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EU AND PRIVATE INTERNATIONAL LAW: OPEN QUESTIONS IN FAMILY LAW, CONTRACTS, AND TORTS

edited by

BETTINA HEIDERHOFF, ILARIA QUEIROLO

EDITORIALE SCIENTIFICA

SCRITTI DI DIRITTO PRIVATO EUROPEO
ED INTERNAZIONALE

Collana diretta da Ilaria Queirolo e Alberto Maria Benedetti

32

BETTINA HEIDERHOFF, ILARIA QUEIROLO (edited by)

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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 2023-2024 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 Jagiellonian University in Kraków; the University of Maribor, and the University of Valencia.

Authors focus on their own research topics, connected to various aspects of family law, tort law, and contract law, mainly from a private international law perspective.

The works poignantly address open questions in conflict of laws, most of which are today to be reconducted to the necessity of ensuring respect of fundamental human rights; to address legal gaps and coordination issues in fields dominated by new technologies; to 'learn' from methods and approaches adopted in other legal systems in light of an new emerging understanding of jurisdiction; and to the necessity to re-address basic concepts of justice and international civil procedure in light of the already

consolidated phenomenon of ‘collective justice’, which hardly fits established general categories in traditional continental approaches.

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

Bettina Heiderhoff
Ilaria Queirolo
May 2025

The Hearing of the Child in Custody Disputes and the Principle of Mutual Trust in the EU

Bettina Heiderhoff

1. *Introduction*

The rights of the child in court proceedings have received increasing attention in recent years. In addition to various individual contributions, several comparative manuals have been published. The focus has been on different aspects, but a central point has been the child's right to be heard, which is contained in Article 12 of the CRC[1] and Article 24 of the CFREU[2]. This includes the hearing of

[1] UN Convention on the Rights of the Child, 20.11.1989.

[2] Charter of Fundamental Rights of the European Union, in OJ C 326, 26.10.2012, p. 391.

the child in judicial proceedings. This paper will focus on the hearing of the child, but will consider only one part of all proceedings concerning the child, namely custody disputes between parents.

Custody disputes specifically concern the best interests of the child and the organisation of the child's life, so the hearing in family proceedings has a special significance that goes beyond Article 12 of the CRC. This is discussed in more detail in the first part of this article. Another special feature is that the Brussels IIter Regulation[3], which applies to cross-border proceedings on parental responsibility at the European level, explicitly incorporates the fundamental rights provisions into ordinary law. Particularly, Article 21 of the Brussels IIter Regulation now contains a provision on when and how the hearing must take place. This is explained in more detail in this article, which also addresses the fact that hearings in custody proceedings have traditionally been handled very differently across the EU. While family court judges in Germany hear children as young as three years old, children are heard only rarely and at a relatively advanced age in many Member States. It is clear that there must be deeper reasons for these different approaches. It will be shown that one of the reasons is probably that the hearing has different functions and that the image of family court judges and their tasks and skills differ in the Member States.

On the basis of the findings, the article concludes by considering how mutual trust, which is so important in the area of freedom, security and justice, can be fostered during the hearing and where it must find its limits.

2. *The best interests of the child in custody proceedings*

Two aspects shall be emphasized in advance in order to provide a basis for the subsequent considerations. Firstly, it will be briefly described how important the best interests of the child are in custody disputes. Secondly, it will be shown that the best interests of the child

[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 L 178, 2.7.2019, p. 1.

must also be safeguarded within in the proceedings themselves – e.g. by not exposing the child to frightening situations in court.

2.1. *Child's best interests in custody proceedings*

2.1.1. *General significance*

In general terms, respecting the best interests of the child is a globally recognised principle for all courts and state authorities. It is enshrined in Article 3 of the CRC – and, for the EU, it is also set out in Article 24 para. 2 of the CFREU.

However, on a more concrete level, the child's best interests are also of great importance in the family law systems of all Member States. If the parents are in dispute over parental custody or contact with the child, the best interests of the child are the main criterion for the court's decision.

Such disputes arise when the parents are unable to agree on these issues after their separation. Although most parents can reach an agreement without the help of the courts, such conflicts are relatively frequent. The family court is then faced with the difficult task of making legal arrangements for parental responsibility and, in particular, for contact.

The issues concerned can be of fundamental nature, for example with regard to the question of which parent the child should live with following the separation. Should the child reside with the mother and only see the father a few days a month? Should it live with the father? Or should the child even reside with each parent for half of the time (so called 50:50 shared care), as many legal systems now consider appropriate?

However, disputes about details are much more common and concern issues such as with which parent the children will celebrate the New Year, or where and for how long they can go on holiday with one of the parents, which school they will attend, what medical treatment they will receive and so on.

Within the EU, there is broad consensus that the decision on matters of parental responsibility ultimately depends on what is best for the individual child.[4]

2.1.2. *Some important factors*

A closer look at the concept of the "best interests of the child" reveals that the understanding of its details varies even among the Member States: Within most legal systems, there probably is a lively debate on the precise meaning of the term.[5] However, the key elements are clear and should suffice for the considerations that follow.

Firstly, as far as the fundamental content of the principle is concerned, it is widely accepted that the best interests of the child include the child's developmental, psychological and emotional needs. Elements such as protection from violence, care for the child, the child's attachments and relations and its education can be categorised here.[6]

The second point of importance in the present context concerns the opinion of the child itself. With regard to the hearing, the CRC states that "the voice of the child" or "any views expressed by the child" must be taken into account when making decisions concerning the child. In proceedings on parental responsibility in Europe, the "will of the child" is often referred to. But the significance of this

[4] Principle 3:3 of the Principles of European Family Law regarding Parental Responsibility, https://ceflonline.net/wp-content/uploads/Principles-PR-English.pdf; by way of example, Articles 371-4, 373-2-1 of the French Code Civil; Article 1:251 of the Dutch Burgerlijk Wetboek; Articles 58, 106 f. of the Polish Family and Guardianship Code (Kodeks rodzinny i opiekuńczy); § 138 of the Austrian ABGB.

[5] By way of example, DE OLIVEIRA G., MARTINS R., *CEFL National Report on Parental Responsibility – Portugal*, p. 15 f., https://ceflonline.net/wp-content/uploads/Portugal-Parental-Responsibilities.pdf; TOLONEN H., KOULU S., HAKALEHTO S., *Best Interests of the Child in Finnish Legislation and Doctrine*, in HAUGLI T., NYLUND A., SIGURDSEN R., BENDIKSEN L. (eds), *Children's Constitutional Rights in the Nordic Countries*, Leiden, 2020, p. 159, 166 ff.

[6] See also the non-exhaustive list of elements for assessing a child's best interests by the UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration*, 2013, para. 48 ff.

will or the opinion of the child for determining the child's best interests is apparently often quite unclear.[7]

This vagueness of family law systems when it comes to taking into account the child's views is interesting in the context of the hearing. Certainly, the lack of clarity hereon is an important reason why the hearing is often neglected or conducted in a somewhat arbitrary manner.

Despite the noticeable uncertainty surrounding the child's will, it is initially safe to say that the child's personal opinions or preferences do not automatically align with its best interests. However, as the child grows older, its wishes and opinions become increasingly important in determining what is in the child's best interests.[8] This relationship can be recognised even without in-depth studies or psychological knowledge, simply from general life experience: When a court has to decide on the residence or the allocation of holiday time for a 16-year-old child, it is evident that the child's wishes should generally be followed by the court. In other words, overriding the child's preferences would need to be specifically justified, perhaps due to school or for other important reasons. Nevertheless, this is only a rough framework and the details remain open to debate. It is certainly difficult to judge at what age it makes sense to take the child's wishes into account at all. Whether the child should be allowed to decide independently on contact matters from a certain age, e.g. 14 years, on, can also be answered in multiple ways. The absence of a uniform approach for weighing the child's views in a best interests assessment constitutes a first major reason for the divergent hearing practices.

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[7] ARCHARD D., SKIVENES M., *Balancing a Child's Best Interests and a Child's Views*, in *International Journal of Children's Rights*, 2009, p. 1 ff.

[8] UN COMMITTEE ON THE RIGHTS OF THE CHILD, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, cit., para. 53; LUNDY L., TOBIN J., PARKES A., *Article 12*, in TOBIN J. (ed), *The UN Convention on the Rights of the Child – A Commentary*, Oxford, 2019, p. 400, 412 f.; SÁEZ J., *The Right of the Child to be heard in Parental Responsibility Proceedings*, in BOELE-WOELKI K., MARTINY D. (eds), *Plurality and Diversity of Family Relations in Europe*, Cambridge, 2019, p. 225, 227 ff.

2.1.3. *Conclusions*

Returning to the general importance of the hearing in custody disputes, one central observation can be made as a result: The content of the hearing has a direct bearing on the outcome of the case. This is because the best interests of the child are the guiding principle for the court's decision-making.

On the one hand, at least for older children, the assessment of the best interests presupposes that the child can express its views. The General Comment of the Committee on the rights of the child also emphasises this link by explaining: "There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives."[9]

On the other hand, hearing the child can be helpful for the best interests determination even beyond the rather diffuse importance of the child's will. Talking to the child facilitates understanding the individual child's needs and its attachments to parents or other important persons. When the person in charge of the hearing has in-depth knowledge and is trained to communicate with children, he or she may also be able to detect fears or even experiences of abuse.[10]

To summarise, a full investigation of the facts of a custody case depends to a large extent on hearing the child, which is inevitably connected to the best interests of the child.

2.2. *Safeguarding the child's best interests within the proceedings*

The third aspect of the child's best interests in family procedure that seems important to introduce is the notion of the child's best

[9] UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 12 – The right of the child to be heard*, 2009, para. 74.

[10] SCAIFE J., *Deciding Children's Futures*, Abingdon, 2025, p. 162 ff.

interests within court proceedings. The question here is, how the best interests of the child are protected within the proceedings themselves.

This question in particular arises in cross-border proceedings. The best interests of the child have, for instance, been a guiding principle in the rules on international jurisdiction in the Brussels IIter Regulation.[11] The Brussels IIter Regulation is based on the principle that jurisdiction is primarily determined by the habitual residence of the child.[12] This ground of jurisdiction is designed to achieve a number of objectives. However, one key benefit is that this proximity of the court to the child's habitual residence ensures short distances for the child. This avoids that the child has to leave its familiar surroundings in order to travel to a foreign court.[13]

Having said this, further issues come to mind. One should bear in mind, that for most children entering a courtroom is probably stressful in itself.[14]

This thought leads to a central issue of the hearing of the child. What is the best – meaning here: child friendliest – way to guarantee the participation of children?

If one looked at the procedural best interests of the child in isolation, one could possibly even think that it might be harmful for the child to be heard at all. However, this can certainly not be the correct conclusion. We have already seen that the child's voice is an important factor for making the decision – and, as we will see in the following, the right to be heard is a fundamental right of the child. In light of this, the question cannot be whether to hold a hearing, but how to conduct it in a child friendly manner.

Nevertheless, what we see is a case of a two-sided coin. The hearing helps to find out what is best for the child. However, as such, it will be also often be stressful for the child.

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[11] Recital 19 of the Brussels IIter Regulation; Judgment of the Court (Third Chamber) of 2 April 2009, A, Case C-523/07, para. 35.

[12] Article 7 of the Brussels IIter Regulation.

[13] LAMONT R., *Care proceedings with a European dimension under Brussels Ila*, in *Child and Family Law Quarterly*, 2016, p. 67, 71; GARBER T., *Article 7*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume IV, Brussels IIter Regulation*, Köln, 2023, p. 128.

[14] CASHMORE J., PARKINSON P., *Children's participation in family law disputes*, in *Family Matters*, 2009, p. 15, 18.

3. *The right of the child to be heard*

3.1. *Right to be heard as a fundamental right*

The hearing of the child is not only, as previously described, significant for obtaining comprehensive knowledge of the facts of the case. Instead, it has a second important function, which is its actual basis, namely the right of the child to be heard. Shifting the focus to this fundamental right, the international regulations can, again, be the starting point.

The right of children to be heard is guaranteed by the CRC, and for Europe, it is also included in the CFREU. Article 12 of the CRC provides that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child."

This regulation is in itself clear and meaningful. The child has a right to be heard – and it is somewhat surprising how fragmented the implementation is in many European Member States. As the recommendations issued by the CRC Committee show, many state parties still need to take further measures for implementing Article 12 of the CRC.[15]

In light of this, the significant increase in academic attention devoted to the hearing of the child, particularly in family proceedings, must all the more be acknowledged as a positive development. Analysing the existing differences as well as the reasons for them has become feasible because of several newly published, outstanding comparative legal works. On the basis of these, some typical ways of conducting the hearing of the child are outlined below. Afterwards, it will be explained how mutual trust – an essential factor in cross-border proceedings – can be achieved despite the recognisable differences.

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[15] All concluding observations for the individual states can be accessed here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=5, see e.g. the observations for France (CRC/C/FRA/CO/6-7, p. 5), Finland (CRC/C/FIN/CO/5-6, p. 5) and Ireland (CRC/C/IRL/CO/5-6, p. 5). STERN R., *Implementing Article 12 of the UN Convention on the Rights of the Child*, Leiden, 2017, p. 82 ff., also provides an overview on the implementation and persisting deficits.

3.2. *Implementation in the Member States*

The following brief comparison of the hearing of the child will focus on two central questions: firstly, the age at which children should be heard, and secondly, the way in which the hearing is conducted.

In contrast to these matters, it would be much more difficult to compare the extent to which the court will then take the child's opinion into account. Although a few studies on the subject exist, there still is a great deal of uncertainty.[16] But with regard to mutual trust within the EU, which is the main issue here, this point is less relevant. It would be unlikely that a Member State hears a child, but then completely ignores the child's views in the decision-making process. As seen above, such an approach would also not be compatible with Article 12 of the CRC, which expressly requires the consideration of the views of the child.[17]

3.2.1. *From which age on will children be heard?*

Looking back to Article 12 of the CRC in regard to the age from which a child must be granted the right to be heard, we only find a rather vague provision. The rule concerns any child who is "old enough to form their own views". This wording is deliberately open and is intended to show that such thing as a fixed age limit does not exist.[18]

Nonetheless, it is important to realise that the level of maturity described in Article 12 of the CRC is reached rather early. Full understanding or insight of the child is not required. Instead, the necessary capability is merely a factual one, as the General Comment

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[16] For Norway, GERDTS-ANDRESEN T., HANSEN H., *How the child's views is weighted in care order proceedings*, in *Children and Youth Services Review*, Volume 129, October 2021, 106179, assume a very low significance of the child's hearing; the results are based on an evaluation of 86 cases. See also MOL C., *The Child's Right to Participate in Family Law Proceedings*, Cambridge, 2022, p. 201 ff. with an analysis of "due weight" in the case law of the European Court of Human Rights.

[17] Likewise Article 24 para. 1 of the CFREU and Article 21 of the Brussels IIter Regulation.

[18] UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 12 – The right of the child to be heard*, 2009, para. 20 f.

explicitly describes: "Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences."[19]

Although these statements in the General Comment are quite clear, the question from which age on a hearing shall be mandatory in custody proceedings is seen rather differently in the contracting states. The fact that the age limit is set very high in many European legal systems is likely to violate Article 12 of the CRC.[20] In many of the jurisdictions concerned this has sparked an intensive discussion, which will not be taken up as such here. However, this point cannot be ignored in the context of the recognition of foreign decisions under the Brussels IIter Regulation. Despite the desire for a high level of mutual trust, it would certainly not be correct to accept violations of fundamental rights.

If we now take a closer look at how the hearing takes place in the Member States, it is not easy to assess what the practice really looks like. The legal provisions are often formulated very openly and then applied more narrowly by the courts. The impressions presented here are essentially based on the *International Handbook on Child Participation in Family Law* published by *Schrama* et al. and on the work *Children's right to information in EU civil actions* published by *Carpaneto/Maoli*. Both works contain country reports which provide detailed information on the hearings in many Member States.

On the basis of this research, it can be concluded that children are heard only very rarely in the EU before they start school.[21] Regular

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[19] See para. 21 of UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 12 – The right of the child to be heard*, cit.

[20] UN COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 12 – The right of the child to be heard*, cit., para. 21; UNICEF, *Implementation Handbook For The Convention On The Rights Of The Child*, Geneva, 2007, p. 153 f.; QUEIROLO I., CARPANETO L., MAOLI F., *Reconstructing human rights instruments on child participation: the right of the child to information in civil proceedings*, in CARPANETO L., MAOLI, F. (eds), *Children's right to information in EU civil actions*, Pisa, 2021, p. 3, 5.

[21] Apparently, this only occurs in Germany; for an overview, see MOL C., *Child Participation in Family Law Proceedings Compared*, in SCHRAMA W., FREEMAN M., TAYLOR N., BRUNING M. (eds), *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 335, 338.

hearings from early primary school age on are also a rather isolated occurrence, but take place e.g. in Denmark.[22] Germany is a major exception in this respect. In family proceedings concerning the child, e.g. in a dispute between parents about access rights, children are already heard from the age of three.[23] And the judge must even personally take a look at a newborn child.[24] For this purpose, he or she typically travels to the child's home and observes the child in its familiar surroundings.

In contrast, there are many Member States where a personal hearing is not compulsory until a fairly advanced age. An age limit of around twelve years is common. This age limit is frequently accompanied by the addition that the child must be heard earlier if it is sufficiently mature.[25] In some cases, the hearing *may* also take place earlier if the child requests it[26] or if the judge considers it important.

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[22] JEPPESEN DE BOER C., KRONBORG A., *Denmark*, in SCHRAMA W., FREEMAN M., TAYLOR N., BRUNING M. (eds), *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 157 ff.; for Romania, FLORESCU S., *Romania*, in SCHRAMA W., FREEMAN M., TAYLOR N., BRUNING M. (eds), *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 273, 275 f.

[23] KARLE M., GATHMANN, S., *The State of the Art of Child Hearings in Germany*, in *Family Court Review*, 2016, p. 167, 172, 182; BVerfG, Beschluss v. 23.3.2007 – 1 BvR 156/07, in *Zeitschrift für das gesamte Familienrecht*, 2007, p. 1078.

[24] This obligation was recently introduced by an amendment of § 159 of the FamFG; ERNST R., *Das Gesetz zur Bekämpfung sexualisierter Gewalt gegen Kinder*, in *Zeitschrift für das gesamte Familienrecht*, 2021, p. 993, 997; KISCHKEL T., *Die Reform der Kindesanhörung nach § 159 FamFG – Auswirkungen auf die Praxis*, in *Zeitschrift für das gesamte Familienrecht*, 2021, p. 1595.

[25] E.g. in the Netherlands, BRUNING M., SCHRAMA W., *The Netherlands*, in SCHRAMA W., FREEMAN M., TAYLOR N., BRUNING M. (eds), *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 231, 236 f.; in Italy, DI NAPOLI E., MAOLI F., *Italy*, in SCHRAMA W., FREEMAN M., TAYLOR N., BRUNING M. (eds), *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 219, 225 f.; in Spain, ESPLUGUES MOTA C., QUINZÁ REDONDO P., GONZÁLEZ MARIMÓN M., *Children's right to information in civil proceedings in Spain*, in CARPANETO L., MAOLI, F. (eds), *Children's right to information in EU civil actions*, Pisa, 2021, p. 263, 274 ff.; similarly in Bulgaria, MUSSEVA B., PANDOV V., *Children's right to information in civil proceedings in Bulgaria*, in CARPANETO L., MAOLI, F. (eds), *Children's right to information in EU civil actions*, Pisa, 2021, p. 91, 97.

[26] In the Netherlands, the court then has a margin of discretion in such cases (BRUNING M., SCHRAMA W., *The Netherlands*, cit., p. 237); in Belgium, the parties can request the hearing and it has to take place if the child also requests it (BOONE I., DECLERCK C., VERTOMMEN E., *Belgium*, in SCHRAMA W., FREEMAN M., TAYLOR N., BRUNING M. (eds), *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 103, 110).

In practice, however, this happens only rarely.[27] It is doubtful whether a combination of the age limit of 12 years combined with the mere possibility of hearing younger children already suffices to meet the standard of Article 12 of the CRC.

3.2.2. *How and by whom is the hearing performed?*

3.2.2.1. *Overview*

The second point, the question of who hears the child, is also interesting. In some countries, it is highly valued that the hearing is conducted directly by the judge, while in other countries this very modality is seen as problematic.

The underlying ideas about judges and their areas of responsibility are vividly illustrated in the novel *The Children Act* by *Ian McEwan*. It deals with the question of whether a judge should personally speak to a 17-year-old. This 17-year-old, Adam, is refusing for religious reasons medical treatment for cancer that might save his life.

Adam clearly has a right to be heard. But in English law, and as described in the novel, it is by no means a matter of course for the judge to speak to the young adult him- or herself. The novel also describes how upset the judge is by the personal encounter. Whether it is the direct conversation with Adam that enables her to make the right decision, or whether it takes away all objectivity, is a question that readers may answer differently.

With regard to the person designated to hear the child, Article 12 of the CRC states no preferences. The hearing is to be performed "either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law".

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[27] BRUNING M., SCHRAMA W., *The Netherlands*, cit., p. 240; ROCHA RIBEIRO G., *Portugal*, in CARPANETO L., MAOLI, F. (eds), *Children's right to information in EU civil actions*, Pisa, 2021, p. 233, 248 ff. with an analysis of Portuguese case law; VAN HOF T., BRUIJNEN L., LEMBRECHTS S., *Belgium*, in CARPANETO L., MAOLI, F. (eds), *Children's right to information in EU civil actions*, Pisa, 2021, p. 53, 79 f.

3.2.2.2. *Guardian ad litem*

Before addressing some of the methods for conducting a hearing that are provided in the legal systems of the Member States, a brief side-note seems useful. In most states, in addition to or instead of a hearing by a judge, there is another way of safeguarding the rights of the child in family proceedings and of including its views. Generally speaking, it is often the task of a specially appointed person, such as a guardian ad litem, a child's lawyer, or a type of public prosecutor,[28] to ensure that the child's rights and its best interests are guaranteed. The tasks of this person may overlap with the task of hearing the child. However, this is by no means always the case: Frequently, these "child advocates" are supposed to take a more objective view of the child's situation and act accordingly instead of representing the child's subjective views.[29] For the purposes of this analysis, one should, therefore, distinguish between the hearing of the child and the appointment of a guardian ad litem. Only where the child's advocate is specifically charged with the hearing of the child will this person be included in the following considerations.

3.2.2.3. *Different ways of communication with the child*

When looking at by whom and how the hearing is performed, one can again see significant differences within the EU. Systems in which the child is heard directly by the judge are for example Italy, Belgium and the Netherlands. In Germany, too, a judge will always meet the child in person. This may surprise, because the children who are heard in court can be extremely young: As previously mentioned, a German judge must personally see a child involved in family proceedings regardless of its age, § 159 para. 1 of the German FamFG.[30] Consequently, judges will visit infants in their home and

[28] E.g. in Greece, see Judgment of the Court (Sixth Chamber) of 19 April 2018, Saponaro v Xylina, Case C-565/16, para. 8 f.; as described here, the prosecutor even has the quality of a party to the proceedings.

[29] Mol C., *Child Participation in Family Law Proceedings Compared*, cit., p. 341 ff.

[30] Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (https://www.gesetze-im-internet.de/englisch_famfg/englisch_famfg.html).

they will invite children to the court and involve them in a conversation as soon as they are able to communicate verbally.

At first glance, this may seem shocking, as family court judges have only a legal education – and they often only work in the family court for an interim period in their careers, which means that their level of experience may be rather limited. In response to ongoing demands from the legal profession,[31] a new provision has been included in § 23b para. 3 of the GVG[32], which stipulates that "Family court judges must have proven knowledge in the fields of family law, particularly the law on parent and child matters, procedural law in family matters and the parts of the law on child and youth welfare services required for proceedings in family matters, as well as proven basic knowledge of psychology, particularly child development psychology, and communication with children".[33] Belgian law has similar requirements, although younger children are rarely heard there.[34] However, doubts remain as to whether the judges might not often base their decisions too much on their own essentially lay assessment rather than on the expert opinions.

Many European countries, such as Sweden,[35] take a fundamentally different approach and leave the hearing of children to a person specifically qualified to work with them. The details differ and it is

[31] LIES-BENACHIB G., *Generalisten vs. Spezialisten*, in *Zeitschrift für das gesamte Familienrecht*, 2019, p. 427; KINDERRECHTEKOMMISSION DES DEUTSCHEN FAMILIENGERICHTSTAGES E.V., *Die Richterschaft in der Familiengerichtsbarkeit – Plädoyer für eine Qualitätsoffensive*, in *Zeitschrift für das gesamte Familienrecht*, 2018, p. 666.

[32] Courts Constitution Act (https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html); the provision was introduced on 1 January 2022.

[33] A judge who has no proven knowledge in these fields may be assigned the tasks of a family judge only if it is anticipated that he or she will acquire this knowledge in the very near future. On the availability of training programs and the actual levels of participation in Germany, VEIT B., *Qualifikationsanforderungen für Familienrichter*, in *Zeitschrift für das gesamte Familienrecht*, 2024, p. 253.

[34] BOONE I., DECLERCK C., VERTOMMEN E., *Belgium*, cit., p. 111.

[35] KALDAL A., *Children's Participation in Legal Proceedings – Conditioned by Adult Views of Children's Capacity and Credibility?*, in ADAMI R., KALDAL A., ASPÁN M. (eds), *The Rights of the Child*, Leiden, 2023, p. 61, 64 ff.

partly at the discretion of the judge whether and how the hearing is conducted in individual cases.[36]

A third way of ensuring that the child's voice is heard and its views are ascertained is through reports that can be requested by the judge. In Ireland, for example, it is possible to obtain a "Voice of the Child Report" in addition to the "Child Welfare Report" which is specifically intended to guarantee the right to be heard.[37]

3.3. *Concluding remarks*

Finally, the reasons that might lead to the very different ways of hearing the child shall briefly be considered. It can be assumed that none of the EU Member States is of the opinion that the best interests of the child are unimportant. Rather, it seems that only the function of the hearing is understood differently. On the one hand, the purpose of the hearing seems to go beyond merely granting the child's fundamental right to be heard in some Member States. And on the other hand, the function of granting the fundamental right itself appears to be perceived differently.

3.3.1. *Taking evidence*

If we first look at the possible additional purposes of the hearing, it may also serve the gathering of evidence, so that the court can rely on a sufficient basis for its decision. The taking of evidence is subject to the rules of national procedural law. In Germany, for example, the principle of direct taking of evidence generally applies – meaning that judges themselves must obtain a direct impression of all evidentiary material. Even if this principle only applies to a limited extent in proceedings on parental responsibility, it is likely to have strongly

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[36] For example, REŠETAR B., LUZIĆ N., *Croatia*, in SCHRAMA W., FREEMAN M., TAYLOR N., BRUNING M. (eds), *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 143, 149; for an overview, *Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment, Final Report – Analytical annexes*, Luxemburg, 2015, p. 48 f.

[37] https://revisedacts.lawreform.ie/eli/1964/act/7/revised/en/html#SEC32.

influenced the German rules on judges hearing even very small children in person. To give a particularly striking example of a completely different approach to taking evidence, it suffices to refer to the Anglo-American system. In the US and also in England, family proceedings are usually still characterised by an adversarial approach where witnesses are questioned by the lawyers – who will try to corner them. This may indeed be frightening and detrimental for a child. Consequently, the child's hearing and the gathering of evidence should not be mixed. In some states in the US, there is now an in-camera procedure for hearing children in custody disputes, in which only the judge speaks to the child. The aim of these in-camera hearings is to grant the child's right to be heard without them having to endure the incriminating questioning as a witness.[38]

In anticipation of the following considerations on mutual trust, the different understandings of taking evidence as such seem less relevant: There is no risk of a breach of fundamental principles (which would prevent recognition) when the best interests or the will of the child are determined by experts instead of the judge.

3.3.2. *Different understanding of "granting" the right to be heard*

When it comes to guaranteeing the child's fundamental rights as a central function of the hearing, it can first be stated that it does not matter who hears the child. Article 12 of the CRC itself mentions the hearing by the judge as well as the hearing by a designated person; both methods are considered to be equally suitable to fulfil the child's right to be heard.

It is interesting, however, that the way in which the child is invited to the hearing also varies considerably from one Member State to another. This aspect raises many questions: Is it sufficient to inform the parents or their lawyer?[39] Or is it necessary to ensure that the

[38] ELROD L., *United States of America*, in SCHRAMA W., FREEMAN M., TAYLOR N., BRUNING M. (eds), *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 317, 322 ff.; California Family Code section 3042.

[39] In France, the child must actively request to be heard by the court, but the duty to inform the child about this possibility is assigned to the parents: Article 338-1 para. 1 of the French Code de procédure civile, MALLEVAEY B., *Children's Access to and Participation*

child itself is directly informed of the opportunity to express its opinion? Should the child receive the mere offer to be heard,[40] or should it be directly summoned to court? And might it be necessary to provide a real and low-threshold opportunity to participate in the hearing independently of the parents' involvement, for example through a mandatory appointment with the competent authority or by having a person come to the child's home?

The CRC does not provide a clear answer to these questions. In any case, the way in which the child is invited indicates a very different understanding of the hearing. If the hearing, as in Germany, is seen as an essential part of the evidence-gathering process because it allows an understanding of the child's feelings and needs, then the hearing is typically not just an option. But even if the hearing and the taking of evidence are not so closely linked, a mere invitation via the parents cannot automatically be sufficient to effectively guarantee the child's rights. At the very least, the child must be given the opportunity to exercise its right without the help and influence of the parents.

Another question is whether the child's right to be heard must be granted even if the child's wishes or even its objective situation has no influence on the outcome of the proceedings. This will very rarely be the case in proceedings on parental responsibility – but it could, for example, exceptionally occur if one parent is clearly incapable of raising the child. Divorce proceedings are a more striking example. In France, children are heard when their parents divorce.[41] When out-of-court divorces were introduced, if and how children could still be heard, was discussed as one of the major problems.[42] In many other countries, children are not heard in divorce proceedings be-

in the Family Justice System in France: Limits, Paradoxes and Recommendations, in PARÉ M., BRUNING M., MOREAU T., SIFFREIN-BLANC C. (eds), *Children's Access to Justice*, Cambridge, 2022, p. 71, 76 ff.

[40] This is the case in Belgium and the Netherlands, BOONE I., DECLERCK C., VERTOMMEN E., *Belgium*, cit., p. 109; BRUNING M., SCHRAMA W., *The Netherlands*, cit., p. 236 f.

[41] Article 229-2 of the Code civil, Article 1092 of the Code de procédure civile.

[42] FERRAND F., FRANCOZ-TERMINAL L., *Beträchtliche Neuigkeiten im französischen Familienrecht 2016–2017*, in *Zeitschrift für das gesamte Familienrecht*, 2017, p. 1456, 1457; Conseil Constitutionnel, decision number 2016-739 DC of 17 November 2016.

cause the views of the child are – from a legal perspective – irrelevant for the outcome: The views cannot have any influence on the decision that the court will take and the hearing is, therefore, seen as unnecessary.[43] Accordingly, no EU country seems to think that the lack of a hearing of the child could lead to the non-recognition of a divorce decision.[44] However, one could still ask whether the French position is the correct one. When the hearing also takes place in divorce proceedings it obviously has the mere – somewhat pure – purpose to offer the children the occasion to utter their thoughts and feelings in a matter that has to do with their lives. All in all, doubts prevail. A divorce, or any other problem in the private life of the parents, affects the child only indirectly. Where the child's views cannot have any influence in the proceedings, the right to be heard does not apply.

4. *Recognition and enforcement within the EU*

This article shall conclude with a closer look at the recognition of foreign court decisions. During the proceedings in the foreign Member State, the child was most likely heard in a different way than the one that is used in the state where the title is to be recognised. In such a case, the different procedural law cultures really clash.

4.1. *Interrelated provisions in the Brussels IIter Regulation: Articles 21 and 39 para. 2 of the Brussels IIter Regulation*

As mentioned above, the right of the child to express its views has been explicitly regulated in Article 21 para. 1 of the Brussels IIter Regulation. It contains the obligation of the Member States to ensure the right of the child to express its views in parental responsibility proceedings. Its wording is strongly modelled on Article 12 of the

[43] E.g. in Germany, the provisions on divorces in §§ 121 ff. of the FamFG do not require a hearing of a child.

[44] See also Articles 38 and 68 of the Brussels IIter Regulation on refusing the recognition of decisions and of authentic instruments and agreements in matrimonial matters: in contrast to matters of parental responsibility, the absence of a hearing of the child is not named as a valid ground for non-recognition.

CRC. Article 21 of the Brussels IIter Regulation also refers to the child's ability to form its own opinion, and the provision does not specify how the child should be heard. Instead, it mentions both direct and indirect hearings and leaves the details to national legislation.[45] The only new aspect compared to Article 12 of the CRC is the addition that the opportunity for the child to express its opinion must be "genuine and effective".

Only the second paragraph then regulates, in a somewhat restrained manner, the necessity of taking the child's will into account, by saying "where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity." This second aspect of the child's right to be heard should actually be self-evident. This is not only because the right to be heard would otherwise be an empty shell. In fact, as shown, the views of the child even constitute an important aspect of the best interests of the child.

Article 21 of the Brussels IIter Regulation in itself is formulated without exception and requires the hearing of every child "who is capable of forming his or her own views". As has be shown in the context of Article 12 of the CRC, this capability is usually given at a very early age.[46] However, the regulation is subject to restrictions if it is considered in connection with Article 39 para. 2 of the Brussels IIter Regulation. Article 39 concerns the recognition of non-privileged decisions on parental responsibility.[47] Under the established system of the Brussels II Regulations, such Member State decisions are automatically recognised within the EU and under the Brussels IIter Regulation, they are now also enforceable without the need for a declaration of enforceability.[48] However, recognition or

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[45] Recital 39 of the Brussels IIter Regulation; GARBER T., *Article 21*, in MAGNUS U., MANKOWSKI P. (eds), *European Commentaries on Private International Law, Volume IV, Brussels IIter Regulation*, Köln, 2023, p. 310.

[46] EUROPEAN COMMISSION, *Practice Guide for the application of the Brussels IIb Regulation*, Luxemburg, 2022, p. 191; GARBER T., *Article 21*, cit., p. 311.

[47] Privileged decisions are decisions on access rights and custody decisions of the state of origin in abduction cases, Article 42 of the Brussels IIter Regulation; more on the latter under 4.3.2.3.

[48] Articles 30, 34 of the Brussels IIter Regulation.

enforcement may still be refused for the reasons listed in Article 39 of the Brussels IIter Regulation. Article 39 para. 2 specifically mentions as one such ground the failure to hear the child in the Member State of origin contrary to the requirements of Article 21 of the Brussels IIter Regulation. However, it also clarifies that based on this ground, recognition cannot be refused if the proceedings only concerned the property of the child. The same applies if the hearing was omitted due to serious grounds, whereby the urgency of the case is given as an example. It is worth noting that Recital 39 of the Brussels IIter Regulation additionally mentions a far more general restriction to the obligation of hearing the child by saying that "hearing the child cannot constitute an absolute obligation, but must be assessed taking into account the best interests of the child, for example, in cases involving agreements between the parties." Although this is not mirrored in the provisions themselves, it seems self-evident. However, it is crucial to interpret this as a narrow exception for extreme cases.[49]

Finally, it is interesting to mention that the wording of Article 39 of the Brussels IIter Regulation leaves the refusal of recognition to the discretion of the court: The recognition "may be refused". However, when deciding on non-recognition, it must be taken into account that the hearing is a fundamental right of the child – guaranteed not only by the CRC but also by the CFREU. In case of a clear violation of the right to be heard, for example because an older child had no right to express its opinion in a matter concerning it, the margin of discretion must therefore be "reduced to zero". In other words, the decision must then not be recognised and enforced. Otherwise, the recognition itself would violate Article 24 para. 1 of the CFREU.

4.2. *Low but explicit standard as improvement*

Overall, these new, more specific provisions on hearing children and taking their views into account in Article 21 and Article 39 para. 2 of the Brussels IIter Regulation can be seen as progress. This is

[49] GARBER T., *Article 21*, cit., p. 312, therefore speaks of the child's best interests as a further ground for omitting the hearing.

true even though it must be conceded that, from a German perspective, they represent a lowering rather than a raising of the standard for hearing children. However, in the system of the former Brussels IIbis Regulation[50], the strict requirements of the German law, with the mandatory hearing of even very young children, and always by the judge in person, had often led to problems with the recognition of decisions from other Member States. Under the Brussels IIbis Regulation, a common autonomous standard for the hearing had still been missing. Instead, Article 23 lit. b) of the Brussels IIbis Regulation only very openly stipulated that recognition could be refused if the failure to hear the child constituted a "violation of fundamental principles of procedure of the Member State in which recognition is sought". Since these "fundamental principles" were sometimes understood very broadly by the German courts, the recognition of decisions from other Member States with less strict requirements was frequently refused.[51] The fact that mere differences in the conduct of the hearing could therefore in themselves lead to the non-recognition of foreign judgments was a considerable obstacle to the mobility of family law titles. At the same time, however, it must be recognised that in some Member States there were serious deficits regarding the hearing of the child, which constituted a violation of the child's fundamental rights.[52] The primary aim of Article 21 of the Brussels IIter Regulation, therefore, was to eliminate such genuine weaknesses in the protection of children's fundamental rights.

[50] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in OJ L 338, 23.12.2003, p. 1.

[51] E.g. OLG Saarbrücken, Beschluss v. 18.12.2023 – 6 UF 115/23, BeckRS 2023, 42067 (lack of hearing of 9- and 11-year-old children); OLG Stuttgart, Beschluss v. 15.10.2020 – 15 UF 8/20, in *Zeitschrift für das gesamte Familienrecht*, 2021, p. 783 concerning a 5 ½-year-old child; OLG München, Beschluss v. 20.10.2014 – 12 UF 1383/14, in *Zeitschrift für das gesamte Familienrecht*, 2015, p. 602; OLG Hamm, Beschluss v. 26.8.2014 – 11 UF 85/14, BeckRS 2016, 2189 (almost 7-year-old child); OLG Schleswig, Beschluss v. 19.5.2008 – 12 UF 203/07, in *Zeitschrift für das gesamte Familienrecht*, 2008, p. 1761 (6- and 10-year-old children).

[52] The Report from the Commission on the application of Council Regulation (EC) No 2201/2003 COM(2014) 225 final, p. 12 also cautiously mentions such deficits; both problems are identified in the proposal for the recast, COM(2016) 411 final, p. 5.

Thus, it is a consistent and correct development that the Brussels IIter Regulation now sets out its own requirements for the hearing of the child and the consideration of the child's wishes. These requirements are based on the fundamental rights in Article 24 para. 1 sentence 1 of the CFREU and Article 12 para. 1 of the CRC, which is also convincing. In particular the fact that the performance of the hearing directly by the judge is not required – and that this may therefore no longer be required for recognition[53] – must be assessed positively in view of the strong legal-cultural differences that exist at this point. With regard to the very openly formulated age limits in the standard, it is to be hoped that a sensible, not overly restrictive common approach will be found quickly. As shown above, the age limits in some Member States are currently quite high and compromises will have to be made. It would be advisable for the ECJ to follow the guidelines on Article 12 of the CRC that convincingly suggest to hear children from around five to six years of age.[54]

4.3. *Dealing with shortcomings in mutual trust*

4.3.1. *The right of the child to be heard*

Thinking further, one can ask whether even more mutual trust could be reached. In fact, it would have been consistent within the system of EU recognition law not to regard the lack of a hearing as a ground for refusal of recognition. The ECJ has repeatedly stated that non-compliance with provisions contained in EU law itself cannot lead to a decision not being recognised in another Member State.[55] Since Article 21 of the Brussels IIter Regulation itself stipulates for all Member States when and how the child must be heard,

[53] Recital 57 of the Brussels IIter Regulation explicitly mentions that the recognition must not be refused solely because the child was heard in a different way than it would have been heard in the Member State of recognition.

[54] https://www.unicef.ch/sites/default/files/2018-08/brosch_kindesanhoerung_leitfaden_de.pdf.

[55] Judgment of the Court (First Chamber) of 16 July 2015, Diageo Brands v Simiramida, Case C-681/13, para. 49, m. Anm. SCHULZE G., in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2016, p. 234; Judgment of the Court (First Chamber) of 16 January 2019, Liberato v Grigorescu, Case C-386/17, para. 54.

mutual trust should be applied regarding the adherence to this common standard. In other words, it should be assumed without any "control" that Member States comply with this requirement and do not violate the child's fundamental right to be heard. Actually, during the reform of the Brussels IIbis Regulation the abolition of this ground for non-recognition had been planned. Even the EU Parliament had considered this appropriate.[56] Nonetheless, the preliminary plans were not realised.

The compromise now found in Articles 21 and 39 of the Brussels IIter Regulation clearly shows that mutual trust currently exists only to a limited extent. If a foreign court does not hear the child in non-privileged decisions contrary to Article 21 of the Brussels IIter Regulation, at least a certain degree of control is still considered necessary.[57] Even if the result is somewhat disappointing, it is comprehensible. As seen, the fundamental right to be heard is still understood quite differently within the EU. At the same time, decisions on parental responsibility do often have great significance for the child.

Therefore, the now found comprise seems convincing. It secures that the Member State where recognition is invoked is not forced to tolerate any violation of the fundamental right of the child but can refuse recognition and enforcement. On the other hand, the requirements for recognition must not be excessive. The way in which the hearing is performed cannot build a ground for refusal.

Overall, the new regulation is therefore rightly seen as mostly positive.[58] However, the child's fundamental right to be heard will

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[56] Report of 30.11.2017 on the proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction (recast) (COM(2016)0411 – C8-0322/2016 – 2016/0190(CNS)) A8-0388/2017; on the other hand, the EU Parliament demanded that the rules on the hearing should be much more specific, see amendment proposal No. 44 concerning Article 20, p. 28.

[57] However, the situation is different regarding privileged decisions. Even if a certificate issued for such a decision incorrectly confirms that the child has been heard, the enforcing state may not refuse enforcement for this reason. This happened, for example, in the famous case *Aguirre Zarraga*, Judgment of the Court (First Chamber) of 22 December 2010, Aguirre Zarraga v Pelz, Case C-491/10 PPU; hereon EßLINGER S., *Gegenseitiges Vertrauen*, Tübingen, 2018, p. 10 ff.

[58] WELLER M.-P., *Die Reform der EuEheVO*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2017, p. 222, 227; BÖHM D., *Das Recht des Kindes auf Meinungsäußerung (Art 21 Brüssel IIb-VO)*, in GARBER T., LUGANI K. (eds), *Die Brüssel IIb-VO*, Wien,

be sufficiently safeguarded only when, as already mentioned, standardised guidelines emerge from the currently still vague Article 21 of the Brussels IIter Regulation. Only then will recognition and enforcement within the EU no longer fail due to its violation. By the time the regulation is further reformed, mutual trust could perhaps have grown sufficiently to dispense with checks on recognition altogether.

4.3.2. *The best interests of the child in the enforcement of foreign judgments*

4.3.2.1. *Recognition by law and very limited grounds for non-recognition*

The existing tension between mutual trust and the protection of children's rights is also evident when one finally looks again at the importance of the best interests of the child in the context of recognition and enforcement. The principle of recognition by operation of law of course also applies in this regard. There is no review of the substance of the foreign judgment. It is totally irrelevant and no valid ground for non-recognition if the courts of the state where recognition is invoked consider another solution to be better for the child.

This follows from Article 39 para. 1 lit. a) of the Brussels IIter Regulation, which states that recognition may only be refused if the recognition would be manifestly contrary to the public policy of the Member State in which recognition is invoked. In this respect, the requirements are high.[59] A substantively different assessment of the best interests of the child is not sufficient. Rather, an unacceptable infringement of fundamental principles would only be reached if the

2022, para. 9/29; ANTOMO J., *Die Neufassung der Brüssel IIa-Verordnung – erfolgte Änderungen und verbleibender Reformbedarf*, in: PFEIFFER T., LOBACH, Q., RAPP, T. (eds), *Europäisches Familien- und Erbrecht*, Baden-Baden, 2020, p. 13, 42; CARPANETO L., *Impact of the Best Interests of the Child on the Brussels II ter Regulation*, in BERGAMINI E., RAGNI C. (eds*), Fundamental Rights and Best Interests of the Child in Transnational Families*, Cambridge, 2019, p. 265.

[59] Judgment of the Court (Fourth Chamber) of 19 November 2015, P v Q, Case C-455/15 PPU, para. 35 ff. on the need for a strict interpretation of the grounds for non-recognition.

individual best interests of the child had not been the subject of the decision in the state of origin at all, and the courts had decided according to purely abstract, schematic criteria.[60]

4.3.2.2. *Article 56 para. 6 of the Brussels IIter Regulation as an additional instrument of "national" child protection*

If a foreign judgment has to be enforced, things become more complicated. The Brussels IIter Regulation aims at ensuring that this enforcement does not result in a *new* grave risk to the best interests of the child. The question of whether there is sufficient trust in the foreign court to have safeguarded the legal position of the child is only a side aspect here. The core issue rather is that the executing state itself must not act contrary to the best interests of the child. Article 56 para. 6 of the Brussels IIter Regulation therefore allows the courts to finally refuse enforcement of foreign decisions in certain exceptional cases.

However, a more thorough look reveals that the requirements for the refusal of enforcement are remarkably high. First and foremost, Article 56 para. 6 of the Brussels IIter Regulation can only apply if changes have occurred *after* the foreign judgment was issued. This is a direct consequence of the principle of mutual trust. In addition, enforcement must entail a grave risk of physical or psychological harm to the child due to these new circumstances.[61] Finally, the grave risk under Article 56 para. 6 of the Brussels IIter Regulation must be of a permanent nature – otherwise only a temporary suspension of enforcement under para. 4 is possible.[62] These strict requirements show that the foreign title is typically considered "inescapable"

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[60] HAUSMANN R., *Internationales und Europäisches Familienrecht*, München, 2024, N Rn. 143 ff.; HEIDERHOFF B., *Art. 39 Brüssel IIb-VO*, in SÄCKER F., RIXECKER R., OETKER H., LIMPERG B. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, München, 2024, Rn. 4 ff.

[61] GONZÁLEZ BEILFUSS C., *Article 56*, in GONZÁLEZ BEILFUSS C., CARPANETO L., KRUGER T., PRETELLI I., ŽUPAN M. (eds), *Jurisdiction, Recognition and enforcement in matrimonial and parental responsibility matters*, Cheltenham, 2023, p. 467 f. on the need for a narrow interpretation; EUROPEAN COMMISSION, *Practice Guide for the application of the Brussels IIb Regulation*, cit., p. 164 f. provides some examples.

[62] GONZÁLEZ BEILFUSS C., *Article 56*, cit., p. 468; according to para. 5, the court should primarily consider appropriate measures to avert the danger.

even during the enforcement process. It is important for the functioning of the principle of mutual *recognition* in an "area of Freedom, Security and Justice" that Article 56 para. 6 of the Brussels IIter Regulation is understood very narrowly.

4.3.2.3. *Article 56 para. 6 and hearing the child – a loophole in child abduction cases?*

The need for restraint in the application of Article 56 of the Brussels IIter Regulation becomes particularly clear when considering its potential impact in child abduction cases. How to deal with cases of international child abduction is first and foremost governed by the Hague Child Abduction Convention[63]. When one parent has wrongfully removed the child to another country than the country of its habitual residence, the other parent may apply for a return order in the state of removal or retention. The special feature of such child return proceedings under the Hague Child Abduction Convention is that the child is to be returned to the country of origin quickly. For this reason, the assessment of the child's best interests is greatly shortened – the return order does not depend on whether it is in the best interests of the child to return.[64] Only after the child has been returned, the courts in the country of origin should thoroughly decide which parent the child should live with permanently.

Even within these shortened proceedings, the child must still be heard. Leaving aside Article 12 of the CRC and and Article 26 of the Brussels IIter Regulation, this is already the case because according to Article 13 para. 2 of the Hague Child Abduction Convention the return order may be refused if the child objects to being returned.

Coming back to Article 56 para. 6 of the Brussels IIter Regulation, it must be noted that the operation of this provision during child ab-

[63] Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[64] This is clear from the narrow grounds on which the return of the child can be refused. If the return proceedings have commenced within one year after the removal, the return may essentially only be denied if there is a grave risk of serious harm to the child or if a sufficiently mature child strongly objects the return, see Articles 12 et seq of the Hague Child Abduction Convention.

duction cases is complicated. In the primary return proceedings under the Hague Child Abduction Convention, the provision rarely becomes relevant because the return of the child is usually ordered and enforced in the country to which the child was abducted.[65]

However, the Brussels IIter Regulation refines the system for abductions between Member States and makes some additions to the system of the Hague Child Abduction Convention.[66] It particularly provides for the possibility of a second application for the return of the child in the state of origin after the state of removal has refused the return under the Convention for certain reasons. This peculiar possibility of an "overriding" return order issued at a later stage is regulated in Article 29 para. 6 of the Brussels IIter Regulation. It is an improved version of the much criticised Article 11 para. 8 of the Brussels IIbis Regulation.[67] If this return order under Article 29 para. 6 of the Brussels IIter Regulation is issued, it must be enforced in the state to which the child has been abducted and where it is living now. This "Article 29 para. 6 type" of return order falls in the category of privileged decisions under Articles 42 et seq of the Brussels IIter Regulation.

Under the Brussels IIbis Regulation, there were no exceptions for the enforcement of such a privileged decision. Enforcement could not even be refused if the certificate of enforcement was issued wrongly.[68] It might, in particular, have confirmed that the child was heard, even though this did not happen.

Similarly, under Article 47 of the Brussels IIter Regulation, the state of origin must issue the certificate for the privileged return decision only if the child has had an opportunity to express its views.

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[65] If, exceptionally, the enforcement must happen in a third Member State (because the child has once again moved to another state), the Brussels IIter Regulation is applicable under Article 2 para. 1 lit. a) of the Brussels IIter Regulation.

[66] On the interplay, e.g. Deuschl H., *Kindesentführungen: Das Zusammenspiel HKÜ und VO 2019/1111*, in *Neue Zeitschrift für Familienrecht*, 2021, p. 149; Lusznat L., *The Brussels IIb Regulation*, in *Journal of Private International Law*, 2024, p. 129, 144 ff.

[67] See for detail Kruger T., Carpaneto L., Maoli F., Lembrechts S., van Hof T., Sciaccaluga G., *Current-day international child abduction: does Brussels IIb live up to the challenges?*, in *Journal of Private International Law*, 2022, p. 159, 174 ff.

[68] Judgment of the Court (First Chamber) of 22 December 2010, Aguirre Zarraga v Pelz, Case C-491/10 PPU.

If such a certificate is issued, the country of refuge will still be prevented from checking whether the child indeed had that opportunity and from examining the above-mentioned grounds for non-recognition. But the previous lack of any means of control at the enforcement stage is now mitigated by Article 56 para. 6 of the Brussels IIter Regulation. According to this provision, the enforcement of the privileged return order may be refused if it would entail serious risks for the child. However, as has been shown, this only applies if this risk is caused by circumstances arising after the judgment to be enforced was issued. Such a newly arisen risk can be assumed if the child emphatically opposes return for the first time in the course of the enforcement proceedings.[69]

Under the Brussels IIter Regulation, it is now questionable how to deal with the case that the child was not heard in the original proceedings and the certificate was nevertheless issued.[70] Unfortunately, this might not be a theoretical scenario.[71] After all, the child has been abducted from the state where the overriding return decision was issued and a hearing will often be difficult or even impossible due to its absence. The temptation to issue the certificate nonetheless may be high, and judges may not even realise the lapse. In such a case, one might be enticed to simply say: When the child expresses its objections during the enforcement for the first time, these are always new. However, the proceedings under Article 29 para. 6 of the Brussels IIter Regulation are a follow-up to the return proceedings under the Hague Child Abduction Convention in the state to which the child was abducted. If the child has been heard during these original

[69] See Recital 69 which expressly mentions this group of cases, for detail KRUGER T., CARPANETO L., MAOLI F., LEMBRECHTS S., VAN HOF T., SCIACCALUGA G., *Current-day international child abduction: does Brussels IIb live up to the challenges?*, cit., p. 184.

[70] Critical for example GRUBER U., MÖLLER L., *Die Neufassung der EuEheVO*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2020, p. 393, 398; BROSCH M., *Die Neufassung der Brüssel IIa-Verordnung*, in *Zeitschrift für das Privatrecht der Europäischen Union*, 2020, p. 179, 187; NADEMLEINSKY M., *Internationale Kindesentführung unter der Brüssel IIb-VO*, in GARBER T., LUGANI K. (eds), *Die Brüssel IIb-VO*, Wien, 2022, para. 10/70.

[71] BEAUMONT P., WALKER L., HOLLIDAY J., *Conflicts of EU courts on child abduction: the reality of Article 11(6)-(8) Brussels IIa proceedings across the EU*, in *Journal of Private International Law*, 2016, p. 211, 234 f.

return proceedings, and has already objected against the return, Article 56 para. 6 of the Brussels IIter Regulation can hardly be applied. In other words, the decision ordering the return must be enforced despite the child's (continued) refusal.

This result may sometimes be frustrating, but under the Brussels IIter Regulation, the decision of the court in the country of origin prevails. One could draw a somewhat pessimistic conclusion by saying that the principle of recognition by law and of mutual trust wins over the right of the child to be heard. However, the contrary perspective is maybe more correct: Even where parents fight irreconcilably, court proceedings must come to an end at some point.[72]

Giving the last word to the country of origin is a valid decision, and the swift enforcement should be the normal outcome. No matter which perspective one follows, there definitely is a difference between privileged and non-privileged decisions. Only for privileged decisions, the Brussels IIter Regulation demands "full mutual trust" – and Article 56 para. 6 of the Brussels IIter Regulation must not be used as a loophole.

4.3.3. *Restrictive application in practice is key*

How the standards in Articles 39 and 56 of the Brussels IIter Regulation are interpreted by the ECJ and by the Member States has great influence on the child's best interests. The swift and reliable enforcement of national decisions on parental responsibility is generally in the best interests of the child. As long as full mutual trust has not been reached, any exceptions to recognition and enforcement should be handled with utmost restriction.[73]

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[72] González Beilfuss C., *What's New in Regulation (EU) No 2019/1111?*, in *Yearbook of Private International Law*, Vol. 22 (2020/2021), p. 95, 113.

[73] This accounts even more for Article 57 of the Brussels IIter Regulation which (cautiously) allows recourse to grounds provided for by Member State law; see for examples recital 63. In German law, § 44b para. 1 of the IntFamRVG completely excludes the application of this provision, Klinkhammer F., *Das Durchführungsgesetz zur Brüssel IIb-VO*, in *Zeitschrift für das gesamte Familienrecht*, 2022, p. 325, 328.

4.4. *Improving mutual trust in small steps*

Mutual trust and an area of freedom, security and justice cannot be created simply by installing European regulations on jurisdiction, recognition and enforcement. On the contrary, trust must develop continuously.

How mistrust can be diminished can be seen quite clearly at the example of the hearing of children. Simply achieving more understanding for different practices by taking a closer look at other legal systems will be a helpful first step. Article 21 of the Brussels IIter Regulation shows how the legislator can help with improving trust. By introducing common but not too high standards for the hearing, gradually, a more unified practice will emerge.[74] This effectively improves the fundamental right of the child to be heard. The necessary counterpart is Article 39 of the Brussels IIter Regulation, which allows the refusal of recognition if the child's right to be heard has been violated.

The really difficult question is how to proceed if EU law – as is the case for privileged decisions under Articles 42 et seq of the Brussels IIter Regulation – is based on full mutual trust. How should one proceed if the privileged decision violates the fundamental rights of the child? It is questionable whether – as the ECJ recently ruled for non-privileged decisions outside of family law[75] – the protection of fundamental rights still takes precedence over recognition. In such cases, mutual trust means that the protection of individual rights remains in the responsibility of the Member State of origin.

[74] EUROPEAN COMMISSION, *Practice Guide for the application of the Brussels IIb Regulation*, cit., p. 195: Some Member States used the Regulation as an impulse to reform their national law by repealing existing age limits (for example Estonia).

[75] Judgment of the Court (Grand Chamber) of 4 October 2024, Real Madrid Club de Fútbol, Case C-633/22.

THE CONSTRUCTION OF A LIMPING PARTY AUTONOMY IN THE BRUSSELS I BIS REGULATION

Ilaria Queirolo, Stefano Dominelli*

1. *Introduction*

There is little doubt as per the importance party autonomy in its broader sense[1] has acquired in many legal systems and in different fields. It is from such *private autonomy*[2], understood as the possibility for people to freely determine multiple aspects of their own lives, that *party autonomy* is generally derived from. Along this, *party autonomy in conflict of laws*[3] is further juxtaposed, rather than being

* For academic purposes only, paras. 1, and 2 are attributed to Ilaria Queirolo; paras. 3, and 4 to Stefano Dominelli.

[1] See, in EU law, J.D. LÜTTRINGHAUS, *Vertragsfreiheit und ihre Materialisierung im Europäischen Binnenmarkt. Die Verbürgung und Materialisierung unionaler Vertragsfreiheit im Zusammenspiel von EU-Privatrecht, BGB und ZPO*, Tübingen, 2018.

[2] On the distinction, as well as on the philosophical and economical foundations, see J. BASEDOW, *EU Private Law. Anatomy of a Growing Legal Order*, Cambridge, 2021, p. 406 ff.

[3] On the principle of self-determination as founding principle for party autonomy in private international law, cf K. KROLL-LUDWIGS, *Die Rolle der Parteiautonomie im europäischen Kollisionsrecht*, Tübingen, 2013, p. 148.

simply considered a derivation of the former[4]. An autonomy that, as noted by scholars, intervenes, when wisely used together with comparative law expertise, to settle a structural inadequacy of both the international legal order and domestic systems to mould legal consequences the parties seek to obtain in various jurisdiction, also in light of their economic interests[5]. Not only: party autonomy, and its

[4] Whereas it has been argued in the past that party autonomy in private international law, i.e. the possibility of choosing the applicable law to a given relationship, was allowed by – and to be exercised within the limits of – the given applicable law, such conclusion does no longer seem to be the correct one under EU law. Under the Rome I Regulation (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), for example, provides under art. 3 the possibility for the parties to choose the applicable law. Such a choice does not meet further requirements according to which the choice of a foreign law should also be admitted either by the "natural" *lex causae* or by the chosen law. Furthermore, where it is the Rome I Regulation that limits party autonomy, as in the case of insurance contracts (on art. 7(3), see S. DOMINELLI, *Party Autonomy and Insurance Contracts in Private International Law: A European Gordian Knot*, Roma, 2016, p. 361 ff, and ID, *Article 7(3) Rome I Regulation and the Law Applicable to Non-Life Mass Risk Insurance Contracts: A Critical Appraisal*, in M. WAŁACHOWSKA, M. FRAS, P. MARANO (eds), *Insurance in Private International Law. Insurance and Reinsurance in Private International Law, Jurisdiction and Applicable Law*, Cham, 2024, p. 63 ff), the Rome I Regulation also may admit a possibly greater party autonomy provided for in the law that has been chosen by the parties under a limited *optio legis*. This seems to show not only that party autonomy in conflict of laws is promoted under EU law, but that such autonomy is not conceived as being dependant from contractual party autonomy – even though, of course, there is a clear symbiotic functionalism between the two. In the scholarship, in the sense that *optio legis* is not functional to the expression of party autonomy, but is party autonomy itself, see K. KROLL-LUDWIGS, *Die Rolle der Parteiautonomie im europäischen Kollisionsrecht*, cit., p. 146 ('[d]*ie Rechtswahlerklaerung ist demnach nicht blosse Willensmitteilung, sondern Ausdruck des Willens*'). In general, on the relationships between contractual party autonomy and party autonomy in private international law, see S. LEIBLE, *Parteiutonomie im IPR – Allgemeines Anküpfungprinzip oder Verlegenheitslösung?*, in H.P. MANSEL, T. PFEIFFER, H. KRONKE, C. KOHLER, R. HAUSMANN (eds), *Festschrift für Erik Jayme*, München, 2004, p. 485 ff; J. BASEDOW, *The Law of Open Societies: Private Ordering and Public Regulation of International Relations (General Course on Private International Law)*, in *Recueil des cours*, Volume 360, p. 165 ff; S.M. CARBONE, *L'autonomia privata nei rapporti economici internazionali ed i suoi limiti*, in *Rivista di diritto internazionale privato e processuale,* 2007, p. 891 ff, and P. FRANZINA, *L'autonomia della volontà nel regolamento « Roma I » sulla legge applicabile ai contratti*, in I. QUEIROLO, A.M. BENEDETTI, L. CARPANETO (eds), *La tutela dei soggetti deboli tra diritto internazionale, dell'Unione europea e diritto interno*, Roma, 2012, p. 29, at p. 32 ff.

[5] S.M. CARBONE, *Opportunità e limiti dell'autonomia privata. Tra diritto comparato e D.I.P.*, in *Dialoghi con Guido Alpa*, Roma, 2018, p. 41, at p. 43 ('[L'autonomia interviene per comporre una] *inadeguatezza strutturale e operativa sia dell'ordinamento internazionale sia degli ordinamenti statali …* [per] *adottare, tenendo conto della effettiva concretezza dei problemi relativi ad ogni specifica operazione economica, le possibili soluzioni*

limits, becomes a benchmark to evaluate the democratic character of a legal system itself. Every limitation to party autonomy is perceived as being a limitation to the individual's possibility of self-determination, and – as such – should properly be justified[6].

Given this starting point, there is little surprise in the fact that European Union law promotes party autonomy in conflict of laws in those three fields[7] that are the core of judicial cooperation in civil and commercial matters, i.e. jurisdiction, applicable law, and – indirectly – recognition and enforcement of decisions between Member States[8]. It is in fact strongly believed that party autonomy can

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normative al riguardo praticabili in funzione degli obiettivi voluti dalle parti contraenti e degli effetti che essi intendono produrre nei vari ordinamenti …').

[6] H. KELSEN, *Reine Rechtslehre*, Wien, 1960, p. 285.

[7] P. FRANZINA, *Introduzione al diritto internazionale privato*, Torino, 2023, p. 7, also speaking of administrative cooperation between courts and authorities, for example in the field of taking of evidence and cross-border service of documents, on which see *amplius* F. POCAR, *L'assistenza giudiziaria internazionale in materia civile*, Padova, 1967.

[8] It would be a mistake to argue that parties also have *direct* party autonomy in matters of recognition and enforcement of decisions; still, some normative evolutions have had the effect of promoting party autonomy in this field as well. The 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) is, for now, the arriving point of a long legal evolution in matters of free movement of decisions which has witnessed a number of new rules. Traditionally, 'judgments', being the expression of the public power of a foreign State, have territorial effects. States have taken actions to promote different regional approaches to ensure continuity of a legal status lawfully acquired abroad. Such coordination has taken up the most diverse shapes, and – for the purposes of the present investigation – EU law has witnessed three different phases. At the beginning, with the 1968 Brussels Convention, the court requested of recognition and enforcement had to verify that no ground to refuse recognition and enforcement was given in the case at hand. With the adoption of the 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), the court requested of recognition had to carry out formality checks and eventually grant the necessary *exequatur* leaving to the parties the possibility to oppose recognition and enforcement (see art. 41). Lastly, with the Brussels I bis Regulation, decisions are immediately enforceable in all the European Union judicial space – the *exequatur* procedure being only a subsequent possibility. In other words, nowadays, a foreign decision that is against the public policy of the requested Member State could still be enforced if the interested party does not challenge the decision before national courts. On the role of party autonomy and free movement of decisions, see Z.S. TANG, *Jurisdiction and Arbitration Agreements in International Commercial Law*, New York, 2014, p. 224; D. SCHRAMM, *Enforcement and the Abolition of Exequatur under the 2012 Brussels I Regulation*, in *Yearbook of Private International Law*, 2013/2014, p. 143; C.E. TUO, *La rivalutazione della sentenza straniera nel regolamento Bruxelles I: tra divieti*

provide for great legal certainty both as per the competent court and the applicable law; a reason that has led to 'elevating' party autonomy – at least in contractual and tort matters – to the cornerstone of the system[9]. Yet, this is not always the case, and it has not been so at all times.

On the one side, party autonomy has witnessed an uneven evolution: if the principle is promoted in contracts and torts, the same does hold true in other fields. In cross-border family law matters, for example, a (limited) party autonomy is a recent result which still undergoes many limits[10]. Also, in insolvency matters party autonomy plays no role in the choice of the competent court or the applicable law[11]. On the other side, even within the same field, party autonomy has witnessed a different evolution: where national legal systems have for a time been open to the idea of domestic courts applying a foreign law, thus 'renouncing' to the application of the *lex fori*, States have shown resistances in admitting a derogation from national (adjudicatory) jurisdiction[12]. Still, neither of these

e reciproca fiducia, Padova, 2012; A.T. VON MEHREN, *Recognition and Enforcement of Foreign Judgments. General Theory and the Role of Jurisdictional Requirements*, in *Recueil des cours*, Volume 167, p. 13; R. MICHALES, *Recognition and Enforcement of Foreign Judgments*, in R. WOLFRUM (ed), *The Max Planck Encylopedia of Public International Law*, Oxford, 2012, VIII, p. 672; P.F. SCHLOSSER, *The Abolition of Exequatur Proceedings – Including Public Policy Review?*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, p. 101; P. BEAUMONT, E. JOHNSTON, *Abolition of the Exequatur in Brussels I: Is a Public Policy Defence Necessary for the Protection of Human Rights?*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, p. 105; ID, *Can Exequatur be Abolished in Brussels I Whilst Retaining a Public Policy Defence?*, in *Journal of Private International Law*, 2010, p. 249; P. OBERHAMMER, *The Abolition of Exequatur*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2010, p. 197; G. CUNIBERTI, I. RUEDA, *Abolition of Exequatur. Adressing the Commisions' Concerns*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2011, p. 286, and G. BIAGIONI, *L'abolizione dei motivi ostativi al riconoscimento e all'esecuzione nella proposta di revisione del Regolamento Bruxelles I*, in *Rivista di diritto internazionale privato e processuale*, 2011, p. 971.

[9] Rome I Regulation, recital 11.

[10] *Ex multis*, C. KOHLER, *Anmerkungen zur Parteiautonomie im internationalen Familien- und Erbrecht*, in M. GEBAUER, H.-P. MANSEL, G. SCHULZE (eds), *Die Person im Internationalen Privatrecht. Liber Amicorum Erik Jayme*, Tübingen, 2019, p. 9 ff, and L. CARPANETO, *Autonomia privata e relazioni familiari nel diritto dell'Unione europea*, Roma, 2020.

[11] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), in OJ L 141, 5.6.2015, p. 19.

[12] Cf L. MARI, I. PRETELLI, *Possibility and Terms for Applying the Brussels I Regulation (Recast) to Extra-EU Disputes: Excerpta of the Study PE 493.024 by the Swiss Institute of*

circumstances surprise: saying that party autonomy becomes a benchmark to evaluate the democratic nature of a legal system also means that party autonomy becomes a focal lens to understand how a legal system conceptualises itself, for example in terms of its own function and its own jurisdiction.

With specific reference to the last distinction, party autonomy in choice of law and in choice of court, albeit the two of them should remain separate[13] in light of the different goals they may pursue and for the possible different degree of evolution they have[14], clearly have a symbiotic nature and function. In theory, choice of court agreements could be concluded mainly to escape the applicable law, thus following patterns close to *fraud legis*[15].

Comparative Law, in *Yearbook of Private International Law*, 2013/2014, p. 211 (writing that '[w]*hilst on the application of foreign laws – at least in the field of contractual obligations – (continental) States were traditionally more open, already used to deal with the ius commune and the lex mercatoria in the post roman era, international jurisdiction* […] *was still regarded as deeply connected with State sovereignty* […]'). Italian law was also along the same lines: under the preliminary dispositions to the civil code (rules that are now repealed under the 1995 Private International Law Act), Italian courts could have applied the law of foreign common nationality between the parties (art. 25(1) preleggi), but the parties were not allowed to derogate Italian jurisdiction unless few and well-identified cases were at stake (according to art. 2 c.p.c. [code of civil procedure], now repealed, '[la] *giurisdizione italiana non può essere convenzionalmente derogata a favore di una giurisdizione straniera, né di arbitri che pronuncino all'estero, salvo che si tratti di causa relativa ad obbligazioni tra stranieri o tra uno straniero e un cittadino non residente né domiciliato nella Repubblica e la deroga risulti da atto scritto*').

[13] P. Franzina, *L'autonomia della volontà nel regolamento « Roma I » sulla legge applicabile ai contratti*, cit., p. 33.

[14] As example, one could think of the different role party autonomy still has in Italy in legal separation and divorce. Parties are not allowed to derogate Italian jurisdiction or to conclude a choice of court agreement. On the contrary, parties are – with limits – allowed to concluded an *optio legis* under the Rome III Regulation (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, p. 10), and under the Brussels II ter Regulation are also allowed to take advantage of alternative rules on jurisdiction, and have a limited party autonomy in parental responsibility matters (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 L 178, 2.7.2019, p. 1, artt. 3 ff, and art. 10 on parental responsibility matters).

[15] See J. Basedow, *Exclusive Choice-of-Court Agreements as a Derogation from Imperative Norms*, in P. Lindskoug, U. Maunsbach, G. Millqvist (eds), *Essays in Honour of Michael Bogdan*, Lund, p. 15; M.M. Winkler, *Overriding Mandatory Provisions and Choice of Court Agreements*, in P. Mankowski (ed), *Research Handbook on the Brussels Ibis Regulation*, Cheltenham, 2020, p. 346; T. Szabados, *Overriding Mandatory*

It is within the context of this complex – and only briefly mentioned – framework that some recent decisions follow the path of strengthening party autonomy in international civil procedure under the Brussels I bis Regulation[16]. In the following pages, the *fil rouge* connecting these judgments will be reconstructed to determine to what extent these can contribute to the general theory of choice of court agreements. Furthermore, the case study will also seek to highlight that such empowerment of party autonomy via jurisdictional approaches leads to a limping situation either because single decisions, in pursuing this aim, might be at odds with traditional methodologies or because the further empowerment still knows no mechanism to avoid recognition and enforcement of decisions that have breached party autonomy.

2. *Entering an appearance without contesting jurisdiction: art. 26 Brussels I bis and the Bundesgerichtshof in V ZR 112/22*

Under the Brussels I bis Regulation, party autonomy is empowered as not only parties can expressly choose the competent court via choice of court agreements; parties may also prorogate the jurisdiction of a court that would otherwise be without jurisdiction and competence simply with their procedural behaviour. These, sometimes referred to as 'tacit'[17] choice of court agreements, can also derogate

Provisions in the Autonomous Private International Law of the EU Member States — General Report, in *ELTE Law Journal*, 2020, p. 9, at p. 32 ff, and H. KRONKE, *The Fading of the Rule of Law and its Impact on Choice of Court Agreements and Arbitration Agreements – Law and Policy*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2024, p. 106.

[16] On recent trends, see S.M. CARBONE, C.E. TUO, *Il valore della electio fori e i suoi limiti nel regolamento Bruxelles I-bis: alcune recenti tendenze*, in A. ANNONI, S. FORLATI, P. FRANZINA (eds), *Il diritto internazionale come sistema di valori. Scritti in onore di Francesco Salerno*, Napoli, 2021, p. 631.

[17] In these terms, Judgment of the Court (Fourth Chamber) of 20 May 2010, Česká podnikatelská pojišťovna as, Vienna Insurance Group v Michal Bilas, Case C-111/09, ECLI:EU:C:2010:290, para. 21, on which see A. TEDOLDI, *La proroga tacita della giurisdizione nelle controversie contro assicurati, consumatori e lavoratori nel reg. UE n. 44/2001*, in *Rivista di diritto processuale*, 2011, p. 1255; A. STAUDINGER, *Wer nicht rügt, der nicht gewinnt - Grenzen der stillschweigenden Prorogation nach Art. 24 EuGVVO*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2011, p. 548; P. MANKOWSKI, *Besteht der europäische Gerichtsstand der rügelosen Einlassung auch gegen von Schutzregimes besonders geschützte Personen?*, in *Recht der Internationalen Wirtschaft*, 2010, p.

a previous express choice of court clause signed by the parties. According to art. 26 Brussels I bis Regulation, the uncontested appearance of the defendant before the court not having jurisdiction under any other rule of the instrument[18] grounds the jurisdiction of the court. Only exclusive heads of jurisdiction call for different solutions, and where the defendant is a 'weaker party' entering an appearance before a court other than those provided for in the specific rules for the protection of weaker parties, the court should ensure that the defendant has knowledge of the consequences following an uncontested appearance.

(a) *BGH V ZR 112/22: The case*

The case decided by the German *Bundesgerichtshof*[19] was about a claim to retrieve cultural property. It is not clear whether the asset could have been qualified as 'cultural property' under the EU Directive 2014/60[20]. Such qualification, along with the presence of the

667; A. SPERLICH, A. WOLF, *Internationale Zuständigkeit für Versicherungssachen aufgrund rügeloser Einlassung*, in *Versicherungsrecht*, 2010, p. 1101; U. GRUSIC, *Case C-111/09, Česká podnikatelská pojišťovna as, Vienna Insurance Group v. Michal Bilas, Judgment of the European Court of Justice (Fourth Chamber) of 20 May 2010*, in *Common Market Law Review*, 2011, p. 947; A. LEANDRO, *Lecito anche nelle controversie assicurative accettare la giurisdizione in modo tacito*, in *Guida al diritto*, 2010, 23, p. 100; S. MARINO, *La proroga tacita di giurisdizione nei contratti conclusi dalle parti deboli: la sentenza Bilas*, in *Rivista di diritto internazionale privato e processuale*, 2010, p. 915.

[18] On the residual nature of jurisdiction under art. 26 Brussels I bis Regulation, see Judgment of the Court (Sixth Chamber) of 11 April 2019, ZX v Ryanair DAC, Case C-464/18, ECLI:EU:C:2019:311; critical on such an approach, as this would be inchoerent with the value and role of party autonomy, see F. KOECHEL, *Art. 26 EuGVVO als (vermeintlich) subsidiärer Gerichtsstand und rügelose Einlassung durch „beredtes Schweigen"*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2020, p. 524. For a general comment on the decision, see S. DOMINELLI, P. SANNA, *Sulla determinazione dell'autorità giurisdizionale competente a conoscere di una domanda di compensazione pecuniaria per ritardo di un volo: certezze, dubbi e riflessioni sul coordinamento tra strumenti normativi a margine della causa Ryanair C-464/18 della Corte di giustizia dell'Unione europea*, in *Il Diritto marittimo*, 2020, p. 398.

[19] BGH, Urteil vom 21.07.2023 - V ZR 112/22, in *Neue Juristische Wochenschrift*, 2023, p. 3013, with note by D. MOLL, M. HENNEMANN.

[20] Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast), in OJ L 159, 28.5.2014, p. 1, on which see M. FRIGO, *La trasposizione nell'ordinamento italiano della direttiva 2014/60*

asset in the territory of a Member State, and together with the 'European domicile' of the defendant (which was missing in the case at hand), could have paved the way to analyse art. 7(4) Brussels I bis Regulation, instituting a special forum for the recovery of cultural property[21]. The domicile of the plaintiff also seems uncertain[22], yet

sulla restituzione dei beni culturali che hanno illecitamente lasciato il territorio di uno Stato membro, in E. CATANI, G. CONTALDI, F. MARONGIU BUONAIUTI (eds), *La tutela dei beni culturali nell'ordinamento internazionale e nell'Unione europea*, Macerata, 2020, p. 63.

[21] On which see Z. CRESPI REGHIZZI, *A New Special Forum for Disputes Concerning Rights in Rem over Movable Assets: Some Remarks on Article 5(3) of the Commission's Proposal*, in F. POCAR, I. VIARENGO, F. VILLATA (eds), *Recasting Brussels I*, Milano, 2016, p. 173; ID, *Profili di diritto internazionale privato del commercio dei beni culturali*, in E. CATANI, G. CONTALDI, F. MARONGIU BUONAIUTI (eds), *La tutela dei beni culturali nell'ordinamento internazionale e nell'Unione europea*, Macerata, 2020, p. 149; S. DOMINELLI, *Cultural Objects and Conflicts of Jurisdiction in Cross-Border Cases: A Reading of New Article 7(4) Brussels Ia Regulation*, in G.C. BRUNO, F.M. PALOMBINO, A. DI STEFANO, G.M. RUOTOLO (eds), *Migration and Culture: Implementation of Cultural Right of Migrants*, Rome, 2021, p. 259; F. FRANCIONI, *Public and Private in the International Protection of Global Cultural Goods*, in *European Journal of International Law*, 2012, p. 719; P. FRANZINA, *The Proposed New Rule of Special Jurisdiction Regarding Rights in Rem in Moveable Property: A Good Option for a Reformed Brussels I Regulation?*, in *Diritto del commercio internazionale*, 2011, p. 789; M. FRIGO, *La Convenzione dell'UNIDROIT sui beni culturali rubati o illecitamente esportati*, in *Rivista di diritto internazionale privato e processuale*, 1996, p. 435; ID, *Recognition and Enforcement of Judgments on Matters Relating to Personality Rights and the Recast of the Brussels I Regulation*, in F. POCAR, I. VIARENGO, F. VILLATA (eds), *Recasting Brussels I*, Milano, 2012, p. 341; ID, *Trasferimento illecito di beni culturali e legge applicabile*, in *Diritto del commercio internazionale*, 1988, p. 611; A. GARDELLA, *Nuove prospettive per la protezione internazionale dei beni culturali: la Convenzione dell'UNIDROIT del 24 giugno 1995*, in *Diritto del commercio internazionale*, 1998, p. 997; M. GEBAUER, *A New Head of Jurisdiction in Relation to the Recovery of Cultural Objects*, in F. FERRARI, F. RAGNO (eds), *Cross-border Litigation in Europe: the Brussels I Recast Regulation as a Panacea?*, Milano, 2016, p. 31; A. LEANDRO, *Prime osservazioni sul Regolamento (UE) n. 1215/2012 ("Bruxelles I bis")*, in *Giusto processo civile*, 2013, p. 583; P. MANKOWSKI, *Article 7*, in U. MAGNUS, P. MANKOWSKI (eds), *European Commentaries on Private International Law, Volume I, Brussels Ibis Regulation*, Köln, 2023, p. 108, in part. p. 334 ff; F. MARRELLA, *Proprietà e possesso di beni mobili di interesse culturale nel diritto internazionale privato italiano*, in F. MARRELLA (ed), *Le opere d'arte tra cooperazione internazionale e conflitti armati*, Padova, 2006, p. 107; K. SIEHR, *International Art Trade and the Law*, in *Recueil des Cours*, Volume 243, p. 13; T. SZABADOS, *In Search of the Holy Grail of the Conflict of Laws of Cultural Property: Recent Trends in European Private International Law Codifications*, in *International Journal of Cultural Property*, 2020, p. 323.

[22] Cf BGH, V ZR 112/22, cit., para. 7, where noting that in lower proceedings, jurisdiction was grounded on domestic law (§32 ZPO), rather than on the Brussels I bis Regulation.

there appears to be little doubts on the (more relevant for the instrument) lack of domicile in a Member State of the defendant.

It is in these circumstances that the *Bundesgerichtshof* had to determine if art. 26 Brussels I bis Regulation, on 'tacit' prorogation agreements, was applicable and whether it grounded the jurisdiction of the seised court.

(b) *The applicability of art. 26 Brussels I bis Regulation: The reasoning of the Court*

The *Bundesgerichtshof* argues that art. 26 Brussels I bis Regulation is indeed applicable in the case at hand since the provision does not expressly limit its scope of application to the 'European domicile' of the defendant[23]. As known, such an element acquires fundamental relevance in the context of the instrument: as a matter of general principle, only where the defendant is domiciled in a non-EU Member State, the domestic court may still apply domestic rules of international civil procedure[24]. Only few exceptions are given; some are contemplated in art. 6(2) Brussels I bis Regulation, according to which (some) European based weaker parties may still take advantage of their (European) protective forum even where defendants are domiciled in a third country. Additionally, the Brussels I bis Regulation finds application regardless of the domicile of (both) the parties in cases of exclusive jurisdiction and in case of *express* choice of court agreements in favour of the court of a Member State. In other words, on its own the Brussels I bis Regulation does not expressly say whether art. 26 is applicable or not regardless of the domicile of the defendant or regardless of the domicile of both the parties.

The German *Bundesgerichtshof*, to support its conclusion, adopts interpretation criteria based on analogy and on the reasoning of the provisions[25]. The Court[26] gives weight to the evolution of express choice of court agreements in time: under the 1968 Brussels

[23] BGH, Urteil vom 21.07.2023 - V ZR 112/22, cit., para. 11 ff.

[24] Brussels I bis Regulation, art. 6.

[25] BGH, Urteil vom 21.07.2023 - V ZR 112/22, cit., para. 15.

[26] BGH, Urteil vom 21.07.2023 - V ZR 112/22, cit., para. 14.

Convention, choice of courts agreements in favour of courts of a Member States did fall within the scope of application of the Convention only if both parties to the agreement had their domicile in a Member State. Such validity requirement was subsequently changed in the Brussels I Regulation, where at least one of the parties to the agreement (regardless of whether this party was plaintiff or defendant in the case) needed to have their domicile in a Member State. Lastly, in the Brussels I bis Regulation, no party to the agreement needs to have their domicile in a Member State for the agreement to be valid. According to the *Bundesgerichtshof*[27], such an empowerment of *express* choice of court agreements should not remain without consequences on the interpretation of *tacit* choice of court, since, by analogy, they both promote the same principle and value.

(c) *Some critiques*

The solution offered by the *Bundesgerichtshof* seeks to bring to unity two different provisions which both promote party autonomy in the choice of the competent court, and thus bring an end to a differentiated treatment between provisions and their scope of application that might have been considered as a limping treatment of party autonomy. Nonetheless, it has to be noted that bringing together direct (art. 25) and indirect party autonomy (art. 26) enters in tension with one of their respective distinctive features. 'Direct' party autonomy is surely more extended that the indirect one as this last one, as mentioned, only grounds a *residual* jurisdiction if the seised court cannot ground its jurisdiction on any other provision of the Brussels I bis Regulation. In this sense, from a dogmatic perspective, bringing together the two different provisions which embody a different degree of party autonomy should also lead to not lose sight of their differences when proposing an application by analogy.

[27] BGH, Urteil vom 21.07.2023 - V ZR 112/22, cit., para. 12. It also has to be noted that the Court already had opportunities in the part to dwell on current art. 26 Brussles I bis Regulation. Under the former Brussels Convention, the Court did adopt a different solution than the one in its most recent case law; past limits to express choice of court agreements were also interpreted as conditioning the scope of application of tacit choice of court (BGH, 21.11.1996 - IX ZR 264/95, in *Neue Juristische Wochenschrift*, 1997, p. 397, at p. 398). Such previous case law, thus, has more recently been subject to express *overruling*.

As per the substantive result attained by the *Bundesgerichtshof*, it should also be noted that by not requiring the European domicile of neither of the parties for the scope of application of art. 26 Brussels I bis Regulation, the court adheres to part of the scholarship[28], which is albeit not unanimous on the matter[29]. Regardless of whether the final result of the Court is to be shared, it is on this point that some reflections – also of methods – can be made.

In the first place, it seems the *Bundesgerichtshof* has exceeded its own competences, limited to the *application* of EU law, to *interpret* both art. 6(2) and art. 26 Brussels I bis Regulation. The first provision has been interpreted since, whilst allowing for exceptions to the requirement of the European domicile of the defendant for the application of the regulation, it does not expressly mention art. 26. The second provision has also been interpreted, more specifically in light of art. 25 Brussels I bis to realign the personal scope of application of the articles. As much as it may be complicated to draw the proper line between application and interpretation of the law, the *Bundesgerichtshof* seems to fall within this last activity which is reserved to the Court of Justice of the European Union[30] (CJEU). In this sense, it can be criticised the choice, based on the *acte claire* doctrine[31], not to raise a preliminary question to the CJEU and not to give this organ the possibility to offer uniform indications on the matter. It should also be reminded that the CJEU did already touch upon the question of the European domicile of the defendant in cases of appearance without challenging the jurisdiction: in Josi Group, when express choice of court agreements still required the European

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[28] *Ex multis*, P. Gottwald, *Art. 26 Brüssel Ia-VO*, in *Münchener Kommentar zur ZPO, Band 3*, München, 2022, p. 2496, rn. 4; M Gebauer, F. Berner, *Art. 26 Brüssel Ia-VO*, in M. Gebauer, T. Wiedmann (eds), *Europäisches Zivilrecht*, München, 2021, p. 1391, rn. 2; S. Dominelli, *Party Autonomy and Insurance Contracts in Private International Law: A European Gordian Knot*, cit., p. 305.

[29] For a reconstruction of the different positions, see A.L. Calvo Caravaca, J. Carrascosa González, *Art. 26 Brussels Ibis*, in U. Magnus, P. Mankowski (eds), *ECPIL, Volume I Brussels Ibis Regulation*, Köln, 2023, p. 666, rn. 28 ff.

[30] Consolidated version of the Treaty on European Union, in OJ C 202, 7.6.2016, p. 1, art. 19; and Nota informativa riguardante le domande di pronuncia pregiudiziale da parte dei giudici nazionali, 1 dicembre 2009, in F. Pocar. M. Tamburini, *Norme fondamentali dell'Unione europea*, Milano, 2009, p. 344.

[31] BGH, Urteil vom 21.07.2023 - V ZR 112/22, cit., para. 16.

domicile of both the parties, the CJEU did already highlight that tacit prorogation agreements did not require the European domicile of the plaintiff[32] (thus showing that the parallelism between the two provisions adopted by the *Bundesgerichtshof* may be useful but not an imperative necessity). Precisely because the decision by the *Bundesgerichtshof* 'complements' the case law of the CJEU on art. 26 Brussels I bis Regulation, it should probably have been for this last court to rule on the matter.

In the second place, even the inter-textual reading of artt. 26 and 25 Brussels I bis Regulation followed by the *Bundesgerichtshof* can be criticised in as much the court does not consider the approach of ensuring effective consent that is generally followed in the context of express choice of court. The protection of consent under (current) art. 26 Brussels I bis has raised questions in the case law and has ultimately led to the current provision[33] which, for the defendant weaker party, requires the court to ensure that the defendant has knowledge of their right to contest the jurisdiction. If it is admitted that art. 26 no longer requires for its application the 'European domicile' of the defendant consistently in derogation to the general framework of the Regulation, this would become applicable to third country defendant and it would be proper to integrate in the declaration of jurisdiction whether the defendant has knowledge of their right to contest jurisdiction tacitly stemming from a procedural behaviour.

3. *Domestic contracts and choice of court: The Inkreal case by the CJEU*

As mentioned, the choice to promote and empower party autonomy is also grounded on the practical utility such a tool acquires: parties can pre-emptively solve positive and negative conflicts of

[32] Judgment of the Court (Sixth Chamber) of 13 July 2000, Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC), Case C-412/98, ECLI:EU:C:2000:399, para. 44.

[33] Cf Judgment of the Court (Fourth Chamber) of 20 May 2010, Česká podnikatelská pojišťovna as, Vienna Insurance Group v Michal Bilas, Case C-111/09, cit.

jurisdiction by directly identifying the court competent to decide[34]. *A contrario*, it could be argued that party autonomy in the choice of the competent court loses its significance and value when the legal relationship is not cross-border in nature and, as such, raises no private international law questions. Clearly, a sales contract whose entire effects and consequences are located within a single jurisdiction *should* does not raise question as per the competent jurisdiction or the applicable law.

In this sense, it becomes apparent that the very definition of 'cross-border' becomes fundamental[35], since the lack of such a

[34] *Ex multis*, on choice of court agreements see J. BASEDOW, *Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2011, p. 32; S.M. CARBONE, *Giurisdizione ed efficacia delle decisioni in materia civile e commerciale nello spazio giudiziario europeo: dalla convenzione di Bruxelles al regolamento (CE) n. 44/2001*, in S.M. CARBONE, M. FRIGO, L. FUMAGALLI, *Diritto processuale civile e commerciale comunitario*, Milano, 2004, p. 3; ID, *Gli accordi di proroga della giurisdizione e le convenzioni arbitrali nella nuova disciplina del Regolamento (UE) 1215/2012*, in *Diritto del commercio internazionale*, 2013, p. 651; ID, *Autonomia privata e commercio internazionale. Principi e casi*, Milano, 2014; A. MALATESTA, G. VITELLINO, *Le novità in materia di proroga della giurisdizione*, in A. MALATESTA (ed), *La riforma del Regolamento Bruxelles I*, Milano, 2016, p. 63; I. QUEIROLO, *Gli accordi sulla competenza giurisdizionale. Tra diritto comunitario e diritto interno*, Padova, 2000; ID, *Choice of Court Agreements in the New Brussels I-bis Regulation: A Critical Appraisal*, in *Yearbook of Private International Law*, Vol XV, 2013/2014, p. 113; F.C. VILLATA, *L'attuazione degli accordi di scelta del foro nel Regolamento Bruxelles I*, Milano, 2013; ID, *Choice-of-Court Agreements in Favour of Third States' Jurisdiction in Light of the Suggestions by Members of the European Parliament*, in F. POCAR, I. VIARENGO, F.C. VILLATA (eds), *Recasting Brussels I*, Milano, 2012, p. 219; G. VITELLINO, *La c.d. proroga tacita*, in A. MALATESTA (ed), *La riforma del Regolamento Bruxelles I*, Milano, 2016, p. 78; U. MAGNUS, *Choice of Court Agreements in the Review Proposal for the Brussels I Regulation*, in E. LEIN (ed), *The Brussels I Review Proposal Uncovered*, Londra, 2012, p. 83; P. BEAUMONT, *Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status*, in *Journal of Private International Law*, 2009, p. 509; J.J. KUIPERS, *Choice-of-court Agreement under the European and International Instruments. The Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*, in *Common Market Law Review*, 2014, p. 1549; M. WINKLER, *Understanding Claim Proximity in the EU Regime of Jurisdiction Agreements*, in *International and Comparative Law Quarterly*, 2020, p. 431; L. VALKOVA, *Choice-of-Court Agreements under the EU Regulations in Family and Succession Matters*, Milano, 2022; M. AHMED, *The Nature and Enforcement of Choice of Court Agreements. A Comparative Study*, Oxford, 2017. Per ulteriori riferimenti, v. S. DOMINELLI, *Ancora sull'accordo di proroga della giurisdizione contenuto nel contratto di trasporto ceduto dal passeggero alla società di riscossione*, in *Il Diritto marittimo,* 2024, p. 110.

[35] On choice of court and choice of law agreements in domestic contracts, see recently S. BARIATTI, *Volontà delle parti e internazionalità del rapporto giuridico: alcuni sviluppi recenti nella giurisprudenza della Corte di giustizia sui regolamenti europei in materia di*

quality may conceptually deny the applicability of private international law. It becomes thus crucial to understand if such an international element can only be objective in nature, or whether the party can make a domestic relationship 'international' simply by exercising their private international law autonomy – i.e. by concluding a choice of court agreement in favour of the courts of another (Member) States or by concluding an *optio legis*[36]. For a given time, the answer to the question somewhat seemed to be more straightforward, at least from a practical perspective, in the field of choice of law; the Rome I Regulation on the law applicable to contractual obligations does allow parties to choose a foreign law even in the case of domestic contracts[37]. A possibility which undergoes some limitations: to avoid that parties only conclude a choice of law agreement with the sole purpose of avoiding the applicability of the 'natural' law to the internal contract, an *optio legis* in similar circumstances still undergoes the application of rules in said natural law that cannot be freely derogated from[38]. Furthermore, according to some scholars[39], the possibility at hand should not be qualified as party autonomy in private international law *stricto sensu*, as this would be a different form of substantive contractual regulation by incorporation in

diritto internazionale privato, in *Rivista di diritto internazionale privato e processuale*, 2019, p. 513.

[36] See already N. BOSCHIERO, *Obbligazioni contrattuali (diritto internazionale privato)*, in *Enciclopedia del diritto. Annali. Volume V*, Milano, 2012, p. 975.

[37] Cf Rome I Regulation, art. 3(3), and (4).

[38] On the *faud legis*, see for all S. BARIATTI, *Abuso del diritto, conflitto di leggi e diritto del commercio internazionale: spunti di riflessione sul forum shopping*, in S.M. CARBONE (ed), *L'Unione europea a vent'anni da Maastricht. Verso nuove regole*, Napoli, 2013, p. 269. In general, on the cross-border element in the choice of a foreign applicabile law, see P. OSTENDORF, *Anforderungen an einen genuinen Auslandsbezug bei der Rechtswahl im Europäischen Kollisionsrecht*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2018, p. 630, and ID, *The Choice of Foreign Law in (Predominantly) Domestic Contracts and the Controversial Quest for a Genuine International Element: Potential for Future Judicial Conflicts between the UK and the EU?*, in *Journal of Private International Law*, 2021, p. 421.

[39] P. MANKOWSKI, *Article 3*, in U. MAGNUS, P. MANKOWSKI (eds), *ECPIL, Volume II Roma I,* Köln, 2017, p. 87, rn. 374 ff; *contra*, speaking of a limited choice, D. MARTINY, *Bestimmung des Vertragsstatut*, in C. REITHMANN, D. MARTINY (eds), *Internationales Vertragsrecht*, Köln, 2022, p. 68, rn. 2.137; cf also F. FERRARI, *Art. 3 Rom I-VO*, in F. FERRARI ET AL, *Internationales Vertragsrecht, Rom I-VO, CISG, CMR, FactÜ Kommentar*, München, 2018, p. 32, rn. 50.

the contract of foreign provisions. In other words, a *private autonomy* in contractual matters, rather than *party autonomy* in conflict of laws, which *per se* is not able to forge the cross-border element but which only materially incorporates foreign laws in the substantive regulation of the contract.

In *Inkreal*[40], the CJEU precisely deals with this matter from the specific perspective of choice of court agreements, thus filling a gap in the case law, albeit with a solution that may meet some criticism as per the approach that has been followed.

(a) *Inkreal: The case*

The factual elements in *Inkreal* are not necessarily complex[41], and may be summarised as follows: two Slovak companies concluded a loan which was subsequently assigned to a third Slovak company – *Inkreal*. This last company started legal proceedings in the Czech Republic according to a choice of court agreement included in the contract. The CJEU was thus requested to clarify whether the application of the Brussels I bis Regulation requires an objective element of internationality or whether it is sufficient that two parties with their seat in the same Member State agree on the jurisdiction of courts of another EU Member State[42].

Despite the clarity of the facts and the direct nature of the question raised by the preliminary court, the substantial divergence between

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[40] Judgment - 08/02/2024 – Inkreal, Case C-566/22, ECLI:EU:C:2024:123, on which see R. Wagner, *Gerichtsstandsvereinbarung ausreichend für Begründung der Anwendbarkeit von EU-Recht*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2024, p. 264; M. Gade, *Die neue Freizügigkeit bei der Gerichtsstandsvereinbarung in der EU*, in *Europäische Zeitschrift für Wirtschaftsrecht*, 2024, p. 410; F. Pollitzer, *Wahl des Gerichts eines anderen Mitgliedsstaats als Auslandsbezug?*, in *Zeitschrift für das Privatrecht der Europäischen Union*, 2024, p. 77; G. Cuniberti, *Inkreal: Bypassing National Rules Governing Jurisdiction Clauses?*, in *EAPILBlog*, 26 February 2024; S. Gimenez, *Inkreal: Freedom of Choice of Courts of EU Member States?*, in *EAPILBlog*, 26 February 2024; P. De Miguel Asensio, *Inkreal: A View from Madrid*, in *EAPILBlog*, 27 February 2024; H. Muir Watt, D. Bureau, *Inkreal: Jurisdictional Barrier-crossing in Domestic Cases: A Threefold Critique*, in *EAPILBlog*, 1 March 2024.

[41] R. Wagner, *Gerichtsstandsvereinbarung ausreichend für Begründung der Anwendbarkeit von EU-Recht*, cit., p. 264.

[42] Judgment - 08/02/2024 – Inkreal, Case C-566/22, cit., para. 6 ff.

the CJEU and the Advocate General[43] already shows that the solution of the Court was by no means to be taken for granted.

(b) *Inkreal: The solution of the CJEU and its reasoning*

The CJEU concludes that art. 25 Brussels I bis Regulation on choice of court agreements is also applicable when, in the context of a purely domestic contract, the parties prorogate the jurisdiction of the court of another Member State as in such circumstances party autonomy would be a cross-border element[44]. The Court employs a number of hermeneutic approaches to sustain its conclusion[45]. First, the Court adopts a teleological approach, giving value to the context of the legal framework and the specific goal pursued by art. 25, i.e. promoting party autonomy[46]. Second, the Court adopts a literal interpretation of the provision at hand, highlighting that art. 25 Brussels I bis Regulation only requires a cross-border element (an element that is not defined) and no further requirements[47]. However, according to the Court, 'a' cross-border element is always necessary as this grounds the very application of the Brussels I bis Regulation itself[48].

The CJEU thus sees it necessary to determine 'when' a legal relationship is cross-border in nature with the consequential application of the relevant EU law rules; this time adopting an 'internal' comparative approach, the Court recalls that other instruments adopted by the European Union in international civil procedure, contrary to the Brussels I bis Regulation[49], do expressly qualify the cross-border element, that would be the parties having their domicile or their habitual residence in a State different from the one whose

[43] Opinion of the Advocate General Jean Richard De La Tour delivered on 12 October 2023, Case C-566/22, Inkreal s. r. o. v Dúha reality s. r. o., ECLI:EU:C:2023:768.

[44] Judgment - 08/02/2024 – Inkreal, Case C-566/22, cit., para. 39.

[45] On which see *amplius* U. MAGNUS, *Introduction*, in U. MAGNUS, P. MANKOWSKI (eds), *ECPIL, Volume I Brussels Ibis Regulation*, Köln, 2023, p. 7, rn. 98.

[46] Judgment - 08/02/2024 – Inkreal, Case C-566/22, cit., para. 16.

[47] *Idem*, para. 17 ff.

[48] *Idem*, para. 18.

[49] M. GADE, *Die neue Freizügigkeit bei der Gerichtsstandsvereinbarung in der EU*, cit., p. 411.

courts have been seised[50]. Considering that all different regulations are of the same field – that of international civil procedure – the CJEU argues the opportunity to 'unify'[51] the definition of 'cross-border element', *de facto* extending the notion adopted by other instruments to the Brussels I bis Regulation. Furthermore, by invoking its precedents, the Court argues that the Brussels I bis Regulation is applicable whenever questions on the allocation of jurisdiction are at stake[52]. According to the Court, '… *the existence of an agreement conferring jurisdiction on the courts of a Member State other than that in which the parties are established in itself demonstrates the cross-border implications of the dispute in the main proceedings*'[53].

To further support its conclusions, the CJEU argues that the solution implements the principle of certainty and foreseeability of the competent court as, otherwise, the matter would have to be resolved by the (diverse) domestic legislation of the concerned Member States. An approach that, in the Court's eye, would increase the risk of '*concurrent proceedings* [with possible] *irreconcilable judgments*'[54].

Additionally, always in the Court's eye, imposing a condition on the existence of an objective element of internationality would mean

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[50] Judgment - 08/02/2024 – Inkreal, Case C-566/22, cit., para. 20.

[51] R. WAGNER, *Gerichtsstandsvereinbarung ausreichend für Begründung der Anwendbarkeit von EU-Recht*, cit., p. 265, suggesting that the inter-textual reading of the different instruments, albeit in principle to be pursued, should not be followed at any cost as in the case of the definition contained in 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, p. 1) was specifically developed for this instrument alone. Also critical in respect to the reference to the European order for payment procedure, F. POLLITZER, *Wahl des Gerichts eines anderen Mitgliedsstaats als Auslandsbezug?*, cit., p. 81 ff, in particular because the definition of cross-border element in the European order for payment (that one of the parties has their domicile in a Member State other than that whose courts are seised) does not promote certainty of law, as this would be a 'subsequent' element. Additionally, for the A., the second criterion invoked by the CJEU (the existence of circmustances that call for questions on the allocation of jurisdiction), albeit being an *ex ante* criterion to evaluate the cross-border nature of the legal relationship, as it has been interpreted in the case dealt with by the CJEU, could potentially create tensions with the principle of attribution of competences to the European Union.

[52] Judgment - 08/02/2024 – Inkreal, Case C-566/22, cit., para. 22.

[53] *Idem*., para. 25.

[54] *Idem*, para. 31.

introducing an element of discretionality[55] on domestic courts which, on a case-by-case approach, would have to qualify a case as being domestic or cross-border, with negative consequences in terms of uniform application of EU law.

The CJEU also adopts an 'external' comparative analysis of the Brussels I bis Regulation by looking at the international conventions on choice of court agreements: these instruments[56], which expressly may require an objective element of internationality for their application, are not relevant for the interpretation and application of the rules of the European judicial space, which is built on the special principle of mutual trust between Member States[57].

(c) *Inkreal: Some reflections and three critiques (on methods)*

Without surprise, the *Inkreal* Judgment by the CJEU has been met by discording voices in the scholarship[58]. The aim here is not to

[55] *Idem*, para. 33.

[56] Reference is made to the Hague Convention of 30 June 2005 on Choice of Court Agreements, art. 1(2) ('*a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State*').

[57] Judgment - 08/02/2024 – Inkreal, Case C-566/22, cit., para. 35 ff.

[58] Critical, in particular, G. CUNIBERTI, *Inkreal: Bypassing National Rules Governing Jurisdiction Clauses?*, cit., where, adhering to the opinion of the Advocate General De La Tour (cit., at para. 33), notes that the solution of the court allows parties to *de facto* derogate to internal rules on competence; S. GIMENEZ, *Inkreal: Freedom of Choice of Courts of EU Member States?*, cit., stressing that the parallelism with choice of law approaches has regrettably not led to the development of limits to party autonomy in the choice of the competent court as well; P. DE MIGUEL ASENSIO, *Inkreal: A View from Madrid*, cit., correctly noting how the Court's fears on certainty and foreseeability may easily be contained by rules on *lis alibi pendens*, and H. MUIR WATT, D. BUREAU, *Inkreal: Jurisdictional Barrier-crossing in Domestic Cases: A Threefold Critique*, cit., where the Judgment is criticised from the epistemological perspective for not having taken into account further elements in the analysis, such as politics and economics of law. Others, on the other hand, have welcomed the decision by the CJEU in the *Inkreal* case as per its practical usefulness; cf G. VAN CALSTER, *CJEU Does Not Follow its AG in Inkreal: Confirms Wide, Subjective Scope of International Element for Choice of Court*, in *GACV Blog*, blogpost 8 February 2024; M. WELLER, CJEU, *Case C-566/22, Inkreal v. Dúha Reality: Choice of Another Member State's Court in an Otherwise Purely Domestic Case is Sufficient to apply Art. 25 Brussels Ibis Regulation*, in *Conflictoflaws.net*, blogpost 17 February 2024 ('*the CJEU answered the question in the affirmative, thereby strengthening party autonomy and predictability in the context of international civil procedure. This is to be welcomed*'); R. WAGNER, *Gerichtsstandsvereinbarung ausreichend für Begründung der Anwendbarkeit von EU-*

repeat what others have already said, nor to enter in the merits of the solution offered by CJEU; it is also not the present aim here to touch again upon the need to adopt an extensive definition of 'cross-border element', with all the difficulties that follow in determining which elements may be suitable for the task[59]. Today, at least from a practical standpoint, such a problem seems to be solved as the Court has confirmed that the choice of a court in another Member State is per se an element that makes the legal relationship cross-border in nature[60]. Rather, on the one hand and in general terms, the aim is to highlight how the CJEU continues its promotion of party autonomy, and, on the other hand, how this goal is not always pursued with a reasoning that is free from criticism.

First of all, it is surprising that the CJEU does not dwell at all on the content and scope of art. 81 of the Treaty on the Functioning of the European Union (TFEU). The circumstance is even more perplexing if one notes that the topic had been correctly identified and analysed by the Advocate General in their opinion[61]. The question has also extensively been debated in the scholarship, which was

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Recht, cit., p. 264 f, albeit noting how the compression in the scope of application of domestic law would have been a reason for disagreement, and F. POLLITZER, *Wahl des Gerichts eines anderen Mitgliedsstaats als Auslandsbezug?*, cit., p. 79.

[59] I. QUEIROLO, *Gli accordi sulla competenza giurisdizionale tra diritto comunitario e diritto interno*, cit., p. 139 ff, in part. p. 140 f ('*Più conveniente sembra, peraltro, riferire il requisito* [dell'internazionalità] *all'accordo attributivo di competenza, ossia ritenere che la sola indicazione di un giudice straniero sia sufficiente ad "internazionalizzare" un rapporto interno .... Se un limite si vuole ricercare, questo va rintracciato non nelle precisazioni* [del regolamento] *ma nel contesto in cui è destinato ad intendersi il rapporto soggetto alla clausola di proroga. In particolare, sembra potersi sostenere che alcuni rapporti sono "internazionalizzati" dalla sola scelta di un organo giudiziario straniero, mentre altri sfuggono all'applicazione delle disposizioni uniformi, nonostante l'elezione del foro ...*'), and S. DOMINELLI, *Party Autonomy and Insurance Contracts in Private International Law: A European Gordian Knot*, cit., p. 158 f ('*… domestic courts should assess the possible international character of the case looking beyond the elements which are expressily considered by the regulation, [and] take a holistic approach (where the will of the parties might also play a role) and evaluate all factual and legal specifics of the single case that might objectively raise a possible conflict of jurisdiction'*).

[60] R. WAGNER, *Gerichtsstandsvereinbarung ausreichend für Begründung der Anwendbarkeit von EU-Recht*, cit., p. 265.

[61] Opinion of the Advocate General Jean Richard De La Tour delivered on 12 October 2023, Case C-566/22, Inkreal s. r. o. v Dúha reality s. r. o., cit., para. 28 ff.

divided on the point[62]. As is well known, art. 81 TFEU is the legal basis for the Union's action in the field of civil cooperation and is of fundamental importance since it limits[63] the Union's competences to disputes that have a cross-border character. Clearly, when the CJEU interprets the element of internationality for the purposes of the applicability of the Brussels I bis Regulation, the Court is also indirectly interpreting art. 81 TFEU and, therefore, the Union's own competences. The fundamental notion referred to in art. 81 TFEU, and which conditions the applicability of the Brussels I bis Regulation, is debated, also from a political perspective[64], and would have certainly deserved some additional thoughts. More in detail, the CJEU could have clarified, and probably better argued, the relationship between the various elements of the rule. The Union's action is conditioned by the cross-border nature of the case (a condition that the Court reiterates and confirms at least as a formal requirement[65]) and, in these cases, party autonomy in private international law is grafted (or should be grafted upon). In what could be referred to as the 'post-*Inkreal* era', however, party autonomy logically precedes the internationality of the case, and can even create it. In short, it is one thing to say that party autonomy is one of the elements in the light of which the cross-border nature of the relationship can be assessed; it is quite another to make the internationality of the case

[62] Cf M. GADE, *Die neue Freizügigkeit bei der Gerichtsstandsvereinbarung in der EU*, cit., p. 410 ff. arguing that art. 25 Brussels I bis Regulation should *not* be applied to purely domestic contracts, see P. MANKOWSKI, *Art. 25 Brüssels Ia-VO*, in T. RAUSCHER (ed), *Europäisches Zivilprozess- und Kollisionsrecht, Band I, Brüssels Ia-VO*, Köln, 2021, p. 666, rn. 32. *Contra*, C. THOLE, *Art. 25*, in *Stein, Jonas Kommentar zur Zivilprozessordnung, Band 12 EuGVVO*, Tübingen, 2022, p. 489, rn. 18; cf P. GOTTWALD, *Art. 25 Brüssel Ia-VO*, *Münchener Kommentar zur ZPO, Band 3*, München, 2022, p. 2470, rn. 71, stressing that the provision does not require an objective connection between the chosen court and the case, meaning that the aim of the regulation is to allow the parties the choice of a *neutral court*.

[63] On art. 81 TFEU in light of *Inkreal*,. F. POLLITZER, *Wahl des Gerichts eines anderen Mitgliedsstaats als Auslandsbezug?*, cit., p. 79 s. In general, *amplius* O. LOPES PEGNA, *La nozione di controversia 'transfrontaliera' nel processo di armonizzazione delle norme di procedura civile degli Stati membri dell'Unione europea*, in *Rivista di diritto internazionale privato e processuale*, 2018, p. 922.

[64] *Ex multis*, B. HESS, *Europäisches Zivilprozessrecht*, Heidelberg, 2010, p. 34, and M. STÜRNER, *Art. 81 AEUV*, in *Frankfurter Kommentar zu EUV, GRC und AEUV*, Tübingen, 2023, p. 1311, at p. 1322 ff.

[65] Judgment - 08/02/2024 – Inkreal, Case C-566/22, cit., para. 21.

depend solely on the autonomy of the parties, which can then choose to 'extend' the scope of Union law to circumstances in which it would not apply, i.e. purely internal situations. There is no doubt that in a reverse hypothesis, i.e. an objectively international contract with party autonomy exercised to deny the cross-border element so to 'escape' the application of Union law, the Court would not have valued party autonomy so highly. However, if the theoretical basis is valid in absolute terms, if one recognises that the parties' will can internationalise an internal situation (by escaping the applicable national rules), conceptually, it should also be possible to reach the same conclusion in a reversed scenario.

Second, if one agrees with the result attained by the CJEU by emphasising the parallelism with art. 3(3) of the Rome I Regulation on the law applicable to contractual obligations[66] (admittedly not mentioned by the Court), one cannot fail to note that the latter provision on choice of law and domestic contracts, precisely because its *sui generis* nature, is not without limits and boundaries. As recalled, the choice of a foreign law for domestic contracts is limited by the application of the non-conventionally derogable rules of the 'natural law' applicable to the contract. So, in this sense, and with a view to methodology, the Court could also have identified limits, although those already expressly contemplated in the Rome I Regulation cannot be transposed *sic et simpliciter*[67].

Third, again with a view to methodology, it must be noted that the reference that the CJEU makes to other legal texts is not proper (up to the point of the argument being somewhat 'downgraded' by the Court itself in its most recent case law[68]). The Court notes that

[66] On the relationship between art. 1 Rome I Regulation, according to which the instrument is applicable in circumstances that raise conflict of laws questions, and art. 3(3) on domestic contracts and choice of law, see J. Von Hein, *Art. 3 Rom I-VO*, in T. Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht, Band III, Rom I-VO, Rom II-VO*, Köln, 2023, p. 86, at p. 152.

[67] Cf S. Gimenez, *Inkreal: Freedom of Choice of Courts of EU Member States?*, cit.

[68] Judgment - 29/07/2024 - FTI Touristik (Élément d'extranéité), Case C-774/22, ECLI:EU:C:2024:646, para 35 ('*the interpretation of the concept of 'international element' such as that set out in paragraph 30 of this judgment cannot be called into question by the reference made, for the sake of completeness, by the Court's earlier case-law to the concept of 'cross-border case' which is defined in Article 3(1) of Regulation No 1896/2006 as a case 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(1) of Regulation No 1896/2006 creating a European order for payment procedure offers an explicit definition of cross-border element[69], identifying it as the circumstance that one of the parties is domiciled or habitually resident in a Member State other than that of the court seised. *Ça va sans dire*, this element is *objective* and not subjective in nature[70]. In this sense, therefore, the Court could have given greater weight to the fact that, in *Inkreal*, the proceedings in the prorogated Member State had already been instituted and that it was this circumstance, rather than party autonomy *ex se*, that created a conflict of jurisdiction in respect of which it was necessary to apply the Brussels I bis Regulation. Still, such a solution, although it would have continued to require an objective element of internationality, would not have been as functional to the principle of legal certainty as the solution offered by the Court: the party to the domestic contract bound by a prorogation agreement in favour of the jurisdiction of another Member State could have objected at the time of appearance in court to the applicability of art. 25 Brussels I bis Regulation and to the transnational nature of the relationship. The Court's choice, although not exempt from possible criticism, is certainly clearer and is evidently inspired by a strong legal pragmatism.

Lastly, it remains to be understood what the consequences of the *Inkreal* Judgment will be, also on the side of global relations with other States: if, as has been said, the 2005 Hague Convention on Choice of Court Agreements requires an element of objective internationality in order to be applicable, and if it is true that art. 25 of the Brussels I bis Regulation, at least as of now, does not demand such a requirement and the domicile of both parties is not relevant for its application, two parties domiciled in the same third State

[69] In OJ L 399, 30.12.2006, p. 1

[70] It should also be noted that in its own case law, the CJEU has traditionally favoured objective elements to assess the cross-border nature of a legal relationship. Cf M. GADE, *Die neue Freizügigkeit bei der Gerichtsstandsvereinbarung in der EU*, cit., p. 411, and most recently, Judgment - 29/07/2024 - FTI Touristik (Élément d'extranéité), Case C-774/22, cit., where rules for the protection of the consumer have been deemed applicable in an all-inclusive transport contract where both parties had their domicile in the same Member State, but where the service was performed in a second State.

could 'bypass' the Hague Convention by concluding a prorogation of jurisdiction clause in favour of a court of a Member State[71].

(d) *Inkreal and Maersk A/S: A conjunct reading confirming the intention of the CJEU to empower party autonomy in domestic contracts*

The idea that, to some extent, the Court of Justice of the European Union wanted to take *Inkreal* as any opportunity to 'empower' party autonomy is partly confirmed by a further circumstance: in *Inkreal*, the Court ignored an issue that remained in the background, namely that of the personal scope of application of a choice of court agreement in cases of assignment of contracts; an issue that on other occasions has been carefully addressed, even in recent times.

In its Judgment of 25 April 2024 rendered in the *Maersk* affair[72] (thus substantially contemporary with the *Inkreal* Judgment), the CJEU addressed choice of court agreements and their binding effects for the assignee of the contract. In *Maersk*, the case related to some quite usual circumstances and events: the bill of lading had on its back a choice of court agreement in favour of English courts and the insurer – subrogated to the rights of the consignee of the goods – brought an action before Spanish courts to have the carrier ordered to pay damages. The issue of the enforceability of the clause following the circulation of the contract had already been dealt with by the CJEU which, on this point, has held that the choice of court agreement in the original contract can be enforced against the third party only where the latter, by virtue of the applicable law, takes over all the obligations and rights of the original party to the contract and the choice of court agreement[73]. The Court has also assessed situations

[71] Cf R. WAGNER, *Gerichtsstandsvereinbarung ausreichend für Begründung der Anwendbarkeit von EU-Recht*, cit., p. 265 M. GADE, *Die neue Freizügigkeit bei der Gerichtsstandsvereinbarung in der EU*, cit., p. 413.

[72] Judgment - 25/04/2024 – Maersk, Case C-345/22 (Joined Cases C-345/22, C-346/22, C-347/22), ECLI:EU:C:2024:349.

[73] Judgment of the Court of 19 June 1984, Partenreederei ms. Tilly Russ and Ernest Russ v NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout, Case 71/83, ECLI:EU:C:1984:217, para. 24 ff. Cf S. CORNELOUP, *Wirksamkeit und Drittwirkung von*

in which the third party, alien to the original clause, has succeeded only *to some* of the assignor's rights. For example, a recent case dealt with assignment of air passenger claims to companies specialising in debt collection[74]. Here, too, the Court has upheld the necessity of a full take-over of the assignee's original legal position by the assignor under the applicable law or, alternatively, the necessity for a new consent of and between all parties to be bound by the choice of court clause[75].

The peculiarity in the *Maersk* case lies in the rules of Spanish law (which was not, however, the *lex contractus*), according to which choice of court agreements contained in a bill of lading could not be invoked between new parties that were not part of the original agreement[76]. Art. 25 of the Brussels I bis Regulation, correctly interpreted on this point by the CJEU, regulates aspects of the formal validity of agreements, without expressly addressing the question of substantive validity. That question must be resolved on the basis of two indications contained in the regulation. On the one hand, art. 25 itself conditions the validity of the clause to the law of the chosen court (in this case, Spanish law) in the limited hypothesis that the latter considers the agreement to be void. This rule, according to the Court,

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Gerichtsstandsvereinbarungen, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2017, p. 309.

[74] Judgment of the Court (First Chamber) of 18 November 2020, Ryanair DAC v DelayFix, Case C-519/19, ECLI:EU:C:2020:933, on which, in addition to the already quited scholarship, see R. GEIMER, *Schwindende Rechtssicherheit bei der Forumplanung in der Europäischen Union*, in *Recht der Internationalen Wirtschaft*, 2021, p. 261; B. WOŁODKIEWICZ, *The Enforceability of a Jurisdiction Clause against an Assignee*, in *Journal of European Consumer and Market Law*, 2021, p. 206; P. MANKOWSKI, *Legal Tech im Inkassomodell und Gerichtsstandsvereinbarungen im europäischen Internationalen Zivilprozessrecht*, in *Recht der Internationalen Wirtschaft*, 2021, p. 397; M. THON, *AGB-Kontrolle und Drittwirkung von Gerichtsstandsvereinbarungen im Anwendungsbereich der EuGVVO: Rolle rückwärts in puncto Rechtssicherheit?*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2022, p. 236; C.E. TUO, *Contratto di trasporto aereo e tutela del passeggero-consumatore: la validità dell'electio fori al vaglio della Corte di giustizia nel caso Delayfix*, in *Il Diritto marittimo*, 2021; p. 797; I. QUEIROLO, S. DOMINELLI, *Successioni di parti nel contratto e clausola di proroga della giurisdizione: riflessioni a margine della sentenza della Corte di giustizia dell'Unione europea nel caso DelayFix*, in *Il Diritto marittimo*, 2021, p. 801.

[75] Judgment of the Court (First Chamber) of 18 November 2020, Ryanair DAC v DelayFix, Case C-519/19, cit., para. 44.

[76] Judgment - 25/04/2024 – Maersk, Case C-345/22, cit., para. 59.

could not have been applied in the present case since the matter was not the existence of the clause, but the succession of parties to the agreement[77]. On the other hand, recital 20 Brussels I bis Regulation, which was apparently not taken into account by the Court, provides that the substantive validity of the agreement is to be determined by the law of the Member State of the chosen forum, including its rules of private international law[78]. However, the Court ruled out that a regulation such as the Spanish one was compatible with European Union law (in other words, European Union law precludes a regulation such as the one in the present case) since by not permitting the transferability of the clause where the third party takes over all the legal positions under the law applicable to the relationship, it would circumvent art. 25 Brussels I bis Regulation as interpreted by the CJEU itself[79].

Returning to the combined reading of the recent case-law, considering the attention the CJEU usually pays to choice of court agreements, it is surprising that the issue of succession of parties was not even mentioned in *Inkreal*, where the plaintiff was the assignee of a loan agreement which had not personally negotiated (and in respect of which the joint willingness of both new parties to be bound by the clause does not emerge in clear terms from the judgment). In *Inkreal* the main issue was certainly about the applicability of art. 25, not the subjective scope of the clause; however, the *Inkreal* company invoking the clause argued, amongst other things, that there was in the present case '*no other jurisdiction ... within the meaning of that regulation*'[80]. It was precisely this allegation that could have led the CJEU to go a step further and assess the subjective scope of the discussed clause. It is in the potentially negative result that could have followed from such an analysis, perhaps, that one can understand why the Court did not deal with an issue that was partly apparent from the circumstances of the case.

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[77] *Idem*, para. 47 ff.

[78] On the conflict of laws side for choice of court agreements, see U. MAGNUS, *Sonderkollisionsnorm für das Statut von Gerichtsstands- und Schiedsgerichtsvereinbarungen?*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2016, p. 521.

[79] Judgment - 25/04/2024 – Maersk, Case C-345/22, cit., para. 60.

[80] Judgment - 08/02/2024 – Inkreal, Case C-566/22, cit., para. 10.

4. *The (limping) empowerment of party autonomy: Breach of choice of courts agreements, and free movement of decisions in the European judicial space*

As seen, although not always with perfectly acceptable logical-legal reasoning, the case law, both national and supranational, seeks to promote and better protect party autonomy and choice of courts agreements. This enhancement, however, at times appears to be based on methodologically limping reflections, and, moreover, appears to be itself limping. In view of the treatment party autonomy receives, one might reasonably expect that the Brussels I bis Regulation would also develop techniques to prevent the 'product' (the judicial decision) that has violated this fundamental value from being allowed to circulate in the European judicial space[81]. Although the question of the consequences of violating choice of court agreements and consequent actions for damages has been widely debated in the scholarship[82], the CJEU has only recently intervened on the

[81] Possible 'reactions' to violations of choice of courts agreements may, in some legal systems, remain without effects. The CJEU has concluded that national orders aimed at protecting abroad a choice of court agreement and whose effects are to inhibit foreign proceedings, may be denied recognition and enforcement in such second Member States based on the public policy exception (on '*quasi anti-suit injunctions*', see Judgment - 07/09/2023 - Charles Taylor Adjusting, Case C-590/21, ECLI:EU:C:2023:633).

[82] *Amplius*, F.C. VILLATA, *L'attuazione degli accordi di scelta del foro nel Regolamento Bruxelles I*, cit., p. 187 ff; J. ANTOMO, *Schadensersatz wegen der Verletzung einer internationalen Gerichtsstandsvereinbarung?*, Tübingen, 2017; E. PEIFFER, *Schutz gegen Klagen im forum derogatum. Gültigkeit und Durchsetzung von Gerichtsstandsvereinbarungen im internationalen Rechtsverkehr*, Tübingen, 2013; P. MANKOWSKI, *Art. 25 Brüssels Ia-VO*, cit., rn. 404 ff; M. AHMED, *The Nature and Enforcement of Choice of Court Agreements. A Comparative Study*, cit., p. 84 ff; C. THOLE, *Art. 25*, cit., rn. 163 ff; F. BERNER, *Der Erfolgsort bei Verleiten zum Bruch von Gerichtsstandsvereinbarungen*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2019, p. 333; L. COLBERG, *Schadensersatz wegen Verletzung einer Gerichtsstandsvereinbarung*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2020, p. 426; P. HAY, *Forum Selection Clauses - Procedural Tools or Contractual Obligations? Conceptualization and Remedies in American and German Law*, in *Emory International Law Review*, 2021, p. 1; L. THEIMER, *Protection Against the Breach of Choice of Court Agreements: A Comparative Analysis of Remedies in English and German Courts*, in *Journal of Private International Law*, 2023, p. 208; F. RIELÄNDER, *Schadensersatz wegen Klage vor einem aufgrund Gerichtsstandsvereinbarung unzuständigen Gericht*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2020, p. 548. On actions for damages following compliance with a null and void of choice of court agreements, see P. GOTTWALD, *Art. 25 Brüssel Ia-VO*, cit., rn. 102.

point with its decision in the *Gjensidige* affair[83]. It is also worth noting that the circumstances that will now be analysed constitute, or should constitute, a marginal or residual hypothesis. For the hypothesis that parallel proceedings exist before *a* court of a Member State and before *the* court of a Member State identified by a choice of court agreement, art. 31(2) Brussels I bis Regulation provides for an obligation for the court not identified by the clause to stay proceedings pending the determination of jurisdiction.

(a) *Gjensidige: The case dealt with by the CJEU*

Again, the facts of the case are not particularly complex, although the applicable legal framework must be carefully reconstructed. To simplify: the carrier, a Dutch company, concluded a contract of carriage with their customer, a Lithuanian company. The contract of carriage contained a choice of court agreement in favour of Lithuanian courts. Following a theft during transport, the insurance company Gjensidige reimbursed a large sum to the consignee of the goods. The carrier, for its part, started legal proceedings in the Netherlands to obtain a declaration on limitation of liability. The Dutch company considered that jurisdiction was governed by the Convention on the Contract for the International Carriage of Goods by Road (CMR) of 1956 (as amended by a protocol of 1978). According to art. 31 of the Convention, a choice of court agreement does not affect the possibility of bringing the dispute before the court of the place where the goods were loaded. A rule that evidently 'comes into tension' with art. 25 Brussels I bis Regulation under which a choice of court agreement is deemed to be exclusive unless the parties agree otherwise. In addition to this, art. 41 CMR does not allow for a limitation of the fora provided for in the Convention. For this reason, the Dutch courts declared the choice of court agreement to be null and void, entertained the dispute and ordered the carrier to pay a sum of money.

The insurance company brought an action against the carrier in Lithuania to obtain reimbursement of the amount paid to the client that was not granted in the Dutch judgment. Lithuanian courts at first

[83] Judgment - 21/03/2024 – Gjensidige, Case C-90/22, ECLI:EU:C:2024:252.

rejected the claim on the basis of the Dutch judgment limiting the carrier's liability. In the following instances, Lithuanian courts expressly asked the Court of Justice of the European Union whether the judgment of another Member State rendered in violation of an exclusive choice of court agreement could be refused recognition and enforcement[84].

(b) *Gjensidige: The solution given by CJEU*

The CJEU tackles several issues, and the first concerns the identification of the proper legal framework governing free movement of decisions. It should be recalled that the Brussels I bis Regulation contains several 'disconnection' clauses by which it intends to unilaterally coordinate with other acts of EU law or with international conventions on particular matters governing all or part of the topics covered by the regulation[85]. More specifically, art. 71 of the Brussels I bis Regulation allows certain international conventions in particular matters to which the Member States are party (if at least one third State is party to the same regime) to take precedence. The CMR

[84] *Idem*, para. 15 ff.

[85] *Amplius*, S.M. CARBONE, *From Speciality and Primacy of Uniform Law to its Integration in the European Judicial Area*, in S.M. CARBONE (ed), *Brussels Ia and Conventions on Particular Matters. The case of Transports*, Roma, 2017, p. 17; C.E. TUO, *Brussels Ia and International Transports Conventions: the Regulation's «Non Affect» Clause through the Lens of the CJEU Case Law*, in *ibidem*, p. 33; L. CARPANETO, *On Collisions and Interactions between EU law and International Transport Conventions*, in *ibidem*, p. 63; R. ESPINOSA CALABUIG, *Brussels Ia Regulation and Maritime Transport*, in *ibidem*, p. 107; A. PUETZ, *Brussels Ia and International Conventions on Land Transport*, in *ibidem*, p. 141; P.F. SOLETI, *Brussels Ia and International Air Transport*, in *ibidem*, p. 181; P. CELLE, *Jurisdiction and Conflict of Laws Issues between Contracts of Transport and Insurance*, in *ibidem*, p. 215; S. CARREA, *Brussels Ia and the Arrest of Ships: from the 1952 to the 1999 Arrest Convention*, in *ibidem*, p. 237; E.G. ROSAFIO, *Il problema della giurisdizione nel trasporto aereo di persone e nei pacchetti turistici*, in *Riv. dir. nav.*, 2016, p. 107; P. MANKOWSKI, *Art. 67 Brussels Ibis*, in U. MAGNUS, P. MANKOWSKI (eds), *ECPIL, Volume I Brussels Ibis Regulation*, Köln, 2023, p. 984; S. DOMINELLI, P. SANNA, *Sulla determinazione dell'autorità giurisdizionale competente a conoscere di una domanda di compensazione pecuniaria per ritardo di un volo: certezze, dubbi e riflessioni sul coordinamento tra strumenti normativi a margine della causa Ryanair C-464/18 della Corte di giustizia dell'Unione europea*, cit., p. 398; I. QUEIROLO, C.E. TUO, P. CELLE, L. CARPANETO, F. PESCE, S. DOMINELLI, *Art. 67 Brussels I bis Regulation: An Overall Critical Analysis*, in C.E. TUO, L. CARPANETO, S. DOMINELLI (eds), *Brussels I bis Regulation and Special Rules: Opportunities to Enhance Judicial Cooperation*, Rome, 2021, p. 13, where further references.

certainly falls among these conventions that 'take precedence' over the regulation. However, matters not covered by the international convention continue to be regulated by the Brussels I bis Regulation, which, in this sense, performs a 'fill the gap' function with respect to the individual convention. In the present case, the CJEU notes that the central issue is that of recognition; according to the Court, the CMR does not lay down detailed rules, since art. 31 of the Convention merely subordinates the enforcement of a "judgment" to the fulfilment of the formalities prescribed for that purpose in the country concerned[86]. Formalities that are thus dictated in this case by the Brussels I bis Regulation. It is in this latter instrument, therefore, that the Court seeks the solution to the question whether it is possible to refuse recognition and enforcement of a judgment for breach of a choice of court agreement.

The Court correctly points out that the Brussels I bis Regulation contains particularly detailed rules on the grounds to refuse recognition and enforcement of decisions given by the courts of other Member States in civil and commercial matters: public policy cannot be invoked to verify the jurisdiction of the court of origin and, moreover, the – exhaustive[87] – list of grounds does not include a breach of art. 25[88]. The fact that art. 45 Brussels I bis Regulation provides for a specific ground of refusal connected with the violation of the exclusive grounds of jurisdiction in art. 24 is not a sufficient condition for supplementing the rule with a provision protecting the exclusive jurisdiction based on choice of court agreement[89]. In other words, according to the Court '*the mere fact that an action is not heard by the court designated in an agreement conferring jurisdiction and*

[86] Judgment - 21/03/2024 – Gjensidige, Case C-90/22, cit., para. 43.

[87] Brussels I bis Regulation, art. 45(3). In the scholarship, see E. D'ALESSANDRO, *Il riconoscimento delle sentenze straniere*, Torino, 2007, p. 143 ff; C.E. TUO, *La rivalutazione della sentenza straniera nel regolamento. Bruxelles I: tra divieti e reciproca fiducia*, cit., p. 69 ff, and P. GOTTWALD, *Art. 45 Brüssel Ia-VO*, in *Münchener Kommentar zur ZPO, Band 3*, München, 2022, p. 2548, rn. 58. In the domestic case law, see Audiencia Provincial Palma de Mallorca (ES) 06.03.2008 - 27/2008, in *unalex*, ES-293.

[88] Judgment - 21/03/2024 – Gjensidige, Case C-90/22, cit., para. 52 ff. *Amplius* in the scholarship, see already J. ANTOMO, *Schadensersatz wegen der Verletzung einer internationalen Gerichtsstandsvereinbarung?*, cit., p. 263, and E. PEIFFER, *Schutz gegen Klagen im forum derogatum*, cit., p. 396 ff.

[89] Judgment - 21/03/2024 – Gjensidige, Case C-90/22, cit., para. 56 ff.

that, as a result, it is not ruled upon under the law of the Member State to which that court belongs cannot be regarded as a sufficiently serious breach of the right to a fair trial to render recognition of the judgment in that action manifestly at odds with the public policy of the Member State addressed'[90].

(c) *Gjensidige: A general conclusion*

The reasoning of the CJEU is straightforward and has to be shared: recognition of decisions between Member States is the rule and any derogation is the exception which, as such, must not be interpreted extensively[91]. Art. 45 Brussels I bis Regulation provides for a limited number of hypotheses in which a ground of non-recognition and non-enforcement may be invoked[92]. Quite simply, the violation of choice of court agreements is not among them and, if it is so desired, it should be for the 'legislator' of the Union to introduce, in the course of recast, a special ground for refusal.

Generally speaking, considering the importance that the principle of mutual recognition of decisions has in the European judicial space characterised by a trust between Member States[93], the solution reached by the Court is certainly worthy of support, although it clearly shows how the intention to promote party autonomy encounters limits and may still be somewhat 'circumvented'. In this sense,

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[90] Judgment - 21/03/2024 – Gjensidige, Case C-90/22, cit., para. 75.

[91] See already, Judgment of the Court (Grand Chamber) of 28 April 2009, Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams, Case C-420/07, ECLI:EU:C:2009:271, para. 55.

[92] *Ex multis*, C. KOLLER, *Art. 45*, in *Stein, Jonas Kommentar zur Zivilprozessordnung, Band 12 EuGVVO*, Tübingen, 2022, p. 839, rn. 5.

[93] *Amplius*, O. LOPES PEGNA, *Mutual trust, riconoscimento delle decisioni civili e tutela dei valori comuni nello spazio giudiziario europeo*, in A. ANNONI, S. FORLATI, P. FRANZINA (eds), *Il diritto internazionale come sistema di valori. Scritti in onore di Francesco Salerno*, Napoli, 2021, p. 742. In the domestic case law, see Tribunal da Relação Porto (PT) 30.09.2004 – 0434423, in *unalex*, PT-52 ('[a]*rticle 33 Brussels I Regulation is based on the principle of mutual confidence between the jurisdictions of the Member States. It is based on the so-called 5th freedom, which is the free circulation of judicial decisions within the areas of freedom, security and justice*'); Audiencia Provincial Barcelona (ES) 22.10.2008 - 339/2008, in *unalex*, ES-302; Vrhovno sodišče Republike Slovenije (SI) 13.06.2006 - Cpg 4/2006, in *unalex*, SI-4, and ArbG Berlin (DE) 08.11.2006 - 86 Ca 405/06, in *unalex*, DE-641.

it emerges how the promotion (and protection) of party autonomy is still limping, given that the *ex post* protection of agreements concluded between the parties must (*rectius*, can) be further implemented.

In the continental legal system, anyone wishing to plead a violation of a choice of court agreement will have no choice but to bring a new and autonomous action for damages[94], with all the difficulties that this entails also in terms of demonstrating and quantifying the harm for which compensation is sought[95]. Although, it should be noted, such a circumstance should be the exception in intra-European relations where coordination mechanisms exist to counter abusive behaviour and tactics by the parties[96].

In this perspective, then, private (substantive) autonomy itself could intervene, accompanying choice of court agreements with clear and express consequences, for example by identifying penalties to be applied in the event that a party violates the choice court agreement[97].

Also, it is not surprising that several (common law) jurisdictions resort to protective mechanisms, such as anti-suit injunctions[98] to 'protect' both arbitration clauses[99] and choice of court

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[94] C. THOLE, *Art. 25*, cit., rn. 163 ff.

[95] In the case law, see BGH, Urteil vom 17.10.2019 – III ZR 42/19, in *Neue Juristische Wochenschrift*, 2020, p. 399, para. 21, where the Court applies German substantive law to determine the party's liability, as German law was chosen as *lex contractus* and the choice of court clause was in favour of German courts. In the scholarship, see already E. PEIFFER, *Schutz gegen Klagen im forum derogatum*, cit., p. 429 ff.

[96] See Brussels I bis Regulation, art. 31(2), and U. MAGNUS, *Art. 25 Brussels Ibis Regulation*, in U. MAGNUS, P. MANKOWSKI (eds), *ECPIL, Volume I Brussels Ibis Regulation*, Köln, 2023, p. 580, rn. 166b.

[97] C. THOLE, *Art. 25*, cit., rn. 164; U. MAGNUS, *Art. 25 Brussels Ibis Regulation*, cit., rn 166.

[98] J. ANTOMO, *Schadensersatz wegen der Verletzung einer internationalen Gerichtsstandsvereinbarung?*, cit., p. 273 ss e M. AHMED, *The Nature and Enforcement of Choice of Court Agreements. A Comparative Study*, cit., p. 91.

[99] On anti-suit injunctions in the context of the Brussels I bis Regulation, and their limited effects, see in the case law Judgment of the Court (Grand Chamber) of 10 February 2009, Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc, Case C-185/07, ECLI:EU:C:2009:69, on which see *ex multis* A. DUTTA, C. HEINZE, *Anti-Suit Injunctions zum Schutz von Schiedsvereinbarungen*, in *Recht der Internationalen Wirtschaft*, 2007, p. 411; M. WINKLER, *West Tankers: la Corte di Giustizia conferma l'inammissibilità delle anti-suit injunctions anche in un ambito escluso dall'applicazione del Regolamento*

agreements[100]. If, in the opposite scenario, such instruments are adopted against the court of a Member State whose jurisdiction has been agreed upon by the parties, such anti-suit injunctions are no limit to the court of the Member State which would have to entertain the claim[101].

Bruxelles I, in *Diritto del commercio internazionale*, 2008, p. 735; R. FENTIMAN, *Arbitration and Antisuit Injunctions in Europe*, in *Cambridge Law Journal*, 2009, p. 278; F. MARONGIU BONAIUTI, *Emanazione di provvedimenti inibitori a sostegno della competenza arbitrale e reciproca fiducia tra i sistemi giurisdizionali degli Stati membri dell'Unione europea*, in *Rivista dell'arbitrato*, 2009, p. 245; F. PERILLO, *Arbitrato comunitario e anti-suit injunctions nella sentenza West Tankers della Corte di Giustizia*, in *Diritto del commercio internazionale*, 2009, p. 351; E. MERLIN, *Proroghe pattizie e principio di "pari autorità" nell'accertamento della competenza internazionale nel Reg. CE 44/2001*, in *Rivista di diritto processuale*, 2009, p. 971; C. GAMBINO, *La legittimità delle azioni risarcitorie per violazione di clausole compromissorie dopo la giurisprudenza West Tankers*, in *Rivista di diritto internazionale privato e processuale*, 2010, p. 949; A. LEANDRO, *Le Anti-suit injunctions a supporto dell'arbitrato: da West Tankers a Gazprom*, in *Rivista di diritto internazionale*, 2015, p. 815.

[100] Judgment - 07/09/2023 - Charles Taylor Adjusting, Case C-590/21, cit.

[101] U. MAGNUS, *Art. 25 Brussels Ibis Regulation*, cit., rn. 166.

Share Purchase Agreement Regarding Shares in a Polish Limited Liability Company - Considerations under Private International Law

Dominik Mizerski

1. *Introduction*

The share purchase agreement regarding shares in a limited liability company is the principal method for the secondary acquisition of shareholder status in such a company. In practice, due to the increasing internationalization of economic relations, this type of agreement is more frequently concluded with foreign elements. For example, an agreement may be concluded outside the borders of the Republic of Poland or by persons located in different countries at the time of its conclusion. This can raise questions regarding the determination of the law applicable to such an agreement and the requirements for its form. This is because the legal systems of most countries allow the parties to choose the form of the agreement, except in cases expressly provided for by relevant legislation[1].

This article aims to identify the conflict-of-law rules applicable to determining the law governing the share purchase agreement

[1] Pazdan M., Tynel A., Funk J., Chwalej W., Fuchs B., *Międzynarodowe Prawo Handlowego*, Warsaw, 2006, p. 99.

shares in a Polish limited liability company and the requirements for the form of such an agreement. The article also seeks to prove that the provisions of the Polish Commercial Companies Code[2], which require that an agreement on the transfer of ownership of shares be concluded in writing with notarized signatures, do not constitute overriding mandatory provisions. The scope of this analysis is limited to the provisions of the Rome I Regulation[3] and the Private International Law Act[4]. The provisions of the United Nations Convention on Contracts for the International Sale of Goods[5] are not relevant to this analysis, as they explicitly exclude agreements for the sale of shares from their applicability.

2. *Share purchase agreement in accordance with the provisions of the Polish Commercial Companies Code*

2.1. *General considerations*

In the doctrine of commercial law, shares can be understood in two ways. One view is that a share is defined as a property right of a binding and organizational nature to which a shareholder is entitled. It forms part of the membership relationship between a shareholder and a limited liability company and encompasses a number of rights arising from the articles of association and the provisions of the Commercial Companies Code[6]. The other view is that a share can also be understood as a fraction of the share capital.

Shares are not a securities. The provisions of the Commercial Companies Code introduce a general prohibition on the issuance of

[2] Commercial Companies Code of 15 September 2000 (Journal of Laws 2024, item 18, as amended), hereinafter abbreviated as CCC or the Commercial Companies Code.

[3] 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, pp. 6–16*),* hereinafter abbreviated as Rome I Regulation.

[4] Act of 4 April 2011 on Private International Law (Journal of Laws 2023, item 503, as amended), hereinafter abbreviated as PILA or the Private International Law Act.

[5] United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980.

[6] HERBET A., *§ 24. Rozporządzanie udziałami*, in SOŁTYŃSKI S. (ed.), *System Prawa Prywatnego, t. 17A.* Prawo spółek kapitałowych, Warsaw, 2015, p. 327.

bearer share certificates, registered share certificates, or endorsable documents (art. 174 § 6 CCC). The prohibition on the incorporation of share rights in securities is primarily intended to prevent the "splitting" of the right to shares from the right to profits, regardless of the corporate relationship[7].

Shares are subject to the general principle of free transferability[8]. The transferability of shares is a consequence of the capital nature of the limited liability company and is intended to facilitate the trading of rights arising from participation in the company. It is also a consequence of the separation of company membership from the articles of association, as the transferability of shares does not require an amendment to the articles of association[9]. A fraction of a share and, in certain cases, a part of a share, can also be an object of transfer[10]. It is also permissible to dispose of specific, purely pecuniary claims with the normative form of a claim, such as the right to a share in the company's profits. However, a shareholder may not dispose of individual share rights that are part of a share, i.e., the dividend right[11].

Notwithstanding the above principle of the free transferability of a share, specific laws or provisions in the articles of association of a limited liability company may provide for restrictions on the disposal of shares. In the case where the articles of association require the consent of the company for the disposal of shares, but do not provide otherwise, the consent for the disposal is given by the company's management board (art. 182 CCC). The main reason for restricting the freedom to sell shares (mainly through contractual clauses) is to guarantee stability in the company's shareholding or

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[7] JARA Z., art. 174 mn. 23, in JARA Z. (ed), *Kodeks spółek handlowych. Komentarz*, Warsaw, 2024, pp. 718-719.

[8] SZAJKOWSKI A., TARSKA M., art. 180 mn. 4-6, in SOŁTYSIŃSKI S., SZAJKOWSKI A., SZUMAŃSKI A., SZWAJA J., TARSKA M., HERBET A., *Kodeks spółek handlowych. Spółka z ograniczoną odpowiedzialnością. Komentarz do artykułów 151-300. Tom II*, Warsaw, 2014, p. 282; KIDYBA A., *Kodeks spółek handlowych. Tom I. Komentarz do art. 1-300[134],* Warsaw, 2023, p. 722; KWAŚNICKI R. L., *Spółka z ograniczoną odpowiedzialnością*, Warsaw, 2005, p. 464; Pabis R., art. 180 mn. 1, in BIENIAK J., BIENIAK M., NITA-JAGIELSKI G. (eds.), *Kodeks spółek handlowych. Komentarz*, Warsaw, 2024, p. 643.

[9] KOPACZYŃSKA-PIECZNIAK K., KIDYBA A. (eds.), *Spółka z ograniczoną odpowiedzialnością*, Warsaw, 2013, p. 147.

[10] STANIK M., *Art. 180 mn. 1*, in JARA Z. (ed.), *Kodeks spółek handlowych. Komentarz*, Warsaw, 2024, pp. 760-761.

[11] HERBET A., *§ 24. Rozporządzanie udziałami*, cit., p. 329.

the possibility of pre-selecting persons who are to enter the company in place of an existing shareholder (seller)[12].

The transfer of shares is qualified as a purposive act (as a result of the conclusion of an agreement, the purchaser acquires a property interest), a causative act (the validity of the act depends on the existence of a proper cause for the adoption of the act, understood as a typical economic purpose of the act in question), and a consensual act (it takes effect at the time of the submission of a declaration of intent, i.e., no actual act is required). It has been pointed out in the literature that the provisions on the transfer of claims apply to the transfer of shares as a subjective right to the extent to which they are not regulated by the provisions of the Commercial Companies Code. This also applies to art. 510 § 1 of the Civil Code[13], which provides for the so-called double binding and disposing effect of the agreement of sale, exchange or other agreement providing for a transfer of a right designated as to identity[14]. This makes the share purchase agreement similar to the agreement transferring ownership and the assignment of receivables[15].

The conclusion of a share purchase agreement regarding shares does not constitute an amendment to the company's articles of association. Moreover, in accordance with the judgement of the Supreme Court of 9 June 1989, the purchaser of shares in a limited liability company is not required to submit a notarised statement on joining the company and taking up the shares[16].

The shares in the company may be purchased by either its existing shareholder or a third party[17]. The company may also acquire its own shares in the cases specified in the provisions of the Commercial

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[12] HERBET A., *Obrót udziałami w spółce z o.o*., Warsaw, 2004, p. 181.

[13] Civil Code of 23 April 1964 (Journal of Laws 2024, item 1061, as amended), abbreviated as CC or the Civil Code.

[14] SZAJKOWSKI A., TARSKA M., *art. 180 nb. 8,* cit*.,* p. 283; NOWACKI A., *Spółka z ograniczoną odpowiedzialnością. Tom I. Komentarz. Art. 151-226 KSH*, Warsaw, 2018, p. 575; OPALSKI A., *art. 180 mn. 4*, in OPALSKI A. (ed.), *Kodeks spółek handlowych. Tom IIA. Spółka z ograniczoną odpowiedzialnością. Komentarz. Art. 151-226,* Warsaw, 2018, pp. 415-416.

[15] KOPACZYŃSKA-PIECZNIAK K., KIDYBA A. (eds.), *Spółka z ograniczoną odpowiedzialnością*, cit., p. 147.

[16] Resolution of the Supreme Court of 9 June 1989, III CZP 55/89, Legalis No. 26696.

[17] STANIK M., *art. 180 mn. 6*, cit., p. 761.

Companies Code. As a rule, all the rights of the seller in the corporate relationship with the company (membership rights) are transferred to the purchaser, including the right to vote, to participate in profits, and the right to receive remuneration for recurring services in kind. The transfer of shares is fully subject to the principle "*nemo plus iuris in alium transfere potest quam ipse habet*". Therefore, it is not possible to acquire shares effectively from a person who is not a shareholder – even if, at the time of the transfer, that person is registered as the company's shareholder in the register of entrepreneurs of the National Court Register or in the company's internal documents, e.g., in the book of shares[18].

The change of an entity entitled to the shares takes place, in principle, at the time of the conclusion of a share purchase agreement and the transfer is effective *erga omnes*. However, this rule does not apply to the company itself[19]. The provisions of the Commercial Companies Code introduce an obligation to notify a limited liability company on the transfer of a share, a part of a share, or a fraction of a share to another person. In addition, the transfer of shares is effective against the company only after it has received notice of the transfer (art. 187 CCC). Such notice may be given by the seller or the purchaser of shares. In practice, the parties to a share purchase agreement choose to make a joint notification. When making the notification, it is necessary to provide evidence of the transfer, i.e., a copy of the concluded share purchase agreement.

The company's management board, upon receipt of the notification on the disposal of shares, is obliged to update the book of shares (art. 188 § 1 CCC). It is an internal company document. Its purpose is to identify the company's shareholding. The book is mainly of a record-keeping nature and an entry in it is only declaratory. In addition, each shareholder has the right to inspect the book of shares (art.188 § 2 CCC).

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[18] Dąbroś M., *Obrót udziałami spółki z ograniczoną odpowiedzialnością a jawność wewnętrzna i zewnętrzna składu osobowego spółki,* in *Przegląd Prawa Handlowego,* 2015, 12, p. 22; Kopaczyńska-Pieczniak K., Kidyba A. (eds.), *Spółka z ograniczoną odpowiedzialnością*, cit., p. 183; Opalski A., *art. 180 mn. 9,* cit., p. 418.

[19] Dąbroś M., *Obrót udziałami spółki z ograniczoną odpowiedzialnością a jawność wewnętrzna i zewnętrzna składu osobowego spółki*, cit., p. 19.

In the case of the sale of shares, the company's management board is also obliged to file with the registration court a new list of shareholders signed by all the members of the company's management board, indicating the number and nominal value of each share and the pledge or usufruct of a share (art. 188 § 3 CCC). The obligation to submit a list of shareholders is seen in the literature as an external aspect of the openness of shareholders of a limited liability company[20]. However, the list is not entered in the register of entrepreneurs of the National Court Register[21]. It is only submitted to the registration file[22]. Only shareholders who individually or jointly hold at least 10 percent of the share capital are entered in the register of entrepreneurs of the National Court Register (art. 38 section 8(c) of the National Court Register Act) [23]. Disclosure of information on shareholders in the register of entrepreneurs of the National Court Register does not sanction the effects of an invalid provision, but it does create presumptions regarding registration in accordance with the rules set out in the National Court Register Act.

2.2. *Form of the share purchase agreement under Polish law*

The form of the share purchase agreement regarding shares in a limited liability company follows directly from the provision of art. 180 of the Commercial Companies Code, which requires a written form with notarised signatures for agreements on the sale of a share, a part thereof, or a fraction thereof. The purpose of the requirement of written form with notarised signatures is to prevent the backdating and postdating of share purchase agreements[24]. The requirement for

[20] ROMANOWSKI M., *Status wspólnika w spółce z o.o. a wpis w księdze udziałów* in *Przegląd Prawa Handlowego,* 2005, 9, p. 10.

[21] Act on the National Court Register (Journal of Laws 2024, item 979, as amended), hereinafter abbreviated as National Court Register Act.

[22] WRÓBEL K., LETOLC P., *Podstawa prawna wpisu nowego wspólnika do rejestru przedsiębiorców KRS – III CZP 12/12* in *Monitor Prawniczy,* 2012, 20, pp. 5-6.

[23] See: DĄBROŚ M., *Brak ujawniania w rejestrze przedsiębiorców danych mniejszościowego wspólnika spółki z o.o. – czy zasadnie* in *Przegląd Prawa Handlowego,* 2015, 9, p. 50.

[24] STANIK M., *art. 180 mn. 12*, cit., p. 762; SZAJKOWSKI A., TARSKA M., *art. 180 mn. 3,* cit*.,* p. 281.

a special form for share disposals is a consequence of the adoption of the construction of a share as a right without its simultaneous externalisation in the form of a security[25]. The requirement of a written form with notarised signatures applies irrespective of the status of the parties to the agreement. Consequently, it also applies to the acquisition of own shares by a limited liability company.

The written form with notarised signatures means that the notary includes a clause certifying the authenticity of a person's signature on the document[26]. Notarisation may be applied to documents drawn up in Polish and may also be applied to documents written in a foreign language[27]. Under art. 97 of the Law on Notaries[28], a certification must contain the date and place of its execution (upon request, also the time of the act), the notary's office, the signature of the notary issuing the certification and his or her seal.

When notarising, the notary is not obliged to verify the signatory's authority to represent the party to the agreement. Moreover, the scope of notarisation performed by the notary does not include the power of the signatory to represent a party to a legal action[29]. Furthermore, when performing the activity of certifying the authenticity of a signature on a document, the notary is not obliged to verify the legality of the content of the document[30]. The written form with a notarised signature is maintained both when the signatures were put to the agreement in the presence of the notary and when the signature was not put in the presence of the notary, but the persons signing the agreement acknowledged the signature before the notary as their own. If the certification of signature as one's own was made before the notary on a date later than the date of signing the share purchase

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[25] MICHALSKI M., *art. 180 mn. 5*, in KIDYBA A. (ed.), *Kodeks spółek handlowych. Tom II. Komentarz do art. 151-300*, Warsaw, 2018, p. 239.

[26] WOŹNIAK R., *Kilka uwag w dyskusji o formie zawarcia umowy sprzedaży udziałów w spółce z o.o.* in *Przegląd Prawa Handlowego,* 2018, 1, p. 15.

[27] OPALSKI A., *art. 180 mn. 22,* cit., p. 422.

[28] Act of 14 February 1991 - Law on Notaries (Journal of Laws 2024, item 1001, as amended), hereinafter abbreviated as the Law on Notaries.

[29] NOWACKI A., *Spółka z ograniczoną odpowiedzialnością. Tom I. Komentarz. Art. 151-226 KSH*, cit., p. 569.

[30] SZCZUROWSKI T., *Forma umowy rozporządzającej udziałami spółki z o.o.* in *Przegląd Ustawodawstwa Gospodarczego,* 2018, 1, p. 26.

agreement, the date of certification of the signature is considered to be the date of conclusion of the agreement[31].

The requirement of written form with notarised signatures applies to disposing and binding-disposing agreements[32]. It is not necessary for binding and preliminary agreements to satisfy the described form requirement. They may be concluded in any form (art. 60 CC)[33]. The observance of written form with notarised signatures shall also apply to the supplementation, amendment, or termination of an agreement by mutual agreement of the parties (art. 77 § 1 CC). On the other hand, renunciation or its termination by notice shall be evidenced in writing (art. 77 § 3 CC).

2.3. *Admissibility of certifying signatures by a foreign notary public*

The legal obligation to conclude a share purchase agreement in written form with a notarised signature may also be executed abroad before a Polish consul or a foreign notary[34]. However, it is necessary to maintain the equivalence of form, which will be the case if there is a functional similarity between the foreign notarial act and the Polish one, a similarity between the position of the notary in both legal systems and the convergence of procedures[35]. Moreover, it is

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[31] RODZYNKIEWICZ M., *Kodeks spółek handlowych. Komentarz,* Warsaw, 2018, p. 367.

[32] OPALSKI A., *art. 180 mn. 23,* cit., p. 423; RODZYNKIEWICZ M., *Kodeks spółek handlowych. Komentarz*, cit., p. 367; STRZĘPKA J. A., ZIELIŃSKA E., *art. 180 mn. 7* in PINIOR P., STRZĘPKA J.A. (eds.) *Kodeks spółek handlowych. Komentarz*, Warsaw, 2024, pp. 404-405; HERBET A., *Obrót udziałami w spółce z o.o*., cit., pp. 276-277.

[33] WOSIAK K., *Skutki umowy przedwstępnej oraz umowy zobowiązującej do zbycia udziałów w spółce z o.o. zawartych bez zachowania formy pisemnej z podpisami notarialnie poświadczonymi* in Monitor Prawniczy, 2024, 5, p. 291.

[34] WOŹNIAK R., *Kilka uwag w dyskusji o formie zawarcia umowy sprzedaży udziałów w spółce z o.o.,* cit., p. 16; OPALSKI A., *art. 180 mn. 22,* cit., p. 422; NOWACKI A., *Spółka z ograniczoną odpowiedzialnością. Tom I. Komentarz. Art. 151-226 KSH*, cit., p. 570.

[35] GÓRECKI J., *Wykorzystanie w Polsce zagranicznego aktu notarialnego lub innego dokumentu potwierdzającego dokonanie czynności prawnej zagranicą*, in POPIOŁEK W. (ed.), *Międzynarodowe Prawo Handlowe. System Prawa Prywatnego. Tom 9*, Warsaw 2013, p. 364; SOŁTYSIŃSKI S., *Prawo właściwe dla spółek prawa handlowego* in Rejent, 2001, 7-8, pp. 288-289; CZUBIK P., OPLUSTIL K., *Forma zagranicznych czynności prawnych związanych z powstaniem i funkcjonowaniem polskiej spółki z o.o.* in Prawo Spółek, 2007, 1, p. 25; PAZDAN M., *7.4.2. Wymagania w zakresie formy*, in SZUMAŃSKI A. (ed.), *Prawo spółek handlowych, System Prawa Handlowego, t. 2A,* Warsaw, 2019, p. 368.

rightly point out that foreign law does not have to be identical to Polish law for the equivalence to be recognised. Instead, it must enable the same objective to be achieved by similar means[36]. These requirements do not apply to the case of a share purchase agreement concluded before a notary under the common law system, as such individuals are normally not persons of public trust and do not need to have legal training.

2.4. *Consequences of concluding a share purchase agreement in breach of the rules on its form*

The written form with notarised signatures is reserved for the transfer, under pain of invalidity[37]. Consequently, the conclusion of a share purchase agreement regarding shares in a Polish limited liability company without observing the requirement of written form with notarised signatures leads to the invalidity of the agreement and consequently to the invalidity of the transfer (art. 73 § 2 CC in conjunction with art. 2 CCC).

Where an agreement stipulates that a notarial deed is required for share purchase agreements, a failure to comply with that requirement does not render the agreement null and void. However, in accordance with the judgment of the Supreme Court of Justice of 9 February 2007[38], this legal action is subject to suspended invalidity.

2.5. *Possibility of concluding a share purchase agreement using a template*

The Commercial Companies Code also introduces an exception to the requirement to maintain the above form in the case of a limited liability company whose agreement was concluded using a model agreement (art. 182 § 2 CCC). The shares of a company thus formed

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[36] KLYTA W., *Czynności notarialne w polskim międzynarodowym prawie spółek* in Rejent 2001, 7-8, p. 139.

[37] See: SZCZUROWSKI T., *Forma umowy rozporządzającej udziałami spółki z o.o.*, cit., p. 25.

[38] Judgement of the Supreme Court of Justice of 9 February 2007., III CSK 311/06, Legalis No. 156842.

can be sold using a template made available in an electronic system. The case in which the articles of association are concluded using a template should be understood only as a situation in which the articles of association concluded using a template always remain in conformity with the template without interruption, even in the case of amendments to the articles of association[39]. The declaration of the seller and the purchaser shall be made by filling in the relevant fields of the template[40] and shall be accompanied by a qualified electronic signature, a trusted signature or a personal signature[41]. Only the parties to the agreement to be concluded have the right to use the above method. The seller and the purchaser may always decide to conclude the agreement in writing with notarised signatures. Notably, the template by means of which a share purchase agreement may be concluded restricts the parties from freely adapting the content of such an agreement to specific needs in order to safeguard the interests of the seller or the purchaser[42]. Therefore, to concretise the legal relationship between them, the parties may seek to conclude a written agreement with notarised signatures.

3. *Requirements under the Rome I Regulation*

3.1. *General considerations*

First, it is worth considering the issue of the rules applicable for determining the regime to be applied to the share purchase agreement regarding shares in a Polish limited liability company. For this reason, it is first appropriate to analyse whether the provisions of the Rome I Regulation are applicable for determining the law to be applied to the disposal of shares. The provisions of this regulation explicitly indicate that the following are excluded from its scope of application: obligations arising under bills of exchange, cheques,

[39] NOWACKI A., *Spółka z ograniczoną odpowiedzialnością. Tom I. Komentarz. Art. 151-226 KSH*, cit., p. 576.

[40] KIDYBA A., *Kodeks spółek handlowych. Tom I. Komentarz do art. 1-300[134],* cit., p. 729.

[41] DUMKIEWICZ M., *Kodeks spółek handlowych, Komentarz*, Warsaw, 2020, p. 340.

[42] RODZYNKIEWICZ M., *Kodeks spółek handlowych. Komentarz*, cit., p. 368.

and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character (art. 1 section 2(d) Rome I Regulation) and questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body (art. 1 section 2(f) Rome I Regulation).

The exemption in art. 1 section 2(d) of the Rome I Regulation applies to those participation rights that are included in a security. As explained above, shares are not a security. Therefore, the exemption under this provision is not applicable. The exemption set out in art. 1 section 2(f) of the Rome I Regulation is not applicable either. Consequently, the provisions of the Rome I Regulation are applicable for determining the law to be applied to the disposal of shares (subject to the following).

The provisions of the above Regulation apply to agreements of sale concluded after 17 December 2009 (art. 28 Rome I Regulation). The law applicable to agreements concluded before that date is determined by the provisions of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations[43].

3.2. *Possibility of choosing law applicable to the share purchase agreement other than Polish law*

First, it is necessary to distinguish between binding and disposing agreements on the transfer of shares[44]. With regard to binding agreements, it is undisputed that the choice of law applicable to the share purchase agreement regarding shares in a Polish limited liability company is governed by the law chosen by the parties pursuant to art. 3 section 1 of the Rome I Regulation. Where, on the other hand, all the elements of the factual situation relating to the agreement at

[43] Convention 80/934/EEC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, in OJ L 266, 9.10.1980, pp. 1-19.

[44] GÓRECKI J. *Forma umów związanych z tworzeniem osób prawnych i obrotem prawami udziałowymi w spółkach*, cit., p. 368.

the time of the choice of law are concentrated in the territory of Poland, then Polish law remains applicable and the choice of law has only the value of a so-called substantive indication (art. 3 section 3 of the Rome I Regulation). In the absence of a choice of law, an agreement for the sale of goods is governed by the law of the country in which the seller has his habitual residence (art. 4 section 1(a) of the Rome I Regulation).

The conflict-of-law rules which are the subject matter of the provisions of the Rome I Regulation do not apply to agreements producing an in rem effect, apart from the exception provided for in art. 14 of the Regulation[45]. This raises the question of determining the law applicable to the share purchase agreement regarding shares in a Polish limited liability company. In this respect, authors have pointed out that the personal status of the company should be considered the *lex causae* for an agreement forming the basis for the transfer of shares, which are the performance of a previously created obligation[46]. The personal status of the company also determines whether or not there is a binding and disposing effect of the obligatory act (or, more precisely, whether or not there is also a disposing effect of the obligatory act). The obligatory status only generally determines the obligation to dispose, but the way in which the obligation is to be fulfilled, i.e., the conditions that must be met for the disposal to take place, is determined by the personal status of the company. It may require the performance of certain factual acts, e.g., the execution of a document or legal acts, the submission of a separate declaration of intent to dispose of a right[47]. It can therefore be said that the personal status of the company specifies the content of the obligation of the party obliged to dispose. A detailed analysis of this issue is the subject matter of section 4 of this paper.

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[45] KLYTA W., *Forma czynności prawnych w międzynarodowym prawie spółek. Uwagi prawnoporównawcze* in PAZDAN M., JAGIELSKA M., ROTT-PIETRZYK E., SZPUNAR M. (eds.), *Rozprawy z prawa prywatnego. Księga jubileuszowa dedykowana Profesorowi Wojciechowi Popiołkowi*, Warsaw, 2017, p. 933 and the literature referenced therein.

[46] OPALSKI A., *art. 180 mn. 32,* cit., p. 428; GÓRECKI J.*, Forma umów związanych z tworzeniem osób prawnych i obrotem prawami udziałowymi w spółkach,* cit., p. 368.

[47] POPIOŁEK W., *§ 84. Zbywanie praw uczestnictwa*, in ROMANOWSKI M. (ed.), *Prawo spółek osobowych. Tom 16B, System Prawa Prywatnego*, Warsaw, 2021, p. 939; POPIOŁEK W., *Prawo właściwe dla przeniesienia akcji poza obrotem regulowanym* in *Przegląd Prawa Handlowego,* 2002, 11, p. 44.

3.3. *Form requirements under the Rome I Regulation*

The requirements for the form of a binding agreement are set out in art. 11 of the Rome I Regulation. Under art. 11 section 1 of this regulation, an agreement concluded between persons who, or whose agents, are in the same country at the time of its conclusion is valid in terms of the form if it satisfies the formal requirements laid down by the law applicable to the agreement (*lex causae*) or, alternatively, by the law of the country in which the agreement is concluded (*lex loci actus*). In the case where the parties or their agents were not in the same country at the time of conclusion of the agreement, it is sufficient that the agreement complies with the formal requirements of either the law determined by *lex causae* or the law of the country in which one of the parties or their agent was present, or the law of the country in which one of the parties had his habitual residence or the seat of the governing body of the company or other legal person at that time (art. 11 section 2 of the Rome I Regulation).

3.4. *Consequences of a breach of obligations regarding the form of the share purchase agreement*

The form status also sets out the consequences of a failure to comply with the form. The obligation to comply with the form and the consequences of non-compliance are closely linked. The form status thus determines the consequences of a breach of the substantive rules of the law applicable to the form[48]. When an agreement does not comply with the formal requirements of one of the relevant laws, the question of the consequences of non-compliance with the form arises. The provisions of the Rome I Regulation do not expressly determine which of the alternative laws applicable to the assessment of the form of an agreement determines the consequences of a failure to observe the formal requirements. In the context of the analysis, it is pointed out that the sanctions for non-compliance with the form of an agreement are to be determined according to whichever of the

[48] Górecki J., F*orma umów obligacyjnych i rzeczowych w prawie prywatnym międzynarodowym*, Katowice, 2007, p. 163.

alternative laws referred to in art. 11 of the Rome I Regulation provides for the mildest consequences of non-compliance with the form of the agreement[49].

4. *Requirements under Polish Private International Law Act*

The question of the personal status of a company subject to the provisions of the Private International Law Act should be considered first. The personal status is determined on the basis of art. 17 section 1 of the Private International Law Act. This article provides that a legal person is subject to the law of the state in which it has its seat. At the same time, the prevailing view in the literature is in favour of adopting the real seat theory. However, if the law designated pursuant to art. 17 section 1 of the Private International Law Act provides for jurisdiction by reference to the law of the state in which the legal person is incorporated, the law of that state shall apply (art. 17 section 2 PILA).

The personal status determines, *inter alia*, the acquisition and loss of the status of shareholder or member and the rights and obligations attached to it (art. 17 section 3.7 PILA). The purpose of this provision is to subject all forms of participation in the company and the assessment of a shareholder's legal status to the company's personal status[50].

The form of a legal act is determined by the law applicable to that act (*lex causae*). The provisions of the Private International Law Act also include two subsidiary conflict-of-law rules. In order to comply with the requirements as to the form, it is sufficient to observe the form provided for by the law of the state in which the act is performed (*lex loci actus*). If an agreement is concluded by persons who, at the time of the declarations of will, are located in different states, it is sufficient to comply with the form prescribed for the act by the law of one of these states (art. 25 section 1 PILA). This provision introduces, by analogy with art. 11 of the Rome I Regulation,

[49] GÓRECKI J. *Forma umów związanych z tworzeniem osób prawnych i obrotem prawami udziałowymi w spółkach,* cit., p. 368.

[50] KLYTA W., *Art. 17 mn. 46*, in PAZDAN M. (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warsaw, 2018, p. 250.

a rule allowing the parties to comply either with the formal requirements of the country in which the act is performed or with the formal requirements of the law of the country in which the act is performed[51]. However, the possibility of applying the *lex loci actus* is only possible when the requirements of the *lex causae* have not been met[52].

The above subsidiary rules of conflict of laws do not apply to acts relating to immovable property and to acts the object of which is the creation, merger, division, transformation or dissolution of a legal person or an organisational unit without legal personality (art. 25 section 2 PILA). This means that, as regards the form of the above legal actions, only the law applicable to these actions (*lex causae*) applies.

Once the above issues have been outlined, it is possible to move on to conclusions regarding the form applicable to disposing agreements and binding-disposing agreements relating to shares in a Polish limited liability company. As already indicated, recent literature classifies these types of agreements as belonging to the personal status of the company designated based on the provision of art. 17 of the Private International Law Act[53]. The personal status of the company does not apply to agreements transferring the rights of shareholders in the company but instead sets out the conditions for the acquisition or loss of the status of a shareholder. One should adhere to the view that this law, together with the provision of art. 25 of the Private International Law Act, may constitute the basis for

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[51] WOLAK G., *Forma aktu notarialnego zastrzeżona dla czynności prawnych (oświadczeń woli) w k.s.h. (cz. 1)* in *Prawo Spółek,* 2010, 10, p. 54.

[52] PAZDAN J., *Art. 25, mn. 13,* in PAZDAN M. (ed.), *Prawo prywatne międzynarodowe. Komentarz,* 2018, p. 285; TOMASZEWSKI M., *Art. 25 mn. 7-8*, in POCZOBUT J. (ed.), *Prawo prywatne międzynarodowe. Komentarz*, Warsaw, 2017, p. 441; PAZDAN M., *7.4.2. Wymagania w zakresie formy*, cit.*,* p. 367.

[53] In this direction: GÓRECKI J., *Forma umów związanych z tworzeniem osób prawnych i obrotem prawami udziałowymi w spółkach,* cit., p. 368; OPALSKI A., *art. 180 mn. 32,* cit., p. 428, KLYTA W., *Forma czynności prawnych w międzynarodowym prawie spółek. Uwagi prawnoporównawcze*, cit.*,* p. 929.

determining the status of the form of disposing agreements and binding-disposing agreements[54]. In this respect, the acts listed in the provision of art. 25 section 2 of the Private International Law Act do not include agreements concerning the disposal of shares. Therefore, the form of disposing and binding-disposing agreements is subject to both the *lex causae* and the *lex loci actus*, in accordance with art. 25 section 1 of the Private International Law Act[55]. This provision is general in nature and applies to all legal transactions (apart from those specified in art. 25 section 2 of the Private International Law Act). Therefore, if one of the parties to a share purchase agreement regarding shares in a Polish limited liability company is domiciled in Poland and the other is domiciled in a country that provides for less restrictive requirements regarding the form of the sale of shares in a limited liability company, there is no obligation for each party to conclude the agreement in the same form (implicitly in the more restrictive form). It should be considered sufficient to conclude the agreement in accordance with the law of the country in which one of the parties is located at the time of the conclusion of the agreement[56]. Consequently, there may be a case where an agreement is concluded in ordinary written form, even though one of the parties is located in the territory of the Republic of Poland[57].

Regarding the consequences of non-compliance with the form, authors argue that these consequences are to be determined exclu-

[54] By contrast: MATACZYŃSKI M., *Prawo właściwe dla formy czynności prawnych, których przedmiotem jest rozporządzenie prawami udziałowymi w spółkach handlowych, jak również powstanie, łączenie, podział, przekształcenie lub ustanie osoby prawnej,* in OLEJNIK A., HABERKO J., PYRZYŃSKA A., SOKOŁOWSKA D. (eds.), *Współczesne problemy prawa zobowiązań*, Warsaw, 2015, p. 416, who indicates that the law applicable to the transfer of shares which do not take the form of a document or a record in an information system shall be the law designated by art. 14 of the Rome I Regulation.

[55] KLYTA W., *Czynności notarialne w polskim międzynarodowym prawie spółek,* cit., pp. 136-141*;* CZUBIK P., OPLUSTIL K., *Forma zagranicznych czynności prawnych związanych z powstaniem i funkcjonowaniem polskiej spółki z o.o*., cit., pp. 24 ff.

[56] See: POPIOŁEK W., *§ 84. Zbywanie praw uczestnictwa*, cit., p. 939.

[57] WOŹNIAK R., *Kilka uwag w dyskusji o formie zawarcia umowy sprzedaży udziałów w spółce z o.o.,* cit., p. 18.

sively based on the provisions of the law applicable to the legal transaction in question (*lex causae*)[58]. A failure to comply with the form of a share purchase agreement regarding shares in a Polish limited liability company will therefore result in the invalidity of the transfer of the shares.

5. *Considerations on the issue of overriding mandatory provisions*

Reference should also be made to the issue of overriding mandatory rules. Overriding mandatory provisions are those that cannot be excluded or limited by the will of the parties or by reference to a conflict-of-laws rule[59]. Provisions of this kind are particularly important for the protection of the public policy of the state and, by their purpose or nature, apply irrespective of the law governing the legal relationship[60]. Such provisions are the subject of art. 9 section 1-2 of the Rome I Regulation and art. 8 of the Private International Law Act.

A minority view in the field under analysis is that art. 180 of the Commercial Companies Code, requiring the written form with notarised signatures for a share sale agreement, is an overriding mandatory provision. Such an obligation arises from the importance of the security of trading[61]. However, an overwhelming majority of Polish authors believe that art. 180 of the Commercial Companies Code is not an overriding mandatory provision[62].

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[58] GÓRECKI J., *Skutki naruszenia obowiązku dochowania formy,* cit., pp. 370; TOMASZEWSKI M., *Art. 25 mn. 8*, cit., p. 441; PAZDAN M., *7.4.2. Wymagania w zakresie formy*, cit., p. 366.

[59] MATACZYŃSKI M., *Przepisy wymuszające swoje zastosowanie w prawie prywatnym międzynarodowym*, Zakamycze, 2005, pp. 43-44.

[60] ZACHARIASIEWICZ M. A., *§ 15. Przepisy wymuszającego swoje zastosowanie,* in PAZDAN M. (ed.), *System Prawa Prywatnego, t. 20A, Prawo prywatne międzynarodowe*, Warsaw, 2014, p. 435, WYSOCKA-BAR A., KAMARAD E., Ovveriding Mandatory Provisionns in Polish 2011 Private International Law Act, Law in: Law Series of the Annals of the West University of Timosoara, 2023, 1, p. 75

[61] SOŁTYSIŃSKI S., *Prawo właściwe dla spółek prawa handlowego*, cit., p. 289.

[62] CZUBIK P., OPLUSTIL K., *Forma zagranicznych czynności prawnych związanych z powstaniem i funkcjonowaniem polskiej spółki z o.o.*, cit., p. 25; GÓRECKI J., *Forma umów związanych z tworzeniem osób prawnych i obrotem prawami udziałowymi w spółkach,* cit., pp. 367-368; NOWACKI A., *Spółka z ograniczoną odpowiedzialnością. Tom I. Komentarz.*

The majority view, which rejects the qualification of art. 180 of the Commercial Companies Code as an overriding mandatory provision, should be accepted. There is no clear legal basis for any other qualification. One should also agree with the view expressed in the literature that the legislator deliberately refrains from preserving national formal requirements in the case of acts performed abroad in order to ensure the security of trading[63]. Consequently, the legislator seeks to guarantee the validity of an act performed abroad as far as possible. The application of such reasoning is also in line with the current tendency in the literature to limit the application of such norms[64].

However, it should be noted that the conclusion of a share purchase agreement regarding shares in a Polish limited liability company in Poland, while subjecting the agreement to foreign law to apply a more lenient form than that required by the Commercial Companies Code, results in the agreement's invalidity due to the conflict of that act with the provision of art. 58 of the Civil Code.

6. *Conclusions*

In summary, the binding agreement for the sale of shares in a Polish limited liability company may be governed by the law chosen by the parties to such an agreement. In that case, the form of an agreement should comply with the requirements set out in detail in art. 11 of the Rome I Regulation. As regards disposing and binding-disposing agreements, they are subject to the personal status of the company and the form status of such agreements is governed by the personal status of the company and provision of art. 25 section 1 of the Private International Law Act. As a result, where an agreement on the sale of shares in a Polish limited liability company is concluded by the parties in a state that allows for concluding such an agreement in another, softer form (e.g., ordinary written form), the

Art. 151-226 KSH, cit., p. 575; KLYTA W., *Forma czynności prawnych w międzynarodowym prawie spółek. Uwagi prawnoporównawcze,* cit., pp. 936-937.

[63] KLYTA W., *Czynności notarialne w polskim międzynarodowym prawie spółek,* cit., p. 136.

[64] KLYTA W., *Forma czynności prawnych w międzynarodowym prawie spółek. Uwagi prawnoporównawcze,* cit., p. 929 and the literature referenced therein.

conclusion of that agreement in this form will result in the effectiveness of the disposal made. However, the disposal of shares must comply with the provisions on the restrictions on the disposal of shares (whether statutory restrictions or restrictions under the articles of association of a limited liability company). In the case of a disposal, it is also necessary to notify the company of the disposal made to comply with the obligation under art. 187 of the Commercial Companies Code. The members of the company's management board are also obliged to update the book of shares, submit lists of shareholders reflecting the transfer of shares to the registry court and, if necessary, submit an application for updating the information in the register of entrepreneurs of the National Court Register.

Furthermore, the view that art. 180 of the Commercial Companies Code, which requires a share purchase agreement to be concluded in writing with notarized signatures, is an overriding mandatory provision should be rejected. As mentioned above, this view lacks a clear legal basis and its adoption could weaken the security of trading.

Forum non conveniens in EU Regulations: More than a Convenient Title?

Leonie Schwannecke

1. *Introduction*

The doctrine of *forum non conveniens* is considered a well-established principle of the common law. At its most basic level, it can be described as providing a court with the discretion not to exercise its jurisdiction if it considers a different forum to be better suited to deal with the dispute. The European Court of Justice, on the other hand, unambiguously rejected the compatibility of the doctrine of *forum non conveniens* with the EU's rules on civil procedure in *Owusu v. N.B. Jackson*[1]. Yet, Art. 6 EU Succession Regulation[2] and Art. 12

[1] Judgment of the Court (Grand Chamber) of 1 March 2005, Andrew Owusu v N.B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others, Case C-281/02.

[2] 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.

Brussels IIb Regulation[3] are commonly considered as being based on the common law doctrine of *forum non conveniens*[4].

Art. 6 EU Succession Regulation allows for a dismissal and Art. 12 Brussels IIb Regulation allows for a stay of an action, if the court currently seized considers the courts of a different Member State "better placed" to rule on the dispute in question. This does indeed suggest an implementation of a (watered-down) *forum non conveniens* concept. However, the extent to which the EU rules mentioned above actually resemble the doctrine of *forum non conveniens* as applied in the common law world – beyond the feasibility of allocating them to the same general, neo-Latin[5] heading – is questionable. With the aim of determining its extent, this paper seeks to provide a functional analysis of the relationship between the common law doctrine of *forum non conveniens* and the rules provided by Art. 6 EU Succession Regulation and Art. 12 Brussels IIb Regulation.

The first part is devoted to the doctrine of *forum non conveniens* as applied in the common law. It must be kept in mind that there is not one uniform *forum non conveniens* doctrine, but that it developed in different ways and at different times in different common law jurisdictions. This paper focuses on the doctrine's development and contemporary application in England, Scotland and the U.S., with the aim to identify mutual core functions.

The second part of the paper provides a functional analysis of Art. 6 EU Succession Regulation and Art. 12 Brussels IIb

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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 L 178, 2.7.2019.

[4] BONOMI A., *Article 6*, in BONOMI A., WAUTELET P., *Le droit européen des successions: Commentaire du Règlement n°650/2012 du 04 juillet 2012*, Brussels, 2016, para. 4-5. See also DUTTA, A., *Art. 6 EuErbVO*, in SÄCKER, F.J., RIXECKER R., OETKER H., LIMPERG B. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Volume 12*, *Internationales Privatrecht I, Europäisches Kollisionsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-26)*, 9th ed., Munich, 2024, para. 4 and HEIDERHOFF, B., *Art. 12 Brüssel IIb-VO*, in SÄCKER, F.J., RIXECKER R., OETKER H., LIMPERG B. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Volume 12*, *Internationales Privatrecht I, Europäisches Kollisionsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-26)*, 9th ed., Munich, 2024, para. 3, each with further references.

[5] BORN G., RUTLEDGE P.B., *International Civil Litigation in United States Courts*, 7th ed., Boston, 2023, p. 405.

Regulation. Each provision will be examined separately, focusing first on the functions that the EU legislator envisioned the respective provision to serve, and second, on the relationship with the functions of the common law doctrine of *forum non conveniens*, as identified in the first half.

2. *The function of forum non conveniens in common law jurisdictions*

Today, the *forum non conveniens* doctrine is recognized in many common law jurisdictions. It addresses the question as to which of several available fora is the right one to deal with a given dispute[6]. The EU's rules on international jurisdiction, when confronted with the question of several available fora, accord perpetual jurisdiction to the first competent Member State court seized[7]. In contrast, the *forum non conveniens* doctrine asks which available forum best serves the interests of justice. It equips the court seized with the discretionary power to decline to exercise its jurisdiction if the court considers that these interests will be better served in a different forum[8].

While the underlying idea to choose the forum that best serves the interests of justice is the same in the various common law jurisdictions, the ways in which the doctrine developed as well as the conditions which need to be satisfied for the courts to exercise this discretionary power and the consequences attached to a successful *forum non conveniens* motion, vary[9]. In order to shed light on some shared core functions of *forum non conveniens*, it is useful to revisit the historical development and contemporary application of the doctrine in Scotland, England and the U.S.

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[6] Brand R.A., Jablonski S.R., *Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention on Choice of Court Agreements*, Oxford, 2007, p. 2.

[7] E.g. Art. 17 EU Succession Regulation; Art. 20 Brussels IIb Regulation. See also Hess B., Richard V., *Brussels I (Conventions and Regulation)*, in Basedow J., Rühl G., Ferrari F., Miguel Asensio P.A. (eds), *Encyclopedia of private international law*, Cheltenham, 2017, p. 219, 224.

[8] Brand R.A., Jablonski S.R., *Forum Non Conveniens*, cit., p. 2.

[9] C.f. Brand R.A., Jablonski S.R., *Forum Non Conveniens*, cit., p. 1.

2.1. *Historical development*

2.1.1. *Scotland*

Scotland is typically considered the birthplace of the *forum non conveniens* doctrine[10]. Legal historians disagree when exactly the doctrine was applied for the first time. Some claim that it can be traced back to cases in the 17th century grouped under the heading of "*forum competens*" [11], while others think that the origins of today's *forum non conveniens* doctrine date back to the mid-18th century[12]. In any event, it was only in the early to mid-19th century that the doctrine started to appear on a more regular basis, under the misleading name *forum non competens*[13].

Unlike their English neighbors, Scottish courts had long required a strong connection to the forum to assume *in personam* jurisdiction: generally, the defendant had to either be a resident in Scotland or have been present in Scotland when the cause of action arose[14]. However, in the 18th century, Scottish courts expanded their jurisdiction by introducing the arrestment of moveable property within the forum as a new ground for jurisdiction[15]. Whether the property had any connection with the case or a value corresponding to the pursuer's claim, was irrelevant[16]. Actions in which jurisdiction was based on the exorbitant element of moveable property arrested in Scotland oftentimes lacked a close connection to the Scottish forum,

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[10] BRAND R.A., JABLONSKI S.R., *Forum Non Conveniens*, cit., p. 1.

[11] BRAND R.A., JABLONSKI S.R., *Forum Non Conveniens*, cit., p. 7. Overview in ARZANDEH A., *The Origins of the Scottish Forum Non Conveniens Doctrine*, in *J. Priv. Int'l L.*, 2017, p. 131 f., 136 ff., with further references in footnote 9, p. 131.

[12] See ARZANDEH A., *The Origins of the Scottish Forum Non Conveniens Doctrine*, cit., p. 141 ff.

[13] ARZANDEH A., *The Origins of the Scottish Forum Non Conveniens Doctrine*, cit., p. 130, 133 f.

[14] ANTON, A.E., *Private International Law*, Edinburgh, 1967, p. 91-92; ARZANDEH A., *The Origins of the Scottish Forum Non Conveniens Doctrine*, cit., p. 141.

[15] ARZANDEH A., *The Origins of the Scottish Forum Non Conveniens Doctrine*, cit., p. 143. For a more general account, see ANTON, A.E., *Private International Law*, cit., pp. 106-114.

[16] ANTON, A.E., *Private International Law*, cit., p. 108.

in contrast to the cases heard under the previously existing grounds for jurisdictions[17]. With an increasing prevalence of this exorbitant jurisdiction at the beginning of the 19th century, the need for a response to the potential harshness of the rule increased[18]. The solution the courts resorted to was the introduction of a discretionary element to allow them to not exercise jurisdiction over cases based on exorbitant jurisdiction and to encourage litigation at the dispute's "center of gravity"[19].

The first case in which the Scottish Court of Sessions clearly manifested its discretionary power to stay proceedings on the basis that it did not consider itself to be the proper forum, was *M'Morine v. Cowie*[20]. Despite having jurisdiction, the court referred to itself as "*forum non competens*". In *M'Morine*, as well as in the subsequent cases *Longworth v. Hope*[21] and *Clements v. Macaulay*[22], the Court of Session's jurisdiction was based on the arrestment of the respective defendant's assets in Scotland[23]. The same was true in *Macadam v. Macadam*[24], the first case in which the Scottish court eventually employed the terminology of *forum non conveniens* to describe the court's discretion not to exercise its otherwise soundly founded jurisdiction[25].

While the line of cases set out above supports the idea that arrestment as an exorbitant ground of jurisdiction was a key driver in the

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[17] ARZANDEH A., *The Origins of the Scottish Forum Non Conveniens Doctrine*, cit., p. 144.

[18] ARZANDEH A., *The Origins of the Scottish Forum Non Conveniens Doctrine*, cit., p. 144 f. JURIANTO J., *Forum Non Conveniens: Another Look at Conditional Dismissals*, in *83 U. Det. Mercy L. Rev.,* 2005, p. 369, 371; REUS A., *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, in *16 Loy. L.A. Int'l & Comp. L. Rev.* 1994, p. 455, 459.

[19] ARZANDEH A., *The Origins of the Scottish Forum Non Conveniens Doctrine*, cit., p. 144 f.; c.f. NUYTS A., *L'exception de Forum non conveniens: Étude de droit international privé comparé*, Brussels, 2003, pp. 94 ff.

[20] *M'Morine v. Cowie* (1845) 7 D 270.

[21] *Longworth v. Hope* (1865) 3 M 1049.

[22] *Clements v. Macaulay* (1866) 4 M 583, 590.

[23] C.f. *M'Morine*, cit., p. 270; *Longworth*, cit, para. 1052; *Clements*, cit., p. 591. See also ARZANDEH A., *The Origins of the Scottish Forum Non Conveniens Doctrine*, cit., p. 147.

[24] *Macadam v. Macadam* (1873) 11 M 860.

[25] *Macadam*, cit., p. 861.

development of the doctrine[26], it was not limited to such cases. In another key case, *Sim v. Robinow*[27], the Court assumed personal jurisdiction over the defendant because he had been residing in Scotland for more than 40 days when he was served[28]. In rejecting defendant's *forum non conveniens* application, Lord Kinnear famously stated a court will not refuse to exercise its jurisdiction "upon the ground of a mere balance of convenience and inconvenience"[29]. Instead, the Court would need to be satisfied that there is "another Court in which the action ought to be tried as being more convenient for all parties and more suitable for the ends of justice"[30]. Nearly a century later, the House of Lords relied on this judgment in *Spiliada Maritime Corporation v. Cansulex Ltd*, the central contemporary *forum non conveniens* decision for England and Scotland[31].

2.1.2. *England*

The House of Lords officially recognized the Scottish doctrine of *forum non conveniens* in the 1926 case *Société de Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Francais"*[32], where it upheld the Court of Session's decision to grant defendant's motion to stay the proceedings based on the argument that France was the better-suited forum[33]. It then took another sixty years before the doctrine was officially introduced into English law.

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[26] Similar ARZANDEH A., *The Origins of the Scottish Forum Non Conveniens Doctrine*, cit., p. 144; JURIANTO J., *Forum Non Conveniens: Another Look at Conditional Dismissals*, cit., p. 371; REUS A., *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany*, cit., p. 455, 459.

[27] *Sim v. Robinow* (1892) 19 R 665.

[28] *Sim*, cit., p. 667.

[29] *Sim*, cit., p. 668.

[30] *Sim*, cit., p. 669.

[31] *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] AC 460, p. 461. See below at 2.2.1.

[32] *Société de Gaz de Paris v. Société Anonyme de Navigation "Les Armateurs Francais"* [1926] SC (HL) 13.

[33] C.f. ARZANDEH A., *The Origins of the Scottish Forum Non Conveniens Doctrine*, cit., pp. 130, 132 f.

The development of the discretionary power of English courts to stay proceedings started out with cases of *lis alibi pendens*[34], i.e. cases where proceedings concerning the same parties and subject matter were already pending before a different court. A stay would be granted if continuing the proceedings before the English court would be "vexatious and oppressive"[35] – a test that had already been developed in English law in relation to common injunctions[36].

In 1906, the House of Lords first applied the 'vexatious and oppressive' test outside the *lis alibi pendens* context in *Logan v. Bank of Scotland*[37], where a Scottish plaintiff sued a Scottish bank in England. In his judgment, Sir Gorrell Barnes stressed that while English courts are generally open to foreigners, this hospitality should not be abused[38]. Therefore, "*the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought-not to be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court*"[39].

This was understood as requiring the English courts to apply a standard of vexation that was stricter than the test used by their Scottish neighbors[40]. Nevertheless, the factors under consideration – such as the presence of witnesses or written evidence in the forum – were similar to those Scottish courts looked at under their *forum non conveniens* doctrine[41].

In *St. Pierre v. South American Stores (Goth & Chaves), Ltd.*[42], however, the Court of Appeal stopped any further development

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[34] Most notable in this respect is *McHenry v. Lewis*, (1882) 22 Ch D 397 (CA), where the plaintiffs had brought a total of three separate proceedings, two in England and a third in the U.S. Defendant sought to stay the second proceedings in England.

[35] *McHenry*, cit., p. 405 f.

[36] C.f. Arzandeh A., *Forum (non) conveniens in England*, Oxford, 2019, pp. 31 f.

[37] *Logan v. Bank of Scotland* [1906] 1 K.B. 141 (C.A.).

[38] *Logan*, cit., p. 150.

[39] *Logan*, cit., p. 150.

[40] C.f. *Logan*, cit., p. 151.

[41] *Logan*, cit., p. 152.

[42] *St. Pierre v. South American Stores (Goth & Chaves), Ltd.* [1936] 1 K.B. 382 (C.A.).

towards a more lenient *forum non conveniens* doctrine[43] and instead formulated an even stricter version of the "vexatious-and-oppressive" test[44]. In its decision, the Court stressed that a "mere balance of convenience" would not suffice to refuse the right of access to English courts[45]. Instead, the defendant had to show that (a) "the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way" and (b) that the stay would not "cause an injustice to the plaintiff"[46]. Under *St. Pierre*, great deference had to be given to the plaintiff's choice of forum, and the threshold the defendant had to overcome for a stay to be granted was high[47].

English courts only started to loosen this strict approach in the 1970s. In *The Atlantic Star*[48], the House of Lords reiterated that it was not prepared to adopt a test as lenient as the Scottish one, but nevertheless relaxed the defendant's burden through a liberal and wide interpretation of what is "vexatious and oppressive"[49]. Lord Wilberforce set out a two-stage test in which the first stage gave deference to the plaintiff's choice of forum, but highlighted that plaintiff's right to sue in England was subject to the Court's discretion to stay proceedings. The second stage required a critical equation taking into account any *bona fide* advantage to the plaintiff and any disadvantage to the defendant of an action in England[50].

In *MacShannon v. Rockware Glass Ltd.*[51], the House of Lords further refined this test. In a first step, the defendant now had to show

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[43] See ARZANDEH A., *Forum (non) conveniens in England*, cit., pp. 37, 39, referring to *Egbert v. Short* [1907] 2 Ch 205 and *In re Norton's Settlement* [1908] 1 Ch 471 (CA).

[44] ARZANDEH A., *Forum (non) conveniens in England*, cit., p. 43.

[45] *St. Pierre*, cit., p. 398.

[46] *St. Pierre*, cit., p. 398.

[47] ARZANDEH A., *Forum (non) conveniens in England*, cit., p. 45; BRAND R.A., JABLONSKI S.R., *Forum Non Conveniens*, cit., p. 13. ARZANDEH A., *Forum (non) conveniens in England*, cit., p. 45 indeed points to just one case in which a stay was granted during that time: *The Marinero* [1955] P 68.

[48] *The Atlantic Star* [1974] A.C. 436 (H.L.).

[49] *The Atlantic Star*, cit., pp. 454, 468.

[50] *The Atlantic Star*, p. 468.

[51] *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795 (H.L.).

that an action in another forum would be substantially less inconvenient. In a second step, it had to be shown that such a stay would not deprive plaintiff of a legitimate personal juridical advantage[52]. This advantage had to exist "objectively and on the balance of probability", not just in the plaintiff's own belief[53]. Although the Court still endorsed a liberal interpretation of "vexatious-and-oppressive", it pointed out that "a solid preponderance of disadvantage to the defendant over advantage to the plaintiff" would suffice[54].

After *MacShannon*, it took another 8 years until the decision in *Spiliada*. In the interim, cases like *Amin Rasheed Shipping Corp. v. Kuwait Ins. Co.*[55], a service-out case, and *The Abidin Daver*[56], a *lis alibi pendens* case, helped set the stage for *Spiliada*. In both cases, the House of Lords stressed the importance of comity in deciding whether a plaintiff should be able to (continue to) sue in England[57].

In *The Abidin Daver*, Lord Diplock pointed out that "*the essential change in the attitude of the English courts to pending or prospective litigation in foreign jurisdictions that has been achieved step-by-step during the last 10 years […] is that judicial chauvinism has been replaced by judicial comity to an extent […] indistinguishable from the Scottish legal doctrine of* forum non conveniens"[58]. This highlights that unlike in Scotland, the historical development of the *forum non conveniens* doctrine in England was not linked to one specific new and exorbitant ground of jurisdiction, but to a shift in mindset. Denning M.R. once poignantly stated that "*[n]o one who comes to [the English] courts asking for justice should come in vain. […] This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this ' forum shopping' if you please, but if the*

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[52] *MacShannon*, cit., p. 812.

[53] *MacShannon*, cit., p. 812.

[54] *MacShannon*, cit., p. 827.

[55] *Amin Rasheed Shipping Corp. v. Kuwait Ins. Co* [1984] A.C. 50 (H.L.).

[56] *The Abidin Daver* [1984] A.C. 398 (H.L.).

[57] *Amin Rasheed*, cit., p. 65; *The Abidin Daver*, cit., p. 411.

[58] *The Abidin Daver*, cit., p. 411.

forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service"[59].

But once the Court's mindset shifted away from such a 'judicial chauvinism' towards 'judicial comity', the need arose to limit the previously seemingly unlimited grounds on which English courts assumed jurisdiction. Lord Reid had already rejected the above-quoted statement of Denning, M.R. in *The Atlantic Star* and highlighted the undesirability of forum shopping[60]. Lord Diplock's statement in *The Abidin* summarizes the subsequent development of *forum non conveniens* in England. Thus, although at a significantly later point, the English courts, too, moved towards the Scottish-based *forum non conveniens* doctrine as a way to limit forum shopping, made possible by the broad grounds of jurisdiction in English law.

2.1.3. *United States*

The first time the U.S. Supreme Court applied the term *forum non conveniens* was in 1947 in *Gulf Oil Co. v. Gilbert*[61], and the second time in *Koster v. American Lumbermens Mutual Casualty Co*[62], both decided on the same day[63]. However, at that point, the principle of a court's discretionary power to abstain from deciding a case in sufficiently foreign matters[64] had already been developing in the United States for many years[65]. Federal admiralty courts, for example, declined to exercise their jurisdiction over certain cases with strong foreign elements as early as 1801[66]. From the 1920s onwards, starting with one oft-cited article by Paxton Blair[67], the doctrine of *forum*

[59] [1973] Q.B. 364, 38lG, 382c. The appeal to this decision was decided by the House of Lords in *The Atlantic Star*, cit.

[60] *The Atlantic Star*, cit., p. 454.

[61] *Gulf Oil Co. v. Gilbert* 330 U.S. 501 (1947).

[62] *Koster v. American Lumbermens Mutual Casualty Co*, 330 U.S. 518 (1947)

[63] C.f. BORN G., RUTLEDGE P.B., *International Civil Litigation*, cit., p. 405, 409.

[64] C.f. BORN G., RUTLEDGE P.B., *International Civil Litigation*, cit., p. 406.

[65] C.f. BRAND R.A., JABLONSKI S.R., *Forum Non Conveniens*, cit., p. 37.

[66] *Willendson v. Forsoket*, 29. F. Cas. 1283 (No. 17,862) (Pa. 1801). For further cases see BORN G., RUTLEDGE P.B., *International Civil Litigation*, cit., p. 406, footnote 12.

[67] BLAIR P., *The Doctrine of Forum Non Conveniens in Anglo-American Law*, in *29 Colum. L. Rev.*, 1929, p.1.

non conveniens was increasingly accepted by American jurists[68], although before the Supreme Court's decision in *Gilbert* not explicitly by use of the phrase[69].

In both *Gilbert* and *Koster*, the Supreme Court encouraged a strong deference to the plaintiffs' choice of forum, especially if they chose their home forum[70]. Nevertheless, the Supreme Court in both cases upheld the lower courts' dismissals of plaintiffs' claims, expressly relying on the principle of *forum non conveniens*. In doing so, the Court identified both "private interest of the litigants" and "public interest" as relevant factors[71] in deciding whether the presumption in favor of the plaintiff's choice of forum could be overcome and a motion for dismissal on grounds of *forum non conveniens* granted[72].

Notably, the progressive emergence of this clearer approach to the *forum non conveniens* doctrine in the U.S. common law system occurred during the same period as the grounds for *in personam* jurisdiction in the U.S. were expanded.[73] Like in Scotland and England, the doctrine was thus adopted as a counterweight to increasingly broad grounds of jurisdiction[74].

2.2. *The forum non conveniens doctrine today*

2.2.1. *England and Scotland: The Spiliada-Test*

In its landmark decision *Spiliada Maritime Corporation v. Cansulex Ltd.*, the House of Lords officially recognized the Scottish

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[68] Born G., Rutledge P.B., *International Civil Litigation*, cit., p. 407.

[69] But see *Canada Melting Co. v. Paterson Steamships Ltd.*, 285 U.S. 413 (1932), in which the Supreme Court cited Blair's article, thereby at least indirectly mentioning the phrase "*forum non conveniens*"; Born G., Rutledge P.B., *International Civil Litigation*, cit., p. 408 f.

[70] *Koster*, cit., p. 524; Brand R.A., Jablonski S.R., *Forum Non Conveniens*, cit., p. 47.

[71] *Gilbert,* cit., p. 508.

[72] Dunham D.W., Gladbach E.F., *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, in *24 Brook. J. Int'l L.,* 1998, pp. 665, 669.

[73] See in particular *International Shoe v. Washington*, 326 U.S. 310 (1945).

[74] Born G., Rutledge P.B., *International Civil Litigation*, cit., p. 429-430.

doctrine of *forum non conveniens* as part of English law. The test that derived from Lord Goff's judgment is now enshrined in both English and Scottish law[75].

Spiliada itself was a "service-out" case, meaning that it concerned the question whether a plaintiff may initiate proceedings against a foreign defendant in England as the most convenient forum (*forum conveniens*)[76]. Nevertheless, the two-stage test formulated by Lord Goff was phrased in terms of a discretionary staying of as-of-right proceedings under *forum non conveniens*. The essence of this test was then extended to *forum conveniens* cases, with the key difference that the burden of proof is the obverse[77].

Under the test's first stage, the defendant bears the burden of persuading the court that it should exercise its discretion to stay the proceedings because "there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action"[78]. Lord Goff observed that this stage is typically easier satisfied where the connection to the English forum is particularly fragile, for example, if it does not go beyond the defendant's brief presence in the forum at the time he was served[79]. If the defendant can establish that there is "some other available forum which prima facie is clearly more appropriate for the trial of the action"[80], a stay of proceedings will typically be granted. However, at the second stage, the plaintiff receives the opportunity to prove "circumstances by reason of which justice requires that a stay should nevertheless not be granted"[81]. To resist a motion to stay the proceedings under *forum non conveniens*, it is not sufficient for the plaintiff to show that he

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[75] See, eg, *Sokha v Secretary of State for the Home Department* 1992 SLT 1049; *PTKF Kontinent v VMPTO Progress* 1994 SLT 235; *Royal Bank of Scotland v Davidson* 2010 SLT 92, cited in in ARZANDEH A., *The Origins of the Scottish Forum Non Conveniens Doctrine*, cit., footnote 7.

[76] In *Spiliada*, Liberian shipowners sought damages for breach of contract against shippers operating in British Columbia. English courts granted them leave to serve proceedings on the shippers in Canada on the basis that the contract was governed by English law.

[77] *Spiliada*, cit., p. 481.

[78] *Spiliada*, cit., p. 476.

[79] *Spiliada*, cit., p. 477.

[80] *Spiliada*, cit., p. 478.

[81] *Spiliada*, cit., p.478.

will lose some kind of benefit. Instead, he must prove that he will not receive "substantial justice" in the other available forum[82].

2.2.2. *U.S.: The two-stage test from Piper Aircraft v. Reyno*

The landmark case that continues to govern the contemporary application of the *forum non conveniens* doctrine in U.S. federal law[83] is *Piper Aircraft Co. v. Reyno*[84].

Piper Aircraft concerned the crash of a small commercial aircraft in the Scottish Highlands, killing the pilot and five passengers. All of them, as well as their heirs and relatives, were Scottish subjects and residents. Reyno, as representative for the estates, brought a wrongful death action in the U.S.[85]. Plaintiff admitted that the reason for filing an action in the U.S. was because "its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland"[86]. Defendants moved for dismissal on grounds of *forum non conveniens*, in favor of Scottish courts as the more appropriate forum. Their motion was granted by the district judge but reversed by the Third Circuit Court of Appeal, based on the argument that a *forum non conveniens* dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiff.

The Supreme Court granted certiorari, and in its decision analyzed the relevant factors to be considered as well as their respective weight when deciding on whether a case should be dismissed based on *forum non conveniens*. The Court affirmed that both private interests of the litigants and public interest have to be considered and refined the broad categories that had already been set out in *Gilbert*. Furthermore, the Court stressed that dismissal may not be barred solely because of the possibility of an unfavorable change in law[87].

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[82] *Spiliada*, cit., p., 482.

[83] Born G., Rutledge P.B., *International Civil Litigation*, cit., p. 412 f.

[84] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)

[85] Initially, the action was brought in the Superior Court of California. After various motions by the defendants, it ended up in a federal district court in Pennsylvania.

[86] *Piper Aircraft Co.*, cit., p. 240.

[87] *Piper Aircraft Co.*, cit., p. 249.

Six years before *Spiliada*, the U.S. Supreme Court in *Piper Aircraft* thus set out a two-stage test for *forum non conveniens*. First, the court has to assess whether an alternative forum is available where the case can be adequately tried. A forum is deemed available if the defendant is subject to its jurisdiction[88]. Typically, this requirement is easily satisfied as the defendant routinely consents to the jurisdiction of the alternative forum as part of their motion[89] or the court will condition a dismissal upon the defendant's consent to litigation in the alternative forum[90]. U.S. courts will generally consider an available forum as adequate unless the plaintiff can show that it is so inadequate that the potential remedy offered would be no legal remedy at all[91].

Where the court is satisfied that an alternative forum is available, it moves to the second stage and balances private and public interest factors in favor and against the alternative forum deciding the case[92]. Private interest factors relate to the convenience for the litigants and include ease of access to sources, availability of witnesses or the possibility to view premises[93]. As pointed out above, a change in the applicable law should typically not be given "conclusive or substantial weight"[94], as long as it does not deprive the plaintiff of an effective remedy altogether. Generally, deference is given to the forum chosen by the plaintiff; however, such deference is weaker if the plaintiff is a foreigner[95]. Public interest factors focus on the convenience of the forum[96]. This includes a forum's interest to have localized controversies decided 'at home' or the unfairness of burdening

[88] DAVIES M., *Time to Change the Federal Forum Non Conveniens Analysis*, in *77 Tul. L. Rev.,* 2002, p. 309, 316.

[89] RICHMAN W.M., REYNOLDS W.L., CHRISTOPHER A. WHYTOCK C.A., *Understanding Conflict of Laws*, 4th ed., New Providence, 2013, p. 148.

[90] JURIANTO J., *Forum Non Conveniens: Another Look at Conditional Dismissals*, cit., p. 400.

[91] C.f. *Piper Aircraft Co.*, cit., p. 254 and footnote 22. See BORN G., RUTLEDGE P.B., *International Civil Litigation*, cit., p. 491 ff. for further elaboration of an adequate alternative forum.

[92] BRAND R.A., JABLONSKI S.R., *Forum Non Conveniens*, cit., pp. 52, 53.

[93] *Gilbert*, cit., p. 508.

[94] *Piper Aircraft Co.*, cit., p. 250.

[95] *Piper Aircraft Co.*, cit., p. 256.

[96] C.f. *Piper Aircraft Co.*, cit., p. 241.

citizens with jury duty if the forum has little connection with the controversy[97]. In addition, the applicable law and potential change in the applicable law is relevant as a matter of public interests, as it is more costly and time-consuming for a court to apply a foreign law as opposed to the *lex fori*[98].

If this balance favors the alternative forum, the case will generally be dismissed[99] and not merely stayed, as in English courts. If the plaintiff is not willing and/or able to pursue the suit in the alternative forum, or the alternative forum is not willing to hear the case, the *forum non conveniens* dismissal effectively brings the suit to an end entirely[100]. To avoid hardship, U.S. courts typically grant *forum non conveniens* dismissals subject to certain conditions, such as the defendant's consent to suit and service of process in the alternative forum, a waiver of any statute of limitation defense in the foreign action, or the defendant's consent to pay any foreign judgment obtained by plaintiffs[101]. If the defendant does not comply with the U.S. court's conditions or if the foreign court refuses to exercise jurisdiction, the initial U.S. court may decide to take up the case once again[102].

When talking about *forum non conveniens* in the U.S., it is necessary to also mention 28 U.S.C. §1404(a). This provision allows the *transfer* of a civil action between federal courts "[f]or the convenience of parties and witnesses, in the interest of justice", put differently, on the basis of an analysis similar to that of *forum non conveniens* analysis[103]. It is worth noting that a transfer under § 1404(a), unlike a dismissal based on *forum non conveniens*, does not lead to a change in the applicable law. Instead, the transferee court has to

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[97] *Piper Aircraft Co.*, cit., pp. 243, 260.

[98] C.f. *Piper Aircraft Co.*, cit., p. 243, 260; *Gilbert*, cit., p. 509.

[99] C.f. *Piper Aircraft Co.*, cit., p. 261.

[100] Richman W.M., Reynolds W.L., Christopher A. Whytock C.A., *Understanding Conflict of Laws*, cit., p. 150

[101] Born G., Rutledge P.B., *International Civil Litigation*, cit., p. 479; Jurianto J., *Forum Non Conveniens: Another Look at Conditional Dismissals*, cit., p. 399 f.

[102] Born G., Rutledge P.B., *International Civil Litigation*, cit., p. 479-480.

[103] Born G., Rutledge P.B., *International Civil Litigation*, cit., p. 412; c.f. *Atlantic Marine Constr. Co. v. U.S. Dist. Court for Western Dist. of Tex.,* 571 U.S. 49 (2013), p. 60-61; *Van Dusen v Barrack*, 376 U.S. 612 (1964).

apply the law that was applicable in the original forum[104]. However, the provision has no bearing on motions to dismiss a case in favor of a court in a different country. For international cases, the common law doctrine of *forum non conveniens* applies[105].

2.3. *Functions of forum non conveniens in the common law*

Based on the analysis of the three jurisdictions above, four mutual core functions that are closely related can be identified:

First, the doctrine has been developed over time and continues to serve as a counterweight to broad grounds of jurisdiction.

Second, the doctrine helps to establish procedural justice between the parties. If a forum requires only minimal connections to assume personal jurisdiction over a defendant, the plaintiff is presented with an opportunity to forum shop. They get the first shot at a forum and will likely try to choose the one that is most advantageous to them. *Piper Aircraft* is a prime example of such a reasoning. Providing the defendant with the *forum non conveniens* "weapon" allows courts to double-check whether it is just to exercise jurisdiction over the defendant.

Third, *forum non conveniens* helps promote judicial efficiency and practicability[106]. Trying a case in a forum where none of the relevant evidence is available is not efficient. Nor is it practical to have to fly in numerous witnesses from abroad. Many of the factors that the courts of different jurisdictions look at when entertaining *forum non conveniens* motions are similar. How much weight a forum attaches to a change in the applicable law is questionable, and common law jurisdictions appear to differ on this. But even under *Piper Aircraft*, it can be one factor taken into consideration, and since it is easier for a court to apply its *lex fori*, it is certainly one that promotes efficiency and practicability.

Fourth, the doctrine is an expression of the principle of comity, i.e. a court not acting out of judicial obligation but out of friendliness

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[104] *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Ferens v. John Deere Co.*, 494 U.S. 516 (1990).

[105] *Atl. Marine Const. Co.*, cit., p. 60

[106] C.f. BORN G., RUTLEDGE P.B., *International Civil Litigation*, cit., p. 428.

towards other jurisdictions[107]. This is particularly clear in the development of the doctrine in England, where the principle is mentioned in various cases, including *Spiliada*, with Lord Goff pointing out that *forum non conveniens* is "a subject where comity is of importance"[108]. Similarly, one of the relevant public interest factors under *Piper Aircraft* is the alternative forum's interest in 'bringing the case home' – another expression of comity.

Concededly, these functions are not clear-cut, and will in many cases point to different fora, which inevitably leads to the question of which function the court dealing with a *forum non conveniens* motion will prioritize. However, a detailed analysis of this question would go beyond the scope of this paper.

3. *(No) Forum non conveniens in the EU*

3.1. *General incompatibility of forum non conveniens with the EU's rules on jurisdiction*

When discussing *forum non conveniens* in an EU setting, the case that immediately comes up is *Owusu v. Jackson*[109]. In the original proceedings, the English Court of Appeal had jurisdiction under the Brussels I Regulation, however, the defendant asked the Court to stay its proceedings in favor of Jamaican courts. The Court of Appeal referred to the ECJ for a preliminary ruling on whether the exercise of a discretionary power to not exercise jurisdiction over a case for which jurisdiction is founded on the Brussels I Regulation would be inconsistent with the Regulation.

The ECJ unmistakably confirmed such an inconsistency. First and foremost, it stressed the importance of certainty and predictability of available fora that the mandatory Brussels Regime guaranteed. If Member State courts were allowed to exercise wide discretion to stay proceedings for which jurisdiction is founded on the Regulation, the

[107] Muir Watt H., Dornis T.W., *Comity*, in Basedow J., Rühl G., Ferrari F., Miguel Asensio P.A. (eds), *Encyclopedia of private international law*, Cheltenham, 2017, p. 382.

[108] [1987] A.C. 460, 477 (H.L.).

[109] Judgment of the Court (Grand Chamber) of 1 March 2005, Andrew Owusu v N.B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others, Case C-281/02.

guarantee of legal certainty would be significantly curtailed[110]. This would be detrimental to both defendants and plaintiffs, even without considering the costs and duration added to the proceedings by bringing a new action[111]. Furthermore, allowing the application of *forum non conveniens* would run counter to the EU-wide uniform application of the Regulation's rules, since only few Member States followed it under their national rules[112].

The judgment in *Owusu* thus clarified that *forum non conveniens* and the Brussels-Regime are incompatible. Even leaving aside the mandatory nature of the Regulation's rules and the resulting prohibition of determining jurisdiction over a person domiciled in a Member State based on exorbitant grounds of jurisdiction[113], this is hardly surprising. The Brussels I bis Regulation[114] provides for detailed and limited rules based on which a court may assume jurisdiction over a defendant that is domiciled in a Member State. Accordingly, the need to counterbalance particularly wide, exorbitant grounds of jurisdiction does not arise[115].

3.2. *Introduction of forum non conveniens 'light' through the Brussels IIb and the EU Succession Regulation?*

Both the Brussels IIb Regulation and the EU Succession Regulation contain detailed rules according to which courts may assume jurisdiction, and it is clear that the *forum non conveniens* doctrine as

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[110] Judgment of the Court (Grand Chamber) of 1 March 2005, Andrew Owusu v N.B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others, Case C-281/02, para. 37 ff.

[111] Judgment of the Court (Grand Chamber) of 1 March 2005, Andrew Owusu v N.B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others, Case C-281/02, para. 42.

[112] Judgment of the Court (Grand Chamber) of 1 March 2005, Andrew Owusu v N.B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others, Case C-281/02, para. 43.

[113] C.f. Art. 5(1) Brussels Ia Regulation.

[114] 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.

[115] C.f. SCHLOSSER P., *Report on the Convention of 9 October 1978 on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice*, in *OJ C59/71*, 1979, para. 78.

such cannot be used by a Member State to decline the exercise of its jurisdiction. Yet, Art. 12 Brussels IIb Regulation and Art. 6 EU Succession Regulation provide the courts with a discretion to stay or dismiss a case in favor of the courts of a different Member State that are better placed to deal with the case. The question that arises is to what extent these two provisions serve similar functions as the common law doctrine of *forum non conveniens* to which they allegedly can be "traced back"[116].

3.2.1. *Art. 12 Brussels IIb Regulation*

The Brussels IIb Regulation provides rules of jurisdiction, for the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction. Art. 12 as the most relevant provisions for this purpose is found in the second chapter's section about jurisdiction in matters of parental responsibility, starting with Art. 7.

3.2.1.1. *Requirements and consequences of Art. 12 Brussels IIb Regulation*

According to the basic rule in Art. 7 Brussels IIb, the courts of the Member State in which the child has its habitual residence have jurisdiction over matters of parental responsibility. Art. 12 Brussels IIb may only be invoked if the court seized has jurisdiction according to Art. 7-9, 11, or 14 of the Regulation[117]. Otherwise, the court can only declare that it has no jurisdiction according to Art. 18[118].

Art. 12 Brussels IIb provides in its first paragraph that "*in exceptional circumstances, a court of a Member State having jurisdiction*

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[116] See ŽUPAN M., *Article 12: Transfer of Jurisdiction to a Court of Another Member State*, in GONZÁLEZ BEILFUSS C., CARPANETO L., KRUGER T. (eds), *Jurisdiction, Recognition and Enforcement in Matrimonial and Parental Responsibility Matters: A Commentary on Regulation 2019/1111 (Brussels IIb)*, Cheltenham, 2023, para. 12.04 for Art. 12 Brussels IIb.

[117] DÖRNER H., *Art. 12 EUEHEVO*, in SAENGER I. (ed), *Zivilprozessordnung: Familienverfahren, Gerichtsverfassung Europäisches Verfahrensrecht*, 10th ed., Baden-Baden, 2023, para. 2.

[118] ŽUPAN M., *Article 12*, cit., para. 12.17.

as to the substance of the matter may, upon application from a party or of its own motion, if it considers that a court of another Member State with which the child has a particular connection would be better placed to assess the best interests of the child in the particular case, stay the proceedings or a specific part thereof [….]" and initiate a transfer of the proceedings to such a court of another Member State.

Thus, Art. 12 I Brussels IIb provides for two substantive conditions that need to be satisfied in order to trigger the court's discretion to stay the proceedings[119]. First, the court first seized needs to be satisfied that there is a court in another Member State to which the child has a "particular connection". This objective assessment is guided by Art. 12(4), which sets out an exhaustive list of five connecting factors, at least one of which needs to be present to allow the court seized to even consider staying its proceedings[120]. Provided a court with which the child has a particular connection exists, the court seized proceeds to inquire whether this other court "would be better placed to assess the best interests of the child in the particular case". This second step allows a balancing of various factors and interests in favor and against transferring the proceedings to the other court with regards to the child in the particular case. Importantly, the court may only consider procedural factors but must not inquire into the substantive result the other court might reach[121]. This is an expression of the principle of mutual trust, as all Member States courts must be considered equally competent to deal with a case[122]. A transfer will only be initiated if the court is satisfied that this will be beneficial to the child by providing "*genuine and specific added value with respect to the decision to be taken in relation to that child, as*

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[119] ŽUPAN M., *Article 12*, cit., para. 12.31.

[120] Judgment of the Court (Third Chamber) of 27 October 2016, Child and Family Agency v J. D., Case C-428/15, para. 51; ŽUPAN M., *Article 12*, cit., para. 12.36 f.

[121] Judgment of the Court (Third Chamber) of 27 October 2016, Child and Family Agency v J. D., Case C-428/15, para. 57; DÖRNER H., *Art. 12 EUEHEVO*, cit., para. 3.

[122] European Commission Directorate-General for Justice and Consumers, Practice Guide for the Application of the Brussels IIa Regulation (European Commission, 20 June 2016) 35 (70-71); ŽUPAN M., *Article 12*, cit., para. 12.40 f.

compared with the possibility of the case remaining before that court"[123].

Provided these conditions are satisfied, the court seized can either give the parties the opportunity, within a specified time frame, to inform the court of the other Member State of the pending proceedings, of the possibility to transfer jurisdiction and to commence an action there (Art. 12(1)(a)) or directly request the court of the other Member State to assume jurisdiction (Art. 12(1)(b)). The first alternative will typically be used where the court's inquiry into a transfer was already based on the request of one of the parties, while alternative (b) is reasonable for *ex officio* inquiries[124].

Paragraph 2 sets out that the court of the other Member State may accept such a request – be it by the parties or by the first court[125] – for a transfer of jurisdiction within six weeks if it considers this to be in the best interest of the child. Thus, the second court engages itself in an independent inquiry as to whether the transfer would be beneficial for the child and whether a particular connection exists at the time of the inquiry[126]. Regardless of whether it considers the conditions for a transfer to be satisfied, the second court is not obliged to accept jurisdiction[127]. The second court shall inform the first court seized about its decision as soon as possible; if it accepts, the first court is required to decline its jurisdiction (Art. 12(2)). However, if the second court declines to assume jurisdiction or if the first court does not hear back from it within seven weeks, the first court continues to exercise its jurisdiction (Art. 12(3)).

With regards to the analysis of whether a different court than the one originally seized is better placed to assess the child's best interest, the same principles apply under Art. 13. As a partner provision to Art. 12, Art. 13 allows courts of Member States with which the

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[123] Judgment of the Court (Third Chamber) of 27 October 2016, Child and Family Agency v J. D., Case C-428/15, para. 57; Order of the Court (Eighth Chamber) of 10 July 2019, EP v FO, Case C-530/18, para. 42. ŽUPAN M., *Article 12*, cit., para. 12.39.

[124] HEIDERHOFF B., *Art. 12 Brüssel IIb-VO*, cit., para. 25.

[125] C.f. HEIDERHOFF B., *Art. 12 Brüssel IIb-VO*, cit., para. 25.

[126] HEIDERHOFF B., *Art. 12 Brüssel IIb-VO*, cit., para. 30; DÖRNER H., *Art. 12 EUEHEVO*, cit., para. 8.

[127] HEIDERHOFF B., *Art. 12 Brüssel IIb-VO*, cit., para. 30; DÖRNER H., *Art. 12 EUEHEVO*, cit., para. 8.

child has a particular connection to *request* a transfer from the court of a Member State that has assumed jurisdiction under the Brussels IIb regime. Like the second court requested to assume jurisdiction over a case under Art. 12(1) has no obligation to accept the request, the court already seized has no obligation to transfer the case, nor to even reply to the other Member State's request[128].

In anticipation of the *forum non conveniens* analysis that will follow, it is worth highlighting at this point that both parties may request a transfer and that the court can initiate such a transfer at its own motion, regardless of whether the parties want this or not[129]. Furthermore, a negative or positive conflict of jurisdictions cannot occur: If the second court agrees to the transfer, the first court declines its jurisdiction. If the second court does not reply or replies in the negative, the first court must continue to exercise its jurisdiction. Finally, a case can only be transferred to the courts of another Member State, and only if at least one of the connecting factors in Art. 12(4) is satisfied with respect to that Member State.

3.2.1.2. *Ratio of Art. 12 Brussels IIb Regulation*

The overarching purpose of Art. 12 is to promote the child's welfare by ensuring that the court best placed to decide on the dispute over parental responsibility ends up having jurisdiction[130]. The general rule under the Brussels Regime is that the court first seized in accordance with the rules of the pertinent Regulation has jurisdiction. In accordance with the principle of *perpetuatio fori*, it is irrelevant whether a different court could have been seized. In disputes over parental responsibility, the EU legislator was aware of the hardship that could arise for a child out of the principle of *perpetuatio fori* in exceptional circumstances, especially in connection with a

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[128] C.f. Art. 13 (2)(3); HEIDERHOFF B., *Art. 13 Brüssel IIb-VO*, in SÄCKER, F.J., RIXECKER R., OETKER H., LIMPERG B. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Volume 12*, *Internationales Privatrecht I, Europäisches Kollisionsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-26)*, 9th ed., Munich, 2024, para. 3.

[129] C.f. HEIDERHOFF B., *Art. 12 Brüssel IIb-VO*, cit., para. 28; DÖRNER H., *Art. 12 EUEHEVO*, cit., para. 6.

[130] HEIDERHOFF B., *Art. 12 Brüssel IIb-VO*, cit., para. 1; DÖRNER H., *Art. 12 EUEHEVO*, cit., para. 1.

move briefly before or after the proceedings commenced[131]. Art. 12, 13 Brussels IIb allow courts to address such a concern by enabling a transfer to another Member State's courts if this is beneficial to the child's welfare[132], regardless of whether this other court would have had jurisdiction under Art. 7 ff. Brussels IIb or not[133].

3.2.1.3. *Forum non conveniens analysis*

Like its predecessor provision, Art. 15 Brussels IIa[134], Art. 12 is often said to be built on the common law doctrine of *forum non conveniens*[135]. At first glance, this seems an obvious conclusion: Art. 12 (1) allows a staying of proceedings where the court initially seized considers that a court of a different Member State "would be better placed to assess the best interests of the child in the particular case" – put differently, if the court seized considers the courts of the other Member States to be the more appropriate forum for the case.

However, when approached from a functional perspective, the similarities with the core functions of the *forum non conveniens* doctrine as applied in the common law fade. This is most evident with respect to the first function of the common law doctrine identified above: Art. 12 does not serve to counterbalance any broad grounds of jurisdiction. The court seized engaging in an Art. 12-analysis does not even consider whether the second court has jurisdiction under Brussels IIb Regulation[136]. Instead, the provision adds an additional

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[131] HEIDERHOFF B., *Art. 15 EuEheVO, Das Kindeswohl und die EuEheVO 2019*, in *IPRax*, 2020, p. 521.

[132] On its wording, the importance of the child's welfare seems to be weaker in Art. 12 Brussels IIb as compared to its predecessor provision Art. 15 Brussels Ia, see HEIDERHOFF B., *Art. 15 EuEheVO, Das Kindeswohl und die EuEheVO 2019*, cit., p. 521.

[133] C.f. DÖRNER H., *Art. 12 EUEHEVO*, cit., para. 2.

[134] For commentary on Art. 15 Brussels IIa, see DÖRNER H., *Art. 15 EUEHEVO aF*, in SAENGER I. (ed), *Zivilprozessordnung: Familienverfahren, Gerichtsverfassung Europäisches Verfahrensrecht*, 10th ed., Baden-Baden, 2023, in particular para. 2 as to a brief *forum non conveniens* analysis.

[135] See for example GRUBER, U.P., *Art. 15. EuEheVO 2023*, in HEIDEL T., HÜßTEGE R., (eds), *BGB Allgemeiner Teil / EGBGB*, 4th ed. Baden-Baden, 2003, para. 1; DÖRNER H., *Art. 12 EUEHEVO*, cit., para. 1. Critical HEIDERHOFF B., *Art. 12 Brüssel IIb-VO*, cit., para. 3.

[136] C.f. DÖRNER H., *Art. 12 EUEHEVO*, cit., para. 2.

ground of jurisdiction by allowing a transfer to a Member State court that would not otherwise have jurisdiction under Art. 7 ff. Brussels IIb[137].

Second, a court considering a transfer under Art. 12 Brussels IIb is not concerned with the procedural fairness to the parties of the action in matters of parental responsibility, i.e. the holders of parental responsibility. The Regulation already provides little room, if any, for the forum shopping that would require one of the parties to be equipped with a *forum non conveniens* defense. Instead, the core concern of the Regulation and of the inquiry under Art. 12 Brussels IIb is the protection of the child, i.e. someone who is neither plaintiff nor defendant but could better be described as the subject of the dispute. Under the common law doctrine, only the defendant can request a stay of proceedings on grounds of *forum non conveniens*; under Art. 12 Brussels IIb *either* party as well as the court on its own motion can initiate such a stay and transfer proceedings for the benefit of the child.

The similarities with *forum non conveniens* in the common law are perhaps greatest with respect to the promotion of judicial efficiency and practicability. When deciding whether the courts of a different Member State would be better placed to assess the best interests of the child, the court seized considers similar factors as a common law court would in a *forum non conveniens* inquiry to establish whether the other suggested forum really is more appropriate. These include factors like the availability of witnesses and other evidence, the language spoken in court – but also the potential hardship for the child to have to travel to a different country for court appointments[138]. Like in the common law, the overall aim is to establish whether the other forum is more appropriate, especially because it has a closer connection. However, the Member State court has to focus its inquiry on whether the *child* that is the subject of the parental responsibility dispute has a special connection with the other

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[137] HEIDERHOFF B., *Art. 12 Brüssel IIb-VO*, cit., para. 3.

[138] HEIDERHOFF B., *Art. 12 Brüssel IIb-VO*, cit., para. 19; ŽUPAN M., *Article 12*, cit., para. 12.40; Judgment of the Court (Third Chamber) of 27 October 2016, Child and Family Agency v J. D., Case C-428/15, Opinion of Advocate General Wathelet, para. 95. Note that a transfer of the case does not affect the applicable law, which both courts determine under Brussels IIb Regulation.

forum and whether a transfer would serve *its* welfare. The Member State court is thus less free than a common law court engaging in a *forum non conveniens* inquiry.

The fourth function identified above was comity. While comity is clearly not a separate consideration under Art. 12 Brussels IIb, the principle of mutual trust on which the EU's system of harmonized rules on international jurisdiction is based[139] arguably serves a comparable function. Art. 12 Brussels IIb goes even beyond this in that it appears to promote a true judicial cooperation between Member State courts regarding child welfare[140]: The legal consequence attached to Art. 12 Brussels IIb is not just a stay of proceedings, subject to the parties actively attempting to bring their case in a different forum, but a transfer of jurisdiction over a case, if both courts involved consider this to be reasonable. At least with respect to the legal consequence, Art. 12 Brussels IIb is thus comparable to a transfer of federal cases in the U.S. pursuant to 28 U.S.C. §1404(a). Such a promotion of judicial cooperation goes far beyond the considerations of friendliness towards foreign jurisdictions that the principle of comity encompasses.

3.2.2. *Art. 6 EU Succession Regulation*

In the EU Succession Regulation, the second chapter deals with questions of jurisdiction. Under the basic rule set out in Art. 4, the courts of the Member State in which the deceased had his last habitual residence have jurisdiction to rule on the succession as a whole. In the envisioned archetypical case, this leads to *forum* and *ius* coinciding, i.e. the forum applying its own law, since Art. 21 (1) provides that the law applicable to the succession as a whole shall be the law of the State in which the deceased had his last habitual residence.

Art. 4 of the Regulation is supplemented by Art. 10[141], which does not primarily aim at a concurrence of *forum* and *ius*, but under

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[139] HESS B., RICHARD V., *Brussels I (Conventions and Regulation)*, cit., p. 222.

[140] HEIDERHOFF B., *Art. 12 Brüssel IIb-VO*, cit., para. 3.

[141] DUTTA, A., *Art. 10 EuErbVO*, in SÄCKER, F.J., RIXECKER R., OETKER H., LIMPERG B. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Volume 12*,

certain circumstances allows the courts of a Member State to assume jurisdiction over all or part of the estate's assets if the deceased's last habitual residence was in a third state. According to Recital 30 of the EU Succession Regulation, Art. 10 seeks to ensure that the courts of all Member States can exercise their jurisdiction over a person's estate on the same basis, thereby rendering national rules of jurisdiction irrelevant[142]. The provision allegedly based on the doctrine of *forum non conveniens*, is Art. 6 (a).

3.2.2.1. *Requirements and consequences of Art. 6 EU Succession Regulation*

If the deceased chose the law of a Member State to govern his succession pursuant to Art. 22, Art. 6 provides that "*the court seized pursuant to Art. 4 or Art. 10 may, at the request of one of the parties to the proceedings, decline jurisdiction if it considers that the courts of the Member State of the chosen law are better placed to rule on the succession, taking into account the practical circumstances of the succession, such as the habitual residence of the parties and the location of the assets* […]."

Accordingly, the requirements for Art. 6(a) to be applicable are (1) that the first court seized has jurisdiction under Art. 4 or Art. 10, i.e. under one of the two general grounds of jurisdiction, (2) that the deceased made a valid choice of law under Art. 22, and (3) that one of the parties requested the court to decline jurisdiction in favor of the courts of the Member State the law of which governs the succession according to the deceased's choice. It is noteworthy that the parties may make this request any time during the proceedings, even near the end[143]. The stage the proceedings are at might only affect

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Internationales Privatrecht I, Europäisches Kollisionsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-26), 9th ed., Munich, 2024, para. 1, speaks of a basic rule of jurisdiction arising from Art. 4 and Art. 10 EuErbVO.

[142] Cf. BONOMI A., *Article 10*, in BONOMI A., WAUTELET P., *Le droit européen des successions: Commentaire du Règlement n°650/2012 du 04 juillet 2012*, Brussels, 2016, para. 2.

[143] DUTTA, A., *Art. 6 EuErbVO*, cit., para. 7; MAKOWSKY M., *Art. 6 EuErbVO*, in HÜßTEGE R., MANSEL H.P. (eds), *BGB, Rom-Verordnungen*, 4th ed. Baden-Baden, 2024, para. 13 f.

the court's discretionary decision whether the courts of the other Member State are (still) better suited to rule on the succession[144].

If these conditions are satisfied, the court seized may decide to decline its jurisdiction, if it considers that the courts of the Member State of the chosen law are better placed to rule on the succession. The decision is a discretionary one. Factors to be taken into account include the place where assets of the estate are located, where documents and witnesses are available, and the stage the proceedings in the first court are at when the request is made, but not that the court seized has to apply a law that is not the *lex fori*[145]. Since parties can only request the court to decline jurisdiction under Art. 6(a) if the deceased validly chose the law of a *different* Member State, the court's discretionary power to decline its jurisdiction can indeed only be triggered in cases where the court is not applying the *lex fori*[146]. It is solely in exceptionally complex cases that the court seized may factor in that the other court would apply its own law[147].

If the first court seized concludes that the courts of the other Member State are better placed to rule on the succession, it *declines* its jurisdiction. This constitutes an important difference to Art. 12 Brussels IIb, where the court of the first Member State may only *stay* its proceedings. Yet, the risk of the succession litigation failing due to a negative conflict of jurisdiction does not arise. In declining jurisdiction, the first court prorogates the courts of the other Member States: Under Art. 7(a), they are obliged to assume jurisdiction over the succession[148]. *De facto*, Art. 6 EU Succession Regulation, too, leads to the transfer of a case.

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[144] DUTTA, A., *Art. 6 EuErbVO*, cit., para. 7

[145] DUTTA, A., *Art. 6 EuErbVO*, cit., para. 8.

[146] DUTTA A., *Art. 6 EuErbVO*, cit., para. 8.

[147] DUTTA A., *Art. 6 EuErbVO*, cit., para. 8; MAKOWSKY M., *Art. 6 EuErbVO*, cit., para. 8.

[148] Judgment of the Court (Sixth Chamber) of 9 September 2021, RK v CR, Case C-422/20, para. 44 ff. See also Recital 27 EU Succession Regulation; DUTTA A., *Art. 6 EuErbVO*, cit., para. 11; MAKOWSKY M., *Art. 6 EuErbVO*, cit., para. 20.

3.2.2.2. *Ratio of Art. 6 EU Succession Regulation*

The rule in Art. 6(a) furthers the Regulation's underlying principle of a concurrence of *forum* and *ius*[149]. While the EU Succession Regulation grants testators a limited choice of law under Art. 22, it does not allow a choice of courts. Thus, the testator cannot unilaterally bind the parties of a *post-mortem* litigation to a particular forum[150]. This means that a concurrence of *forum* and *ius* would typically be precluded whenever the deceased made a valid choice of law. After all, Art. 22 does not allow him to choose the law of a (last) habitual residence. By allowing parties to request the court to decline its jurisdiction in favor of the courts of the Member State the law of which the deceased had chosen, Art. 6 provides room to achieve a concurrence of *forum* and *ius*, subject to the discretion of the court seized.

3.2.2.3. *Forum non conveniens analysis.*

At first glance, Art. 6 EU Succession Regulation, too, looks like an implementation of a common law *forum non conveniens* doctrine. Based on the legal consequence of a dismissal of the case, it seems to primarily resemble the application of the doctrine in the U.S. However, a functional analysis once again sheds a different light on the provision.

First, it is striking that Art. 6 EU Succession Regulation does not serve to counterbalance broad rules of jurisdiction that allow claimants to forum-shop. Instead, it allows a court to assume jurisdiction over the succession as a whole that would not be competent under any other provision in the second chapter.

Second, and linked with this first point, Art. 6 (a) does not serve as a safeguard for procedural fairness between the parties involved. The EU Succession Regulation's rules on jurisdiction will generally

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[149] C.f. DUTTA A., *Art. 6 EuErbVO*, cit., para. 1.

[150] DUTTA A., *vor Art. 4 EuErbVO*, in SÄCKER, F.J., RIXECKER R., OETKER H., LIMPERG B. (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Volume 12*, *Internationales Privatrecht I, Europäisches Kollisionsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1-26)*, 9th ed., Munich, 2024, para. 29.

only point to one Member State as an available forum. Accordingly, there is no leeway for the party bringing the proceedings to choose a forum more favorable for itself and less favorable for the defendant. Put briefly, there is no room for forum shopping. Overall, the aspect of procedural fairness to the litigants appears to be of negligible importance in the inquiry under Art. 6.

Instead, the analysis is primarily a practical one, concerned with efficiency and practicability of the proceedings[151]. Thus, the inquiry in dismissing a case under Art. 6 resonates most with the third function of the doctrine in the common law identified above. Just because a deceased validly chose the law of a different Member State under Art. 22 EU Succession Regulation does not necessarily mean that they personally had a closer connection with that Member State: For the validity of the choice of law, the Regulation is only concerned with the question of whether the deceased was a national of the Member State the law of which he chose – not whether he had any connection with that state going beyond nationality. Therefore, the Court asked to dismiss the proceedings must engage in a balancing exercise with respect to the current proceedings. Relevant factors include the language of the proceedings, access to information, location of the deceased's assets, and the habitual residence of the parties to the litigation[152].

Fourth, here too, comity is only an aspect insofar as it can be compared to the principle of mutual trust. Read in the light of Art. 7(a) EU Succession Regulation, the legal consequence of Art. 6 is likewise a transfer of jurisdiction, again leading to a limited resemblance with 28 U.S.C. §1404(a) with respect to the legal consequences. However, unlike any *forum non conveniens* stay or dismissal in the common law jurisdictions analyzed above, and even unlike Art. 12 Brussels IIb, the courts of the Member State the law of which the deceased had chosen in his will, do not get a say in whether or not they accept the transfer. Instead, they are obliged to do so[153].

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[151] Dutta A., *Art. 6 EuErbVO*, cit., para. 8.

[152] Dutta A., *Art. 6 EuErbVO*, cit., para. 8.

[153] Judgment of the Court (Sixth Chamber) of 9 September 2021, RK v CR, Case C-422/20, para. 44 ff.

4. *Conclusion*

The similarities that Art. 12 Brussels IIb Regulation and Art. 6 EU Succession Regulation bear with the *forum non conveniens* doctrine as applied in the common law are limited. While the common law doctrine seeks to counterbalance broad grounds of jurisdictions and equip the defendant with a procedural weapon against forum shopping, both EU provisions extend jurisdiction and allow a court to assume jurisdiction that it would not otherwise have over a given case. Both EU provisions furthermore lead to a transfer of jurisdiction. At least in the case of Art. 12 Brussels IIb where the second court, too, has to engage in an independent inquiry as to whether it would be better placed to decide the parental responsibility matter, this appears to further judicial cooperation. Art. 6 EU Succession Regulation, on the other hand, leads to a straightforward transfer without regard for the second court's position.

The greatest functional similarity that can be established is with respect to judicial efficiency and practicability. Member State courts in Art. 6 EU Succession Regulation and Art. 12 Brussels IIb Regulation inquiries as well as common law courts in *forum non conveniens* inquiries consider similar factors. However, unlike courts of common law jurisdictions, Member State courts are extremely restricted in exercising their discretion by means of the purpose of the pertinent provision allowing a transfer of jurisdiction.

What remains is primarily the neo-Latin phrase *forum non conveniens* as a convenient heading that also encompasses inquiries such as under Art. 6 EU Succession Regulation and Art. 12 Brussels IIb Regulation. But one should not be quick to equate EU provisions allowing Member State courts to "stay" or "dismiss" proceedings with the famous common law doctrine.

Jurisdiction in Representative Collective Consumer Proceedings: On the Relationship between the Brussels I bis Regulation and Directive (EU) 2020/1828

Anna Isfort

1. *Introduction*

Through Directive (EU) 2020/1828[1] the E. U. legislator created a collective redress instrument under the Directive on Representative Actions for the Protection of the Collective Interests of Consumers. The Directive does, however, not establish specific provisions regarding the international jurisdiction of national courts. Consequently, the determination of the competent court must rely on the application of the Brussels I bis Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial

[1] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, in OJ L 409, 4.12.2020.

matters.[2] This paper aims to conduct a detailed analysis of the relevant provisions within the Brussels I bis Regulation that should govern proceedings instituted under Directive (EU) 2020/1828.

1.1. *Proceedings under Directive (EU) 2020/1828*

The general concept of collective actions has been a subject of considerable debate within the European Union. While some have viewed it as a promising mechanism to enhance access to justice and strengthen consumer protection[3], others have expressed concerns about the potential commercialization of civil procedure arguing that collective actions is unsuitable and unnecessary for some European countries[4].

Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumersprovides for collective representative actions. It allows a "qualified entity" to pursue consumer claims on behalf of consumers. Similar to U.S. class actions, consumers remain entitled to their claim and the entity only pursues it on their behalf. Therefore, only the "qualified entity" becomes a real party to the proceedings - consumers are merely registered with the entity and bound by the outcome of the proceedings. "Qualified entities" are regulated by the Member States and will often be consumer organizations or similar bodies. Directive (EU) 2020/1828 contains provisions for both national and international "qualified entities".[5]

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[2] 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, in OJ L 351, 20.12.2012; Recital 21, Directive (EU) 2020/1828.

[3] RÖTHEMEYER P., *Das Verbraucherrechtedurchsetzungsgesetz (VDuG) zur Umsetzung der Verbandsklagen-Richtlinie – Die neue Abhilfeklage*, in *VuR,* 2023, p. 332; GRAMUNT FOMBUENA M., BARCELÓ COMPTE R., *The definitive impetus for access to justice: Mandatory consumer arbitration in Spain*, in *Maastricht Journal of European and Comparative* Law, 2022, p. 229; TANG Z. S., *Consumer Collective Redress in European Private International Law*, in 7 *Journal of Private International Law,* 2011, p. 101.

[4] BRUNS A., *Instrumentalisierung des Zivilprozesses im Kollektivinteresse durch Gruppenklagen?,* in *NJW,* 2018, p. 2753.

[5] See: Article 4 and 6 Directive (EU) 2020/1828.

Proceedings under Directive (EU) 2020/1828 differ from U.S. class actions in a number of details. The main difference is that under Directive (EU) 2020/1828, a "qualified entity", rather than a claimant selected from the group, represents the claimants. [6] In addition, U.S. class actions operate on an opt-out basis, whereby all parties who fall within the definition of the class are bound by the *res judicata* effect of the proceedings, unless they actively opt-out.[7] For international proceedings under Directive (EU) 2020/1828, an opt-in system is used, whereby only those parties who actively opt in are bound by the judgment. For national proceedings, the E.U. legislator has left it to the Member States to decide whether an opt-in or an opt-out system is more appropriate.[8]

These procedures can also be distinguished from group or mass actions, where all plaintiffs collectively become real parties to the proceedings and are not represented by a single entity.[9] Finally, a distinction should be made to model proceedings such as the German "*Musterfeststellungsklage*"[10], in which the collective action only leads to a decision on liability and damages must be assessed in subsequent proceedings. According to Art. 9 of Directive (EU) 2020/1828, the courts will decide on damages in collective actions.[11]

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[6] NUYTS A., *The Consolidation of Collective Claims under Brussels I*, in NUYTS A., HATZIMIHAIL N., *Cross-Border Class Actions: The European Way,* Munich, 2013, p. 69; RENTSCH B., *Grenzüberschreitender kollektiver Rechtsschutz in der Europäischen Union: No New Deal for Consumers*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2021, p. 548.

[7] See: NEWBERG H., *Newberg on Class Actions*, New York City, 2009, para. 16:20.

[8] RENTSCH B., *Grenzüberschreitender kollektiver Rechtsschutz in der Europäischen Union: No New Deal for Consumers*, cit., p. 551.

[9] NUYTS A., *The Consolidation of Collective Claims under Brussels I*, cit., p. 69; describing the differences between mass and class action with regards to arbitration: GLOVER M., *Mass Arbitration*, in *74 Stanford Law Review*, 2022, p. 1283.

[10] For more detail see: RÖTHEMEYER P., *Musterfeststellungsklage: Weiterentwicklung Zu Systemrelevanten Fragen Auch Im Lichte Der Verbandsklagen-Richtlinie*, Baden-Baden, 2022.

[11] The details of different collective proceedings and their comparison to Directive (EU) 2020/1828 are beyond the scope of this work. The aforementioned summary is not comprehensive and merely serves the purpose of offering background information necessary for this paper.

1.2. *Applicability of Brussels I bis Regulation*

Although there have been calls for the European legislator to regulate jurisdiction in collective proceedings[12], in order to create legal certainty and avoid forum shopping, Directive (EU) 2020/1828 does not specify jurisdiction. Therefore, the Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be applied to determine international jurisdiction as mentioned in Recital 21 of Directive (EU) 2020/1828.[13] For the Brussels I bis Regulation to be applicable, the matter must possess international significance[14], which would be the case if an international "qualified entity" were to present the claims before a court.

1.3. *Possible Conflicts*

Pursuant to the principle *actor sequitur forum rei*, a claimant is generally required to initiate proceedings in the defendant's domicile jurisdiction, in accordance with Article 4 Brussels I bis Regulation. However, the Regulation permits alternative jurisdictions in cases involving consumer disputes, contractual relationships, delict or quasi-delict, and so on.

The issue at hand is whether these jurisdictional provisions should be extended to encompass "qualified entities" when pursuing

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[12] RENTSCH B., *Kollektiver Rechtsschutz unter der EU-Verbandsklagerichtlinie - Systemwettbewerb unter Brüssel Ia?* in *Europäische Zeitschrift für Wirtschaftsrecht*, 2021, p. 531.

[13] *"This Directive should not affect the application of rules of private international law regarding jurisdiction, the recognition and enforcement of judgments or applicable law, nor should it establish such rules. Existing instruments of Union law should apply to the procedural mechanism for representative actions required by this Directive. In particular, Regulation (EC) No 864/2007, Regulation (EC) No 593/2008 and Regulation (EU) No 1215/2012 of the European Parliament and of the Council should apply to the procedural mechanism for representative actions required by this Directive."*

[14] See: Judgment of the Court (Eighth Chamber) of 14 November 2013, Armin Maletic and Marianne Maletic v lastminute.com Gmbh and TUI Österreich GmbH, Case C-478/12, para. 26. (The requirement of international significance is disputed amongst scholars. For more detail see: ANTOMO J., *Brüssel Ia-VO Art. 1*, in VORWERK V., WOLF C., *BeckOK ZPO*, Munich, 2025, para. 15).

a claim on behalf of a group of consumers. There are concerns that a multiplicity of possible jurisdictions could lead to forum shopping.[15] Other factors to be taken into account are consumer protection, procedural efficiency, access to justice and the right to equal treatment.

2. *General Jurisdiction at the Domicile of the Defendant*

The fallback provision in the Brussels I bis Regulation designates the defendant's domicile as the jurisdictional forum, as outlined in Article 4.[16] Should none of the provisions discussed below be deemed applicable to proceedings under Directive (EU) 2020/1828, "qualified entities" would be required to initiate their claims at the domicile of the corporate defendant.

The application of Article 4 of the Brussels I bis Regulation would certainly offer several advantages, particularly in terms of predictability. Given that the defendant's domicile serves as the default jurisdictional forum, it would provide clear foreseeability for all parties involved.

As the judgment would be given in the defendant's domicile, there would also be no need for recognition.[17] In general, a foreign judgment may be subject to additional proceedings if the prevailing party wishes to have it recognized or enforced in a State other than the State in which it was given. Within the European Union, such a procedure is not necessary, since a judgment is recognized in all Member States pursuant to Art. 36 para. 1 of the Brussels I bis Regulation and enforced in accordance with Art. 39 Brussels I bis Regulation. However, even within the Union, the party seeking enforcement

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[15] See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions "Towards a European Horizontal Framework for Collective Redress", Strasbourg, 11.6.2013, COM(2013) 401 final, para. 3.7.

[16] STADLER A., KRÜGER C., *EuGVVO Art. 4*, in MUSIELAK H-J, VOIT W, *ZPO*, Munich, 2024, para. 1; TANG Z. S., *Consumer Collective Redress in European Private International Law*, in 7 *Journal of Private International Law,* 2011, p. 106.

[17] See also: PATO A., *Jurisdiction and Cross-Border Collective Redress: A European Private International Law Perspective,* Oxford, 2019, p. 213.

must produce certain documents pursuant to Art. 37 para. 1 Brussels I bis Regulation and may have to provide a translation pursuant to Art. 37 para 2 of the Brussels I bis Regulation. These are additional administrative hurdles. It is very likely that consumers must seek enforcement at the defendant's domicile since that is where the defendant's main assets are located. If the judgment has already been given at the seat, the additional administrative steps described above will not be necessary.

The use of the fallback jurisdictions under Art. 4 Brussels I bis Regulation undoubtedly has certain disadvantages. Primarily, the defendant consistently enjoys the advantage of its home jurisdiction, which not only reinforces its position but also exerts a deterrent effect on "qualified entities" considering initiating a claim. Pursuing legal action outside one's home jurisdiction is rare, owing to administrative hurdles and the inherent financial risks involved. Finally, the defendant could strategically move its domicile or registered office to weaken the consumer's position.[18] Although the last scenario may be very uncommon in practice.[19] All this would be contrary to the objective of strengthening access to justice and consumer rights.

Consequently, despite the advantages of jurisdiction under Art. 4 Brussels I bis Regulation, it might be appropriate to provide "qualified entities" with other forums to pursue their claims.

3. *Competent Court in Consumer Matters*

Pursuant to Article 17 of the Brussels I bis Regulation, a consumer is granted the right to initiate legal proceedings against a company before the court located at the consumer's domicile. This provision confers exclusive jurisdiction in matters pertaining to consumer disputes. The purpose of this provision is to protect the consumer, as the weaker party, from having to bring proceedings in an inconvenient forum, thereby improving access to justice.

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[18] See also: PATO A., *Jurisdiction and Cross-Border Collective Redress: A European Private International Law Perspective*, cit., p. 213/214.

[19] PATO A., *Jurisdiction and Cross-Border Collective Redress: A European Private International Law Perspective,* cit., p. 214.

3.1. *Case Law of the European Court of Justice*

In the past, the European Court of Justice ("ECJ") has not extended this right to any person or organization exercising a right conferred by the consumer.[20] The Court only allowed the application of Art. 17 of the Brussels I bis Regulation where consumers themselves assert their own rights. It argued that an assignment of rights should not affect international jurisdiction.[21]

3.2. *Applicability to Directive (EU) 2020/1828*

The question arises whether this approach can and should be applied to "qualified entities" under Directive (EU) 2020/1828.[22] It is clear that a "qualified entity" is not a consumer within the meaning of the Brussels I bis Regulation. A consumer is a natural person acting outside his economic activity.[23] However, a "qualified entity" represents a group of consumers, which raises the question of whether it should be treated as a consumer. While the case law cited above also dealt with entities representing one consumer or a group of consumers, "qualified entities" are unique in several respects:

First, they only represent the consumers in court, while the consumers retain all rights to their claims. Therefore, it is still the consumers who benefit from successful proceedings. In both ECJ cases cited with regards to the application of Art. 17 Brussels I bis

[20] Judgment of the Court of 19 January 1993, Case C-89/91 Shearson v TVB, Case C-89/91, para. 18, 23, 24; Judgment of the Court (Third Chamber) of 25 January 2018, Maximilian Schrems v Facebook Ireland Limited, Case C-498/16, para. 44.

[21] Judgment of the Court (Third Chamber) of 25 January 2018, Maximilian Schrems v Facebook Ireland Limited, Case C-498/16, para. 48.

[22] See: RENTSCH B., *Kollektiver Rechtsschutz unter der EU-Verbandsklagerichtlinie - Systemwettbewerb unter Brüssel Ia?*, cit., p. 532.

[23] See: GOTTWALD P., *Art. 17 Brüssel Ia VO*, in RAUSCHER T., KRÜGER W., *MüKo ZPO*, Munich, 2020, para.2; STADLER A., KRÜGER C., *EuGVVO Art. 4*, cit., para. 1.

Regulation to collective action, the consumer had assigned his or her right to an organization or an individual.[24]

Second, "qualified entities" can only have very limited commercial interests, which may limit the risk of abuse. While companies and individuals who buy and pursue claims might put their own interests before the needs of consumers, "qualified entities" are often state-funded, and their sole purpose is to pursue the claim for consumers.

Third, third-party funders can make a difference with regard to litigation strategy and opportunities. Companies that buy consumer claims on a commercial basis may either have significant resources of their own or be backed by a third-party litigation funder. Individuals pursuing claims assigned to them may also obtain third-party funding. After the first draft of a regulation on third-party funding[25] was not followed by binding legislation, third-party funding is generally not regulated in the European Union.

However, Directive (EU) 2020/1828 contains its own regulation on third-party funding. In Art. 10, the regulation seeks to prevent undue influence by third-party funders by requiring Member States to "*ensure that: (a) the decisions of qualified entities in the context of a representative action, including decisions on settlement, are not unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers concerned by the representative action; (b) the representative action is not brought against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent."* [26]

While the idea of preventing such undue influence is sensible to ensure the integrity of the proceedings, the implementation in some Member States leads almost to a de facto ban on third-party funding.

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[24] See: Judgment of the Court of 19 January 1993, Shearson v TVB, Case C-89/91, para. 11; Judgment of the Court (Third Chamber) of 25 January 2018, Maximilian Schrems v Facebook Ireland Limited, Case C-498/16 paras. 24, 48.

[25] European Parliament, Responsible private funding of litigation European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation (2020/2130(INL))., in OJ 5.4.2023 C.-125, p. 2.

[26] See also: RENTSCH B., *Kollektiver Rechtsschutz unter der EU-Verbandsklagerichtlinie - Systemwettbewerb unter Brüssel Ia?*, cit., p. 529.

In Germany, under § 4 para. 2 No. 3 of the Verbraucherrechtedurchsetzungsgesetz ("VDuG"), litigation funders may not receive more than 10% of the total amount granted to the consumer. In view of the risk associated with litigation funding, this regulation strongly discourages companies from funding collective proceedings pursuant to Directive (EU) 2020/1828.[27] Therefore, the commercial background of "qualified entities" is very different from what is possible in the traditional model of commercial purchase of consumer claims.

Finally, the ECJ has argued that an assignment of rights should not affect international jurisdiction[28], which could encourage forum shopping.[29] However, in cases under Directive (EU) 2020/1828, the "qualified entity" exists only to pursue consumer claims and therefore does not have its "own" pre-existing international jurisdiction that could be affected, as it exists only to pursue consumer claims. This is particularly true in cases where the consumer joins the claim of a national "qualified entity", as both the entity and the consumer will have the same jurisdiction, so the fact that the consumers do not pursue the claims themselves does not affect the jurisdiction.[30] This may be different in cases where businesses or individuals buy claims from consumers residing in other Member States.

These differences lead to the conclusions that Art. 17 Brussels I bis Regulation may be applicable to "qualified entities".

3.3. *The "Qualified Entity" as the "Weaker Party"*

The purpose of Art. 17 Brussels I bis Regulation is to protect the consumer as the weaker party and thereby guarantee access to

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[27] STADLER A., *VDuG § 4*, in MUSIELAK H.-J.,VOIT W., *ZPO*, Munich, 2024, para. 3.

[28] Judgment of the Court (Third Chamber) of 25 January 2018, Maximilian Schrems v Facebook Ireland Limited, Case C-498/16, para. 48.

[29] Judgment of the Court (Third Chamber) of 25 January 2018, Maximilian Schrems v Facebook Ireland Limited, Case C-498/16, para. 48.

[30] See also: RENTSCH B., *Kollektiver Rechtsschutz unter der EU-Verbandsklagerichtlinie - Systemwettbewerb unter Brüssel Ia?*, cit., p. 532.

justice.[31] In the words of the European Court of Justice, the purpose of the rule is "*to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than the other party to the contract, and the consumer must not therefore be discouraged from suing by being compelled to bring his action before the courts in the Contracting State in which the other party to the contract is domiciled."*[32]

The question at hand is whether the ratio applied by the ECJ to individual consumers should be extended to "qualified entities". It could be argued that by grouping consumers together and having them represented by a "qualified entity", the usual disadvantages faced by consumers fade. As a represented group, they may have more resources and access to the expertise needed to successfully pursue the claim. If these disadvantages were indeed eliminated and the "qualified entity" would therefore see eye to eye with the defendant, it could be argued that allowing a "qualified entity" to bring a claim under Art. 17 Brussels I bis Regulation would violate the defendant's right to equal treatment. If the corporate defendant and the "qualified entity" are on an equal footing, the protection of Art. 17 Brussels I bis Regulation would be unnecessary and an unjustified disadvantage for the defendant.[33]

On the other hand, one might want to focus on the purpose of Directive (EU) 2020/1828, which is to protect consumers by improving access to justice through collective redress.[34] Allowing "qualified entities" to benefit from Art.17 Brussels I bis Regulation would support this objective. The limited financial resources of consumer organizations need to be taken into account. Art. 10 Directive (EU) 2020/1828 only restricts the funding of collective redress under Directive (EU) 2020/1828 by third-party funders. This provision leaves

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[31] See: Judgment of the Court of 19 January 1993, Case C-89/91 Shearson v TVB, Case C-89/91, para. 18.

[32] Judgment of the Court of 19 January 1993, Case C-89/91 Shearson v TVB, Case C-89/91, para. 18.

[33] See: TANG Z. S., *Consumer Collective Redress in European Private International Law*, cit., p. 111.

[34] See: Judgment of the Court of 19 January 1993, Case C-89/91 Shearson v TVB, Case C-89/91, para. 18.

room for Member States to introduce specific limits on third-party funding. Whether these limits affect the means of the "qualified entity" in a way that it cannot compete with an average corporate defendant depends on the regulation of the Member State.

Taking Germany as an example, where the use of third-party funders is extremely limited, it could be argued that German law effectively excludes third-party funders from proceedings under Directive (EU) 2020/1828. Given that "qualified entities" do not have many other options to raise funds, their financial resources are very limited. Hence, the "qualified entity" is not equal to the defendant.

At least in Member States with strict regulations on third-party funding the "qualified entity" is still the *"economically weaker"* party, using the words of the ECJ.[35] As a consequence, it faces disadvantages during the proceedings which may have a deterrent effect. In order to eliminate this effect, it seems necessary to allow "qualified entities" to sue under Art.17 Brussels I bis Regulation. This would certainly be in line with the purpose of both Art.17 Brussels I bis Regulation and Directive (EU) 2020/1828, which is to protect consumers' access to justice.

3.4. *Outlook*

Given the unique setting of the "qualified entity" and its financial framework in some states, it may further the objective of Directive (EU) 2020/1828 to apply Art.17 Brussels I bis Regulation to "qualified entities". Arguments can be made in both directions should the issue be opened up by the ECJ. Consumer protection certainly argues in favor of allowing "qualified entities" to sue under Art.17 Brussels I bis Regulation.

[35] Judgment of the Court of 19 January 1993, Case C-89/91 Shearson v TVB, Case C-89/91, para. 18.

4. *Jurisdiction for Contractual Disputes*

According to Art.7 No. 1 I Brussels I bis Regulation, any person domiciled in a member state may be sued "*in matters relating to a contract, in the courts for the place of performance of the obligation in question"*. It is unclear whether this jurisdiction is also open to "qualified entities" acting on behalf of a group of consumers under Directive (EU) 2020/1828. Due to the unique nature of the Regulation as an instrument for a representative procedure, the party to the contract and the party appearing before the court are not identical on the claimant's side. While consumers are parties to contracts with the defendant, the "qualified entity" appears before the court.

4.1. *Contractual Relationship*

The wording of Art.7 No. 1 Brussels I bis Regulation refers only to "matters relating to a contract", the norm does not specify whether the parties to the proceedings must also be signatories to the contract.

On the one hand, the "qualified entity" has not entered into a contract with the defendant, which argues against the possibility of bringing an action under Art. 7 No. 1 of the Brussels I bis Regulation.[36] On the other hand, the "qualified entity" only represents the consumers, and the claims still belong to them. The consumers have concluded a contract with the defendant. It could therefore be sensible to apply Art. 7 No. 1 I Brussels I bis Regulation to proceedings under Directive (EU) 2020/1828.

4.2. *Case Law of the European Court of Justice*

In the case of Verein für Konsumenteninformation v Karl Heinz Henkel, a consumer organization representing a group of consumers before perused a claim before a court in Austria. As under Directive (EU) 2020/1828, the consumers did not become parties to the

[36] See: RENTSCH B., *Kollektiver Rechtsschutz unter der EU-Verbandsklagerichtlinie - Systemwettbewerb unter Brüssel Ia?*, cit., p. 532.

proceedings but retained the right to pursue their claims. The organization merely represented the consumers before the court. Here, the ECJ held that a case brought by a consumer organization on behalf of a group of consumers is not a case "*in matters relating to a contract"* since only the consumers and not the organization contracted with the defendant.[37] Thus, although the wording of the Regulation does not make it clear that the parties to the proceedings must also be parties to the contract, the Court seems to interpret the Regulation in this way.

However, in the same case, the Court discussed Art. 7 No. 2 Brussels I bis Regulation,[38] which regulated matters relating to tort, delict or quasi-delict and confers international jurisdiction on the court of the place where the damage occurred. The wording of the Regulation leaves it open whether the party to the proceedings must be the party harmed by the tort, delict or quasi-delict. It is clear that the consumers, and not the organization representing them were harmed by the defendant. It is not completely evident why the Court found that it is sufficient for jurisdiction under Art. 7 No. 2 Brussels I bis Regulation if the consumers and not the organization are harmed, even if the consumers did not become parties to the proceedings, but that Art. 7 No. 1 Brussels I bis Regulation asks for the representing entity to be a party to the contract if the consumers do not become parties to the litigation.

Furthermore, as regards special jurisdiction, Recital 16 of the Brussels I bis Regulation states that its purpose is to ensure the jurisdiction of the court closest to the place of performance. Such proximity facilitates the taking of evidence and thus protects the integrity and efficiency of judicial proceedings.[39] Collective actions would

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[37] Judgment of the Court (Sixth Chamber) of 1 October 2002, Verein für Konsumenteninformation v Karl Heinz Henkel, Case C-167/00, paras. 39 f.

[38] Judgment of the Court (Sixth Chamber) of 1 October 2002, Verein für Konsumenteninformation v Karl Heinz Henkel, Case C-167/00, paras. 36 and 41 ff.

[39] "*In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice…"* Recital 16, Brussels I bis Regulation*;* See also: THODE R., *Brüssel Ia-VO Art. 7*, in VORWERK V., WOLF C., *BeckOK ZPO*, Munich, 2024, paras. 13a-13b; GRAZIANO T. K., *Jurisdiction under Article 7 No. 1 of the Recast*

also benefit from these advantages. The reasons set out in Recital 16 generally speak in favour of allowing "qualified entities" to bring actions under Art. 7 No. 1 of the Brussels I bis Regulation.

4.3. *Applicability to Directive (EU) 2020/1828*

First, considering the Court's reasoning regarding the purpose of Art. 7 No. 1 Brussels I bis Regulation, one might think that the advantages of proximity for the taking of evidence would also apply in cases under Directive (EU) 2020/1828. However, it seems that in the past the ECJ did not find this reasoning sufficient to allow collective actions under Art. 7 No. 1 Brussels I bis Regulation.

Second, some practical issues may argue against allowing a court at the place of performance to assume jurisdictions in proceedings under Directive (EU) 2020/1828. By definition, collective representative actions deal with multiple contracts that carry the risk of multiple places of performance. Such cases would jeopardize the benefits of having a court close to the place of performance decide the case. It could also increase the risk of forum shopping. In collective proceedings, however, one is always confronted with the possibility that not all claims are identical or even similar enough to make a common procedure practical at all stages of the proceedings. In U.S. class actions, the challenge is met by creating subclasses.[40] Here, the class is divided so that the claims of all members of a subclass are "similar enough" to permit joined proceedings. A similar approach could be employed by permitting "qualified entities" to establish subclasses of claimants, or by allowing two entities to represent distinct classes of claimants.

Brussels I Regulation: Disconnecting the Procedural Place of Performance from Its Counterpart in Substantive Law: An Analysis of the Case Law of the ECJ and Proposals de Lege Lata and de Lege Ferenda, in *Yearbook of Private International Law Vol. XVI,* 2015, p. 170.

[40] Rule 23 (c) 4 or 23 (d) FRCP; See also: KLONOFF R. H., *Antitrust Class Actions: Chaos in the Courts,* in *Stanford Journal of Law, Business & Finance*, 2005, p. 10; FUOCO P. S., *Explaining Class Actions*, in *New Jersey Lawyer,* 1984 no. 4, p. 44- 45; HANOTIAU B., *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class* Actions, Alpen aan Rijn, 2006, p. 263.

Third, unlike the ECJ cases cited with regard to the application of Art. 17 Brussels I bis Regulation to collective action[41], Verein für Konsumenteninformation v Karl Heinz Henkel[42], did not involve the assignment of claims but an organization suing on behalf of consumers, which makes it more comparable to cases under Directive (EU) 2020/1828 and argues in favor of applying the Court's reasoning.

4.4. *Outlook*

Although the matter seems more certain than in the case of jurisdiction under Art. 17 Brussels I bis Regulation, it can be seen from the above that the law is not entirely clear with regards to the question of whether and under what circumstances jurisdiction at the place of performance can be assumed in collective proceedings under Directive (EU) 2020/1828.[43] It would therefore be desirable for the European legislator to clarify the matter.

5. *Jurisdiction in Cases of Delict and Quasi-Delict*

In matters of delict and quasi-delict, Art. 7 No. 2 Brussels I bis Regulation confers jurisdiction on the court of the place where the act giving rise to the delict or quasi-delict was committed and on the court of the place where the victim feels the effects of the wrong.[44]

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[41] See: Judgment of the Court of 19 January 1993, Shearson v TVB, Case C-89/91, para. 11; Judgment of the Court (Third Chamber) of 25 January 2018, Maximilian Schrems v Facebook Ireland Limited, Case C-498/16.

[42] Judgment of the Court (Sixth Chamber) of 1 October 2002, Verein für Konsumenteninformation v Karl Heinz Henkel, Case C-167/00, para. 14.

[43] On collective proceedings in general see: TANG Z. S., *Consumer Collective Redress,* in *European Private International Law,* cit., p. 111.

[44] Judgment of the Court of 7 March 1995, Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA, Case C-68/93; Judgment of the Court (Sixth Chamber) of 11 January 1990, Dumez France SA and Tracoba SARL v Hessische Landesbank and others, Case C-220/88; Judgment of the Court of 30 November 1976, Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA, Case C-21/76; STADLER A., *Der deliktische Erfolgsort als internationaler Gerichtsstand bei reinen Vermögensdelikten*, in SCHÜTZE R. A., GEIMER R, *Fairness, justice, equity: Festschrift für*

Art. 7 No. 2 of the Brussels I bis Regulation ensures that the competent court is close to the place of the offence, which, again, facilitates the taking of evidence.[45]

5.1. *Case Law of the European Court of Justice*

In the above-mentioned case of Verein für Konsumenteninformation v Karl Heinz Henkel, the ECJ held that a case brought by a consumer organization concerning unfair terms was a delict or quasi-delict within the meaning of Art. 7 No. 2 of the Brussels I bis Regulation (then Article 5 No. 3). The Court concluded that the court of the place where the delict or quasi-delict was committed had jurisdiction.[46] The fact that the actions were not brought by victims but by consumer associations did not, in the Court's view, affect the applicability of Art. 7 No. 2 of the Brussels I bis Regulation

Similarly, in the case of CDC Hydrogen Peroxide v Akzo Nobel, the Court held that jurisdiction could be based on Art. 7 No. 2 Brussels I bis Regulation (then Article 5 No. 3). In this case, CDC Hydrogen Peroxide acquired cartel damages claims from cartel victims. The claims were then assigned to CDC Hydrogen Peroxide, which brought them in a bundle. The ECJ held that the question of where the damage occurred is not affected by the assignment of a claim.[47] It follows that the assignment or bundling of claims does not affect

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Reinhold Geimer zum 80. Geburtstag, Munich, 2017, p. 715; GOTTWALD P., *Art. 7 Brüssel Ia VO*, in RAUSCHER T., KRÜGER W., *MüKo ZPO*, Munich, 2020, para 46; THODE R., *Brüssel Ia-VO Art. 7*, cit., para. 66.

[45]Judgment of the Court of 7 March 1995, Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA, Case C-68/93; Judgment of the Court (Sixth Chamber) of 11 January 1990, Dumez France SA and Tracoba SARL v Hessische Landesbank and others, Case C-220/88; Judgment of the Court (Sixth Chamber) of 1 October 2002, Verein für Konsumenteninformation v Karl Heinz Henkel, Case C-167/00, para. 46; GOTTWALD P., *Art. 7 Brüssel Ia VO*, cit., para. 46; THODE R, *Brüssel Ia-VO Art. 7*, cit., para. 66.

[46] Judgment of the Court (Sixth Chamber) of 1 October 2002, Verein für Konsumenteninformation v Karl Heinz Henkel, Case C-167/00.

[47] See: Judgment of the Court (Fourth Chamber) of 21 May 2015, Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others, Case C-352/13, para. 35.

the jurisdiction of the courts under Art. 7 No. 2 Brussels I bis Regulation.

Finally, the ECJ confirmed its reasoning in a collective action case in 2020. In the Vereniging van Effectenbezitters v BP plc, the Court argued that the collective nature of an action is "*not, in itself, decisive in determining the place where the harmful event occurred, in accordance with Art. 7 No. 2 of Regulation No 1215/2012.*"[48]

5.2. *Applicability to Directive (EU) 2020/1828*

According to the ECJ, neither the bundling nor the assignment of claims affects the applicability of Art. 7 No. 2 Brussels I bis Regulation. Similarly, the collective nature of an action alone cannot lead to a different interpretation of Art. 7 No. 2 Brussels I bis Regulation. This reasoning is a consistent application of the purpose of the Regulation. Its aim is to give jurisdiction to the court of the place where the delict or quasi-delict was committed in order to facilitate the taking of evidence. The place of the action and the conditions for taking evidence and the necessary evidence do not depend on the party filing the suit, but only on the place and circumstances of the delict or quasi-delict. Letting the assignment of the claim affect the application of Art. 7 No. 2 Brussels I bis Regulation would be contrary to its objectives. Consequently, the collective nature of claims brought under Directive (EU) 2020/1828 should not affect the applicability of Art. 7 No. 2 Brussels I bis Regulation according to the jurisprudence of the ECJ.

A more specific feature of Directive (EU) 2020/1828 is that consumers are represented in court by the "qualified entities" but remain entitled to their claims. This should not affect the applicability of Art. 7 No. 2 Brussels I bis Regulation. If the rule applies even if the victims of delict or quasi-delict have assigned the claim and are not linked to the outcome of the case, it should apply all the more if they remain entitled to the claim.

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[48] Judgment of the (First Chamber) of 12 May 2021, Vereniging van Effectenbezitters v BP plc., Case C-709/19, para. 36.

Consequently, following the case law of the ECJ, jurisdiction under Art. 7 No. 2 Brussels I bis Regulation also applies to cases brought under Directive (EU) 2020/1828.[49]

5.3. *Outlook*

Allowing special jurisdiction at the place of delict or quasi-delict in collective representative actions under Directive (EU) 2020/1828 seems to be in line with the purpose of Art. 7 No. 2 Brussels I bis Regulation. Proximity to the place of action will also benefit the taking of evidence in collective actions. It should be noted that the application of Art. 7 No. 2 Brussels I bis Regulation may lead to different places of jurisdictions for different consumers. As seen above, this challenge could be met by creating "subclasses".

The conferral of jurisdiction under Art. 7 No. 2 Brussels I bis Regulation appears at first sight to be an opportunity for forum shopping. However, the risk of forum shopping is very limited as no additional jurisdiction is created. In a case of delict or quasi-delict in a collective action, the place of delict will be an appropriate place of jurisdiction, similar to the same scenario in bilateral proceedings.

Even if "qualified entities" were given to option to file claims under Art. 17 Brussels I bis Regulation, forum shopping is not a likely scenario. As in bilateral consumer disputes, the exclusive[50] jurisdiction of Art. 17 Brussels I bis Regulation would prevail over jurisdiction under Art. 7 No. 2 of the Brussels I Regulation, no additional forum would be created.

6. *Jurisdiction in Case of Multiple Defendants*

Art. 8 No. 1 of the Brussels I bis Regulation provides that where there are several defendants, a plaintiff may bring proceedings at the

[49] For more details on jurisdiction under Art. 7 No 2 Brussels I bis in collective redress see: PATO A., *Jurisdiction and Cross-Border Collective Redress: A European Private International Law Perspective,* cit., p. 215.

[50] On the nature of Art. 17 Brussel I bis as exclusive jurisdiction see above.

domicile of any one of them. For this rule to apply, all the claims must be connected in such a way that it is reasonable to pursue them together. The case of multiple plaintiffs is not dealt with in Art. 8 No. 1 Brussels I bis Regulation or anywhere else in the Regulation.[51]

6.1. *Case Law of the European Court of Justice*

Looking at the case law of the ECJ in antitrust damages actions, victims of cartels can bring an action at the domicile of any cartel participant.[52] This creates the possibility of strategic use of jurisdictions, where a particular jurisdiction is only used to bring an action against a defendant outside its home jurisdiction. By establishing an additional forum, one is always faced with some room for forum shopping.

6.2. *Applicability to Directive (EU) 2020/1828*

The potential risk of forum shopping should not lead to the inapplicability of Art. 8 No. 1 Brussels I bis Regulation in cases under Directive (EU) 2020/1828 for two reasons: First, the application of Directive (EU) 2020/1828 does not create an additional risk of forum shopping that is not already embedded in the Brussels I bis Regulation. Jurisdiction pursuant to Art. 8 No. 1 Brussels I bis Regulation could always create additional forums even without the possibility of collective action under Directive (EU) 2020/1828. Second, even according to the case law of the ECJ, plaintiffs are prohibited from choosing a particular forum for purely strategic reasons.[53] Hence,

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[51] GOTTWALD P., *Art. 8 Brüssel Ia VO*, in RAUSCHER T., KRÜGER W., *MüKo ZPO*, Munich, 2020, para. 5.

[52] Judgment of the Court (Fourth Chamber) of 21 May 2015, Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others, Case C-352/13, paras. 23 f.

[53] Judgment of the Court (Fourth Chamber) of 21 May 2015, Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others, Case C-352/13, para. 27; See also: RENTSCH B., *Kollektiver Rechtsschutz unter der EU-Verbandsklagerichtlinie - Systemwettbewerb unter Brüssel Ia?*, cit., p. 533.

strategic misuse is already addressed through ECJ jurisprudence which the Court can uphold with regard to Directive (EU) 2020/1828.

Thus, the case law of the ECJ does not prohibit the use of jurisdiction under Art. 8 No. 1 Brussels I bis Regulation in collective proceedings.

Moreover, with regard to the factor of multiple parties, Directive (EU) 2020/1828 and Art. 8 No. 1 of the Brussels I bis Regulation do not apply to the same scenario. While the Directive focuses on multiple potential claimants represented by a "qualified entity", Art. 8 No. 1 Brussels I bis Regulation deals with cases of multiple defendants.

6.3. *Outlook*

There is no reason why a "qualified entity" suing several defendants should not be able to bring an action before a court which has jurisdiction under Art. 8 No. 1 of the Brussels I bis Regulation. As with other provisions, it could be argued that "qualified entities" should not benefit from special jurisdiction because they are not individual plaintiffs. However, the jurisdiction of this forum is jurisdiction for related matters. Its purpose is therefore to bring together in one jurisdiction proceedings which are related in substance.[54] It is not the purpose of this regulation to compensate for an inequality of arms. Thus, the fact that "qualified entities" may be assessed differently from individual consumers or claimants in this respect does not affect the applicability of Art. 8 No. 1 Brussels I bis Regulation to proceedings under Directive (EU) 2020/1828.

7. *Conclusion*

In general, the risk of strategic forum shopping to the detriment of one party is not significantly increased by Directive (EU) 2020/1828. According to previous decisions of the ECJ, it seems that

[54] GOTTWALD P, *Art. 8 Brüssel Ia VO*, cit., para.1.

jurisdiction at the place of performance of the contract under Art. 7 No. 1 Brussels I bis Regulation may not be available to "qualified entities" in proceedings under Directive (EU) 2020/1828. The question of whether Art. 17 Brussels I bis Regulation can be applied under the Directive seems to be less clear. Jurisdiction at the place of delict and quasi-delict pursuant to Art. 7 No. 2 of the Brussels I bis Regulation, as well as jurisdiction in cases of multiple defendants under Art. 8 No. 1 of the Brussels I bis Regulation will be available.

With regard to the first two provisions, the ECJ could consider (re-)evaluating its position in the light of proceedings under Directive (EU) 2020/1828. Consumer protection would certainly benefit from the recognition of jurisdiction under Art. 17 Brussels I bis Regulation. Regarding the jurisdiction at the place of performance in contractual relationships felicitating the taking of evidence speaks in favor of reassessing the previous views. Furthermore, the fact that collective representative actions can be brought under Art. 7 No. 2 but not under Art. 7 No. 1 seems inconsistent.

In conclusion, the reference to the Brussels I bis Regulation in Recital 21 alone does not resolve all questions of jurisdiction under Directive (EU) 2020/1828. Thus, even if the risk of forum shopping is limited, the European legislator should address collective proceedings in its next revision of Brussels I bis Regulation to create legal certainty. Otherwise, the ECJ may wish to open up the question of jurisdiction under Directive (EU) 2020/1828 if the legislator will not fully resolved all issues in this regard.

Cross-border collective redress in the European Union and issues of *lis pendens*

Clara Pastorino

Contents: 1. Introduction. – 2. The 2013 Commission Recommendation and the fragmentation of national collective redress. – 3. Regulation (EU) 1215/2012, Lis pendens and related cases (articles 29-30). – 4. *(continued)* ... in the extra-European dimension. – 5. Concluding proposals.

1. *Introduction*

Collective redress is a term used in the European Union law which refers to a variety of mechanisms for the resolution of mass disputes, where numerous claimants bring a single action or procedure[1]. Although effective collective redress mechanisms have existed in the United States since the 1960s[2], it was not until the late 1990s that such instruments began to develop in the EU Member States, albeit with some differences. Studies recently carried out by the European Parliament[3] show that the concept of collective redress is still subject to different mechanisms in terms of qualification of the group, the legal standing of the representative bodies, the possibility of using the mechanism for injunctive actions and/or also for civil actions to determine liability and damages, as well as the existence or otherwise of specific rules of private international law and procedural law for cross-border collective redress.

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[1] Queirolo I., Tuo C.E., Celle P., Carpaneto L., Pesce F., Dominelli S., *Art. 67 Brussels I bis Regulation: An Overall Critical Analysis,* in I. Queirolo, R. Espinosa Calabuig, G.C. Giorgini, N. Dollani, *Brussels I bis Regulation and Special Rules: Opportunities to Enhance Judicial Cooperation*, Naples, 2021, p. 86.

[2] Pato A., *Jurisdiction and Cross-Border Collective Redress. A European Private International Law Perspective*, Oxford, 2013, pp.7 ff; Buxbaum H.L., *Class Actions, Conflict and the Global Economy*, in *Indiana Journal of Global Legal Studies*, 2014.

[3] European Parliament, *Collective redress in the Member States of the European Union,* PE 608.829, 2018, pp. 15 ff.

These differences in procedures and remedies between Member States are accepted by EU law in accordance with the so-called principle of procedural autonomy laid down in Article 19, para.1[4] of the Treaty on European Union. As provided for in the Treaty, each Member State shall guarantee the remedies necessary to ensure effective judicial protection in the areas governed by European Union law. This means that, while the guarantee of judicial protection constitutes a fundamental principle of European Union law (also enshrined in Article 47 of the Charter of Fundamental Rights[5]), it is primarily for the Member States to establish and make operational a system of judicial remedies and procedures designed to ensure full and effective protection of the rights referred to in European Union law[6]. Within this framework, the European Union has therefore generally pursued the harmonisation of procedural rules "indirectly"[7], through the interpretative activity of the Court of Justice of the European Union or by adopting sectoral provisions in which procedural rules have also been included. The procedural rules set by the European Union have thus been considered necessary and ancillary to the substantive rules. Although the Treaty on European Union does not therefore provide for any explicit competence of the European Union in procedural matters, it does enable the European Union, in respect of the principles of proportionality and subsidiarity[8], to influence the way in which national legal systems operate, by reinforcing the instruments and means put in place by the Member States or by laying down *ad hoc* rules and procedures to be incorporated into national

[4] POCAR F., BARUFFI M.C., *Commentario Breve ai Trattati dell'Unione europea*, Padua, 2014, pp. 89 ff; ADAM R., TIZZANO A., *Manuale di diritto dell'Unione europea*, Turin, 2020, pp. 370.

[5] Charter of Fundamental Rights of the European Union, 2016/C 202/02.

[6] ADAM R., TIZZANO A., *cit.,* pp. 371 ff. In particular, the European Court of Justice, since *Rewe* judgment, 33/76, 16 December 1976, para. 5, has held that "*Accordingly, 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, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature.*"

[7] MAFFEO A., *Diritto dell'Unione europea e processo civile nazionale*, Naples, 2019, p. 62.

[8] Art. 5 TEU. See, POCAR F., BARUFFI M.C., *Commentario Breve ai Trattati dell'Unione europea*, *cit.,* p. 24.

legal systems[9]. An example of this type of action by the European Union is the Directive on the collective protection of consumers[10].

However, in view of the increasing number of cases of damage suffered by a large number of persons in different Member States[11] (and beyond), the scholarship has been arguing for some years that the European Union should intervene in this area by resolving specific problems that cross-border collective redress may raise in relation to the rules of private international law and procedure that the European Union itself has established[12].

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[9] ADAM R., TIZZANO A., *cit*., p. 371.

[10] Examples include consumer protection measures, with Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC; or alternative dispute resolution measures, with Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes, amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); or, in the field of the environment, Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in the drawing up of certain plans and programmes relating to the environment and amending Council Directives 85/337/EEC and 96/61/EC as regards public participation and access to justice.

[11] By way of example, two situations are reported in which damage was caused to a large number of people, SILVA DE FREITAS E., KRAMER X., *First Strike in a Dutch TikTok class action on privacy violation: court accepts international jurisdiction*, in *Conflict of Laws*, 2022; HOEVENAARS J., KRAMER X., *Mass Litigation in Times of Corona and developments in the Netherlands*, in *Conflict of Laws*, 2020.

[12] For an examination of the relationship between collective redress and the rules of private international law in the European Union, see, inter alia: QUEIROLO I., TUO C.E., CELLE P., CARPANETO L., PESCE F., DOMINELLI S., *Art. 67 Brussels I bis Regulation: An Overall Critical Analysis, cit.,* p. 12; BARIATTI S., *Le azioni collettive dell'art. 140-bis del codice del consumo: aspetti di diritto internazionale privato e processuale*, in *Class action: il nuovo volto della tutela collettiva in Italia*, Atti del Convegno di Courmayeur, 1-2 ottobre 2010, Milano, 2011, p. 135; BOSTERS T., *Collective Redress and Private International Law in the EU*, Hague, 2017; FERACI O., *Questioni internazionalprivatistiche in tema di cross-border collective redress nello spazio giuridico europeo,* in *Rivista di diritto internazionale,* 2013, p. 914; PATO A., *Jurisdiction and Cross-Border Collective Redress, A European Private International Law perspective,* Oxford, 2013, pp. 1-23; STADLER A., *The Commission's Recommendation on common principles of collective redress and private international law issues,* in *Nederlands Internationaal Privaatrecht,* 2013, p. 483; MUIR WATT H., *Brussels I and Aggregate Litigation or the Case for redesigning the Common Judicia Area in Order to Respond to Changing Dynamics, Functions and Structures in Contemporary Adjudication and Litigation*, in *IPRax* 2010, pp. 1-5; RIELANDER F., *Aligning the Brussels Regime with the Representative Actions Directive,* in *Cambridge University Press,* 2022, p. 107; FAIRGRIEVE D., LEIN E., *Extraterritoriality and Collective Redress,* Oxford, 2012, p. 3; HARSÀGI V., VAN RHEE C.H., *Multi-Party Redress Mechanism in Europe: Squeaking*

This possible overall increase in collective disputes with cross-border implications resulting from the economic system also established in the European Union does indeed raise specific questions as to the particular interaction that collective disputes with cross-border elements may have with the rules of private international law and procedural law. In particular, specific problems may arise when, in a transnational collective dispute, rules of international procedural law are to be applied which have been developed on the basis of a individualistic concept of litigation, in which an individual plaintiff acts in order to hold a defendant liable and to obtain compensation for damages. It will be seen that the European regulation on the rules of international procedural law that will be analysed here, i.e. Regulation (EU) n. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, so-called Brussels I bis Regulation[13], only provides for the joinder of defendants, but says nothing about collective plaintiffs.

While the Regulation's individualistic approach does not per se exclude collective actions from its scope[14], the application of the Regulation to collective actions raises questions to which it seems appropriate to find an answer. Which court could assume jurisdiction over a cross-border collective dispute where, for example, the defendant is a Dutch company that has caused non-contractual damage to a large number of persons and the plaintiffs include not only Dutch victims but also German, Belgian and French victims? How do the *lis alibi pendens* rules established by the Union's rules of international procedural law operate in relation to national collective redress mechanisms which do not have the same characteristics?

Mice?, Cambridge, 2014, p. 2; STADLER A., *Collective Redress in Europe – Why?,* Cambridge, 2015, p. 5.

[13] 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.

[14] Although it has been suggested that a literal interpretation of article 1, which excludes from its scope *"bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings"* also excludes collective proceedings, it has been considered that this view is incorrect. See, STÜNER M., *Cross-border issues,* in STADLER A., JEULAND E., SMITH V. (eds), *Collective and Mass Litigation in Europe, Model Rules for Effective Dispute Resolution,* Cheltenham, 2020, p. 297; FERACI O., *Questioni Internazionalprivatistiche in tema di cross-border collective redress nello spazio giuridico europeo*, *cit*., p. 922.

These are only two of the questions that may arise when the application of the Brussels I bis Regulation is envisaged for cross-border litigation with collective elements. In fact, for the sake of completeness, collective actions[15] also raise questions with regard to the stage of recognition and enforcement of judgments. Let us take the example of a cross-border collective dispute that is settled in the Netherlands. Can the judgment be recognised and enforced in Germany, where a different collective redress mechanism would apply? And does it make any difference if some parties have initiated collective redress proceedings in Germany to resolve the same collective dispute? Is it possible to have the Dutch collective redress judgment recognised and enforced in Germany? And does this depend on the type of collective redress mechanism used or on other factors?

It is to these questions that the European Union has tried and is trying to give an answer. This work will therefore focus, on the one hand, on the measures taken by the European Union in the field of collective redress, in particular by analysing the Commission Recommendation of 2013[16], which is still the most far-reaching measure that the European Union has attempted in the field of collective redress, and, on the other hand, on the interaction of national collective mechanisms with European rules of private international law and procedural law. In particular, the interaction with the rules on *lis pendens* and connected and related actions will be examined. Indeed, it has been pointed out that one of the main problems that may arise relates to parallel proceedings and the definition of "*same parties*" in the face of different collective actions.

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[15] In this work, collective action is used as a synonym for collective redress. For the sake of completeness, it is emphasised that in some areas, such as the EU employment context, the two concepts do not fully overlap. In fact, commonly «the concept of 'collective action' includes many different forms of industrial struggle, since different systems of industrial relations know (or have known) different ways for the workers to exert pressure upon the employer. From the most 'classical' strike, to boycotts, working to rule, and go-slows» See, PERARO C., *Jurisdiction over cross-border collective redress in the Eu employment context*, in *Ordine Internazionale e diritti umani*, 2019, p. 1015.

[16] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013.

2. *The 2013 Commission Recommendation and the fragmentation of national collective actions*

Logically, the work should begin with a European definition of collective redress. However, even the search for a legal definition of the subject reveals the fragmented nature of the subject within the European Union law and thus the differences between the Member States. The concept of collective redress has been defined by doctrine as a concept *whose boundaries are fuzzy*[17]. In fact, the European institutions have given different definitions to the concept, sometimes including all existing collective mechanisms, sometimes excluding some and sometimes using definitions that make collective redress look like public interest litigation[18]. In 2011, for example, the European Commission defined collective redress as '[a] *broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices. There are two main forms of collective redress: by way of injunctive relief, claimants seek to stop the continuation of illegal behaviour; by way of compensatory relief, they seek damages for the harm caused. Collective redress procedures can take a variety of forms, including out-of-court mechanisms for dispute resolution or, the entrustment of public or other representative entities with the enforcement of collective claims*'[19].

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[17] PATO A., *Jurisdiction and Cross- Border Collective Redress, A European Private International Law Perspective*, *cit.,* p. 47.

[18] Collective redress can also take the form of "*actio popularis*", which allows citizens and/or certain organisations to bring actions in the public interest, even where there are no identifiable complaints. This is technically different from representative actions brought by interest groups or public bodies on behalf of a group of individuals - and not simply to pursue the public interest in abstracto. See LAUHERTA S.B., *Enforcing EU Equality Law Through Collective Redress: Lagging Behind?,* in *Comm. M. Law Rev.,* 2018, p. 783 ff; PERARO C., *Jurisdiction over cross-border collective redress in the EU employement context*, cit., p. 1016; CHAYES A., *The Role of Judge in Public Law Litigation*, in *Harvard Law Review*, 1976; MAGISTÀ M., *Public interest litigation: origini e prospettive*, in *Rivista Associazione Italiana dei Costituzionalisti*, 2019.

[19] *Ibidem.*

This definition, not by chance also referred to by the doctrine as the '*umbrella definition*'[20], in fact included within it both actions for injunctions and actions for damages and of these, without specifying them, different types, including: group actions, model case-litigation, collective actions brought by public authorities or sectoral organisations and qualified collective actions with an *opt-out* system. The general category of collective redress thus includes procedural mechanisms aimed at the defence of collective or diffuse interests, both for the purpose of preventing unlawful conduct (i.e. collective actions for injunctive relief) and for the purpose of compensating damage (i.e. actions for damages), with all the different forms of qualification and legitimation that they may assume in the national procedures of the Member States.

Two years later, this definition was partially narrowed. In its 2013 Recommendation on common principles for collective redress[21], the Commission defined collective redress as '*(i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress)*'[22].

In this respect, it has highlighted the assumption of a real change of terminology by the European Union, almost as if to distinguish the mechanisms falling under "European" collective redress from the collective action, more precisely the class action, typical of the United States of America[23]. Although the European Commission, in

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[20] Hess B., *Collective Redress and the Jurisdictional Model of the Brussels I Regulation*, in Nuyts A., Hatzimihail N. (eds), *Cross-Border Class Actions: The European Way*, Berlin, 2014, p. 59.

[21] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU).

[22] *Ibidem*, para. 3(a).

[23] See, Hodges C., *Collective redress: A Breakthrough or a Damp Squib?,* in *Journal of Consumer Policy,* 2017, p. 72.

[23] Scarchillo G., *Class action. Dalla comparazione giuridica alla formazione del giurista: un caleidoscopio per nuove prospettive*, Turin, 2019, p. 4; He specifies that the term

its Recommendation, has given a more precise definition of collective redress, i.e. a legal mechanism that allows several individuals or a representative body to take action to obtain the cessation of a practice or compensation for damage, it is also true that, over the years, the Member States have also introduced mechanisms that can be traced back to collective redress with imprecise contours and definitions[24]. This, because of the indirect competences of the European Union in this area, still partly justifies the broad definition that is given in 2013, as well as the provision of common principles on cross-border collective redress in an act of *soft law* such as a recommendation[25]. With regard to the legal nature of the Recommendation, it has not failed to point out, among other things, how the European Union has had to balance the divergent political interests of the Member States (and the business community)[26].

Beyond the definition, it is considered important to underline that the Recommendation was part of a package of proposals presented by the Commission in June 2013, which consisted of the presentation of three related documents, all connecting to the discipline of collective redress. The first concerned a proposal for a Directive on collective redress for antitrust damages; the second consisted of the Recommendation on common principles for collective redress, accompanied by the third document, a Communication on a Horizontal Framework for Collective Redress.

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class action refers to "*the protection of homogeneous superindividual interests as developed and evolved in the North American system"*, whereby "*one or more individuals may initiate legal proceedings on their own behalf and at the same time request that the case be conducted on behalf of all members as individuals injured in the same right by the conduct of a third party"*. On this point, see also, GIUSSANI A., *Le azioni di classe dei consumatori delle esperienze statunitensi agli sviluppi europei*, in *Rivista trimestrale di diritto e procedura civile*, 2019, pp. 157-177. For an examination of the American class action and a comparison with the collective actions of the Member States of the European Union, see PATO A., *cit*., pp. 8 ff; YEAZELL S.C., *From Medieval Group Litigation on the Modern Class Action*, in *Yale University Press,* 1987, pp. 240-245.

[24] For example, the Spanish legislature has created a collective redress instrument by the name *acciones colectivas* which is similar in term to the American class action, but unlike the latter, the individual is not allowed to act on behalf of the group. See PATO A., *cit.,* p. 50.

[25] STADLER A.*, The Commission's Recommendation on common principles of collective redress and private international law issues, cit.*, pp. 483.

[26] Recital n. 7.

The aim of the Recommendation, which should be read in conjunction with the Communication, was to provide a set of non-binding common definitions and principles for both damages actions and actions for injunctions in order to achieve a certain degree of convergence in Member States' national laws and thus enable citizens and businesses to enforce their rights under EU law in the event of collective damages[27]. Thus, according to para. 1, the objective of the Recommendation is "*to facilitate access to justice [...] while ensuring adequate procedural safeguards to avoid abusive litigation*". This was also reiterated in the Communication on a Horizontal Framework for Collective Redress, where the Commission added that "*Whereas it is the core task of public enforcement to apply EU law in the public interest and impose sanctions on infringers to punish them and to deter them from committing future infringements, private collective redress is seen primarily as an instrument to provide those affected by infringements with access to justice*" [28].

With this specification, the Commission thus identifies two different objectives, one relating to public enforcement, which is due to the deterrent effect that the collective action for an injunction must have, and the other relating to private enforcement, to which the Commission ascribes the objective of guaranteeing access to justice. Although it is possible to argue that[29], in the case of collective actions for damages, the guarantee of access to justice for a large number of victims of an unlawful act which has caused damage is also linked to the objective of ensuring the greatest possible deterrence of unlawful conduct[30], the Commission distinguishes between these

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[27] The European Commission defines collective damage as a situation in which two or more natural or legal persons claim to have suffered damage as a result of the same unlawful activity by one or more natural or legal persons. Commission Recommendation, *cit.,* art. 3(b).

[28] European Commission, *Communication: Towards a European Horizontal Framework for Collective Redress* COM (2013) 401, 10.

[29] Hodges C., *Collectivism: Evaluating the Effectiveness of Public and Private Models for Regulating Consumer Protection,* in W.H. Van Boom and M. Loss (eds), *Collective Enforcement of Consumer Law: Securing Compliance in Europe through Private Group Action and Public Authority Intervention*, Groningen, 2007, pp. 218-219.

[30] Since the issue remains unresolved, for the sake of clarity it is assumed that the development of one of the categories of collective action within the European Union need not necessarily exclude the other. In this respect see, Pato A., *cit*., p. 51.

two objectives, almost as if to distinguish them from the objectives proper to the American collective action, in which the collective action is able to guarantee both access to justice and deterrence[31]. From this perspective, the European Commission leaves no room for misunderstanding as to the objectives underlying the harmonisation of compensatory collective redress instruments, which generally converge in the need to maintain global competitiveness and to have an open and functioning internal market.

The objectives set by the European Union for collective actions brought by private individuals to protect their rights are not very different from those of the Member States. In fact, today, the prevision - through collective instruments - of an implementation of the right of access to justice also motivates national collective mechanisms, especially when it comes to *small value claims*[32], i.e. disputes with a modest economic value[33]. On the other hand, however, it is also true that some national collective redress mechanisms have been adopted, not to guarantee access to justice for victims, but as a procedural tool to deal with collective damages from the perspective of the efficiency and cost-effectiveness of judicial action[34]. Moreover,

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[31] *Ibidem.*

[32] HODGES C., *The Reform of Class and Representative Actions in European Legal System*, London, 2008, pp. 10 ff.

[33] With regard to small claims, the European Union, on the basis of article 81 TFEU, adopted Regulation (EU) 2015/2421 of the European Parliament and of the Council of 16 December 2015 amending Regulation (EC) No 861/2007, which established a European Small Claims Procedure, and Regulation (EC) No 1896/2006, which established a European Order for Payment Procedure. This Regulation applies to cross-border civil and commercial disputes and provides that judgments given under this procedure are enforceable without any intermediate procedure, in particular without the need for a declaration of enforceability in the Member State of enforcement (abolition of *exequatur*). The general objective of Regulation (EC) No 861/2007 was to facilitate access to justice for consumers and businesses by reducing the costs and speeding up the civil proceedings in disputes falling within its scope.

[34] The introduction of the Italian class action is one of the examples cited by the doctrine. The provision for the Italian collective action arose after the Parmalat case, driven by the need to consolidate actions for reasons of procedural efficiency. PATO A., *cit.,* p. 52; SILVESTRI E., *Class Actions in Italy: Great Expectations, Big Disappointment*, in HARSAGI V., VAN RHEE C.H. (eds), *Multi-Party Redress Mechanism in Europe: Squeaking Mice?*, Cambridge, 2014, p. 197. For an examination of the specific development of compensatory collective action in Italy, see, GIUSSANI A., *L'azione collettiva risarcitoria nell'art. 140-bis cod. cons.*, in *Rivista di diritto processuale*, 2008, p. 1227 ff; BENVENUTI E., *La tutela collettiva risarcitoria dei consumatori nelle controversie transfrontaliere: diritto interno e*

even in national legislation, as seen at the European level, the objectives depend on the interests that collective redress is intended to protect. If the collective mechanism is only adopted with the aim of protecting a general interest, such as air or soil quality, the collective redress mechanism will aim to stop the polluting practice, but not to compensate the members of a collective whose individualisation would be complex. Beyond the objectives that the establishment of collective redress mechanisms is intended to achieve and the macro difference between public and private enforcement, further elements need to be examined in order to fully understand the differences between Member States in the specific area of private enforcement on which we will focus.

Another element relevant to the definition of a collective redress instrument of a compensatory or declaratory nature relates to the system of community construction. In this respect, systems of construction fall into two macro categories: *opt-in* and *opt-out* systems. In most Member States, the decision binds only those individuals who have expressly consented to the proceedings, i.e. those who have been identified before the beginning of the action for damages; this characterises the opt-in system[35]. On the other hand, in some Member States[36], the decision is binding on all members of the group, except those who have chosen not to be bound (opt-out system). Both systems have advantages and limitations. It is widely recognised that the *opt-in* system has the undeniable advantage over the opt-out system of respecting the will of the parties to sue and making

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prospettive di armonizzazione, in *Rivista di diritto internazionale privato e processuale*, 2020, pp. 584 ff.

[35] Pato A., *cit*., p. 53.

[36] This is currently the case in the Netherlands. Article 3:305a-d of the Dutch Civil Code provides for this system for collective arbitration of mass disputes. Article 3:305a-d, paragraph 5, states that a judicial decision has no effect with respect to a person whose interests are protected by the legal action, but who has made it clear that he does not wish to be affected by this decision, unless the nature of the judicial decision entails that it is not possible to exclude this specific person from its effect. European Parliament, *Study on Collective Redress, cit.,* p. 25. However, other Member States also provide for the possibility of using this mechanism, albeit under certain conditions or limited to certain matters, such as Belgium, Germany, Spain, Portugal, Bulgaria and Denmark. For an overview, Giussani A., *Le azioni di classe dei consumatori dalle esperienze statunitensi,* in *Rivista trimestrale di diritto e procedura civile*, 2019. p. 162; Bertolino G., *L'«opt-out» nell'azione risarcitoria collettiva*, in *Rivista trimestrale di diritto e procedura civile*, 2016, p. 7.

the size of the collective claim predictable for the defendant[37]. This is the system that the Recommendation encourages Member States to adopt. In particular, the European Union emphasised that the plaintiff should be constituted on the basis of the express consent of the natural or legal persons claiming to have suffered an injury and that any exception to this principle should be duly justified on grounds of the good administration of justice[38]; that, as with the right to bring an action, a member of the claimant group should be free to withdraw at any time before final judgment is given or the case is otherwise determined, subject to the same conditions as apply to withdrawal in individual actions, without losing the right to bring an action in another form where this is not contrary to the sound administration of justice[39]; that natural or legal persons claiming to have suffered the same collective damage should be able to join the claimant at any time before final judgment is given or the case is otherwise validly decided[40]; and finally, that the defendant should be informed of the composition of the claimant and of any change therein[41].

Despite the fact that the *opt-in* system also has limitations that have not been overlooked[42], the European Union prefers it to the *opt-*

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[37] *Ibidem*.

[38] European Parliament resolution of 2 February 2012 on Towards a Coherent European Approach to Collective Redress, 2011/2089(INI), 2013/C 239 E/05, para. 21.

[39] *Ibidem*, para. 22 ('*A victim who decides not to join a collective action can still bring an individual action against the same defendant. In this regard, the European Parliament has stressed that «a system based on collective legal actions can usefully supplement, but is no substitute for, individual legal protection»*').

[40] *Ibidem*, Para. 23.

[41] *Ibidem*, Para. 24.

[42] Although this system has been considered "better" for the purpose and objective of the Recommendation, namely to facilitate access to justice and to enable injured parties to obtain compensation in situations of collective damage caused by violations of the rights conferred by Union rules, and to ensure that there are adequate procedural safeguards to prevent abuse of litigation, this system, like the other, has a number of limitations that may impede the objective of efficiency and guaranteeing access to justice. First of all, it has been pointed out that the *opt-in* mechanism, which requires the will of the parties, may not include all victims in a collective action, which can be a disadvantage if few victims decide to join the collective action. Indeed, the participatory approach required by an opt-in system may not be effective if psychological and economic barriers prevent victims from coming forward and joining the collective action. Moreover, the opt-in system requires significant financial resources to identify potential victims and organise the group. In this sense, the *opt-in* system has been judged as potentially not guaranteeing the facilitation of access to justice. On this point, see also, PATO A., *cit.,* pp. 54; MULHERON R., *The Case for an Opt-*

out system. The explanation for this can be found in the European Union's aversion to this system, which is based on a number of issues, the first of which is the desire to differentiate itself from the American class action. The 2013 Communication accompanying the Recommendation underlined the EU's concern about the use of a class action mechanism modelled on the American one, as it has the potential to generate a system of litigation abuse by claimants who are qualified to join the action through an *opt-out* system[43]. However, this reluctance on the part of the European Union must be seen in the light of the existence of this method in national civil procedures. In fact, the opt-out system does exist in some EU Member States, although not to the exclusion of the opt-in system, but rather as a complement to it. In particular, it has been pointed out that Bulgaria, the Netherlands and Portugal, for example, have introduced a new hybrid solution in which both systems coexist[44] without leading to abuse of the judicial system by litigants[45].

While it is not only the fear of litigation abuse that has led the European Union to favour *the opt-in* system[46], the introduction of the cross-border element and the consideration of the scope of the effect of the measure do indeed reveal potential problems with the use of the *opt-out* system. Normally, the final measure binds only the parties to the proceedings; however, in the case of a cross-border

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*Out Class Action for European Member States: A Legal and Empirical Analys*is, in *Columbia Journal of European Law*, 2009, pp. 428-429; Nagy C.I., *The European Collective Redress Debate after the European Commission's Recommendation: One Step Forward, Two Steps Back?*, in *Maastricht Journal of European and Comparative Law*, 2015, pp. 530-552.

[43] European Commission, *Communication: Towards a European Horizontal Framework*, *cit.,* para. 2.2.2.

[44] Pato A., *cit.,* p. 55.

[45] In this regard, a passage from Ervo I., *Opt-In is Out and Otp-Out is In*, in *EU Civil Justice: Current Issues and Future Outlook*, B. Hess et al (eds), London, 2016, p. 198, *"[t]he possibility to abuse the system is the most traditional argument against class actions generally and especially against the opt-out system. However, this argument does not hold. Because, in such case, substantive law (...) does not change; and collective redress will not do so either. If punitive damages are not allowed according to substantive law or if the threshold for establishing negligence or liability has not been lowered, the fear of this type of negative Americanisation is amateurish. Collective redress is just a procedural tool to realise substantive law like all procedures*."

[46] European Commission, *Communication, cit*. *supra*, para. 3.4.

collective action established through an *opt-out* system, it is complex to determine who is bound by the proceedings, the amount of damages due to each individual and whether the procedural rights of the parties have been respected. In addition, and of undoubted relevance where there is a transnational element, there is the problem of a possible short-circuit between jurisdiction, adherence to the action, opting-out of the home jurisdiction of the class member (whose individual action would fall under another jurisdiction) and the law applicable to the collective dispute. Finally, this feature also affects the moment at which the plaintiffs must be identified and the different moments provided for by national law (in some jurisdictions this must be done at the time the claim is lodged, in others it may be done at a later stage)[47].

Before going into the specifics of private international law and procedural law, let us outline another relevant element of collective redress, namely legal standing. Normally, in civil litigation between a plaintiff and a defendant, the standing of individuals is not an issue, as long as they claim a violation of their (subjective) rights. Rather, standing consists in the capacity of a subject - be it an individual, an institution or a recognised NGO - to bring a representative action before a court or another independent and impartial body in order to protect its own right or, in administrative procedural law, a diffuse interest[48]. The right to bring a collective action in the Member States depends on the type of collective redress mechanism. For certain types of collective actions, such as, for example, group actions where the initiative is jointly taken by those who claim to have suffered harm, the question of standing is relatively straightforward because it is easy to identify the legal standing of each member of the group.

However, in the context of representative actions, the legal standing needs to be defined. For EU law, as defined in the last Directive on collective protection of consumers[49], representative action means an action for the protection of the collective interests of victims that

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[47] FERACI O., *cit.,* p. 921.

[48] PISAPIA A., *Il locus standi delle associazioni per la tutela di interessi collettivi, cit.*, p. 159.

[49] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020.

is brought by a qualified entity as a claimant party on behalf of victims to seek an injunctive measure, a redress measure, or both[50]. In this respect, the EU law states that Member States should designate representative organisations which may bring representative actions subject to clearly defined conditions of legitimacy[51]. These conditions should include at least the following requirements: the organisation should be non-profit-making; there should be a direct link between the organisation's main objectives and the rights conferred by the Union rules allegedly infringed in respect of which the action is brought; and the organisation should have sufficient capacity in terms of financial and human resources and legal expertise to represent a large number of claimants acting in their interests[52].

The legal status of representative bodies varies considerably from one Member State to another. In Finland, for example, the power to bring collective actions is vested solely in the public authorities (the so-called *Ombudsman*) [53]; in France, on the other hand, there has been a constant evolution that has led the French State to adopt a collective redress mechanism (specifically l'*action de groupe*) [54], initially available only in certain sectors, and extended at the time of writing by the adoption of a horizontal framework regulating group actions before both administrative and judicial courts.

In general, the mere mention of the collective redress provisions in these Member States shows that there are differences between the Member States in the areas in which the body can act, as well as in

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[50] *Ibidem*, art. 3, para. 5.

[51] In addition, Article 6, para.1 of Directive (EU) 2020/1828 provides that entities qualified to bring representative actions in one Member State may also bring such actions before the authorities of another Member State, without the latter being able to challenge their legal standing on the basis of its national law, but at most being able to assess whether the corporate purpose of the entity justifies the action brought by it in a specific case. For more on the problem of the law applicable to preliminary questions in EU private international law, VILLATA F., *On the track of the law applicable to preliminary questions in Eu private international law*, in *Rivista di diritto internazionale privato e processuale*, 2024, pp. 1043 ff.

[52] European Commission, *Recommendation, cit*., para. 4.

[53] See ERVON L., PERSSON A., *Finnish and Swedish Legislation in Light of the ADR Directive – Boards and Ombudsmens,* E. LEIN et al (eds), *Collective Redress in Europe*: *Why and How?,* BIICL , 2015, pp. 463 ff.

[54] European Parliament, *Collective redress in the Member States of the European Union, cit*., pp. 151 ff.

the nature of the body itself that can act. There is, however, one common feature: the standing of representative bodies is rarely general. In most Member States, the standing of representative bodies is only provided for in specific areas, such as consumer protection, environmental protection or competition law.

Taking into account these necessary considerations on two key aspects of collective redress, namely the system of class certification and the standing of a group of individuals and representative bodies, as well as the principles laid down in the 2013 Recommendation, which aim to harmonise a fragmented and differentiated framework, the question arises as to how these differences affect the rules of private international law and procedural law established by the European Union when the collective dispute has elements of transnationality.

In particular, and without claiming to be exhaustive, we would like to focus on one of the problems that arise when a collective dispute has cross-border elements, namely the possibility of parallel proceedings. In a system where the regulation of collective redress appears to be fragmented and established according to national parameters, it is possible for parties to sue the same defendant in different Member States and through different collective redress mechanisms. Is it then possible to speak of the same parties in a proceeding? Do the rules of private international law and procedural law for the coordination of proceedings pending in several States also apply to collective actions?

The following chapter will attempt to answer these questions by analysing the provisions of the Brussels I bis Regulation.

3. *Regulation (EU) 1215/2012, lis pendens and related cases (art. 29-30)*

Fundamentally, an integrated judicial area resulting from the presence of common rules concerning jurisdiction, such as the European one, cannot overlook a regulation aimed at preventing the concurrent exercise of jurisdiction by other Member States regarding the same

dispute between the same parties[55]. However, in a European market and with European Union Member States introducing collective redress mechanisms differing in form and scope, one can anticipate the emergence of parallel collective actions between Member States but also between a Member State and a Third State. The emergence of multiple proceedings in different States can lead to potential "overlaps" between actions.

In the absence, at the time of writing, of a European-level coordination mechanism for cross-border collective redress actions, the issue of the possible parallel collective proceedings raises questions about the scope and reach of the rules established by the European Union in the Brussels I bis Regulation on the coordination of litigation pending simultaneously in several States. The Regulation deals with two scenarios: lis pendens and the joinder of cases, both in the so-called intra-European[56] and extra-European geographical dimension[57].

Lis pendens occurs when different proceedings are identical. In this respect, the lis pendens rule set out in article 29 of the Regulation provides that, where the courts of different Member States are seised of actions involving the same parties and having the same object and cause of action, the court other than the court first seised shall of its own motion stay the proceedings before it until such time as the court first seised has established its jurisdiction. Under Article 29, para. 3, it is the establishment of jurisdiction by the court first seised that renders the other courts incompetent[58].

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[55] Carbone S.M., Tuo C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, *cit.,* p. 278 ff.

[56] Franzina P., *Introduzione al diritto internazionale privato*, 2021, Turin, p. 121.

[57] Magnus U., Mankowski P., *Brussels Ibis Regulation*, Koln, 2016, pp. 713 ff; Marongiu Buonaiuti F., *Lis alibi pendens and related actions before third country courts under the Brussels Ibis Regulation*, in Mankowski P. (ed.), *Research Handbook on the Brussels Ibis Regulation*, Cheltenham, 2020, pp. 250 ff; Lupoi M.A., *La nuova disciplina della litispendenza e della connessione tra cause nel regolamento Ue n. 1215 del 2012*, in Riv. trim. dir. proc. civ., 2013, p. 1425 ff; Salerno F., *Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012 (rifusione)*, Vicenza, 2015, pp. 235 ff; Simons T., Carpaneto L., *Art. 27*, in Simons T., Hausmann R., Queirolo I. (eds), *Regolamento «Bruxelles I». Commentario al Regolamento (CE) 44/2001 e alla Convenzione di Lugano,* München, 2012.

[58] Carbone S.M., Tuo C.E., *cit.,* p. 279.

With regard to this rule, a first critical aspect in the context of collective actions is the criterion of the identity of the parties. In this respect, the question arises as to whether this requirement can be satisfied, in essence, where there are two collective proceedings involving only partially overlapping classes of persons, or where the pending proceedings have been brought by an individual and by a body representing a class or group of persons, including the plaintiff in the individual proceedings.

The interpretation of this requirement by the Court of Justice of the European Union is significant in answering this question. Over the years, the Court has clarified that where there is only a partial overlap between the parties to the two proceedings, the court second seised must declare itself incompetent only in respect of those who are also parties to the first set of proceedings, while the remainder of the proceedings may continue[59]. In addition, the requirement of subjective identity is satisfied if the parties to the two proceedings have "identical and indivisible interests", a circumstance which must in any event be assessed by the courts of the Member States[60]. The reference to assessment by the Member States extends an autonomy which, together with their discretion as to the details of collective redress mechanisms, strengthens the argument that art. 29 of the Regulation should almost never be applied in collective redress cases. Furthermore, in *Drouot Assurances* case, the European Court of Justice clarified that the requirement of subjective identity is satisfied where the parties to the two proceedings have «identical and indissociable interests», a circumstance which must in any event be assessed by the national courts of the Member States[61].

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[59] European Court of Justice, 6 December 1994, C-406/92, *The owners of the cargo lately laden on board the ship "Tatry" c. The owners of the ship "Maciej Rataj"*, ECLI:EU:C:1994:400, para 33 « […] *where some of the parties are the same as the parties to an action which has already been started, Article 21 requires the second court seised to decline jurisdiction only to the extent to which the parties to the proceedings pending before it are also parties to the action previously started before the court of another Contracting State; it does not prevent the proceedings from continuing between the other parties.*»

[60] European Court of Justice, 19 May 1998, C-351/96, *Drouot assurances SA c. Consolidated metallurgical industries (CMI industrial sites), Protea assurance e Groupement d'intérêt économique (GIE) Réunion européenne*, ECLI:EU:C:1998:242, para. 23.

[61] European Court of Justice, 19 May 1998, *Drouot assurances SA v Consolidated metallurgical industries (CMI industrial sites), Protea assurance and Groupement d'intérêt économique (GIE) Réunion européenne*, Case C-351/96, ECLI:EU:C:1998:242, para. 23.

Indeed, the formal identity of the parties is based on the qualification mechanism chosen to form the class. Collective redress mechanisms in the Member States allow for both *opt-in* and *opt-out* models of class formation. In the first model, the identification of the formal and objective identity is easily verifiable, as the class members have explicitly expressed their intention to participate; in the second model, the individual initiatives of the class members do not become relevant during the collective proceedings. This makes it very complex for the control system established by art. 29 to work effectively.

While this situation may raise particular concerns about the efficiency of the Brussels system, it is also true that - in the specific context of collective consumer protection - the European Union has introduced a number of requirements aimed at mitigating the risk of parallel litigation. Art. 9, para. 3 of the Directive on representative actions for the protection of consumers[62] provides that consumers who are not habitually resident in the Member State in which the representative action is brought "*must expressly express their willingness to be represented in such representative action in order to be bound by the outcome of that representative action*". In addition, Article 9, para. 4 explicitly states that "*Member States shall lay down rules to ensure that consumers who have expressly or impliedly agreed to be represented in a representative action may not be represented in other representative actions with the same cause of action and against the same trader, nor may they bring an individual action with the same cause of action and against the same trader*".

While the European Union has succeeded in creating conditions under which lis pendens issues should not arise in the specific context of collective consumer protection, the situation is different when it comes to the application of art. 30 of the Brussels I bis Regulation on the joinder of related actions[63]. According to art. 30, actions are

[62] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

[63] It has been pointed out that this notion, which is justified by the specific objectives of coordination of the exercise of jurisdiction underlying the rule, is not transferable to the nexus of claims provided for in Regulation 8.1 and is subject to stricter conditions of application as a rule conferring jurisdiction by way of derogation from the general criterion. Carbone S.M., Tuo C.E., *cit.,* p. 297.

deemed to be related if they are so closely connected that it is expedient to hear and determine them together in order to avoid irreconcilable judgments[64]. In such a situation, the court other than the court first seised may, on the application of one of the parties, stay the proceedings[65] and even decline jurisdiction, provided that the court first seised has jurisdiction over all the claims and that its law permits the consolidation of proceedings[66]. Unlike the rule on lis pendens, this provision does not require the identity of the parties, which theoretically makes it possible to deal with the phenomenon of collective actions.

These questions have been dealt with by the District Court of Amsterdam in the *Veb/Steinhoff* case[67]. The case concerned the defendant company, *Steinhoff*, which had its registered office in Amsterdam and is listed on the German stock exchange. The proceedings against the defendant were initiated in the Netherlands in 2018 with the issuance of a writ of summons in a collective action by a Dutch association (*Veb*). Under Dutch national law, a writ of summons in a collective action can be issued even after the proceedings have been commenced. This was the case in the present case. As the defendant was domiciled in the Netherlands, the District Court of Amsterdam considered itself competent under the Brussels I bis Regulation before the writ of summons was issued[68]. This meant that the Dutch proceedings were deemed to be pending as a collective action from the date of the issuance of the writ of summons. However, in the year before the case was brought in the Netherlands, other proceedings had been brought in other Member States against the same defendant. These included a request to the German lower court to initiate a test case model under the German class action mechanism (*KapMuG*)[69].

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[64] Regolamento (UE) n. 1215/2012, *cit*., art.30, para 3.

[65] *Ibidem*, art. 30, para 1.

[66] *Ibidem*, art. 30, para. 2.

[67] Amsterdam District Court, 26 September 2018, ECLI:NL: RBAMS:2018:6840.

[68] For an in-depth analysis of the case, see TZANKOVA I., *Legal standing in collective redress*, in STADLER A., JEULAND E., SMITH V., *Collective and mass litigation in Europe. Model Rules for Effective Dispute Resolution*, London, 2020, pp. 147 ff.

[69] ARONS T.M.C., *cit.,* p. 33.

In the light of the foregoing, the Amsterdam court considered whether the Dutch collective proceedings should be stayed pursuant to articles 29 and 30 of the Brussels I bis Regulation.

Regarding the lis pendens scenario, according to the Amsterdam Court, the condition laid down by the Regulation, which states that parallel proceedings are such if they are initiated by the same parties and have the same subject matter, was not satisfied. In particular, the Court found that the same parties condition was not met: *VEB*, the plaintiff in the Dutch proceedings, was an association, whereas the plaintiffs in the German *KapMuG* proceedings were individuals. According to the Amsterdam court, the association and the German plaintiffs could not be regarded as the same party. In addition, the Court noted that *VEB* did not represent the individuals in the German proceedings. The Court therefore concluded that the conditions set out in art. 29 of the Brussels I bis Regulation were not fulfilled.

Another consideration was the application of art. 30. In this case, the Amsterdam Court compared the two different collective action mechanisms, and in particular examined the specific features of the *KapMuG*: an *opt-in* procedure, the effects of which are determined by German law and are limited to claimants who have a case pending before a German court. In view of these characteristics, the *res judicata effects* of the *KapMuG* procedure, according to the Amsterdam court, are limited only to another German court and have no binding effect elsewhere. In addition, the Dutch court noted that, at the time of its decision, the further course of the *KapMuG* proceedings was still uncertain and depended on the approval of the German court. In light of these considerations, the District Court of Amsterdam held that a Dutch class action brought in accordance with the requirements of Section 305a of the Dutch Civil Code could not be stayed by a *KapMuG* proceeding or any other non-representative adherence mechanism, as the same parties criterion would never be met and the German class action could not affect the decision of a Dutch court.

The Court's decision was criticised, not for its conclusions, but rather for its interpretation of the same parties. It was pointed out that the Dutch court had not taken into account the interpretation of the same parties that the Court of Justice of the European Union has given over the years. While the starting point may be that the same parties literally means “the same parties”, there are exceptions where

the parties are not identical but their procedural position is the same and they are seeking the same result[70]. On the other hand, the conclusions were considered to be correct. It would have been difficult to accept that the presentation of a grouping of individual cases in one Member State could lead to the suspension of collective proceedings in another Member State concerning the same (or similar) issue and against (partly) the same defendants. Following this line of reasoning, scholars have questioned whether the grouping of individual actions as provided for by the *KapMug* mechanism could be considered equivalent to a collective action if a sufficient number of individual claimants are grouped and the test case is approved by the German lower court as a model case. In this case, the idea is that the *KapMug* mechanism could change its nature from individual to collective. However, this was considered highly controversial and was widely debated[71].

In summary, the prevailing view seems to be that a national collective action brought by a representative body is unlikely to be stayed under art. 29 or 30 of the Brussels I bis Regulation by a collective redress mechanism such as the *KapMuG*, which provides for the grouping of individual claims designed as a model case.

The *Steinhoff* case is just one example that has allowed the author to highlight the discussions arising from the different approaches to standing in collective redress in the Member States and the unforeseen and far-reaching consequences that collective litigation can have. Moreover, while a clear rule on the stay of proceedings does not seem to be an option in a situation where collective redress mechanisms differ from one State to another, with regard to the difficulty of determining which court should be seised first in collective disputes, it has been suggested that one could imagine the implementation of a communication channel between courts, as provided for in art. 29, para. 2 of the Brussels I bis Regulation, or the creation of a European register of collective redress actions, as proposed in the Commission's 2013 Recommendation. These proposals are not a panacea, but they do aim to bring greater clarity to the complex legal

[70] *Ibidem.*

[71] TZANKOVA I., *The Netherlands*, *a Forum Conveniens for Collective Redress? (II)*, in *EapilBlog*, 2021. (https://eapil.org/2021/03/11/the-netherlands-a-forum-conveniens-for-collective-redress-ii/)

landscape of the European Union[72]. However, it is not excluded that even with this solution it is difficult to claim that the examined articles of the Brussels Ibis Regulation could easily be applied to collective redress.

4. *(continued) ...in the extra-European dimension*

Problems similar to those mentioned above may also arise with regard to lis pendens and the connection with proceedings initiated in third countries. The Brussels I bis Regulation contains specific provisions on these issues in art. 33 and 34. If the same case between the same parties is simultaneously pending before a court of a Member State and a court of a third State, art. 33 of the Regulation applies. The scenario seems similar to that of intra-European lis pendens, but the treatment is quite different[73]. Although the starting point may be similar, there is in fact at least one significant difference. It is one thing to coordinate parallel proceedings between States that cooperate and generally share the same values; it is quite another to satisfy a similar need for coordination between two States that do not actually know each other. In this situation, the automatisms observed earlier necessarily give way to a more cautious approach[74].

Art. 33 applies where the proceedings pending in a third State were instituted prior to those pending in the Member State. It applies only if the jurisdiction of the European court is based on the general provision of art. 4 or the special jurisdiction provisions of articles 7, 8 or 9 of the Brussels I bis Regulation. This provision excludes the application of such discipline where the jurisdiction of the Union court is based on one of the criteria for the protection of weaker parties, such as consumers[75].

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[72] Pato A., *cit.,* in *EAPILBLog*.

[73] Franzina P., *Introduzione al diritto internazionale privato*, *cit.*, p. 123.

[74] *Ibidem.*

[75] Such a choice, although based on the need not to undermine the objectives pursued by the rules on exclusive jurisdiction and the protection of weaker parties, seems inappropriate to ensure the full coordination with non-European jurisdiction that the Regulation aims to achieve. This becomes particularly clear when this article is read in conjunction with, for example, Article 45 para. 1(d) of the same Regulation. See, Carbone S.M., Tuo C.E., *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, *cit.*, p. 304.

Art. 33 provides that the European court must stay the proceedings before it if both of the following conditions are cumulatively met: the decision to be given by the third State can reasonably be recognised in the forum State; and the European judge is satisfied that the stay is "*necessary for the proper administration of justice*"[76]. Art. 33 therefore confers a discretionary power on the Member State court to decide whether to stay proceedings. Unlike art. 29, art.33 does not provide that such a stay may lead to a waiver of jurisdiction. If the court of the third State declares itself competent, there is no need for the Member State to renounce the case. Only if the non-European proceedings result in a judgment which is recognisable in the European court may the latter request the termination of the proceedings, thus bringing the matter to a conclusion[77].

As regards the joinder of cases, art. 34 provides a mechanism which, on the one hand, reproduces the corresponding rules for intra-European joinder and, on the other hand, incorporates some elements characteristic of lis pendens with proceedings pending in third States. Thus, the notion of related cases in art. 30, para 3 - according to which the claims are so closely connected that it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments - is conditioned in art. 34 by the requirement that the judgment given in the third State must be recognisable and by a more general assessment in terms of the "proper administration of justice". This latter element is seen as limiting the degree of flexibility granted by the article, since the assessment of the proper administration of justice must nevertheless be made within the precise parameters derived from art. 6 of the European Convention on Human Rights and art. 47 of the Charter of Fundamental Rights of the European Union, which provide for the right to a fair trial[78].

Quite apart from the fact that these rules were intended to complement the proposed extension of the scope of the previous Brussels

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[76] Recital 24, Regulation (UE) n. 1215/2012.

[77] CARBONE S.M., TUO C.E., *cit*., p. 303 ff.

[78] FRANZINA P., *Lis Pendens Involving a Third Country Under the Brussels I-bis Regulation: an Overview*, in *Rivista di Diritto Internazionale Privato e Processuale,* 2014, p. 34 ff.

I Regulation[79], what matters here is the relevance they may have to the disputes under consideration[80]. In particular, two important facts are highlighted: there are some extra-European jurisdictions where collective actions appear to be particularly advanced; similarly, there is a certain tendency for non-European claimants to seek satisfaction of their claims within the Union for infringements committed in third countries. It is widely recognised that both of these circumstances may increase the risk of overlap between actions brought within the European Union and similar actions brought in third countries. An example of this is the case of *Municipio De Mariana & Ors v BHP Group*[81], brought by more than 200,000 Brazilian citizens against two companies based in the United Kingdom and Australia, concerning the substantial material and environmental damage suffered by the victims following the collapse of a dam owned by a Brazilian company belonging to the group headed by the defendant companies. The environmental disaster had also given rise to a number of collective actions previously brought before the Brazilian courts. The existence of such actions raised, in relation to the English case, the question of the possible relevance of the extra-European connection rule (as regards the English defendant) and the Anglo-Saxon doctrine *of forum non conveniens*. In relation to the UK defendant and the application of the extra-European connection, the English Court of Appeal held that the conditions for staying proceedings commenced in the UK were not satisfied[82].

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[79] See the European Commission proposal for the revision of the Regulation (UE) n. 44/2001, COM (2010)748 def. – COD (2010) 383.

[80] Fumagalli L., *Lis Alibi Pendens. The Rules on Parallel Proceedings in the Reform of the Brussels I Regulation*, in F. Pocar, I. Viarengo, F.C. Villata (eds.), *Recasting Brussels I*, Padua, 2012, p. 244 ff; Van Calster G., *Lis Pendens and third states: the origin, DNA and early case-law on Articles 33 and 34 of the Brussels Ia Regulation and its "forum non conveniens-light" rules*, in *Journal of Private International Law*, 2022, p. 363 ff, who highlights the particular relevance of the provisions under consideration with respect to climate change litigation and collective actions.

[81] High Court of Justice, 9 Novembre 2020*, Municipio de Mariana v. BHP Group* [2020] EWHC 2930.

[82] Van Calster G., *Lis Pendens and third states, cit.,* p. 398, according to which Anglo-Saxon case law on Articles 33-34 of Regulation n. 1215/2012 reveals *"a strong presumption against a stay".* For an examination of the case, see Chalas C., Muir Watt H., *Vers un régime de compétence adapté à la responsabilité environnementale des entreprises multinationales? Point d'étape post-Brexit (Affaires Municipio de Mariana v. BHP plc & BHP*

In the context of cross-border collective disputes, the rules on extra-European lis pendens and connection therefore give rise to a number of considerations, in addition to those already expressed in relation to articles 29 and 30. The relevant point here does not seem to be the restriction that jurisdiction must be based on certain grounds of jurisdiction laid down in the Regulation; indeed, this restriction itself does not seem to have a decisive impact on the analysis of transnational collective disputes, since these grounds of jurisdiction include some of the most commonly used forums[83]. Rather, it is the principle of temporal precedence that underpins the operation of the Regulation, which prevents Member State courts from renouncing jurisdiction in favour of foreign authorities seised at a later stage, even in cases where the latter may be in a better position to decide the case[84]. In this context, and from the point of view of collective actions, it has been pointed out that the application of this criterion may not meet the requirements of the "sound administration of justice" and may be detrimental to the interests of the group where the action is brought in a third country with a particularly developed procedural system for collective actions and an identical or related action is already pending in a Member State[85].

So, these institutions revolve around the possibility that the foreign court first seised may deliver a decision that is recognisable and enforceable in the Member State concerned; however, the recognition of decisions from authorities outside the European Union is not subject to uniform rules, but is governed by the national law of each Member State[86]. This situation does not seem to contribute to the

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group Ltd1; Okpabi and others v Royal Dutch Shell Plc and another), in *Revue Critique de Droit Intrernational Privé,* 2021, p. 336 ff.

[83] BENVENUTI E., *Climate change litigation e diritto internazionale privato dell'Unione europea. Quale spazio per la tutela collettiva?,* in *Rivista di diritto privato e processuale*, 2024, p. 894.

[84] CARBONE S.M., TUO C.E., *cit*., pp. 306 ff.

[85] FENTIMAN R., Articles 33, 34, in U. MAGNUS, P. MANKOWSKI (eds.), *European Commentaries on Private International Law*, *Brussels Ibis Regulation*, Köln, 2016, p. 761; MARONGIU BUONAIUTI F., *L'incidenza della disciplina della giurisdizione nelle azioni nei confronti delle società multinazionali per danni all'ambiente sul diritto di accesso alla giustizia*, *cit.,* pp. 640-641.

[86] CARBONE S.M., *What About the Recognition of Third States' Foreign Judgments?,* in F. POCAR, I. VIARENGO, F.M. VILLATA (eds.), *Recasting Brussels* I, *cit*., p. 299 ff.

uniform application of the rules in question within the European Union[87], since the existence of different solutions within the national legal systems of the Member States could lead to different results depending on the jurisdiction involved[88].

5. *Conclusive proposals*

What has been briefly analysed above is only part of the issues relating to the fragmentation that exists within the European Union with regard to collective redress and its interplay with the functioning of the rules of private international law and procedural law established by the Brussels I bis Regulation when the collective action has transnational elements.

It has been emphasised that the starting point is characterised by a heterogeneous European context due to the existing differences in collective redress procedures in the national laws of the Member States. Given this diversity and the construction of EU civil procedural rules based on a one-to-one approach, the first concluding consideration answers a broader preliminary question than the mere examination of the rules on lis pendens and related actions established by the Brussels I bis Regulation. Are collective actions ontologically incompatible with the system of international procedural law established by the European Union? In the author's opinion, the answer is negative.

In fact, there is a regulation in the European Union's legal system, the Insolvency Proceedings Regulation[89], which supports the answer. There are different collective insolvency proceedings in the national laws of the member states. Faced with this situation, the European Union has opted for an international-private approach to regulating cross-border proceedings[90]. The Regulation takes account of

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[87] Van Calster G., *Lis Pendens and third states*, *cit*., p. 376.

[88] Marongiu Buonaiuti F., *Lis Alibi Pendens and Related Actions*, *cit*., p. 271.

[89] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), GU L 141 del 5.6.2015. For an overview see, Queirolo I., Dominelli S. (eds), *European and National Perspectives on the Application of the European Insolvency Regulation*, Rome, 2017, pp. 21 ff.

[90] An approach that only concerns jurisdiction, applicable law and recognition of insolvency decisions, by specifying in an annex which of the proceedings provided for by each

the fact that, given the considerable differences in substantive law, it was unrealistic to create a single insolvency procedure with universal validity throughout the Union.

This makes it possible to highlight two interesting aspects. First, the adoption of rules of international procedural law does not necessarily require the substantive uniformity of collective mechanisms. Secondly, the non-adoption of ad hoc grounds of jurisdiction for collective actions in the system of civil procedure established by the Brussels I bis Regulation is not the result of the incompatibility of collective redress mechanisms with the system, but of the interest or otherwise of the European legislator in this specific mechanism of judicial protection.

While the European Union's interest in collective redress mechanisms has been characterised by an approach that seeks to distinguish itself from the American class action, it is also true that today's litigation is increasingly characterised not only by the collective element, but also by the use of collective litigation between private parties to protect a public interest. This opens up a further consideration, as this type of litigation would be much closer to the European Commission's 2013 definition of class action than collective redress.

Finally, with a view to finding specific solutions, from a collective perspective, to the provisions of the rules on lis pendens and related actions, the conclusions of a recent study[91] on possible amendments to the Brussels I bis Regulation are reported here. With regard to the problems identified in the coordination of multi-State litigation, two proposals were made: the first related to the system of class certification and the second to the discretion left to Member States by the Regulation.

The first proposal is not a reform of the Regulation, but rather a proposal aimed at limiting the criteria established by the Member States for their collective redress mechanisms when they are to be used in cross-border disputes. In particular, in line with what the European Union has already established in the Directive on the

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Member State fall within the legal concept of insolvency proceedings. See, BACCAGLINI L., *L'esecuzione transfrontaliera delle decisioni nel Regolamento (UE) 2015/848*, in *Rivista di diritto internazionale privato e processuale*, 2020, pp. 56 ff.

[91] HESS B., ALTHOFF D., BENS T., ELSNER N., JÄRVEKÜLG I., *The Reform of the Brussels Ibis Regulation*, in *MPILux Research Paper Series*, 2022, pp. 13 ff.

protection of consumers by representative bodies, it emphasises the need to qualify the collective of victims through an explicit *opt-in* system. This is considered important in order to understand the scope of the group of victims, both for compensation purposes and to guarantee the principles of predictability and legal certainty on which the Brussels I bis Regulation is based.

The second proposal focuses on the discretion left to the courts of the Member States. It has been pointed out that, in cases of damage affecting a large number of subjects within the European Union, it is possible for a representative and qualified entity to bring a collective action on behalf of a group of victims against a defendant in one Member State, while at the same time a victim, represented by the same entity for the same damage and against the same defendant, has already brought his action in another Member State. This raises the question of lis pendens, in particular whether the representative entity and the victim can be considered the same party in an individual action. As discussed above, art. 29 of the Regulation requires the court second seised to stay the proceedings and decline jurisdiction once the jurisdiction of the first court has been established. On the other hand, it is also possible that collective actions concerning different groups of victims but arising out of the same harmful event are brought before the courts of different Member States. In this respect, art. 30 states that if the actions are related, the court second seised may, but is not obliged to, stay the proceedings or decline jurisdiction in favour of the court first seised at the request of one of the parties. In this context, the relevant time for both lis pendens and related actions is the time at which a court was first seised.

In this respect, the Brussels I bis Regulation autonomously determines the relevant moment for the identification of the court "first seised". With regard to collective actions, and with the aim of making the Brussels system efficient for a specific type of collective action, namely that brought by a representative entity, the possibility of considering the identification of the court first seised at the time when the qualified entity makes the application for the institution of a collective action on behalf of the victims has been discussed, as

well as the possibility of amending Article 30 by removing the discretionary element in order to avoid overlaps[92].

In the light of these proposals, there is no hiding the fact that the question ultimately arises as to the most appropriate place for this type of action and, in particular, whether it is sufficient to proceed with a revision of Regulation (EU) 1215/2012, whether a structural intervention is necessary or whether it would be better to promote an act other than a regulation - for example, a directive[93] - in which the entire discipline of cross-border collective redress could be included.

[92] STEFANELLI J.N., *Parallel Litigation and Cross-Border Collective Actions under the Brussels I Framework: Lessons from Abroad,* in *Extraterritoriality and Collective Redress, cit.,* p. 156; HESS B., ALTHOFF D., BENS T., ELSNER N., JÄRVEKÜLG I., *The Reform of the Brussels Ibis Regulation, cit.,* p. 14.

[93] One example is 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, OJ L 136, 24.5.2008. This Directive is in fact the result of a long and complex process of harmonising the idea and concept of mediation among the Member States. See, TROCKER N., DE LUCA A., *La mediazione civile alla luce della direttiva 2008/52/CE*, Florence, 2011.

Third-Party Claims for Data Breaches Resulting from Satellite Imagery- A Comparative Analysis of Treaties and the GDPR

Marta Zdunek

1. *Introduction*

1.1. *The Commercialization of Space: The Rise of New Space*

The end of the Cold War significantly reduced political competition in space and weakened governmental control over space policy[1]. While some scholars trace the origins of the commercialization of the space sector to the termination of the Space Shuttle program in 2011, an equally critical shift has emerged: the increasing role of private companies in data collection and management[2]. The conclusion of the Space Shuttle program in 2011 initially created a new reliance on Russian space capabilities, as the Soyuz rocket became

[1] Iacomino C., *The Evolving Role of Private Actors in Space Exploration*, in *Commercial Space Exploration, Potential Contributions of Private Actors to Space Exploration Programmes*, Springer, 2019.

[2] Heracleous L., Terrier D., Gonzales S., *NASA's Capability Evolution Toward Commercial Space*, in *Space Policy*, 2019, at p. 3.

the sole method of transporting American astronauts to the International Space Station (ISS). In 2006, NASA began outsourcing resupply missions to private space companies under the Commercial Resupply Services (CRS) program, one of two strategies managed by the Commercial Crew and Cargo Program Office (C3PO)[3]. While this initiative primarily focused on transport, it set a precedent for broader private sector involvement in space activities. Since then, the shift toward private sector dominance has extended beyond transportation to encompass satellite communication, Earth observation, and data analytics. Today, private companies, rather than state agencies, control vast amounts of data collected from space, raising important legal and ethical questions regarding data privacy, ownership, and accountability.

The new approach adopted by governments, particularly the United States, focused on fostering the growth of a competitive commercial space industry[4]. One of the most prominent areas where these concerns emerge is satellite surveillance[5]. Private satellite operators provide imagery and geospatial data services for commercial, governmental, and security applications. The increasing use of high-resolution satellite imagery, coupled with artificial intelligence and big data analytics, enables unprecedented monitoring of human activities. While such technologies can be beneficial for environmental monitoring, disaster response, and urban planning, they also raise privacy concerns. The potential for mass surveillance, unauthorized data collection, and misuse of geospatial data underscores the urgent need for legal frameworks that regulate private sector accountability in outer space. These developments underscore the transformative shift towards commercial innovation and exploration in the space sector[6].

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[3] Ibidem.

[4] Blue Origin Completes Third Human Spaceflight, in Blue Origin News, December 11, 2021, https://www.blueorigin.com/news/new-shepard-ns-19-mission-updates (6 October 2024).

[5] MACWHORTER K., *Sustainable Mining: Incentivizing Asteroid Mining in the Name of Environmentalism*, in WM. & MARY ENV'T L. & POL'Y REV., 40, 2016, p. 645, at p. 650.

[6] LEON A. M., *Mining for Meaning: An Examination of the Legality of Property Rights in Space Resources* in VA. L. REV, 104, 2018, at p. 497, at p. 507.

Research indicates that new investors and companies entering the space sector, following the end of the paradigm dominated by state agencies, aim to develop cheaper, faster, and more accessible space technologies[7]. This opening of the space market to private firms has significantly increased the number of missions and innovations in the field[8]. By combining public resources with private initiative, these partnerships are reshaping the dynamics of space exploration, paving the way for broader access and innovation in the industry[9].

The emergence of *"New Space"* has revolutionized the approach to space missions, shifting from a traditional model dominated by state space agencies to a more diversified and competitive market where private companies and investments play a crucial role[10]. This transformation has increased access to outer space, accelerated technological innovation, and opened up new business and exploration opportunities. Driven by national policies supporting the growth of a robust space industry, the "*New Space"* environment has created a unique commercial ecosystem. Coined by the Space Frontier Foundation in 2006, the term *"New Space"* refers to Silicon Valley-style agile entrepreneurship backed by private funds and emphasizing service-oriented business models within the space sector[11].

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[7] European Space Policy Institute (ESPI), *The Rise of Private Actors in the Space Sector*, ESPI Report, 2024, https://www.espi.or.at/wp-content/uploads/2022/06/ESPI-report-The-rise-of-private-actors-Executive-Summary-1.pdf (12 October 2024).

[8] CHAMBEN J. B., *Extending Humanity's Reach: A Public-Private Framework for Space Exploration*, in *Journal of Strategic Security*, 2020, p. 75 ff.

[9] BÓGDAŁ-BRZEZIŃSKA A., WENDT J. A.*, Turystyka Kosmiczna - Między Konkurencją a Współpracą Państw i Podmiotów Niepaństwowych*, in *Geo Journal of Tourism and Geosites*, 2021, p. 1151 ff..

[10] BAIOCCHI D., WELSER W. IV, *The Democratization of Space: New Actors Need New Rules*, in *Foreign Affairs*, 2015, p. 98 ff.

[11] VALENTINE D., *Exit Strategy: Profit, Cosmology, and the Future of Humans in Space*, in *Anthropological Quarterly*, 2012, p. 1045 ff. SWEETING M. N., *Modern Small Satellites-Changing the Economics of Space*, in *Proceedings of IEEE*, 2018, p. 343 ff. DENIS G. et al., *From New Space to Big Space: How Commercial Space Dream Is Becoming a Reality*, in *Acta Astronautica*, 2019, p. 431 ff. The term *"New Space"* is typically used to describe the evolution of the private space industry in the United States, but it also signifies broader changes in the relationship between the private and public sectors globally. In Europe, the rise of public-private partnerships, procurement agreements, and competitive contracting with private partners exemplifies these transformations. Commercial activities in outer space are regulated through strategic public-private alliances, which have already shown promising results in joint space initiatives The evolution toward a *New Space* ecosystem

However, the rapid commercialization and diversification of space activities under the New Space paradigm have also brought new regulatory challenges to the forefront. In particular, the growing reliance on private actors for satellite communication, Earth observation, and data processing has raised complex legal questions regarding data governance, privacy, and accountability in outer space.

Although some efforts have been made to regulate space-based data collection, such as the European Union's General Data Protection Regulation (GDPR) and national space laws in the United States, a global consensus on privacy rights in outer space remains absent. Many private space firms operate across multiple jurisdictions, further complicating enforcement mechanisms.

In contrast to terrestrial data protection laws, which establish clear rules regarding personal data processing, space-related data remains a legal gray area. The issue of private sector accountability in space is particularly evident in the satellite communication industry, where commercial firms dominate the market. While governments continue to rely on private contractors for satellite-based services, including intelligence gathering and Earth observation, there is a lack of clarity on the extent of governmental oversight. This regulatory gap raises concerns about the misuse of data for commercial gain, potential human rights violations, and the role of private actors in shaping global surveillance infrastructure. Ultimately, the transition from a state-controlled space industry to a private sector-driven

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remains ongoing, with many segments of the space industry reliant on the federal government as their primary client. Despite governmental efforts to foster competitive markets, most of the private space sector operates in a monopolistic environment, with government demand constituting the primary source of revenue. The commercial satellite communication sector is one of the few areas that exemplifies a fully developed *New Space* environment, with only about 20% of its revenues coming from government contracts. This can be attributed to the fact that commercial entities often struggle to identify markets for the end products of innovative projects. In such cases, public partners frequently provide financial support for groundbreaking ventures and subsequently become their primary "consumer" see more at Inmarsat*, Annual Report and Accounts 2018*, March 2019, https://www.inmarsat.com/wpcontent/uploads/2019/12/Inmarsat_Annual_Report_2018.pdf, *Form 20-F. Securities Exchange Commission Filing for Registration of Securities of Foreign Private Issuers*, Intelsat, February 20, 201; *Annual Report 2018*, SES, February 2019, https://www.ses.com/sites/default/files/SES_AR_2018_A4_0319_web_0.pdf; VIASAT, *Annual Report 2019*, Viasat, September 2019, http://investors.viasat.com/static-files/743e5c27-c611-4a1cab86-63b66b82451b. (12 September 2024).).

model has far-reaching implications beyond economic and technological advancements. The privatization of space activities necessitates a reassessment of regulatory frameworks to address data privacy risks, cybersecurity threats, and liability for data misuse. As commercial activities in outer space continue to expand, the need for an international legal framework that ensures responsible data governance and accountability in space becomes increasingly urgent.

1.2. *Satellite Communication within the European Union*

One of the most prominent and commercially significant manifestations of the New Space paradigm is the development and rapid expansion of satellite communication services. As private actors increasingly take the lead in launching, maintaining, and operating satellite constellations, the satellite communication sector has become a cornerstone of the evolving space economy. Within this context, the European Union plays a particularly active and strategic role, aiming to enhance its autonomy and technological leadership in space-based communication infrastructure.

For a long time, the European Union avoided involvement in issues of space security. However, by the late 1990s, the EU began to recognize that the benefits of space activities extended far beyond the traditional realms of defense and science[12]. It was acknowledged that space technologies possess immense potential in the civilian and commercial spheres, prompting the EU to seek broader legal competencies in this domain

The first significant step in this direction was the adoption of the Satellite Directive in 1994[13]. This directive introduced a competition regime in the satellite telecommunications services sector, contributing to the development of the internal market in this area as well.

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[12] F. G. VON DER DUNK, European Space Law,**"** in *Handbook of Space Law*, ed. F. G. VON DER DUNK (CHELTENHAM: EDWARD ELGAR, 2015), AT P.239. F. G. VON DER DUNK, The European Union and the Outer Space Treaty: Will the Twain Ever Meet?" in *Fifty Years of the Outer Space Treaty: Tracing the Journey*, ed. A. LELE (New Delhi: Springer, 2017), at p. 75–90.

[13] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993.

This was a crucial milestone, as implementing such regulations required a specialized legislative process that took into account the international and increasingly commercial nature of space activities[14].

In the 1990s, the European Union became actively involved in the development of space programs[15]. The primary aim of these efforts was to provide satellite-based radionavigation support for the trans-European transport networks. Additionally, there was a growing need for a global satellite Earth observation system that could deliver critical environmental data, enabling better understanding and mitigation of climate change impacts while simultaneously ensuring civil security.

Beyond the satellite communication sector, private commercial space enterprises in Europe remain rare[16]. The European space sector continues to operate largely based on models that do not fully reflect the dynamics of the contemporary commercial market. European space activities have historically been characterized by a less expansive approach compared to the United States, relying on three main legal and organizational pillars[17]. The first pillar is the European Space Agency, an independent international organization that has established the framework for scientific and technological research in space, distinct from the European Union. The second pillar comprises key member states such as France, Germany, and Italy, which have developed similar yet autonomous space policies, including in the areas of defense and the space industry. The most recent of these is the emerging role of the European Commission, which supports a "services for citizens" approach centered on the development of two

[14] Commission Directive amending Directive 88/301/EEC and Directive 90/388/EEC, particularly with regard to satellite communications (hereinafter referred to as the Satellite Directive), 94/46/EC, of 13 October 1994, in OJ L 268/15 (1994).

[15] European Court of Auditors, *EU's Space Assets: Ready for More Action?*, 2021, https://www.eca.europa.eu/lists/ecadocuments/sr21_07/sr_eus-space-assets_pl.pdf (12 July 2024).

[16] According to the 2021 report by the Polish Space Agency (POLSA) the European space industry primarily focuses on the design, production, and operation of satellites, which constitute a key element of space infrastructure. https://polsa.gov.pl/wpcontent/uploads/2021/11/POLSA_Analiza_sektora_kosmicznego_wybranych_krajow_1.pdf?utm.com (19 June 2024).

[17] POLKOWSKA M., *Bezpieczeństwo w przestrzeni kosmicznej: Prawo, zarządzanie, polityka*, Publishing Institute EuroPrawo, 2021.

flagship programs: Galileo and Copernicus. Galileo is Europe's global satellite navigation system, while Copernicus is its Earth observation program[18].

European Union satellite programs, such as Copernicus and Galileo, deliver high-resolution data, raising significant issues related to the protection of personal data. Sentinel-2 satellites, part of the Copernicus program, provide imagery with a spatial resolution of up to 10 meters per pixel, meaning that each pixel represents an area of 10x10 meters on the Earth's surface. While this resolution allows for the identification of large objects, such as buildings or infrastructure, it does not enable the recognition of individual persons. Galileo, utilizing dual-frequency systems, provides real-time positioning accuracy within one meter, enhancing navigation capabilities across various applications[19].

The Copernicus and Galileo programs leverage the services of private companies and involve extensive collaboration with the private sector[20]. Both the Copernicus and Galileo programs are predominantly funded and managed by public institutions of the European Union, such as the European Commission and the European Space Agency (ESA), distinguishing them from typical public-private partnerships (PPPs)[21], where there is a greater balance in the sharing of risks and profits between public and private partners. Copernicus is entirely funded by the EU budget and managed by the European Commission in cooperation with ESA. The program is overseen by public institutions, and its data is made freely available to users worldwide. Similarly, Galileo is financed by the European Union

[18] Spectator Earth, *Najczęściej zadawane pytania*, https://spectator.earth/najczesciej-zadawane-pytania/?.com (26 September 2024). The Copernicus program focuses, among other things, on monitoring disasters on Earth.

[19] European Court of Auditors, *EU's Space Assets: Ready for More Action?*, 2021, https://www.eca.europa.eu/lists/ecadocuments/sr21_07/sr_eus-space-assets_pl.pdf (20 October 2024).

[20] European Parliament, *Galileo and Copernicus – EU flagship space programmes*, EP Think Tank, 2017; European Commission, *EU Space Programme – Performance*, European Commission, 2021; SPACENEWS, *Airbus, Thales win second-generation Galileo satellite contracts*, SpaceNews, 2021.

[21] Public-private partnerships (PPPs) are long-term arrangements between public and private entities, where both parties share investment costs, risks, and profits. Unlike fully public initiatives, PPPs typically involve private sector contributions in financing, management, or operation of services or infrastructure.

and managed jointly by the European Commission and ESA. Like Copernicus, Galileo is a public program, with its budget sourced from EU funds. An example of collaboration with the private sector within these programs includes contracts awarded to Airbus Defence and Space and Thales Alenia Space for the construction of second-generation satellites. Both programs aim to deliver societal and economic benefits to EU citizens, emphasizing the role of publicly funded space initiatives in advancing European space capabilities and supporting global applications.

Traditionally, the management of outer space and the regulation of space activities have been state-centric. However, the rapid commercialization of the space market highlights the need for establishing international standards and regulations to govern space traffic and the exploitation of space resources, ensuring safe and efficient economic activities in outer space. Regarding the legal capacity of states, including EU member states, to exercise control over activities in outer space, it should be noted that outer space is considered a global commons. This classification means that it lies beyond national jurisdiction and, unlike *terra nullius* historically found on Earth, cannot become part of any national territory, as explicitly stated in Article II of the 1967 Outer Space Treaty. Unlike *terra nullius*, which could be claimed by sovereign states under historical doctrines of international law, outer space is considered *res communis*, a domain legally designated as the province of all humankind[22].

Consequently, on one hand, states, including EU members, face limited possibilities for exercising control over all commercial actors operating in outer space. On the other hand, private partners remain dependent on their respective states for inclusion in critical space projects. This dynamic creates a legislative stalemate, underscoring the need for clear and cooperative regulatory frameworks to balance state sovereignty and private sector involvement in space exploration

[22] See Article II of the Outer Space Treaty (1967), which explicitly prohibits national appropriation of outer space, the Moon, and other celestial bodies. For a discussion on the distinction between terra nullius and res communis in international law, see: Cheng, B. (1997). Studies in International Space Law. Oxford: Clarendon Press.

and utilization. The same issue is addressed, among others, by Tronchetti[23].

One example of legal gaps is the protection of an individual's right to their image and the respect for private and family life in the context of emerging space technologies. The commercialization of satellite technologies, particularly within the framework of collaboration between the EU space sector and private entities, poses significant challenges regarding the protection of personal image and third-party rights. Modern satellites are capable of capturing high-resolution images of the Earth, which have the potential to identify individuals, their locations, or private property.

Data processed by commercial entities is often utilized for economic or geopolitical purposes, posing risks to the right to privacy and the protection of personal data as guaranteed within the EU. In this context, it is essential to examine the extent to which EU regulations enable effective enforcement of data protection in cases involving the cross-border nature of space sector activities. Moreover, in the absence of comprehensive international regulations, states may be compelled to address these issues within their national space activity laws, potentially leading to a fragmented approach to governing such a global concern[24]. This article will analyze whether existing legal frameworks adequately address the challenges posed by the global development and commercialization of satellite technologies in the context of protecting individual rights.

[23] TRONCHETTI F. "*Chapter 9: Legal Aspects of Satellite Remote Sensing."* In Law 2015, Edward Elgar Publishing, 2015, at p. 501–553.

[24] SKAAR R., *Commercialization of Space and Its Evolution: Will New Ways to Share Risks and Benefits Open Up a Much Larger Space Market*, European Space Policy Institute, Report no. 4, May 2004, p. 5.

2. *Third-Party Data Protection in the EU Space Sector: Definition and Issues*

2.1. *The Right to Privacy in the Digital Age*

In the digital age, where technological advancements increasingly blur the boundaries between public and private life, the right to privacy has become one of the most significant and contested fundamental rights. Within the European legal framework, privacy protection is primarily grounded in two major legal instruments: the Charter of Fundamental Rights of the European Union[25] and the European Convention on Human Rights (ECHR or Convention)[26]. While distinct in origin and scope, both documents play a complementary role in shaping privacy standards across the continent. This section explores how these frameworks define and safeguard the right to privacy, with particular emphasis on their relevance in an era marked by widespread data processing, surveillance technologies, and the growing use of satellite-based systems.

According to the Charter, which is binding on EU institutions and member states in the application of EU law, Charter guarantees the protection of privacy and personal data. Article 7 of the Charter ensures individuals the right to respect for their private and family life.

While the right to respect for private and family life, as defined in Article 7 of the Charter, differs from the protection of image rights per se, the two areas can intersect in certain circumstances. This nuanced relationship highlights the broader scope of privacy rights under the Charter and EU law, particularly in contexts where emerging technologies challenge traditional boundaries of individual rights.

The protection of private life encompasses a significantly broader scope, including personal privacy, family life, correspondence, and one's home, whereas the protection of an individual's image primarily focuses on preventing the unlawful use and dissemination of that

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[25] *Charter of Fundamental Rights of the European Union*, 2000 OJ (C 364) 1.

[26] *Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.*

image[27]. While the right to one's image pertains to a specific aspect of an individual's identity, the protection of private life under Article 7 serves as the foundation for broader personal rights protection. This encompasses both passive avoidance of interference and active measures by the state to safeguard privacy[28].

Another key provision, Article 8 of the Charter, addresses the protection of personal data and establishes that everyone has the right to the protection of data concerning them. Personal data may be processed only under certain conditions, particularly if the processing is lawful, based on the consent of the individual concerned, or derived from other legal grounds. The article also grants individuals the right to access their data, to have it corrected, and, in certain cases, to have it erased. This provision is a cornerstone of privacy and personal data protection within the European Union, further reinforced by the General Data Protection Regulation (GDPR).

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[27] KLIMA K. et al., *Evropské právo*, Plzeň: Aleš Čeněk, 2011.

[28] Ibidem, as Klima K. mentioned reference can be made here to the study of the ECtHR's judgment in *P.G. and J.H. v United Kingdom* (2001), *Kruslin and Huvig v France* (1990), and *Heglas v Czech Republic* (2007). This was indirectly affirmed by the Court of Justice in one of its judgments, indicating that the protection of an individual's image, including its processing for various purposes, falls within the scope of Article 7 of the Charter (Judgment of the European Court of Human Rights of July 4, 2023, *GLUKHIN v. RUSSIA*, 11519/20, LEX no. 3576063.). Thus, it can be argued that Article 8 of the Charter may serve as the foundation for the discussed right. The Charter of Fundamental Rights guarantees the right to respect for private life, particularly through the protection of personal data. The Court of Justice of the European Union has long emphasized the importance of these rights, and the Charter has enhanced their recognition and protection. These rights now hold a central position within the EU legal framework (Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen (EU:C:2010:662; Court of Justice of the European Union, 9 November 2010); Joined Cases C-293/12 and C-594/12 Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources (ECLI:EU:C:2014:238; Court of Justice of the European Union, 8 April 2014); Case C-131/12 Google Spain SL and Google Inc v. Agencia Española de Protección de Datos (ECLI:EU:C:2014:317; Court of Justice of the European Union, 13 May 2014); Case C-212/13 Rynei v. Urad pro ochranu osobních údajů (ECLI:EU:C:2014:2428; Court of Justice of the European Union, 11 December 2014); Case C-230/14 Weltimmo s.r.o. v. Nemzeti Adatvédelmi és Információszabadság Hatóság (ECLI:EU:C:2015:639; Court of Justice of the European Union, 1 October 2015); Case C-362/14 Schrems v. Data Protection Commissioner (ECLI:EU:C:2015:650; Court of Justice of the European Union, 6 October 2015); Joined Cases C-203/15 Tele2 Sverige AB v. Post- och telestyrelsen and C-698/15 Secretary of State for the Home Department v. Watson (ECLI:EU:C:2016:970; Court of Justice of the European Union, 21 December 2016); Opinion 1/15 (ECLI:EU:C:2017:592; Court of Justice of the European Union, 26 July 2017) in the matter of the Agreement on Data Exchange between the EU and Canada.

The second legal act examined, the Convention for the Protection of Human Rights and Fundamental Freedoms, contains Article 8, which concerns the right to respect for private and family life. As K. Klima observes, The Convention outlines four distinct rights related to privacy protection[29]. Firstly, it defines "private life," which, according to the European Court of Human Rights (ECtHR), includes physical and mental integrity, personal behavior, family relationships, and inner thoughts. The concept of private life is dynamic and expands through ECtHR case law. It also connects to the right to a favorable environment, especially when severe interference threatens health or family life (e.g., the right of a father to deny paternity). The right to respect for family life requires the state to support individuals in leading normal family lives, including facilitating parent-child meetings and enabling marriage. The right to respect for one's home and correspondence specifically protects privacy, with violations including unauthorized wiretapping of phone calls, especially when not serving legitimate purposes or lacking proportionality.

These rights and values are taken as established normative points of reference, as defined by the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. The purpose of this analysis is not to scrutinize the essence of these rights, but rather to examine the frameworks and mechanisms through which they are legally protected in the face of contemporary technological developments. Therefore, the references to these rights remain brief and illustrative, serving primarily as a foundation for the broader legal inquiry that follows.

In the context of satellite imagery, these provisions take on particular importance, as advanced satellite technologies, such as those used in programs like Copernicus and Galileo, can capture detailed location data and even images of private properties and areas. The high resolution of satellite images poses a risk of violating the right to personal data protection, especially when individuals can be indirectly identified through such data. This type of processing, if conducted without the consent of the individuals concerned or in a manner that fails to meet GDPR requirements, may constitute a violation

[29] KLIMA K., *European Constitutional Polycentrism Guaranteeing the Protection of Human Rights and Freedoms*, in *Przegląd Prawa Publicznego, 2024, nr 7-8,* 2024, no. 7-8, at p. 138-157.

of Article 8 of the Charter of Fundamental Rights of the EU and undermine the fundamental right to privacy.

2.2. *The Concept of a Satellite*

In order to fully understand the privacy challenges associated with satellite-based technologies, it is essential to first consider what constitutes a satellite under international space law.

The first artificial satellite, Sputnik, was launched into space in October 1957. According to the European Space Agency, navigation satellites can pinpoint your location to within a few meters or even better, regardless of weather conditions. Advanced instruments can determine the position of a stationary object with an accuracy of a few centimeters by measuring its location thousands of times over several hours and averaging the results[30].

The 1972 Liability Convention[31] article contains definitions for terms such as "damage," "space object," "launching state," and "launch into space." The Convention defines a space object to also include its components and the launch vehicle and its parts. During negotiations, a broader definition of space object was considered, which would encompass items on board the spacecraft, as well as objects that are detached, ejected, or launched from the spacecraft[32].

Some authors advocate for a more comprehensive definition. According to Cheng, from a legal standpoint, a space object, based on practice, includes the spacecraft, satellites, and anything that humans launch or attempt to launch into space, along with their components and launch vehicles[33]. This general definition encompasses satellites, spacecraft, equipment, stations, installations, and other structures, as well as launch vehicles and their parts. Myszona-

[30] European Space Agency, *About Satellite Navigation*, http://www.esa.int/Our_Activities/Navigation/About_satellite_navigation (9 September 2024).

[31] *Convention on International Liability for Damage Caused by Space Objects* (Liability Convention), opened for signature March 29, 1972, entered into force October 9, 1973, 961 UNTS 187.

[32] Hara R., *Status prawny obiektów kosmicznych*, *Państwo i Prawo*, 44(9), September 1989, p. 73-82.

[33] Cheng B., *Spacecraft Satellites and Space Objects*, in R. Bernhardt (ed.), *Max Planck Encyclopedia of Public International Law*, Amsterdam, 1981, p. 310.

Kostrzewa, in her latest works, suggests that a space object is *"any object that has been, is, or will be launched into outer space, including the Moon and celestial bodies",* the author notes that this would imply that states are also responsible for space debris remaining in outer space[34]. It seems acceptable and reasonable to recognize that a state launching a space object is responsible for its components, even when it ceases to perform its function. It seems both acceptable and reasonable to acknowledge that a state launching a space object into space is responsible for its components, even if it ceases to perform its function.

In conclusion, while the term "satellite" technically applies to any object orbiting a larger celestial body, such as the Earth orbiting the Sun, artificial satellites specifically refer to human-made objects that orbit the Earth[35]. A "satellite," is a obvious target of "international space law," can best be defined as "a manufactured object or vehicle intended to orbit the Earth, the Moon, or another celestial body"[36]. Given that satellites operate in outer space, the three main sectors of such operations — satellite communication, satellite remote sensing (including Earth observation), and satellite navigation — are linked to orbits around the Earth and are subject to general international space law, as well as their own specific international regimes[37].

Satellites, both natural and artificial, play a crucial role in space exploration and in daily life on Earth. According to the F. Von Der Dunk, this definition is indisputable in light of the following considerations. The concept of a space object, in the context of international conventions, is broad and includes not only active satellites but also their components, launch vehicles, and space debris. As a result, states launching space objects are responsible not only for their operation but also for any pollution and debris left in outer space.

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[34] MYSZONA-KOSTRZEWA K., *Rejestracja obiektów kosmicznych*, in *Kosmos w prawie i polityce. Prawo i polityka w Kosmosie*, ed. MYSZONA-KOSTRZEWA K., Warszawa, 2017, at p. 45.

[35] HOWEL, E., *What is a Satellite?*, National Aeronautics and Space Administration Website, Feb. 12, 2014, https://www.nasa.gov/audience/forstudents/5-8/features/nasa-knows/what-is-a-satellite-58.html (9 September 2024).

[36] VON DER DUNK, F., *An article in Oxford Research Encyclopedia of Planetary Science*, ed. FREELAND S., 2019, at p. 27.

[37] Ibidem.

3. *Absolute State Liability and State Immunity: Safeguarding Personal Data in the EU Space Sector*

3.1. *The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*

In light of existing international treaties, created during the era of state dominance in space exploration ("*Old Space"*), it is doubtful that they adequately address contemporary challenges arising from the activities of private entities[38]. The Space Age began in 1957 when the Soviet Union launched the first artificial satellites into low Earth orbit. This event marked the start of what is now known as the *"Old Space"* era, which set the course for space exploration and expanded humanity's vision of the universe. Initially focused on Earth observation, communication, and information transmission, the space industry evolved towards more complex activities, such as the search for life on other planets, space resource exploitation, space tourism, and the growing presence of the private sector in space. With this development, new challenges have emerged, both technological and legal. Space law, as part of the international legal order, must keep pace with the dynamic changes driven by new commercial initiatives in space, creating the need for its revision and adaptation to contemporary realities.

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty)[39], was opened for signature on January 27, 1967, under United Nations General Assembly Resolution 2222 (XXI) of December 19, 1966, and entered into force on October 10, 1967. The treaty has been ratified by 107 states, with an

[38] Akun V. N., *Space Law under International Conventions and International Documents*, in Balin E.; Akun V. N. Alis S. (eds.), *Proceedings for the First Symposium on Space Economy, Space Law and Space Sciences*, 2022, p. 101-108.

[39] United Nations. 1967. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies. United Nations, OŚ 2222 (XXI).

additional 23 states as signatories[40]. Among the state parties to the treaty are countries leading in space technologies, which undoubtedly reinforces the document's status. The treaty contains provisions that establish the framework of international space law and formulate fundamental principles. Article VI of the Outer Space Treaty addresses state responsibility for national activities in outer space, whether conducted by governmental or private entities. According to this article, states party to the treaty are responsible for the activities of their citizens in outer space, including on the Moon and other celestial bodies. The Outer Space Treaty assigns oversight of private entities operating in space to the respective signatory states rather than to an international body. In practice, this means that each state must ensure that its citizens' activities comply with international space law. States are obligated to supervise the activities of non-governmental organizations and are held accountable for all their actions in outer space. The treaty explicitly states that states are responsible for both public and private space activities conducted by their nationals. States are required to oversee and regulate all space activities undertaken by private entities, which can be a significant challenge given the intensification of private space exploration. Furthermore, the treaty emphasizes that outer space should be used exclusively for peaceful purposes, underscoring the need for cooperative and non-aggressive activities in this global commons.

When analyzing potential claims, it is essential to examine certain key components required to initiate legal action. These components include establishing jurisdiction, identifying the responsible parties, proving the existence of damage, and demonstrating a causal link between the actions of the defendant and the harm suffered. A thorough assessment of these elements is crucial to determine the viability of a claim, particularly in the complex and rapidly evolving context of space law and satellite technologies.

The concept of "damage" in space law represents one of the key regulatory issues in the era of rapidly advancing satellite technologies and space exploration. If privacy violations related to data are considered "damage" within the meaning of Article VII of the Outer

[40] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967.

Space Treaty, proponents of a treaty-based international regulation of data privacy in satellite telecommunications may argue that the signatory states, by joining the Liability Convention, have already committed to addressing international claims and disputes arising from unauthorized access to personal satellite data.

The term "damage" in the Outer Space Treaty is framed broadly, which can lead to various interpretations of its scope. Article VII of the Treaty specifies that the state launching a space object is liable for damages caused by that object on Earth, in airspace, or in outer space. In the author's view, the notion of damage under the Outer Space Treaty should be interpreted expansively to include not only material harm but also non-material damage. This broader interpretation would encompass violations of privacy and personal data rights, aligning the treaty's application with contemporary challenges posed by the commercialization of satellite technologies[41].

Another issue arising under the Treaty concerns the question of active legal standing, rather than merely passive liability, which will be addressed below. As some authors argue, Article VI of the Outer Space Treaty provides states—not individuals—with legislative authority and protection from liability for damages caused by commercial entities. This provision highlights the Treaty's focus on state responsibility, potentially leaving individuals without direct recourse for harm caused by private actors in the context of space activities[42]. While the Treaty imposes international liability on states for damages caused by their space objects to other states or their natural and legal persons, it also mandates signatory states to fully protect the interests of individuals who have suffered harm due to the activities of space objects. However, such liability is resolved at the intergovernmental level, effectively precluding private individuals from directly pursuing claims. This limitation arises from the principle of diplomatic immunity, which shields states from lawsuits filed by private entities. Consequently, individuals must rely on their governments to seek redress on their behalf under the Treaty's framework[43].

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[41] Dempsey, P. S., *National Laws Governing Commercial Space Activities: Legislation, Regulation, & Enforcement*, 36 Nw. J. Int'l L. & Bus., 2016, p. 8-9.

[42] Larsen, P. B., *Small Satellite Legal Issues*, 82 J. Air L. & Com., 2017, p. 290-91.

[43] Hingorani, R. C. *Damage by Satellite*, 30 U.K.C.L. Rev., 1962, p. 214.

This mechanism is designed to facilitate the effective resolution of disputes in the spirit of international cooperation.

The Treaty states that nations are responsible for space activities conducted by their citizens, whether public bodies an private parties. States must oversee and regulate all space activities undertaken by private entities, which can pose significant challenges given the intensifying private exploration of outer space. The Treaty emphasizes that outer space should be used exclusively for peaceful purposes. However, the growth of private exploration and the potential competition for resources may lead to conflicts and tensions, contrary to the spirit of the Treaty.

Moreover, the Treaty recognizes outer space as the common heritage of humanity. Private companies, often driven primarily by profit, may overlook the broader interests of humanity, potentially leading to the exploitation of resources in an inequitable manner. In conclusion, the Treaty neither actively supports private activities nor establishes a mechanism for enforcing third-party claims, leaving significant gaps in addressing contemporary challenges in the evolving space sector[44]. As a result, the profits that incentivize private companies to dedicate their resources to space exploration may be challenging to safeguard, even for the companies themselves[45]. Without some form of international assurance guaranteeing the ability to operate safely in outer space, the commercial space industry may hesitate to invest its resources. The Outer Space Treaty and all subsequent agreements pertain exclusively to state actors and can only be enforced through civil litigation[46]. Only states have the authority to establish regulations for space traffic management, leaving private activities unprotected against such regulatory frameworks.

[44] CHABEN J. B., *Extending Humanity's Reach: A Public-Private Framework for Space Exploration*, Journal of Strategic Security, 13(3), 2020, at p. 75-98.

[45] Ibidem.

[46] STUART J., *The Outer Space Treaty has been Remarkably Successful - But is it Fit for the Modern Age?*, 2017, https://theconversation.com/the-outer-space-treaty-has-been-remarkably-successful-but-is-it-fit-for-the-modern-age-71381, (30 March 2023).

3.2. *The Convention on International Liability for Damage Caused by Space Objects*

The Convention on International Liability for Damage Caused by Space Objects[47] was opened for signature on March 29, 1972, pursuant to United Nations General Assembly Resolution 2777 (XXVI) of November 29, 1971, and entered into force on September 1, 1972. The Convention has been ratified by 95 states, with 19 additional states as signatories. It addresses one of the most critical issues related to state activities in outer space: the international liability of states for damages caused by space objects. The content of the Convention implements the legal principles governing state activities in the exploration and use of outer space, as outlined in the 1963 Declaration of Legal Principles, and is closely linked to the 1967 Outer Space Treaty. As noted by Galicki, the provisions of Article VII of the 1967 Outer Space Treaty form the foundation for the more detailed rules set out in the 1972 Liability Convention[48]. This interconnected framework underscores the evolution of international space law to address the increasing complexities of space activities and state responsibilities.

Under the treaty, the Liability Convention establishes a legal framework governing the basis of liability, exoneration principles, types of damages, compensation, procedures, and statutes of limitation. The Convention introduces a dual system of liability, including absolute liability, which applies to damages caused on the surface of the Earth or to aircraft in flight by space objects. Under this framework, the launching state is held liable regardless of fault, ensuring that victims of such incidents have access to remedies without the need to prove negligence or misconduct[49]. The second form of liability is fault-based liability, which applies to damages caused in outer space (beyond the Earth's surface). Under this framework, a state is held liable if the damage results from its fault. This system

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[47] *Convention on International Liability for Damage Caused by Space Objects, 1971, resolution 2777 XXVI.*

[48] GALICKI Z., *Rozwój zasad odpowiedzialności międzynarodowej za działania kosmiczne*, in A. WASILKOWSKI (ed.), *Działalność kosmiczna w świetle prawa międzynarodowego*, Warsaw, 1991.

[49] Article II of Liability Convention.

requires demonstrating negligence or misconduct by the state or entities under its jurisdiction to establish responsibility for damages occurring in outer space[50]. In this way, the Convention establishes *"a largely uniform system of international liability for damages caused by space objects."* Article II outlines absolute liability, stipulating that the launching state bears absolute responsibility for damages caused on the surface of the Earth or to an aircraft in flight. Article III further specifies that for damages occurring in outer space, liability is contingent on fault. This distinction is crucial for determining the conditions of cooperation and the allocation of risks in contractual agreements. The 1972 Liability Convention, which builds upon and expands the provisions of Article VII of the Outer Space Treaty, has a significant impact on the development of contract law in the space sector, particularly in managing liability and risk-sharing in public-private partnerships and other collaborative endeavors[51]. According to Galicki, *"the primary subjects of international liability for all forms of national activities in outer space are states,"* which, in the author's view, constitutes *"a customary norm of international law, regardless of its inclusion in the text of the Outer Space Treaty"*[52]. This interpretation underscores the foundational role of states in ensuring compliance with international space law and their responsibility for activities conducted under their jurisdiction or control. A consequence of adopting this view is the opinion of Myszona-Kostrzewa, who argues that states bear responsibility under Article VI not only for the actions of non-governmental entities authorized and under constant supervision but also for everything that occurs under their jurisdiction[53].

The Liability Convention explicitly states that the state from whose territory or facilities a space object is launched is responsible

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[50] Article III of Liability Convention.

[51] Liability Convention opened for signature on March 29, 1972, and entered into force on September 1, 1972.

[52] GALICKI Z., *Rozwój zasad odpowiedzialności międzynarodowej za działania kosmiczne*, in A. WASILKOWSKI (ed.), *Działalność kosmiczna w świetle prawa międzynarodowego*, Warsaw, 1991. p. 43.

[53] MYSZONA-KOSTRZEWA, K., *Nawigacja satelitarna w świetle prawa międzynarodowego*, Stowarzyszenie Absolwentów Wydziału Prawa i Administracji UW, 2011, at p. 240.

for damages caused by that object on Earth or in outer space. The launching state is obligated to compensate for the damage caused. According to the 1972 Liability Convention, compensation is determined in accordance with international law and the principles of equity and justice, ensuring reparation that restores the individual, legal entity, or state to the condition that would have existed had the damage not occurred (Article XII). The Convention defines "*damage*" as "*loss of life, personal injury or other impairment of health, or loss of or damage to property of a state or of natural or juridical persons, or property of international intergovernmental organizations*"[54]. Such an interpretation may create challenges regarding the concept of damage in cases of personal data breaches.

In the context of liability for damage in the outer space environment, compensation or restoration to the previous state could be pursued. However, it should be recognized that such measures, particularly restitution, could entail significant costs for the responsible state, while also serving as an effective deterrent. This framework of international liability enforces higher safety and accountability standards on entities operating in outer space. States, as part of their international obligations, develop national licensing frameworks to regulate the activities of entities under their jurisdiction in space. Article IV of the Convention stipulates that when two states cooperate in launching a space object, they are jointly and severally liable for damage caused to a third state. However, the provisions of the Convention do not apply to damage caused to the citizens of the launching state.

Despite significant achievements, the Liability Convention leaves certain gaps that are subsequently addressed by national laws, which, however, are not uniform. For example, there are differences in definitions and approaches to liability for damage caused by space objects across various countries[55]. Consequently, individual countries define specific rules of liability for damages related to space activities, leading to a lack of uniformity. National regulations may vary in how space objects are defined and which types of space activities

[54] Kuźniar D., *Ochrona środowiska przestrzeni kosmicznej i ciał niebieskich. Studium prawnomiędzynarodowe*, Wydawnictwo Uniwersytetu Rzeszowskiego, Rzeszów, 2019.

[55] Christol C. Q., *International Liability for Damage Caused by Space Objects*, American Journal of International Law, 74, 1980, at p. 346, 356.

fall under liability frameworks. While the Outer Space Treaty and the Liability Convention establish the foundational legal framework for international liability in space activities, they leave certain gaps that are filled by diverse national laws. These discrepancies can result in inconsistencies in the application of international liability for damages caused by space objects, complicating the global governance of space activities[56]. Private exploration of planets may appear inconsistent with the Outer Space Treaty. R. Bierzanek and J. Symonides note that two principles governing the use of outer space are particularly emphasized in the 1967 Outer Space Treaty: the principle of using outer space for peaceful purposes and the principle of acting for the benefit and in the interest of all states—indeed, all humankind[57]. These principles underscore the collective and cooperative vision of space as a global commons, potentially conflicting with profit-driven private initiatives that prioritize individual or corporate interests over the broader good.

In practice, it is also unclear which entity—under the 1967 Outer Space Treaty and the 1972 Liability Convention—should bear responsibility for violations of international law or damages caused. According to the 1972 Liability Convention, the responsible entity is the "launching state," defined as the state that launches or procures the launching of a space object, as well as the state from whose territory or facilities the space object is launched (Article I(c)). This broad definition can lead to situations where multiple states might be held liable for resulting damages. As a result, the 1972 Liability Convention is currently ill-suited to effectively address international state liability for damages in the outer space environment or on celestial bodies. The complexities of shared liability among multiple states, combined with the evolving nature of space activities, highlight the need for a more precise and contemporary framework to govern such responsibilities[58]. Its provisions require significant

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[56] DUAN, K., *Regulatory Aspects in Launch Services Contracts for Small Satellites*, in *8th Joint IISL/IAF Session: Legal Framework for Cooperative Space Activities*, International Institute of Space Law, 2018, p. 897-915.

[57] BIERZANEK R., SYMONIDES J., BALCERZAK M., KAŁDUŃSKI M., *Prawo międzynarodowe publiczne*, Wolters Kluwer Polska SA, 2023.

[58] BLOCK W. E., *Space Environmentalism, Property Rights, and the Law*, in *Property Rights*, Palgrave Studies in Classical Liberalism, Palgrave Macmillan, Cham, 2019.

amendments, both in terms of the basis and principles of liability. In the context of space commercialization and the liability of private companies, the 1972 Liability Convention presents several critical challenges. Regarding the liability of private partners under the Convention, the key entity held responsible is the state that launches the space object. The Convention establishes the responsibility of the launching state, defined as the state from whose territory or facilities the object was launched. However, the issue of private companies' liability, particularly those involved in the process of launching space objects, is more complex. Experts such as A. Kerrest argue that excluding the private sector from liability would undermine the entire framework of the Convention[59]. This highlights the need for reforms that better address the role of private entities in space activities while maintaining the overarching principles of accountability and international responsibility enshrined in the Convention. Others argue that private companies cannot be used as a means for states to evade their responsibility[60]. Countries must maintain a close connection with private operators, for instance, through the registration of space objects within the state, which serves as evidence of their association and responsibility. Accordingly, the state is obligated to initiate, promote, or supervise activities related to the launching of space objects, regardless of whether such activities are conducted by public or private entities. A challenging issue arises in establishing the link between a private entity and the state that is to be recognized as the launching state under international law. It is necessary to agree with H.K. Böckstiegel, for whom attributing actions to a state requires active involvement in the form of initiating, requesting, or promoting the launch of an object. The nationality of the private operator is not a sufficient condition for determining the launching state. Undoubtedly, evidence of the state's connection with the private operator is the registration of the object within that state.

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[59] KERREST A., *Liability for Damage Caused by Space Activities*, in M. BENKŐ, K.-U. SCHROGL, D. DIGRELL, E. JOLLEY (eds.), *Space Law: Current Problems and Perspectives for Future Regulation*, Utrecht, 2005.

[60] BÖCKSTIEGEL K. H., *The Term 'Launching State' in International Space Law*, *Proceedings of the 37th Colloquium on the Law of Outer Space*, 1994, at p. 81.

Finally, it is worth noting that the Liability Convention, along with Articles VI and VII of the Outer Space Treaty, when read together, impose full responsibility on signatory states *"for compensating bodily injuries and property damage caused by their space objects on the surface of the Earth or to aircraft in flight."* The launching state *"assumes responsibility for damages caused by both its government and private entities launching into space"* through its *"ratification or accession to the 1967 Outer Space Treaty or the 1972 Liability Convention."*

This framework creates additional inconsistencies within the legal system, as it places the burden of liability entirely on the state, potentially disregarding the complexities of modern space activities involving private actors and multinational operations. These discrepancies highlight the need for a more nuanced and adaptable legal approach to address the evolving challenges of space exploration and commercialization.

3.3. *General Data Protection Regulation (GDPR)*

The protection of third-party rights concerning their image and personal data, including detailed satellite imagery, is not comprehensively regulated by a series of legal acts within the European Union. According to Article 47 of the Charter of Fundamental Rights, everyone is guaranteed the right to an effective remedy in case of a violation of rights protected under the Charter. However, in the context of processing personal data through satellite imaging, there is a lack of specific legal regulations addressing this particular technology.

Therefore, the general principles of data protection, as outlined in Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016[61], commonly known as the GDPR, apply. The GDPR establishes a legal framework for the protection of individuals concerning the processing of their personal data and governs the free movement of such data. The General Data Protection Regulation is a fundamental legal instrument of the European Union,

[61] 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.

aimed at safeguarding the personal data of individuals. In the context of the space market, the GDPR is particularly relevant, as processed information, such as satellite imaging data, may directly or indirectly lead to the identification of specific individuals. In this rapidly evolving industry, with an increasing presence of private entities, compliance with GDPR is not only a legal requirement but also a vital tool for protecting the rights of third parties. In the dynamic space sector, where data processing poses potential risks to individual privacy, adherence to GDPR is essential both for meeting legal obligations and for ensuring the ethical protection of human rights. Public enforcement is carried out by national data protection supervisory authorities, which have the power to impose administrative fines, as well as by the centralized European Data Protection Board, ensuring consistent application across the Union.

Reflecting the right to an effective judicial remedy under Article 47 of the GDPR, individuals whose data is affected may, under Article 82 of the GDPR, seek compensation from data controllers or processors for damages incurred as a result of GDPR violations. Article 79 of the GDPR provides the right to an effective judicial remedy against a controller or processor, while Article 82 grants individuals the right to claim compensation, making it a crucial element of judicial redress. As a result, GDPR compliance is achieved through a complementary system of public and private enforcement, where public fines are supplemented by private claims for damages. This dual approach is akin to the enforcement framework for competition law within the EU, combining public oversight with individual recourse to ensure robust protection of data subjects' rights[62]. To establish legal grounds for third-party claims regarding the processing of personal data in the space sector, a detailed analysis of Articles 4, 6, 9, 17, and 82 of the GDPR is essential.

In the context of personal data protection, the key definitions provided in Article 4 of the GDPR serve as the interpretative foundation for regulations governing data processing. According to paragraph 1, "personal data" encompasses any information relating to an identified or identifiable natural person. Identifiability can be based on

[62] O'Dell E., *Compensation for Breach of the General Data Protection Regulation*, 40(1) *Dublin University Law Journal* (ns), 2017, at p. 97-164.

elements such as a name, identification number, location data, online identifier, or other factors that determine an individual's identity. Additionally, paragraph 14 defines "biometric data" as personal data resulting from specific technical processing that relates to physical, physiological, or behavioral characteristics, enabling the unique identification of a person. Examples include facial images and fingerprint data. Thus, the scope of protected interests involved in satellite mapping aligns with these definitions, as the data collected and processed through such technologies can potentially include personal or biometric information.

To protect rights and assess potential claims available to individuals, it is necessary to examine the entities addressed by the aforementioned regulation. When considering the incorporation of GDPR principles into the Outer Space Treaty or the Liability Convention, it is crucial to evaluate the implications of classifying satellite telecommunications providers as "processors" or "controllers" of data. Such classifications carry significant consequences for determining responsibilities, liabilities, and compliance obligations in the context of data processing activities related to space technologies. Under the GDPR, data processors and data controllers have distinct but interrelated roles in the processing of personal data. Processors act on the instructions of controllers, strictly adhering to their directives, and do not have the authority to independently determine the purposes or methods of data processing. Controllers, on the other hand, bear primary responsibility for deciding the purposes and means of processing personal data. Importantly, these two categories are neither rigid nor mutually exclusive. An entity may assume both roles depending on the nature of its data-related activities. For example, an organization may act as a controller for one set of data while simultaneously functioning as a processor for another, depending on the level of control and decision-making it exercises over the specific data in question. This flexibility is critical in complex data ecosystems, such as those found in the space sector, where organizations often engage in multifaceted roles.

A significant issue arises when determining whether, under the GDPR—particularly Articles 6(1) and 9(2)—the processing of data derived from systems such as Galileo and Copernicus requires the consent of the data subject, or whether it falls within the scope of

exceptions outlined in these legal provisions. The GDPR establishes that the consent of the data subject is the fundamental basis for legitimizing the processing of personal data. However, as confirmed by case law, including the ruling of the Regional Administrative Court in Warsaw, such consent is not required if the data controller can demonstrate a specific legal provision that explicitly authorizes the processing of personal data under Article 6(1) of the GDPR[63]. When analyzing the provisions of the GDPR, two key legal bases potentially applicable to the processing of data by Galileo and Copernicus can be identified. First, data processing may be justified as necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, as outlined in Article 6(1)(e). Second, regarding special categories of data, including geolocation data, Article 9(2) provides for processing in cases where it is necessary for reasons of substantial public interest, based on Union or Member State law. However, in my view, neither of these bases unequivocally applies to the processing of data within the Galileo and Copernicus systems. First, it should be noted that these systems do not operate under typical mechanisms associated with the performance of public tasks, such as public procurement contracts, concessions, or public-private partnerships[64]. Although Galileo and Copernicus are collaborative programs between the European Union and the European Space Agency, their operations are largely commercial in nature. Second, the commercial nature of these systems is evident in their provision of data to private entities that utilize it for commercial purposes, such as developing navigation applications, monitoring environmental resources, or managing infrastructure. Third, in light of existing case law, reliance on "public interest" or "the legitimate interests of the controller" as a basis for data processing requires detailed justification. Such justification may

[63] Judgment of the Administrative Court in Warsaw of 30 August 2024, II SA/Wa 265/24, LEX No. 3789993.

[64] Myszona Kostrzew K. (ed.), *Legal and Political Aspects of the Use of European Satellite Navigation Systems Galileo and EGNOS, First Edition, Warsaw: Scholar Publishing House, 2018.*

be difficult to establish in the case of systems like Galileo and Copernicus[65]. While future developments in case law and practice may support alternative interpretations, the current legal framework and operational realities highlight substantial uncertainties in this regard.

According to Article 4(7) of the GDPR, a "controller" is defined as a natural or legal person, public authority, agency, or other body that determines the purposes and means of processing personal data. This means that responsibility for the processing of personal data, including violations, lies directly with the data controller and not with the state, unless the state acts as a controller in the context of specific processing activities. In the context of space technologies and satellite imaging, controllers may include private companies, satellite operators, public institutions, or international space agencies that determine the purposes and methods of processing personal data. This raises the question of whether a state, when acting as a controller, falls within the scope of these regulations. In the author's view, if a state were to act as a data controller, an individual could potentially seek liability from the broadly understood "state treasury." However, in satellite operations, private companies are typically data controllers, further emphasizing their role in ensuring compliance with data protection obligations under the GDPR[66]. The above considerations highlight an inherent conflict between legal provisions. In cases of GDPR violations related to the processing of personal data by satellites, claims for data protection should be directed towards the data controller in accordance with GDPR principles. However, under the absolute liability framework established by

[65] Judgment of the Court of Appeal in Szczecin of 10 July 2024, I ACa 1400/22, LEX No. 3781048. Judgment of the Supreme Administrative Court of Poland of 17 October 2024, III OSK 744/23, LEX No. 3770853. Judgment of the Supreme Administrative Court of Poland of 10 October 2024, III OSK 4804/21, LEX No. 3774636. Judgment of the Supreme Administrative Court of Poland of 18 December 2020, III OSK 2700/22, LEX No. 3115095. Judgment of the Regional Administrative Court in Warsaw of 18 July 2024, II SA/Wa 164/24, LEX No. 3792715. Judgment of the Regional Administrative Court in Warsaw of 22 May 2024, II SA/Wa 1618/23, LEX No. 3782247. Decision of the European Court of Human Rights of 11 December 2018, Case No. 17331/11, Mehmedovic v. Switzerland, Right to respect for private and family life. Permissible scope of observation by a private detective commissioned by an insurer, LEX No. 2626931.

[66] SABOORIAN A., *A Brave New World: Using the Outer Space Treaty to Design International Data Protection Standards for Low-Earth Orbit Satellite Operators*, in *Journal of Air Law and Commerce*, 84(4), 2019, pp. 575-604.

the Liability Convention, full responsibility is assigned to the state launching the space object. Under the Liability Convention, while the state is accountable under international space law, it can only be the subject of claims in the context of inadequate supervision over the activities of private entities. It is not directly liable for violations of data protection regulations, such as those under the GDPR. This dichotomy underscores the complexity of reconciling international space law with data protection frameworks in the rapidly evolving domain of space activities.

An additional weakness of the aforementioned Regulation is that it does not apply to the protection of fundamental rights and freedoms or the free movement of personal data in activities that fall outside the scope of EU law, such as those related to national security. This limitation creates a regulatory gap in addressing certain scenarios where personal data protection might otherwise be necessary, leaving such matters under the jurisdiction of individual member states or other applicable legal frameworks[67]. It also does not apply to the processing of personal data by Member States when conducting activities related to the EU's Common Foreign and Security Policy.

These considerations highlight the need for better harmonization of national, EU, and international regulations to address the specific legal challenges posed by space activities. In particular, there is a pressing need to clarify liability principles and to develop more comprehensive mechanisms for protecting the rights of third parties in the context of data processing within the space sector. Such efforts would ensure greater consistency and efficacy in safeguarding individual rights while fostering responsible and sustainable space operations.

[67] Ostrihansky M., Sakowska-Baryła M., Szmigiero M., *5.2.2. System of Guarantees for the Right to Privacy*, in Ostrihansky M., Sakowska-Baryła M., Szmigiero M, *The Law of Drones. Unmanned Aircraft in European Union Law*, Warsaw, 2021, at p. 222.

4. *Final Conclusions*

Over the past decade, global space governance has been characterized by an influx of private space entities that have influenced political decision-making and the regulatory landscape. This trend highlights the need to adapt international and national legal frameworks to account for the growing role of private entities in the exploration and utilization of outer space. M. Czajkowski argues that the fundamental space law treaties, developed in the 1960s and 1970s, are no longer suited to contemporary realities[68]. These treaties were developed during the early stages of human activity in space and do not account for the rapid technological advancements and evolving dynamics of the space sector. There is an urgent need to align international space law with contemporary realities. Similarly, J. Bryła emphasizes that existing treaties and international regulations were formulated during a period when state-run space agencies dominated the field, leaving them ill-equipped to address the challenges posed by the growing involvement of private entities[69]. As the main international regulatory body governing human activities in outer space, the United Nations included the International Telecommunication Union (ITU) as a specialized agency in 1947.). The modern reality, where an increasing number of private companies engage in space activities, necessitates an update to these regulations. On the other hand, the high costs and technological risks associated with system failures continue to justify public intervention in funding space programs and fostering innovation. Balancing these dynamics is essential to ensure both the sustainability of private sector involvement and the advancement of space exploration as a collective endeavor[70].

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[68] CZAJKOWSKI M., *Przestrzeń kosmiczna a bezpieczeństwo międzynarodowe. Katalog problemów*, in W. GIZICKI (ed.), *Wybrane problemy bezpieczeństwa globalnego po zimnej wojnie*, Instytut Sądecko Lubelski, Lublin, 2015, at p. 99-115.

[69] BRYŁA J., *Delimitacja przestrzeni kosmicznej: cel, zasadność, rywalizacja interesów*, *Prace i Studia Geograficzne*, 54, 2014, at p. 7-27.

[70] OECD, *Space and Innovation*, OECD Publishing, Paris, 2016, p. 62-63, https://doi.org/10.1787/9789264264014-pl.

The commercial space industry is highly diverse, and while the current lack of regulation is not yet a significant issue, it has the potential to become one in the near future. Private companies and individual nations are making increasing strides in space exploration. Soon, inconsistent licensing regulations imposed by different governments, uncertain protection of property rights, and the absence of unified rules for space traffic management and safety could lead to catastrophic consequences that might have been preventable with proactive measures.

Despite the application of general data protection principles, the increasing use of satellite imaging for both commercial and public purposes highlights the need for more detailed regulations. In the author's opinion, the current legal framework fails to address the specific characteristics of satellite technology, particularly in the context of cross-border data processing, the involvement of private entities, and the growing reliance on geospatial data analytics. These gaps underscore the urgency of developing targeted legal instruments to ensure effective data protection in the rapidly evolving field of satellite imaging.

In the context of the analyzed legal instruments, the GDPR grants individuals the right to file complaints and pursue claims for damages, but only within the jurisdiction of the European Union. On the other hand, the Outer Space Treaty and the Liability Convention allow injured parties to seek claims under these treaties exclusively through actions brought on their behalf by their respective governments, i.e., states. In the author's view, this creates a legislative gap. The Outer Space Treaty establishes the absolute liability of states, while the GDPR specifies the protected individuals and responsible entities, extending liability beyond states to include other actors. A key issue arises from the commercialization of the space sector, where activities involve both states as contracting parties and private entities, which are typically the data controllers. States often act as mere sponsors of such endeavors. This results in a lack of connection between the two legal frameworks, creating a misalignment in addressing liability and enforcement. The divergence is also apparent in determining the appropriate forum for bringing such claims, further complicating the resolution of disputes in this emerging area of law.

Firstly, it is essential to establish regulations enabling states to exercise control over their citizens participating in space activities, regardless of where those activities occur. Secondly, states have the authority to enact laws governing space activities conducted by entities under their jurisdiction to ensure compliance with international space law and public interest. States can regulate the space activities of their citizens and companies operating from their territory, even when such activities take place beyond Earth. However, it is important to note that such territorial jurisdiction is not "exclusive," as other states may also regulate activities conducted from their territories in the same area of outer space. Many countries have implemented national space laws leveraging this form of jurisdiction to oversee and manage space activities carried out by private operators. This approach underscores the need for international coordination to address overlapping jurisdictions and ensure consistent governance in the increasingly complex domain of space exploration and commercialization[71]. An example can be found in certain EU Member States that have established comprehensive national space laws regulating the space activities of private entities operating from their territories[72]. However, some states still lack enacted legislation governing space activities. This legislative gap poses challenges to ensuring compliance with international space law and creates inconsistencies in regulating private operators across different jurisdictions. Thirdly, the unification of jurisdiction becomes imperative. The International Court of Justice (ICJ) resolves disputes and issues final judgments in cases between states. As the highest body of international judiciary, the ICJ has jurisdiction over matters arising from treaties and other international agreements. On the other hand, the GDPR is a purely EU-specific regulation, where the Court of Justice of the European Union (CJEU) serves as the highest judicial authority. This duality could lead to situations where two different rulings – one from the ICJ and another from the CJEU – might address the same matter with potentially conflicting conclusions. Such

[71] MARBOE I., *National Space Law*, in F. G. von der Dunk (ed.), *Handbook of Space Law*, 133 and following, 2015.

[72] Ibidem; e.g., Sweden, Belgium, the Netherlands, France, Austria, Denmark, Finland, and the United Kingdom.

discrepancies highlight the need for greater alignment and coordination between international and EU legal frameworks, especially as cross-border issues in space activities and data protection become more prevalent.

Regardless of whether it pertains to space activities or other fields, EU institutions can establish binding rules that supersede national law only within the limits permitted by the treaties, laws enacted pursuant to them, and the principles of "conferral," "subsidiarity," and "proportionality." This raises questions about the jurisdiction of Member States in space-related matters. Under the principle of *nemo dat quod non habet* and its extended interpretation, Member States cannot grant the European Union greater competencies than those they themselves possess under international space law[73]. The greatest challenge regarding the EU's jurisdiction over commercial activities in outer space is that the European Union itself is not a party to the core space treaties. While the Rescue Agreement, the Liability Convention, and the Registration Convention do, in principle, allow the EU to act as a quasi-party to these conventions as an intergovernmental organization, this status remains largely theoretical[74]. The European Union has not yet decided to adopt such a quasi-party status within any of the relevant treaties. For a long time, the EU has avoided getting involved in space security issues[75]. The above principle also creates a kind of deadlock in the ability to impose space activity laws on member states.

Analyzing the provisions of the Treaty on the Functioning of the European Union (TFEU), including articles related to the customs union, freedom to provide services, free movement of capital and people, and tax harmonization, it can be concluded that there are solid foundations for the internal market. Extending these principles

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[73] Von Der Dunk F. G., *The European Union and Space—Space for Competition?*, International Institute of Space Law, 61(2), October 2018.

[74] See Article 6, the Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Space Objects, London/Moscow/Washington, drafted on April 22, 1968, entered into force on December 3, 1968.

[75] Von Der Dunk F.G., *Europe and Security Issues in Space: The Institutional Setting*, 4 *Space and Defense*, 2010, at p. 71-99; Von Der Dunk, F.G., *European Space Law*, in *Handbook of Space Law*, F.G. Von Der Dunk (ed.), 2015, at p. 239. Von Der Dunk, F.G., *The European Union and the Outer Space Treaty: Will the Twain Ever Meet?*, in *Fifty Years of the Outer Space Treaty: Tracing the Journey*, A. Lele (ed.), 2017, at p. 75-90.

to space activities could support the harmonization of regulations and increase the competitiveness of the space sector in Europe. The above analysis suggests that EU member states could transfer the jurisdictional powers over space activities carried out from their territories, by EU citizens (including businesses), and over space objects registered in the EU, to EU institutions, if they consent. Such a transfer of powers would allow the creation of a unified regulatory mechanism at the EU level, which could increase the efficiency and consistency of space activity regulations in Europe. The development of regulations in the space sector, beyond the area of satellite telecommunications, has faced numerous challenges. The commercialization and privatization of these sectors were incomplete, accidental, and often dominated by specific concerns and government interventions. Regarding the Liability Convention, Article XXV allows for the proposal and adoption of amendments by a majority vote of the signatories, meaning that a number of amendments reflecting the GDPR can be added, introducing necessary changes to accommodate third-party claims. Furthermore, the Convention uses the term "damage" limited to physical interference, which may raise certain dilemmas regarding its application in the case of personal data leaks.

For now, however, issues related to jurisdiction remain a serious problem for private entities. The concept of responsibility for activities that violate international law, including the activities of private entities, and state responsibility for damages caused by space objects, including those operated by private operators, remains a fundamental issue in international space law. States are therefore forced to take internal measures to monitor and control the activities of private businesses[76].

[76] VON DER DUNK F.G., *Public Space Law and Private Enterprise*, in R.S. JAKHU (ed.), *Space Law - General Principles*, Institute of Air and Space Law, McGill University, Montreal, 2007, Vol. I, p. 470-471).

On the Definition of 'Combined Transport' and the Recent Contribution by the Court of Justice of the European Union

Martina Molinari

1. *Introduction to the European Union transport policy: the general framework*

The transport sector has received attention from the European Union institutions – the then European Community institutions – since the origin of the process of European integration[1], i.e. with the Treaty of Rome (1957) where the desire to pursue a *"common transport policy"*[2] was made explicit. However, this policy has only been implemented since the mid-1980s[3], mainly thanks to the intervention

[1] The transport sector has an inherently internationalist nature, and it is instrumental in the pursuit of free movement, particularly of goods and persons. The then European communities, willing to establish a single European market, soon realised that the transport was a focal point for achieving this goal. Indeed, the free movement of goods and people (then: workers) depended heavily on an efficient transport system throughout the Union. On this point, see L. Carpaneto, *Il diritto comunitario dei trasporti tra sussidiarietà e mercato*, Turin, 2009, p. 3; H. Stevens, *Transport Policy in the European Union*, Houndmills, Basingstoke, Hampshire, 2004, p. 37; F. Munari, *Il diritto comunitario dei trasporti*, Milan, 1996, p. 2.

[2] The Treaty establishing the European Economic Community – more commonly known as the Treaty of Rome – devotes an entire title to the subject of transport, which opens with Article 70 that states: "*The objectives of this Treaty shall, in matters governed by this title, be pursued by Member States within the framework of a common transport policy".*

[3] Due to different national approaches, the European Community was not able to immediately implement the so-called "common transport policy", remaining in an impasse for a long time and opting for a process of gradual liberalisation and harmonisation. Regarding transport and its regulation, two main approaches can be distinguished at national level, i.e. the Anglo-Saxon and the continental approach. The former involves the use of market

of the Court of Justice of the European Union[4], whose case law proved to be fundamental in breaking an impasse by interpreting the relevant rules[5].

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mechanisms to maximise the efficiency of transport; the latter, which is interventionist in nature, sees transport matters incorporated into public policy. Undoubtedly, these two approaches are not clearly distinct, yet they have influenced the transport debate at EU and European level. On this subject, see H. STEVENS, *Transport Policy in the European Union*, cit., p. 2. Moreover, during this time, the Member States of the then European Community were divided between those most in favour of a rapid liberalisation of transport and those who, on the other hand, called for its harmonisation first. They finally opted for a process of gradual liberalisation and harmonisation. On this subject, see L. CARPANETO, *Il diritto comunitario dei trasporti tra sussidiarietà e mercato*, cit., p. 9. For more on the reasons for European Community inertia in this sector, see also H. STEVENS, *Transport Policy in the European Union*, cit., pp. 47-56.

[4] The European Community inertia regarding the transport sector began to falter thanks to the intervention of the CJEU. For more on the development of the common transport policy in the context of the integration of EU Member States, see F. MUNARI, *Il diritto comunitario dei trasporti*, cit., p. 49.

[5] In 1974, with French Merchant Seamen case (Judgment of the EC Court of Justice of 4 April 1974 in Case 167/73, Commission v. France [1974] ECR 359), the Court clarified for the first time that the principles of the Treaty must also be applied to the field of transport and that the legal basis contained in the Treaty is sufficient for the adoption of secondary legislation. Indeed, the Court specified that *"Far from involving a departure from these fundamental rules, therefore, the object of the rules relating to the common transport policy is to implement and complement them by means of common action"* (para. 25). The second major contribution by the Court came in 1985, when it upheld the action for failure to act brought by the Parliament against the Council (Judgment of the EC Court of Justice of 22 May 1985, in Case 13/83, Parliament v. Council in [1985] ECR 1513), clarifying the Council's non-generic obligation to intervene in matters of free movement of transport services. Finally, in Nouvelles Frontières (Judgment of the EC Court of Justice of 30 April 1986 in Joined Cases C-209-213/84, Asjes (Nouvelles Frontières) [1986] ECR 1425 ff.), the Court reaffirmed that the EC Treaty is applicable to the transport sector in competition matters. For more details, see L. CARPANETO, *Il diritto comunitario dei trasporti tra sussidiarietà e mercato*, cit., p. 13. Moreover, since the second half of the 1980s, there have been various initiatives in this regard. One example is the White Paper presented by the Commission in 1992 (Commission document COM 92 494 final of 2 December 1992, in Bull. EC, Suppl. 3/93). In this document, a change in the Community's approach to transport is particularly notable. Indeed, whereas until then the sector had been conceived as separate from the others, the Commission began to integrate it with other Community policies. On this subject, L. CARPANETO, *Il diritto comunitario dei trasporti tra sussidiarietà e mercato*, cit., p. 17. In 2001, a subsequent White Paper ('European transport policy for 2010: time to decide', COM (2001) 370 final of 12 September 2001) was presented by the Commission, in which traffic congestion due to economic growth and the environmental impact were identified as crucial issues for the European transport sector. For further details, see L. CARPANETO, *Il diritto comunitario dei trasporti tra sussidiarietà e mercato*, cit., p. 19. In 2006, the Commission presented a review of the 2001 White Paper (European Commission, Directorate-General for Energy and Transport, Keep Europe moving: sustainable mobility for our continent, Publications Office, 2006). This period saw, inter alia, the emergence of certain

The CJEU judgment *B.W. v Staatsanwaltschaft Köln*[6] is part of the case law on transport issues, the last in time to deal with combined transport, and confirms the importance of the Court's interpretative function in this area. A quick overview of the transport policy is necessary before focusing on the judgment.

As it may be known to the reader, transport is one of the matters in respect of which the EU and its Member States have shared competence[7], as provided for in Article 4[8] of the Treaty on the Functioning of the European Union (TFEU), the exercise of which must respect the principle of subsidiarity[9]. The TFEU dedicates the entire Title VI, which consists of Articles from 90 to 100, to the transport sector. More precisely, Articles from 90 to 99 TFEU are dedicated to the regulation of land transport (including road, inland waterway and rail transport), while Article 100 TFEU extends the regulation to maritime and air transport.

An initial goal of the EU action in the transport sector was to make this market effectively competitive and thus to liberalise it. This objective, limited to the transport of goods, became effective in 1993[10].

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technical projects. These include the European satellite navigation system Galileo, the European Rail Traffic Management System (ERTMS) and the Single European Sky ATM – Air Traffic Management – Research (SESAR). See also S. Dupont, A. Debyser, O. Kuzhym, *Common Transport Policy: Overview,* Fact Sheets on the European Union, 2024, p. 2, available at the following link: https://www.europarl.europa.eu/erpl-app-public/factsheets/pdf/en/-FTU_3.4.1.pdf (last access 13 July 2024).

[6] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22.

[7] Shared competences are those matters in which the Union may intervene and, when it exercises that power, it limits the action of the Member States. See R. Adam, A. Tizzano, *Lineamenti di diritto dell'Unione europea*, Turin, p. 358.

[8] Specifically, transport is identified as a sector within shared competences in Article 4(2)(g) TFEU.

[9] To balance the expansion of the Union's competences, the principle of subsidiarity was affirmed, now formulated in Article 5(3) TEU, which states that the Union shall act only when the Member States, due to their national dimension, cannot adequately achieve the objectives set at the EU level. For a more thorough analysis of the principle of subsidiarity, see R. Adam, A. Tizzano, *Lineamenti di diritto dell'Unione europea*, cit., p. 363.

[10] F. Munari, L. Carpaneto, *Trattato sul funzionamento dell'Unione europea, Art. 91*, in (eds) F. Pocar. M. C. Baruffi, *Commentario breve ai Trattati dell'Unione europea*, Padua, 2014, p. 715.

Parallel to this development, the awareness of the EU institutions on environmental issues in the transport sector has increased considerably over time. As an example of this evolution, the 2011 White Paper[11] can be mentioned, in which the Commission expressed its desire to limit the negative externalities of transport[12] and found multimodal transport[13] to be one of the tools for achieving this goal[14].

Combined transport, which is a particular type of multimodal transport[15], is considered as even better suited as a "sustainable" mode of transport, because it reduces the movement of goods by road, providing that this only takes place in the final and initial part of the transport and that the main part is carried out by less pollutant ways (i.e. by rail, waterway, or sea)[16].

Accordingly, for some time now, the EU institutions have been placing emphasis on combined transport, believing that it could meet

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[11] European Commission: Directorate-General for Mobility and Transport, *White Paper on Transport. Roadmap to a Single European Transport Area: Towards a competitive and resource efficient transport system*, Publications Office of the European Union, 2011, available at the following link: https://data.europa.eu/doi/10.2832/30955 (last access 19 February 2025).

[12] European Commission: Directorate-General for Mobility and Transport, *White Paper on Transport. Roadmap to a Single European Transport Area: Towards a competitive and resource efficient transport system*, cit., p. 363. See also M. REMÁČ, *Multimodal and Combined Freight Transport*, Brussels, 2017, p. 4.

[13] Although there is not a common and widespread position on the definition of multimodal transport, it can generally be defined as the movement of goods involving at least two different modes of transport and taking place under the responsibility of a single carrier. Thus, the three elements necessary to define multimodal transport are (a) the presence of at least two distinct routes, which take place with different means of transport, and which are both relevant (b) the existence of a single contract (c) the exclusive liability of the carrier for the entire journey. On the debate on the definition of multimodal carriage, see M. BRIGNARDELLO, *Il trasporto multimodale*, in (ed) V. ROPPO, *Trattato dei contratti*. *Volume IV: Opere e servizi*, Milan, 2014, p. 260; A. LA MATTINA, *La responsabilità del vettore multimodale: profili ricostruttivi e de iure condendo*, in *Il diritto marittimo*, Genoa, 2005, p. 2; M. CASANOVA, M. BRIGNARDELLO, *Corso breve di diritto dei trasporti*, Milan, 2020, p. 226.

[14] European Commission: Directorate-General for Mobility and Transport, *White Paper on Transport. Roadmap to a Single European Transport Area: Towards a competitive and resource efficient transport system*, cit., p. 7. Also, as a symbolic example, in 2018, the then EU Transport Commissioner – Violeta Bulc – proclaimed 2018 as the year of multimodality. On the declaration, see the following link: https://urban-mobility-observatory.transport.ec.europa.eu/news-events/news/2018-year-multimodality-2018-02-09_en (last access 10 July 2024).

[15] M. REMÁČ, *Multimodal and Combined Freight Transport*, cit., p. 2.

[16] Ibidem.

some of the EU's fundamental objectives, such as the integration of different modes of transport and environmental issues[17], as it is a type of transport that, inter alia, helps to relieve road traffic congestion and increases the level of road safety[18].

2. *On combined transport and cabotage: Directive 92/106 and Regulation 1072/2009*

Considering the objectives identified, from 1975 onwards, the then European Community began to adopt measures to facilitate combined transport, although, at that time, the environmental issue was not yet so strongly felt[19]. Amongst those measures, Directive 75/130[20] was of undoubted relevance, and its main object was the liberalisation of combined transport.

The European legislation on the subject has then been brought together in Directive 92/106[21] (hereinafter "the Directive), which defines combined transport as the movement of goods between Member States where the initial or final part of the journey takes place by road and the other part by rail, inland waterway or sea, which in each case forms part of a unitary transport operation. To be considered "combined", moreover, the part of the transport that does not take place by road must exceed 100 km as the crow flies between the initial and final point. A third condition *sine qua non* for falling within the definition of combined transport given by the Directive is

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[17] This point was already present in the Commission's 2001 White Paper.

[18] F. MUNARI, *Il diritto comunitario dei trasporti*, cit., p. 113.

[19] Indeed, even though the first Community initiatives on environmental issues – in any case closely related to economic interests – date back to the 1970s, the European Union formally obtained competence in environmental matters with the Single European Act (SEA) in 1986, which introduced the new Title VII on this matter in the EEC Treaty. For more on the evolution of environmental protection in EU law, see F. MUNARI, L. SCHIANO DI PEPE, *Tutela transnazionale dell'ambiente*, Bologna, 2012, p. 69-111.

[20] Council Directive 75/130/EEC of 17 February 1975 on the establishment of common rules for certain types of combined road/rail carriage of goods between Member States, OJ L 48, 22.2.1975, p. 31–32. The Directive is no longer in force. On this point, see F. MUNARI, *Il diritto comunitario dei trasporti*, cit., p. 114.

[21] Council Directive 92/106/EEC of 7 December 1992 on the establishment of common rules for certain types of combined transport of goods between Member States, OJ L 368, 17.12.1992, p. 38–42.

that the closest railway station to the point of loading and unloading or, in the case of maritime and navigable transport, a port within a radius of 150 km from the point of loading and unloading must be chosen[22].

Articles 75 and 84 of the EEC Treaty – now Articles 91 and 100 TFEU – serve as the legal basis for the Directive and, in its recitals, it is confirmed that combined transport should be enhanced to reduce traffic congestion, protect the environment and make road traffic safer[23].

The Directive not only provides for the liberalisation of combined transport – a provision that has indeed proved insufficient for the spread of this mode of transport[24] – but it also provides for advantages for those road hauliers who choose it, such as exemptions from limits on the weight and size of vehicles, and tax relief[25].

However, the Directive has some critical aspects, which have been highlighted on several occasions by the Commission. These include a scope that is considered too narrow, insufficient economic support for the operators concerned, and the fact that the documents to be produced must be on paper. Considering these issues, several revisions have been proposed since the Directive was adopted more than 30 years ago. The first, in 1998, was put forward by the

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[22] Article 1 of the Directive 92/106/EEC recites as follow: *"This Directive shall apply to combined transport operations, without prejudice to Regulation (EEC) No 881/92 (5). For the purposes of this Directive, 'combined transport' means the transport of goods between Member States where the lorry, trailer, semi-trailer, with or without tractor unit, swap body or container of 20 feet or more uses the road on the initial or final leg of the journey and, on the other leg, rail or inland waterway or maritime services where this section exceeds 100 km as the crow flies and make the initial or final road transport leg of the journey;*

- between the point where the goods are loaded and the nearest suitable rail loading station for the initial leg, and between the nearest suitable rail unloading station and the point where the goods are unloaded for the final leg, or;

- within a radius not exceeding 150 km as the crow flies from the inland waterway port or seaport of loading or unloading".

[23] Recital 3, Directive 92/106/EEC.

[24] Initially, the Community emphasised the liberalisation of combined transport but failed to substantially increase its use. As a result, Directive 75/130 underwent several amendments, which subsequently necessitated the drafting of a new directive, as stated in recital 1 of Directive 92/106.

[25] Article 6 of the Directive 92/106/EEC. See also T. JANSEN, J. BLANCKAERT, *Revision of the Combined Transport Directive*, European Parliamentary Research Service (EPRS), Brussels, 2023, p. 2.

Commission[26] but, as no agreement was reached during the inter-institutional dialogue, the proposal was withdrawn in 2001[27].

The second revision proposal was presented in 2016[28], following a 2016 REFIT[29] evaluation. Inter alia, it proposed to clarify the definition of combined transport and to extend its scope[30]. However, as the trialogue was unsuccessful, the Commission withdrew this proposal in 2020[31].

The latest proposal was published by the Commission in November 2023[32]. Picking up on some earlier suggestions, the Commission organised its proposal into four main areas, suggesting (1) to simplify the conditions necessary to access the support provided by the Directive in order to increase the number of intermodal transport

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[26] Proposal for a Council Directive amending Council Directive 92/106/EEC on the establishment of common rules for certain types of combined transport of goods between Member States, OJ C 261, 19/08/1998, p. 10. In the introduction of the Directive, it is held that *"the existing measures in favour of the performance and the competitive position of combined transport have insufficient impact, and should be improved to encourage the transfer of goods from road transport to modes which are more environmentally friendly, safer, more energy efficient and cause less congestion, like rail, inland waterways and maritime transport for the longer part of the journey"*.

[27] T. Jansen, J. Blanckaert, *Revision of the Combined Transport Directive*, cit., p. 3.

[28] Proposal for a Directive of the European Parliament and of the Council amending Directive 92/106/EEC on the establishment of common rules for certain types of combined transport of goods between Member States, COM/2017/0648 final - 2017/0290 (COD).

[29] Commission staff working document REFIT ex-post evaluation of Combined Transport Directive 92/106/EEC Final Report, SWD (2016) 141 final, Brussels, 2016. The European Commission's regulatory fitness and performance programme (REFIT) is an initiative of the Commission, part of the broader "Better Regulation" project. Through REFIT, the Commission ensures that European legislation is effective and accessible, so that it achieves its intended objectives. For more information on REFIT, see the Commission's website: https://commission.europa.eu/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-more-efficient-and-future-proof_en#:~:text=Documents,About%20REFIT,cutting%20red%20tape%2C%20whenever%20possible (last access 20 February 2025).

[30] Proposal for a Directive of the European Parliament and of the Council amending Directive 92/106/EEC on the establishment of common rules for certain types of combined transport of goods between Member States, cit., p. 3.

[31] T. Jansen, J. Blanckaert, *Revision of the Combined Transport Directive*, cit., p. 3.

[32] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/106/EEC as regards a support framework for intermodal transport of goods and Regulation (EU) 2020/1056 of the European Parliament and the Council as regards calculation of external costs savings and generation of aggregated data, COM/2023/702 final, Brussels, 2023.

cases, (2) to provide the appropriate economic support to those operators that fall within the scope of the Directive (3) to increase transparency with regard to both national regulations and the market situation, in order to assess whether the support offered to operators is in line with the actual situation, and (4) to establish transparency obligations for intermodal terminal operators, who will must make available data on terminal facilities and services[33].

For the purposes of this analysis, another relevant type of freight transport is cabotage[34], regulated by Regulation 1072/2009[35] (hereiafter "the Regulation") – repealing Regulations 881/92[36] and 3118/93[37] – which is the main EU instrument on access to the international freight transport market[38].

The definition of cabotage transport operations is contained in the Regulation itself, where it is stated that these are *"national carriage for hire or reward carried out on a temporary basis in a host Member State"*[39]. The scope of the Regulation includes not only the carriage of goods by road for hire or reward carried out between Member States, but also those from an EU country to a third country and vice versa[40].

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[33] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/106/EEC as regards a support framework for intermodal transport of goods and Regulation (EU) 2020/1056 of the European Parliament and the Council as regards calculation of external costs savings and generation of aggregated data, cit., pp. 4-5.

[34] F. MUNARI, L. CARPANETO, *Trattato sul funzionamento dell'Unione europea, Art. 91*, cit., p. 723.

[35] Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (recast) (Text with EEA relevance), OJ L 300, 14.11.2009, p. 72–87.

[36] Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States, OJ L 95, 9.4.1992, p. 1–7.

[37] Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State, OJ L 279, 12.11.1993, p. 1–16.

[38] A. LA MATTINA, L. SCHIANO DI PEPE, *Il trasporto su strada: profili generali*, in (ed) V. ROPPO, *Trattato dei contratti – Volume IV: Opere e servizi*, Milan, 2014, p. 42.

[39] Article 2(6), Regulation (EC) No 1072/2009.

[40] Article 1, Regulation (EC) No 1072/2009.

EU law does not prohibit cabotage, but Regulation 1072/2009 establishes the necessity of its temporary nature, providing for certain limits to guarantee fair competition between national and foreign operators[41]. Indeed, the Regulation allows haulers to carry out a maximum of three cabotage operations in the seven days following an international journey to the host country of the cabotage[42]. According to the Regulation, it is necessary to possess a Community license to be able to carry out international road haulage operations. This is an essential requirement also for drivers who are nationals of a non-EU State, who are additionally required to possess a driver's certificate[43].

Considering the two legal acts set out above, although the Regulation specifies that it does not affect the provisions of the Directive[44], certain road haulage services within the EU territory may be difficult to classify and, consequently, it could be unclear whether the discipline of reference is provided by the Directive on combined transport, or by the Regulation on cabotage.

Clarifying the nature of these transport services and, consequently, the applicable law is of fundamental importance, precisely because, on the one hand, the Directive has an incentive function with respect to combined transport and, on the other, the Regulation has a restrictive function with respect to cabotage. The transport services that are the subject of the CJEU case under consideration lie precisely at this crossroads, and only the Court of Justice of the European Union can solve this problem of interpretation and establish whether they should be defined combined transport services (permissible and to be incentivised) or cabotage services (liable to an administrative sanction by exceeding the limits provided for in the cabotage regulations).

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[41] This can be seen from Recitals 4 and 5 of the Regulation, which state, respectively: *"(4) The establishment of a common transport policy implies the removal of all restrictions against the person providing transport services on the grounds of nationality or the fact that he is established in a different Member State from the one in which the services are to be provided"*, and *"(5) In order to achieve this smoothly and flexibly, provision should be made for a transitional cabotage regime as long as harmonisation of the road haulage market has not yet been completed"*.

[42] Article 8(2), Regulation (EC) No 1072/2009.

[43] Article 3, Regulation (EC) No 1072/2009.

[44] Recital 16, Regulation (EC) No 1072/2009.

3. *The CJEU judgment B.W. v Staatsanwaltschaft Köln*

One of the most complex hypotheses, in which the distinction between road haulage within the framework of combined transport and that constituting cabotage transport is not so clear-cut, is precisely the case of the road transport of empty containers considered in the judgment under discussion.

The case *B.W. v Staatsanwaltschaft Köln*[45] is the latest intime to provide an interpretation on the applicability of Directive 92/106 and Regulation 1072/2009.

The main dispute originated in early 2020, when the *Bundesamt für Güterverkehr* (the Federal Office for the Carriage of Goods, Germany; hereinafter, "the Federal Office") challenged 60 transports carried out by the TIM-Trans Impex SRL (hereinafter "TIM-Trans"), established in Romania, on behalf of Contargo Rhein-Neckar GmbH (hereinafter "Contargo"), established in Germany[46].

The Federal Office noted that at least 57 cases of transport of empty containers did not benefit from the privileged treatment provided for by the EU legislation on combined transport but instead constituted cabotage transport. Therefore, according to the Federal Office, these cases violated Article 8 of Regulation 1072/2009, which sets a limit of three cabotage transports in seven days. The infringement was attributed to BW, the managing director of TIM-Trans[47].

Contrary to the Federal Office's interpretation of EU law, BW claimed during a hearing that the transport of empty containers carried out by her company constituted an integral part of combined transport and therefore fell within the scope of Directive 92/106. In fact, BW specified that the main purpose of the TIM-Trans' activity was to transport full containers to a port for shipment by sea, and that, in this context, the company also took over empty containers

[45] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22.

[46] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 14.

[47] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 15.

from one container terminal and returned them, once emptied, to another container terminal[48].

The Federal Court took a different view and, considering the transport of empty containers before loading and after unloading to be subject to the limits of Regulation1072/2009, imposed a fine on BW[49].

At this point, BW lodged an appeal against the Federal Court's decision before the *Amtsgericht Köln* (District Court, Cologne, Germany), the referring court of this case[50].

The District Court considered that, on the one hand, Regulation 1072/2009 did not allow the transports at issue to be classified as part of combined transport or not[51]. On the other hand, the referring court raised doubts as to whether Directive 92/106 should be interpreted broadly[52].

Assuming that it was unable to rule on the dispute at issue in the main proceedings, the referring court therefore decided to stay the proceedings and, by way of a reference for a preliminary ruling, asked the Court to rule on the following question: *"Is the transport of empty containers to or from the loading or the unloading point an inseparable part of the transport of the loaded containers such that the transport of the empty containers benefits from the privileged*

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[48] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 16.

[49] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 17. In the field of transport, infringement of European legislation must be sanctioned by the competent authorities of the country of establishment of the haulier. In the present case, the transporter is represented by the company Contargo, which is based in Germany, so it is the German authorities who have the prerogative to sanction possible infringements. On this point, see F. Munari, L. Carpaneto, *Trattato sul funzionamento dell'Unione europea, Art. 91*, cit., p. 716.

[50] The Court of Justice of the EU enjoys, inter alia, non-contentious preliminary ruling jurisdiction. Indeed, it may give preliminary rulings on the interpretation of EU law and acts of the EU institutions. That jurisdiction may be exercised by national courts and tribunals of all levels, which must stay in the main proceedings and ask the Court to give a ruling on the interpretation of the EU legislation in question. For further information on the preliminary ruling jurisdiction of the EU Court of Justice, see R. Adam, A. Tizzano, *Lineamenti di diritto dell'Unione europea*, cit., p. 287.

[51] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 19.

[52] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 20.

treatment afforded to the transport of the full containers in so far as those empty containers are exempt from the cabotage rules in the context of combined transport?"[53].

In its initial part, the CJEU's ruling refers to the definition of combined transport within the meaning of Directive 92/106[54] and of cabotage within the meaning of Regulation 1072/2009[55], suggesting that the Directive provides for a more extensive liberalisation of the transports falling within its scope, even more so considering that the Regulation places restrictions on cabotage transport[56].

In its reasoning, the Court focuses on the relationship between the Directive and the Regulation, finding that one is to be applied without prejudice to the provisions of the other and vice versa[57], as also Advocate General De La Tour suggests[58]. In this regard, the Court recalls Recital 16 of the Regulation, which specifies that road transport operations in a host Member State that are not part of a combined transport operation within the meaning of the Directive automatically fall within the definition of cabotage transport operations and, therefore, within the scope of the Regulation. In the Court's view, therefore, the main issue to be solved is whether the transport operations in question form part of a combined transport[59].

At the same time, the Directive does not explicitly regulate the carriage of empty containers, so that, according to the Court, a teleological and systematic interpretation is required, which should

[53] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 21.

[54] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 23.

[55] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 25.

[56] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 27.

[57] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, paras. 32-33.

[58] Opinion of the Advocate General of the Court of Justice of 20 April 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 26.

[59] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 34.

consider the context and the purpose of this legal act[60]. The Advocate General shares this view, and he also specifies the autonomy, specificity, and pursuit of different objectives of these two instruments[61].

Endorsing the Advocate General's analysis[62], the Court considers that the transport of empty containers is ancillary, but necessary, to the main transport of goods and that this is the only possible interpretation if the objectives pursued by the Directive are to be achieved[63].

In conclusion, the Court finds that the transport of empty containers falls within the concept of combined transport and is therefore subject to the rules laid down in Directive 92/106 and to the favourable regime that the Directive provides for[64].

4. *Final observations*

The judgment, although concise in providing an interpretation on the applicability of the Combined Transport Directive, is clear in establishing that the service of transporting empty containers is ancillary to, but necessary for, the transport of full containers within the framework of combined transport.

In this respect, *B.W. v Staatsanwaltschaft Köln*'s very first contribution is that it clarifies and broadens the definition of combined transport within the meaning of the Directive which, in the past, has been regarded as a critical issues[65]. Therefore, it will be easier for

[60] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 36.

[61] Opinion of the Advocate General of the Court of Justice of 20 April 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 31.

[62] Opinion of the Advocate General of the Court of Justice of 20 April 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 38.

[63] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 37.

[64] Judgment of the Court of Justice of 14 September 2023, Staatsanwaltschaft Köln and Bundesamt für Güterverkehr v BW, C-246/22, para. 43.

[65] Doubts about the definition of combined transport as set out in Directive 92/106 were raised in both proposals for revision of the Directive, in 1998 and 2017 respectively. In particular, as mentioned by the Advocate General in his Conclusions at para. 33, the 2017 proposal clarified, in the rewording of Article 3, that the definition of combined transport

national authorities and carriers to understand when a movement of empty containers falls within the definition of combined transport, and this may contribute to a greater spread of combined transport. In fact, since the Combined Transport Directive provides advantages for those road hauliers that choose it, such as exemptions from limits on vehicle weight and dimensions and tax relief[66], it is likely that a clearer and more extensive definition of combined transport will lead to its greater diffusion, helping to achieve the positive aspects that characterise it.

Some possible practical effects that the ruling will have on operators should be also appreciated, and indeed some organisations of the transport sector and legal operators already welcomed the judgment. First, a clearer definition of combined transport contributes to the harmonisation of different interpretations adopted by the Member States and, therefore, to greater legal certainty for market players[67]. Second, the judgment leads to the limitation of cabotage and, consequently, to a push towards greater liberalisation of combined transport[68]. Third, the decision also has a positive effect on multimodal transport in general, insofar as imposing restrictions arising from cabotage would be a disincentive to operate this type of transport[69].

Ultimately, the positive effects of the ruling on market players lead, in the long run, to a benefit for the environment[70], such as the

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may include *"[...] the transport of empty load units before and after the transport of goods"*.

[66] Article 6, Directive 92/106. See also T. JANSEN, J. BLANCKAERT, *Revision of the Combined Transport Directive*, cit., p. 2.

[67] For the opinion of the European Association for Forwarding, Transport, Logistics and Customs Services (CLECAT) on this, see CLECAT, *ECJ Rules Transport of Empty Containers No Longer Covered by Cabotage Rules*, online, 29 September 2023, available at the following link: https://www.clecat.org/en/news/newsletters/ecj-rules-transport-of-empty-containers-no-longer- (last access 15 February 2025). See also the opinion of the law firm TIGGES, *ECJ: Transport of Empty Containers in Combined Transport is Not Cabotage*, online, available at the following link https://www.tigges.legal/en/ecj-transport-of-empty-containers-in-combined-transport-is-not-cabotage-.html (last access 15 February 2025).

[68] CLECAT, *ECJ Rules Transport of Empty Containers No Longer Covered by Cabotage Rules*, cit.

[69] Ibidem.

[70] As mentioned above, the EU has identified combined transport as an effective method to reduce the environmental impact of freight transport. See, ex multis, M. MINÁRIK,

reduction of emissions[71]. And, finally, it seems that there are also positive effects in economic terms for companies that choose combined transport[72].

The Commission seems to have welcomed the interpretation on the transport of empty containers provided by the CJEU. In its proposal for a new directive on combined transport, it is in fact specified that the transport by road of an empty container that has the characteristics of the transports considered in the judgment falls within the definition of combined transport[73]. Although it is difficult to foresee the outcome of this proposal in the short term, since the Parliament will have to decide on it in this legislative period, the contribution of case law to the development of EU law is once again to be appreciated.

Even though the interpretation given in *B.W. v Staatsanwaltschaft Köln* addresses only one of the issues that make Directive 92/106 lacking in efficiency and clarity, the synergy between the Court of Justice and the Commission is conspicuous and an added value.

The ruling, while settling an apparently liminal issue of the definition of combined transport within the meaning of the Combined Transport Directive, corroborates a broader path at EU level that has been intersecting, for some time now, transport policy with environmental issues, seeking to minimise the negative impact of road transport by providing the right incentives to companies expressing a willingness to switch to combined transport.

Though the importance of the Court's interpretation is undoubted, it should also be emphasised that the judgment and, more generally, the mere adoption of EU legislation is not sufficient for the proper spread of combined transport as promoted by EU policies. The benefits of combined transport, whether they may be environmental or

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Sustainable Transport of Goods Using Combined Transport Solutions: The Case of EU, in *Naše gospodarstvo/Our Economy*, 67(2), 2021, p. 29, at p. 30.

[71] CLECAT, *ECJ Rules Transport of Empty Containers No Longer Covered by Cabotage Rules*, cit.

[72] L. Capoani, L. Rotaris, S. Tonelli, *Trasporto combinato: una scelta vincente per le imprese e per l'ambiente*, in *Ragioni Comuni*, 2, 2023, p. 217.

[73] Article 1 quarter (3), Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/106/EEC.

financial for companies, still prove to be poorly publicised among multimodal transport operators[74].

It is therefore to be hoped that the synergy between the CJEU and the Commission will result in the adoption of the proposal drawn up by the Commission and that, at the same time, combined transport will be given a higher profile as an environmentally and economically efficient mode of freight transport[75].

[74] The development of the proposal can be followed at the link: https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2023/0396(COD)&l=en (last access 20 February 2025).

[75] L. CAPOANI, L. ROTARIS, S. TONELLI, *Trasporto combinato: una scelta vincente per le imprese e per l'ambiente*, in *Ragioni Comuni*, 2, 2023, p. 219.

Influence of "Soft Law" on the Position of "Gatekeepers" or Operators of Digital Platforms in Achieving the Objectives of the Digital Markets Act

Natalija Kunstek

1. *Summary*

Like Directive 2011/16 on administrative cooperation in the field of taxation[1], also the Digital Markets Act[2] aims for fair competition. This is achieved by shifting responsibility to the main actors, specifically goalkeepers in the case of the Digital Markets Act.

When assessing the responsibility of goalkeepers based on the penal provisions of the regulation, their responsibility is significant. Penalties are prescribed up to one-fifth of the goalkeeper's income, and in exceptional cases, even with operational prohibitions. The

[1] Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

[2] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directive (EU) 2019/1937 and EU 2020/1828 Digital Market Act in PE 17/2022/REV/01 OJ L 265, 12.10.2022, p. l, hereinafter referred as Digital Market Act.

same applies to the Directive 2011/16/EU, where penal provisions define activity restrictions.

The legal consequence of non-compliance with these regulations is sanction. But can this sanction also be imposed based on the provisions of 'soft law', such as specific contributions from the Commission's Guidelines or the Slovenian Tax Authority's standpoint? In other words, how can 'soft law' influence the imposition of penalties based on penal provisions?

This paper presents a comparative analysis of the impact of soft law on achieving the objectives of both regulations. Among other things, we are interested in whether the legal consequences of the application of soft law can affect the obligated parties of a particular regulation, even in cases where it is not a Regulation, such as the Digital Markets Act, but rather a Directive, such as Directive 2011/16/EU.

If 'soft law' serves as the foundation for binding law, 'soft law' should not be the basis for imposing sanctions. However, as explained in the article, the Commission's Guidelines must generally be respected; otherwise, a member state may face sanctions. Consequently, even a member state demands compliance with these Guidelines. Therefore, if a goalkeeper fails to adhere to the Guidelines, they may face penalties under the Digital Markets Act.

Now, let's consider the standpoint of the Slovene tax authority and its impact on Directive 2011/16/EU implementation in this article. Firstly, Directive 2011/16/EU gained its actual legal force only upon its implementation into the Slovenian legislative system. It was transposed through the Tax Procedure Act[3]. For the purposes of defining the impact of soft law (Slovene Tax Authorities' information's, on the enforcement of the Tax Procedure Act, and indirectly on Directive 2011/16/EU, it's essential to emphasize the principle of legal protection of trust. If the Slovenian Tax Authority

[3] Tax Procedure Act of the Republic of Slovenia. Official Gazette of the Republic of Slovenia, No. 13/11 – Consolidated Text, 32/12, 94/12, 101/13 – ZDavNepr, 111/13, 22/14 – Decision of the Constitutional Court, 25/14 – ZFU, 40/14 – ZIN-B, 90/14, 91/15, 63/16, 69/17, 13/18 – ZJF-H, 36/19, 66/19, 145/20 – Decision of the Constitutional Court, 203/20 – ZIUPOPDVE, 39/22 – ZFU-A, 52/22 – Decision of the Constitutional Court, 87/22 – Decision of the Constitutional Court, 163/22, 109/23 – Decision of the Constitutional Court, and 131/23 – ZORZFS.

imposes sanction, based on their standpoint or opinion per Article 13 of Slovene Tax Procedure Act, they provide an "binding" explanation to taxpayer, explaining the material law, which is not something the Slovene Tax Authorities is allowed to do per Article 13 of Slovene Tax Procedure Act. Namely, if Slovene Tax Authorities shall issue a standpoint in provisions of Directive, taxable person should follow it, otherwise it can get penalized in case of tax inspection.

Therefore, generally the «soft law' is not supposed to have a legal effect, but indirectly, it often does. From the perspective of the Commission's Guidelines, this effect is evident through the prescribed sanctions for member states when they fail to comply. Similarly, in the case of the Slovene tax authority's opinions, where the legal consequence might arise in case of tax inspection when Slovene Tax Authorities follow their standpoint or opinion.

To conclude, even though the Commission's Guidelines lack legal validity, they must still be respected. On the other hand, the tax authority's opinions shall only be informative writings intended for taxpayers, rather than material law interpretations. However, their indirect impact is unavoidable in the case of tax audits.

2. *Introduction*

This paper examines the impact of so-called "soft law" on the actions of "gatekeepers" during the implementation of Regulation (EU) 2022/1925 of the European Parliament and the Council of September 14, 2022, on contestable and fair markets in the digital sector and the amendment of Directives (EU) 2019/1937 and (EU) 2020/1828 (the Digital Markets Act). The analysis is based on the following thesis: "Soft law" may have adverse legal consequences for the position of digital platform operators, or "gatekeepers," which could affect the (non-)achievement of the Digital Markets Act's objectives. This thesis was tested using a comparative analysis of the impact of "soft law" on EU legislation, specifically Council Directive (EU) 2021/514 of March 22, 2021, amending Directive 2011/16/EU on administrative cooperation in the field of taxation (Directive 2011/16/EU). While the latter mainly ensures fair competition, it pursues a comparable objective to the Digital Markets Act.

The paper focuses on the objectives of both legislative acts, which primarily aim to establish fairer competition. At the conclusion, we address the legal consequences arising from the penalty provisions of both legislative acts and the use of "soft law" for "gatekeepers" or platform operators. We assume that penalty provisions are inherently designed to achieve the goals of the regulations and thus represent the only evident legal consequences for "gatekeepers" or platform operators.

The Digital Markets Act establishes clear rules for large "gatekeeper" platforms, e.g. Amazon, Meta, Apple, offering so-called "core platform services," ensuring that they do not abuse their position, such as by favoring their own products or preventing users from installing external applications. This regulation imposes limitations on "gatekeepers" and assigns them responsibility in cases of non-compliance. Non-compliance with the provisions of the Digital Markets Act is subject to substantial penalties.

Directive 2011/16/EU strengthens administrative cooperation and digital platform integration. It sets rules to improve administrative collaboration in taxation and addresses challenges posed by the digital platform economy. Increasingly, individuals and businesses use digital platforms to sell goods or provide services. However, the income generated through digital platforms is often not reported, and taxes are consequently unpaid, particularly when digital platforms operate across multiple countries. EU member states thus lose tax revenue, and traders on digital platforms gain an unfair advantage over traditional businesses.

In the pursuit of fair competition in digital platform business operations, especially for large corporations, two key questions arise. First, how does "soft law," such as European Commission Guidelines, influence the implementation of the Digital Markets Act? Second, can the Slovenian tax authority, through its interpretations under Article 13 of the Slovene Tax Procedure Act (ZDavP-2)[4], influence the implementation of Directive 2011/16/EU on administrative cooperation in taxation?

[4] Official gazette of RS, No. 21/06 with amandments.

3. *History of the Digital Markets Act and Directive*

The EU legal framework[5] for digital services has not changed since the adoption of the E-Commerce Directive in 2000[6], but digital technologies, services, and business models have rapidly evolved. In this context, the European Commission presented a digital services package in December 2020, consisting of the Digital Services Act (DSA[7]) and the Digital Markets Act (DMA). Together, the DSA and DMA define the framework and introduce measures to protect users while supporting innovation in the digital economy.

On November 25, 2021, EU member states unanimously adopted the Council's position on the Digital Markets Act[8]. A provisional agreement within the Council and the European Parliament was reached on March 24, 2022, and then confirmed by EU member states' representatives on May 11, 2022. The European Parliament adopted the provisional agreement on the Digital Services Act on July 5, 2022, and the Council ratified it in September 2022.

A similar process occurred with the adoption of the amendments to Directive 2011/16, which began being implemented in 2023.

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[5] Council of the European Union (2021). The Council adopted new rules to strengthen administrative cooperation and include sales through digital platforms. Retrieved February 29, 2024, from https://www.consilium.europa.eu/sl/press/press-releases/2021/03/22/taxation-council-adopts-new-rules-to-strengthen-administrative-cooperation-and-include-sales-through-digital-platforms/.

[6] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), in OJ L 178, 17.7.2000, p. 1.

[7] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), in OJ L 277, 27.10.2022, p. 1.

[8] Retrieved September 13, 2024, from https://www.consilium.europa.eu/sl/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/.

4. *Objectives of the Digital Markets Act*

The Digital Markets Act (DMA)[9] is intended to ensure a fairer digital market for all businesses, primarily by preventing the abuse of monopoly positions held by large and influential global platforms. Indirectly, it aims to provide greater protection for internet users in the EU. Large online platforms will no longer be allowed to track users across different platforms, preventing the removal of pre-installed apps, or hindering alternative services. The use of their data for targeted advertising is also prohibited.

The Digital Markets Act applies only to large global companies, which are defined in the Act as "gatekeepers" based on objective criteria. These are companies that control at least one core platform service, such as online marketplaces, search engines, messaging services, social networks, or operating systems, and have a large user base across multiple EU countries[10]. "Gatekeepers" are required to enable interoperability with their services, provide access to platform-generated data, ensure transparency, and allow the promotion of offers from other companies. "Gatekeepers" must no longer discriminate against competing services or prevent the connection of consumers with businesses outside their platforms. However, they still can develop innovations and services.

The primary goal of the Digital Markets Act is to create a fairer economic and technological environment that empowers small and medium-sized technology companies, offering protection from large global platforms such as Apple and Facebook. These companies are no longer allowed to engage in unfair business practices such as an important gateway between businesses and consumers in relation to core platform service, e.g. using data to perform marketing service or advertising As a result, competition and innovation from smaller players in the EU market will increase, giving them more

[9] Government Office of the Republic of Slovenia for Digital Transformation (2022). The Digital Markets Act has come into effect. Retrieved February 29, 2024, from https://www.gov.si/novice/2022-11-04-v-veljavo-stopil-akt-o-digitalnih-trgih/.

[10] First paragraph of Article 3 of the Digital Markets Act: "*A company is designated as a gatekeeper if it has a significant impact on the internal market, provides a core platform service that is an important gateway through which business users reach end users, and has a stable and durable position in the performance of its activities, or is expected to have such a position in the near future.*"

opportunities to develop services and ensuring fairer and more equal market access. Before the Digital Market Act big platforms were enabled to gather more data from more customers and use them for marketing. Consequently, more clients hired them, because of a better result. On the other hand, small players had small EU Market, because small players could not give their clients marketing as wide as big players with more contacts.

The Digital Markets Act addresses key issues hindering the development of digital markets, such as weak competition, unfair practices by large players, and fragmented legal regulation within the EU. It also indirectly enhances the protection of individuals, as their data generated while browsing the web or using apps cannot be collected or sold to advertisers without explicit consent. The regulation is expected to lead to a larger number of available apps and online services, and, due to increased market competition, prices are likely to decrease.

Based on the introduction to the Digital Markets Act[11], the key objectives of this Act can be understood as: first, ensuring a competitive and fair digital sector in general; and second, specifically ensuring competitive and fair core platform services that foster innovation, high-quality digital products and services, fair and competitive prices, as well as high quality and choice for end users in the digital sector.

The question of whether, and to what extent, "soft law" can influence the achievement of these defined objectives, and how it might do so, will be addressed in the following sections of this paper.

5. *Objectives of Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation*

The Digital Markets Act and Directive 2011/16 share comparable objectives. Therefore, this paper presents a comparative analysis of the impact of soft law on achieving the goals of both regulations. Among other things, we are interested in whether legal consequences arising from the application of soft law can affect the obligations of

[11] Digital Market Act, Point 107 of the Recitals.

subjects under a specific regulation, even in cases where it is not a Regulation, like the Digital Markets Act, but a Directive, such as Directive 2011/16/EU.

Unlike EU Regulations, EU Directives require member states to implement them into their national legal frameworks. Korkea-aho[12] suggests that the substantive content of EU Directives can only be clarified post-implementation and proposes the following approach for the European Union courts regarding legal interpretation: "*When adjudicating on framework legislation, the courts should acknowledge administrative reasoning. This is a form of reasoning that embodies the development of framework directives by multiple actors in the form of soft law guidance. Its use by the courts requires clarification of the unclear legal authority of guidance, and the article concludes by discussing early judicial steps in this direction'*.[13]"

In 2021, new rules were adopted under Directive 2011/16/EU to strengthen administrative cooperation and include sales via digital platforms.[14]

According to a communication from the EU Council[15], an increasing number of individuals and businesses use digital platforms for selling goods or providing services. However, the income generated through these digital platforms is often not reported, and taxes are not paid, especially when digital platforms operate across multiple countries. Consequently, member states lose tax revenue, and professionals on digital platforms gain an unfair advantage over traditional businesses.

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[12] KORKEA-AHO E., *Legal interpretation of EU framework directives: A soft law approach*, in *European Law Review*, 2015, pp. 70-88.

[13] KORKEA-AHO E., *Legal interpretation of EU framework directives: A soft law approach*, cit., p. 70.

[14] Council of the EU (2021). Taxation: The Council adopted new rules to strengthen administrative cooperation and include sales through digital platforms. Retrieved February 29, 2024, from https://www.consilium.europa.eu/sl/press/press-releases/2021/03/22/taxation-council-adopts-new-rules-to-strengthen-administrative-cooperation-and-include-sales-through-digital-platforms/.

[15] Council of the EU, 2021, Taxation: Council adopts new rules to strengthen administrative cooperation and include sales through digital platforms; https://www.consilium.europa.eu/sl/press/press-releases/2021/03/22/taxation-council-adopts-new-rules-to-strengthen-administrative-cooperation-and-include-sales-through-digital-platforms/, accessed February 29, 2024.

This issue is intended to be addressed through amendments to Directive 2011/16. Based on these amendments, operators of digital platforms are required to report the income generated by sellers on their platforms, and member states must automatically exchange this information.

The rules in question encompass digital platforms both within and outside the EU and have been in effect since January 1, 2023. National tax authorities are thus enabled to identify income generated through digital platforms and determine the corresponding tax obligations. Additionally, operators of digital platforms will find it easier to comply with requirements, as reporting will occur in only one member state under a common EU framework.[16]

This represents a significant update to EU rules, aimed at ensuring that sellers active on digital platforms also pay their fair share of taxes.

The provisions of the Directive were incorporated into Slovenian law in December 2022 through an amendment to the Tax Procedure Act (ZDavP-2N)[17]. According to Chapter III.C of the fourth part of ZDavP-2, operators of digital platforms are required to report to the Financial Administration of the Republic of Slovenia (FURS) information regarding the business activities of sellers operating through digital platforms. The business activities for which reporting is mandatory include rental of real estate, personal services, sale of goods, and rental of any mode of transportation.

Given that the provisions of Directive 2011/16/EU have been transposed into Slovenian law under Chapter III.C of the fourth part of ZDavP-2, a question arises as to whether the Slovenian tax authority can influence the implementation of ZDavP-2 in relation to Directive 2011/16/EU through its positions in Articles 13 and 14 of ZDavP-2.

Positions and explanations from the Slovenian tax authority appear in various forms. These include brochures and positions of the tax authority, often referred to as "non-binding" legal information

[16] Digital Market Act, Article 11.

[17] Financial Administration of the Republic of Slovenia (2022). Data exchange reported by platform operators (MRDP/DAC7). Retrieved February 29, 2024, from https://www.fu.gov.si/nadzor/podrocja/mednarodna_izmenjava/izmenjava_podatkov_ki_jih_sporocajo_operaterji_platform_dpi_model_rules/dac7/#c9128.

under Article 13 of ZDavP-2, as well as "binding" legal information from the tax authority in accordance with Article 14 of ZDavP-2, which includes APA agreements and others.

Regarding the so-called "non-binding" information, it is not intended to assert that the tax authority's information is not legally protected. It is even argued that the tax authority must adhere to its information[18]. However, the legal certainty of tax subjects is often questionable in practice when it comes to writings from the tax authority that are not explicitly defined as binding information.

In cases of binding information, the legal certainty of the taxpayer is somewhat higher. Nevertheless, even in the case of binding information, the legal certainty of the taxpayer is questionable, particularly regarding the possibility of changes or withdrawals of the relevant information by the tax authority.

Since binding information incurs a fee, they are limited in number. While there are more non-binding opinions, in cases of disagreement between the taxpayer and the tax authority, as already argued elsewhere[19], the tax authority can insist on its interpretation, and the taxpayer may face negative consequences, such as sanctions, for "misreading" the tax authority's explanation.

In the context of the Digital Markets Act and Directive 2011/16/EU, as well as the provisions of Chapter III.C of the fourth part of ZDavP-2, such legal consequences for taxpayers or platform operators are sanctions, which we analyze further.

6. *Sanctions in Case of Violations*

In defining sanctions, we utilize Pavčnik's[20] assertion that the structure of a legal rule is fourfold. One of these components is sanction. Thus, a legal rule, along with its sanction, highlights everything necessary to understand the lawful behavior and actions that legal entities should undertake; otherwise, a sanction follows.

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[18] CHAN W., *Binding Rulings*, in *Fiscal Studies*, 1997, pp. 189-210.

[19] KUNSTEK N., *The Legal Nature of Tax Authority Positions*, in *Tax and Financial Practice*, 2024, p. 20.

[20] PAVČNIK, M., *Theory of Law: A Contribution to Understanding Law*, Ljubljana, 2020, p. 96.

6.1. *Digital Markets Act*

When a large online company is defined as a gatekeeper, it must comply with the rules of the Digital Markets Act within six months. If a gatekeeper violates the rules set forth in the Digital Markets Act, a fine of up to 10% of its total global revenue may be imposed. In cases of repeated violations, a fine of up to 20% of its total global revenue may be imposed.[21] The penalties are thus exceptionally high; up to one-fifth of the gatekeeper's revenue.

If a gatekeeper systematically violates the Digital Markets Act, i.e., commits at least three violations within eight years, the European Commission may initiate a market investigation and, if necessary, impose behavioral or structural remedies[22]. In this regard, the Council of the European Union, on its website, states that fair competition in the digital services sector is crucial to ensure that all businesses and consumers can equally capitalize on digital opportunities[23].

6.2. *Directive on Administrative Cooperation in the Field of Taxation (Directive 2011/16)*

In the case of Directive 2011/16/EU, sanctions are defined in such a way that the supervisory authority, in the event of a violation of the provisions (ZDavP-2N), may require a corrected report or issue a decision prohibiting the conduct of activities.

7. *Implementation of the Digital Markets Act is Exclusively within the Competence of the European Commission*

The Digital Markets Act also stipulates that its implementation is exclusively within the competence of the European Commission.[24]

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[21] Digital Market Act, Article 30 and Article 31.

[22] Digital Market Act, Recital 75.

[23] Digital Market Act, Third point of Article 18.

[24] Government Office of the Republic of Slovenia for Digital Transformation (2022). The Digital Markets Act has come into effect. Retrieved February 24, 2024, from https://www.gov.si/novice/2022-11-04-v-veljavo-stopil-akt-o-digitalnih-trgih/.

Based on the introduction of the Digital Markets Act, it is understood that if gatekeepers' resort to practices that are unfair or restrict competition in core platform services already named under the Digital Markets Act, yet where such practices are not explicitly regulated by this regulation, the European Commission must have the ability to update this regulation through delegated acts[25]. For updates via delegated acts, the same investigative standard should be applied, and such updates should be conducted following a market investigation. Also, in determining these types of practices, the European Commission should use a predetermined standard. This legal standard should ensure that the type of obligations that may be imposed on gatekeepers under this regulation is sufficiently predictable.

7.1. *Legally Binding Delegated Acts*

Through legally binding delegated acts, the European Commission can supplement or amend non-essential parts of EU legislative acts, thus defining measures in greater detail.[26] The European Commission adopts a delegated act that enters into force unless opposed by the Parliament and the Council. The European Commission adopts a delegated act based on the authority granted in the text of the EU legal act[27], in this case, legislative.

The European Commission adopts delegated acts under strict limitations, as a delegated act cannot change the essential elements of the legislative act; the legislative act must define the objectives, content, scope, and duration of the given mandate, and the European Parliament and Council can revoke the mandate or oppose the delegated act.

According to Article 49 of the Digital Markets Act, this measure is enabled by the European Commission.

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[25] Digital market Act, Point 79 of the Recitals.

[26] Types of EU Legal Acts (2024). Retrieved January 15, 2024, from https://commission.europa.eu/law/law-making-process/types-eu-law_sl#types-of-eu-legal-acts.

[27] European Commission (2024). Definition of Delegated Acts. Retrieved January 10, 2024, from https://commission.europa.eu/law/law-making-process/adopting-eu-law/implementing-and-delegated-acts_sl#implementing-acts.

7.2. *Adoption of Guidelines by the European Commission*

According to the Introduction to the Digital Markets Act, the European Commission has the option to prepare guidelines and provide additional guidance on various procedural aspects of the Digital Markets Act or to assist companies providing core platform services in fulfilling their obligations under the Digital Markets Act. Such guidance should be based on the experiences the European Commission gains from monitoring compliance with the Digital Markets Act. The issuance of any guidelines based on the Regulation, or the Digital Markets Act is the exclusive authority and discretion[28] of the European Commission and should not be considered an essential element in ensuring that the relevant companies or business associations comply with their obligations under the Digital Markets Act.

According to Article 46 of the Regulation or the Digital Markets Act, it is stipulated that the European Commission may adopt implementing acts that establish detailed arrangements for the application of certain articles of the Digital Markets Act.

In preparing the draft of the relevant implementing act, the Commission consults the European Data Protection Supervisor, and may also consult the European Data Protection Board, civil society, and other relevant experts regarding the form, content, and other details of official notifications and submissions made under the articles specified in Article 46 of the Digital Markets Act.

Regarding the Guidelines of the European Commission, Article 47 of the Regulation or the Digital Markets Act states that the European Commission may adopt guidelines on any aspect of this regulation to facilitate its effective implementation and enforcement.

According to Article 48 of the Digital Markets Act, the European Commission may, as necessary and when appropriate, mandate European standardization bodies to develop relevant standards to facilitate the implementation of obligations under this regulation.

Since the Court assesses decisions made by the European Commission under the Digital Markets Act according to the TFEU, the

[28] Digital Market Act, Point 97 of the Recitals.

Court should have unlimited jurisdiction regarding penalties pursuant to Article 261 TFEU[29].

7.3. *Competences of National Authorities Regarding the Digital Markets Act*

Effective and complementary enforcement of the available legal instruments applicable to gatekeepers requires cooperation and coordination between the European Commission and national authorities within their competences[30]. The European Commission and national authorities should cooperate and coordinate their actions necessary for the enforcement of the available legal instruments applicable to gatekeepers under this regulation and respect the principle of loyal cooperation as outlined in Article 4 of the Treaty on European Union (TEU)[31].

7.4. *Competences of National Authorities Regarding Directive 2011/16/EU*

Slovenia implemented the Directive into its national legal framework through the amendment of the Tax Procedure Act[32] (ZDavP-

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[29] Article 261 TFEU: "*With regulations adopted in accordance with the provisions of the Treaties by the European Parliament and the Council jointly and those adopted by the Council alone, the Court of Justice of the European Union may be granted unlimited jurisdiction regarding the penalties provided for in these regulations."*

[30] Digital Market Act, Point 91 of the Recitals.

[31] Article 4 TEU: "*Member States retain all powers not conferred on the Union by the Treaties in accordance with Article 5. The Union respects the equality of Member States before the Treaties as well as their national identity, which is inherent in their fundamental political and constitutional structures, including regional and local self-government. It respects their essential state functions, ensuring territorial integrity, maintaining public order, and safeguarding national security. National security remains the exclusive competence of each Member State. The Union and the Member States respect and assist each other in fulfilling the tasks arising from the Treaties based on the principle of loyal cooperation. Member States take all general or specific measures necessary to ensure the fulfillment of the obligations arising from the Treaties or acts of Union institutions. Member States support the Union in fulfilling its tasks and refrain from any measures that could jeopardize the attainment of the Union's objectives.*"

[32] Tax Procedure Act (Official Gazette of the Republic of Slovenia, No. 13/11 – consolidated text, 32/12, 94/12, 101/13 – ZDavNepr, 111/13, 22/14 – decision of the

2N), which means that for the purposes of this paper, it is comparable to the Digital Markets Act in terms of objectives and the wording of ZDavP-2N. post-implementation, the implemented provisions are entirely within the jurisdiction of Slovenian authorities.

If we have considered the Guidelines of Commission as "soft law" for Digital Markets Act, it is reasonable to consider the rulings, especially non-binding rulings issued by Slovenian tax authority the soft law for Directive 2011/16/EU or the Slovenian legal framework of Slovene Tax Procedure Act where the Directive 2011/16 is implemented.

From this perspective, we will further examine the influence of "soft law," specifically the Guidelines of the European Commission on the implementation of the Digital Markets Act and the positions of Slovene tax authority on the implementation of Directive 2011/16/EU or ZDavP-2. The discussion is directed towards the consequences for gatekeepers or platform operators. Since both cases involve legally defined sanctions, the next part of the paper is dedicated to them.

8. *The Influence of "Soft Law" on Achieving the Goals of European Regulations and Consequently the "Use" of Penal Sanctions*

8.1. Soft Law and Its Impact on Legislative Implementation

"Soft law," or "rules of conduct defined in instruments that do not have legal nature as such but have a certain – indirect – legal effect, and whose purpose is to achieve practical results [33]," has been used for some time to mitigate the lack of formal legislative authority and/or enforcement resources and has been characteristic of international public law.

Constitutional Court, 25/14 – ZFU, 40/14 – ZIN-B, 90/14, 91/15, 63/16, 69/17, 13/18 – ZJF-H, 36/19, 66/19, 145/20 – decision of the Constitutional Court, 203/20 – ZIUPOPDVE, 39/22 – ZFU-A, 52/22 – decision of the Constitutional Court, 87/22 – decision of the Constitutional Court, 163/22, 109/23 – decision of the Constitutional Court, and 131/23 – ZORZFS; hereinafter referred to as ZDavP-2).

[33] Legal Affairs Committee. The Use of Soft Law Instruments. 2009, p. 1.

At the European Union level, "soft law" encompasses everything from green and white papers, Council resolutions, joint statements, resolutions of the Council, codes of conduct, guidelines, communications, and recommendations, to a phenomenon known as "co-regulation." It also includes processes such as the "open method of coordination." It is worth noting that treaties explicitly provide for certain instruments of "soft law," particularly recommendations and communications, which will be emphasized the most in this paper.

Documents that could be classified under "soft law," as Maja Brkan[34] states in her paper titled "Soft Law and 'Hard' Legal Consequences," are guidelines that stakeholders typically adhere to, raising questions about their legal nature. On one hand, Brkan continues, these are "soft law"; on the other hand, documents sometimes also foresee legal sanctions, which is typical of classic legal norms.

Almost 20 years ago, Peters and Pagotto argued that soft law exists in a legal penumbra[35]. It can be easily distinguished from mere political documents, depending on its proximity to the prototype of law. Findings obtained from studying international soft law are relevant to the soft law of the EU despite certain differences between these legal regimes. This includes both the Guidelines of the European Commission and the information from the tax authority, which are relevant to our paper.

European soft law is created by institutions, member states, and private actors. Peters and Pagotto argue that the legal effects of soft law acts can be categorized based on their relationship with hard law. Both practical and normative aspects encourage reliance on soft law. An examination of the legal consequences of non-compliance with soft law shows that compliance monitoring mechanisms for hard and soft international law converge. Furthermore, some compliance factors are independent of the theoretical rigidity or softness of a given norm.

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[34] BRKAN M., *Soft Law and "Hard" Legal Consequences*, Retrieved February 29, 2024, from *https://www.iusinfo.si/medijsko-sredisce/kolumne/mehko-pravo-in-trde-pravne-posledice-306488, 2023.*

[35] PETERS A., PAGOTTO, O., *Soft Law as a New Mode of Governance: A Legal Perspective* in *NEWGOV – New Modes of Governance Project, 4: Democracy & New Modes of Governance*, University of Basel, 2006.

According to Korkea-aho[36], empirical evidence has shown that soft enforcement mechanisms for soft law could rationalize legislative action by providing the information and administrative resources necessary to conduct effective procedures for identifying violations. Additionally, managing implementation through collectives that utilize soft law reduces the burden of cases, as issues are resolved among participants, using soft law without judicial intervention.

Soft law can also enhance the legitimacy of governance and ultimately adjudication. Korkea-aho asserts that soft law is essential for the development and implementation of directive provisions. He argues that this type of soft law implementation, referred to here as administrative reasoning, embodies the work undertaken by multiple actors in the form of soft law guidelines. To fully unleash the (legitimizing) potential of soft law, its application by courts must be noted, he concludes, while also highlighting the ambiguous legal authority of soft law.[37]

On the other hand, Yamelska[38] suggests distinguishing soft law from traditional conceptions of international law, specifically as a system of universally binding norms developed by states while considering postmodern trends in the transformation of national legal systems.

Furthermore, Stefan[39] observes that court reasoning based on legal principles incorporates new soft law instruments issued at the Commission level, citing the Guidelines on the method of determining penalties[40] imposed under Article 23(2)(a), Paragraph 3 of

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[36] Korkea-aho E., *Watering Down the Court of Justice: The Dynamics Between Network Implementation and Article 258 TFEU Litigation* in *European Law Journal*, 2014, p. 649.

[37] Korkea-aho E., *Legal Interpretation of EU Framework Directives: A Soft Law Approach* in *European Law Review*, 2015, p. 70.

[38] Yamelska H.Yu., *The Legal Nature of Soft Law Acts of the Council of Europe* in *Uzhhorod National University Herald Series Law № 64,* 2021, p. 397-402.

[39] Stefan O.; Avbelj A., et al, *EU Soft Law in the EU Legal Order: A Literature Review*, available on SSRN. 2019.

[40] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ L 1, 4.1.2003, p. 1–25.

Regulation No. 1/2003 and the Commission's notice[41] on the establishment of valid rules for assessing illegal state aid as examples. I believe a similar principle could apply to the Guidelines of the European Commission based on provisions within the Digital Markets Act. This, as Stefan continues, is reflected in EU court rulings that complement the establishment of a so-called virtuous circle contributing to a comprehensive legal framework. At this point, Stefan notes that the Court remains cautious in applying the same principle when evaluating the effects that EU soft law may have at the national level.

Druzin[42] addresses the question of why soft law is often followed, even when it lacks legal validity. Druzin argues that the use of soft law depends on its breadth of application. The more stakeholders utilize soft law, the sooner a "snowball effect" occurs – an effect where soft law is widely applied. In contexts where its use is broad, soft law is uniquely suited to promote voluntary acceptance, even compliance. Policymakers can strategically exploit such soft law to encourage legal harmonization; however, Druzin cautions against the potential negative consequences in this case.

Stefan[43] argues that National courts of Member states (EU courts) do not recognize the significant consequences that EU soft law can have on the rights and obligations of individuals. Such an approach can negatively impact the legal enforceability of soft law, as it creates a space for an extensive set of EU instruments to evade judicial oversight. Moreover, soft law, without judicial recognition, fails to fulfill some of its key objectives, such as promoting legal certainty, transparency, and consistent application of rules in a multi-level EU governance system.

Reisman[44] suggests that the concept of soft law is useful for certain endeavors in international law, such as understanding the

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[41] *Commission's notice on the establishment of valid rules for assessing illegal state aid*, in OJ C119/22.

[42] DRUZIN H.B., *Why does Soft Law Have any Power Anyway?* in *Asian Journal of International Law, Volume 7, Issue 2, 2017, p.* 361 – 378.

[43] STEFAN O., *Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance* in *2014 King's College London Dickson Poon School of Law Legal Studies Research Paper Series, paper no. 2014-18, 2014.*

[44] REISMAN W.M., *Soft Law and Law Jobs* in *Journal of International Dispute Settlement, Vol. 2, No. 1,* 2011, p. 25–30.

process of creating international law and the politics behind the adoption of legal instruments. However, the author believes that soft law should be avoided in the activities of international judges and arbitrators. By adding the adjective "soft" to the term law, we introduce the idea that legality appears in degrees, where soft law is merely "slightly" legal in nature. This, in turn, introduces uncertainty into the regulatory regime. Uncertainty deters engagement in economic activities and is a favored technique of authoritarian governments. Therefore, international judges and arbitrators should exclusively use law that does not carry the label "soft."

Yi[45] argues that soft law serves as a fundamental means of interaction between customary and hard law.

Provencher emphasizes that even the Organisation for Economic Co-operation and Development (OECD), which generates tax norms often referred to as soft law, is at the center of tax normativity. Even without coercive power over states, these rules significantly influence their tax regimes. Consequently, these alternative normative processes could exert pressure on democratic theory. According to Habermas[46], it is precisely these democratic processes that enable law to assert legitimacy. He argues that a legal norm will be valid if its addressee perceives themselves as its author. Research has shown that the perception of fairness in the tax system and the impression of compliance by other taxpayers increase behavior towards tax compliance.[47]

Thus, various authors define the influence of soft law on legislative implementation differently. On one side, it is argued that soft law helps understand legislation; on the other, with widespread adherence to soft law, its influence can become comparable to hard law. In the context of both the Guidelines of the European Commission and the explanatory notes of the tax authority, I believe that both soft law institutes are widely utilized. This suggests that they could have comparable effects to hard law. Courts play a crucial role in this

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[45] Yi Z., *On the Relation and Transformation of Customary and Soft Law* in *2012 Journal of Shandong University (Philosophy and Social Sciences), issue 2, p. 94-100.*

[46] Habermas J., *Droit et démocratie, entre faits et normes,* Paris, 1997, p. 479.

[47] Provencher A., *Soft Laws and Tax Conformity: 'We are Not Accusing You of Being Illegal, we are Accusing You of Being Immoral'* in *Normativités alternatives et conformité fiscale: 2018 (2016) 50 RJTUM 821*, 2018, p. 822-859.

regard, yet as noted above, they currently appear reluctant to acknowledge soft law. This indicates that taxpayers per law could be sanctioned in both the case of the Digital Markets Act and Directive 2011/16/EU if they fail to comply with the Guidelines of the European Commission or the explanatory notes of the Slovenian tax authority.

8.2. *Commission Guidelines*

Guidelines, or recommendations, are intended for institutions to express opinions and propose specific actions without imposing legal obligations on the recipients. Recommendations are non-binding[48]. Since the European Commission has not yet issued guidelines regarding the implementation of the Digital Markets Act, and the purpose of this paper is to present the legal nature of EU Guidelines and their consequent impact on the liability of "gatekeepers," we summarize an example from Brkan's[49] article titled "Soft Law and 'Hard' Legal Consequences" to illustrate how Guidelines, as "soft law," can influence the legal consequences for stakeholders (including "gatekeepers").

Brkan states that "*the EU Commission's Guidelines for staff using online accessible generative artificial intelligence tools specify that employees must not share (or input into such programs) any information that is not already publicly available or personal data. A reference to Article 17 of the Staff Regulations for EU officials is included in a footnote to this provision, the violation of which is subject to disciplinary action. Therefore, although the European Commission's guidelines represent 'soft law,' the document anticipates sanctions for violations*[50]."

Furthermore, Brkan notes in her article that the EU Court has encountered the question of the legal nature of soft law several times.

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[48] LENAERTS K., DESOMER M. *Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures,* Malden, 2005.

[49] BRKAN M., *Soft Law and "Hard" Legal Consequences* from https://www.iusinfo.si-/medijsko-sredisce/kolumne/mehko-pravo-in-trde-pravne-posledice-306488, 2024, Retrieved February 29.

[50] BRKAN M., *Soft Law and "Hard" Legal* Consequences, cit., p. 1.

In the judgment in the joined cases AJFR[51] concerning the controversial Romanian judicial reform, the EU Court ruled that Romania must, in accordance with the principle of loyal cooperation, consider reports from the European Commission prepared based on the decision to monitor Romania's progress in the areas of judicial reform and the fight against corruption, even though such reports are generally non-binding."

Even though these reports do not foresee penalties, non-compliance with a ruling from the EU Court may lead to financial sanctions for the state based on the second paragraph of Article 260 TFEU[52].

Slovenia has experience with formally non-binding acts, as noted by Brlek. "Although the EU Court ruled in the Kotnik case (C-526/14) that the Commission's Communication on banking, which specified certain conditions for permissible state aid during the financial crisis, was not binding, non-compliance with this communication would de facto signify illegal state aid in Slovenia's bank resolutions."

Regarding the legal nature of the European Commission's recommendations, as used in a very old ruling from 1989 in case C-322/88[53], the court concluded that "the European list of occupational

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[51] C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, and C-397/19.

[52] Article 260 TFEU: "*If the Court of Justice of the European Union finds that a Member State has failed to fulfill an obligation under the Treaties, that Member State must take the measures necessary to comply with the judgment of the Court. If the Commission considers that the Member State has not taken the necessary measures to comply with the judgment of the Court, it may bring an action before the Court after allowing that Member State to submit its observations. The Commission shall determine the amount of the lump sum or penalty payment to be paid by the Member State, which it considers appropriate in the circumstances of the case. If the Court finds that the Member State has not complied with its judgment, it may impose a lump sum or penalty payment on that Member State. This procedure does not affect Article 259. 3. If the Commission brings an action before the Court under Article 258 because the Member State has failed to comply with the obligation to notify measures for the transposition of a directive adopted under the legislative procedure, the Commission may, when it considers appropriate, determine the amount of the lump sum or penalty payment which it considers appropriate in the circumstances and which the Member State must pay. If the Court finds a violation, it may impose a lump sum or penalty payment on the Member State that does not exceed the amount determined by the Commission. The obligation to pay takes effect from the date specified by the Court in its judgment.*"

[53] Judgment of the Court (Second Chamber) of 13 December 1989. Salvatore Grimaldi v Fonds des maladies, Case C-322/88.

diseases and Commission Recommendation 66/462 of July 20, 1966, on the conditions for granting compensation to victims of occupational diseases cannot, in themselves, confer rights on individuals that they can invoke before national courts. However, national courts are obliged to take these recommendations into account when deciding on disputes presented to them, particularly when they can illuminate the interpretation of other provisions of national law or Community law."

From the above, it can be concluded that the European Commission's Guidelines must be followed, but they do not confer rights on individuals.

8.3. *Tax Authority Positions*

In Slovenia, for example, Tax procedure Act explicitly determines that the positions (nonbinding information or binding opinion) are of an informative nature. However, the Law also provides for the issuance of so-called binding information from the tax authority, where the legal effect is not in question and are therefore not considered as "soft law" and furthermore not analyzed in this paper.

The non-binding positions of the tax authority or non-binding ruling should not have legal effects, as the relevant wording explicitly states that it is not a legal source.

According to the Case Law in Slovenia (Administrative Court ruling UP00047198[54]), the financial authority provided an explanation (non-binding ruling) that deviated from the obligation to adhere to the legal positions of the Administrative Court regarding the application of substantive rules and procedural rules. However, the court deemed this explanation unacceptable in the specific case, as such conduct directly contradicted the position adopted by the Constitutional Court. In this case, where the Slovene Constitutional Court clearly stated that the plaintiff has the right to participate in the tax inspection procedure at company A d.d., the financial authority directly violated the principle of legality in administrative procedures

[54] Judgment of the Administrative Court of the Republic of Slovenia No. UP0004798; ECLI:SI: UPRS:2021:I.U.1563.2019.11.

by interpreting substantive law contrary to the directives from the Administrative Court ruling.

In this matter, the Administrative Court of Slovenia ruled that the tax authority's explanation or rulings was inapplicable as it contradicted the position of the Constitutional Court.

Therefore, when are the relevant positions applicable?

Brkan[55] argues that there is a risk of "apparent bindingness" with soft law norms adopted by public authorities. According to her, the adoption of such guidelines may create the impression that there is no need for other binding legal acts. Furthermore, "soft law" is often characterized by the simultaneous adoption of multiple different guidelines, which can lead to inconsistencies in regulation. Therefore, if "soft law" does not become a binding norm, it should be treated as such—i.e., non-binding.

Moreover, as Trubeck, Cottrell, and Nance[56] state, "soft law" serves as a foundation or precursor for the adoption of binding legal acts. However, as long as a binding legal act is not adopted, "soft law" remains non-binding and should not have legal effects.

In addition, as Hart[57] notes, the law that exists is law, whether we like it or not. This truth is so straightforward that it seems sensible to follow it. What, then, is the position of the tax authority or the EU Guidelines? Is it law? The fact is that it should not be binding. Therefore, it should not have legal effects on "gatekeepers" or operators of digital platforms.

However, we must not forget, as Grad points out in his paper, that the principle of legality has many facets, all of which share a common respect for the law.[58]

Therefore, does respect for the law also mean merely adhering to a "seemingly" binding act of the tax authority? Should such an act be followed in the same manner as the European Commission's

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[55] Brkan M., *Soft Law and "Hard" Legal Consequences*, cit.

[56] Trubek D.M., Cottrell P., and others. '*Soft law', 'Hard Law', and European Integration: Toward a Theory of Hybridity* in *Univ. of Wisconsin Legal Studies Research Paper No. 1002*, 2005, p. 6.

[57] Hart H.L.A., *Positivism and the separation of law and morals*, in *The Harvard Law Review Association*, 2012.

[58] Grad F., *Nomotehnika, pravna država in politika*, in *Pravni letopis,* 2013, p. 5.

Guidelines? Affirmative, due to the need to ensure legal certainty for those affected by such positions.

9. *Conclusion*

The Digital Markets Act, like Directive 2011/16, aims for fairer competition. This is achieved through the two regulations by transferring responsibility to key actors, in the case of the Digital Markets Act, to "gatekeepers." If the responsibility of "gatekeepers" is measured based on the penal provisions of the regulation, their liability is significant, as penalties can be imposed up to one-fifth of the "gatekeeper's" revenue. In special cases, even a prohibition on operations may apply. Similarly, the penal provisions of the Directive also define prohibitions on conducting activities.

The legal effect of non-compliance with the relevant regulations is, therefore, a legally defined sanction. Can such a sanction also be imposed based on the content of the European Commission's guidelines or the positions of the Slovenian tax authority? Based on the above, it can be.

Accetto[59] states that the effectiveness of law depends on several factors, including the alignment of adopted rules with the interests of their recipients, the degree of stability of established patterns of social behavior, and the level of development of the legal system and the work of supervisory authorities that ensure the implementation of rules in practice. This sounds straightforward. However, it is not. Soft law is indeed one example where the alignment of adopted rules may be inconsistent with the interests of their recipients. Established patterns of social behavior, which previously adhered only to hard law, have significantly changed with the emergence of soft law. The same applies to the work of supervisory authorities; they often treat soft law as if it were hard law.

As defined above, "soft law" serves as a basis for binding law. If this is the case, "soft law" should not be a basis for imposing sanctions. However, as explained in this paper, compliance with guidelines is necessary, or the state may face sanctions. According to the

[59] ACCETTO A., *How to Restore Trust in Law* in *IUS INFO, 2011,* Retrieved February 29, 2024, from https://www.iusinfo.si/medijsko-sredisce/dnevne-novice/74908.

Court ruling C-322/88 from 1989, the European Commission's Guidelines must be followed. This consequently means that member states are required to comply with the Guidelines. Therefore, if the Guidelines are not adhered to by a "gatekeeper," they may face penalties under the Digital Markets Act.

Regarding the positions of the tax authority and their impact on the implementation of Directive 2011/16/EU or ZDavP-2, it is essential to emphasize the principle of protection of legitimate expectations in law. If the Slovenian tax authority penalizes taxpayers based on its positions, which should not have legal effects, this principle is undoubtedly undermined. According to Article 13 of ZDavP-2, the tax authority may only inform the taxpayer. It should not interfere with the interpretation of the substantive regulation in a manner that would have legal effects on the taxpayer, including in terms of imposing sanctions.

Concerning the principle of protection of legitimate expectations in law, Accetto notes that this principle is one of the fundamental principles of the legal order in Slovenia. According to the decisions of the Constitutional Court, it is encompassed in the principle of the rule of law as stated in Article 2 of the Constitution. For example, the Constitutional Court stated in decision U-I-89/99[60] that "the Constitution in Article 2 establishes Slovenia as a legal and social state. The rule of law must respect the principle of protection of legitimate expectations in law, legal certainty, and other principles of the rule of law. The principle of protection of legitimate expectations requires that individual decisions, which are lawful and adopted without prior reservations and are not transient by nature, remain stable. Law can fulfill its function of regulating social life if it is as constant and enduring as possible. Both the law and the conduct of all state authorities must be predictable, as this is required by legal certainty. The principle of protection of legitimate expectations assures individuals that the state will not worsen their legal position without reason based on prevailing public interest."

Furthermore, Accetto explains that this principle, like many others, is subject to balancing when it conflicts with other

[60] Decision of the Slovene Constitutional Court U-I 89/99; http://www.us-rs.si/documents/bb/99/u-i-89-992.pdf. (visited: September 28, 2024).

constitutionally protected goods, but at its core, it is undeniably established as one of the fundamental principles of the Slovenian legal order.

Jaderova and Hubalkova[61] also assert that legal certainty is an essential condition for individual autonomy, as a lack of certainty hinders planning future activities and making rational decisions. Like other key legal principles, it encompasses an axiological property that influences the interpretation of legal rules and the application of statutory provisions. Therefore, all branches of government should adhere to it.

Based on the foregoing, it can be concluded that "soft law" should not have legal effects, yet it often does so indirectly. In terms of the European Commission's Guidelines, this effect is evident based on the prescribed sanctions for member states in cases of non-compliance, while in the case of the tax authority's positions, it is based on the interpretation provided by the tax authority during tax inspections of taxpayers.

Therefore, the thesis that "soft law" can have negative legal consequences on the position of operators of digital platforms or "gatekeepers," which can also affect the (non)achievement of the objectives of the Digital Markets Act, must be affirmed.

Indeed, as derived from the above (particularly Brkan), the European Commission's guidelines, despite lacking legal validity, must be respected. Unlike the European Commission's guidelines, the positions of the Slovenian tax authority are still writings intended to inform taxpayers, not to interpret substantive regulations. Nevertheless, they have an indirect impact on the legal consequences for taxpayers, as the tax authority follows its writings during taxpayer inspections.

It may be prudent to clarify the legal nature of the soft law instruments that are applied and followed, such as the European Commission's Guidelines and the positions of the Slovenian tax authority.

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[61] JANDEROVÁ J., HUBÁLKOVÁ P., *Legal Certainty – Protected Values and Partial Objectives: The Case of the Czech Republic*, in *Central European Public Administration Review*, *2021,* p. 63-82.

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