the final settlement agreement.

The ratification of the Singapore Convention would grant substantial legal weight to international settlement agreements and thereby bolster mediation as a dispute resolution mechanism in international trade. Mediation would become more attractive particularly *vis-à-vis* parties that reside outside the internal market.

ALENKA KRIŽNIK

HOW DOES THE EU LEGAL ORDER ENSURE THE PROTECTION OF THE 'RIGHT TO SAY GOODBYE' TO A DECEASED PERSON?

1. *Introduction and problem statement*

Fundamental rights are, in principle, the category of rights defined in the Constitution, while human rights are a slightly broader category of rights that are also regulated by acts[1]. The right to say goodbye to a dying or deceased person is not directly regulated either in the Republic of Slovenia's Constitution or in any of its acts. While it is therefore not a fundamental right, it may be indirectly protected under other fundamental rights such as the right to respect for private and family life, the right to privacy, and the right to personality. The exercise of the right to farewell was not guaranteed to everyone on equal terms even in »normal« times, and even less so during the pandemic, since the public interest also had to be protected. Individual institutions often either substituted face-to-face visits with remote visits, or temporarily restricted them altogether. This raises the question of the consequences of preventing contact between the dying and their relatives, particularly for the grieving process and the reintegration of the bereaved into society. Research on fundamental human rights in the area of dying and mourning among lawyers is mainly concerned with defending the right to choose death, and not so much with the right to a good quality of life until the end of life

[1] POLAJNAR - PAVČNIK A., in PAVČNIK M., POLAJNAR- PAVČNIK A., WEDAM-LUKIĆ D., *Temeljne pravice*, Ljubljana, 1997, p. 15-16.

and all that it entails. This includes the right to say goodbye, which is usually more commonly referred to as farewell.

In Slovenia, the farewell to a deceased person is left to improvisation. At the level of principle, it seems obvious to allow a goodbye, but in practice we encounter several cases where this is not the case. The outcome depends on the sensitivity of the persons carrying out certain tasks and whether they will allow a relative to say goodbye to his or her child, parent or loved one who has died suddenly. The right to say goodbye may also be protected under the right to private life, which is protected by Article 12 of the 1948 UN Universal Declaration of Human Rights[2] and Article 17 of the International Covenant on Civil and Political Rights (ICCPR)[3], Article 8 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[4] and by Article 35 of the URS[5]. With the onset of a person's death, the protection of mental integrity may become part of the deceased's piety[6], but it is certainly a personal right of the relatives, which has not ceased with death[7]. Thus, the commentary of the URS also makes it clear that the relatives' feelings of respect for the deceased are protected in the context of their personality right, more specifically in the context of the personality right to mental integrity[8]. Piety[9] is the memory of the personality of the deceased. The

[2] Universal Declaration of Human Rights, proclaimed by the General Assembly, resolution 217 A (III), A/RES/3/217 A, 10 December 1948.

[3] The International Covenant on Civil and Political Rights (ICCPR) was signed on December 16, 1966 in New York, and entered into force on March 23, 1976. It has been in force in Slovenia since July 1, 1992 (Official Gazette of the Republic of Slovenia, No. 35/92 - MP, No. 9/92).

[4] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, CETS No.005.

[5] BETTETO N. *Denarna odškodnina za negmotno škodo zaradi okrnitve osebnostne pravice,* in *Pravna praksa*, 1997, no. 21, pp. 24-27.

[6] Thus, in the VSL judgment II Cp 764/2009, 01.04.2009.

[7] Regarding the postmortem protection of personal rights, opinions are divided and we would not define them in detail here. For more see BETTETO N. *Pravna sposobnost fizične osebe ter varstvo človekov osebnosti pred rojstvom in po smrti*, Podjetje in delo, no.6-7, 2003, pp. 1742-1755 and TOPLAK L.., *Civilnopravno varstvo osebnostnih pravic in mediji* in *Podjetje in delo*, no. 6-7, 1997, p. 1166-1176.

[8] ŠTURM L., article 34. in:, AVBELJ M., BARDUTZKY S.,BELE I., BLAHA M., CERAR M., ČEBULJ J., DESINGER M., GALIČ A., GRAD F., KAUČIČ B.I., et.al., *Komentar Ustave Republike Slovenije - Dopolnitev – A.,* Ljubljana, 2011, p. 483.

[9] Deep respect, consideration e.g. to the dead: VERBINC, F., *Slovar tujk*, Ljubljana, 1997, p. 544.

High Court of Ljubljana explains that the deceased's goods are also protected by pieté: »*The personality rights of an individual cease with his death. The protection of his or her personal goods is achieved through the corresponding goods of relatives. The right to respect for one's dignity falls within the framework of the right to mental integrity, which is part of one's privacy. Privacy is an area of the individual which no one may interfere with without specific legal authority*[10].«

The protection of the right of a deceased person can also be found in Article 34 URS, which provides that everyone has the right to personal dignity and security. *»It is necessary to bear in mind that freedom of action does not mean unlimited and abstract »natural« freedom. As members of a social community, individuals must suffer limitations to their general freedom of action dictated by the interests of others and of the community as a whole*[11].« Thus, there can be no question of immediate protection of individual rights in the event of sudden death. In certain cases[12], the limitation of immediate farewell may be justified in order to protect the public interest[13]. In such cases, the challenge is to strike a balance that will adequately safeguard two conflicting rights. During the Covid-19 pandemic, this dilemma became even more pronounced when institutions had to weigh the reduction of infection-related damage against the damage caused by isolation[14]. However, personality rights are absolute and protected *erga omnes*[15] and, as with all interferences with fun-

[10] VSL judgment II Cp 764/2009, 01.04.2009.

[11] ŠTURM L.., article 34, cit., p. 482.

[12] Likewise: Article 8 of the ECHR: »*1. Everyone has the right to respect for his private and family life, home and correspondence. 2. The public authority may not interfere with the exercise of this right, unless it is determined by law and necessary in a democratic society for the sake of national security, public safety or the economic well-being of the country, in order to prevent disorder or crime, to secure health or morals, or to protect the rights and freedoms of other people.*«

[13] Due to the possible interest in the investigation of a criminal offense in case of suspicion of service of a criminal offense or emergency situations.

[14] DOWNAR J., KEKEVICH M., *Improving family access to dying patients during the COVID-19 pandemic*, in *The Lancet*, Vol. 9, Issue 4, 2021, pp. 335-337.

[15] FINŽGAR A., *Osebnostne pravice*, Ljubljana, 1985, p. 39.

damental human rights, the principle of proportionality must be respected[16]. Interference with the right to take a private life and with a person's personal or family life is also permissible only on grounds laid down by law or with consent[17]. Still, any interference must be proportionate to the interest to be protected.

Everyone has the right to be given the opportunity to say goodbye to a loved one. While there is a constitutional and legal basis for this right, it is not sufficiently explicit. In normal circumstances, the reason for denying this right may also be due to ignorance of its importance for the mourning process[18] or in the absence of legal acts[19] or perhaps due to a lack of expertise and support from the involved professionals[20]. In any case, the authorities involved in such an extraordinary event should intensify their cooperation as a preventive measure[21]. There is no need to adopt additional legislation in this respect, as it can build on existing legislation[22] that allows for cooperation between authorities and possibly adopt internal protocols for dealing with sudden events that serve to structure the handling of an otherwise complex and stressful event.

Slovenia is a social country governed by the rule of law. It also provides social protection through a special social welfare system, which furnishes adequate professional support to citizens. Article 69

[16] More about NOVAK J., *Načeli sorazmernosti in pro rata temporis*, in *Podjetje in delo*, 3-4, 2014, p. 447.

[17] So in VSL judgment II Cp 764/2009, 01.04.2009.

[18] Which is partly the result of several decades of tabooing death in today's society.

[19] The word goodbye can only be found in the Code of Ethics in Nursing and Care of Slovenia (fficial Gazette of the Republic of Slovenia, no. 71/2014).

[20] RAWLINGD D., WINSALL M., YIN H., DEVERY K., *How hospital staff say goodbye to dying patients – Evaluation of an online education module: Imminent death*, URL: https://anmj.org.au/how-hospital-staff-say-goodbye-to-dying-patients-evaluation-of-an-online-education-module-imminent-death/ (29.11.2023).

[21] Police, prosecutor's office, judiciary, healthcare, social work, funeral service, etc.

[22] For example Article 16 of the Family Code (FC) (Official Gazette of the Republic of Slovenia, no. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – odl. US, 94/22 – odl. US in 5/23)), stipulates that in carrying out the tasks specified by this code, social work centers must collaborate with other holders of public authority, providers of public services, state and judicial authorities, local community bodies, as well as humanitarian and other non-governmental organizations. Similar provisions are also found in other laws (e. g., Article 16 of the State Prosecution Office Service (SPOS) (Official Gazette of the RS, No. 58/11, 21/12 – ZDU-1F, 47/12, 15/13 – ZODPol, 47/13 – ZDU -1G, 48/13 – ZSKZDČEU-1, 19/15, 23/17 – ZSSve and 36/19, 139/20, 54/21 in 105/22 – ZZNŠPP).

of the Social Assistance Act (ZSV)[23] stipulates that social welfare services shall be provided by professionals and assistants who have a certain level of education. This means that in a contemporary society, the provision of certain services in the public interest requires appropriate skills and qualifications. People who come to a social work centre or other comparable body for help are usually in distress and can be supported by a professional who has the appropriate training and at least five years' experience[24]. When relatives suddenly lose a loved one, they find themselves in severe distress and not infrequently have their first contact with a funeral service, for which there is no specific psychosocial training or requirement for the funeral service to provide appropriate psychosocial support. This can be attributed to the fact that this activity is classified as an economic utility, the principal activity of which is waste management. Their clients are usually in need of treatment comparable to the procedures and services provided by Social work center.

People who have lost loved ones should receive professional treatment. A short survey[25] showed that those responsible for funeral services do not perceive a need for special training in this area, nor for rendering psychosocial assistance for bereaved persons. The Slovenian Funeral and Cemetery Services Act (FCSA)[26] does not prescribe any specific procedure regarding the training and required skills of employees of funeral companies, while the Croatian Law on Funeral Service[27] requires a specific examination for the performance of funeral activities (Articles 18 – 20). The required qualifications and continuous education are essential in order to adequately perform activities that support citizens in challenging life situations.

[23] Social Assistance Act (SAA) (Official Gazette of the Republic of Slovenia, no. 3/07 – official consolidated version, 23/07 – popr., 41/07 – popr., 61/10 – ZSVarPre, 62/10 – ZUPJS, 57/12, 39/16, 52/16 – ZPPreb-1, 15/17 – DZ, 29/17, 54/17, 21/18 – ZNOrg, 31/18 – ZOA-A, 28/19, 28/19, 189/20 – ZFRO, 196/21 – ZDOsk, 82/23 in 84/23 – ZDOsk-1).

[24] Point e) of the first paragraph of Article 3 Rules on standards and norms for social assistance services (Official Gazette of the Republic of Slovenia, no. 45/10, 28/11, 104/11, 111/13, 102/15, 76/17, 54/19, 81/19, 203/21, 54/22, 159/22).

[25] It was carried out by the author of this article for the purpose of determining the need for more specific regulation of ensuring the right to say goodbye.

[26] Funeral and Cemetery Services Act (FCSA) (Official Gazette of the Republic of Slovenia, no. 62/16 in 3/22 – ZDeb).

[27] Funeral Activity Act (FAA) (Official gazette of the Republic of Croatia, no. 36/15, 98/19).

Humans are holistic beings and their 'spiritual' legacy should not be overlooked as it has a profound impact on the grieving process of relatives.

Sometimes relatives are not given the opportunity to say goodbye, or are advised by certain institutions not to say goodbye but instead to just keep the deceased in their memory[28]. Expert evidence shows that the identification of the deceased is important for the relatives, who may not accept that it is their deceased until they have seen them[29]. The question of whether or not to allow or disallow a goodbye raises questions about the identification of the person itself[30].

From the point of view of the protection of fundamental human rights, the importance of farewells can also be seen from a spiritual perspective, which highlights the importance of an intimate farewell, which takes time[31], as it is of the utmost importance for the »absorption« of the shock and the grieving process[32]. This area is more often studied in the scientific fields of anthropology, philosophy, psychology, etc., while we did not find any literature in in the field of law.

If, therefore, it is assumed that human beings have physical and mental integrity, it is essential that this integrity should also be enabled and protected. Society has a normatively well-regulated post-death relationship when it comes to property, but much less so when it comes to the spiritual component. Ties and relationships are created between close persons which constitute a legacy, but no one pays attention to this, even though it may be more important for the rehabilitation of the heirs than the property relationship. Dying itself

[28] RAČIČ M., SLANA M., *Starši utopljenega 10-letnika: Nisva vedela, kje je najin otrok, nisva mogla do njega, Available*: https://www.24ur.com/novice/slovenija/starsi-utopljenega-10-letnika-nisva-vedela-kje-je-najin-otrok-nisva-mogla-do-njega.html (29.01.2023); FAJDIGA, B., FAJDIGA G., *Odprto pismo zaposlenim na OI: Odvzeta možnost,* URL: https://www.delo.si/mnenja/pisma-bralcev/odprto-pismo-zaposlenim-na-onkoloskem-institutu-odvzeta-moznost/ (13.04.2023).

[29] SCOTT T., *Sudden Death*, cit., p. 60.

[30] STA, *Po zamenjavi identitete bolnikov v Celju ministrstvo uvaja spremembe*, URL: https://n1info.si/novice/slovenija/ob-sprejemu-v-bolnisnico-po-novem-obvezna-prepoznava-z-osebnim-dokumentom/ (13.04.2023).

[31] SCOTT T., *Sudden Death,* cit., p. 141.

[32] The inability to properly say goodbye to a deceased loved one can have lasting effects on those who are grieving, SCOTT T., *Sudden Death*, cit., p. 134.

is a relational experience that affects not only the dying person, but everyone around them[33].

At present, in the chain of institutions involved in sudden and accidental deaths, there is no normative obligation to remind the relatives of the right to a proper farewell and to support them independently in their decision. The funeral service is usually the last in the chain of institutions that could make this right possible, or empower the relatives to make a decision in a subtle way. Other institutions in the health and social care sectors, or even the police, could take steps to help ensure a proper farewell, but all of them decline to do so because they do not have an appropriate space where this right could be guaranteed. Nor is there any law that makes it compulsory for immediate family members to have an intimate place to say goodbye. Whereas comparable arrangements at least oblige hospitals to provide a place for the farewell. In the Republic of Slovenia, every funeral undertaking should therefore provide adequate support and space for the relatives' decision to say goodbye, even though they are not obliged to do so by any Slovenian law. They are only bound by the FCSA and the Rules on minimum standards and norms for the provision of funeral services[34], which do not specifically mention farewells. The Slovenian Ethical code of funeral and cemetery services[35] does not contain this provision either. This gap could be filled by an explicit normative regulation in this area, so that the right to farewell is considered as one of the regular options to be provided to relatives. Improving the professional qualifications of staff in all professions related to bereavement would certainly also contribute to improving the situation. The activities of the funeral service would also require the involvement of psychosocial staff, or appropriate external support for users and staff (e. g., in the form of

[33] BORGSTROM E., ELLIS J., WOODTHORPE K., B., *'We Don't Want to Go and Be Idle Ducks': Family Practices at the End of Life*, in *Sociology*, 53(6), 2019, pp. 1127-1142. https://doi-org.ezproxy.lib.ukm.si/10.1177/0038038519841828.

[34] Rules on the minimum standards and norms for the provision of funeral services (Official Gazette of the Republic of Slovenia, no. 42/17).

[35] Code of Ethics for Funeral and Cemetery Activities, Chamber of Craft and Small Business of Slovenia, and Chamber of Commerce and Industry of Slovenia, available: https://www.komunala-nm.si/Portals/0/Vsebina/eti%C4%8Dnikodeks.pdf?ver=2014-04-10-105912-387 (29.01.2023).

regular supervision), so that the possibility of the right to a goodbye and other forms of support become part of the routine.

Health and social care rules also do not provide for a right to say goodbye. The word »goodbye« can only be found in the 2014 Code of Ethics in Nursing and Care of Slovenia[36], while The Code of Ethics for Employees in Nursing and Care[37] has deleted it and repealed the previous Code, which shows further systemic lack of regulation in this area and the exclusion of the meaning of goodbye from the professional environment that is confronted with it. Consequently, this confirms the thesis of society's alienation from the cornerstone of progress, namely the protection of the most intimate relationships between people.

This was particularly evident in the context of the epidemic, when the dying were often unable to say goodbye to their loved ones. While medical staff have tried in various ways to enable those in hospital to contact their families via social networks, this is no substitute for face-to-face contact, and the situation has often made long-distance contact impossible. Those whose relatives have died during the time of restrictions find it difficult to grieve, wondering under what circumstances their loved ones have passed away. Vachon et al. developed a definition of 'pandemic grief' for this type of mourning, not attributing it to a syndrome of dysfunctional grief[38]. In situations of emergency, fundamental human rights are infringed because of the challenges of balancing the interests of individuals and the public. The risks that come into focus in such situations provide an opportunity to establish safeguards to prevent unnecessary interference with fundamental human rights when such situations arise again. The farewell process during the extraordinary circumstances of the pandemic was also significantly influenced by the media, as evident from Selman et al. analysis. In the conclusion of their

[36] Code of Ethics in Nursing and Care of Slovenia (Official Gazette of the Republic of Slovenia No. 71/14).

[37] Code of Ethics for Employees in Nursing and Care (Official Gazette of the Republic of Slovenia, No. 13/17).

[38] UMMEL D., VACHON M., GUITÉ-VERRET A., *Acknowledging bereavement, strengthening communities: Introducing an online compassionate community initiative for the-recognition of pandemic grief*, in *American Journal of Community Psychology*, 69, 2023, pp. 369–379. https://doi.org/10.1002/ajcp.12576.

article, they also presented recommendations for policymakers, healthcare professionals, and journalists[39].

1.1. *Terminology*

The term farewell[40] was not common enough in the past decades to be given an independent cue in the Slovene Dictionary of the Literary Slovenian Language (SSKJ), but it is still recorded in modern dictionaries, for example in the Synonym Dictionary of the Slovene Language . It is a derivative of the term »to say goodbye«. It is not often used, however, and it is used less frequently, as for example in the 19th century, perhaps because of the general tabooing of everything connected with death. The word is only recorded a little over a hundred times in the Gigafida corpus, which means that it will not be treated in the SSKJ unless its use increases at least a little[41].

For the purpose of this paper, a farewell is defined as that moment at the onset of death which is no more than a few hours or a day at most from the moment of death and represents the most intimate event between the dying or deceased and his or her loved ones.

While we can think of a wake or a funeral as a farewell service, it is those first moments when they can say goodbye to their loved one with a touch or a hug that are important for the people closest to them. Thus, goodbyes can begin during life, when life is expected to end soon, or immediately after death, when the loved ones are made aware of the loss. Restricting this right, however, constitutes an interference with the fundamental human right to the inviolability of one's physical and mental integrity, privacy and personality rights. The question is therefore whether the interference with that right is proportionate, which must be assessed on a case-by-case basis. In

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[39] SELMAN E.L., SOWDEN R., BORGSTROM E., *'Saying goodbye' during the COVID-19 pandemic: A document analysis of online newspapers with implications for end of life care*, in *Palliative Medicine*,2021, 35(7), pp. 1277-1287.

[40] "Slovo" (maybe in English : Goodbye) is used in Slovenian every day, but not "Poslovitev" (maybe in English: "farewell.")

[41] Summarized written consultation with AHAČIČ K. Definition of farewell in the synonym dictionary, accessible at: https://fran.si/iskanje?View=1&Query=poslovitev (24.11.2023).

the case of an emergency, such as the situation at the time of the Covid-19 pandemic, it is also systemic.

A significant term encompassing farewell and parting is vigil at the deathbed[42]. It refers to the process of loved ones being present at the dying person's bedside.

1.2. *The importance of goodbyes for the grieving process*

The notion of saying goodbye to the dying or deceased from a legal point of view is rarely found in the literature. According to the above definition, it constitutes a fundamental human right, which by its nature corresponds to a personality right, characterised by its non-transferability and erga omnes nature. The consequences of (non)farewell occur either for one or for two persons. In the first case, if it is a parting from the deceased, and in the second case, if it is a parting from the dying. In the latter case, therefore, the link is established between two persons. The visualisation of the end of life is important for the further grieving process of the relatives.

"The lost object that is mourned is always important to the person who is mourning and is always an essential part in the construction of the subject's world. The object that is being lost or that is being lost and mourned is internalised in the psychic structures and the subject has invested in it a certain positive meaning and significance"[43]. This definition implies that the relatives are losing a part of themselves, and it is therefore necessary to consider the proportionality of the interference with the freedom to decide on the farewell and the way in which it is to be carried out. From a legal standpoint, the indirect or direct restriction of the right to bid farewell is interesting in terms of studying the relevance of negative consequences for the involved subjects, who are more or less protected

[42] CASWELL G., WILSON E., TURNER N., POLLOCK K., *'It's Not Like in the Films': Bereaved People's Experiences of the Deathbed Vigil. OMEGA*, in *Journal of Death and Dying*, 2022.

[43] MILIVOJIEVIČ Z., *Emocije*, in *Novi Sad*, 2008, p. 661.

within the framework of civil law. Monetary compensation is particularly relevant, as restoring to the previous state or other forms of protection are not possible or are ineffective[44].

1.2.1. *The right to say goodbye as a personal right*

Article 35 URS provides that the inviolability of a person's physical and mental integrity, privacy and personality rights shall be guaranteed. The right to privacy can be considered within a dualistic concept, according to which it is protected both as a personality right under civil law and as a human right - of a public law nature, protected by the URS and international law instruments[45]. Human rights can thus be protected against interference by the State and its organs or by other individuals. Determining whether the right to take a private life is protected only against individuals or also against State interference requires identifying the possible forms of violation of this right. If we proceed from the fact that the right of parting is nowhere explicitly defined, we cannot speak of direct infringements of a public-law nature; thus, according to the linguistic interpretation, the right of parting cannot be legally protected at all, but the right of parting, according to the above definition, can be classified as a personality right and, at the same time, as a right protected under the right to privacy. As such, it is therefore protected both as a civil right and as a human right under public law. In times of emergency, such as the Covid-19 pandemic, the issue of the right to a private life has also been subject to general restrictions on other fundamental human rights, such as the rights to freedom of movement, association, home, etc.

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[44] Article 134 of Obligations Code (OC) (Official Gazette of the Republic of Slovenia, No. 97/07 – consolidated text, 64/16 – decision of the Constitutional Court, and 20/18 – OROZ631) establishes the basis for a claim to cease an action that violates the inviolability of a person's personality, personal and family life, or any other personal right. However, questions arise about how relatives, in the shock of a sudden illness or even loss, can demand the cessation of the violation of personal rights in cases requiring a swift response. Restoration to the previous state (Article 164 of the OC) is not possible.

[45] TOPLAK L., article 35, IN: ŠTURM L.; ARHAR F., PLAUŠTAJNER K., RIJAVEC V., TOPLAK L.; BLAHA M., BUČAR F.; ČEBULJ J., DEISINGER M., DULAR J., FRIEDL J., GRASSELLI A., JADEK-PENSA D., et .al., *Komentar Ustave Republike Slovenije – e-KURS*, Ljubljana, 2002, https://e-kurs.si/komentar/uvodna-opredelitev/ (29.4.2023).

There is no numerus clausus of personality rights, and it is therefore necessary to clarify at a concrete level whether the the right to farewell is a general personality right or a specific personality right, or whether it is a right *sui generis*[46]. The right to say goodbye, according to the defined definition for the purpose of this contribution, is considered a personal right since it fulfills one of the fundamental conditions, namely, that it is non-transferable. No one else can say goodbye in place of the person who is saying goodbye, because it is essentially an act between two subjects[47]. Moreover, it is a human right which has both a public law and a civil law character. It can be restricted by both public and private law entities.

The right to bid farewell can be realized both bilaterally and multilaterally, if regarded as a relational experience[48]. When it concerns acts which realise the interest of two parties, the person who is dying, for example, and their loved ones on the other side, we are talking about an interference with the relationship of two or more persons. It is an interference with both the privacy and the dignity of the persons concerned. It is a violation of both the right to privacy as a personal right and of the personal right to mental integrity. The latter can be protected under Article 34 of the URS as a right to personal dignity and security, which guarantees the individual recognition of their worth as a human being in their own right and from which derives the capacity for autonomous decision-making. This human attribute is also the source of the guarantee of personality rights. When we talk about bidding farewell to a deceased person, it constitutes a violation of the rights of individuals on one side. It intrudes upon the mental integrity or privacy of the relatives, restricting their freedom to freely decide on the possibility of bidding farewell. The right to a farewell may to a degree form part of the feelings of respect for the deceased, which are protected under the right to mental integrity. *»Piety is the respect, the remembrance of the personality of the deceased, which the individual cherishes in accordance with his or her convictions. As a personal right to mental integrity, it is part of his*

[46] TOPLAK L., *article 35*, cit.

[47] Intentionally, we'll avoid discussing possible forms of bidding farewell to objects, multiple subjects, etc.

[48] BORGOSTROM E., ELLIS J., WOODTHORPE K., '*We Don't Want to Go and Be Idle Ducks': Family Practices at the End of Life,* cit., p. 1127.

or her privacy. Within this framework, personal emotions and inner mental life are protected. In particular, the mental integrity of an individual is violated by infringing his feelings and perceptions, by causing anger, fear, sadness, feelings of inferiority, by interfering with his inner life. If, in such cases, the mental integrity of the persons closest to the deceased is also affected, they may oppose the interference, not only in the interests of the deceased, but also in their own interests. This is subject to the condition that their own personal property is interfered with or that their own interest in mental integrity is affected«[49].

The right to farewell is thus a personal right belonging to both the person who is saying goodbye and their close relatives. In the case of a dying person, this right is protected under the right to privacy, to personal dignity, to mental integrity, etc. In the context of civil law, personality rights are protected under Article 134 of the OC, but in such cases the question arises as to the effectiveness of legal protection. The speed of the proceedings is an essential element in the protection of the right to say goodbye to a dying or deceased person, which is why in most cases the request for termination of the infringement will be decided too late and protection can only be provided in the context of compensation. The right of a dying person to say goodbye could be interpreted in the context of the Patients' Rights Act (PRA)[50]: the general principles, the right to information and participation, the right to decide independently on treatment, the right to respect the wishes expressed in advance, the right to prevent and alleviate suffering[51] ect., but the question arises as to how effective these bases are in practice.

How the right of farewell is affected is also important. In practice, we often observe a formalistic enabling of the right to farewell for everyone, yet this frequently entails suggestive influence on the beneficiaries, often due to subjective perspectives on the issue.

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[49] TOPLAK L., article 34, cit., https://e-kurs.si/komentar/pravica-do-osebnega-dostojanstva/.

[50] Patients' Rights Act (PRA) (Official Gazette of the Republic of Slovenia, no. 15/08, 55/17, 177/20, 100/22 – ZNUZSZS).

[51] For more see, KRALIĆ S., *Prikaz pacientovih pravic in dolžnosti po ZPacP*, in KRALIĆ S., ČIZMIĆ J.,.(eds), *Hrestomatija medicinskega prava*, Maribor, 2020, pp. 23-48.

The existing legal protection is thus ineffective, as the beneficiaries are usually in a weaker position, which the other side "abuses" in good faith because of its own prejudices. Ethically questionable decisions, such as a decision involving a patient's spirituality, demand self-reflection, self-awareness, and an understanding of how the involved party (the decision-maker) processes decisions. Significant decisions require a keen awareness of the boundary between the needs and emotions of the decision-maker and the needs and desires of the patient or their family[52]. The situation could be more rapidly alleviated through explicit regulation at various levels (legal changes, adoption or amendment of ethical codes, unified regulations, education, and establishment of professional standards for services dealing with the provision of fundamental rights) aimed at preventing violations rather than merely providing more or less adequate remedies for the consequences of violating personal rights.

1.3. *Institutions*

All institutions that deal with this issue in their work are obliged to make the right to say goodbye to the dying or deceased available or to make it known as soon as possible. The right to say goodbye to a dying person stems from their right to be informed (Article 20 of the PRA). Clear and open communication without medical paternalism can allow the dying individual to plan their final days and have an influence on their own decisions[53]. All hospitals, social care institutions, the police, coroners, prosecutors, funeral homes are obligated to respect the autonomy[54] of the dying and their families. A purely formalistic approach, which gives relatives the mere option of a legal right to say goodbye, does not correspond to the real protection of fundamental rights that is expected from an effective legal

[52] BATCHELOR A., JENAL L., KAPADIA F., STREAT S., WHETSTINE L., WOODCOCK B., *Ethics roundtable debate: should a sedated dying patient be wakened to say goodbye to family?*, in *Crit Care,* 2003, pp. 335-388.

[53] ARIMANY-MANOSA J., TORRALBAB F., GOMEZ-SANCHOC M., GOMEZ-DURAND E.L., *Ethical, medico-legal and juridical issues regarding the end of life*, in *Med Clin,* 2017, p. 218.

[54] *Ibidem.*

system. An objective presentation of the possibility of farewell demands an independent approach that presents the involved parties with possible negative and positive aspects while also offering professional support in the ensuing process. Users[55] report advice to keep the relative in good memory because confronting the corpse would be a severely traumatic experience, a claim that is not backed up by expert or scientific findings. This suggests a subjective approach to counselling which may lead to harmful consequences for the relatives. In such situations, they are more vulnerable and susceptible to "advice," hence they need to be adequately supported [56]. As such, the subjects are in a weaker position, and any suggestion borders on the abuse of the weaker position of the opposing party in the relationship[57]. This raises the question of not only the effectiveness of mechanisms to protect weaker subjects but also the need for stricter regulation in this area.

Let us also address the question of what it is that leads a society to a binding regulation. The answers to this question can be sought in several scientific disciplines: history, sociology, political science, and law. Here we will focus on the legal perspective, which in itself is a challenge, since we inadvertently collide with the field of political science, which constitutes an important element of "rule-making". To avoid complications, for the purposes of this paper we will start from the view of Professors Kečanović and Igličar: "*that in the past, lawmaking was mostly a matter of inspiration, intuitive reasoning and the improvisations of the first, primitive editors."* Instead of the initially spontaneous exchange of thoughts and ideas, development necessitated the need for established patterns of behaviour and practices, which eventually became routine, customary and obligatory, and which also no longer met the needs of development, which eventually required that editorial activity evolve into conscious planning and the adoption of general rules. This has evolved over time

[55] Also one of the interviewees in a brief research with funeral homes also confirmed that the pathologist discouraged a farewell, indicating a paternalistic approach towards the deceased's family.

[56] SCOTT T., *Sudden Death,* cit., p. 71.

[57] It is necessary to consider the specific circumstances in which consent (analogously, refusal) is given: PAVČNIK M.,in : PAVČNIK M POLAJNAR - PAVČNIK A., WEDAM-LUKIĆ D.., *Temeljne pravice*, cit., p. 168.

into a skill or discipline, nomotechnics, which is a scientifically based approach to the drafting and adoption of general rules[58]. We are not so much interested in this area here as we are in the process of a development that leads to a systematic arrangement and which, in our opinion, has not historically ended, but can develop in all directions, even (seemingly) retrograde. In the area of the rights of dying persons and all persons involved in this process, we can perceive conditions that are similar to the historical period before the development of the systematic regulation of relationships. Due to changes in the social value system, a part of human existence, which is inseparably connected with his existence, began to be pushed to the periphery as something that is not a general social problem. With the decline in the birth rate and the aging of the population, this is becoming a serious social problem that requires not only effective and nomotechnically perfect regulation, but also systemic support at the moral-ethical level of the entire society.

At this point, we could continue the extensive discussion of defenders and opponents of positivists and naturalists regarding the importance of following explicit legal provisions or ethical and moral social standards, but that would go beyond the purpose of this article. However, we can take the position that the need for explicit regulation and strict adherence to legal norms disappears if society adequately protects fundamental human rights based on the fundamental act (constitution) and social standards.

The last period of life affects us all in one way or another. Therefore, the interest in respecting the fundamental rights to intimacy, dignity and acceptance in society in all dimensions of human life should be a universal interest that needs to be systematically regulated, because society at the level of "primitive editors"[59] is no longer able to protect such rights. The question is whether protection at the level of the highest general acts (constitutions) is sufficient, since they can only be implemented or protected through (as a rule) lengthy legal proceedings, which, in principle, cannot undo the damage caused by their non-compliance. Therefore, the protection

[58] KEČANOVIĆ V., IGLIČAR A., *Nomotehnika kot ovira zlorabam v pravodajnih postopkih*, in *Pravni letopis*, 2013, p. 283.

[59] *Ibidem.*

within the framework of the existing legal order is not sufficient. The essence of law is precisely to ensure the effectiveness of legal protection. Therefore, we must consider adopting stricter regulations at the level of human rights[60], which would ensure that all citizens, under the same conditions, could realize the right to say goodbye, independent of the subjective perception of the meaning of this by the involved subjects[61]. The current regulationprovides the framework for a compensation claim, in which all general assumptions must be proven: an inadmissible act, culpable responsibility with a reversed burden of proof, and causation. These requirements reduce the effectiveness of legal security in this area to almost zero, Leaving the injured party without legal protection.

1.4. *Restriction of fundamental human rights due to protective measures due to the Covid-19 pandemic*

Human rights and fundamental freedoms may exceptionally be temporarily revoked or restricted in a state of war or state of emergency, only for their duration, but to the extent that such a state of emergency requires and in such a way that the measures taken do not cause inequality based only on race, nationality, sex, language, religion, political or other belief, financial status, birth, education, social position or any other personal circumstance (Article 16 of the URS). Provisions on the limitation of fundamental human rights can also be found in the ICCPR (Article 6) and the ECHR (Article 15).

The Covid-19 pandemic represented a state of emergency and a special challenge also in relation to the protection of the fundamental human rights of all involved. Although States were obliged to protect lives, questions were raised about the effectiveness and proportionality of their interventions. It is certainly the duty of States to protect people's health and life, even from only foreseeable threats[62]. The

[60] PAVČNIK M., in . PAVČNIK M., . POLAJNAR-PAVČNIK A., WEDASM-LUKIC D., *Temeljne pravice*, cit., p. 15.

[61] Following the example of some European countries, which began protecting personality rights based on theories of equality through instruments of civil law. TOPLACK L., article 35, cit., available: https://e-kurs.si/komentar/uvodna-opredelitev/ (29.01.2023).

[62] Spadaro A., *COVID-19: Testing the Limits of Human Rights*, in *European Journal of Risk Regulation*, 2020, p. 318-320.

limitation of rights requires balancing individual and collective interests and is regulated by numerous provisions of the ICCPR and ECHR, which, like the URS, do not allow limitations of certain rights even in emergency situations. In accordance with the conventions, the contracting States can use two mechanisms in the event of an emergency, namely limitation of certain human rights (limitation) and deviation from the provisions of the convention (derogation). Restrictions come into consideration, among others, in the human right to privacy and family life (Article 8 of the ECHR) and the right to freedom of movement (Article 2 of the ECHR), which, from the point of view of the right to say goodbye, can represent a basis for restrictions during emergency situations such as witnessed during the epidemic. However, interference with these "non-absolute" rights requires an assessment of whether the restrictions are consistent with a legitimate aim and are both necessary and proportionate to the identified legitimate aim, meaning that no other less restrictive alternative is available[63]. During emergency situations that threaten the nation, the State can even abrogate certain human rights to the extent necessary, but only when it first declares a state of emergency[64]. In accordance with the principle of proportionality, it makes sense for the State to first use the limitation of rights, and only if it is not possible to achieve the desired goal with them, to consider declaring a state of emergency and revoking fundamental human rights for a shorter period of time. Individual countries can thus deviate from the generally accepted provisions of the conventions, but under certain conditions.

Article 15 of the ECHR allows for derogation in the event of an emergency. Derogation is only permissible during times of war or other public emergencies threatening the life of the contracting nation. This is strictly limited to the extent required by critical circumstances and on the condition that these measures do not conflict with other international legal obligations.

Absolute rights, such as the right to life (Article 2 of the ECHR - except for legal exceptions), the prohibition of torture, inhuman and degrading treatment and punishment (Article 3 of the ECHR), the

[63] *Ibidem.*
[64] *Ibidem.*

prohibition of slavery and subjection (Article 4 of the ECHR), and the principle of nulla poena sine lege (Article 7 of the ECHR - no punishment without the law), remain unaffected by derogation and must always be respected.

Any High Contracting Party that exercises the option to temporarily restrict rights must fully inform the Secretary-General of the Council of Europe about the measures taken and the reasons behind them. It is also obligated to notify the Secretary-General of the Council of Europe when these measures have ceased to apply, indicating the complete reinstatement of the Convention's provisions.

During the epidemic, the government of the Republic of Slovenia tried to curb the spread of the Covid-19 disease and prevent endangerment of the wider population by adopting acts which generally interfered with human rights. On May 31, 2020, the government canceled the epidemic[65]. The first wave was followed by two more, but the government no longer declared an epidemic, but instead implemented protection measures through decrees[66]. The Constitutional Court of the Republic of Slovenia defined the above procedure as a violation of the principle of legality and wrote: *"When the legislator empowers the executive authority to issue a subordinate regulation, they must first comprehensively regulate the content that should be the subject of the regulation, and define the framework and guidelines for its more detailed subordinate regulation. The law must clearly express or unmistakably indicate the legislator's intent and the value criteria for the enforcement of the law. A mere or blank authorization of the executive authority (i.e., an authorization that is not supplemented with substantive criteria) signifies the legislator's omission of mandatory legal regulation, which is not in accordance with the constitutional order. The requirement to specify the legal basis is even stricter when it comes to limiting human rights and fundamental freedoms. Human rights and fundamental freedoms are the starting point and central part of the constitutional order. Ac-*

[65] Ordinance on the revocation of the COVID-19 epidemic (Official Gazette of the Republic of Slovenia, no. 68/20).

[66] Ordinance on the temporary measures for the prevention and control of infectious disease COVID-19 (Official Gazette of the Republic of Slovenia, no. 174/21, 177/21, 185/21, 190/21, 197/21, 200/21, 201/21, 4/22, 8/22, 13/22, 19/22, 22/22).

cording to the Constitution, restrictions on human rights and fundamental freedoms can only be prescribed by law. A general act that directly interferes with the human rights or fundamental freedoms of an indefinite number of individuals can only be a law"[67].

The period of spread of the SARS-Cov2 virus largely resembled wartime conditions[68]. The restriction of freedom of movement interfered the most with fundamental human rights, which meant death for many, not only because of illness but also because of loneliness. The right to say goodbye to the dying was always guaranteed, according to the leaders of social care institution[69], but sometimes they did not recognize in time that the person was dying. Research indicates distress among relatives who weren't timely informed about the approaching death of their loved ones[70]. Given the fact that the elderly were identified as the most vulnerable population[71], the risk of sudden deterioration and death was high and consequently could be expected in any case. In a war situation, the protection of all rights is different than in a war-free state, so compliance with legal regulations during the Sars-Cov2 virus was more demanding than usual. Especially in social care institutions and also in hospitals, respecting everyone's rights was extremely demanding. Some demanded complete isolation because they feared for their lives while others opposed social isolation and migration and wanted contact with their loved ones, even at the cost of their lives, as they were most afraid

[67] Constitutional Court of the Republic of Slovenia Decision U-I-79/20, 13. 5. 2021.

[68] ŠTEINER A., *Primerjava pandemije Covid-19 z vojno paradigmo*, in *Anali PAZU HD*, Vol. 7(1-2), 2021, available: https://journals.um.si/index.php/anali-pazu-hd/article/view/1670/1420 (18.03.2023).

[69] The author of the article conducted a short survey with leaders in social welfare institutions in order to determine the conditions for ensuring the right to say goodbye. See chapter 2 for more on this.

[70] GERLAVH C., BAUS M., GIANICOLO E., BAYER O., HAUGEN DF., WEBER M., MAYLAND CR., *What do bereaved relatives of cancer patients dying in hospital want to tell us? Analysis of free-text comments from the International Care of the Dying Evaluation (i-CODE) survey: a mixed methods approach,* in *Support Care Cancer.*, 2022, p. 81.

[71] The population of elderly individuals residing in care homes is even more at risk of life-threatening complications if infected with the said virus. Available at: https://www.gov.si/novice/2020-03-06-popolna-prepoved-obiskov-v-domovih-za-starejse/ (29.4.2023).

of dying elsewhere[72]. A clear and unequivocal definition of the justification for taking action and restricting fundamental human rights during the period of spread of the SARS-Cov2 virus is demanding. In any case, this period is a turning point and represents an opportunity for social development in the direction of finding protection solutions for the most vulnerable populations in ways that prevent the concentration of a large number of people in large housing units that resemble the isolation of individual age groups and as such represent a kind of "ghetto"[73]. Smaller housing units and a well-coordinated network of support services can provide humane living conditions for more vulnerable groups. In emergency situations, this strategy provides contacts only for the closest subjects and thus represents a risk only for a narrower circle of people, which in turn enables decisions to be regulated in a smaller population, thereby reducing restrictions for reasons of public interest. In such conditions, securing the right to say goodbye is also easier.

2. *Legal regulation in the Republic of Slovenia*

The Slovenian legal system does not regulate the right to say farewell to the dying or deceased. Currently, this right is only protected within the framework of constitutional protection, more specifically personal rights. We question the effectiveness of such protection. The term 'farewell,' let alone 'goodbye,' is not mentioned in any of the important laws regulating relations with the dying or deceased: PRA, FCSA, Police Tasks and Powers Act (PTPA[74]). Countries that we have compared, explicitly regulate this field, especially in the field of health legislation or operation of hospitals.

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[72] Situations in elderly care homes during the first wave of the COVID-19 epidemic, Report on the research by the Advocate of the Principle of Equality. Avalible at: https://zagovornik.si/wp-content/uploads/2022/08/Razmere-v-domovih-za-starejse-v-prvem-valu-epidemije-Covida-19.pdf, p. 76 (19.03.2023).

[73] Dictionary of the Slovene Literary Language (SSKJ): an area, particularly a part of a city, where a social group lives isolated from other social groups, usually in poor conditions.

[74] Police Tasks And Powers Act (PTPA) (Official Gazette of the Republic of Slovenia, no. 15/13, 23/15 – popr., 10/17, 46/19 – odl. US, 47/19, 153/21 – odl. US).

2.1. *Research – ensuring the right to say goodbye in the time of COVID-19*

In the period from 10. - 31.1. 2022, we conducted a micro-survey in a nearby social care institution (SCI). The purpose of the research was to determine whether and how the right to say goodbye was ensured during the time when measures had been instituted by the government in an attempt to contain the spread of the Sars-Cov-2 virus. We obtained basic data using the semi-structured interview method. Our goals were to utilize our research findings to determine what methods people in [75] SCI useto help ensure visits and to foster the right to say goodbye, what obstacles they encountered in doing so, and what their point of view is regarding the quality of personal contact and contact at a distance. Our hypothesis was that a blanket reference to systemic restrictions does not justify limiting fundamental human rights, which are protected both by the USR and by international conventions.

2.1.1. *Research methods*

a) Descriptive research method

In the theoretical part, we used a descriptive research method of work. We reviewed domestic and foreign professional literature, used it sensibly and connected it to the research problem (compilation method).

b) Interview method

In the empirical part, we used a guided approach and a semi-structured interview to obtain data, consisting of general information about the methods of providing visits to the Home for the Elderly[76] (HE).

[75] Slovene: Socialno varstveni zavod (SVZ).
[76] Slovene: Dom za starejše občane (DSO).

We used a guided interview and included seven HE from different statistical regions in the sample. With the help of the online application Zoom, we interviewed three directors and one quality manager for three HE. One of them sent the completed questionnaire by email. We processed the data manually and generated a summary of the obtained data, which will serve for further research. We collected data from 10 to 31 January 2022. We recorded the interviews and then transcribed them into a Word document.

Since the questionnaire did not include any ethically objectionable questions, ethical clearances were not required. The interviewees agreed to the recording of the interview. The recordings were deleted as soon as the interviews were recorded, which the interviewees were informed about at the beginning. We conducted interviews with responsible persons in ISC throughout Slovenia, who participated in the research voluntarily. We analyzed the data manually.

2.1.2. *The results*

In the five interviews we conducted, we wanted to find out from the interviewees, among other things:

1. "Did DSO guarantee the right to say goodbye during the measures and in what way?"
2. "What is the position of the responsible persons regarding whether we can replace the personal farewell with digital ways of saying goodbye?"

The following is a summary of the statements from the interviewees regarding the provision of the right to say goodbye during the measures. Interviewees mentioned that visits for palliative patients were always allowed unless it was exceptionally assessed that the person was in the process of bidding farewell. Others stated that they followed guidelines and protocols, resorting to alternatives during lockdown, such as phone and video calls. With full protective gear, exceptional visits were allowed in the gray and red zones, especially for residents in the farewell process.

A third interviewee explained that visits were always allowed, even for those with psychological distress in the red zone, with special protective equipment. All interviewees asserted that there were no visit restrictions for the dying.

The fourth interviewee emphasized significant differences between waves. Initially, like everyone else, they closed facilities for visits. However, they allowed visits after death, as they have a farewell area where relatives could say their goodbyes. They also have guidelines on how to handle the deceased. He highlighted the challenges of closures and measures, as half of the relatives were upset because contacts were restricted, and others because they were not. Similarly, among residents, individualized treatment was emphasized. After the first wave and overcoming fears, they started treating cases very individually. The fifth interviewee reiterated a similar sentiment, stating that the most challenging times were during the first wave, but later they ensured visits if someone expressed a desire.

Regarding whether personal farewells can be replaced by digital means, the interviewees (all responsible for this area) stated that it could theoretically work in extreme cases, but they believe that being in the same physical space with the deceased person holds more meaning. While digitalization can facilitate certain aspects, it cannot replace personal contact.

When asked about how remote communication was experienced by relatives and residents, interviewees responded that it was "better than nothing." Some had facilitated similar contacts earlier, especially for residents with relatives abroad. During the pandemic, remote contact posed organizational challenges, as social workers, for example, focused solely on this. The third and fourth interviewees mentioned that having such contact was positive, especially for dementia patients' relatives, who found solace in seeing the condition of their loved ones.

The fifth interviewee also saw remote contact as positive, but emphasized that no digital means could replace personal interaction.

2.1.3. *Discussion*

An aim of our research was to better understand how visits and, especially, the right to say goodbye, were ensured during the epidemic measures to prevent the spread of the SARS-CoV-2 virus. In the introductory part, we formulated statistical questions to explore various circumstances influencing the provision of this right. These questions allow for comparisons within a randomly selected sample based on the number of residents, statistical region, the interviewee's position, approximate interest in visits before and during the epidemic, encompassing the period when the epidemic was not declared but certain measures were in place. We focused on the perspective of those responsible in residential care homes on the importance of visits, personal contact, and the right to say goodbye.

Findings from the first research question about whether residential care homes ensured the right to say goodbye during the measures revealed that all interviewees took a stance that the right to say goodbye was always provided in person if there was expressed interest. Visits were conducted in accordance with protocols and instructions, both in person and remotely using digital tools such as Zoom and Skype on devices like phones, tablets, and iPads. However, four interviewees expressed challenges in recognizing when someone was bidding farewell or when there was a sudden deterioration leading to death, making it difficult to facilitate goodbyes. One interviewee mentioned that their facility had a designated space for farewells to the deceased, allowing relatives to say their goodbyes in unexpected death situations.

Regarding the facilitation of visits, we observed significant differences across different waves. The first wave, characterized by unfamiliarity with the virus and fear, created considerable uncertainty. One interviewee expressed challenges due to varying interests among both relatives and residents. Balancing these interests was difficult, leading them to recognize an efficient approach as one that was individualized with decision-making based on the needs of each individual.The first research question showed that the leaders of ICH recognize the farewell as important and that it should be carried out live, i.e. with a personal visit and not remotely. They pointed out the

problem because during the measures it happened that someone died earlier, before they managed to recognize that they were saying goodbye or sudden death occurred. At the time of the measures, the provision of visits was different in each wave and, according to some interviewees, also in ICH, given that the instructions were already such that the director was responsible for decisions, so each home created its own system and method of providing visits. However, they pointed out that this was a considerable challenge. Certain employees were exclusively involved in the organization of visits.

Answers to the second research question, which inquired about the perspective of responsible individuals on whether personal farewells can be replaced by digital means, yielded the following findings. Interviewees emphasized the irreplaceability of personal contact during farewells, stating that digital methods are useful for visits but not suitable for saying goodbye. One interviewee considered remote farewells as exceptionally acceptable, while others mentioned enabling personal visits even for COVID-19 patients, albeit with protective gear. Digital methods for remote communication posed a significant challenge in broader implementation. In some cases, this form of communication was already in use before the epidemic. However, digital visitation methods were not deemed suitable for dementia patients, although they proved beneficial for relatives, offering them at least a glimpse into the well-being of their loved ones.

With the second research question, what is the opinion of the responsible persons regarding whether we can replace the personal farewell with digital ways of saying goodbye, we found that all interviewees see digital ways of contact as positive, but not for saying goodbye. In doing so, they consider personal contact to be very important.

Conducting remote contacts presented a certain challenge for homes.

In other words, even enabling a remote farewell in a last resort is seen as acceptable, but it cannot replace a personal presence.

The research thus established a basic insight into the provision of visits and contacts during the measures. This is the view of the responsible personnel. On the basis of personal experiences and stories of relatives of residents in SVZ, we note that visits were possibly

formally permissible under certain conditions, but were presented to visitors as undesirable for security reasons. It was during one of the interviews that the situation worsened and visits were prohibited in certain homes, even though the epidemic had not been declared. For the same home, the interviewee stated that visits were allowed for that period. On the other hand, one of the interviewees said that even before the Covid-19 pandemic, similar measures were occasionally taken in homes due to the flu, and visits were limited or temporarily prohibited. Undoubtedly, the course of allowing visits was greatly influenced by the fear of an unknown virus and the difficulty of respecting the interests of all residents, relatives, the public, etc. A significant obstacle is staff shortage in all SVZ and in some places also architectural handicaps. In the future, with further research, it would be possible to increase the representative sample and, based on the findings, to propose improvements in this area, which may already be recognized in practice. However, it would be reasonable to concretize them. The interviewees mentioned possible solutions: investing in staff training in the field of palliative care, improving architectural conditions (fewer residents per square meter), location separation of red zones so that healthy residents do not infringe on their fundamental rights to movement, physiotherapy treatment, etc.

The research showed that the right to say goodbye was always guaranteed live, even during full closure. In fact, other circumstances prevented this from being realized. Relatives who were not able to do so report distress due to questions about the course of the last period of life, etc. Saying goodbye thus significantly affects the course of mourning, but both relatives and the resident must express interest in it. We see the individual approach as effective, which was also highlighted by one of the interviewees.

In our research, one of the interviewees pointed out that the measures and social isolation left irreversible consequences on the residents, something which is not talked about. The limitations on personal contacts have led to a deterioration in health and cognitive decline. In the future, it makes sense to strengthen the education of all involved institutions dealing with the area of dying. The present micro-research showed the situation on a small statistical sample regarding the situation and attitude of those responsible for the right to

say goodbye. In further research, it would make sense to conduct an in-depth analysis of the circumstances that influenced the provision of the right to say goodbye and to consider system improvements that would enable an individual approach. Certain solutions have already been offered by the results of this research (staff training, architectural adaptations, external red zones, etc.). In the case of emergency situations such as the Covid-19 pandemic, it certainly makes sense to use an individual approach to solve such dilemmas. Legally ensuring the right to say goodbye also requires systemic normative regulation, which currently does not exist.

3. *Comparative legal view*

Legal content on the subject of the right to say goodbye is not found in foreign databases either. This area is mainly researched from other scientific disciplines. The legal system of the Republic of Slovenia does not explicitly regulate the right to say goodbye. Similarly, there is no legal literature in this field in the Republic of Croatia. Germany and Austria legislation contains specific articles which, as a rule, explicitly oblige hospitals to provide relatives with adequate conditions for saying goodbye.

In Germany, this area is governed by regional legislation, which contains provisions on the obligation to ensure the right to farewell. For example, in the Hospital Act of the federal state of Hessen (Hessisches Krankenhausgesetz), Article 6, paragraph 3, states that hospitals are obliged to treat dying and deceased patients with dignity. The bereaved must be able to say goodbye in an appropriate manner. A suitable separate room should be provided for this purpose. If dying patients and their relatives wish to be treated and cared for at home, the hospital will discharge them if the necessary care is adequately provided[77].

[77] « 3) Hospitals are obligated to ensure a dignified treatment of dying and deceased patients. Relatives should be able to take appropriate leave. For this purpose, a suitable separate space must be provided. If the dying and their family members wish for treatment and care to be conducted at home, the hospital should discharge them when the necessary care is adequately ensured. »

The Saxony-Anhalt Land has a provision in the law on funeral services that, in cases where death occurs in a hospital, nursing home or Retirement home, relatives must be given the opportunity to say a dignified goodbye before the transfer[78].

Overview of the provisions containing the farewell arrangement:

Croatia	Germany	Austria	EU
/	§ 3 Krankenhausgestaltungsgesetz des Landes Nordrhein-Westfalen (KHGG NRW)	§ 22b Gesundheits- und Krankenpflegegesetz	/
	§ 28 Krankenhausgesetz für das Land Schleswig-Holstein Landeskrankenhausgesetz- (LKHG)		
	§ 16 Sächsisches Bestattungsgesetz Sachsen		
	§ 1 Landeskrankenhausgesetz (LKG) Rheinland-Pfalz		
	§ 6 Gesetz Nr. 1573 – Saarländisches Krankenhausgesetz Saarland		
	§ 3 Krankenhausgesetz des Landes Nordrhein-Westfalen - KHG NRW		
	§ 23 Bremisches Krankenhausgesetz - (BremKrhG)		

4. *EU Regulation*

EU acts do not explicitly regulate the area of farewell, but the duty to respect human fundamental rights is evident from general acts, e.g., Charter on fundamental rights of the European Union[79], ECHR. The question of the right to say goodbye belongs to the field

[78] »If the death occurs in a hospital, nursing home, or care facility, the relatives should be given the opportunity to take a dignified farewell before the transfer.«

[79] Charter of Fundamental Rights of the European Union, in OJ C 326, 26.10.2012, p. 391–407.

of palliative and hospice care, which would require an explicit definition of the meaning of saying goodbye at the EU level as well.

5. *Suggestions for improvements*

Passing and changing legislation usually requires social changes that reach a sufficiently large consensus on the necessary changes. The problem of restricting the right to farewell is not only evident in emergency situations, but it is a frequent case of violations in normal conditions. There is an opinion in principle that this right is always guaranteed, but in practice too often this is not the case. Given that the field does not experience sufficient realization on a moral and ethical level, it is necessary to protect it with binding legal norms. Protection within the framework of personal rights is a long and complicated procedure, which represents an excessive burden for the relatives of the dying or deceased person, and above all, it does not prevent the resulting damage. This means that legal protection at this level is not effective, which is the basic assumption of the legal system[80].

Restrictions on farewell rights could be reduced in several ways. One way is to strengthen the professional training of services and institutions that deal with the dying and deceased and their relatives in their work. For example, in 2015 Australia funded a project called End-of-Life, which provides online training for employees working in acute hospitals with the aim of increasing their knowledge and confidence in end-of-life care and encouraging them to think about how they can improve their practice.[81] Although admirable and appropriate in terms of quality, a drawback is that it takes too long. The second way is to change all legislation, the passing of which directly or indirectly represents part of the basic matter[82].

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[80] PAVČNIK M., *Teorija prava*, Ljubljana, 2013, p. 311.

[81] RAWLINGS D., WINSALL M., YIN H., DEVERY K.,., *How hospital staff say goodbye to dying patients – Evaluation of an online education module: Imminent death*, URL: https://anmj.org.au/how-hospital-staff-say-goodbye-to-dying-patients-evaluation-of-an-online-education-module-imminent-death/ (29.11.2023).

[82] FCSA, PRA , PTPA.

Any legal regulation in the Republic of Slovenia and other Members of the European Union that do not yet explicitly regulate this area must clearly guarantee the possibility of saying goodbye to everyone under the same conditions. The current regulation in the Republic of Slovenia is deficient because it establishes unequal conditions for the possibility of saying goodbye to the deceased for those cases when a person dies outside their home. In accordance with Article 39(3) of the FCSA, relatives can bring a person to their home if they die outside the home, only if the cemetery does not have a mortuary. Relatives can take their time to say goodbye to a person who dies at home, because in accordance with Article 5 of the Rules on the Conditions and Methods of Performing Postmortem Services[83], they are obliged to inform the deceased about the death or stillbirth as soon as possible, no later than 12 hours from the moment, when they learned about the death or stillbirth. The relatives inform the funeral service when they decide to do so, but within 12 hours at the latest. During this time, relatives and loved ones can say a dignified goodbye in the way they choose. However, in the case of sudden and unexpected deaths, where an individual dies outside their home and is taken over by public institutions, this is not possible, thereby violating the fundamental principle of equal treatment of the same cases.

In the Republic of Slovenia, much was expected from the regulation of long-term care, but actual solutions have not yet been shown in practice. The trend of building homes for the elderly has not decreased, despite the fact that deinstitutionalization has been presented as a humane form of care for many years. As the most vulnerable group, the elderly are at risk in buildings that provide large accommodation capacities that are not spatially dislocated. Architecturally inadequate and oversized buildings and an understaffed SVZ system pose an exceptional risk for the elderly in the event of disease outbreaks. Even influenza, which occurs all of the time, poses significant risks. In this article, we focus on to the violation of the fundamental human right to dignity from the perspective of the

[83] "Regulations on the Conditions and Methods of Performing Mortuary Examination Services (Official Gazette of the Republic of Slovenia,, no. 99/22).

right to say goodbye, although we could also talk about a wider range of violations of fundamental human rights.

For a greater respect for human dignity, it would be necessary to ensure an increase in care services at home, connect all important sectors (public, economic and non-governmental) and systematically increase programs to promote intergenerational cooperation and active social responsibility in the care of the elderly and other vulnerable groups, which will presented effective solutions in practice. The above calls for more systemic methods of solving the problem, which are not based solely on legal regulation. However, they are of great importance in order to effectively implement legal norms, which cannot represent an effective legal order if it is not supported by other industry solutions. In sum, a multifaceted approach is warranted.

Given that there are still cases[84] when relatives are not allowed to visit hospitals and say goodbye properly, there is an urgent need for explicit regulation that will lay the legal foundation for ensuring the right to say goodbye and also the conditions for professional support during the farewell in a way as it is recognized abroad[85].

Proposal of legal provisions that would regulate the right to say goodbye:

Right to farewell

1. Farewell according to this law is defined as the time dedicated to the dying person or to the deceased and their relatives in a place suitable for this.

2. Saying goodbye to the deceased represents moments that are not more than a few hours away from the onset of death or maximum one day, unless it could not be done earlier due to extraordinary circumstances.

3. Institutions are obliged to present the right to say goodbye to the dying or deceased to everyone and at the same time provide them with adequate psychosocial support in the decision process.

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[84] FAJDIGA B., FAJDIGA G., *Odprto pismo zaposlenim na OI: Odvzeta možnost, Avalible at:* https://www.delo.si/mnenja/pisma-bralcev/odprto-pismo-zaposlenim-na-onkoloskem-institutu-odvzeta-moznost/ (13.04.2023).

[85] For more see, SCOTT T., *Sudden Death*, cit., p. 12-13.

4. The farewell is carried out in an appropriate separate room that meets the standards of an intimate farewell in the home or a comparable environment.

5. Farewell is facilitated in accordance with religious and other beliefs, as well as the personal wishes of the dying or deceased person and their relatives, unless the law dictates otherwise.

6. Farewell can also take place at home if the dying person or their relatives wish so, unless the law dictates otherwise.

7. The Minister responsible for family affairs, in consultation with other relevant ministers and based on a professional assessment, prepares a detailed Regulation on ensuring the right to farewell and training for professional and responsible personnel who encounter the dying and the deceased in their work.

6. *Conclusion*

Concerning the right to say goodbye, there is a gap in both the Slovene and Croatia legal spaces.A unified regulation would be welcome even at the EU level, since the free movement of people requires a more detailed regulation of all periods of life, including the last one.

In principle, this area is a self-evident fact in the general public, and individuals only become aware of its importance when faced with the restriction of their rights. Other scientific disciplines classify farewells as rituals important to the grieving process, while law does not deal with this area. Dying and mourning are pushed aside in society, and as a result, even in the field of legal regulation, this area finds a place only at the level of communal activity. Narrow legal thinking thus leaves a legal vacuum that provides protection only at the constitutional level, which, as a rule, represents too much of a burden for injured parties and, as a result, ineffective protection. The state of emergency established systemic conditions for regular violations of the right to farewell in practice, although legally and formally, according to the assurances of the interviewees in the research, they were always guaranteed.

A disabled farewell represents a risky behavior for the further process of grieving and, as a result, a difficult or extended return of

the bereaved to the work process, school or society. This imposes a financial burden not only upon individuals but on the entire society. Therefore, if sympathetic relations do not represent a "positive calculation" from the point of view of profit, perhaps they represent it from some other point of view. In any case, care for vulnerable groups and the protection of fundamental human rights represent a civilizational minimum that has been built up for centuries.

CLARA PASTORINO

THE *FORUM NECESSITATIS* MECHANISM IN LIGHT OF THE PROPOSAL FOR AN EU DIRECTIVE ON CORPORATE SUSTAINABILITY DUE DILIGENCE

CONTENTS: 1. Introduction. – 2. The proposal for a Directive of the European Union on Corporate Sustainability Due Diligence. – 3. The features of the *forum necessitatis* in the European judicial area. – 4. The 'Brussels system' and the *forum necessitatis*. – 5. Conclusions: the value and political considerations of the mechanism.

1. *Introduction*

Although corporations play a key role in generating economic growth, wealth, employment, income, innovation, and development, thus contributing to the enjoyment of basic human rights, it is now increasingly recognised that the activities of non-State actors, such as transnational corporations, have also a negative impact on the full range of human rights, including civil and political rights, economic, social and cultural rights, labour rights and environmental rights. The distinctive feature of the operations of these companies lies in the fragmentation of their production and supply activities across several States through the creation of global networks or value chains. This geographical fragmentation and the consequent risk of undermining legal certainty are also possible due to the obvious difficulty of public international law in establishing a universal paradigm of liability, which is not limited to damage caused by a company within the territory of a State[1].

The difficulty of public international law in guaranteeing the protection of fundamental rights along global corporate value chains, however, has made it possible to recognise the role that private international and procedural law can play instead. Identifying, in fact,

[1] S.M. CARBONE, *Caratteristiche e tendenze evolutive della comunità internazionale*, in *Istituzioni di diritto internazionale*, Turin, 2021, pp. 1 ff; N. BOSCHIERO, *Corporate responsibility in transnational human rights cases. The U.S Supreme Court decision in Kiobel v. Royal Dutch Petroleum*, in *Rivista di diritto internazionale privato*, 2013, p. 250 ff.

criteria of jurisdiction and conflict rules capable of responding to peculiar characteristics of a global network of activities allows victims to overcome the fragmentation of the company by asserting their claims before the courts of States where forms of protection, both procedural and substantive, can effectively respect the enjoyment of a right compared to those provided by the States where the allegedly liable company operates or has committed the violation. The need to ensure the protection of fundamental human rights also in cross-border relations comes through the legislative determination and subsequent application by the courts of jurisdiction criteria that directly affect certain fundamental rights, first and foremost the right to effective access to justice. Therefore, two rights that differ in logic and purpose, private international law and procedural law and human rights[2], are seen and analysed by scholars in terms of their complementarity and similarity of function[3].

The purpose of this article is to analyse the interaction of the two rights in the light of the proposal for a Directive of the European Union on Corporate Sustainability Due Diligence. Two are the objectives of the proposal: to establish a framework for companies to recognise civil liability for the violation of human rights along their global value chain and to ensure effective access to justice for victims. The attempt to harmonise the subject matter by means of a

[2] See P. PIRRONE, G. ROSSOLILLO, *Diritti umani e diritto internazionale privato e processuale: pluralismo, relativismo e flessibilità* in P. PIRRONE,G. ROSSOLILLO (eds), *Diritti umani e diritto internazionale*, 2014, p. 519 ff; F. SALERNO, *Competenza giurisdizionale, riconoscimento delle decisioni e diritto all'equo processo*, in *La tutela dei diritti umani e il diritto internazionale* (Convegno SIDI, Catania 2011), A. DI STEFANO,R. SAPIENZA (eds), Naples, 2011, p. 277-326.

[3] See the Resolution of the Insitut du Droit International on *Human rights and Private international Law*. For analysis, P. PIRRONE, *La risoluzione dell'Institut de Droit International su Human Rights and Private International Law: considerazioni generali*, in *Diritti umani e diritto internazionale*, 2022, p. 243 ff; R. BARATTA, *Art. 1 e 2 della risoluzione dell'Institut de droit international su Human Rights and Private International Law: i diritti umani quali regole ordinanti del diritto internazionale privato*, in *Diritti umani e diritto internazionale*, 2022, p. 261 ff; F. MARONGIU BUONAIUTI, *Art. 3 della risoluzione dell'Institut de Droit International su Human Rights and Private International Law: la disciplina della giurisdizione in materia civile e la sua incidenza sul diritto di accesso alla giustizia*, in *Diritti umani e diritto internazionale*, 2022, p. 283; O. LOPES PEGNA, *Accesso alla giustizia e giurisdizione nel contenzioso transfrontaliero,* Bari, 2022, p. 34 ff. See also REPORT OF BASEDOW, *Droits de l'homme et droit international privé, Annuaire de l'Institut de droit International*, 2018, p.23 ff.

binding instrument is certainly, in itself, worthwhile. This contribution focuses on the lack of private international law rules, specifically jurisdiction criteria, in the proposal. Establishing that the Member States adopt rules on the civil liability of companies but leaving them freedom as regards the choice of jurisdiction criteria means that, despite the pursuit of a harmonised solution to a problem that is currently being solved in a fragmented manner, the impact of a civil action in this respect will still depend, to a considerable extent, on the private international law of the State before whose courts it is brought.

Given an overview of the proposal for a Directive and the recommendations that the Legal Affairs Committee of European Parliament and the European Group on Private International Law have put forward in relation to it, this contribution seeks to specifically focus on the proposal to introduce in the EU regulation n. 1215/2012[4] (so-called Brussels I *bis*) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, a mechanism operating in exceptional and subsidiary cases to guarantee the right of access to a judge, i.e. the so-called, *forum necessitatis*.

The contribution analyses the *forum necessitatis* mechanism in the light of its peculiar features in other European regulations, including EU regulation n. 4/2009 on maintenance obligations, and thus examines whether, in the end, the time is not now ripe for its introduction also in the Brussels I *bis* regulation, the cornerstone of the European judicial area in civil and commercial matters.

2. *The proposal for a Directive of the European Union on Corporate Sustainability Due Diligence*

The evolution of economic relations and trade in goods and services on a global level has enabled internationally operating compa-

[4] Regulation (EU) n.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 (recast) in OJ L 351, 20.12.2012, p. 1.

nies to develop the ability to exploit to their own advantage the discrepancies that exist between the various national legislations, the so-called "*faculty of abuse*"[5].

This capacity of companies has not been followed by a development in international law that binds them to respect human rights and the environment throughout their production and supply chain. It was only in 2011 that the UN Guiding Principles on Business and Human Rights[6] proposed human rights due diligence as a means of implementing the responsibility of companies to respect human rights during their global business chain. While for years this provision remained an instrument of soft law , recently there has been an evolution[7] that has led the European Union to draft the proposal for a Directive on Corporate Sustainability Due Diligence (hereafter, "the proposal"), a regulatory instrument with human rights and environmental due diligence obligations. Based on Articles 50 and 114 of the Treaty on the Functioning of the European Union (TFEU), the proposal pursues a twofold objective. On the one hand, it aims to harmonise human rights due diligence obligations to be required from companies operating in the internal market, thus preventing that national regulations on the subject may – due to their different application – fragment the functioning of the same. On the other hand, it aims to guarantee the right of access to justice for victims who have suffered violations of human rights, considered fundamental by the European Union, due to the breach of due diligence obligations by the company, by establishing that the Member States regulate a civil liability for this.

Regarding the objectives of the proposal, firstly, recital (16) of the Directive emphasises how the process of implementing the due diligence in the Directive echoes the Organisation for Economic Cooperation and Development (OECD) guidelines on the duty of care

[5] A. SANTA MARIA, *Il diritto internazionale dell'economia*, in *Istituzioni di diritto internazionale*, Torino, 2021, p. 606.

[6] OHCHR, *UN Guiding Principles on Business and Human Rights*, 2011.

[7] See P. FRANZINA, *Il contenzioso civile transnazionale sulla corporate accountability,* in *Rivista di diritto privato e processuale*, 2022, pp. 828 ff.

for sustainable business conduct[8]. These include the due diligence measures that companies must apply to identify and prevent negative impacts on human rights and the environment.

The due diligence, under the proposal, does not require companies to ensure that negative impacts never occur or that they are stopped regardless of their consequences. Rather, it is – as defined in recital (15) – an *"obligation[s] of means"*[9], which is imposed by reference to the measures that the company can reasonably be expected to take to prevent or minimise the negative impact. This concept, which thus defined effectively modifies the company law concept of due diligence[10], seems to be read as a standard of conduct[11] to judge whether all interests at stake have been balanced.

Moreover, the due diligence obligation has a markedly extra-territorial dimension. It applies not only to (medium- to large-sized) companies based in the European Union, but also to those established outside but operating, above a certain turnover threshold[12], in the European market, extending also to the activities of partners or subsidiaries[13]. If the company has not adapted its activities to comply

[8] OECD GUIDELINES ON DILIGENCE FOR RESPONSIBLE BUSINESS CONDUCT, The Due Diligence Implementation Process, 2018, p. 20 ff. The process of implementing the due diligence must take place through the following steps: 1) integration of the duty of care into policies and management systems, 2) identification and assessment of adverse human rights impacts and adverse environmental impacts, 3) prevention stop or minimisation of adverse impacts, whether actual or potential, on human rights and the environment, 4) assessment of the effectiveness of measures, 5) communication, 6) remediation.

[9] Proposal for a Directive, recital (15).

[10] The factors determining corporate due diligence pursue the so-called *best interests* of the company and are, therefore, determined by objectives of balancing economic interests and corporate welfare. On the nature and content of human rights due diligence, see S. BIJLMAKERS, *Corporate social responsibility, Human rights, and the Law*, New York, 2019, p. 102 ff; C. MACCHI, *Business, Human Rights and the Environment: The Evolving Agenda,* The Hague, 2022, p.3 ff; J.G RUGGIE, J.F SHERMAN, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale,* in *The European Journal of International Law*, 2017, pp. 921 ff; F. MARELLA, *Protection internationale des droits de l'homme et activités des sociétés transnationales*, in *Recueil des cours*, 2016, p. 210 ff.

[11] N. BOSCHIERO, *Corporate responsibility in transnational human rights cases*, cit., 2013, p. 257 ff.

[12] Proposal of a Directive, recital (21).

[13] Proposal for a Directive, Art. 3. The proposal specifies that these must be established business relationships. i.e., direct or indirect relationships which, by reason of their intensity

with the due diligence towards human rights[14], minimising potential negative impacts, and these have caused damage, then, according to the proposal, the company must be held liable and the victims must be guaranteed effective compensation[15].

Article 22 (paragraphs 1 and 4) emphasises that it is up to the States to assess the existence and scope of liability and that the Directive does not affect existing European or national rules on civil liability. The only reference to private international law is contained in paragraph 5 of the same article. The civil liability provided for in the Directive must be considered mandatory in cases where the applicable law is not that of a Member State. Therefore, despite the peculiar extraterritoriality of the scope of application, the proposal does not include any rules on jurisdiction. This means that if a company is connected to the European Union only through turnover, it will once again be the private international law of each Member State that will come into play. This is not a solution to the problem of fragmentation of results. Indeed, it is reasonable to believe that the criteria in force in the Brussels I *bis* regulation and the regulation on the law applicable to non-contractual obligations[16] (so-called

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or temporal extent, are or are expected to be long-lasting and which represent a non-negligible or merely incidental part of the value chain. See ECCJ, *European Commission's proposal for a directive on Corporate Sustainability Due Diligence. A comprehensive analysis*, April 2022, www.corporatejustice.org.

[14] The Annex to the proposal for a directive sets out 20 hypotheses of human rights abuses to be prevented and remedied by companies. Although there is a clause allowing the scope to be extended to violations of prohibitions or additional rights not expressly covered, but provided for in the listed international legal instruments, the extension is conditional upon *"the company concerned could have reasonably established the risk of such impairment and any appropriate measures to be taken in order to comply with the obligations referred [...] taking into account all relevant circumstances of their operations, such as the sector and the operational context"*. See *Annex to the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final*, 23 february 2022, part. I, para. 21. On the critical points with regard to the formulation of the list in the Annex, see, A. BONFANTI, *Catene globali del valore, diritti umani e ambiente, nella prospettiva del diritto internazionale privato: verso una direttiva europea sull'obbligo di diligenza delle imprese in materia di sostenibilità*, in *Vita e Pensiero/Pubblicazioni dell'Università Cattolica del Sacro Cuore*, 2022, p. 305 ff.

[15] Proposal for a Directive, recital (56).

[16] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) in OJ L 199, 31.7.2007, p. 40.

Rome II) do not allow, as they are structured, to overcome all the procedural and substantive difficulties that victims of human rights violations linked to the activities of companies along their global chain of activity may, presumably, encounter[17]. Indeed, they do not include criteria of jurisdiction or connection linked only to turnover.

In this regard, the Legal Affairs Committee of the European Parliament and the European Group on Private International Law (GEDIP) have recommended the introduction of private international law rules. The aim of both proposals, with regard to jurisdiction, is not only the extension of attributive connection – as laid down in Article 8 (5) of the Brussels I *bis* Regulation – to defendants domiciled in third States, but also the introduction of a *forum necessitatis* in case there is a real risk of a denial of justice.

Therefore, with the specific aim of guaranteeing effective access to justice, the proposal of the Legal Affairs Committee suggests the introduction of a new article, 26 *bis*, directly into the Brussels I *bis* regulation for the creation of a *forum necessitatis*, to be used in the case where – towards a violation of human rights connected with a third State – the victim cannot reasonably be guaranteed effective access to justice in that State. The Member State, before which the victim lodges the application, must have a sufficient connection to the dispute[18]. In practice, the Legal Affairs Committee re-proposes the provision that was proposed when the Brussels I regulation was recast[19].

The recommendations of the European Group on International Law are similar, but with few differences. Referring to the *forum*

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[17] A. BONFANTI, *Catene globali del valore, diritti umani e ambiente,* cit., p. 315.

[18] REPORT with recommendations to the Commission on corporate due diligence and corporate accountability, cit. supra. Nuovo Art. 26*bis*.

[19] Proposal Article 26: *"Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may exceptionally hear the case if the right to a fair trial or the right of access to justice so requires, in particular (a) if the proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected, or (b) if the judgment on the substance given in a third State cannot be recognised and enforced in the Member State of the court seised under the law of that State, and recognition and enforcement are necessary to ensure that the rights of the defendant are respected, and the dispute has a sufficient connection with the Member State of the court seised",* Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), Brussels, 2011, COM (2010) 748 def.

necessitatis, also the following proposal links it to the objective of avoiding a denial of justice, to the conditions under which no EU or national provision attributes jurisdiction to a Member State, and to the circumstance that proceedings outside the EU are impossible or cannot reasonably be brought. The only requirement that differentiates them is the existence of a sufficient connection. Although both consider that there must be a connection to the Member State where the victim makes the application, the Legal Committee considers that this must be *sufficient*, on the contrary, GEDIP eliminates the adjective.

3. *The features of the forum necessitatis in the European judicial area*

The *forum necessitatis* is not an unknown mechanism in the European judicial area[20]. Although, following the model of the Brussels Convention[21], the regulations initially adopted by the then European Community on the basis of Article 65 TEC were intended to apply within a predetermined scope *ratione personae*, which varied for each instrument[22] but which was aimed at identifying situations of strict relevance to the internal market.

However, in 2009, the European legislator was concerned that the lack of harmonisation of the rules of jurisdiction among the Member States, with the consequent need to resort to residual national competences, would undermine the plaintiff's right to justice in the Eu-

[20] The *forum necessitatis*, with different characteristics, is a mechanism also present in some national legal systems. See INSTITUT DE DROIT INTERNATIONAL, *Droits de l'homme et droit international privé,* Rapporteur Basedow, 2019, par. 41-47 ff.

[21] Brussels Convention (1968) on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, C 027, 26/01/1998.

[22] Such as the criterion of the domicile of the defendant in Regulation EC 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 12, 16.1.2001; or the criterion of the centre of main interests in Regulation EC 1346/2000 of 29 May 2000 on insolvency proceedings, in OJ L 160, 30. 6.2000; or to the criterion of the habitual residence and nationality of spouses of Regulation EC 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, in OJ L 338, 23.12.2003.

ropean Union. With the awareness that negative conflicts of jurisdiction could thus arise whereby no competent court within the EU could be identified and the plaintiff would be forced to turn to the court of a third State, the *forum necessitatis* first appeared as a closing forum[23] in regulation 4/2009 on maintenance obligations[24].

The *forum necessitatis* was included in a regulation which, however, is not based on the model of the Brussels Convention. Indeed, it does not contain specific conditions of application *ratione personae*, nor an express reference to national rules of jurisdiction[25]. Regulation 4/2009 is primarily aimed at safeguarding a material value, namely the protection of the maintenance creditor. Thus, a comprehensive system of jurisdiction criteria was established that substituted national ones and in which, consequently, a closing rule, or extreme limit, beyond which the regulation did not apply. The regulation has thus been structured with the objective of protecting a specific subject, as well as a plaintiff, in specific situations, and the *forum necessitatis* serves this purpose. Article 7 allows a court of a Member State to hear a case even when there is no jurisdiction in favour of that authority. However, this is allowed only if the plaintiff considers it impossible to bring the dispute in the third State where the criteria would locate it[26].

Therefore, there is a functional correlation, reflecting not territorial but rather material characteristics, between the use of the *forum necessitatis* and the need to avoid or remedy a denial of justice that

[23] To date, the *forum necessitatis* can be found in Regulation (EU) no. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and the acceptance and enforcement of authentic instruments in matters of succession and the creation of a European Certificate of Succession; in Council Regulation (EU) 2016/1103 and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, recognition and enforcement of decisions regarding the property consequences of matrimonial property and registered partnerships.

[24] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in OJ L 7, 10/1/2009.

[25] For an analysis of the Regulation, see L. CARPANETO, F. PESCE, I. QUEIROLO, *La «famiglia in movimento» nello spazio europeo di libertà e giustizia*, Turin, 2019; F. PESCE, *Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione europea,* Rome, 2013.

[26] P. FRANZINA, *Sul forum necessitatis nello spazio giudiziario europeo*, in *Rivista di diritto internazionale*, 2009, p. 1122.

might take place in a third State. The derogation from the territorial criteria generally used in the regulation, in favour of a deemed necessity, makes this mechanism limited and constrained by its subsidiary and exceptional nature, as well as by the presence of a sufficient connection with a Member State. The subsidiary character appears in line with the justification based on the guarantee of access to justice. In fact, the necessary jurisdiction does not interfere with the rules on jurisdiction based on a localisation approach, but sits alongside them, operating when the dispute cannot be heard by any Member State. On the other side, the exceptionality of the mechanism and the presence of a sufficient connection make it clear that necessity cannot be found in relation to any situation in need of protection, but the case must affect fundamental, procedural, or substantive rights of the plaintiff. Hence, necessity must be qualified and identifiable only in relation to those situations the protection of which, on the one hand, is considered indispensable by the court system, and on the other hand, there is some proximity of the dispute to the forum.

The need to avoid a denial of justice highlights a final aspect of the forum of necessity mechanism in the European judicial area: the discretion granted to the judge as to establishing his or her jurisdiction. If the *ratio* behind the maintenance obligations regulation is to protect the maintenance creditor, the exercise of jurisdiction requires an evaluation first as to whether there is a real need to protect the creditor and then as to whether there are no actions that can be brought in a third State. To achieve the objective, it was believed that this could not be enclosed in too rigid a scheme. The regulation sets out three hypotheses that may lead to a denial of justice: either because the proceedings cannot reasonably be brought, or conducted, or are impossible in the third State. The only scenario in the regulation, mentioned in recital 16, refers to the occurrence of a civil war or to the hypothesis of impossible proceedings in a third State. In relation to the other cases, the regulation leaves a margin of appreciation to the court of each Member State, which may thus consider the objective characteristics of the judicial system of the third

State concerned, as well as the objective characteristics of the plaintiff, to be relevant factors[27].

The mechanism could remedy a dysfunction of the civil process in a third State that makes it unnecessary to conduct proceedings in its courts, but it could also be argued that it could be invoked by the plaintiff even if proceedings in a third State were possible, but would end in the denial of his claims[28]. There is no doubt, however, that this mechanism, which has the function of conferring jurisdiction on a Member State, is intended to protect the position of the plaintiff, guaranteeing judicial protection of his rights.

When the European Union introduced the *forum necessitatis* in the maintenance obligations regulation, it was thought that the introduction of the mechanism as it was conceived in that one, could also take place in the civil and commercial regulation.

4. *The "Brussels system" and the forum necessitatis*

The idea that the objectives of economic integration and the efficient functioning of the internal market could not have been achieved without a facilitated circulation of civil and commercial judgments, gave rise to the so-called "Brussels system". From the Brussels Convention of 1968, a series of founding principles were developed, progressively refined, and adapted to the needs of practice. Then, due to the evolution and extension of the European community's competences, we have moved on to regulations that have

[27] For an analysis of *forum necessitatis* in regulation n. 4/2009, see G. BIAGIONI, *Alcuni caratteri generali del forum necessitatis nello spazio giuridico europeo,* in *Cuadernos de Derecho Transnacional,* 2012, pp. 20-36; F.M BUONAIUTI, *Art. 4 della risoluzione dell'Institut de Droit International su Human Rights and Private International Law: il forum necessitatis come strumento volto a garantire il diritto di accesso alla giustizia,* in *Diritti umani e diritto internazionale*, 2022, pp. 307-325; P. FRANZINA, *Sul forum necessitatis nello spazio giudiziario europeo*, cit., pp. 1121-1129; G. ROSSOLILLO, *Forum necessitatis e flessibilità dei criteri di giurisdizione nel diritto internazionale privato nazionale e dell'Unione europea,* in *Cuadernos de Derecho Transnacional*, 2010, pp. 403-418.

[28] G.BIAGIONI, cit. supra, p. 31.

assumed the function of normative benchmark on which the regulation of the entire European civil procedural system has been based, starting with EC regulation n. 44/2001[29].

Ten years later, in 2011, there was the first recast of the regulation in which the Commission presented its proposal for amendment. The aim of the proposal was "*to develop the European area of justice by removing the last remaining obstacles to the free movement of judicial decisions, in line with the principle of mutual recognition*"[30]. Therefore, the main amendments that were proposed concerned (i) the relationship of the regulation with arbitration; (ii) the defendants domiciled in third states; (iii) choice of court agreements; (iv) the *exequatur* procedure[31].

The adoption of the resulting EU regulation n. 1215/2012 represented a moment of reconfirmation of the founding principles of the system and of adaptation of the applications to the needs of practice, while downsizing some of the main innovations contained in the Commission's proposal. The interest was to open the system to defendants domiciled in third States. Although the regulation has been partly "extended" to defendants not domiciled in the EU, this was done because of a further strengthening of the protection of specific categories of plaintiffs, the so-called weaker parties[32], who, as consumers or employees, may bring proceedings in the courts of the place of their domicile, in the case of consumers, or of the place where they habitually carry on their business or where their employment took place, in the case of employees, irrespective of the domicile of the other party (Art. 18(1) and 21(2)).

At that time, therefore, the objective of introducing wide-ranging provisions – in addition to the special forums for weak contracting parties and the exclusive forums (Articles 24 and 25), which already extend the system – connecting with third States, was not achieved.

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[29] S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale, il regolamento UE n. 1215/2012*, Turin, 2016, p.6 ff.

[30] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM/2010/0748 final.

[31] See S.M. CARBONE, C.E. TUO, *Non-EU States and the Brussels I Recast Regulation: New Rules and Some Solutions for Old Problems,* in *Rivista di Diritto internazionale privato e processuale,* 2015, p. 1 ff.

[32] With the exclusion of the insured. Art. 11 of reg. 1215/2012.

It was believed that the introduction of this would increase the margins of discretion and uncertainty outside the so-called "Brussels system"[33]. In particular, the European Parliament considered that a discussion on international jurisdiction should rather have been carried out by the Hague Conference on Private International Law and would have required *"much study wide ranging consultations and political debate [...]"* [34].

As with its predecessors, therefore, the definition of the sphere of applicability *ratione personae* of EU Regulation n. 1215/2012 – which must be carried out on the basis of the combined provisions of Articles 4, 5 and 6[35] – places at the centre the criterion of the defendant's domicile which, as a matter of principle and for the purposes of the application of the regulation, must be located within a Member State (Article 4). It therefore follows that the criteria of the Brussels I *bis* system do not apply, except in the cases outlined above, *"if the defendant is not domiciled in a Member State"* (Article 6).

With reference to the *forum necessitatis* mechanism, the Commission's Green Paper on the revision of Regulation (EC) n. 44/2001 hinted to the possibility of its introduction in the new regulation. Article 26, on the Commission's Paper, identified in this regard two distinct conditions, one corresponding, in substance, to the wording contained in Article 7 of Regulation n. 4/2009. If no court of a Member State had jurisdiction under the regulation, the courts of a Member State could, exceptionally, hear the dispute, in order to guarantee the right of access to justice, provided that the proceedings could not reasonably have been brought, conducted, or deemed impossible in the third State, or the judgment given in the third State could not be recognised and enforced in the Member State seized under the law

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[33] F. MARONGIU BUONAIUTI, *La tutela del diritto di accesso alla giustizia e della parità delle armi tra i litiganti nella proposta di revisione del regolamento n. 44/2001*, in *La tutela dei diritti umani e il diritto internazionale*, Napoli, 2012, p. 345 ff.

[34] Please refer to the project on jurisdiction – started in 1992 – of the Hague Conference, which has seen recent developments following the 2019 diplomatic session. *Conclusions and Decisions adopted by CGAP of March 2023*, available at https://assets.hcch.net/docs/5f9999b9-09a3-44a7-863d-1dddd4f9c6b8.pdf

[35] S.M CARBONE E C.E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale,* cit., p. 50.

of that State. This could only have been the case if there was a sufficient connection with the court. The second condition referred to the situation where there was already a judgment rendered in a third State that could not be recognised or enforced in the Member State of the court even though recognition and enforcement were considered necessary to satisfy the plaintiff's rights. In order to fall within this second condition, it was not necessary, however, that recognition and enforcement had been denied in practice, since the plaintiff could therefore apply to the courts of a Member State on the basis of *forum necessitatis* even when the refusal of recognition or enforcement was only foreseeable[36].

However, with reference to the first consideration, even though the wording is inspired by Article 7 of regulation n. 4/2009, it must be acknowledged that the application of the mechanism does not seem to be possible in the same way in the civil and commercial regulation.

The European Union has included the *forum necessitatis* for the first time in regulations that are primarily aimed at safeguarding material values, such as creditor protection in the maintenance Regulation. The Brussels I *bis* regulation, on the contrary, does not pursue the same purpose. The objective of the Union in this respect appears to be *"the maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice [...]"* particularly *"when necessary for the proper functioning of the internal market"*[37]. The focus is therefore on a number of principles such as the principle of foreseeability of jurisdiction, respect for the autonomy of the parties, a clear mechanism in the event of *lis pendens* and one concerning related actions. With the aim of safeguarding the functioning of the internal market, over the years, following the interpretation given by the Court of Justice of the European Union, they have acquired a kind of hierarchy[38]. Foreseeability of solutions appears to

[36] G. BIAGIONI, *Alcuni caratteri generali del forum necessitatis,* cit., p.34.

[37] Brussels I bis Regulation, recital (15).

[38] U. MAGNUS, P. MANKOWSKY, *European Commentaries on Private International Law, Commentary on the Brussels I bis Regulation, Article 1*, 2nd revised edition, Cologne, 2022, p. 77.

be the principle considered essential[39]. Moreover, as recital (15) of the Brussels I *bis* regulation itself states, *"the rules of jurisdiction must have a high degree of foreseeability"* so that the plaintiff can easily identify the court to which he has to turn, and the defendant can reasonably foresee the court before which he will be sued.

In line with the underlying principles, according to Article 4 of the Brussels I *bis* Regulation, the defendant's domicile in the territory of a Member State constitutes both the essential connecting factor, in determining the scope, and the general criterion for determining the court that has jurisdiction[40]. The jurisdiction of the court of the State in which the defendant is domiciled constitutes the guiding principle of the regulation hence the rules which derogate from that criterion cannot be interpreted extensively[41].

The mandatory nature – except for the cases provided for in the regulation itself – of Article 4 thus embodies the principles constituting the regulation, namely the principle of legal certainty and proximity. The underlying conviction – like its predecessors – was based on the primary idea that differences between the national laws of the Member States on jurisdiction and the recognition of judgments and differing procedural formalities could hinder judicial cooperation. The need to protect these principles, therefore, led to consider the domicile of the defendant as the most appropriate criterion, within a system, such as the Brussels system, where – unlike Regulation 4/2009 – the plaintiff does not assume (except in the cases exhaustively provided for by the regulation itself) a position qualified by a specific need for protection.

Moreover, as we have seen, the scope of application *ratione personae* leads to the consequence that, where the conditions in the regulation, are not met, there is a reference to the national rules of so-called exorbitant jurisdiction (Art. 6). The Brussels I *bis* regulation is thus not conceived as a comprehensive system of jurisdictional rules that fully replaces the domestic rules of the Member States.

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[39] See, for example, Color Drack GmbH, Case C386/05, judgment of 3 May 2007, para. 19; Tacconi, Case C-334/00, judgment of 17 September 2002, para. 20; Owusu, Case C281/02, judgment of 1 March 2005, para. 38.

[40] S.M. CARBONE, C.E. TUO, *Il nuovo spazio giudiziario europeo,* cit., p. 77.

[41] European Court of Justice, *ÖFAB, Östergötlands Fastigheter AB v Frank Koot e Evergreen Investments BV*, C-147/12, 18 July 2013, para 58 ff.

Rather, the rules of jurisdiction have the function of allocating jurisdiction among the Member States, but not of determining the existence of jurisdiction in relations with third States. In this context, the presence of a system that is more open to the concurrence of rules of different sources makes the need for a closing rule of the system, to be resorted to in exceptional cases, less pressing[42].

The differences in the values of the two regulations make it possible to emphasise how doubts may arise as to the compatibility of the *forum necessitatis* and its features in the Brussels I *bis* regulation, also with regard to two further profiles of the mechanism under consideration: the location of the dispute and the discretion of the courts.

Although the Brussels I *bis* regulation contains exceptions to the principle of proximity – for example, Article 24 concerning rights in immovable property – in favour of certain relationships and situations in dispute, it is also true that in relation to these criteria there is no power for the parties (both) to determine the competent court. In the case of *forum necessitatis*, one of the parties has the power to determine the competent court and this inevitably derogates from the principle of foreseeability for the defendant[43].

Moreover, the exceptional character of this forum and the discretionary given to the judge in ascertaining the criterion of jurisdiction ensure a marked flexibility of the institution. And although the *forum necessitatis* differs from the *forum non conveniens* precisely because of the interest of a substantive nature that the former aims to protect and because of its 'flanking' with the rules on jurisdiction[44], the Court of Justice of the EU has been strict in arguing that the exercise of highly discretionary assessments by judges risks undermining the application and foreseeability of the rules of jurisdiction contemplated in the regulation in question[45].

On a first reading, therefore, the founding principles of the Brussels I *bis* Regulation do not seem to admit the *forum necessitatis* mechanism.

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[42] F. MARONGIU BUONAIUTI, *Art. 4 della risoluzione dell'Institut de Droit International su Human Rights and Private International Law,* cit., p. 311.

[43] G. BIAGIONI, *Alcuni caratteri generali del forum necessitatis*, cit., p. 30

[44] P. FRANZINA, *Sul forum necessitatis,* cit., p. 1123.

[45] European Court of Justice, *Owusu*, cit., par. 37 ff.

However, even though from a technical point of view on the compatibility or otherwise of the mechanism with the principles, it is not possible to conclude that the *forum necessitatis* is incompatible with the Brussels I *bis* regulation. This, first, in the light of the exceptions to the principles, and the degree of flexibility that the regulation already presents within it[46]. But also, in the light of the value that the use of the *forum necessitatis* is intended to protect, i.e. the safeguarding of the right of access to justice in the face of its possible denial, which is considered a founding value of the European Union.

Therefore, a purely technical discussion does not allow for a complete understanding of why it is so complex to include the *forum necessitatis* in the Brussels I *bis* regulation. It is considered that the reasoning must lead elsewhere so that in the discussion of the problem we do not forget a crucial element: no value is neutral but is always rather functional to the achievement of an interest.

5. *Conclusions: the value and political considerations of the mechanism*

Every system of jurisdictional conflict rules is based on a tension and balance between the elements of externality and the connection criteria. In every domestic as well as European system, the determination of the degree of connection sufficient to attribute jurisdiction to the courts is the result of considerations that are *lato sensu* political, linked both to legal and cultural traditions and to the contingencies of the historical and cultural moment[47]. Moreover, the belief that a rule can be independent, or neutral, with respect to a given society is closely linked to the idea that rules designed for global market efficiency and functionality can have a predictable and measurable impact on the functioning of the economy. If it is a substantive interest that the EU is pursuing rather than the structure of a regulation

[46] See S.M. CARBONE, C. TUO, *Il valore dell'electio fori e i suoi limiti nel regolamento Bruxelles I bis*, in *Il diritto internazionale come sistema di valori. Scritti in onore di Francesco Salerno*, Napoli, 2021, pp. 631 ff; I. QUEIROLO, *Evolutionary Trends in Choice of Court Agreements: from the Lotus Case to the Brussels I-bis Regulation*, I. QUEIROLO, B. HEIDERHOFF (eds), *Party Autonomy in European Private (and) International Law*: Tome I, Rome, 2015, pp. 83-124.

[47] M.A. LUPOI, *Conflitti transnazionali di giurisdizioni,* cit. p. 11.

that can determine whether a rule is used or not, then the European Parliament is entitled to insist for a broader debate involving a reflection on which interests the EU of today wants to focus on.

If the interests of the Union turn their attention – as appearing from the proposal of Directive in recital (1) but in general from the political and economic actions that have been set as priorities – to actions that include the promotion of sustainable economic, social and environmental development not only of the European union but also of developing countries, then one must consider a consequent adjustment of the jurisdiction criteria, as well as of the connecting criteria, which, in exceptional and subsidiary cases, also open up cooperation with third States. This is the idea that the GEDIP Recommendation also pursues. If the future Directive is to be really effective, it must address these issues itself, and should do not leave them to the various private international law systems of the Member States, as this would lead to uncertain, unpredictable and contradictory outcomes.

The *forum necessitatis* is clearly in the interest of developing judicial cooperation with third States. Certainly, as it has been emphasised, this is a development of cooperation through coordination carried out in the *"negative"*[48], on the basis of a substantial distrust of the judicial protection that can be administered outside the Union and consequently considering that the protections administered are not easily interchangeable. However, this constitutes a connection with foreign situations that, in principle, are considered susceptible to adequate protection because they underlie values perceived by the European union as important. And although this coordination should be completed and balanced with "positive" coordination through the development of cooperation instruments with third States, the first step is still to consider which present and future interests to emphasise, thus determining the need for effective protection.

[48] P. FRANZINA, *Sul forum necessitatis,* cit., p. 1124.

GUGLIELMO BONACCHI

THE NEW HAGUE "JUDGMENTS" CONVENTION: THE EU'S GAMBLE IN STRENGHTHENING TIES WITH THIRD COUNTRIES

CONTENTS: 1. Introduction. – 2. The background of the Judgement Convention of 2019. – 3. The key provisions of the Judgments Convention. – 3.1. Article 4: recognition and enforcement. – 3.2. Article 5: basis for recognition and enforcement. – 3.3. Article 7: refusal for recognition and enforcement. – 4. The issue of "mutual (un)trust" inside the Judgments Convention. – 5. Why the Judgments Convention matters: EU process of enlargement, Brexit and "reluctant States". – 6. Final remarks

1. *Introduction*

One of the cornerstones of private international law is recognition and enforcement of foreign judgments. The reason is clear: having rights and being able to prove them in court against a foreign subject may become useless if the judgment has no value outside the State of the court issuing it.

The existing legal framework in international law is quite complex due to the presence of different players that can establish new rules at the global level, or at the regional level. The rules under international law are developed thanks to the efforts of different international bodies, the most important are the United Nations Commission on International Trade Law (UNCITRAL)[1], the Hague Conference on Private International Law[2] and

[1] UNCITRAL can be briefly described as the legal body of the United Nations system in the field of international trade law. It was established by the General Assembly with the Resolution 2205 (XXI) of 17 December 1966, in Resolutions adopted by the General Assembly during its 21st session. 20 September-20 December 1966. - A/6316. - 1967. - p. 99-100. - (GAOR 21st sess., Suppl. no. 16).

[2] The Hague Conference on Private International Law (HCCH) is an international organization established in 1955 with the purpose of promoting "the progressive unification of the rules on private international law" (art. 1 Statute of the Hague Conference on Private International Law, adopted during the Seventh Session of the Hague Conference on Private International Law on 31 October 1951 and entered into force on 15 July 1955. Amendments were adopted during the Twentieth Session on 30 June 2005 (Final Act, C), approved by Members on 30 September 2006 and entered into force on 1 January 2007). Today the HCCH counts 91 members (90 states and 1 Regional Economic Integration Organization, the EU).

the International Institute for the Unification of Private Law (UNIDROIT)[3]. At the regional level, the most important player is the European Union because it is a regional organization with competence on judicial cooperation in civil matters involving its member States[4].

The last legal source is national law, precisely the rules on private international law[5], often integrated by bilateral agreement on specific matters between States with more economic ties.

The positive outcome of the judicial cooperation inside the EU is that judges and lawyers can count on the same set of rules to deal with enforcement of judgments disputes concerning two member States. Moreover, they can rely on the interpretation of the EUCJ, an added value that generally international treaties do not have due to the absence of an international judicial authority granted with the power to rule binding decisions on interpreting the provisions of the treaty.

The same level of legal certainty is not granted when the judgment comes from a country which is not part of the EU. This is one of the reasons why the EU promoted the Lugano Convention of 2007[6], which is an international treaty between EU, Swiss, Denmark, Norway, and Iceland. Thanks to this Convention, similar rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters are applicable also for these States to cases involving EU countries[7].

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[3] UNIDROIT is an independent intergovernmental organization founded in 1926 with the purpose of studying and developing private law to harmonize it at the international level.

[4] The most relevant provision is certainly art. 81 of the Consolidated version of the Treaty on the Functioning of the European Union in OJ C 202, 7.6.2016, p. 78–79. Hereinafter "TFEU". Concerning the subject of this paper, art. 81 par. 2 (a) "*For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases.*". It is necessary to remind the fact that Denmark is not bound by this provision.

[5] For example, in Italy when Brussels I bis Regulation is not applicable, there is art. 64 L. 218/1995 (G.U. n. 128 3.06.1995), named "Reform of Italian system of private international law" ("Riforma del sistema italiano di diritto internazionale privato").

[6] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 339, 21.12.2007, p. 3–41).

[7] Concerning the "EU rules" established on jurisdiction and enforcement of judgments, a disclaimer is necessary. The provisions incorporated in the Lugano Convention of 2007 are those provided by the so called "Brussels I" regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 12, 16.1.2001, p. 1–23). This regulation is no longer in force, because it has been replaced by the so called "Brussels I bis" regulation

During the recent years the legal framework we knew is undergoing critical changes.

The first one is the consequence of "Brexit". According to the Agreement[8] between the EU and the United Kingdom, the EU Regulation Brussels I bis is no longer in force in UK. Moreover, leaving the EU has meant for the UK also the automatic exclusion from the Lugano Convention system[9]. Those cases that arose after the transition period and decided by UK Courts will be treated as coming from a third country by the EU member States.

A second change is the entry into force of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters[10].

(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 (recast) in OJ L 351, 20.12.2012, p. 1–32).

In this context is important to bear in mind that the Lugano Convention is framed with the wording of the previous regulation, meaning that some cases can be treated in a different way from the Brussels I bis regulation.

[8] The Title VI (art. 66-69) deals with the transition from the existing, at that time, EU framework on judicial cooperation in civil and commercial matters to the end of it. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community in OJ L 29, 31.1.2020, p. 7–187.

[9] UK has applied to become party of the Lugano Convention, but the EU Commission has stated that UK should not be part of the Lugano Convention. This instrument is part of the EFTA/EEA Agreement, while the UK is not part neither of EU either of the EFTA/EEA. According to the Commission, the proper legal framework to develop cooperation between EU and third country without special links to the internal market is provided by the multilateral agreements developed under the HCCC. Communication from the Commission to the European Parliament and the Council "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention" (COM/2021/222 final).

[10] The *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (also known as "HCCH 2019 Judgments Convention" or "Judgments Convention") was adopted with the aim to facilitate the circulation of judgments in civil and commercial matters. The EU is part of this Convention thanks to the Council Decision (EU) 2022/1206 of 12 July 2022 concerning the accession of the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (ST/13494/2021/INIT) in OJ L 187, 14.7.2022, p. 1–3. To be noted that Denmark is not bound by the EU accession since its special status (it is not part of the Part V of the Treaty on Function of the EU), whereas Ireland has exercised its "opt-in" facility and therefore is bound by the EU accession. The Judgments Convention has entered into force on 1.09.2023, at the moment between EU and Ukraine.

The two events can now be considered connected, since the UK wants further judicial cooperation in civil and commercial matters and the EU has clearly stated that the proper instrument is the Judgments Convention.

The objective of this contribution is to assess whether the Judgments Convention of 2019 is suitable to make easier recognition and enforcement of judgments between EU and third parties, with a look at the post Brexit relationship on this subject.

The first part deals with the history of this international instrument, focusing on his genesis and the relationship with the Hague Convention of 2005 on Choice of Courts Agreements (par. 2). Then the main provisions are analyzed to make it clear how the recognition and enforcement of judgements works under the convention (par. 3). Certain special provisions of the Convention are the subject of the fourth paragraph, dealing with the concept of mutual trust (par. 4). Finally, the reasons why this Convention matter are displayed (par. 5). In conclusion it will be argued that the Judgements Convention will become a success if certain States, known to be reluctant to give effect to foreign judgements, will ratify it thanks to those "special provisions" provided for therein (outlined in par. 4).

2. *The background of the Judgement Convention of 2019*

At this stage it is necessary to point out which are the most relevant elements of this Convention, starting from the reason why the Hague Conference decided to involve itself on this project.

The Hague Convention of 2019 received an aloof welcoming after its final approval[11]. The reason is mainly due to the fact that this Convention, as long as the Convention of 30 June 2005 on Choice of Court Agreements[12], came to light because of the failure of the negotiations between

[11] F. POCAR, *Riflessioni sulla recente convenzione dell'Aja sul riconoscimento e l'esecuzione delle sentenze straniere*, in *Rivista di diritto internazionale privato e processuale*, 2021, p. 5; R. A. BRAND, *The Hague Judgments Convention in the United States: A "Game Changer" or a New Path to the Old Game?,* in *University of Pittsbourgh Law Review*, 2021, p. 847, F. POCAR, *The 2019 Hague Judgments Convention: a Step into the Future or a Restatement of the Present?*, in J. HARRIS, C. MCLACHLAN (ed), *Essays in International Litigations for Lord Collins*, Oxford, 2022, p. 71, H. SCHACK, *HAVÜ Nein danke! Zur Weltweiteren Urteilsanerkennung und Jurisdiction Project der Haager Konferenz für IPR*, in *Zeitschrift für Europäisches Privatrecht*, 2023, p. 285, (English translation of the title: Judgments Convention: no thanks! On the worldwide recognition of judgments and jurisdiction Project of the Hague Conference for private international law).

[12] The Convention on Choice of Courts Agreement of 30 June 2005 entered into force the 1st of October 2015. The EU is part of this Convention thanks to the Council Decision

EU (European Community at that time) and US on making an agreement establishing a framework similar to the Brussels system[13].

The idea, born during the nineties, was to build a convention dealing with jurisdiction and exequatur of judgments. The negotiations failed because the US and European Community were not able to agree on the criteria for determining jurisdiction: each party wanted to protect its own criteria to determine "exclusive jurisdiction" in sensible matters, often conflicting with one other. When it was clear that it was not possible to reach an agreement, the Conference decided to change strategy, making one convention addressing one single issue of private international law and making them open to every interested country. This is clear considering the following facts.

First, the process for the Choice of Courts Agreement Convention started soon after the end of the previous round of negotiations. This new project was seen as the first step towards a much wider framework, able to reach the same goal that was not possible to achieve. The fact that this Convention entered into force so "fast" was considered a success. Second, the Conference were pursuing a different scope: the EU, main sponsor of the Hague Conference, wants to promote judicial cooperation all over the world, the US is no more "the" privileged counterparty[14]. The enthusiasm coming from the 2005 Convention success led to start the negotiations on a convention on judgements, leaving outside of its scope the jurisdiction issue.

There are some significant differences between the two instruments.

The first one is that the 2005 Convention has provisions concerning *lis pendens* (or pending lawsuit), whereas the 2019 Convention has not even one. The second difference regards the notion of "civil and commercial matters," which is not identical concerning the exclusions[15]. The former

(2014/887/EU) of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, OJ L 353, 10.12.2014, p. 5–8.

[13] F. Pocar, *Riflessioni sulla recente convenzione dell'Aja sul riconoscimento e l'esecuzione delle sentenze straniere*, cit., p. 8.

[14] This is clear analyzing the parties to the 2005 Convention: US has not yet ratified the agreement, which entered into force thanks to the EU accession. Other relevant parties to be mentioned: UK, thanks to ratification of 28.12.2020; Singapore, Mexico, Ukraine. China, as US, has only signed it. More information available at https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

[15] It is sufficient to compare art. 2 of the respective convention to prove it.

has a limited exclusion of intellectual property law[16], whereas the latter excludes it without limits[17]. Moreover, the 2019 Convention is not applicable to judgments concerning defamation[18] and privacy[19].

Despite this minor exclusion, the Judgments Convention has also significant enlargement. Some relevant exclusions set in the 2005 Convention are not mentioned. Therefore, the notion of "civil and commercial matters" for the new instrument includes judgments concerning the consumer and contracts of employment[20].

This lack of symmetry can become a problem for future application, as pointed out by keen scholars[21].

At the same time, despite the fact that the Convention regards judgments in "civil or commercial matters", there are some relevant exclusions such as those ruling on carriage of passengers and goods, relevant maritime claims, defamation, privacy and intellectual property[22]. This choice was justified because the majority of these subjects are covered by other instruments, but it has the effect of limiting the scope of application of the Convention, therefore also its final objective.[23]

The final important characteristic of this Convention is that it does not work as the Brussels I bis Regulation. Even if the goal is making recognition and enforcement of judgments easier, there is not an automatic circulation of judgments between parties. The contracting State is obliged to harmonize its conflict of laws rules to the minimum standards set out by the Convention, but significant matters are still under discretion of the

[16] Art. 2 (2) n of the 2005 Convention excludes from the scope of application the agreement of choice of courts concerning "*the validity of intellectual property rights other than copyright and related rights*".

[17] Art. 2 (1) m Judgment Convention.

[18] Art. 2 (1) k Judgment Convention.

[19] Art. 2 (1) l Judgment Convention.

[20] Art. 2 (1) exclude these agreements from the application of Choice of Courts Convention.

[21] F. POCAR, *Riflessioni sulla recente convenzione dell'Aja sul riconoscimento e l'esecuzione delle sentenze straniere*, cit., p. 14, or for possible more problematic consequences on the EU law M. WILDERSPIN, L. VYSOKA, *The 2019 Hague Judgements Convention through European lenses*, in *Nederlands Internationaal Privaatrecht (NIPR)*, 2020, p. 34.

[22] See art. 2.1 for the full list of exclusion.

[23] It has been argued that these exclusions are due to diplomatic reasons. Even if at the beginning the idea was to have two parallel instruments, with the same scope of application, now we have two different set of rules with some enlargements. F. POCAR, *The 2019 Hague Judgments Convention: a Step into the Future or a Restatement of the Present?*, cit., p. 74 - 76.

State concerned, which can, of course, establish regulations more favorable to circulation.

3. *The key provisions of the Judgments Convention*

At this stage of the analysis, it is possible to have a closer look at the main rules provided by this international agreement.

The structure of the Convention, defined as a "simple" instrument[24], can be summarized as follows.

The First Chapter deals with scope[25] and definitions, whereas the Second is the real core of the agreement because it states the general principles applicable to circulation of judgements (art. 4), basis for recognition and enforcement (art. 5) and the ground for refusal (art. 7).

The Second Chapter deals also with other specific issues, such as ruling on preliminary questions (art. 8), circulation of severable judgements (art. 9), refusal on the ground that the judgment recognizes damages that do not compensate an actual loss or damaged suffered (art. 10), enforcement of judicial settlement (art. 11). Moreover, procedural provisions find room at the end of the chapter: documents to be produced (art. 12), procedure for recognition and enforceability (art. 13) and costs of procedure (art. 14).

The Third Chapter sets general rules for the function of the Convention.

The main provisions for the purpose of this contribution are art. 4, 5 and 7, each of them are discussed in the below subparagraphs.

3.1. *Article 4: recognition and enforcement*

This article, named "General provisions", states the meaning of recognition and enforcement of judgments under the Convention.

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[24] F. POCAR, *Riflessioni sulla recente convenzione dell'Aja sul riconoscimento e l'esecuzione delle sentenze straniere*, cit., p. 11, P. A. NIELSEN, *The Hague 2019 Judgements Convention – from failure to success?*, in *Journal of Private International Law*, 2020, p. 205. It is "simple", as stated by Nielsen because "A simple Convention only sets up uniform rules on recognition and enforcement of judgments. It does not harmonize the rules of direct jurisdiction" (p. 208).

[25] The scope of application is set by art.1, which states that the convention is applicable for all judgments concerning "civil and commercial matters". In this case the notion of" civil and commercial matters" to distinguish it from criminal and civil law. The scope of application is specified by art. 2 that, among all the judgments on civil and commercial matters, makes a list of exceptions, already mentioned at the end of the previous paragraph.

According to art. 4, the procedure laid out by the Convention (art. 12-14) is applicable to those judgments issued by the Court of a contracting State, called "State of origin", to be recognized and enforced in another contracting State, called "requested State".

The authority of the requested State can refuse the recognition only under the rules of the Judgments Convention. Moreover, the judicial review on the merit of the judgment is forbidden by art. 4 (2), apart from the application of certain provisions which allow the Court to examine the judgment, for instance art. 5 and 6.

The limited review on the merit is not new in private international law. Broadly speaking, it is usually necessary to ascertain whether the minimum requirements for having a "judgment" are fulfilled according to the law of the requested State. The goal of such an international agreement is to share as much as possible these criteria. Therefore, the more requirements, the more difficult it will be to have foreign judgments recognized and enforced in another State. This is the reason why the drafters tried to pose limits on the examination of the judgment: "[*t]here would be little purpose to the Convention if the court of the requested State could review the underlying factual or legal basis upon which the court of origin reached its decision. In practice, this would imply that the parties may be forced to re-litigate the same case in the requested State*"[26].

This paragraph enlightens the fact that this is a "simple" convention because there is no mention on the findings of the Court regarding jurisdiction. According to the drafters, binding the requested State to findings on jurisdiction of the Court of the State of origin is not the objective of this Convention because it does not provide rules on direct jurisdiction[27].

The judgment shall be recognized and enforced only if it has effect and can be enforced in the State of origin, art. 4 (3). This provision is in line with another general principle, according to which it is not possible to recognize more effects than those provided by the State of origin. In addition, art. 4 (4) provides that the requested State may not recognize and enforce a judgment until the judicial review in the State of origin is on process or the time limit for seeking ordinary review is not expired. This last general provision leaves the decision under the discretion of the Court, opening the

[26] As pointed out by F. GARCIMARTÍN, G. SAUMIER, *Explanatory report on the Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters (HCCH 2019 Judgements Conventions)*, The Hague, 2020, p. 80 (para. 119).

[27] This was not the case of the 2005 Convention, Art. 8 (2). F. GARCIMARTÍN, G. SAUMIER, *Explanatory report on the Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters (HCCH 2019 Judgements Conventions*, cit., p. 81 (para. 121).

door to uneven application. The drafters wanted to allow the interested party to halt recognition and enforcement when it is highly probable that the judgment will be reversed.

3.2. *Article 5: basis for recognition and enforcement*

This provision states a thorough list of connecting criteria that make it possible to ascertain whether the judgment can be recognized and enforced according to the Convention[28]. Meeting one of these conditions is sufficient, as provided for by art. 5 (1). These conditions are called "jurisdictional filters"[29].

These filters are not rules on jurisdiction, that remain untouched by the Convention and regulated by national law of each contracting State. Some legal systems know these filters as "indirect criteria of jurisdiction" or "indirect competence", to distinguish them from those that determine directly which State has jurisdiction[30].

In general, these filters are drafted in a broad and general way. Since these negotiations were more difficult than usual, the result is not only an extensive list of cases, but also with some clauses very specific[31]. For example, art. 5 (1) (j) considers the judgment concerning non-contractual obligations, "*arising from death, physical injury, damage to or loss of tangible property, and the act or omission directly causing such harm occurred in the State of origin, irrespective of where that harm occurred*". Therefore, it is probable that this choice of wording makes it easier to litigate on which subject is "non contractual obligation". Moreover, this strict notion is not in line with the EU law, because according to art. 7 (2) Brussels I bis Regulation both the State where the harmful event occurred and the one where the direct damage materialized (not always are the same State) have jurisdiction. On the other side, this choice has the advantage of making

[28] Art. 5 (1) provides criteria from letter "a" to letter "m".

[29] F. GARCIMARTÍN, G. SAUMIER, *Explanatory report on the Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters (HCCH 2019 Judgements Conventions*, cit., p. 88 (para. 134).

[30] F. GARCIMARTÍN, G. SAUMIER, *Explanatory report on the Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters (HCCH 2019 Judgements Conventions*, cit., p. 88 (para. 135), F. POCAR, *Riflessioni sulla recente convenzione dell'Aja sul riconoscimento e l'esecuzione delle sentenze straniere*, cit., p. 14.

[31] A. BONOMI, C. M. MARIOTTINI, *A game Changer in international litigation? Roadmap to the 2019 Hague Judgements Conventions*, in *Yearbook of Private International Law Vol. XX - 2018/2019,* p. 548.

clear that only one State, where the act or omission occurred, has jurisdiction. This effort for legal certainty can be threatened by the limit of the notion of non-conctractual obligations admitted by the filter.

For the sake of completeness, there is one more jurisdictional filter under art 6: the judgement concerning rights *in rem* of immovable property can be recognized and enforced only if such a property is situated in the State of origin, notwithstanding what provided by art. 5.

3.3. *Article 7: refusal for recognition and enforcement*

This provision states under which circumstances recognition and enforcement may not be granted by the requested State. The wording used by the drafters is "may" because the Court is not obliged to apply art. 7 even if one of the conditions is met. In fact, the national law can derogate this provision giving discretion to the court on allowing recognition and enforcement[32].

It is drafted considering the similar rule in 2005 Convention (art. 9), but comparable grounds for refusal can be found also in Brussels I bis Regulation (art. 45).

This rule is necessary to give a remedy for those cases where either the procedure in the State of origin had some "problems" (e.g., no proper notification to the defendant was given), either the law principle established or applied by the judgement is not compatible with the law of the requested State.

The first two grounds of refusal concern indeed the notification. In other words, the Convention wants to grant the right of the debtor "to be heard", to defend himself, which is one of the fundamental principles of civil procedural law. Therefore, a judgment issued after a proceeding where the defendant did not receive proper notification of the writ of summons or it was notified in the requested State violating the fundamental principle of the law of that State on service of documents, may be not recognized and enforced.

Noteworthy is the "defense" of public policy. It can be triggered when the judgment would be manifestly contrary to the public policy of the requested State, "*including situations where the specific proceedings leading*

[32] P. A. NIELSEN, *The Hague 2019 Judgements Convention – from failure to success?*, cit., p. 228.

to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State"[33].

Public policy is a well-established general principle of private international law, often described as the last resort for the requested State when its Courts invoke it under exceptional circumstances to prevent application of a judgment incompatible with fundamental principle of national law. The drafters opted for adding some details, without the intention to change the meaning of the rule compared to art. 9 of 2005 Convention. They wanted to underline the fact that public policy relates to mandatory rules provided by the national law of the requested State to protect fundamental values[34].

In order to harmonize the system, art. 7 (d) grants ground for refusal when the judgment is issued in violation of a choice of courts agreement, according to which the Court of another State other than the State of origin was chosen by the parties.

In addition, recognition and enforcement can be refused when the judgment is incompatible with another between the same parties on the same claim issued both by the requested State and by another State, but in this case the judgment must meet the conditions to be recognized and enforced in the requested State[35]. Since this is a "simple" convention, dealing only with recognition and enforcement, there are not provisions as art. 29 of Brussels I bis to prevent courts of State parties to issue conflicting judgments. Consequently, the only remedy that can be granted is *ex post*: the requested State will not recognize and enforce a judgment conflicting with others. Moreover, the provision does not give priority on the first judgment issued, when the conflict regards a judgment issued by the requested State,

[33] Art. 7 (1) (c). the wording "manifestly against the public policy" is usually used by the Hague Conference, whereas the last part of the provision ("including…") was added in the 2019 Convention for sake of clarity, as pointed out in F. GARCIMARTÍN, G. SAUMIER, *Explanatory report on the Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters (HCCH 2019 Judgements Conventions*, cit., p. 121 (para. 254).

[34] One problematic issue concerning public policy is, for civil law jurisdiction, recognizing and enforcing judgements applying the common law institute known as "punitive damages". These are damages granted by the Court even if the damaged party has not suffered them, because the Court intended to sanction the damaging party for its act or omission for which has been held responsible. In this context the Convention provides a specific provision, art. 10, according to which the Court of the requested State can refuse to recognize and enforce the judgement that awards damages "*that do not compensate a party for actual loss or harm suffered*". Moreover, the Court of the requested State can consider whether the judgement awards damages to cover costs of proceedings, art. 10 (2).

[35] Art. 7 (e) and (f).

but it is sufficient the mere "inconsistency" between them. Only if the decision was issued by another State, it must be issued earlier than the foreign one.

Art. 7 (2) also deals with the case when the interested party is seeking to enforce a judgment issued when another procedure is pending in the requested State (*lis pendens*). In this case the Court of the requested State may refuse recognition when the pending procedure was enacted before the one of the State of origin and there is a close connection between the dispute and the requested State.

4. *The issue of "mutual (un)trust" inside the Judgments Convention*

The previous paragraph has dealt with the most important provisions to understand how the judgments can be recognized and enforced under this Convention. Now we can move to certain provisions that appear to be quite unique, compared to other relevant Hague Conference instruments, because such rules allow *de facto* the States entering the Convention to adapt it according to their own interests thanks to the power to make specific declarations and to make use of the so called "opt-out" system.

The starting point of this consideration is one of the fundamental principles of international law, according to which an international agreement must be governed by "mutual trust" between the State parties. This concept is the foundation of every international treaty, and it means that one party trusts the other one at least to a certain level.

Mutual trust becomes more important concerning the circulation of judgments, because the requested State has "less" control on the merit of the decision that it will be recognized and enforced. In this specific context, "mutual trust" regards the respective judicial system. At the global level, there are legal systems with a more open approach towards foreign judgments than others, and these opposite approaches clashed during the discussions for the 2019 Convention[36].

Two key elements prove this conflict: not only the unfortunate failure of the negotiations on a "double" convention, but also the fact that the 2019 Convention was built with a certain amount of circumspection. This caution led the drafters to agree on: a narrow notion of "civil commercial matters" (thanks to art. 2), the chance for each interested State to make specific

[36] For a complete study on jurisdictions all over the world: L. GARB, J.D.M. LEW (eds), *Enforcement of Foreign Judgements,* The Hague, 2016.

"declarations" with the effect of diminish its obligation under the Convention (art. 17, 18, 19) and on building a unique system of "opt-out" (art. 29).

Regarding the distinct kinds of declaration allowed by the convention, article 17 allows each State to declare that its Courts will refuse to recognize and enforce judgments coming from another contracting State when the parties are both resident in the requested State and their relationship and all other elements are more connected only to the requested State. Moreover, article 19 allows each State to declare that they will not apply the Convention when the foreign judgments is issued in a procedure where one of the parties is either the State itself or a natural person acting for the State, either a government agency of that State or a natural person acting for that agency. Finally, article 18 allows each State to declare that it will not apply the Convention for a specific matter, provided that there is a "strong interest" in it. The consequence of the declaration is that both the declaring State and the other parties will not recognize and enforce the judgments on that specific matter.

Art. 18 and 19 require the obligation to the declaring State to ensure that the declaration "*is no broader than necessary and that the specific matter excluded is clearly and precisely defined*"[37].

On one hand these provisions allow each State to "adapt" the Convention to protect special interests cutting out certain judgments relating to sensitive matters, on the other hand article 29 establishes a system designed to "cut out" other States.

This provision has no precedent compared to other Hague Conventions. The reason behind it is that during the preparatory works some delegations, often coming from jurisdiction less open to foreign judgments, insisted on the creation of a sort of "safety brake"[38].

This structure is the fruit of a compromise between those States proposing an "open" system and those favoring a "closed" one. The result is a "bilateralisation regime". Therefore, each State can join the Convention, but a contracting State can notify the depositary that it will not be bound to the new party. This notification must be made within 12 months starting from the notification of the depository to the member States regarding the ratification, acceptance, approval, or accession of another State[39]. On the

[37] Art. 18 (1) and art. 19 (1).

[38] M. WILDERSPIN, L. VYSOKA, *The 2019 Hague Judgements Convention through European lenses*, cit., p. 48.

[39] Art. 29 (2).

other hand, even the State depositing the instrument of ratification, acceptance, approval, or accession can communicate that the Convention will not establish relationship between that State and another one (or more)[40].

This decision can be withdrawn at any time (but it cannot be made another time towards the same State)[41].

This mechanism appears to be a bit "extreme" since the Convention provides specific remedies to stop judgments that can violate the legal order of the requested State (above all: ground of refusal under article 7). Since the negotiators were hoping that this "construction" would convince especially those States that have not a tradition to recognize and enforce foreign judgments, it was necessary to listen and to give an answer to their concerns[42].

To conclude this analysis on the initiative that each State can take entering the Convention, it is necessary to mention that the ordinary reservation is still possible to be made. Anyway, at the moment the parties of the Convention have not used these powers, a part for the EU that applied art. 18[43].

5. *Why the Judgments Convention matters: EU process of enlargement, Brexit and "reluctant States"*

After the above analysis on the key provisions, it is now the moment to assess which States can be interested in ratifying this Convention and why.

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[40] Art. 29 (3).

[41] Art. 29 (4).

[42] The goal is of course to attract countries such us U.S., Canada, UK, (more on the next paragraph). It is relevant to note that such a different approach towards foreign judgments can be found closer than we may think. Even inside the European Union the States are not on the same page. The Nordic States are traditionally bound by a closed system recognizing foreign judgments (of course, thanks to the Brussels system, coming from outside EU) thanks to specific bilateral agreements. On the contrary, countries such as Italy and Germany are considered to have an "open system" because they grant recognition and enforcement to all those judgments meeting certain criteria established by national law (very similar to those provided by the Judgment Convention). M. WILDERSPIN, L. VYSOKA, *The 2019 Hague Judgements Convention through European lenses*, cit., p. 41.

[43] The Hague Conference provides a public updated webpage on the "status" of the Convention, providing also the declarations made by the parties. For example, regarding the EU: "*The European Union declares, in accordance with Article 18 of the Convention, that it will not apply the Convention to non-residential leases (tenancies) of immovable property situated in the European Union*". The status of convention can be found at this webpage, last visited the 22nd of November 2023 (https://www.hcch.net/en/instruments/conventions/status-table/?cid=137).

As already mentioned in the first paragraph, The Hague Conference is an international organization aimed to facilitate the harmonization of private international law across the globe. This is one of the reasons why the Judgments Convention was shaped as "simple", because the chosen structure of a "simple" convention - dealing only with circulation of judgments between States parties - aims to convince the highest number of States possible to ratify the Judgements Convention.

This strategy seems to pay off, since the 2019 Convention has recently entered into force[44]. This event made the news because it creates an official close relationship in civil judicial cooperation between Ukraine and EU. The geopolitical consequences of the decision of Ukraine to ratify the Convention are there for all to see. The Judgements Convention is clearly used as a tool to bring closer those States aiming to become part of the EU, but that at this stage do not meet the necessary requirements, especially the institutional one, to become a new member. This assumption is proved analyzing the States who signed the Convention, where West Balkan Countries, such as Montenegro[45] and North Macedonia[46], can be found.

On the other side, this is not the only outcome the Hague Conference is hoping to reach. The purpose is to be a landmark at the global level. Although only Uruguay has ratified it[47], the United States have signed the Convention and seriously thinking about ratifying it[48].

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[44] The 1st of September 2023, but at the moment is applied only between EU and Ukraine.

[45] Signed the 21st of April 2023.

[46] Signed the 16th of May 2023.

[47] The convention will enter into force the 1st of October 2024.

[48] The U.S. are not entirely open to this kind of agreement due to their specific internal circumstances. First of all, the U.S. Constitution requires a rather complicate parliamentary procedure to ratify international conventions. Second, in the specific case of judicial cooperation in civil and commercial matters the competence is still on the Federal States, therefore it is not clear which is the right way to implement such a Convention. Third, the U.S. Courts are reluctant to recognize and enforce foreign judgments because of the widespread belief that other judicial systems may be not as good as theirs and they prefer not to be bound by the limits posed by the Convention. Moreover, they tend to recognize and enforce judgments coming from countries where the defendant directs its activity in the State of origin or has other close relationship with it. The check of U.S. Courts is more on the person rather than the subject, which is a different way compared to the EU model inspiring the Judgment Convention.

On the second point: C. J. BARROSO, *Implementing the Hague Judgments Convention*, in *New York University Law Review*, 2022, p. 1507.

On the third point, arguing that the U.S. should ratify with reservation in order to self-control the minimum standard of the judicial system of other State parties (sic!): D. A.A. REISMAN, *Breaking Bad: Fail -Safes to the Hague Judgements Conventions*, in *The Georgetown Law Journal*, 2021, p. 879.

There are several important States, especially of common law tradition, that are not traditionally open to recognition and enforcement of foreign judgements. The Convention will be considered successful when a lot of these States will join it. In order to persuade the "undecided", an "opt-out" system, unique for The Hague Conference's instruments, has been implemented[49].

Another effect that it was not entirely possible to foresee during the negotiating process was the problematic relationship between the European Union and the United Kingdom after Brexit.

At the time of the final approval by the Hague Conference of the Judgments Convention, the 2nd of July 2019, the Brexit process was far from its completion, therefore the chance to reach an agreement on a closer judicial cooperation in civil and commercial matters was still on the table[50]. Now we know that this was not the case, because the Brussels I bis regulation ceased to have effect in UK the 31st of December 2020 at 11:00 (UK Time)[51]. Moreover, the EU Commission has already given a negative opinion regarding the application made by the UK Government to enter the

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For a more "open" approach towards the Convention: R. A. BRAND, *The Hague Judgments Convention in the United States: A "Game Changer" or a New Path to the Old Game?*, cit.; S. H. COCO, *The Value of a New Judgments Convention for U.S. Litigants*, in *New York University Law Review*, 2019, p. 1209, where the author argue that the Convention would be a significant improvement for U.S. citizens trying to enforce U.S. judgments in countries that set higher standards to grant enforcement such as England, Australia and India. The author also takes into account the recent changes in U.S. law that have been recognized by those civil law States to overcome the traditional doctrine against punitive damages, admitting that judgments granting also punitive damages can be enforced under certain circumstances. These countries are France (Schlenzka & Langhorne v. Fountaine Pajot S.A., Cass. Civ. 1st, Dec. 1, 2010, Fountaine Pajot, N°09-13303, Recueil Dalloz [D.] 2011) and Italy (Axo Sport v. Nosa Inc., Cass., Sez. Un., 5 luglio 2017, n. 16601, Foro.it. I 2017, I, p. 2613). Regarding the Italian landmark judgment, L. COPPO, *The Grand Chamber's Stand on the Punitive Damages Dilemma*, in *Italian Law Journal*, 2017, p. 593 and for a thorough analysis on the subject in general before the finale say of Italian Supreme Court P. IVALDI, *Civil Liability for Health Damages and Uniform Rules of Private International Law*, in *Rivista di diritto internazionale privato e processuale,* 2017, p. 857.

[49] See the previous paragraph.

[50] This was also hoped for by Scholars: C. E. TUO, *The Consequences of Brexit for Recognition and Enforcement of Judgements in Civil and Commercial Matters: some remarks*, in *Rivista di diritto internazionale private e processuale*, 2019, p. 302; A. MALATESTA, *Circolazione delle sentenze tra Unione europea e Regno Unito: a favore di una cooperazione in seno alla Conferenza dell'Aja*, in *Rivista di diritto internazionale private e processuale*, 2021, p. 878.

[51] To know more about the effects of Brexit on UK Private International Law see T.C. HARTLET, *Post-Brexit. The New Shape of English Private International Law*, in J. HARRIS, C. MCLACHLAN (ed), *Essays in International Litigations for Lord Collins*, Oxford, 2022, p. 226.

Lugano Convention. The grounds for this decision may be found considering that the Lugano system is designed for countries that, even if they are not part of the EU, have negotiated special agreements to have access to the Single Market. Therefore, the circulation of judgments granted by Lugano is part of such a special relationship. The UK has decided to stay out from all of this, therefore according to the EU Commission there is no reason to allow a third country to become member of Lugano. The proper place to enhance cooperation on this subject is the Hague Conference on Private International Law[52].

Even if the Judgments Convention is already in force, the UK has only very recently decided to sign it[53], whereas the 2005 Convention was immediately ratified after the Brexit[54]. The reason is probably connected to the fact that the English Courts are often chosen by relevant stakeholders to hear their cases, therefore there was a very strong interest in protecting those English businesses (such as insurance companies) that rely on these kinds of clauses in their contracts. Regarding the 2019 Convention, the UK Government cautious approach can be explained not only because there is still hope to become part of Lugano Convention, but also because there are some further options on how become part of The Hague Conference's new instrument, as we have seen in the previous paragraph. Moreover, there is also some reluctancy in having a too tight links to EU in this field due to the differences between English and European law in conflict of laws, and the consequent clash between the two systems. This contrast has deeper roots than Brexit Referendum[55]. This is confirmed also by the recent case

[52] Communication from the Commission to the European Parliament and the Council "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention" (COM/2021/222 final).

[53] UK signed the Convention only the 12th of January 2024. For the Hague Conference press release see: https://www.hcch.net/en/news-archive/details/?varevent=956 and for the official statement of the UK Governement to the UK Parliament see: https://questions-statements.parliament.uk/written-statements/detail/2024-01-15/hlws179 - :~:text=Statement made on 15 January 2024&text=On Friday 12 January, the,%3B %27the Convention%27).

[54] The EU has acquired competence on judicial cooperation on civil and commercial matters thanks to the several elements combined. First, the fact that it has competence granted by art. 81 TFEU on this subject. Second, EU adopted the Brussels I bis Regulation. Third, art. 3 (2) TFEU provides that the EU acquires exclusive competence "*for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*". Therefore when UK left EU, it is not bound by the treaties EU signed on this subject.

[55] T. C. HARTLEY, *The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*, in *The International and Comparative Law Quarterly*, 2005, p. 813.

law of the EUCJ, where it was held that the common law rule known as "antisuit injunction" violates the EU principle of mutual trust[56].

Despite these differences, the UK launched a public discussion to involve the interested stakeholders on whether and how to become part of the Convention[57]. As pointed out by the General Council of the Bar of England and Wales[58], the need for UK to accede the 2019 Convention is urgent to fill the gap left by Brexit and to answer the need of those who seek justice, both UK and EU businesses and citizens. Moreover, this step forward will give a complete framework integrating the 2005 Convention.

The results of the consultation were published the 23rd of November 2023[59]. The Government decided that it is the interest of the UK to enter the 2019 Convention, as pointed out by the relevant stakeholders, without declarations or reservations because it would undermine the purpose of the Convention itself (but it is clear that other Institutions involved in the process may have a say on this). Moreover, the Government clearly states that entering the Judgments Convention do not prevent the UK from joining also the Lugano Convention, one day[60].

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[56] Judgment of the Court (Third Chamber) of 7 September 2023, Charles Taylor Adjusting Ltd, FD v. Starlight Shipping Co., Overseas Marine Enterprises Inc., case C-590/21. The "antisuit injunction" is a rule according to which the interested party can ask to a Court an injunction against the counterparty that, in violation of a contractual agreement, is suing the claimant in a Court other than the one chosen by the parties. This injunction can be asked also in case of violation of the arbitration clause. In both cases the Court will order the party in breach to stop. This is not the right place to analyze the deep conflict between UK and EU on this subject, but it is important to underline the fact that this issue does have reflects on circulation of judgments. In order to better understand the fierce criticism of English lawyers A. BRIGGS, *The Empire Strikes Back*, in *Lloyd's Maritime and Commercial Law Quarterly*, 2024, p. 4; and A. GIANNAKOPOULOS A. KHALIQ, *Damages for Breach of Dispute Resolution Agreements and EU Public Policy,* in *Lloyd's Maritime and Commercial Law Quarterly*, 2024, p. 7.

[57] This survey is asking the stakeholders if, for example, they see any drawbacks on an application of the 2019 Convention limited to only EU/EFTA States, and if they are interested in excluding the Russian Federation for its unilateral aggression of Ukraine (applying art. 29 of the Convention). The consultation opened the 15th of December 2022 and closed the 9th of February 2023, but the results have not been published yet. More information available https://www.gov.uk/government/consultations/hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-2019.

[58] https://www.barcouncil.org.uk/static/4dd9ddef-c5e4-437f-a5981757e7408c2d/Bar-Council-response-UK-accession-Hague-2019-Convention-8-Feb-2023.pdf.

[59] The results are available at the following link https://www.gov.uk/government/consultations/hague-convention-of-2-july-2019-on-the-recognition-and-enforcement-of-foreign-judgments-in-civil-or-commercial-matters-hague-2019

[60] Since the Convention enter into force 12 months after the ratification instrument is notified the depository, it will not be applicable sooner than 2025.

To conclude, apart from the specific circumstances that are moving the UK to join the Judgments Convention, the other States interested in seem to be those who want to join the EU, whereas the most relevant economic partners of the EU appear to be still hesitant[61]. It is important to bear in mind that it is hard to find one reason why such countries are not proceeding with the ratification because there are also political issues to consider, whether internal or foreign. For example, it is sufficient to read the list of the signatures of the Convention to find States that today have not the same relationship with the EU as they had few years ago[62].

6. *Final remarks*

The European Union, through the Hague Conference on Private International Law, is trying to establish a more efficient judicial cooperation in civil and commercial matters with other countries than those members of the Lugano Convention. From the ashes of the ambitious project of a "double" Convention on jurisdiction and circulation of judgments, two instruments are already born and a third one is currently developing[63].

The first comments were focused on the fact that the legal framework regarding the circulation of judgments set in the Convention is not really innovative, moreover the scope of application is less ambitious as hoped due to relevant exclusion from the concept of "civil and commercial law" therefore it was not seen as a great success.

Despite all these defects, it is clear to me that this Convention has the chance to enhance the judicial cooperation in civil and commercial matters between the EU and third countries. The recent events can demonstrate this assumption. On one hand the Judgments Convention is seen by those States aspiring to become EU member as a step closer to the EU itself, on the other hand it is perceived as the fastest way for the United Kingdom to establish at least a minimum judicial cooperation with the EU countries in civil and commercial matters.

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[61] The main example is the USA that have political and juridical issues to solve to be able to ratify the Convention (see footnote n. 48).

[62] The reference is mainly to the Russian Federation and China.

[63] The Hague Conference has established a permanent working group on jurisdiction. More information available online at the official web page

For an interesting comment N. BRANNIGAN, *Resolving conflicts: establishing forum non conveniens in a new Hague jurisdiction convention*, in *Journal of Private International Law*, 2022, p. 83.

Even if the 2019 Convention is not nearly as ambitious as the Lugano Convention, it is undoubtedly a step forward in the process of establishing a working system of circulation of judgments. It does not influence those national laws where it is already relatively easy to recognize and enforce foreign judgments, simply because the real goal is to make the countries known to be more "closed" towards the foreign judgment, in terms of granting recognition and enforcement, more "open" than they are now.

In the end, the success of this Convention will depend on the number of those "reluctant" States that will join, without declaration, bilateralisation and reservation. The bet of the Hague Conference is that the special provisions, abovementioned as the "safety brake", will persuade such States to ratify and implement the Judgments Convention.

IRENE CÓRDOBA MOCHALES

GREENWASHING IN THE INSURANCE MARKET: ANALYSIS OF THE INSURANCE EUROPE'S RESPONSE TO ESAS CALL FOR EVIDENCE ON GREENWASHING

1. *Introduction*

Greenwashing is a widely used term nowadays. Although it may seem that the textile and fashion sectors suffer the most from it, the truth is that it is present in the entire market, including the financial sector and, with it, the insurance sector.

Emerging from a study on pollution in the hotel sector, greenwashing refers to the business practice of giving a sustainable image through measures that are not carried out, or that are carried out with a different intention than that of being kind to the planet.

Although it originated in the 1980s, it has grown exponentially in popularity in recent years. This is linked to increased knowledge of the phenomenon, as well as awareness of the sustainable options offered by markets such as insurance. The result is more and better detection of greenwashing by consumers, although this does not always imply repercussions for the entity, or at least one that goes beyond social or media condemnation.

Concerns about greenwashing also extend to the corporate side. As far as the insurance sector is concerned, insurers are calling for effective regulation of greenwashing. In this regard, the European Supervisory Authorities issued a "call for evidence" in 2023 to all entities wishing to explain the various questions raised by the fight against greenwashing in the insurance market.

Insurance Europe (IE) responded to these questions by concluding that it will not be strictly necessary to develop new specific legislation on greenwashing, but that existing EU legislation already provides a legal framework capable of dealing with greenwashing, with extensive regulation on consumer protection and transparency. Although it is not necessary to create such a framework, they believe that it should be revised, given that there are legal loopholes and a lack of clarity in certain provisions that can encourage greenwashing, even unintentionally[1].

In the course of this paper, the context of the European insurance market with regard to sustainability will be outlined, and the main features of the greenwashing phenomenon will be outlined, followed by an analysis of the reports by Insurance Europe and EIOPA on the need to adopt measures against greenwashing in the European Union insurance market.

1.1. *An overview of the sustainability framework in the Insurance sector in European Union: the ESG*

Insurance sector can be considered a forerunner in many fields, such as customer protection, as they included provisions about this

[1] INSURANCE EUROPE, Response to ESAs call for evidence on greenwashing, ECO-LTI-23-008, 2023, page 2.

topic in their regulations even before the consumer protection's EU directives were enacted. Currently, it is possible to say that in the Insurance Sector the sustainability investments are also an area in which it can sand out, as it is mentioned in Insurance Europe's response[2].

If we want to approach the topic of sustainability in Insurance sector, it is necessary to give some lines to talk about the ESG[3], both because of its relevance within the legislative framework of sustainability[4], and because as it will be seen in later sections, it is one of the potential points for opening up the greenwashing gap. This is because ESG is one of several sustainability standards applied in the European Union, which are not homogeneous and may lead to misinterpretations[5].

However, before starting to develop the ESG concept and its importance in sustainability, it must be mentioned another important term in this context: the CRS. Corporate Social Responsibility can be defined as "*a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis*"[6]. In short, it is a trend that aims to ensure that the objective of companies is not exclusively to obtain economic profit, that they are aware that they carry out their activities within a context and that they act accordingly, respecting it. The intention is that purely economic measures should be accompanied by environmental, social, and employee-friendly measures.

Meanwhile, ESG stands for Environmental, Social & Governance, a framework for understanding how sustainable an entity, com-

[2] INSURANCE EUROPE, Response to ESAs call for evidence on greenwashing, ECO-LTI-23-008, 2023, page 2.

[3] ESG stands for "Environmental, Social and Governance", the three concepts to evaluate how sustainable is a company or organisation.

[4] ARGERICH, S., "El impacto de los criterios ESG (ASG) en el mercado asegurador", *Revista de Transporte y Seguros*, nº34, Asociación Uruguaya de Aseguradores Marítimos. Comisión Técnica de Transporte, Uruguay, 2022, págs. 311-323.

[5] INSURANCE EUROPE, Response to ESAs call for evidence on greenwashing, ECO-LTI-23-008, 2023, page 2.

[6] EUROPEAN COMMISSION, *Corporate Social Responsibility (CRS)*, MEMO/09/2009, Brussels, 2009.

pany or organisation is being. It is a concept used to enable stakeholders to understand how an entity is performing in terms of its involvement in sustainability, in particular, the management of risks and opportunities related to environmental, social and governance factors (hence they are known as ESG factors). They also allow the concept of sustainability applied in the business environment to be extended beyond the environment, thus separating it from earlier conceptions that only focused on health, safety, or pollution. In terms of acronyms, each refers to the following[7]:the E stands for environmental factors refer to the environmental impact or risk of an entity's practices. They include the emission of greenhouse gases, directly or indirectly; the stewardship of natural resources; or the resilience of a company to physical climate risks, such as global warming, floods, or fires.

Also, the S (Social) refers to the relationships between a company and its stakeholders. Measurement can be carried out with different parameters, among which human capital management (HCM) metrics stand out, internally, including salary or engagement with employees, and also, externally, the impact on the community in which it operates or acts. And it is this same extension that characterises ESG, whose social impact objectives go beyond the company itself and extend to all participants in the business chain, which is particularly important in developing countries where environmental and labour rights legislation is weaker.

And, finally, G (Governance) refers to how an entity is led and organised. ESG seeks to better understand the relationship between leadership initiatives and stakeholder expectations (e.g., investors and consumers), together with consideration of shareholder rights and internal control mechanisms that promote transparency and accountability of managers or directors.

The stakeholders addressed by this concept are not only investors, as the market also includes consumers, suppliers and even employees, who also have an interest in the sustainability performance of entities. ESG has even changed the way decisions are made when it

[7] PETERDY, K., *ESG (Environmental, Social & Governance): a management analysis framework to understand and measure how sustainably an organization is operating* in *Corporate Finance Institute*, 2023.

comes to investing or allocating capital to an entity, as large financial services companies or asset managers will now take these indicators into account when investing. But today's ESG is the result of an evolution[8] of the concept in line with sustainability needs and developments in the economy and society.

The first steps can be traced back to the 1980s in the USA, when the term greenwashing also first appeared, when companies began to realise the increase in pollution and other negative consequences of economic and business growth, so they began to think about modifying internal regulations to reduce these negative externalities, including some labour and safety standards. Hence the term EHS (environment, health, and safety).

A decade later, the concept evolved into "corporate sustainability", as companies began to have management teams that focused on reducing the company's environmental impact even beyond what was legally required, a practice that could camouflage cases of greenwashing by showing off these teams for publicity purposes only.

As we enter the new millennium, the world is beginning to show concern about certain social issues, due to awareness of wars, the differences between developed and developing countries, or the inequality between social classes. These concerns are brought to the marketplace, giving rise to "corporate social responsibility", which brings to business management policies beyond economic ones, such as those related to sustainability or social issues, such as volunteering or donations. Some critics of this movement argued that these

[8] In the following paragraphs, a brief review of the evolution of the ESG will be made, drawing on the work of ULRICH, E., "Entendiendo las inversiones según criterios ESG", *S&P Dow Jones Indices*, S&P Global, 2016, págs. 1-13; PETERDY, K., *ESG (Environmental, Social & Governance): a management analysis framework to understand and measure how sustainably an organization is operating,* in *Corporate Finance Institute*, 2023; CÁCERES, E., *Factores ASG: breve revisión sobre su adopción en el sistema financiero colombiano*, Colombia, 2021; SINGH, A., BATHLA, G., "Environmental, Social and Governance (ESG) Measures and Their impact on Insurance Industry: A Global Perspective", VV.AA., *The Impact of Climate Change and Sustainability Standards on the Insurance Market*, Scrivener Publishing LLC, EEUU, 2023, pages 417-427.

practices became so attractive because of the tax incentives they entailed[9].

Finally, in 2004, the term ESG appeared for the first time in the United Nations report on recommendations for the financial industry to integrate environmental, social and governance issues, within the Global Compact initiative. In fact, the concept of CSR continued to be used throughout these years, and it was not until the pandemic that the term ESG emerged within the movement.

ESG is now conceived as the key to reduce the social and environmental impact of companies and improve governance so that the above objectives can meet with the good treatment of shareholders, investors, consumers, or stakeholders in the marketplace.

The term has now become popular because it has become a requirement or even a demand for many investors or market participants. ESG indicators and even agencies dedicated to assessing them, new standards and legislative frameworks have been created, increasing the transparency and cohesion of ESG-related information provided by companies. Sustainability-related investment mechanisms have emerged to facilitate investors' decisions, although they can also facilitate the emergence of greenwashing.

The relevance of ESG and CRS in the market has grown considerably in the context of the COVID-19 pandemic, since when these assessments became a priority in business strategies[10]. In fact, ESG compliance specialists have even been created, intervening in the market, and promoting objectives such as CO2 neutrality[11], and the CRS, which began as voluntary compliance and has reached the present day with the existence of European directives requiring the implementation of certain measures in this area. This has also led to customers and consumers demanding certain sustainability requirements or social measures when choosing a certain product or service.

[9] In fact, as will be explained in the next section, the term greenwashing was first used precisely to criticise this type of practices.

[10] DE FREITAS NETTO, S.V., FALCÃO SOBRAL, M.F., BEZERRA RIBEIRO, A.R., DA LUZ SOARES, G.R., *Concepts and forms of greenwashing: a systematic review*, in *Environmental Sciences Europe*¸ 2020.

[11] SINGH, A., BATHLA, G., *Environmental, Social and Governance (ESG) Measures and Their impact on Insurance Industry: A Global Perspective*, in VV.AA., *The Impact of Climate Change and Sustainability Standards on the Insurance Market*, Scrivener Publishing LLC, EEUU, 2023, pages 417-427.

The constant need to be attractive to the end user sometimes leads companies to misrepresent or omit information about their CRS policy, which can be considered greenwashing.

2. *Greenwashing as part of colourwashing: concepts and meanings*

Greenwashing is the first of the ″colours″ of what is known as colourwashing, so it is necessary at this point to give a brief introduction to this phenomenon.

Colourwashing is a term used to refer to all those strategies used by companies with the intention of offering a good external image that increases their popularity and, consequently, their income, but which are not accompanied by real measures. The most common disclosures are those related to currently popular social movements or ideas.

This is a concept that encompasses all those areas in which an entity could show its ″good behaviour″. As an example, some of these ″colours″ are[12]: i) whitewashing: this was the first of the terms coined in the 20th century, referring to the plaster paint that was used in homes to cover up flaws in the walls. The term, however, was not used in business but in politics, referring to those systems that tried to conceal what had happened during the dictatorships, sweeping the truth under the carpet. Although it was not used to refer to the whitewashing sought by some entities, it was the origin of the terms that would later be used for this purpose; ii) brownwashing: referring to support for racialised people. There are companies that launch campaigns promoting racial and cultural diversity, but in practice these principles are not applied, lacking equal opportunity or non-discrimination policies; iii) pinkwashing or rainbow-washing: one of the most debated, refers to the multiple campaigns in support of the LGTBIQ+ collective that can be seen during the month of June, only to disappear completely afterwards. The term pink-washing originally came to designate those entities that dressed their products and advertising in pink because of breast cancer, but without actually

[12] PORTAS N., *Del greenwashing al rainbow-washing: colores para todos los (dis)gustos*, in *Diario Responsable*, Diario Responsable S.L., Madrid, 2018.

designating funds for research, or even selling products with carcinogenic elements, according to the association Think before you Pink. Later, it began to be used with regard to the use of flags and colours during Pride Month, although it seems that in recent years rainbow-washing has made headway in these cases; iv) Purplewashing: this type of colourwashing, like the previous one, also tends to be seasonal, specifically around Women's Day, which in Spain is 8th March, so that during this month, or at least the first week, it is common to see posters, advertisements or even products dyed purple. The term refers to entities that carry out these practices as a commercial strategy, without complying with guidelines on equal treatment and opportunities, gender violence or the integration of women.

There are more marketing strategies like these, but they are not named by colour, such as vegan-washing, very popular lately due to the rise of awareness about animal abuse and the dangers of the meat industry, which has led to the go vegan movement gaining strength among consumers, encouraging brands, companies and the hotel and catering sector to offer vegetarian or vegan alternatives in their proposals, which can be used as a mere commercial strategy. It is also possible to speak of health-washing in this sector, offering apparently healthy products due to the trend towards self-care and conscious eating that has emerged in recent years. Finally, cloud-washing could be mentioned as another of the practices on the rise, used by companies that appear to be using the most cutting-edge technology on the market without doing so.

It is not a closed list, as it is to be expected that each progress or social movement can be used by companies as a publicity tool.

With regard to the "green colour", it is one of the most talked-about practices nowadays, due to the number of times that companies have been brought to the fore by pretending to follow sustainable policies in order to position themselves in the market. And it is, as said, the first of the terms that were coined to refer to the facelift that companies wanted to give themselves in order to stop being "demonised" by the public.

Fashion may be one of the best-known industries affected, but greenwashing has been carried out in all commercial sectors. In fact, the term comes from the hotel sector, as it originated from an article

written in 1986 by Jay Westervelt, a New York researcher and environmentalist, who criticised the practices of certain large hotels, which boasted of having adopted sustainable measures in favour of the environment, when the real reason for these decisions was to save costs[13].

Taking this into consideration, it cannot be denied that greenwashing practices can occur in the insurance sector, and it cannot be exempted from this growing trend, which is increasingly and better identified by consumers. However, the identification usually results only in social condemnation, or at most media condemnation, and does not translate into legal or juridical consequences for insurers, let alone preventive measures for the protection of potential or future customers.

Therefore, one of the most urgent questions is whether it is necessary to take specific measures to control or prevent greenwashing, or whether the insurance market itself is already regulated to deal with these practices.

3. *Analysis of the greenwashing phenomena in insurance market: Insurance Europe's Response to ESAS call for evidence on greenwashing*

On 15 November 2022, European Supervision Authorities[14] emitted a Call for Evidence (CfE) on greenwashing practices in financial market. They invite all interested parties to collaborate with the survey given, from financial institutions to consumers' associations[15]. They justify this CfE with the worrying increase in cases and the rising awareness of consumers and customers on sustainability and on this type of fraudulent practices, but also they recall that in 2021 the European Commission yet demand the ESAs to inform about

[13] DE FREITAS NETTO, S.V., FALCÃO SOBRAL, M.F., BEZERRA RIBEIRO, A.R., DA LUZ SOARES, G.R., *Concepts and forms of greenwashing: a systematic review*, cit., page 2. [PLEASE INSERT PAGES].

[14] Next references made to European Supervision Authorities will be done by using the acronym ESA.

[15] EBA, EIOPA, ESMA, "Responding to this Call for Evidente", *Call for evidence on better understanding greenwashing*, 2022, pág. 1.

risks or cases of greenwashing in financial market, the possible measures to take and the difficulties to make them effective, with the aim of concluding with progress report in 2023 and a final report for 2024[16].

In particular, the keys of the CfE can be resumed in the following ideas[17]: i) give a specific concept of greenwashing, and also enough information to improve the awareness of its magnitude and risks; ii) evaluate the usefulness of the current regulation in sustainability in EU financial market, remarking remaining tasks for legislators and financial market participants; iii) identify several elements of the response of supervisors and assess the adequacy of them from a legal and practical perspective; iv) Develop recommendations based on the results obtained in this area.

ESAs also intended to respond EC requests by using this CfE to gather detailed and updated information about greenwashing in financial market, fulfilling the existing information sources they had before[18]. They want this call for evidence to help them collect stakeholders opinions about greenwashing and its causes; examples of practices along investment value chain or product lifecycle; and any other data that can help to understand the phenomena's dimensions or the ambits where the risk level is higher[19].

Among others, Insurance Europe answered this CfE, the European Insurance and Reinsurance Federation, one of the main entities in insurance sector at EU[20].

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[16] EBA, EIOPA, ESMA, "Introduction", Call for evidence on better understanding greenwashing, 2022, page 2.

[17] EBA, EIOPA, ESMA, "Introduction", Call for evidence on better understanding greenwashing, 2022, page 2.

[18] EBA, EIOPA, ESMA, "Introduction", *Call for evidence on better understanding greenwashing*, 2022, pages 2 y 3.

[19] EBA, EIOPA, ESMA, "Introduction", *Call for evidence on better understanding greenwashing*, 2022, page 3.

[20] "*Insurance Europe is the European insurance and reinsurance federation. Through its 36 member bodies — the national insurance associations — it represents all types and sizes of insurance and reinsurance undertakings. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe's economic growth and development. European insurers pay out over €1 000bn annually — or €2.8bn a day — in claims, directly employ more than 920 000 people and invest over €10.6trn in the economy*", extracted from INSURANCE EUROPE, Response to ESAs call for evidence on greenwashing, ECO-LTI-23-008, 2023, page 13.

On 16 January 2023, a report by Insurance Europe (hereinafter "IE") was published in response to a request by the European Supervisory Authorities (ESAs) on the need for specific measures against greenwashing, which broadly stated that new legislation may not be necessary, European insurance legislation is quite comprehensive in terms of information or transparency duties, but it did draw attention to the existence of uncertainty on certain points which may negatively affect the control or policy adopted against greenwashing.

Insurance Europe's reflections will be developed below, classified by answers to provide a logical order to the text[21].

3.1. *Core features of greenwashing*

Insurance Europe stresses the position of insurers at the forefront of sustainable investments for years, carrying out concrete actions such as including information, standards, or strategies on sustainability in their portfolios. It acknowledges that the insurance sector has recognised the importance of initiating action on sustainability and has been in favour of the European Commission's sustainability goals and other agreements on sustainability and social change.

However, there are some blind spots that make it difficult to conclude a better sustainability action than the existing one.

The first issue raised by ESAs relates to the view on the main features of greenwashing and greenwashing regulation. Insurance Europe highlights the lack of consistency and clarity in the European regulatory framework, which has also been supported by The European Insurance and Occupational Pensions Authority[22] in its latest reports on the subject (announcing, in fact, the issuance of a proposal for a regulatory framework on this issue by May 2024). This situation stems from a lack of guidance on the application of the precepts, or on the assessment of when a principle or standard is considered to be met and to what degree, for example in relation to the Regulation

[21] All the data, considerations and conclusions that will be presented in the following paragraphs have been extracted from ESA, *Call for evidence on better understanding greenwashing*, 15th November 2022; INSURANCE EUROPE, *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 16th January 2023.

[22] Also known as EIOPA.

(EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-Related Disclosures in the Financial Services Sector[23]

Divergence in interpretation implies that different Financial Market Participants[24] may use different references or interpretations when assessing their products as sustainable, which may result in faulty information entering the market, although this does not necessarily mean greenwashing[25].

On the other hand, another focus to pay attention to is the definition of sustainable, green, or other related concepts such as the "no significant harm" principle (also highlighted in the EIOPA report). As has been highlighted, European regulations on sustainability in the insurance sector are very extensive, involving a multitude of regulations using common concepts whose definitions, although not always, diverge. The different definitions imply a different interpretation of reality and concepts depending on the legal framework in question, which also opens up the possibility for FMPs to consider their products as sustainable investments according to the most convenient definition. It is also important to differentiate a divergence in the interpretation that is innocuous from one that is necessarily used to avoid other regulations and consider a product as sustainable, which could be classified as greenwashing[26].

Furthermore, this lack of clarity and harmony makes it more difficult for distributors to familiarise themselves with the concept of sustainable investment, as the references may vary from one entity to another.

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[23] Further references to this regulation will be done by using the acronym SFDR.

[24] Or FMP if using the acronym.

[25] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.1. Core features of greenwashing. Q.A.1. Please provide your views on wether the above-mentioned core characteristics of greenwashing reflext your understanding of and/or expedience with this phenomenon and whether you have anything to add/amend/remove", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 2.

[26] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.1. Core features of greenwashing. Q.A.1. Please provide your views on wether the above-mentioned core characteristics of greenwashing reflext your understanding of and/or expedience with this phenomenon and whether you have anything to add/amend/remove", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 2.

Distributors need training in this area in order to intervene properly in the market, but the longer this is delayed, the longer the lack of expert distributors in the market will continue. In addition, increasing financial literacy, in general, is positive as some of the terms are confusing to consumers because of their technicalities.

There is also difficulty in collecting data due to a lack of input or transparency from data providers, which also makes it difficult to broaden the study of the subject and to create clear concepts and standards. Similarly, the lack of reliable data is another source of greenwashing risk[27].

They conclude that new regulation on greenwashing is not necessarily essential, as European legislation is comprehensive and effective in protecting consumers from obscure or unclear premises, including those relating to sustainability (such as those relating to Unfair Competition, Abusive Clauses...). Instead, it is preferable to improve the clarity, consistency, and standardisation of existing rules on sustainability objectives, so that insurers can offer products that are assessed as sustainable under common standards without differences according to which rule, or interpretations are chosen and that, in addition, can be aligned with the interests of customers. Portfolios will only increase and strengthen their sustainable products in the coming years if these needs are addressed.

The second issue concerns the specific definition of greenwashing. In some markets, they respond, the legislation itself includes a definition of the term, such as in France, which Article L121-2 of the Consumer Code[28] defines it as an unfair commercial practice between entrepreneur and consumer that may encompass activities

[27] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.1. Core features of greenwashing. Q.A.1. Please provide your views on wether the above-mentioned core characteristics of greenwashing reflext your understanding of and/or expedience with this phenomenon and whether you have anything to add/amend/remove", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 3.

[28] Article L121-2 Code de la Consommation"*Une pratique commerciale est trompeuse si elle est commise dans l'une des circonstances suivantes : 1° Lorsqu'elle crée une confusion avec un autre bien ou service, une marque, un nom commercial ou un autre signe distinctif d'un concurrent ; 2° Lorsqu'elle repose sur des allégations, indications ou présentations fausses ou de nature à induire en erreur et portant sur l'un ou plusieurs des éléments suivants : a) L'existence, la disponibilité ou la nature du bien ou du service ; b) Les caractéristiques essentielles du bien ou du service, à savoir : ses qualités substantielles, sa composition, ses accessoires, son origine, notamment au regard des règles justifiant*

such as false promises, misleading actions or omissions, and may materially distort the consumer's behaviour within the economy and in relation to the product. Consequently, greenwashing will only apply in a commercial context, although the 2022 recommendation of the French supervisory authorities[29]have already included ESG advertising in life insurance advertisements[30].

However, there is no clear definition of greenwashing in the EU legislative context, so the most similar concept could be done by making a reference to Unlawful Competition Directive[31].

3.2. *Dimensions of greenwashing*

Market participants can play three main roles when greenwashing occurs. They can act as a driver, as a disseminator or as a recipient,

l'apposition des mentions " fabriqué en France " ou " origine France " ou de toute mention, signe ou symbole équivalent, au sens du code des douanes de l'Union sur l'origine non préférentielle des produits, sa quantité, son mode et sa date de fabrication, les conditions de son utilisation et son aptitude à l'usage, ses propriétés et les résultats attendus de son utilisation, notamment son impact environnemental, ainsi que les résultats et les principales caractéristiques des tests et contrôles effectués sur le bien ou le service ; c) Le prix ou le mode de calcul du prix, le caractère promotionnel du prix notamment les réductions de prix au sens du I de l'article L. 112-1-1, les comparaisons de prix et les conditions de vente, de paiement et de livraison du bien ou du service; d) Le service après-vente, la nécessité d'un service, d'une pièce détachée, d'un remplacement ou d'une réparation; e) La portée des engagements de l'annonceur, notamment en matière environnementale, la nature, le procédé ou le motif de la vente ou de la prestation de services; f) L'identité, les qualités, les aptitudes et les droits du professionnel; g) Le traitement des réclamations et les droits du consommateur; 3° Lorsque la personne pour le compte de laquelle elle est mise en œuvre n'est pas clairement identifiable; 4° Lorsqu'un bien est présenté comme étant identique à un bien commercialisé dans un ou plusieurs autres Etats membres alors qu'il a une composition ou des caractéristiques différentes".

[29] Recommandation 2022-R-02 du 14 décembre 2022 sur la promotion de caractéristiques extra-financières dans les communications à caractère publicitaire en assurance vie.

[30] INSURANCE EUROPE, , "1. Possible features of greenwashing. 1.1. Core features of greenwashing. Q.A.2. Do you have or use a specific definition of greenwashing as part of your activities? If so, please share this definition", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 3.

[31] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.1. Core features of greenwashing. Q.A.2. Do you have or use a specific definition of greenwashing as part of your activities? If so, please share this definition", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 3.

in the sense that actors may be the originators of the effect; for example, by misrepresenting the results of their environmental impact analyses or, related to the former, by taking into account specific markers on the assessment of their activities that give more favourable results. But it is also possible that a market participant favours greenwashing, instead of creating the false or biased information, by disseminating it, promoting the company in question for its good performance; and finally, the recipients of all this incorrect or opaque information will be the customers, investors or consumers[32].

ESAs wonders whether, in the case of the insurance sector, these three modes of involvement are possible, to which Insurance Europe replies that they are not.

The problem stems from the immaturity of ESG issues, methodologies and metrics, as this early stage of maturity leads to a lack of uniformity and clarity that can lead to over- or underestimation of the status of an insurer or insurance portfolio. This can lead to greenwashing, or even green bleaching (i.e. undervaluing a company or product in terms of its "green" status, i.e. the opposite of greenwashing), unintentionally. Insurers are calling for initiatives to standardise these indicators, as well as the measurement of insurance related GHG emissions[33].

In addition to the difficulty of accessing transparent and reliable data from insurance companies, this is due to the lack of standardisation of sustainability regulations in the EU financial market.

[32] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.1. The potential roles market participants can play in greenwashing. Q.A.3.2. If no, could you please further elaborate on the roles market participants could play in greenwashing, including on potential alternative or additional roles to the ones identified above?", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 3.

[33] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.1. The potential roles market participants can play in greenwashing. Q.A.3.2. If no, could you please further elaborate on the roles market participants could play in greenwashing, including on potential alternative or additional roles to the ones identified above?", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 4.

Hence, European insurers are calling for the implementation of reporting requirements in SFDR or the completion of the CSRD[34], which will encourage many companies to provide sustainability data that will allow investors access to standardised and transparent sustainability data, enabling not only comparisons but also the study of sustainability gaps and needs. However, sustainability data will not begin to increase in quantity and quality until these laws are implemented and enforced.

This whole context of lack of clarity and consistency in the European legal framework, lack of sustainability data, too short an implementation period, and lack of maturity in the methods of measuring the impact of sustainability factors leads to the risk that confusing, opaque or inaccurate information may be issued, disseminated, and received within the financial market. This is what insurers appear to be doing is striving to apply or substantiate their sustainability claims based on data provided by other market participants. In practice, given the sequencing problems of EU regulation and the general disquiet about the lack of legal clarity and reputational risks associated with greenwashing, we should go through a period where ESG products are not very popular[35].

To address these problems, the role of the legislator, which must provide a clear and enforceable regulatory framework as soon as possible, and the role of supervisory bodies, such as ESAs, which must provide consistent interpretations of the EU market, are essential.

On the other hand, sustainability-related claims can be grouped into three generic themes, applicable to various sectors along what can be called the sustainability value chain, affecting both entity and product level. However, this does not mean that these categories necessarily entail greenwashing in all sectors in which they occur, and

[34] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU as regards sustainability reporting by companies.

[35] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.1. The potential roles market participants can play in greenwashing. Q.A.3.2. If no, could you please further elaborate on the roles market participants could play in greenwashing, including on potential alternative or additional roles to the ones identified above?", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 4.

even the same claim can fit into several topics. For example, an entity's claim to be taking positive action on climate change can be divided into the strategy itself to create this positive impact, the monitoring and implementation of the strategy at the governance level (including staff dedicated to impact analysis), and the indicators for measuring the impact of its strategies. In short, greenwashing does not always have to fit into an isolated claim referring to a specific topic, but can result from the aggregation of different claims that fit into one or more of the above-mentioned themes[36]: statements about an entity's ESG governance or remuneration or about the dedication of resources to sustainability issues by an entity or its products; statements on the strategy, objectives, characteristics or sustainability rating of an entity, product or service; sustainability metrics statements based on historical data or future targets.

On these topics, ESAs ask IE to assess the likelihood of greenwashing occurring on each of the sustainability claims topics. IE considers that the one with the highest impact on the production of greenwashing is sustainable ratings, labels, or certificates, followed by ESG strategies, objectives, and characteristics, ESG development to date, and future commitments, with the remaining topics having the lowest rating in the likelihood of being used as a tool for greenwashing[37].

Following the assessment of these standards as being susceptible to greenwashing, ESAs request justification of those issues with higher scores, in particular by specifying the greenwashing factors underlying these concepts.

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[36] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.2. The topics of sustainability-related claims. Q A.4: Please indicate the degree to which you consider each topic described above, as prone to the occurrence of greenwashing. Please provide a score from 1 to 5 (where 1 = very low occurrence; 2 = low occurrence ; 3 = neutral ; 4 = high occurrence ; 5 = very high occurrence)", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 4.

[37] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.2. The topics of sustainability-related claims. Q A.4: Please indicate the degree to which you consider each topic described above, as prone to the occurrence of greenwashing. Please provide a score from 1 to 5 (where 1 = very low occurrence; 2 = low occurrence ; 3 = neutral ; 4 = high occurrence ; 5 = very high occurrence)", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 4.

IE clarifies that, while some sectors have a regulatory framework that reduces the risk of greenwashing at the entity level (as an example, they refer that in France, Art. 29 of the Climate and Energy Law obliges insurers to provide information on investment in pursuing the objectives of the Paris agreement, or on the management, training of employees, and coping with ESG risks), when it comes to ESG ratings or past and future ESG actions, the lack of clarity in reporting happens due to several underlying factors[38]: the lack of reliable ESG data, what leads to overestimate or underestimate the sustainable characteristics of a product and the level of ESG performance; the complexity and illegibility of the regulations, giving unclear definitions and uncoordinated standards; the lack of human resources dedicated to solve the problems; the lack of true experts in the subject because of its newness; the lack of well understanding of administrators, managers or in general decision-makers and employees; and the lack of training and information.

In addition, labels and certificates are key factors for consumers because they can be easily identified and are obtained by an independent process with third party control (providing impartiality). In this respect, European insurers agree on the need for a common definition or even a label at European level to mark sustainable investments, allowing consumers to find their way around the European financial market, which is very complex, and to obtain harmonised definitions across this market. Indeed, if unified standards are not used, each sustainable label may be different, so that products or services will only need to find the label that fits their characteristics and can be promoted as sustainable, without implying that they are all sustainable according to the same standard (this would be at the level of issuers and distributors).

Then, they were asked to provide a score on the potential harm or impact of a misleading claim made on one of the topics listed in the previous question. IE considers that the greatest impact or harm

[38]INSURANCE EUROPE, "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.2. The topics of sustainability-related claims. Q A.4.1: Please specify the underlying drivers of greenwashing in relation to the topics you scored higher", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 5.

would occur in relation to present development and future ESG engagement, followed by ESG labels, certificates or ratings, and finally, with the lowest score, all other issues[39].

In relation to this, an explanation of the impact or harm they anticipate as a result of greenwashing and its consequences is requested, so IE is based on the impacts that insurers have identified as being related to greenwashing. In general lines, insurers identified as important the impacts of the lack of credibility; the lack of data and the complexity of the regulation, that leads the FMP to a reputational risk of committing greenwashing unintentionally when offering their products and services trying to accomplish the sustainability standards; the risk that consumers' behaviour is distorted when they think they are acting positively towards the planet and society through the financial services they buy, what also jeopardises the collective EU neutral emissions target; and the possibility that the investors misallocate their assets if greenwashing occurs, because they try to minimise transition risks through their sustainable investments strategies but they are actually not investing in sustainable entities, what would trigger long-term negative effects. [40].

3.3. *The way in which a claim can be misleading*

It is requested to classify those misleading qualities that are claimed in relation to sustainability as relevant or not in relation to greenwashing. IE considers the most relevant in this regard to be selective disclosure (selecting only positive information) or hidden

[39] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.2. The topics of sustainability-related claims. Q A.5: For the same list of topics listed in the previous question, please provide a score from 1 to 5 on the potential harm/impact of a misleading claim made on that topic (where 1 = very low impact; 2 = low impact; 3 = neutral; 4 = high impact; 5 = very high impact)", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 6.

[40] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.2. The topics of sustainability-related claims. Q A.5: For the same list of topics listed in the previous question, please provide a score from 1 to 5 on the potential harm/impact of a misleading claim made on that topic (where 1 = very low impact; 2 = low impact; 3 = neutral; 4 = high impact; 5 = very high impact)", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 6.

compensation (omitting relevant information that is negative); omission or lack of disclosure; inconsistency in disclosure and communication (marketing, regulation, websites...); and lies or misinformation. The next ranked are empty claims, being exaggerated or unfulfilled; lack of fair and meaningful comparisons, thresholds, scenarios, or assumptions; and lack of evidence. The rest have been classified as very irrelevant, highlighting that in this classification none of the situations have been classified as not relevant at all (1) or as very relevant (5)[41].

More information is requested in this respect, and in particular a statement on the cases included in the list (whether any items should be deleted, added or amended and why). The response is summarised in the following points[42]: i) on selective disclosure, it is difficult to identify hidden or omitted information, e.g. underlying non-sustainable options (arts. 8 and 9) are very difficult and/or time-consuming to identify; ii) omission or lack of disclosure: compliance issues, risk of being sued by supervisory authorities, civil actions...; iii) vagueness, ambiguity or lack of clarity: risk of civil or supervisory authority action; iv) underlying options: lack of information in this respect leads to massive reputational risk; v) some of the above items, such as lack of evidence or irrelevance, are redundant to others, such as vagueness or lack of disclosure; vi) some of the practices mentioned are easier to identify than others.

[41] INSURANCE EUROPE "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.3. The way in which a claim can be misleading. Q A.8: On a scale from 1 (i.e. "not relevant") to 5 ("very relevant"), please indicate the extent to which you find each of the misleading qualities of a sustainability-related claim listed below relevant to greenwashing practices", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 7.

[42] INSURANCE EUROPE "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.3. The way in which a claim can be misleading. Q A.8: On a scale from 1 (i.e. "not relevant") to 5 ("very relevant"), please indicate the extent to which you find each of the misleading qualities of a sustainability-related claim listed below relevant to greenwashing practices", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 7.

3.4. *The relevance of communication channels*

Another dimension of greenwashing is the channels through which information reaches other actors in the sustainability value chain, i.e. through which data on the entity's ESG compliance is communicated. Some of these channels can be mentioned, although the list is not exhaustive: regulatory documents (key documents or key investor information documents, prospectuses, financial statements, management reports, non-financial information statements, benchmark statements, insurance information documents, pension benefit statements), or regulatory information; ratings, benchmarks, labels; product information (including internal ratings and target market, product testing and distribution of strategy documentation); information on intermediaries or advisors; advertising materials (including website or social media); voluntary information not included in the above categories because it is communicated voluntarily[43].

Regarding to that, they are asked to classify the communication channels through which misleading claims can be communicated to other segments of the sustainable value chain, as likely to convey misinformation or misrepresentations. IE considers that the most susceptible are regulatory documents, ratings, labels and advertising materials; followed by information from intermediaries or advisors; and finally, the remaining three, with again no categories scored with the lowest or highest score.

On this issue they comment that there is a high risk of greenwashing generated by the inconsistent timeline application of the IDD[44], SFDR or Ecolabel, as the former came into force in August 2022 when the ESMA or EIOPA Q&A was not available, and the data needed for financial companies derived from the SFDRs reported from investments in taxonomy data was not available until January 2023. Thus, the data needed for SFDR reporting is available from this year, based on the DA on taxonomy in Art 8 of this rule, but the

[43] INSURANCE EUROPE "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.4. Which communication channel", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 8.

[44] Referring to Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution.

data based on the new CSRD will only be available from 2024, according to the draft proposal, leaving the financial sector with a significant data gap, which affects how the requirements are met[45].

In addition, variations in ESG ratings between different providers due to lack of transparency and homogenisation in methods, available data, and standards of comparison, create reputational risks of greenwashing for those who use them, unless the reasons for the variations are transparent and identifiable.

3.5. *Stage of the insurance lifecycle and model of business*

In addition to the proclamation of claims or their dissemination, greenwashing can take place at different points in the commercial life of a product or service (production, distribution and management), and even more, in the entity itself, because of its business model (value chain, group structures, innovation and technology, external sources) or business management (culture, governance arrangements, systems and processes)[46].

Within the life of a product or service, and in relation to greenwashing, should be highlighted the phase of production, including product development, design and market selection; the distribution phase, about advertising, product dissemination, distribution and sale; and management phase, about product monitoring or reviewing, and continuous product dissemination[47].

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[45] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.4. Which communication channel. Q A.9.1: Please indicate below if you have any comments regarding the communication channels of potentially misleading sustainability-related claims?", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 8.

[46] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing.1.2.5. At which stage of the lifecycle and where in the business model/management does greenwashing occur", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 9.

[47] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.5. At which stage of the lifecycle and where in the business model/management does greenwashing occur. Q A.10: For each of the stages of product lifecycle and with regard to the business model and management, please indicate the likelihood of the occurrence of greenwashing. Please provide scores ranging from 1 (rather unlikely) to 5 (very likely)", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 10.

In this case, the risk of greenwashing is considered low (between 2 and 3 points on a scale of 1 to 5), with the following having less impact: production, product distribution channels, incentives at the point of sale of the product, and business model at entity level.

In this regard, they clarify that greenwashing can occur at the product or service level for different reasons[48]:

- Lack of common definitions in EU regulations, such as sustainable investment, leading to different interpretations and confusion for investors and consumers, which implies that greenwashing occurs in some cases unintentionally, as the consideration of a product or service as sustainable may not have the same result depending on the standard considered. Unified guidance on the application of Articles 8 and 9 of the SFDR is recommended.

- Given the complexity and novelty of this context, distributors are not yet familiar with the concepts and operation, which also opens the gap for greenwashing, again unintentional, due to lack of experience. This issue is expected to continue until insurers provide adequate and comprehensive training to distributors.

- There is also a notable lack of financial literature, which further complicates the situation for consumers, who are not only still unfamiliar with European regulation but are also particularly technical. Consumer confusion is also likely to lead to involuntary greenwashing, as consumers do not understand the labelling of products correctly, or voluntary greenwashing, using it as an advantage to give false appearances.

3.6. *Greenwashing and its risks for insurance or pension providers*

It is thought that greenwashing can lead to certain risks for the insurers, like reputational risks, litigation risks or even solvency

[48] INSURANCE EUROPE, "1. Possible features of greenwashing. 1.2 Dimensions of greenwashing. 1.2.5. At which stage of the lifecycle and where in the business model/management does greenwashing occur. Q A.10: For each of the stages of product lifecycle and with regard to the business model and management, please indicate the likelihood of the occurrence of greenwashing. Please provide scores ranging from 1 (rather unlikely) to 5 (very likely)", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 10.

risks, because being known as an entity that has been taking these practices is nowadays something that can bring a negative image for the company, so the ESAs are questioning which of these risks are now considered as relevant.

IE considers that the reputational risk associated with greenwashing has increased due to the lack of unified and transparent data, the lack of coordination of timing in the application of legislation, and the increased scrutiny of NGOs, with the risk of greenwashing litigation having also increased due to the lack of clarity of requirement and application. Nonetheless, insurers appear to support the ambitious sustainable finance agenda issued by the EC[49].

However, practice does not match these intentions as insurers are forced to adopt very conservative sustainability practices for fear of being accused of greenwashing, which will not diminish unless the uncertainty regarding the interpretation and application of European sustainability regulations in the financial market changes[50].

3.7. *Other considerations about greenwashing in Insurance sector*

ESAs are interested to know if some specific situations can be considered as greenwashing, so at this point they offer an example of a context that can happen frequently, wondering whether it is catalogued as greenwashing or not. The ESAs propose as an example an insurer that indicates that it is improving its social and environmental factors through investments in other companies, and as a result has voting shares in those companies, but does not use the voting rights attached to them to improve its sustainability[51].

[49]INSURANCE EUROPE, "E. EIOPA section of the CfE. Greenwashing and its risks. Q E.1: Please outline below whether the occurrence of greenwashing can also lead to other risks for insurance or pension providers (e.g., reputational risks, litigation risks, solvency risks)", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 12.

[50] INSURANCE EUROPE, "E. EIOPA section of the CfE. Greenwashing and its risks. Q E.1: Please outline below whether the occurrence of greenwashing can also lead to other risks for insurance or pension providers (e.g., reputational risks, litigation risks, solvency risks)", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 12.

[51] INSURANCE EUROPE, "E. EIOPA section of the CfE. Other considerations related to the Insurance and Pensions sector. Q E.6: In your view is this situation greenwashing, please

This example is not considered as greenwashing, because one of the issues to be accounted in the issuance of voting shares is precisely sustainability. It would not be fair to expect all voting decisions to be in favour of sustainability without taking into consideration the broader context[52].

Apart from this case, that is maybe highlighted for its practice relevance, it is demanded to mention the specificities related to greenwashing in insurance sector that can be interesting to emphasise. IE remarks that that regulation on sustainability, transparency and control processes in the insurance market is quite extensive, but this leads to potential drivers of greenwashing. This happens because of the different standards given by each regulation. For example, the [53].Insurance Distribution Directive or IDD govern life and non-life insurance in terms of provision and sales through rules that have proven to work well and have good impact on both the market and consumers; while the SFDRs increase transparency to consumers by requiring insurers to provide a lot of information about the financial products they offer; and by itself the

CSRDs require insurance companies not only to report on the impact of ESG on their financial statement but also on their activities (double materiality).

Apart from those rules, insurance-based investment products are currently in the spotlight of the Ecolabel, which will, if well designed, be an important tool to ensure that allegedly sustainable

explain in the below text box: An insurance/pension provider says that it is improving environmental and social factors via its investments in companies. This insurance/pension provider has consequential voting shares in various companies, but it does not use these voting shares to push these companies to become more sustainable", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, pág. 12.

[52] INSURANCE EUROPE, "E. EIOPA section of the CfE. Other considerations related to the Insurance and Pensions sector. Q E.6: In your view is this situation greenwashing, please explain in the below text box: An insurance/pension provider says that it is improving environmental and social factors via its investments in companies. This insurance/pension provider has consequential voting shares in various companies, but it does not use these voting shares to push these companies to become more sustainable", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 12.

[53] INSURANCE EUROPE, "E. EIOPA section of the CfE. Other considerations related to the Insurance and Pensions sector. Q E.7: Are there any specificities related to greenwashing in the insurance sector that you would like to highlight? If so, please indicate them below", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 12.

products meet minimum criteria, increasing the confidence of consumers seeking such investments. And many insurers are also considered public interest entities and are subject to extra requirements such as auditing. Some go even further, subjecting their sustainability claims to auditing.

If the system is designed correctly, and the data and issues are sequenced, all this legislation is potentially valid to curb greenwashing, but a significant part of this legislative framework has not even been designed or implemented[54].

In the meantime, insurers will have to make every effort to develop sustainable policies and apply them to their products and report data on them. Some were already reporting years ago under the TCFD, others have voluntarily undergone audits to ensure that their sustainability assumptions are being met, and all must now comply with the SFDRs that are already in place and be prepared for the additional reporting that will be required from this year onwards[55].

Finally, multiple insurers have joined the Net-Zero Insurance Alliance, and other initiatives such as the Principles for Sustainable Insurance or Responsible Investment, which support them in obtaining a common standard to adhere to. This also helps to reduce the risk of confusion, and thus greenwashing[56].

[54] INSURANCE EUROPE, "E. EIOPA section of the CfE. Other considerations related to the Insurance and Pensions sector. Q E.7: Are there any specificities related to greenwashing in the insurance sector that you would like to highlight? If so, please indicate them below", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 13.

[55] INSURANCE EUROPE, "E. EIOPA section of the CfE. Other considerations related to the Insurance and Pensions sector. Q E.7: Are there any specificities related to greenwashing in the insurance sector that you would like to highlight? If so, please indicate them below", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 13.

[56] INSURANCE EUROPE, "E. EIOPA section of the CfE. Other considerations related to the Insurance and Pensions sector. Q E.7: Are there any specificities related to greenwashing in the insurance sector that you would like to highlight? If so, please indicate them below", *Response to ESAs call for evidence on greenwashing*, ECO-LTI-23-008, 2023, page 13.

4. *Possible breaches in the system: extract of the EIOPA report to the EC*

The European Insurance and Occupational Pensions Authority (EIOPA), for its part, issued in June 2023 a progress report on the presence of greenwashing in the insurance and pensions sector, advising the European Commission[57].

This report begins by explaining that the European Commission mandated EIOPA, as part of the ESAs, to provide information on its sectors of competence on several points[58]: i) definition of greenwashing; ii) specific cases, events and complaints related to greenwashing; iii) oversight of greenwashing, including the challenges to be faced in this area; iv) state of play of legislation applicable to sustainable finance; v) gaps, inconsistencies and problems in the current legal framework that may favour greenwashing.

Consequently, the first conclusions reached by EIOPA on greenwashing and the progress made so far are presented. Furthermore, they announce that, following this, a final report, with definitive conclusions, will be issued, foreseeably in May 2024.

As part of the ESAs, which are charged with the same task because of their role in the market, as described in the previous section, EIOPA has a common intention and will. It is because of this conjunction and common intention that EIOPA intends to offer a common, cross-sectoral definition of 'greenwashing', to all supervisory authorities, which, as quoted in this report, would be worded as follows: *"A practice whereby sustainability-related statements, declarations, actions, or communications do not clearly and fairly reflect the underlying sustainability profile of an entity, a financial product, or financial services. This practice may be misleading to consumers, investors, or other market participants"*[59].

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[57] EIOPA, *Advice to the European Comission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023.

[58] EIOPA, *Advice to the European Comission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 4.

[59] EIOPA, *Advice to the European Comission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 4.

After a brief introduction on the context, the EC's mandate, and the scope covered by this authority[60], they go on to provide a definition of greenwashing, its risks and its repercussion on the market[61], and then specify where and how it happens in particular in the insurance and pension market[62]. They then devote a section to tackling greenwashing, focusing on the activity of supervisory authorities, the prevention and monitoring of cases, and the tools available to deal with this phenomenon[63]. Finally, they highlight the key issues they have identified in the regulatory framework as areas for improvement, in response to the EC's request[64].

This section will outline the main conclusions reached by EIOPA in analysing the EU insurance market landscape with regard to greenwashing[65].

4.1. *Sustainable investment (art. 2(17) SFDR)*

The Sustainable Finance Disclosure Regulation or SFDR[66] is a regulation that aims to increase transparency in the performance of financial agents, establishing the parameters of the information additional to financial information that they will have to issue in order to better assess the level of sustainability of their financial products.

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[60]EIOPA, "1.1. Background", *Advice to the European Comission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, pages 6-8.

[61] EIOPA, "2. Defining greenwashing, its risks and its impacts", *Advice to the European Comission on* Greenwashing. Progress Report, EIOPA-BoS-23/157, 2023, pages 9-16.

[62] EIOPA, "3. Where and how greenwashing occurs in the insurance and pension sectors", Advice to the European Comission on Greenwashing. Progress Report, EIOPA-BoS-23/157, 2023, pages 17-34.

[63] EIOPA, "4. Tackling greenwashing", Advice to the European Comission on Greenwashing. Progress Report, EIOPA-BoS-23/157, 2023, pages 35-48.

[64] EIOPA, "5. Regulatory framework", *Advice to the European Comission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, pages. 49-59.

[65] The information contained in the following sub-sections is derived from the analysis of the fifth section of the report, EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", Advice to the European Commission on Greenwashing. Progress Report, EIOPA-BoS-23/157, 2023, pages 49-59.. 49.

[66] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability disclosures in the financial services sector.

This regulation offers a fairly complete definition of what a sustainable investment is[67]. However, there are some blind spots in both the definition and the conditions, which lead financial market participants to use different tactics to calculate the sustainability of products, e.g. using more conservative or less conservative calculation standards, and these divergences can lead to confusion for FMPs in assessing the sustainability of investments[68].

4.2. *Principle of "no significant harm" (art. 2 SFDR)*

This principle is one of the conditions required for the investment to be classified as sustainable under the conditions of the article. In assessing this criterion, the adverse impact indicators, or AIPs, as defined in the 2022 regulation, are used, but there remains a certain level of discretion as to how an FMP takes these indicators into account in assessing compliance with the principle, for two reasons. The first reason is that it is unclear how many indicators should be considered to ratify compliance with the principle. Although the ESAs issued in June some clarifications and (non-binding) guidance for their interpretation, practices diverge across the market. In fact, some FMPs simply take into account, with respect to EPI indicators, their compliance or non-compliance based on available data, which facilitates greenwashing. The second one is that there are no established thresholds for assessing what constitutes significant harm within the valuation of an indicator, leaving it up to financial market

[67] Article 2(17) of SFDR: "*'sustainable investment' means an investment in an economic activity that contributes to an environmental objective, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy, or an investment in an economic activity that contributes to a social objective, in particular an investment that contributes to tackling inequality or that fosters social cohesion, social integration and labour relations, or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance*".

[68] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 49.

participants. For example, if an FPM goes into valuing the carbon footprint for one of its products, it could set a very high threshold so that it could lead to investments that undermine environmental objectives. This is in addition to the fact that there currently seems to be a tendency to exclude the worst performing companies within a particular indicator, rather than assessing the level of significant harm as a whole[69].

There is also a principle of no significant harm in the Taxonomy Regulation, which is not linked to, or applied in the same way as, the previous one. Hence, qualifying an investment as sustainable does not have to comply with this principle under both regulations.

This represents a great complexity for FMPs whose products represent sustainable investments under either of the two regulations, which adds further complexity for investors to understand, and increases the potential for greenwashing.

4.3. *Promotion of Environmental and Social Features (art. 8 SFDR)*

The first paragraph of article 8 SFDR requires entities acting within the framework of good governance practices, which offer financial products with environmental and/or social features, to disclose, prior to contracting, information in accordance with Article 6, including information on how these features are met and, where appropriate, on the designated benchmark[70].

However, there is no reference to or specification of these environmental and social characteristics or when they are promoted, leaving this task to financial market participants. Article 8 appears

[69] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, pages 49-50.

[70] Article 8 Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability disclosures in the financial services sector: "*1. Where a financial product promotes, among other characteristics, environmental or social characteristics, or a combination of those characteristics, provided that the companies in which the investments are made follow good governance practices, the information to be disclosed pursuant to Article 6(1) and (3) shall include the following: (a) information on how those characteristics are met; (b) if an index has been designated as a reference benchmark, information on whether and how this index is consistent with those characteristics*".

to be a rather broad provision on which it is difficult to specify whether the above factors are indeed being promoted, both for FMPs and supervisory authorities, thus creating the possibility that non-compliant products may be included without allowing supervisors to act.

Given that being obliged to disclose the aforementioned information implies that the entity complies with certain characteristics that give it the label of sustainable, FPMs may be encouraged to consider that their products comply with the aforementioned environmental or social characteristics in order to be subject to the reporting obligation and therefore be considered sustainable[71].

Within all the products that can be covered by Article 8, there is a large percentage related to taxonomy and sustainability, but a large percentage not related to taxonomy and sustainability. The ambiguity of the terms, coupled with the fact that the SFDR is used as a labelling regime (so that Article 8 products will receive the same label regardless of whether they are related to taxonomy), can lead to difficulties in identifying products with strong sustainability credentials, as consumers may be misled into thinking that all products covered by Article 8 are equivalent[72].

4.4. *Sustainable Investment Objective (art. 9 SFDR)*

The SFDR requires additional disclosures for a financial product with sustainable investment objectives[73], based on the definition of

[71]EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 50.

[72] They add here that, according to Morningstar, Article 8 funds account for 52% of funds in terms of assets and 35% of SFDR funds in terms of number. Although they do not have data around insurance and pension products, these funds are sold in insurance-based investment products (IBIPs) or by pension funds, so they have a direct impact on the sector of interest for the purposes of this report and its consumers.

[73] Article 9 Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability disclosures in the financial services sector: "*1. Where a financial product has sustainable investment as its objective and an index has been designated as a reference benchmark, the information to be disclosed pursuant to Article 6(1) and (3) shall be accompanied by the following: (a)information on how the designated index is aligned with that objective; (b)an explanation as to why and how the designated*

sustainable investments in Article 2 of this regulation[74]. Beyond the issues set out in the previous paragraphs, the SFDR and its 2022[75] delegated regulation do not set a threshold with respect to the minimum proportion of sustainable investments that a product must make to fall within the scope of Article 9.

The Q&A paper on the SFDR published by COM in July 2021 clarifies (in a non-binding manner) that Article 9 products must only make sustainable investments, except where they need to make certain types of investments in accordance with sector-specific prudential rules (e.g. liquidity or hedging requirements[76].

4.5. *SFDR as a labelling regime*

Although the SFDR is a disclosure regulation, the way in which it differentiates the requirements of Articles 6, 8 and 9 has led to the SFDR being used in practice as a labelling regime. At product level, 3 categories are differentiated according to the article referred to[77]:

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index aligned with that objective differs from a broad market index. 2. Where a financial product has sustainable investment as its objective and no index has been designated as a reference benchmark, the information to be disclosed pursuant to Article 6(1) and (3) shall include an explanation on how that objective is to be attained".

[74] Article 2(17) of Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability disclosures in the financial services sector, the content of which is set out in the text above.

[75] Commission Delegated Regulation (EU) 2022/1288 of 6 April 2022 supplementing Regulation (EU) 2019/2088 of the European Parliament and of the Council with regard to regulatory technical standards specifying the details of the content and presentation of the information in relation to the principle of 'do no significant harm', specifying the content, methodologies and presentation of information in relation to sustainability indicators and adverse sustainability impacts, and the content and presentation of the information in relation to the promotion of environmental or social characteristics and sustainable investment objectives in precontractual documents, on websites and in periodic reports.

[76] In practice, however, around 20% of Article 9 funds have a commitment to make sustainable investments below 10%, according to a sample analysed by Morningstar from 2023. Although data is not available for insurance and pension products, given that funds are often converted into insurance and pension products, similar problems could exist. EIOPA, "5. Regulatory framework. Key issues already identified in the regulatory framework", Advice to the European Commission on Greenwashing. Progress Report, EIOPA-BoS-23/157, 2023, page 51.

[77] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, pages. 51-52.

i) Products covered by Article 6 are considered not to have sustainability characteristics and are sometimes referred to as brown or grey products; ii) Article 8 products are those that promote environmental or social characteristics, but do not have a sustainable investment objective, and are therefore labelled as light green products; iii) Article 9 products are considered to have sustainable investment objectives, sometimes referred to as dark green products.

This classification following the SFDR may lead mainly retail investors to look more at the label of the product than the type of investment it makes, and they are not always equivalent. For example, while Article 9 products may be said to make more sustainable investments on average, some of them often fall below those classified under Article 8[78].

4.6. *MOPs in SFDR*

Articles 20 to 22 and 65 to 67 of the Delegated Regulation require that multi-option financial products[79] that promote environmental or social features, or have a sustainable investment objective, disclose sustainability-related information on a pre-contractual and regular basis.

To be considered as a "financial product promoting environmental or social features"[80], an MOP must have at least the following characteristics an MOP must have at least one investment option that promotes environmental or social features. To be considered a

"Financial product with a sustainable investment objective"[81], an MOP must have all of the following characteristics an MOP must have all investment options that have a sustainable investment objective.

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[78] In fact, in the sample analysed by Morningstar, 30% of Article 8 funds earn more SI than 20% of Article 9 funds. In such cases, investors could invest in either an Article 8 fund or an Article 9 fund. In such cases, investors could invest in an Article 9 product and overlook its lower SI percentage simply because the Article 9 label is considered more sustainable. The same reasoning applies to taxonomy-aligned investments.

[79] Also referred as MOPs, the acronym of Multi-Option Products.

[80] Article 8 SFDR, included in footnote 66.

[81] Article 9 SFDR, transcribed in footnote 69.

This means that an MOP with only one investment option from Articles 8 and 9 is an article 8 product, regardless of the fact that all remaining investment options do not correspond to these precepts. Although Article 20 of the regulation states that the pre-contractual information of the MOP should include a list of Article 8 and 9 investment options and a statement that "those environmental or social characteristics will only be met where the financial product invests in at least one of those investment options", this could lead to potential greenwashing. Indeed, a retail investor who does not read the MOP disclosures carefully might assume that one that fits under Article 8 still belongs under Article 8, irrespective of the investment option chosen[82].

Ultimately, the question is that an MOP will have sustainability credentials because it is labelled as Article 8. If there were no labels, disclosure could focus on the type of investments made by the product's investment option, rather than on the product category.

4.7. *Products with sustainable features*

The SFDR requires financial products falling within its scope to report on their sustainability characteristics. This allows, using standardised templates, the sustainability features of products to be assessed. However, it only covers financial products with investment components, but not non-life insurance.

This implies that for non-life insurance there are no standardised disclosures or defining criteria on the information to be disclosed that can be followed when claiming to comply with sustainability features. The only exception will be in relation to taxonomy, as the Regulation governing taxonomy does give indications on the disclosure of key performance indicators on the business underwritten[83].

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[82] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", Advice to the European Commission on Greenwashing. *Progress Report*, EIOPA-BoS-23/157, 2023, page 52.

[83] Article 8 of Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on establishing a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088, known as the Taxonomy Regulation. It is also specified in Article 6 of the Delegated Regulation.

This implies that when a non-life insurance product claims to have sustainability features, there is no standardised disclosure or criteria defining how it should be disclosed, except for taxonomic alignment. This gives financial market participants discretion in disclosing the sustainability features of their non-life insurance products, making it difficult to assess whether they actually have the sustainability features they claim to have, ultimately leading to potential greenwashing[84].

4.8. *Entity-level PAI disclosures (SFDR)*

Financial market participants with more than 500 employees are required to disclose that they consider the Adverse Impact Indicators of their investment decisions in their due diligence statement. However, these commitments would not necessarily translate into effective measures to address the main adverse impacts on their investment decisions, as it would be sufficient to state that they have taken into consideration the Adverse Impact Indicators in their investment decisions, as required by the SFDR, as nothing beyond the statement itself seems to be required[85].

4.9. *Product level disclosure as consumer-facing and market disclosures*

The current templates on the information to be provided under the SFDR precepts for each of the cases include a certain level of detail or technicality, aimed at ensuring that professional investors can access sufficient and complete information to enable them to make an appropriate investment decision in accordance with their preferences.

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[84] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 53.

[85] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", Advice to the European Commission on Greenwashing. Progress Report, EIOPA-BoS-23/157, 2023, page. 53.

The level of technical specificity contained in this information, although positively intended, may make it difficult to achieve the obligation when the recipient is not a professional investor but a consumer. Given that consumers do not necessarily possess the level of technical knowledge that belongs to professional investors, the way in which this information is presented to them may lead to difficulties in understanding, due to information overload or complexity of terms. For example, cross-references to the SFDR on the funds in which it invests, which are included in the prospectus of the investments, in multi-option financial products[86].

Market participants, and especially consumers, may find it difficult to locate SFDR information that is relevant or of interest to their objectives, given the length of these documents[87].

4.10. *Supervision of marketing communications under SFDR*

In principle, under Article 13 of the SFDR[88], fund managers and financial advisors are required to ensure that their marketing communications do not contradict the information they are required to disclose under the SFDR. But nothing is mentioned in Article 13, or elsewhere in the Regulation, about the role of national competent authorities in ensuring that these communications are carried out in

[86] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", Advice to the European Commission on Greenwashing. Progress Report, EIOPA-BoS-23/157, 2023, page 53.

[87] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 53.

[88] Article 13 SFDR: "*Marketing communications. 1. Without prejudice to stricter sectoral legislation, in particular Directives 2009/65/EC, 2014/65/EU and (EU) 2016/97 and Regulation (EU) No 1286/2014, financial market participants and financial advisers shall ensure that their marketing communications do not contradict the information disclosed pursuant to this Regulation.*

2. The ESAs may develop, through the Joint Committee, draft implementing technical standards to determine the standard presentation of information on the promotion of environmental or social characteristics and sustainable investments.

Power is delegated to the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010".

an appropriate manner. There is, however, a reference in this article to sectoral legislation.

Turning, therefore, to sectoral legislation, the Insurance Distribution Directive determines that "*Member States shall ensure that insurance distributors are not remunerated or do not remunerate or assess the performance of their employees in a way that conflicts with their duty to act in accordance with the best interests of their customers. In particular, an insurance distributor shall not make any arrangement by way of remuneration, sales targets or otherwise that could provide an incentive to itself or its employees to recommend a particular insurance product to a customer when the insurance distributor could offer a different insurance product which would better meet the customer's needs*"[89].

The problem arises because this provision does not refer to product manufacturers, leaving out of this mandate those who, more often than not, are the ones who produce the advertising material and marketing elements of an entity. Because of this lacuna, EIOPA considers it desirable to strengthen and clarify the competences of national authorities in relation to how Article 13 of the SFDR would apply to product manufacturers, or, failing that, to extend the scope of Article 17 of the Insurance Distribution Directive to cover these subjects[90].

4.11. *Sustainability preferences under Insurance Distribution Directive's Delegated Regulation*

The Insurance Distribution Directive's Delegated Regulation[91] states that customers' sustainability preferences are related to three criteria: the share of taxonomic alignment, the share of sustainable

[89] Article 17.3 of Directive (EU) 2016/97 of The European Parliament and of the Council of 20 January 2016 on insurance distribution.

[90] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 54.

[91] Commission Delegated Regulation (EU) 2017/2359 of 21 September 2017 supplementing Directive (EU) 2016/97 of the European Parliament and of the Council with regard to information requirements and conduct of business rules applicable to the distribution of insurance-based investment products.

investments under the SFDR, and whether the investment considers the main adverse impact. It is in this last criterion that the potential for greenwashing would be located, as it is not exactly specified in the absence of reference to the SFDR's Adverse Impact Indicators[92].

There is also another source of danger in terms of the production of greenwashing, in those investment options that do not fit into the SFDR disclosure obligation. These options could still fit the taxonomic alignment criteria and the Adverse Impact Indicators, and thus be recommended by distributors as they are considered to fit with the sustainability preferences of customers. In any case, in the absence of disclosure obligations within these criteria for such investment options, it is unclear what information or disclosure insurance distributors should rely on when assessing whether a product has investment options that meet the customer's sustainability preferences[93].

4.12. *Business to business greenwashing*

The Unfair Commercial Practices Directive[94] provides a general regulatory framework for any misleading statements by a company to a consumer about its contributions to the environment in all market sectors. This makes the concept broader than those offered by the SFDR or the Taxonomy Regulation. Even so, one cannot speak of a standard that protects the consumer's position in this respect and against greenwashing, since it omits those cases where claims about

[92] Article 2.4.c) of Directive (EU) 2016/97 of The European Parliament and of the Council of 20 January 2016 on insurance distribution doesn't make any reference to the SFDR regulation.

[93] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 54.

[94] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005, concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (known as 'Unfair Commercial Practices Directive')

environmentally friendly practices occur in a business context, i.e. business-to-business[95].

Considering that even if the deception occurs in the first instance between two companies, it could then spread to the market and have an indirect impact on the consumer, EIOPA considers it appropriate to include a regulation that also covers business-to-business greenwashing[96].

4.13. *Data quality and availability*

The sequencing of the timing of the legislative framework applicable to the insurance market may lead to problems in the quality and availability of data held by insurers and pension funds, leading to 'greenwashing' due to gaps created by the entry into force of the applicable rules.

For example, market participants must report on the Adverse Impact Indicators included in the SFDR in June 2023 and again in June 2024, as this is foreseen by the rule; but there will be no obligation to report on investment entities under the CSRD, as reporting under this provision cannot take place until January 2025, as it is based on data obtained in 2024[97].

4.14. *No clear distinction as to what is greenwashing and what is not*

To conclude this report, EIOPA would like to highlight what could be the root of the problem and the first issue to be addressed

[95] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 54.

[96] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 54.

[97] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 54.

in the fight against greenwashing and attempts to prevent its occurrence.

The issue is that, according to them, there is no clear definition of what is considered greenwashing within the regulatory framework applicable to insurance and pension funds. This lack of a concrete concept hampers the whole process of tackling greenwashing since the lack of a specific term prevents a proper understanding of the phenomenon[98].

The main people affected by this are consumers, since, if they already start from a position of inferiority as they lack the technical and specific knowledge on the subject that market participants considered as professionals or entities possess, they will suffer even more severely from the consequences if they cannot even understand the problem they are confronted with. But they will not be the only ones, as the lack of definition of greenwashing in the insurance market also affects the search for and use of supervisory tools to deal with it.

They conclude by pointing out that, although the report itself already provides some clarity on the terms, further work will be needed on other aspects, such as those outlined in this text, to make progress in this area[99].

5. *Conclusions: improving possibilities and future perspectives*

A conclusion can be drawn from the two reports analysed: both institutions have highlighted that one of the main problems affecting the fight against greenwashing is the difference in valuation criteria that currently exists in the insurance market.

The diversity of measurement standards contrasts with the lack of homogeneity of these standards, leading to situations in which an

[98] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 55.

[99] EIOPA, "5. Regulatory framework. 5.1. Key issues already identified in the regulatory framework", *Advice to the European Commission on Greenwashing. Progress Report*, EIOPA-BoS-23/157, 2023, page 55.

insurer could be subject to certain standards depending on the convenience of these standards for its own data and results, generating different standards that confuse market participants.

To this must be added the lack of clarity of the criteria, in some cases even due to the absence of definitions for the terms used, which confuse institutions and can lead to cases of involuntary greenwashing, which should be remembered as a reality to considered in this context. An insurer may commit unintentional greenwashing by mistakenly believing that it fits within the sustainability standards when in fact it does not, all due to a misunderstanding caused by the obscurity of the concepts.

The lack of data and data transparency should not go unmentioned as an obstacle in the race to curb greenwashing. For research and legislative progress, it is essential the knowledge and contrast of the reality through the results and information provided by the market interveners. If insurance companies do not provide transparent data on their figures and results related to compliance with sustainability regulations, it is impossible to know the impact of the regulation or the range of compliance with it.

And, probably most important of all, this conglomerate of situations not only affects insurers in their performance in the market, but the main sufferers will end up being customers and consumers. These market participants are in the most vulnerable position, lacking technical knowledge and negotiation tools, so the effects of greenwashing, voluntary or not, will fall directly on them, with no shield or defence to combat it. The client may be guided by what he believes to be the most sustainable option when in fact it is not, and if the insurer itself has no way of knowing for certain whether it is truly complying with the standards, much less will the final recipient be able to do so.

However, leaving aside all this reasoning, in my opinion this is a basic problem that needs to be dealt at the root.

The focus is always on the mechanisms of regulation when perhaps the ideal would be to focus on those of education for prevention. If my studies in Criminology have taught me anything, it is that the basis for changing inappropriate social behaviour is not punishment but prevention, not the coercive system but education.

I believe that on the issue of greenwashing, we are once again trying to educate by means of the law. It is true that the law must act when society itself does not adapt its behaviour to the necessary parameters, and that in this case the situation of the planet is so delicate that strict and rapid action must be taken, but the debate on how to oblige subjects ends up in a void when the importance of understanding is forgotten. If the people or entities to be "corrected" understood that the problem is real, global, current, and urgent, perhaps they would voluntarily undertake the necessary measures to alleviate it (because, unfortunately, there is no longer a solution).

In short, perhaps it would be a good idea to start thinking about educational and awareness-raising measures as well as it is being made with measures of obligation and sanction. In the meantime, it will be like throwing seeds on asphalt, they will not germinate if the substrate is not suitable.

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Finito di stampare nel mese di maggio 2024
presso Grafica Elettronica srl, Napoli

€ 30,00