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FOREWORD

WOJCIECH POSTULSKI
JUDGE, EJTN SECRETARY GENERAL



It is with great pleasure that I present the 2019 Themis Annual Journal, the first issue of a publication that is helping to propel the highly acclaimed EJTN THEMIS competition to new levels.

Allow me to begin with a brief recollection of the history of this competition, its structure and objectives. Themis is a long legacy of success. The event was created, financed and run from 2006 to 2009 by two EJTN member institutions – Portugal’s Centre for Judicial Studies (CEJ) and Romania’s National Institute of Magistracy (NIM). In 2010, the competition became an EJTN activity and steps were then taken to adapt and enlarge its format in order to recognise its importance within cross-border training in European law.

The THEMIS competition is open to future European countries’ magistrates undergoing entry-level training within the judicial profession. The competition creates a platform for debating legal topics, sharing common values, exchanging new experiences, discussing new perspectives and practicing judicial skills. Each year, the THEMIS competition consists of four semi-final rounds where up to 11 teams, each accompanied by a tutor, compete with each other. The eight best teams are selected from the semi-final rounds, by juries composed of renowned European judges, prosecutors and scholars, and proceed to the competition’s grand final round. This competition enables approximately 200 participants each year to deepen their understanding of EU topics and interact with other European judicial trainees.

EJTN steadfastly believes in the need to keep developing a common European judicial culture and building mutual trust. Part and parcel to this is identifying and focusing on those crucial aspects that foster judicial culture and build mutual trust and then instilling these at the earliest possible stage of the professional careers of members of the judiciary. THEMIS is a veritable treasure in the EJTN training offer for future and early-career judges and prosecutors. This competition answers the need to have a holistic approach to judicial training by cultivating practitioners’ knowledge, skills and attitudes.

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

The best written papers are selected by the jury members and published in this official EJTN publication, the THEMIS Annual Journal, which will be issued annually after the completion of each year’s semi-final rounds.

I am grateful to all the teams for their efforts in participating in THEMIS, to the jurors for their hard work when assessing and selecting the best of the best and finally to my colleague and member of the EJTN Secretariat, Mr Arno Vinkovic, for managing the THEMIS competition and for all of the enthusiasm and hard work put into its implementation.

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

A handwritten signature in black ink that reads "Wojciech Postulski". The signature is written in a cursive, slightly slanted style.

OVERVIEW

ARNO VINKOVIC

THEMIS PROJECT MANGER



The highly acclaimed THEMIS Competition, open to future EU magistrates undergoing entry-level training, presents an event for debating EU topics, soft-skills learning and development of practicing judicial skills.

In 2019, the topics addressed were the following:

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

DESCRIPTION OF ACTIVITY

The EJTN THEMIS Competition is a unique contest format, open to judicial trainees from across Europe. It provides a platform for exchanging views and developing new approaches on topics related to international civil and criminal cooperation, human rights and judicial deontology.

The THEMIS Competition is designed to develop the critical thinking and communication skills of future magistrates from different European countries. The competition is a forum of discussion on different European law topics, including international judicial cooperation in criminal and civil matters, judicial deontology and human rights.

The jury of the competition, chosen from a pool of experts appointed by EJTN Members, are all well-regarded professionals in the fields of the given semi-final or grand final. As a rule, experts must not have the same nationality as the competing team they will have to assess.

A genuine enthusiasm exists for the THEMIS Competition. In 2019, 33 teams competed in the year's four semi-finals. Each semi-final had three stages: a written paper on a topic relevant for the subject of the semi-final; an oral presentation of that paper; and, a discussion with the jury.

The jury members assessed the overall quality and the originality, the critical thinking and the anticipation of future solutions, the reference to relevant case law, but also the communication skills and the consistency.

In Hindi, TAJ means 'crown' and this journal presents the selection of best publications in a given THEMIS year and the highlights of teamwork and originality in judicial work. Themis should be an experience of having awareness of personal limitations in variety of forms (writing, presentation, discussion, teamwork) and understanding the ways and the future skill-set you will need to overcome them. Judicial work is more than an expertise, it is a true skill and craft which requires continuous training and finetuning. For many of the Themis participants, this is their first leap in the judicial world. Therefore, EJTN encourages its members to provide their trainees the THEMIS experience. Young judges and prosecutors at the start of their careers have the chance to meet their European colleagues and start their professional journey with an already clear EU perspective.

I would like to take this opportunity to thank Judge Wojciech Postulski, EJTN Secretary General and Ms Carmen Domuta, Head of EJTN Programmes Unit, who have supported the idea of the Themis Annual Journal (TAJ) and have done their best to make it a reality. Also, I would like to thank all the hosts of the Themis competitions and their professional staff who make these events possible; the jury members, who provide deeper understanding of the topic and share their experience in it; the tutors, who are year by year becoming better in their work and giving better results while working each year with different teams. At the end, I would like to thank the participants, who have invested their most valuable resource, their time in preparation for the competition. All of us hope we have managed to provide you an experience, a THEMIS experience, that you will remember and be proud of.

SEMI-FINAL A

EU AND EUROPEAN CRIMINAL PROCEDURE

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PARTICIPATING TEAMS

ALBANIA, BULGARIA, DENMARK, ESTONIA, FRANCE, GREECE,
HUNGARY AND ITALY

1st place: Team Italy
2nd place: Team France
3rd place: Team Denmark

Special Award:
Team Albania [Awarded by the Hungarian Academy of Justice]

Selected papers for TAJ
Team Italy
Team Hungary

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23-26 APRIL 2019 BUDAPEST HUNGARY - HUNGARIAN ACADEMY OF JUSTICE

JURY MEMBERS

DAVID J DICKSON (UK)

HEAD OF EXTRADITION, SCOTTISH PROSECUTION SERVICE

It is a privilege to participate as a jury member in the Themis competition and to observe the high standards of knowledge demonstrated by the young judges and prosecutors, who are, after all, the generation to whom we will pass the torch of justice.

As a jury member, the first thing you receive is the written papers from each of the teams. Each is 20 pages long and, in my experience, is usually a well researched written piece of work where the authors demonstrate their knowledge of their chosen topic. This paper provides the basis for the 30 minute presentation the team will undertake at the semi final, following which their knowledge of their chosen topic is subjected to closer questioning by each of the jury members. The jury members are familiar with the subject matter of the semi final. However, part of the joy of Themis as a jury member is undertaking your own further research on receipt of the papers, to enable the contents to be verified but also provide a basis for further questioning. This is part of the beauty of Themis: collaborative learning. The other teams learn by watching the drama unfold!

I am endlessly impressed by the English language skills the participants demonstrate in both their written and oral presentations involving complex legal language.

In my view, the Team Hungary paper deserves to be included in this, the first edition of the journal, as the topic is timely. In Scotland, we recognise the natural environment is one of our key economic drivers. It is one of the key features of the national tourism strategy with the economic value of tourism forecast to reach £25 bn by 2025: 6 years time. The prosecution service has established a wildlife and environmental crime unit to deal with criminal cases arising from the natural and wildlife environment whether poaching, pollution or, as the paper from Hungary considers, trafficking in wild animals. That unit has specially trained prosecutors who work closely with police and other agencies to provide guidance and support from the reporting of the crime to conclusion of court proceedings.

The excellent paper by Team Hungary examines the issue of trafficking in wild animals from motivation to tools to bring effective prosecution. It causes us to reflect on a much overlooked area of law, which, if it is not adequately addressed will result in irreparable harm to the natural world we pass on to the next generation and those after. The paper identifies the current legal framework at international, European and national level. It considers the roles the various actors in the field currently play: the close collaboration which can be achieved. It also quite strikingly demonstrates, the current inadequacies of, principally, law enforcement in the closer and fuller investigation of crimes they come across. And come across means, as the paper describes, by accident: as an accessory or by product of another more substantive crime.

If this was not impressive enough, the Team go on to offer solutions, which they suggest will lead to increased awareness of the criminality involved and associated with trafficking in wild animals. During the course of revising the paper for publication, another 113 species have been declared critically endangered. Only 10-15 % of the illicitly trafficked wildlife within Europe is detected. It is not a standalone crime. It requires consumers. It is a rich area for organised crime groups where the worldwide value of wildlife trafficking is estimated at £17 bn, being fourth after drug trafficking, counterfeiting and human trafficking.

With young judges and prosecutors of the calibre of Team Hungary, we can be confident these issues will be highlighted and actively pursued for the benefit of us all.

CHRISTINE GÖDL (AT)

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

I work as a judge in the Austrian Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice, Department for International Criminal Law since 2011. The topics of my daily work include extradition, mutual legal assistance, transfer of prisoners and all kind of international cooperation in criminal matters. I was part of the jury in the semi finals of the Themis competition on EU Law and European Criminal Procedure which was composed of 3 experts in the field of international criminal law.

The quality of the papers was amazing. The jury had to select a number of papers that would be published in the new Themis Journal. We decided to select two papers, one was the paper of the winning team and the other was chosen because of the originality of the topic. The paper of Team Italy (who won the Semi Finals) contains a very well-structured overview on a classical and actual topic of international criminal law, the principle „ne bis in idem“ and addresses various questions in a comprehensive way. It also focusses on the prevention and solution of conflicts of jurisdiction among European States and Member States and Third States, notes the key-role of Eurojust and directly addresses Public Prosecutors in an open letter. When working with Team Italy on the paper, I suggested additional jurisprudence from the European Court of Justice which they transposed immediately into the paper. It was fantastic to see the great enthusiasm and effort the team members developed when editing the paper. During the competition I really was thrilled by the topics chosen by the teams and presentations of our young colleagues, their very individual way to approach difficult legal themes and aspects, their selfconfidence during the presentation and the way they acted with their colleagues. The teams we selected for 1 to 3 place were the teams which gave the impression of working well together, handing over questions, distributing the answers in an even way, elaborating a response together and having a very deep knowledge of the jurisprudence of the European Court of Justice and the European Court of Human Rights. All these elements will surely also serve the participants in their later professional life as judges or prosecutors.

Finally I would like to mention that THEMIS is a great opportunity for young colleagues to test their writing and oral judicial skills in a European contest. Future papers also could deal with new case law of the European Court of Justice, for example questions with regard to the European Arrest Warrant or the principle of mutual trust and mutual recognition or the question of prison conditions.

NICOLAS PÉREZ-SERRANO DE RAMÓN (ES)

PROSECUTOR, MINISTRY OF JUSTICE OF SPAIN,
EJN POINT OF CONTACT AND DELEGATE OF INTERNATIONAL
JUDICIAL COOPERATION IN BALEARIC ISLANDS.

Discovering the Themis competition and having the opportunity of being a Jury in the criminal Law semi-final, has been the most enriching working experience this year. Being able to see and work with the future generations of the European Judiciary, sharing experiences and knowledge, reinforced the benefit and advantages of a united Europe.

Having the knowledge is important; however, so is meeting the people who can provide that knowledge, and the Themis competition provides the possibility of meeting that people, as they would be the ones solving your doubts when facing an investigation or crime with an international dimension.

All the papers presented were of high quality and provided a theoretical and a practical point of view, which made the learning easy and appealing.

The three Jury members selected the papers that should be edited, based on the originality and the importance of the subject chosen by the teams and their coaches, and I am sure that the final editions will be even better than the first.

Themis competition should be compulsory during the judicial or prosecutor's training, to broaden their minds and give them the opportunity of working with other European colleagues, providing other ways to approach subjects or different solutions that can be given to the same problem.

My experience was absolutely positive and I look forward to any chance of working again with the EJTN.



DON'T TOUCH MY CRIMES. PREVENTION AND SOLUTION OF CONFLICTS OF JURISDICTION

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When a conflict of jurisdiction arises, the respect of the right not to be tried or punished twice for the same crime is best protected if the state which will prosecute the offence is decided in advance. In this paper, the ne bis in idem principle is first discussed, as well as the interpretation of such principle by the Court of Justice of the European Union and the European Court of Human Rights. The European instruments dealing with parallel criminal proceedings and the prevention and settlement of conflicts of jurisdiction are subsequently analysed. The paper then suggests possible ways to solve conflicts of jurisdiction, mainly among European countries; in this context, it considers the role of Eurojust and the use of joint investigation teams. The recent rules for the choice of forum provided by the Regulation 2017/1939 establishing the European Public Prosecutor's Office are examined too. In conclusion, the authors point out the lack of transnational binding rules to settle conflicts of jurisdiction and emphasize the importance of using the existing judicial cooperation tools to avoid the infringement of the ne bis in idem principle. The potential of these tools should be acknowledged and developed by public prosecutors.

KEY WORDS

Conflict of jurisdiction
Ne bis in idem
Judicial cooperation
Eurojust
Joint investigation team
EPPU

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1. INTRODUCTION

A conflict among two or more jurisdictions arises when several states consider themselves respectively competent to decide about a case.

Multiple prosecutions may occur within two or more states for several reasons: different criteria used to exercise jurisdiction;¹ the adoption of international instruments setting up the principle of extra-territoriality in order to strengthen the fight against most serious crimes, such as torture and genocide;² the development of cybercrime, which entails a new concept of territory;³ globalization itself, as the perpetration of cross-border crimes is easier in an area of freedom of movement.

Moreover, the principle of sovereignty plays a dominant role on criminal matters, meaning that states are eager to maintain their jurisdiction and to apply their own national law to offences. In order to protect their sovereignty, in fact, states have never adopted an international legal instrument providing a strict set of rules to allocate criminal jurisdiction for all types of offences.

Similarly, no agreed EU-wide rules on the allocation of criminal jurisdiction exist.⁴

Anyway, the risk that a person is sentenced successively for the same facts in different countries can be avoided by applying the principle of *ne bis in idem*. This principle is fundamental, because it stands as a guarantor of the rights of the individuals and as a guardian of legal certainty. In other terms, although the *ne bis in idem* principle cannot prevent conflicts of jurisdiction, it logically follows them as an *a posteriori* instrument.⁵

Still, a shortcoming of this principle is the so called *first come, first served effect*,⁶ that is to say that the *ne bis in idem* may end up acting as an 'improper mechanism for a preference of jurisdiction'.⁷ As a matter of fact, it can lead to arbitrary results, because it gives preference to the jurisdiction of the state which comes to a final decision first.

In this paper, the authors aim to analyse practical solutions to prevent and solve conflicts of jurisdiction in today's European legal framework.

Therefore, the legal provisions outlining the principle of the *ne bis in idem* will be first examined together with the interpretations of this principle given by the Court of Justice of the European Union (hereinafter also ECJ) and by the European Court of Human Rights (hereinafter also ECtHR).

Then, the analysis will focus on the mutual recognition instruments which could help the surfacing of parallel proceedings, whose benefits and drawbacks will also be dealt with.

Subsequently, the possible ways to solve conflicts of jurisdiction will be outlined considering, on the one hand, the case in which the conflict arises between Member states of the European Union and, on the other hand, the case in which the conflict concerns also Third states.

Finally, the attention will be shifted to the management of conflicts of jurisdiction provided by the Regulation establishing the European Public Prosecutor Office.

2. THE TRANSNATIONAL DIMENSION OF THE NE BIS IN IDEM PRINCIPLE

The latin name of *ne bis in idem* shows that the genesis of this principle dates back to Roman law.⁸ The *ne bis in idem* principle is still foreseen in the modern legal systems of the Member states of the European Union (hereinafter also EU) and it avoids that the same individual faces more than one criminal proceedings for the same material fact(s).

More specifically, the word *bis*, literally translated as two times, indicates the forbidden repetition of second or more criminal proceedings and the *idem*⁹ requirement refers to the identity of judicial decisions in terms of its object.

Traditionally, *ne bis in idem* has been construed as a principle applicable within national jurisdictions.¹⁰ This circumstance has revealed itself as a problem in the context of EU law, since the EU consists of a new legal order, in which transposing the constituent elements of crimes and the general categories of criminal law to the supranational level can be challenging.¹¹

¹ In establishing criteria on exercising jurisdiction, states may take into consideration not only the *locus commissi delicti*, but also other elements, such as the offender's and the victim's nationality. In this sense, G. Giacomelli, 'Ne Bis In Idem Profiles in EU Criminal Law' (2013) (Graduate Thesis, University of Florence). For instance, according to the Italian Law, jurisdiction on criminal matters can be based on: 1) the principle of territoriality; 2) the principle of the active personality; 3) the principle of the passive personality; 4) the principle of security of the state; 5) the principle of universality. See F. Mantovani, *Diritto Penale* (2015), at 878.

² *Ex multis*, Rome Statute of the International Criminal Court of 17 July 1998 in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544.

³ Cottim, 'Cybercrime, Cyberterrorism and Jurisdiction: An Analysis on Article 22 of the CoE Convention on Cybercrime' 2 *European Journal of Legal Studies* (EJLS) (2010), at 7.

⁴ Opinion of the AG Sharpston, *Gasparini and others*, Case C-398/12, ECJ, 15 June 2006, § 51.

⁵ Giacomelli, *supra* note 1, at 1, 2.

⁶ Wasmeier and Thwaites, 'The development of *ne bis in idem* into a transnational fundamental right in the EU Law: Comment on Recent Developments' *European Law Review* (2006) 565, at 576.

⁷ Vervaele, 'Ne bis in idem: Towards a Transnational Constitutional Principle in the EU?' 9 *Utrecht Law review* (2013) 211, at 222.

⁸ Ulpianus, *De officio proconsulis*, 7, in *Corpus iuris civilis, Digestum* 48.2.7.2: *Isdem criminibus, quibus quis liberatus est, non debet praeses pati eundem accusari, et ita divus Pius Salvio Valenti rescripsit. Imperatores Diocletianus, Maximianus, in Corpus iuris civilis, Codex* 9.2.9 pr.: *Qui de crimine publico in accusationem deductus est, ab alio super eodem crimine deferri non potest.*

⁹ Van Bockel, 'The Ne Bis in Idem Principle in EU Law', *Kluwer Law International* (2010), at 45-46.

¹⁰ Vervaele, 'Ne bis in idem principle in the EU Mutual recognition and equivalent protection of human rights' 1 *Utrecht Law review* (2005) 100.

¹¹ Bjork, 'Ne Bis in Idem in EU Law - Late Developments in the Case law of the ECJ' (2013) (Graduate Thesis, Lund University).

Moreover, the EU legal framework, with regard to the *ne bis in idem* principle, is characterized by a perceptible fragmentation.¹² From a general perspective, it is essential to refer to Article 54 Convention Implementing the Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders of 14 June 1985 (hereinafter CISA);¹³ to Article 50 Charter of Fundamental Rights of the European Union (hereinafter Charter)¹⁴ and to Article 4 7th Protocol of the European Convention on Human Rights (hereinafter Article 4 P7 ECHR).

Likewise, the preservation of the principle of *ne bis in idem* is paramount in the European instruments based on the principle of mutual recognition, which subjects the recognition and execution of judicial decisions and judgments taken in another Member state to the respect of *ne bis in idem*.¹⁵

Indeed, a *bis in idem* situation constitutes a common ground for non-recognition and non-execution of: a) a European Arrest Warrant (Article 3(2)

Council Framework decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA) (hereinafter FD 2002/584/JHA on EAW)¹⁶; b) a European Investigation Order (Article 11 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (hereinafter Directive 2014/41/EU on EIO)¹⁷; c) a freezing and confiscation order (Articles 8(1)(a) and 19(1)(a) Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders (hereinafter Regulation 2018/1805 on freezing and confiscation orders)¹⁸).

Despite the different wording of the *ne bis in idem* principle in various legal provisions,¹⁹ the jurisprudence has gradually elaborated a uniform interpretation of its main requirements. Indeed, it is acknowledged that the application of *ne bis in idem* requires: 1) the criminal nature of the proceedings;²⁰ 2) the same person being the subject of the criminal proceedings; 3) the *idem* (i.e. the same facts); 4) the *bis* (i.e. the final deci-

sion) and 5) the enforcement condition, limited to Articles 54 CISA and 3(2) FD 2002/584/JHA on EAW.

3. THE CORNERSTONES OF THE NE BIS IN IDEM PRINCIPLE: THE CONVENTION IMPLEMENTING THE SCHENGEN AGREEMENT; THE 7TH PROTOCOL OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS; THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

As the CISA entered into force, the Contracting Parties acknowledged the increase of cross-border crimes as a side effect of the creation of a borderless area. In this context, it would be inconceivable and contradictory that the freedom of movement was frustrated by the fear of feeling subject to a double prosecution or to a double sanction for the same offence, whenever travelling throughout Europe.²¹ This is why the *ne bis in idem* principle was necessarily to be included in the provisions implementing such an agreement.

As for the interpretation of the principle's requirements, the ECJ has been focusing

the concept of "the same acts" within the meaning of Article 54 CISA on the concrete acts that make the offender twice responsible, not on the legal qualifications that each Member state attributes to criminal facts. Import-export cases, such as *The Esbroeck* case, are a milestone in the interpretation of the *idem* requirement. By analyzing the conduct of the indicted, who had trafficked narcotic drugs among different Member states, the ECJ evaluated the practice of import from a certain state and of export to another state as a single material act.²²

Another aspect to clarify in order to define the extension of *ne bis in idem*, as expressed in Article 54 CISA, is the concept of *finally disposed of*. According to the ECJ precedents, the expression "final decision" includes both convictions and acquittals,²³ since not only the former but also the latter are considered an exercise of the *ius puniendi*. Moreover, also the suspension of criminal proceedings by the police²⁴ or the public prosecutor²⁵ can constitute an obstacle to the opening or the continuation of criminal proceedings in another state, if that decision, under the national law of the first state, definitely bars further prosecution and includes a determination as to the merits of the case.

While the aforesaid aspect is quite undisputed in the ECJ jurisdiction, a more controversial issue is whether a decision, not facing the merits of the case, but just taken on the basis of procedural grounds, might represent a final disposi-

¹² Opinion of the AG Kokott, *Toshiba Corporation and Others* Case C-17/10, ECJ, 8 September 2011, §111-124.

¹³ OJ 2000 L 239/19.

¹⁴ OJ 2012 C 326/391.

¹⁵ Eurojust frequently deals with the *ne bis in idem* as grounds for non-recognition, according to Eurojust, *Report on Eurojust's Casework in the field of the European Arrest Warrant* (2017), available at [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Report%20on%20Eurojust%20casework%20in%20the%20field%20of%20the%20EAW%202014-2016%20\(May%202017\)/2017-05_Eurojust-EAW-Casework-2014-16_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Report%20on%20Eurojust%20casework%20in%20the%20field%20of%20the%20EAW%202014-2016%20(May%202017)/2017-05_Eurojust-EAW-Casework-2014-16_EN.pdf), at 6-7.

¹⁶ OJ 2002 L 190/1.

¹⁷ OJ 2014 L 130/1.

¹⁸ OJ 2018 L 303/1.

¹⁹ See Articles 54 CISA; 50 Charter; 3(2) FD 2002/584/JHA on EAW; Article 4 P7 ECHR.

²⁰ The application of the *ne bis in idem* principle presupposes that the measures which have already been adopted against the accused person are of criminal nature. In order to establish whether a measure has a criminal or administrative nature, the jurisprudence of the ECtHR has elaborated the so-called Engel criteria. See ECtHR, *Engel and Others v. Netherlands*, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, Judgment of 8 June 1976. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

²¹ Van Bockel, *supra* note 9, at 21.

²² Judgment of the Court, *Van Esbroeck* (Case C-436/04), ECJ (Second Chamber), 9 March 2006, § 36-38. All ECJ decisions are available at <http://curia.europa.eu/juris/recherche.jsf?language=en>.

²³ Judgment of the Court, *Van Straaten* (Case C-150/05), ECJ (First Chamber), 28 September 2006.

²⁴ Judgment of the Court, *Turansky* (Case C- 491/07), ECJ (Sixth Chamber), 22 December 2008.

²⁵ Judgment of the Court, *Kossowski* (Case C-486/14), ECJ (^{Grand} Chamber), 29 June 2016.

tion of a case for the purpose of Article 54 CISA. This thorny issue was faced by the ECJ, with different outcomes, in two cases: *Miraglia*²⁶ and *Gasparini*.²⁷ While in the *Miraglia* case the Court excluded the *ne bis in idem*, feeling not to boost the free movement to the detriment of the security exigencies of preventing and fighting crimes,²⁸ in the *Gasparini* case the conclusion was the opposite. In particular, in the *Gasparini* judgment, the *ne bis in idem* principle was applied, since the Court considered an acquittal, based on procedural grounds and with no assessment of the merits of the case, as a final judgment, binding for all Member states.

Article 4 P7 ECHR is indirectly important for the development of *ne bis in idem* on a transnational level, since it refers to 'the jurisdiction of the same state'. In other terms, Article 4 P7 ECHR has the huge limit of being confined by its own wording to a mere internal dimension, with the result that it does not avoid double prosecutions in case of transborder crimes.

Albeit such a point of weakness, this version of the principle distinguishes itself from the wording of the sources examined so far, since it does not provide for

any enforcement condition. With regard to the concept of *idem* requirement in the meaning of the norm, after an initial uncertainty in the jurisprudence of the ECtHR, due to the use of the expression *offence* instead of *same acts*, the Court followed the interpretation by another supranational jurisdiction. More precisely, the ECtHR clarified that 'Article 4 P7 ECHR must be understood as prohibiting the prosecution or trial of the same "offence" as long as it arises from identical facts or facts which are substantially the same as those underlying the first offence'.²⁹ In other terms, the assessment on the *idem* must be fact-based, rather than consisting in a formal comparison between the essential elements of the offences.

As stated, *ne bis in idem* is guaranteed at EU level not only by Article 54 CISA,³⁰ but also by Article 50 Charter, meaning that this principle has become a fundamental right of individuals. After the entry into force of Article 50 Charter, the ECJ held that Article 54 CISA has to be interpreted in the light of the latter provision and that the enforcement provision of Article 54 CISA is compatible with the Charter, being a limitation provided by law within the meaning of Article 52(1) Charter.³¹

²⁶ Judgment of the Court, *Miraglia* (Case C-469/03), ECJ (First Chamber), 10 March 2005.

²⁷ Judgment of the Court, *Gasparini and others* (Case C-467/04), ECJ (First Chamber), 28 September 2006.

²⁸ Richard Lang, 'Third Pillar Developments from a Practitioner's Perspective', in E. Guilt and F. Geyer (eds), *Security versus Justice?: Police and Judicial Cooperation in the European Union* (2008), 265, at 270.

²⁹ ECtHR, *Sergey Zolothukhin v. Russia*, Appl. No. 14939/03, Judgement of 10 February 2009, § 82; ECtHR, *A and B v. Norway*, Appl. Nos. 24130/11 and 29758/11, Judgement of 15 November 2016, § 108; ECtHR, *Maresti v. Croatia*, Appl. No. 55759/07, Judgement of 25 June 2009 §§ 62- 65; ECtHR, *Routsalainen v. Finland*, Appl. No. 13079/03, Judgement of 16 June 2009 §§ 50-57.

³⁰ According to Article 55 CISA, a party may declare that it is not bound to Article 54 to protect its sovereignty. Some scholars doubt that Article 55 is still valid after the entry into force of the Treaty of Amsterdam. Fasolin, 'Conflitti di giurisdizione e *ne bis in idem* europeo' (2011-2013) (PHD Thesis, University of Ferrara). On the contrary, the opinion of the AG Bot, *Piotr Kossowski* Case C-486/14, ECJ, 15 December 2015, §25-68, assumes that Article 55 is part of the Schengen *acquis* and has become an integral part of EU law, but the content of this provision is not compatible with EU law. In particular, these reservations deprive the *ne bis in idem* principle of its content and are not useful nor necessary.

³¹ Judgment of the Court, *Spasic* (Case C-129/14), ECJ (Grand Chamber), 27 May 2014.

As for the evident differences between Article 50 Charter and Article 4 P7 ECHR, Article 52(3) Charter states that the right guaranteed by the Charter has the same meaning and the same rationale as the corresponding right in the ECHR, so it is vital to ensure that the interpretation of Article 50 Charter fulfils the level of protection guaranteed by the ECHR. Moreover, it has to be noted that, pursuant to Article 6(1) Treaty on European Union, the Charter has the same value of the Treaties, thus having direct effect whenever a situation comes within the scope of EU law.³²

4. THE NE BIS IN IDEM PRINCIPLE IN THE MUTUAL RECOGNITION INSTRUMENTS

Article 3(2) FD 2002/584/JHA on EAW contemplates the existence of a final judgment in respect of the same acts as one of the mandatory grounds for refusal of the execution of an EAW. As stated by the ECJ in the *Mantello* case,³³ the provision shares the same rationale of Article 54 CISA, conferring to the charged persons the same form of protection granted to the finally judged ones, although from a different point of view. In particular, while Article 54 CISA prevents the exercise of jurisdiction, allowing those who have been finally judged to move

freely within the Schengen area, Article 3(2) FD 2002/584/JHA on EAW creates an obstacle to the execution of a cooperation request.

Moreover, another nexus between the two provisions is that both of them provide enforcement conditions. In the light of this similarity, the ECJ jurisprudence is prone to assimilate the notion of same acts as mentioned in Article 3(2) FD 2002/584/JHA on EAW to that of Article 54 CISA, as interpreted by the Court itself. This is evident in the aforementioned *Mantello* case, which is at stake for the definition of the "final judgment" requirement too.

In order to have a clear view on the issue, a hint of the facts of this case is appropriate. An EAW was issued in respect of Mr. Mantello in the context of criminal proceedings instituted in Italy for conducts of unlawful possession of large amounts of drugs and participation in a criminal organization. The German judicial authorities posed the issue whether the surrender should be refused based on the *ne bis in idem* principle. In fact, in order not to jeopardize the investigations over the association, at the time of the EAW request Mr. Mantello had only been convicted for unlawful drug possession. The ECJ clearly stated as follows: 'whether a person has been finally judged for the purpose of Article 3(2) FD 2002/584/JHA on EAW is determined by the law of the Member state in which judgment

³² The Italian Court of Cassation, *Resneli* (Case 54467/2016), Judgment of 21 December 2016 held that, due to the direct effect of Article 50 Charter, the Italian judicial authorities had to reject a Turkish request of extradition on the grounds of *ne bis in idem* even in a case in which the final decision had not been rendered by an Italian Court, but by a German Court. The ECJ recognised the direct effect of the Charter in various cases, also in disputes between private parties (for instance, joined Judgment of the Court, *Bauer et al* (Cases C-569/16 and C-570/16), ECJ (Grand Chamber), 6 November 2018).

³³ Judgment of the Court, *Mantello* (Case C-261/09), ECJ (Grand Chamber), 16 November 2010.

was delivered'.³⁴ In conclusion, the Court established that the executing judicial authority cannot apply the mandatory *ne bis in idem* non-execution ground, if the law of the issuing state denies the existence of a previous final judgment covering the same facts.

Moreover, the Italian legislation provides for a broad application of the *ne bis in idem* principle as a ground for refusal of an EAW, since Article 18(1)(o)(p) Italian Law n. 69 of 22 April 2005 envisages the pendency of criminal proceedings as a ground for refusal, both whether such pendency is actual or potential.³⁵

As said, also Article 11 Directive 2014/41/EU on EIO and Articles 8(1)(a) and 19(1)(a) Regulation 2018/1805 on freezing and confiscation orders foresee, as a ground for non-execution of a request, the principle of *ne bis in idem*.³⁶

5. THE BENEFITS AND THE DRAWBACKS OF PARALLEL PROCEEDINGS

As said, the *ne bis in idem* principle comes into play only once a final decision has been rendered.

In order to avoid that two or more proceedings are initiated against the same person for the same fact(s), it is essential to determine in advance whether parallel proceedings for the same offence are being carried out in two or more states and, if so, to concentrate them under the jurisdiction of only one country.

In these terms, the mutual legal assistance instruments, mentioned in the above paragraph, could work as indicators of the existence of parallel proceedings as soon as the need arises to arrest a person, to obtain evidence or to execute seizures in another Member state. The usage of such cooperation tools is beneficial because the decision on where to prosecute, which usually follows the recognition of parallel proceedings, could

already be reached at an early stage of the investigations.³⁷

The phenomenon of parallel proceedings is due to the fact that each state regulates its own criminal jurisdiction, usually extending its powers outside its borders,³⁸ thus creating the risk, already outlined in the introduction, of positive conflicts of jurisdiction (i.e. two or more states claim jurisdiction).

Actually, multiple proceedings can turn out to be beneficial in combating crime, especially transnational offences.³⁹ As a matter of fact, opening investigations in several countries could lead to detect offences, to secure evidence and to reveal the complexity of a criminal activity carried out across more states.

Nonetheless, parallel proceedings entail also undeniable drawbacks. In particular, if parallel proceedings are not coordinated, they can result in a waste of time and resources, in a duplication of work and, above all, they can negatively affect the rights of the individuals involved in them.

Mainly, the accused person could be subject to multiple investigations, custody orders, judgements and convictions for the same offence, finding him/herself compelled to invoke *ne bis in idem* just

after one of the decisions becomes final. Defendants, victims and witnesses could be summoned by numerous Courts, thus suffering a heavier loss of time and possibly money to attend hearings.

6. PREVENTION AND SOLUTION OF CONFLICTS OF JURISDICTION AMONG EUROPEAN STATES

6.A. THE LEGAL FRAMEWORK AND ITS CRITICAL ISSUES

Despite the obvious need for coordination, underlined also by Article 82(1)(b) Treaty on the Functioning of the European Union (hereinafter TFUE), few legal instruments were adopted in this field. Moreover, they do not provide strict rules to avoid conflicts of jurisdiction, so as not to impinge on the already mentioned principle of sovereignty, which is dominant in criminal law.

The most important European act is the Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings (hereinafter FD 2009/948/JHA on con-

³⁴ Eurojust, *Case Law by the Court of Justice of the European Union on the European Arrest Warrant*

(2018), available at [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis/Case%20Law%20by%20the%20Court%20of%20Justice%20of%20the%20European%20Union%20on%20the%20European%20Arrest%20Warrant%20\(October%202018\)/2018-10_EAW-case-law_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis/Case%20Law%20by%20the%20Court%20of%20Justice%20of%20the%20European%20Union%20on%20the%20European%20Arrest%20Warrant%20(October%202018)/2018-10_EAW-case-law_EN.pdf), at 38.

³⁵ The grounds for refusal mentioned in the text are superseded in the context of the applicability of bilateral treaties, such as the Addendum to the European Convention on Extradition of 13 December 1957, signed in Rome on the 24 October 1979 between Italy and Germany (Italian Court of Cassation, *Akinyemi* (Case 13868/2018), Judgment of 22 March 2018). Moreover, the scope of the ban on the execution of EAWs for potential *lis pendens* must be interpreted narrowly (Italian Court of Cassation, *Spasiano* (Case 15866/2018), Judgment of 4 April 2018; Italian Court of Cassation, H. (Case 27992/2018), Judgment of 18 June 2018). Such ban does not encompass EAWs issued because of final judgements (Italian Court of Cassation, *Cosmin* (Case 4444/2018), Judgment of 25 January 2018; Italian Court of Cassation, *L.F., L.S.* (Case 21323/2014), Judgment of 22 May 2014).

³⁶ Furthermore, the 17th recital Directive 2014/41/EU on EIO suggests an interesting usage of such cooperation instrument, providing for the possibility to issue it with the specific purpose to establish whether a possible conflict with the *ne bis in idem* principle exists. In this case the execution of the EIO should not be refused and the interested Member states could ask for the support of Eurojust for a settlement of jurisdiction.

³⁷ Eurojust, *Guidelines for deciding 'which jurisdiction should prosecute?'* (2016), available at [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Guidelines%20for%20deciding%20which%20jurisdiction%20should%20prosecute%20\(2016\)/2016_Jurisdiction-Guidelines_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Guidelines%20for%20deciding%20which%20jurisdiction%20should%20prosecute%20(2016)/2016_Jurisdiction-Guidelines_EN.pdf), at 2, hereinafter *Guidelines for deciding*.

³⁸ Giacomelli, *supra* note 1, at 4.

³⁹ Eurojust, *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction* (2018), available at [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Report%20on%20Eurojust%20casework%20in%20the%20field%20of%20prevention%20and%20resolution%20of%20conflicts%20of%20jurisdiction%20\(2018\)/2018_Eurojust-casework-on-conflicts-of-Jurisdiction_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Report%20on%20Eurojust%20casework%20in%20the%20field%20of%20prevention%20and%20resolution%20of%20conflicts%20of%20jurisdiction%20(2018)/2018_Eurojust-casework-on-conflicts-of-Jurisdiction_EN.pdf), at 6; hereinafter *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction*.

flicts of jurisdiction).⁴⁰ The said framework decision plays a key role in this matter. In fact, the legal system of some Member states (such as Italy) provides for the principle of mandatory prosecution, as a consequence of the principle of legality in criminal matters, which in principle could jeopardise the aim of concentrating the proceedings. However, as pointed out in the 12th recital FD 2009/948/JHA on conflicts of jurisdiction, in the common area of freedom, security and justice provided by Article 67 TFEU, the principle of legality is deemed to be respected if any Member state prosecutes the offence.

Other European instruments dealing with the issue of conflicts of jurisdiction are the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (hereinafter FD 2008/841/JHA on organised crime),⁴¹ the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA (hereinafter Directive 2017/541 on terrorism)⁴² and the Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA.⁴³ All these legal tools provide multiple criteria to found the jurisdiction of the Member states in order to ensure that crimes are prosecuted, but do not set binding criteria to determine

which state is in a better position to prosecute.

The main aim of these instruments is to foster contacts between states in order to: 1) detect the existence of parallel criminal proceedings in cases presenting links to more than one country and 2) reach a consensus on the most appropriate jurisdiction to prosecute.

However, all the above-mentioned instruments have shortcomings, mainly due to the fact that Member states are eager to maintain their sovereignty on criminal matters.

First of all, it has to be pointed out that the initiative of contacting foreign authorities, in order to verify whether parallel proceedings are being conducted, is mainly left to the discretion of Member states.

For instance, Article 5 FD 2009/948/JHA on conflicts of jurisdiction states that ‘when a competent authority of a Member state has reasonable grounds to believe that parallel criminal proceedings are being conducted in another Member state, it shall contact the competent authority of that other Member state to confirm the existence of such parallel proceedings, with a view to initiating direct consultations’. Such a wide discretion characterises also Article 19(3) Directive 2017/541 on terrorism and Article 7(2) FD 2008/841/JHA on organised crime.

So broad a discretion could have a negative impact on the efficiency of the procedure, also because statutory deadlines are not outlined.⁴⁴

Secondly, these instruments do not provide strict criteria to determine which state should have the priority to prosecute. They only enumerate some factors that should be taken into account,⁴⁵ specifying that the final decision must be adopted in the light of the particular facts of each case. Such a case-by-case approach clearly made it possible to avoid the resistance that states would have put up to a strict hierarchy among criteria, which would have restricted their sovereignty.

Thirdly, the same principle of protection of sovereignty appears to be the basis of the provisions that enable Member states to require the assistance of Eurojust in order to facilitate the cooperation among them, as we are to further outline later. Actually, the decisions of this Agency are not binding, so that, in the end, states cannot be obliged to refrain from starting to prosecute or to suspend a prosecution already initiated.⁴⁶

In addition, none of these acts regulates the role of individuals or the judicial review.

These aspects were taken into consideration only by the Green Paper on conflicts of jurisdictions and the principle of *ne bis in idem* in criminal proceedings, presented by the European Commission in 2005. In particular, the Commission maintained that individuals involved in the proceedings should be informed that the issue of jurisdiction has been addressed by the states to which the case presents significant links. In fact, not only individuals can enlighten the existence of some elements that could contribute to determine which state is in the best position to prosecute, but also this information is essential to respect the rights of the defendant, since the outcome of the proceedings may vary considerably depending on the chosen jurisdiction. For this reason, the accused should be put in such a position to be able to intervene in the consultations, so as to avoid the risk that the forum is chosen by states at his/her detriment,⁴⁷ namely only having regard to the possibility of a conviction. It is possible that the consultation of the parties in the pre-trial phase

⁴⁰ OJ 2009 L 328/42. The FD 2009/948/JHA on conflicts of jurisdiction has not been implemented by Luxemburg, Greece and the United Kingdom. The state of implementation of the FD 2009/948/JHA has been last review on 21 May 2018 by the EJM Secretariat and it is available at https://www.ejm-crimjust.europa.eu/ejm/EJM_Library_StatusOfImpByCat.aspx?CategoryId=66.

⁴¹ OJ 2008 L 300/42.

⁴² OJ 2017 L 88/6.

⁴³ OJ 2013 L 218/8.

⁴⁴ See Article 6 FD 2009/948/JHA on conflicts of jurisdiction.

⁴⁵ See 9th recital FD 2009/948/JHA on conflicts of jurisdiction which lists some of the criteria suggested by the Guidelines for deciding ‘which jurisdiction should prosecute?’ first published in 2003. The topic will be dealt with in Part 6, point b). See also Article 19(3) Directive 2017/541 on terrorism and Article 7(2) FD 2008/841/JHA on organised crime which read as follows: when Member States cooperate in order to decide which of them will prosecute the offenders “special account shall be taken of the following factors: a) the Member State in the territory of which the acts were committed; b) the Member State of which the perpetrator is a national or resident; c) the Member State of the origin of the victims; d) the Member State in the territory of which the perpetrator was found”.

⁴⁶ The 11th recital FD 2009/948/JHA on conflicts of jurisdiction provides that ‘no Member State should be obliged to waive or to exercise jurisdiction unless it wishes to do’. As a consequence, if ‘consensus on the concentration of criminal proceedings has not been reached, the competent authorities of the Member States should be able to continue criminal proceedings for any criminal offence which falls within their national jurisdiction’.

⁴⁷ Zimmerman, ‘Conflicts of Criminal Jurisdiction in the European Union’ 3 *Bergen Journal of Criminal Law and Criminal Justice* (2015) 1, at 5; Ignazio Patrone ‘Conflicts of jurisdiction and judicial cooperation instruments: Eurojust’s role’ 14 *Era Forum* (2013), at 215.

jeopardises the prosecution or impinges on the rights of victims and witnesses. In this event, it seems necessary to consult the parties, at least, in the trial phase and national courts should be able to examine the jurisdiction issue, in the light of the principle of reasonableness, whenever states have reached a binding agreement on jurisdiction.

Finally, these instruments do not outline a mechanism to transfer criminal proceedings, once the consensus on the centralisation of the prosecution has been reached.

Given the substantial absence of strict legal rules to allocate criminal procedures, the issues raised by conflicts of jurisdiction can be solved with the support of Eurojust.

28 **6.B. THE ROLE OF EUROJUST**

Eurojust was set up by the Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA),⁴⁸ which was amended by the Council Decision of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime (2009/426/JHA) (hereinafter Decision 2009/426/JHA).⁴⁹

With effect starting on 12 December 2019, the Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA (hereinafter Regulation 2018/1727)⁵⁰ replaces the Decision 2002/187/JHA, pursuant to its Articles 81 and 82.

The mission of Eurojust is to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crimes, as stated in Article 2 Regulation 2018/1727. Within its mission, Eurojust is called to assist national authorities in solving conflicts of jurisdiction. In this regard, Article 21(6)(a) Regulation 2018/1727, in line with the previously in force Article 13(7) Decision 2009/426/JHA, provides that 'the competent national authorities shall inform their national members of cases in which conflicts of jurisdiction have arisen or are likely to arise'. Despite a growth in the number of notifications received under these provisions in the last years, Member states are quite reluctant to inform the National Members about conflicts of jurisdiction.⁵¹

⁴⁸ OJ 2002 L 63/1.

⁴⁹ OJ 2009 L 138/14.

⁵⁰ OJ 2018 L 295/138.

⁵¹ Eurojust, *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction*, *supra* note 32; Eurojust, *Eurojust News Issue*, 14 (2016), available at [http://www.eurojust.europa.eu/doclibrary/corporate/newsletter/Eurojust%20News%20Issue%2014%20\(January%202016\)%20on%20conflicts%20of%20jurisdiction/EurojustNews_Issue14_2016-01.pdf](http://www.eurojust.europa.eu/doclibrary/corporate/newsletter/Eurojust%20News%20Issue%2014%20(January%202016)%20on%20conflicts%20of%20jurisdiction/EurojustNews_Issue14_2016-01.pdf), hereinafter Eurojust News Issue 1/2016, where it is reported that cases registered under former Article 13(7) were 0 in 2010; 6 in 2011; 9 in 2012; 21 in 2013; 28 in 2014; 35 in 2015.

In addition, several other European provisions acknowledge a crucial role to Eurojust in the settlement of jurisdiction, namely Article 12 FD 2009/948/JHA on conflicts of jurisdiction; Article 16 FD 2002/584/JHA on EAW; Article 7 FD 2008/841/JHA on organised crime and Article 19(3) Directive 2017/541 on terrorism.

The position of Eurojust is pivotal in dealing with conflicts of jurisdiction⁵² for, at least, three main reasons, as follows.

a) According to Article 7(4) Regulation 2018/1727, National Members and their deputies are prosecutors, judges or representatives of a judicial authority with competences equivalent to those of a prosecutor or judge under their national law. This entails that National Members are familiar with the respective legal systems and requirements, thus the settlement of the conflict of jurisdiction suggested to the national prosecuting authorities will be arguably compliant with national rules.

b) Article 7(1) Regulation 2018/1727 provides that National Members have his/her regular place of work in Eurojust where all the National Desks are located. This means that, once the notice of a conflict of jurisdiction has arisen or is likely to arise, it is very easy for the National Members of the involved Member states to meet and to discuss the issue.

c) Once the best place to prosecute has been agreed, National Members are also entitled to ensure a smooth

opening or closing of a prosecution in accordance with the European legal framework and their respective national laws.

Specifically, Eurojust deals with conflicts of jurisdiction in four possible ways: 1) through non-binding recommendations issued by National Members or the College; 2) by means of written non-binding opinions drafted by the College; 3) by arranging level II meetings and coordination meetings; 4) by setting up a joint investigation team (hereinafter JIT). This last possibility will be examined in the following paragraph.

Of course, these solutions do not run on parallel lines; on the contrary, they may join and coordinate with each other. For instance, according to the features of the case wherein a decision on which state should prosecute has to be taken, a JIT could be set up or a recommendation could be issued during a coordination meeting. With reference to the data collected by Eurojust, in 2017 approximately 10 recommendations were issued jointly by two or three National Members, following a coordination meeting or after a level II meeting. These joint recommendations are quite appreciated by the national authorities because they are perceived as 'solid (because shared among two or more National Members), reasoned (because a legal assessment is included) and commonly agreed'.⁵³

First, recommendations will soon be based on Article 4(2)(a)(b) Regulation 2018/1727 which empowers National Members to ask the competent authorities to undertake an investigation or a

⁵² Patrone, *supra* note 37.

⁵³ Eurojust, *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction*, *supra* note 32, at 8.

prosecution of specific acts (in the case of negative conflict of jurisdiction) or to consider to accept that one Member state may be in a better position to undertake an investigation or to prosecute specific acts (in case of positive conflict of jurisdiction). Data collected before the entry into force of the Regulation 2018/1727 proved that recommendations by the National Members were used quite often.⁵⁴ Also the College can issue recommendations as provided by Article 4 (2)(a)(b) Regulation 2018/1727.

Secondly, as said, the College can also express written non-binding opinions on how to resolve a case of conflict of jurisdiction according to Article 4(4) and Article 5(2)(b) Regulation 2018/1727, where two or more Member states cannot agree as to which of them should undertake an investigation or prosecution.

Data collected before the entry into force of the Regulation 2018/1727 demonstrated, instead, that the intervention of the College, both in issuing recommendations and writing non-binding opinions, was rather exceptional: the College issued recommendations in just four cases and it has never issued a written non-binding opinion.⁵⁵

In 2009 Article 85(2)(c) TFUE entered into force and paved the way to the attribution to Eurojust of binding powers *vis-à-vis* national judicial authorities in relation to the initiation of criminal investigations and the resolution of conflicts of jurisdiction.⁵⁶ Despite the proposals for a new Regulation of Eurojust and for the establishment of EPPO were tabled together,⁵⁷ the Regulation 2018/1727 has not given Eurojust binding powers to solve a conflict of jurisdiction; differently, the Regulation 2017/1939 has furnished EPPO with binding powers, as it will be explained below.⁵⁸

⁵⁴ Eurojust, *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction*, *supra* note 32, at 9. Specifically, according to Eurojust, *Eurojust News Issue 14* (2016), *supra* note 38, at 2 recommendations issued on the base of Article 6(1)(a)(ii) Decision 2009/426/JHA were 20 in 2010; 12 in 2011; 11 in 2012; 14 in 2013; 12 in 2014; 34 in 2015.

⁵⁵ Eurojust, *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction*, *supra* note 32, at 9.

⁵⁶ Spiezia, 'The European Public Prosecutor's Office: How to implement the Relations with Eurojust?', 2 *Eurocrim* (2018), available at https://eucrim.eu/media/issue/pdf/eucrim_issue_2018-02.pdf, at 130; Patrone, *supra* note 37; Council of the European Union, *Eurojust and the Lisbon Treaty: Towards more effective action Conclusions of the strategic seminar organised by Eurojust and the Belgian Presidency* (2010) available at <http://eurojust.europa.eu/doclibrary/Eurojust-framework/strategic-meetingsonfutureofeurojust/Eurojust%20and%20the%20Lisbon%20Treaty%20-%20Towards%20more%20effective%20action,%20September%202010/17625-2010-12-09-EN.pdf>.

⁵⁷ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust)' COM/2013/0535 final; Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office' COM/2013/0534 final; Spiezia, *supra* note 43.

⁵⁸ Article 4(6) Regulation 2018/1727 has introduced only sharp differences in relation to the case in which a Member State is the addressee of a recommendation or an opinion. Member States shall respond without undue delay to the recommendation or opinion in any case and not only if the State decides not to comply with the advice of Eurojust, as previously stated in Article 8 Decision 2009/426/JHA. Moreover, the Regulation introduces a new ground for refusing to comply with the request when there is the risk to jeopardise the success of an ongoing investigation, whilst Article 8 Decision 2009/426/JHA provided just for the cases related to harm essential national security interests or to endanger the safety of an individual.

The third way in which Eurojust can support national authorities in defining the best place to prosecute, consists in arranging level II meetings or coordination meetings.

Level II meetings take place in Eurojust among the members of the National Desks of the states involved in the conflict of jurisdiction, without the physical presence of the national competent prosecuting authorities. After the meeting, National Members could sign a recommendation asking their respective competent authorities to take on the jurisdiction on the case or to drop it.

A coordination meeting (or level III meeting) could follow a second level meeting or could be arranged when the peculiarities and complexity of the case make the level II meeting not sufficient. When a coordination meeting is planned, all the national authorities of the Member states involved in the conflict of jurisdiction meet in Eurojust: advised by their respective National Members and with the support of simultaneous interpretation, the judicial authorities in charge with the case confront face to face.⁵⁹

In order to facilitate and guide the confrontation, Eurojust has elaborated Guidelines for deciding 'which jurisdiction should prosecute?', which for the first time were published in 2003 and have been revised in 2016.⁶⁰

As seen, the usage of these guidelines is also suggested by the 9th recital FD 2009/948/JHA: they constitute a shared

starting point on the basis of which a decision can be reached. Naturally, the approach to the guidelines must be flexible and the peculiarities of each case must be considered.⁶¹

In the solving of a conflict of jurisdiction, quantitative evaluations could take the lead: the best place to proceed could be the one in which the majority of criminality was committed or where the majority of losses was sustained. Other times, a qualitative approach may prevail: the jurisdiction could be allocated to the state where the most significant part of the criminality was committed or where the most significant part of the loss was sustained. Again, the place where the suspect was found or his/her nationality or his/her usual place of residence could be relevant; the presence of witnesses' protection programmes may play a role. The choice of the best placed jurisdiction may also depend on the stage of the proceedings and/or on the compliance of the state with the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.⁶² The guidelines exclude the possibility to take into account aspects, like the potential higher penalties available in a state rather than in another and the impact on the resources of a prosecution office. One state could not refuse to prosecute just because the crime is not considered as a priority.⁶³

⁵⁹ Eurojust, *Report on Eurojust's casework in the field of prevention and resolution of conflicts of jurisdiction*, *supra* note 32, at 5; Spiezia, *supra* note 43.

⁶⁰ Eurojust, *Guidelines for deciding*, *supra* note 30.

⁶¹ Patrone, *supra* note 37.

⁶² OJ 2012 L 315/57.

⁶³ Eurojust, *Guidelines for deciding*, *supra* note 30, at 2-4.

6.C. THE JOINT INVESTIGATION TEAMS

The JIT could be another useful tool to prevent and resolve conflicts of jurisdictions. The JIT is a judicial cooperation tool introduced by Article 13 Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01) (hereinafter MLA Convention of 2000),⁶⁴ which was entirely reproduced in the Council Framework Decision of 13 June 2002 on Joint Investigation teams (2002/465/JHA) (hereinafter FD 2002/465/JHA).⁶⁵ The two main advantages that follow to the setting up of a JIT are that: a) any investigative measure can be requested without the need to issue letters of request or EIOs (Article 13(7) FD 2002/465/JHA); b) information available can be directly exchanged within the team (Article 13(9) FD 2002/465/JHA).⁶⁶

The JIT is established with the signature of an agreement between the competent authorities of two or more Member states involved in investigations linked with other Member states or non-EU states (see *infra*). The Council of the European Union has proposed a model agreement to facilitate the setting up of JITs: the original one, provided by the Recommendation of 8 May 2003, was revised by the Council Resolution of 26 February 2010 and recently by the Resolution 2017/C 18/01.

The point 14) of the latest model agreement, entitled 'consultation and coordination', provides that 'the parties will ensure they consult with each other whenever needed for the coordination of the activities of the team, including, but not limited to': 1) the best manner in which to undertake eventual legal proceedings; 2) the consideration of the appropriate trial venue.⁶⁷ This entails that, in the context of a JIT, competent authorities may also agree on which jurisdiction should prosecute after the closing of the investigation in order to prevent a possible conflict of jurisdiction and a possible infringement of the *ne bis in idem* principle.

The agreement could provide either 1) to detect one jurisdiction responsible for prosecuting all the crimes investigated by the team, so as to avoid to chop the overall criminal activity carried out by the suspects, or even to split the trial on the criminal group, or 2) to opt for a segmented strategy, splitting the prosecution in some or all the states involved in the joint investigation, taking care not to infringe on the *ne bis in idem* principle, but fulfilling the interest of the participating states to prosecute at least some of the crime.

Once the JIT has operated for the established duration, the settlement of jurisdiction can also be modified by mutual agreement by the JIT's participants in the light of the results obtained during the investigation.⁶⁸

National Members of Eurojust can participate in a JIT according to Article 8 Regulation 2018/1727. Their participation could be crucial considering the knowledge they have of the European and national legal framework and the experience they have collected dealing every day with cross-border criminality and related issues.

7. PREVENTION AND SOLUTION OF CONFLICTS OF JURISDICTION AMONG MEMBER STATES AND THIRD STATES

The principle of mutual recognition is not applicable outside European boundaries. This means that in order to identify parallel proceedings ongoing in Member and non-Member states, it is not possible to count on the aforementioned instruments based on this principle. Also between Member states, only the FD 2002/584/JHA on EAW has been implemented by them all,⁶⁹ instead Denmark and Ireland are not bounded by the Directive 2014/41/EU⁷⁰ and by the Regulation 2018/1805.⁷¹

Article 18(21)(c) 2000 United Nations Convention against Transnational Or-

ganized Crime provides that mutual legal assistance may be refused if the domestic Law of the requested state Party prevents its prosecution authorities from carrying out the action requested with regard to any similar offence, if such offence had been subject to investigation, prosecution or judicial proceedings under their own jurisdiction. The provision considers the similarity of the offences to be enough to reject the request of assistance. This Article could play a role in detecting a possible infringement of the *ne bis in idem* principle between Member and non-Member states, also considering the broad field of application of the Convention, which has been ratified by 189 states.⁷²

Moreover, Eurojust has signed agreements with many Third states to establish and maintain cooperation on the basis of Article 52 Regulation 2018/1727, which, for its nature, is applicable only between Member states. Thus, Third states could be invited to take part to coordination meetings and could be the addressee of recommendations, which they would accept to follow for the sake of the cooperation agreement signed with Eurojust.

Furthermore, Third states can also participate in a JIT, as stated by the 9th recital FD 2002/465/JHA. In a JIT between Member states, a Third country could step in on the basis of international

⁶⁴ OJ 2000 C 197/1.

⁶⁵ OJ 2002 L 162/1.

⁶⁶ Council of the European Union, *Joint Investigation Teams: Practical Guide* (2017), available at <http://www.eurojust.europa.eu/doclibrary/JITs/JITs%20framework/JITs%20Practical%20Guide/JIT-GUIDE-2017-EN.pdf>, at 4; hereinafter the Practical Guide on JITs.

⁶⁷ Council of the European Union, *The Practical Guide on JITs*, *supra* note 50, at 32.

⁶⁸ Council of the European Union, *The Practical Guide on JITs*, *supra* note 50, at 11.

⁶⁹ The status of implementation is available at https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120.

⁷⁰ The status of implementation is available at https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120.

⁷¹ See the 56th and 57th recitals Regulation 2018/1805.

⁷² The status of ratification is available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en.

Conventions which provide for the setting up of JIT.⁷³ In addition, several bilateral agreements have been signed between neighbouring countries or countries with close historical links and they may have included provisions on JITs.⁷⁴ The involvement of Third Countries in a JIT is of utmost importance: they could agree and sign the JIT's agreement containing the settlement of jurisdiction.

8. THE EUROPEAN CONVENTION ON THE TRANSFER OF PROCEEDINGS OF 1972

Once the most appropriate jurisdiction to prosecute a crime is identified, the proceedings have to be transferred in the chosen state. Eurojust plays a significant role also in this field.

The only international instrument devoted to regulate the transfer of proceedings is the European Convention on the Transfer of Proceedings in Criminal matters, adopted by the Council of Europe in 1972 (hereinafter European Convention on transfer of proceedings of 1972).⁷⁵ Under this Convention, each Party can request another Party to

prosecute in its stead, in the cases listed by Article 8.⁷⁶

The transfer of proceedings can operate also if the requested state does not have the jurisdiction to try the offence under its national law. Actually, Article 2 of this instrument provides the jurisdiction to the requested state and makes its criminal law applicable to any offence to which the law of the requesting state is applicable. Consequently, such transfer of proceedings could operate also when there is not a positive conflict of jurisdiction.

However, under Articles 6 and 7 of this Convention, the transfer of proceedings is possible only if the principle of dual criminal liability is fulfilled, meaning that the requested state may prosecute only facts that would be considered an offence and would be sanctioned if committed in its territory.⁷⁷

This act provides detailed rules for the transfer, stating *inter alia* that all requests should be made in writing, the Ministries of Justice are competent for the communications (Article 13), no document should be translated unless required at the time of the signature of the Convention (Article 18) and the Parties cannot claim for any refund of expenses (Article

20). Moreover, Section 5 accurately regulates the application of provisional measures in the requested state, including remand in custody and seizure of property.

Despite so clear a regulation of all the aspects of the procedure, few states have ratified this Convention so far.⁷⁸ Thus the transfer of proceedings is usually carried out according to bilateral agreements, based on a broad interpretation of Article 21 European Convention on Mutual Assistance in Criminal Matters⁷⁹ of 20 April 1959,⁸⁰ in conjunction with Article 6 MLA Convention of 2000. The latter provision ensures a direct contact between judicial authorities to guarantee the efficiency and the speediness of the procedure.

As said, whenever proceedings are transferred pursuant to a bilateral agreement, Eurojust could assist Member states to face all the difficulties that may arise. The main problems are linked to the transfer of evidence to the requested country, the translation of relevant documents, the coordination in the execution of provisional measures and, in general terms, the sharing of the costs.

9. THE CONFLICT OF JURISDICTION IN THE FRAME OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Another important instrument to detect and solve conflicts of jurisdiction is the recent Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO) (hereinafter Regulation 2017/1939).⁸¹

The EPPO is not territorially competent in respect to some non-participating European states (i.e. Denmark, Hungary, Ireland, Malta, the Netherlands, Poland, Sweden and the United Kingdom).

According to Article 86 TFUE, the material scope of competence of the EPPO is limited to criminal offences affecting the financial interests of the Union, as defined in Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law.⁸² In relation to these crimes and to the offences inextricably linked to them, Article 4 Regulation 2017/1939 affirms that the EPPO is responsible for investigating, prosecuting and bringing to judgment the perpetrators.

⁷³ See Article 9 (1)(c) 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Article 19 2000 United Nations Convention against Transnational Organized Crime; Article 49 2003 United Nations Convention against Corruption; Article 20 2001 Council of Europe Second Additional Protocol to the European Mutual Assistance Convention.

⁷⁴ The Agreement between the Kingdom of Spain and the Republic of Cape Verde on the judicial cooperation in criminal matters (2007); the Additional Protocol to the Convention of mutual legal assistance in criminal matters between the Kingdom of Spain and the Republic of Colombia of the 29 May 1997.

⁷⁵ Council of Europe, European Convention on the Transfer of Proceedings in Criminal matters of 15 October 1972, European Treaty Series - No. 73.

⁷⁶ For instance, if the suspect is ordinarily resident in the requested state, or if he/she is a national of the requested state, or if that state is his/her state of origin.

⁷⁷ See Article 7 *Explanatory Report to the European Convention on the Transfer of Proceedings in Criminal Matters*.

⁷⁸ The status of ratification is available at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/073/signatures?p_auth=9Ojmmmd4r.

⁷⁹ See Article 21 *Explanatory Report to the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959*.

⁸⁰ Council of Europe, European Convention on Mutual Assistance in Criminal Matters 20 September 1959, European Treaty Series - No. 30.

⁸¹ OJ 2017 L 283/1.

⁸² OJ 2017 L 198/29.

The European Delegated Prosecutors (hereinafter EDPs) are located in the Member states and they start their own investigation provided that: 1) their respective Member state has jurisdiction over the offence (Article 26(1) Regulation 2017/1939); 2) the EPPO is competent on the basis of the rules set out in Article 25(2)(3) Regulation 2017/1939.

When more Member states have jurisdiction on the same crime, in the context of the EPPO, the choice of the forum is essential because it determines the applicable national criminal law, according to Article 5(3) Regulation 2017/1939.⁸³

In this regard, the rule laid down in Article 26 of the said Regulation provides that when a potential conflict of jurisdiction arises at the initial stage of the investigation, the jurisdiction is allocated to the Member state 1) where the focus of the criminal activity is, or 2) where the bulk of the offences has been committed.

In some cases, investigations could be initiated and carried out by the EDP of a Member state which has jurisdiction over the crime, even though the focus of the criminal activity is not located in its territory and the bulk of the offences has not been committed there. According to the criteria listed in hierarchical order by Article 26(4), that is the case when the state is a) the place of the suspect's or accused person's habitual residence; or b) the national country of the suspect or accused person; or c) the place where the main financial damage has occurred.

The decision has to be duly justified and is taken by a Permanent Chamber (hereinafter PC), after a consultation with the European Prosecutors (hereinafter EPs) and EDPs concerned.

During the investigations, based on these criteria, Article 26(5) foresees that the PC can also reallocate the case to an EDP of another Member state if this is in the general interest of justice. Scholars have demonstrated how this possibility could result in a breach to the right of defence.⁸⁴

When the handling EDP considers the investigation to be completed, Article 35 provides that he/she submits a report to the supervising EP, containing a summary of the case and a draft decision whether or not to prosecute before a national Court. In the report, the handling EDP can make his or her own considerations on the settlement of jurisdiction which, in their turn, will be taken into account by the PC which will definitely decide on the matter.

When more than one Member state have jurisdiction on the case, the PC could opt between two alternatives. First, under the criteria set out in Article 26(4), it may identify one Court where to bring the case to judgment, which could also be a Court other than the one where the EDP is located (Article 36(3)). Alternately, it may propose to join several cases when the investigations have been conducted against the same person(s), with a view to prosecuting these cases in the Courts of a single Member state that, in accord-

⁸³ Michiel Luchtman, 'Forum Choice and Judicial Review Under the EPPO's Legislative Framework', in W. Geelhoed et al. (eds), *Shifting Perspectives on the European Public Prosecutor Office*, T.M.C. ASSER PRESS (2018) 155, at 156; Giuffrida, 'The European Public Prosecutor's Office: king without kingdom?' CEPS (2017) 1, at 2.

⁸⁴ Giuffrida, 'Cross-Border Crimes and the European Public Prosecutor's Office', 3 *Eurocrim* (2017), at 149.

ance with its law, has jurisdiction for each of those cases (Article 36(4)).⁸⁵

Article 42(1) Regulation 2017/1939 has introduced the judicial review of the decisions taken by the PCs on jurisdiction. As stated before, the need for a judicial review on decisions on jurisdiction had been deemed necessary for a long time.⁸⁶ However, the solution adopted by the Regulation 2017/1939, i.e. to leave the review in the hands of the national Courts, has been criticized. Being the EPPO a European body regulated by European statutory law, *de iure condendo*, a case can be made to propose to entrust the ECJ with the judicial review. The appeal to ECJ, pursuant to Article 267 TFEU, is foreseen only by Article 42(2)(a).⁸⁷

In conclusion, binding powers to decide on jurisdiction have been conferred to a European body eventually. Now, the question is whether judges and prosecutors will accept such a binding decision without entrenching themselves behind the principle of sovereignty of their Member state.⁸⁸

⁸⁵ Luchtman, *supra* note 63, at 159.

⁸⁶ Patrone, *supra* note 37.

⁸⁷ Giuffrida, *supra* note 64; Luchtman, *supra* note 63, at 166.

⁸⁸ Patrone, *supra* note 37.

10. CONCLUSION: LETTER TO PUBLIC PROSECUTORS

Dear public prosecutors,

as you may have experienced, today criminals do not recognize borders anymore.

They did it wrong, we know, but they have fundamental rights and one of them is particularly precious: they cannot be finally judged twice for the same offence.

It would be a bad surprise to find out, at the end of your complex and demanding investigation, that *your* criminal has been already finally judged in another state.

So, wake up and pick up your investigation! Choose one of the possible ways to solve a conflict of jurisdiction pointed out in the above paper (that we kindly suggest you to read carefully) and solve it. Better a late decision than no decision on who could prosecute... the axe of *ne bis in idem* hangs over your proceedings!

Sincerely,

Team Italy

DÓRA PÁLFI
ZOLTÁN FÖLDVÁRI
DIÁNA DELY



TUTOR: KAROLINA VARGA

WILDLIFE TRAFFICKERS AND WHERE TO FIND THEM

ASPECTS OF DETECTION AND INVESTIGATION IN ILLICIT WILDLIFE TRAFFICKING CASES

Trafficking in wildlife is insidious and risks irreparably damaging the natural environment. The paper examines the nature and extent of the issue before turning to the current international and European framework to tackle offending, including a consideration of appropriate agencies and the coordinated roles they play. Examples of the detection and prosecution of such crimes in Hungary are considered. The deficiencies in the current model are examined and analysed with solutions for proposed improvement leading to enhanced efficiency of detection, investigation, prosecution and deterrence are given.

KEY WORDS

Wildlife Trade
Organized Crime
Trafficking
Frameworks
Detection - Cooperation in Criminal Matters

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1. INTRODUCTION

By a single glance taken at the world map it can be concluded that the borders of countries and geographical units do not coincide. However, the same natural treasures must be treated as single units, which also implies that we are obliged to act with the same tools and methods and on the same level of intensity for their protection. Without that we would have to face fatal consequences, since the effects of the deficiencies would affect all the countries concerned. As the preservation of the ecosystem and flora and fauna is our common interest and primary obligation for ourselves and future generations, joint action is essential to that end.

Illegal wildlife trade as one of the environmental crimes is not only a significant threat to biodiversity therefore to all of us, but it became a security issue in some source countries, its elimination is our common interest and obligation. The capacity to enforce national legislation is weak and prosecutions are rare in such cases. There are several reasons behind this phenomenon. The monitoring is insufficient, resources are limited, there is a lack of progress in applying the EU environmental standards, and the environmental legislation is often unclear. Problems with evidence and identifications often arise in criminal proceedings, moreover there are not enough specialists (working) in this field. The low awareness of the issue in terms of biodiversity loss and involvement of organized crime among law enforcement and the

judiciary deepens the problem as well¹, environmental crimes are not taken as seriously as they should be. This can be supported by the fact that criminologists started to study green crimes, including wildlife-related crimes only in the 1990s and 2000s.²

Realizing the circumstances mentioned above, the European Union (EU) adopted the Action Plan against Wildlife Trafficking that declares the necessity of making implementation and enforcement of existing rules and the fight against organized wildlife crime more effective in which improving the rate of detection of illegal activities is highlighted.

'The Action Plan covers the five years from 2016 to 2020.³ As the determined period is about to end, examining the results is a current issue. In this paper, we are going to introduce significant initiatives, steps taken by international organizations, the EU and its Member States, further we are going to make proposals on how enforcement powers could eliminate this crime efficiently with the help of devices that are already available and also new ones.

As it will be seen, there are many reasons behind illicit wildlife trafficking (IWT) that cannot be approached by criminal means. IWT would not be permanently prevented if the root causes remained. However, this paper is only intended to draw attention to the threat of organized IWT and to make detection more effective in these cases.

¹ L. Schlingemann (Editor in Chief) et al., *Combating Wildlife and Forest Crime in the Danube-Carpathian Region* (2017), at 7-11.

² D. van Uhm and D. Siegel, 'The illegal trade in black caviar' 19 *Trends Organ Crim* (2016) 67, at 70.

³ Communication from the European Commission 26 February 2016, *EU Action Plan against Wildlife Trafficking*, COM/2016/087 final, at 7.

2. BIODIVERSITY LOSS AND WILDLIFE TRADE

Throughout the history of the world, nature and wildlife were primarily viewed as a resource by humanity. With the rapid development of the 20th century, this began to change. The world's ecological footprint has nearly tripled since 1961⁴, as civilization occupies more and more space, wild fauna and flora ecosystems are pushed back. According to the International Union for Conservation of Nature's (IUCN) Red List of Threatened Species, currently there are 28.338 species in the threatened category, 6.127 of them being 'critically endangered'⁵. Globally, 873 species are already declared extinct.⁶ There are several reasons behind the recent biodiversity reduction, namely habitat destruction, overexploitation, climate change and wildlife trafficking. After nations acknowledged these, legislative steps were taken in order to solve the problems mentioned above.

The fundamental document to regulate wildlife trade on global scale is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) signed in 1973 and ratified by 183 states. In essence, CITES has setup a licensing system administered

by National CITES Authorities to authorize the trade of certain species, and it is used in the export, import, and re-export of wildlife. The three appendices of CITES provide certain levels of protection to threatened species listed there, and they are widely used in national criminal codes to describe the species protected by the law. The trade of species included in Appendix I is banned and the species listed in Appendix II can only be traded with strict restrictions. The species can be uplifted or moved from one appendix to another if the current level of protection is not sufficient or the growing trade is likely to threaten the wild populations.⁷

Even though CITES is not a criminal instrument, Art. VIII requires parties to penalize trade contrary to its rules without detailing the exact measures. Since the efforts taken were not as effective as expected, as the demand for wildlife trading remained and continued in illegal forms, states decided to exercise their punitive power in order to secure biodiversity.

IWT is an environmental crime⁸ that involves the illegal trade, smuggling, poaching, capture or collection of endangered species, protected wildlife (including animals and plants that are

⁴ Global Footprint Network Report, *National Footprint Accounts* (2012), available at <http://data.footprintnetwork.org/#/countryTrends?cn=5001&type=BCtot,EFCtot>.

⁵ A Critically Endangered species is considered to be facing an extremely high risk of extinction in the wild based on the classification system criteria of the IUCN.

⁶ <https://www.iucnredlist.org/search/list>

⁷ R. Duffy, *EU trade policy and the wildlife trade* (2016), at 16.

⁸ Environmental crime – stated in Article 3 of the Directive 2008/99/EC, OJ 2008 L 328/28 on the protection of the environment through criminal law – covers acts that breach environmental legislation and cause significant harm or risk to the environment and human health, including the illegal emission or discharge of substances or ionising radiation into air, soil or water; the illegal shipment or dumping of waste; causing harm by the operation of a plant involved in dangerous activity or by handling nuclear materials; the killing, destruction, possession, taking or the illegal trading in wildlife; causing significant deterioration of a protected site; illegal trade in ozone-depleting substances.

subject to harvest quotas and regulated by permits), derivatives or products thereof.⁹

2.A. CHARACTERISTICS OF IWT

The gravity of the issue can be illustrated by numbers: in 2016, a total of 2,268 seizures were reported by 22 EU Member States¹⁰, but according to Interpol data, only 10 to 15 percent of IWT products transiting through Europe are seized¹¹. There are several reasons behind the demand for wildlife products. They are bought because they are considered exotic or luxurious and for their perceived medicinal value, or simply because of tradition. Beside the well-known endangered mammals, many less recognized species are traded for the pet trade or to be processed as food, jewellery or clothing.¹² The demand is constantly growing, ironically, as a 'species becomes scarcer, its value increases, and with it the incentives to drive it into extinction.'¹³

Supply is created by demand: in source regions impoverished villagers often poach to earn additional income: the profit often represents 6 to 10 times the initial investment into criminal activities.¹⁴ Several source regions tend to have long hunting traditions, unstable and under-resourced governments and weak border enforcements.

Poverty and instability leads to corruption amongst enforcement officials and game guards.¹⁵ The vicious circle continues as corruption further undermines regulatory systems making IWT a key challenge to developing countries.¹⁶

Given the return on investment, IWT is the fourth most lucrative illegal activity in the world, after drug trafficking, counterfeiting and human trafficking. It is worth more than £17 billion annually.¹⁷

IWT assumes a well-organized trafficking chain in which the first step is poaching (as described above). The processing of the hunted animals is usually not done by the poachers – local couriers take them to the national facilitators. Transportation by the exporters varies depending on the source, destination and the smuggled item as well. The trade is facilitated by document fraud and is mainly conducted via the major trade hubs (airports and ports) but new ones (e.g. smaller European airports with direct connections to Africa and Asia) are also emerging. The internet and private mailing centres are also becoming increasingly important creating a new challenge in the EU.¹⁸ Endangered species parts are often concealed in legitimate cargoes¹⁹, taking advantage of the growing trade across the globe.

When transported alive, many of the protected animals die due to the horrible circumstances.

Interpreters have a key role enabling the activities of the criminal network in the constantly growing Asian market as buyers and sellers often depend on interpreters who arrange their meetings and facilitate negotiations.²⁰ The services of professionals are also required.

IWT is difficult to detect because poaching and other activities usually happen in isolated places, which are problematic to monitor and because of no reporting of the crime. The absence of border inspection inside the EU makes smuggling significantly easier and presents additional enforcement challenges. Uncovering wildlife crimes often require specialized knowledge and technical skills from administrative, enforcement and judicial bodies, which they might not possess. In most countries the enforcement priority in comparison with other forms of trafficking is low;²¹ understaffed agencies fail to understand the threat of these criminal activities, offences are sometimes not adequately investigated. Cooperation amongst authorities is ineffective. Successful prosecution does not always result in adequate deterrent sentences.

2.B. ORGANIZED CRIME AND IWT

The low-risk, high-reward nature of IWT attracts organized criminal groups²² (OCGs) with extensive international connections.

The structures of the groups involved are extremely diverse. While many *ad hoc groups* only become active to service a specific order (mainly because of the perishable or delicate nature of some of the goods traded, such as live animals or eggs)²³, there are also some well-organized commercial groups permanently concentrating on IWT. This can be assessed by the ratio of large seizures to total seizures.²⁴

IWT has many similarities to other serious crimes based on trafficking (arms, drugs, and humans) allowing to use the same routes and concealing methods therefore many OCGs are involved in multiple types of this transnational illegal trade. Wildlife products are even 'used as a currency in exchange for drugs and such exchanges are often also part of the laundering of drug traffic proceeds.'²⁵ This relatively new method of money laundering is cashless, traceless, and not subject to seizure like bank accounts.²⁶ This poses a real obstacle for law enforcement. The *modi operandi* of money laundering in IWT cases are rarely examined, whether by cash and bulk currency smuggling via cash couriers, informal systems such as hawala or hun-

⁹ Dalberg Global Development Advisors, *Fighting Illicit Wildlife Trafficking: A consultation with governments* (2012), at 9.

¹⁰ TRAFFIC, *Overview of important seizures in the European Union* (2017), at 1.

¹¹ Interpol, *Global Wildlife Enforcement. Strengthening Law Enforcement Cooperation Against Wildlife Crime* (2018), at 10.

¹² R. Duffy, *supra* note 7, at 9.

¹³ UNODC, *The Globalization of Crime. A Transnational Organized Crime Threat Assessment* (2010), at 169.

¹⁴ Europol, *Threat Assessment 2013. Environmental Crime in the EU*, 2013, p. 15.

¹⁵ UNODC, *The Globalization of Crime, supra* note 13, at 152.

¹⁶ UNODC, *The Globalization of Crime, supra* note 13, at 149.

¹⁷ <https://www.gov.uk/government/collections/illegal-wildlife-trade-iwt-challenge-fund>

¹⁸ R. Duffy, *supra* note 7, at 36.

¹⁹ Wildlife products have been seized hidden in shipments of plastic waste, dried fish, stone statues, even inside coffins as well. See: UNODC, *The Globalization of Crime, supra* note 13, at 153.

²⁰ Wildlife Justice Commission, *Operation Phoenix* (2017), at 7.

²¹ Communication from the European Commission 26 February 2016, *EU Action Plan against Wildlife Trafficking*, COM/2016/087 final, at 3.

²² Article 2 and Article 3 of the United Nations Convention against Transnational Organized Crime defines a transnational organized criminal group as a group of three or more persons existing over a period of time acting in concert with the aim of committing one or more serious crimes for financial or material benefit when the offence is transnational in nature.

²³ Europol, *Threat Assessment 2013, supra* note 14, at 15.

²⁴ UNODC, *The Globalization of Crime, supra* note 13, at 157.

²⁵ S. Sina *et al.*, *Wildlife crime. Study for the ENVI Committee* (2016), at 34.

²⁶ S. Sina *et al.*, *Wildlife crime, supra* note 25, at 37-38.

di, payments via Western Union, prepaid cards and store value cards and Crypto currencies.²⁷ There is even evidence of militant groups being involved in IWT²⁸ to support terrorist financing²⁹.

‘Organized crime seems to be less a matter of a group of individuals who are involved in a range of illicit activities, and more a matter of a group of illicit activities in which some individuals and groups are presently involved. If these individuals are arrested and incarcerated, the activities continue, because the illicit market, and the incentives it generates, remain. Strategies aimed at the groups will not stop the illicit activities if the dynamics of the market remain unaddressed.’³⁰

Due to the international and organized nature of IWT, cooperation between source, transit and destination countries is essential to tackle IWT.

3. INTERNATIONAL FRAMEWORK

In 2015 the United Nations recognized the importance of fighting IWT by criminal measures as the General Assembly adopted GA Res. 69/314, 30 July 2015 entitled ‘Tackling illicit trafficking in wildlife’. The resolution encourages Member States to harmonize regulations to support evidence exchange regarding criminal prosecution, and reassure them to enhance international cooperation and to create national inter-agency wildlife

crime task forces. One way the UN helps Member States is through the United Nations Office on Drugs and Crime (UNODC), its Global Programme for Combating Wildlife and Forest Crime (GP) links existing regional efforts and provides technical assistance to combat wildlife crime. ‘The GP is working for and with the wildlife law enforcement community to ensure that wildlife crime, illegal logging, and related crimes are treated as serious transnational organized crimes.’³¹

Another promising institution in the area is the International Consortium on Combating Wildlife Crime (ICWC) formed in 2010 because of the increasing involvement of organized crime networks in wildlife crime by five inter-governmental organizations: the CITES Secretariat, Interpol, which has a specialized Wildlife Crime Working Group in its own Environmental Security Unit), UNODC, the World Bank and the World Customs Organization. ‘ICWC’s mission is to strengthen criminal justice systems and provide coordinated support at national, regional and international level to combat wildlife and forest crime to ensure perpetrators of serious wildlife and forest crime will face a formidable and coordinated response’³². Its main achievement is the Wildlife and Forest Analytic Toolkit, a comprehensive analysis tool to better understand the main criminal justice system issues relating wildlife crimes. It reviews five key areas in a country: legislation, law enforcement responses, the judiciary and prosecution, drivers and prevention, and data analysis. The

assessments based on the toolkit show the way to strengthen law enforcement capacity at local, national and regional level.³³ 27 countries implemented recommendations based on government requested analysis provided by the Toolkit, the list³⁴ includes key actors in wildlife trafficking like Botswana, Tanzania and Vietnam. ICWC also coordinates and supports international operations fighting traffickers, provides specialized training for national authorities, and organizes high-profile conferences.

With a special focus on migratory animals, the Convention on the Conservation of Migratory Species of Wild Animals treaty signed under the United Nations Environment Programme provided legal grounds for the creation of the Intergovernmental Task Force on Illegal Killing, Taking and Trade of Migratory Birds in the Mediterranean (MIKT), which facilitates cooperation and responds to special problems concerning the illegal trafficking of birds in the Mediterranean. The MIKT has a similar national review function as the ICWC toolkit.³⁵

4. EUROPEAN FRAMEWORK

Europe is in a special position because it is a source, transit and destination region for IWT. The EU is an important market for medicinal products delivered from plants, live reptiles and reptile skin, live and dead birds, eggs, mammal bodies, parts and derivatives, corals, caviar, timber products³⁶. Seizure records show the EU serves as a transit region for African and South American wildlife products heading to Asia. Ivory, rhino horns, dried seahorses, pangolin scales go through European infrastructure hubs with mainly China as destination³⁷.

‘Species in Europe are also endangered and trafficked and sometimes overlooked in wildlife trafficking campaigns.’³⁸ One of the largest issues is the smuggling of the European eel, a ‘critically endangered’ species. 7-20 tonnes of European eel were exported illegally to East Asia each year between 2012 and 2015³⁹, where they were sold for high prices on the black market. Another problem is illegal bird trading and hunting. While hunting is legally practiced in many countries, annually 25 million birds (10 million in the EU) are killed illegally in the Mediterranean.⁴⁰ Criminals transport protected animals from Southern and Eastern Europe as delicacies to high-end restaurants in Italy or France.

³³ <https://www.unodc.org/unodc/en/wildlife-and-forest-crime/key-activities.html>

³⁴ CITES Secretariat and UNODC, *Implementation of the ICWC Wildlife and Forest Crime Analytic Toolkit - Summary of progress* (2018), at 1.

³⁵ UNEP, *Programme of Work 2016-2020 for the Intergovernmental Task Force on Illegal Killing, Taking and Trade of Migratory Birds in the Mediterranean* (2016), at 4-14.

³⁶ European Commission Staff Working Document of 26 February 2016, SWD(2016) 38 final, at 16.

³⁷ European Commission Staff Working Document of 26 February 2016, SWD(2016) 38 final, at 20.

³⁸ L. O. Smith, S. Sina and M. Pantzar, *Delivering and Enforcing the EU Action Plan against Wildlife Trafficking* (2016), at 14.

³⁹ European Commission Staff Working Document of 26 February 2016, SWD(2016) 38 final, at 20.

⁴⁰ Birdlife International, *The Killing* (2015), at 3.

²⁷ Asia/Pacific Group on Money Laundering and UNODC, *Enhancing the Detection, Investigation and Disruption of Illicit Financial Flows from Wildlife Crime* (2017), at 20.

²⁸ UNODC, *The Globalization of Crime*, supra note 13, at 157.

²⁹ UNODC, *World Wildlife Crime Report. Trafficking in protected species* (2016), at 3.

³⁰ UNODC, *The Globalization of Crime*, supra note 13, at 28.

³¹ <https://www.unodc.org/unodc/en/wildlife-and-forest-crime/global-programme.html>

³² <https://cites.org/eng/prog/icwc.php>

'Given that the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them.'⁴¹

4.A. EUROPEAN LAW

Europe is in a uniquely advantageous position to fight wildlife crime compared to the rest of the world thanks to the strong international cooperation in the continent.

The first step in Europe was the Council of Europe Convention on the Protection of Environment through Criminal Law, signed on 4 November 1998. The treaty is 'aimed at improving the protection of the environment at European level by using the solution of last resort – criminal law – in order to deter and prevent conduct which is most harmful to it'⁴². In Article 10, the convention contains specific provisions to strengthen international cooperation regarding the investigation and prosecution of environmental crimes. 14 Contracting States have signed with only Estonia ratifying it. This illustrates the attitude of the nations to the issue.

Directive 2008/99/EC, OJ 2008 L 328/28⁴³ on the protection of the environment through criminal law requires Member States to criminalize the killing, destruction, possession, and trading of species listed in Community legislation⁴⁴ including by legal persons.

Substantial progress has been made in the EU in recent years in combating IWT. In 2014 – prior to the GA Res. 69/314, 30 July 2015 – the European Parliament adopted EP Resolution of 15 January 2014, OJ 2014 C 482/83 on wildlife crime in which it called for the establishment of a wildlife crime action plan and several other measures such as strengthening the judiciary and prosecution regarding wildlife trafficking, harmonization of criminal offences of the area, dedicated training, more financial instruments and enhanced international cooperation. In 2015 the EU joined CITES as a legal entity.⁴⁵ The required Action Plan was adopted in 2016 by the European Commission which is a comprehensive list of efforts to fight wildlife trafficking. The plan has three priorities:

1. preventing wildlife trafficking and addressing its root causes;
2. making implementation and enforcement of existing rules and the fight against organized wildlife crime more effective;
3. strengthening the global partnership of source, consumer and transit countries against wildlife trafficking.

Ambitious goals were set including improving detection rate of illegal activities and cross-border cooperation, improving communication and data flow amongst agencies, increasing expert capabilities, stepping up international cooperation between states and organizations like ICCWC to build law enforcement capacity.

4.B. EUROPEAN INSTITUTIONS

The EU's law enforcement agency, Europol leads the fight against illicit wildlife trafficking. Europol supports national investigating and prosecuting authorities in fighting serious international crimes, including environmental crimes, affecting two or more Member States and assists them by collecting, analysing and disseminating information. It coordinates, organizes and conducts investigations together with national enforcement authorities or within joint investigation teams involving several Member States. In 2013, Europol identified IWT as an emerging threat in its Serious and Organised Crime Threat Assessment (SOCTA) in terms of impact, high value, *modus operandi* and dimension⁴⁶. The EU Policy Cycle (EM-PACT) declared environmental crimes, particularly wildlife trafficking a priority crime area for the period 2018-2021.⁴⁷ Europol has supported several high-profile operations⁴⁸ against wildlife crime. The most significant was the Operation COBRA III, which led to the recovery of a huge amount of wildlife products, in-

cluding over 12 tonnes of elephant ivory, at least 119 rhino horns, 11.439 dead and live specimens with the contribution of 62 countries from four continents.⁴⁹ The agency works closely with EnviCrimeNet, an informal network connecting police officers and other experts.⁵⁰

Between 2012 and September 2018, Eurojust, the European Union's Judicial Cooperation Unit provided legal assistance in 55 environmental crime cases and established four joint investigation teams (JITs).⁵¹ In the '*Bird-Egg case*', Eurojust assisted in setting up a JIT between Sweden and Finland and provided funding, which enabled an ornithologist to join the investigation, whereby a criminal network illegally trading birds was discovered.⁵²

One of the most useful resources restricted for law enforcement fighting IWT is the European Union Trade in Wildlife Information eXchange (EU-TWIX) managed by TRAFFIC. It is a database and mailing list connecting enforcement officials and key organizations like the CITES Secretariat, Eurojust, etc.⁵³ to facilitate information exchange and cooperation in wildlife crime, tracking important seizures and identification of species.

In addition, the European Network against Environmental Crime (ENEC) aims to improve the implementation and application of Directive 2008/99/EC, OJ 2008 L 328/28. The European

⁴¹ Birdlife International, *The Killing* (2015), at 3.

⁴² Council of Europe, *Details of Treaty No. 172*, available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/172>

⁴³ Looking back, in 2003 the European Council adopted the Council Framework Decision 2003/80/JHA with stricter regulations, but the Court of Justice of the European Union eliminated the decision because of formal reasons in 2005 (C-76/03).

⁴⁴ Significant directives in the area are Council Regulation 338/97, OJ 1997 L 61/1 and Council Directive 92/43, OJ 1992 L 206/7.

⁴⁵ Council Decision 2015/451 of 6 March 2015, OJ 2015 L 75/1

⁴⁶ R. Duffy, *supra* note 7, at 18.

⁴⁷ EFFACE, *Environmental crime and the EU* (2016), at 22.

⁴⁸ See: Operation LAKE, Operation Thunderstorm, Operation and Operation SUZAKU

⁴⁹ <https://www.europol.europa.eu/activities-services/europol-in-action/operations/operation-cobra-iii>
⁵⁰ <http://www.envicrimenet.eu/>

⁵¹ H. Nummela, *Eurojust and environmental crimes* (2018), available at <http://waldrapp.eu/science/conference-crete-2018/wp-content/uploads/2018/11/Day-2-1st-plenary-Nummela.pdf>

⁵² 'The Bird-Egg case' 10 *EUROJUST News* (2013), 15.

⁵³ EU-TWIX, *An internet tool to assist the EU in the fight against wildlife trade crime* (2019) at 1-2.

Network of Prosecutors for the Environment (ENPE) has set up a working group exploring the major issues of interpretation, practical application, evidence gathering and quantification of damage to the environment that hinder efficient and effective prosecution and adjudication of non-compliance with EU wildlife laws.⁵⁴ The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) focuses on combating the illegal killing of birds by helping with the implementation of the Birds Directive and the Habitats Directive. Finally, the LIFE programme shall be mentioned, which provides funding for several projects fighting wildlife crime.

Regarding differences between certain regions, local cooperation is necessary, which has been manifested in the form of regional treaties⁵⁵ and organizations.

‘Overall, the regulatory framework of the EU to combat wildlife crime appears rather robust and fit for purpose. Deficiencies are mainly related to enforcement.’⁵⁶

5. DETECTION OF ILLICIT WILDLIFE TRAFFICKING

Despite the EU response, insufficient enforcement is a major concern. Priority 2 of the Action Plan seeks more effectiveness in the rate of detection of illegal activities through implementation and enforcement of existing rules.⁵⁷ Quantitative analyses of IWT is challenging due to its covert nature. ‘Accurately identifying trends in illegal trade (either over time or when comparing countries) is complicated in particular because we do not know what proportion of illegal transactions is seized (seizure rate) and what proportion of these is reported (reporting rate).’⁵⁸ Not only are illegal activities difficult to monitor but the results of such attempts are often biased as they over represent countries where data collection and problem analysis is more effective and under represent others.⁵⁹ Available EU seizure data (2011-2013) indicates that the latency is high. The number of indictments⁶⁰ in environmental crimes in Hungary also seems to confirm this presumption:

	2014	2015	2016	2017
total number of registered cases of all types of crimes	329.575	280.113	290.779	226.452
registered cases of Damaging the Natural Environment (DNE)	125	91	87	81
indictments thereof	49	35	42	28
percentage	39%	38%	48%	35%

These figures demonstrate IWT is not a priority at the national enforcement level,⁶¹ with a minority of Member States having a national action plan on wildlife crime as recommended by Commission Recommendation of 13 June 2007, OJ 2007 L 159/45.⁶²

Based on the experience of Hungarian procedures IWT cases unfold by accident during routine roadside checks. This is confirmed by Hungarian judges ruling in such cases.

5.A. CAUGHT IN THE ACT AND THE INVESTIGATION AFTERWARDS

The typical deficiencies of these cases can be well illustrated with the following Hungarian procedure⁶³.

The Romanian defendant drove through Hungary from Romania to Italy with six Romanian passengers. During a roadside check officers inspected their luggage and found 10 pieces of plucked frozen quail in the driver’s cooler. The intrinsic value of the birds was approximately 1.500.-EUR.⁶⁴

The defendant claimed he had bought venison for a friend but had no knowledge what kind of meat was in the cooler and he did not know permission was required to transport quails in Hungary. He mentioned quails are recommended for shooting in Romania.⁶⁵

Since the defendant had no licence to transport the quails he was convicted DNE⁶⁶ and he was sentenced to 6 months’ imprisonment suspended for 2 years.

Accusing only one person was enough for the investigation authorities in this case, however the circumstances of the perpetration indicated that more people were concerned in the smuggling of the protected animals. Further investigation would have uncovered the organized elements of the crime, yet the following actions were missed by the police:

⁵⁴ <https://www.environmentalprosecutors.eu/wildlife-crime>

⁵⁵ eg. Framework Convention on the Protection and Sustainable Development of the Carpathians, Danube River Protection Convention

⁵⁶ S. Sina et al., *Briefing – Wildlife Crime* (2016), at 2.

⁵⁷ Action 10 of European Commission Staff Working Document of 24 October 2018, SWD(2018) 452 final

⁵⁸ European Commission Staff Working Document of 26 February 2016, SWD(2016) 38 final, at 38.

⁵⁹ BIO Intelligence Service, *Stocktaking of the main problems and review of national enforcement mechanisms for tackling illegal killing, trapping and trade of birds in the EU* (2011), at 18.

⁶⁰ Bűnügyi Statisztikai Rendszer (Criminal Statistic System) available at <https://bsr.bm.hu/Document>

⁶¹ Eurojust, *Strategic Project on Environmental Crime* (2014), at 10.

⁶² S. Sina et al., *Briefing*, supra note 56, at 3.

⁶³ Case 2.B.105/2011. of Municipal Court of Hajdúböszörmény

⁶⁴ The value of a quail is 50.000.-HUF according to the Appendix 2 of the Decree of Minister for the Environment 13/2001. (V.9.).

⁶⁵ Advice and guidance across the EU by the authorities who regulate the movement of species is not always consistent and can depart from EU guidance. Record keeping of advice given to individuals is not always maintained, and it can therefore become challenging to dispute an assertion by a suspect that they had been told it was acceptable to carry out a certain action by the authorities. See in Eurojust, *Strategic Project*, supra note 61, at 58.

⁶⁶ Section 281 of Act IV of 1978 on the Criminal Code of Hungary

1. the source of the endangered animals was not examined;
2. the location and circumstances of the poaching, the hunter's and any possible associates' identity remained unknown;
3. the *mens rea* of the perpetrator(s) was not clarified;
4. the accused's relationship to the identified recipient and their backgrounds and connections were not examined;

If authorities – as in this case – are satisfied with closing the proceedings by punishing one disposable and easily replaceable offender, they have no chance to eliminate the phenomenon.

Law enforcement agencies tend to treat these cases as isolated offences.

In October 2011 it was reported 779 dead Eurasian skylarks were discovered in a car driven by an Italian hunter at the Romanian-Hungarian border crossing point without a proper licence (caused damage: 24.574.-EUR).⁶⁷ 5 weeks later customs found 644 illegally hunted Eurasian skylarks (caused damage: 20.315.-EUR) during a roadside check in a Romanian car heading to an Italian address to deliver them on a Hungarian motorway. The Romanian driver of the car was found guilty in an expedited proceeding and sentenced to a fine of 394.-EUR.⁶⁸

The two competent authorities most probably did not know about each other's cases therefore did not even try to find suspicious similarities between them. More links could have been found

by comparing the data gained by their phones, e-mails, messages and social media, checking their circles of acquaintances, their source, destination and route. Ways of connecting the dots are only limited by capacity, money, willingness and the amount of shared information. The need of intelligence gathered systematically in the field of environmental crime as in other crime areas was also stressed by prosecutors at the Strategic Meeting of ENPE and Eurojust.⁶⁹ 'Since many different agencies and or public bodies are involved in inspecting and investigating wildlife offences, this intelligence gathering should by nature be multidisciplinary. Legal channels of communication of information should also therefore exist at national level to ensure a smooth handling and sharing of intelligence. Collection of intelligence at national level would trigger a more efficient sharing and analysing of intelligence at EU level.⁷⁰ Given all the necessary information to them, the criminal data analysts of Europol could spot the link between the two defendants and put together the whole picture about wildlife trafficking organized crime groups.

5.B. OPEN SOURCE INTELLIGENCE TECHNIQUES

The effective fight against organized IWT requires greater focus by law enforcement in detecting IWT rather than just investigating the cases found by accident. One method to do that is using Open Source Intelligence (OSINT).

'The internet is a horizontal issue affecting most, if not all, crime areas and environmental crime is no exception.⁷¹ Criminal organizations quickly adopt new technologies (such as encrypted communication or online trade) and integrate them into their *modi operandi* creating 'efficiency'.⁷² Criminals use the internet as a tool for their crime which might make it harder to detect and prove, but this can be turned against them variously. The internet can also be a law enforcement weapon.

For the beginning of detection, we recommend greater use of open source material by searching on the surface net that can be accessed by anyone without any special tools; OSINT is information collected from public sources such as those available on the Internet. Although there are signs of IWT on the dark web (, which is used as means to avoid detection), criminals are still not afraid of getting caught enough to disappear from the surface web. People involved in illicit activities choose dark web as a platform instead of the surface web when they worry more about getting caught by law enforcement than about scams on the dark web such as stealing their digital money from deposit by the owner of crypto markets or not getting the purchased items.⁷³ Since investigation authorities do not yet focus on detecting IWT on the internet, crimi-

nals may not be too careful on this platform. For example, in the EU, which is the largest market for reptiles as pets, the internet is increasingly used to sell these rare species.⁷⁴ Investigation authorities may get to know the market on sites and forums providing information about the collection or use of various wildlife animals. When users show interest in having them traders might contact them as possible customers in private to arrange a deal.⁷⁵

The origin of the animals or products made of them or even the fact if these could be purchased legally should also be examined on e-commerce sites.

Despite the fact that the Internet (including social media) is used in IWT, the extent to which the Internet is an important medium cannot be conclusively determined with the existing legislation and available data. It is clear that specially adapted legislation and strong collaboration is needed to further investigate these crimes, in order to determine the scale and nature of the illegal trade so that appropriate enforcement measures can be taken against it.⁷⁶ At the moment 'there is little information available on the extent to which internet-based trade is monitored for most Member States.'⁷⁷

⁶⁷ Europol, *Threat Assessment 2013*, supra note 14, at 17.

⁶⁸ Europol, *European Union Serious and Organised Crime Threat Assessment. Crime in the age of technology* (2017), at 10.

⁶⁹ See more about the functioning and characteristics of the surface and dark web in: D. Pálfi, *A kiberbűnözés elleni fellépés lehetséges eszközei az online illegális piacokon – A Silk Road elleni nyomozás (Possible tools for combating cybercrime in online illegal markets – The Silk Road Investigation)* (2018) (LLM thesis on file at Károli Gáspár University, Budapest).

⁷⁰ S. Sina et al., *Briefing*, supra note 56, at 4.

⁷¹ F. Thomaz, *Illicit wildlife markets and the dark web. A scenario of the changing dynamics* (2018), at 4-5.

⁷² Interpol, *Project Web. An Investigation Into the Ivory Trade Over the Internet within the European Union* (2013), at 3.

⁷³ S. Sina et al., *Wildlife Crime*, supra note 25, at 94.

⁶⁷ <http://zold.info/hirek/2011/10/23/800-pacsirta-egy-terepjaroban>

⁶⁸ <http://greenfo.hu/hirek/2011/12/07/penzbuntetes-a-madarcsempesznek>

⁶⁹ Strategic Meeting towards an enhanced coordination of environmental crime prosecutions across the EU: The role of Eurojust, held in The Hague, 27-28 November 2013.

⁷⁰ Eurojust, *Strategic Project*, supra note 61, at 90.

The role of social media is not negligible: people are not aware how much they might reveal about themselves or others and that is a real advantage for investigations. Instagram is a great example: it is well-known that a number of Italian or Maltese restaurants serve endangered birds from the Carpathians as delicacies. It is also well-known that people like sharing photos of delicacies they eat and they often tag the restaurant. By finding pictures and hashtags indicating the consumption of protected animals, investigators have the opportunity to check whether the restaurant had the proper permit to possess the animals and if not, how it obtained them.

These are just two examples how investigation authorities could start exploring the threads for the whole criminal organization. OSINT techniques are also very useful in situations when the investigation already has a target person but needs to know more about his/her circles, whereabouts, interests, etc. Further methods should be discussed behind closed doors for the success of future investigations.

Regarding prevention, authorities could focus on cooperating with social media organizations and other online service providers in order to monitor and remove illegal trade related content of their applications.

5.C. THE ROLE OF ADMINISTRATIVE AUTHORITIES IN DETECTION

The lawful trade in animals can act as a cover for IWT. Similar to other forms of organized crimes, forging declarations and using false papers to disguise offences occur in IWT cases.⁷⁸ Case studies suggest that some wildlife farms, captive breeding operations, or even zoos may play a role in laundering illegally acquired wildlife. International trade must be monitored and controlled to ensure that it does not enter legal commercial streams.⁷⁹

Regular monitoring by the administrative authorities of traders', breeders' and keepers' activity could prevent the breach of the international, EU and national regulation. In case of noticing suspicious growth of population the administrative authority shall report the case to the investigative authority. As most permit documents do not have an expiry date, – without post-grant monitoring – using illegally traded wild animals to replace dead specimens or pass off as newborns is an easy way to circumvent the rules for criminals.⁸⁰

Sturgeons are on the brink of extinction due to, among other factors, illegal fishing.⁸¹ The scarcity of 'real' (wild) sturgeon caviar has offered a unique opportunity for organized crime to earn millions of euros from illegal fishing, smuggling and trafficking in various countries.⁸²

Illegal trade is often involved with seemingly legal fishing or breeding businesses, therefore it is important to keep them under strict administrative control. 'Enforcement authorities of consumer and transit countries/territories should pay a close attention to caviar that is claimed to be wild sourced and, as appropriate, get in contact with exporting countries to check if export permits are issued properly. Relevant enforcement authorities ... should check that the species, source (e.g. wild, captive bred) and the geographic origin of the caviar match those provided on the label/packaging also using laboratory techniques to minimize the risk of fraud and illegal trade.'⁸³

Food chain safety offices could play an important role in monitoring the source of purchases by restaurants pushing back supply. 'Commercial traceability mechanisms should be strengthened to ensure supply chain integrity from source to destination markets.'⁸⁴

National administrative authorities should rely on the available mechanisms to share data with each other such as EU-TWIX. The United Nations Environment Programme (UNEP) states that monitoring the legal trade and curbing the illegal trade in wildlife requires good information exchange and cooperation, involving importing, exporting and transit countries and recommends that mechanisms be enhanced to facilitate rapid exchanges of intelligence between law enforcement agencies.⁸⁵

Besides the commercial trade, wild populations must be monitored too as this is the only way to notice, prevent and recover suspicious disappearances. The monitoring works quite well; in recent years the Scottish Natural Heritage discovered by analysing its results that a relatively large number of golden eagles were probably killed.⁸⁶

5.D. APPLICABILITY OF COVERT DATA-GATHERING TOOLS

Coercive or complex investigation techniques (e.g. undercover agents, interception of communications) are one of the most powerful tools of the investigators. The conditions of using these tools are different in every national legislation which might be an obstacle in international cooperation. In Hungary using covert data-gathering tools authorised by judges or prosecutors is possible in DNE cases, however in some countries the level of penalty for this offence might not be high enough to allow for these techniques.⁸⁷

⁷⁸ e.g. European Commission Staff Working Document of 26 February 2016, (2016)38 final, at 66.

⁷⁹ UNODC, *World Wildlife Crime Report*, supra note 29, at 3-10.

⁸⁰ S. Sina et al., *Wildlife Crime*, supra note 25, at 94.

⁸¹ L. Harris and H. Shiraishi, *Understanding the global caviar market. Results of a rapid assessment of trade in sturgeon caviar* (2018), at 7.

⁸² D. van Uhm and D. Siegel, supra note 2, at 83.

⁸³ L. Harris and H. Shiraishi, supra note 81, at 69.

⁸⁴ UNODC, *World Wildlife Crime Report*, supra note 29, at 11.

⁸⁵ R. Duffy, supra note 7, at 31.

⁸⁶ Scottish Natural Heritage, *Analyses of the fates of satellite tracked golden eagles in Scotland* (2017), at vii.

⁸⁷ Eurojust, *Strategic Project*, supra note 61, at 57.

6. SOLUTIONS IN INTERNATIONAL INVESTIGATIONS

When the national law enforcement agencies recognize the transboundary nature of IWT they shall conduct the investigation together in order to eliminate the criminal organization.

One of the most effective forms of international cooperation is the Joint Investigation Team (JIT). A JIT is a 'team consisting of judges, prosecutors and law enforcement authorities, established for a fixed period and a specific purpose by way of a written agreement between the States involved to carry out criminal investigations in one or more of the involved States. Team members carry out their duties in accordance with the national laws of the territory in which the investigation takes place. JITs enable the direct gathering and exchange of information and evidence without the need to use traditional channels of mutual legal assistance (MLA).'⁸⁸ JITs allow for the development of a common strategy, on-the-spot coordination and the informal exchange of specialized knowledge on serious cross-border crime cases. They also strengthen mutual trust and interaction between team members from different jurisdictions and work environments.⁸⁹

Member States who want to work together in a JIT can rely on two significant bodies. Europol can provide help for the investigations with information

exchange and criminal intelligence analysis, it can serve as a support centre for law enforcement operations.⁹⁰ Eurojust can provide coordination meetings, JIT funding and expert advice on the conclusion of JIT agreements and related legal questions.⁹¹ Eurojust accelerates the processing of information exchange and ensures efficient coordination of the relevant entities⁹² and contact with the appropriate foreign authority. Despite the benefits of Eurojust and Europol, Member States rarely take the opportunity: the number of cases in which Member States have requested support from Europol remains low (on average less than 10 per year),⁹³ and until 2014 only five countries involved Eurojust in cases of all kinds of environmental crime. In these cases, Eurojust helped the countries to identify criminals, gave recommendations and enabled communication between the parties involved.⁹⁴

As indicated above, OCGs active in IWT are not necessarily hierarchically structured, well-developed giants. In an appropriate and less complex IWT case, the European Judicial Network in criminal matters (EJN) can provide practical help.

The EJN Contact Points are active intermediaries who facilitate judicial cooperation in criminal matters between the EU Member States, particularly in actions to combat forms of serious crime. Local judicial and other competent agencies can contact the foreign competent authorities with the help of their own national contact points who assist to ensure all

the necessary information, to make the request successful, is provided.⁹⁵

6.A. CONTROLLED DELIVERIES

Another highly potential but underused tool is controlled delivery (CD) where an illicit shipment of wildlife products is detected and then allowed to be delivered under strict control and surveillance by law enforcement authorities.⁹⁶ CDs are seen as complicated and too risky but by using the latest technology available for tracking the package⁹⁷ and improving cooperation between the agencies, this tool can lead to uncover most of the IWT chain. Following the shipment can be the first successful step towards an efficient investigation in which the route of the wildlife from source to its final destination and the money and everyone profiting from it would be tracked.⁹⁸ CDs are also necessary because 'simply removing wildlife from the 'supply chain' without taking actions against those responsible, will probably result in those involved acquiring more specimens and beginning the smuggling process afresh'⁹⁹.

'A controlled delivery may be considered when a law enforcement agency either physically detects, or otherwise becomes aware of, wildlife of apparently illegal origin that has begun, or is about to begin, transportation from one country to another.'¹⁰⁰

Managing CDs is not easy, is time consuming and requires a lot of cross border coordination, however European Investigation Orders can be issued for carrying a CD, which speeds up the actions. These advantages and disadvantages of a CD need to be considered beforehand in case involving a smaller shipment.

In 2018, the Council of Europe's Pompidou Group launched a new online handbook on CDs restricted to law enforcement and international judiciary¹⁰¹ that – given the similar nature of drug trafficking and IWT – can be used in wildlife crime cases as well.

6.B. FORENSIC TOOLS

As the classical means of evidence are rare in IWT cases, investigation needs to rely on forensic science even more than usual. Law enforcement often faces difficulties to provide the highly technical evidence required for convictions.

Forensic science is used for species identifications, DNA profiling and determining the geographic origin of animal samples. These tools can be useful when investigators need to narrow down the possibilities but a strong likelihood is not enough for the judiciary. Besides a few generic techniques the majority of wildlife forensic applications are species specific¹⁰² that all need to be accredited in order to be assessed as reliable evidence in court. There are only few labs

⁸⁸ N. Crampton, *Co-operation in enforcing Wildlife trafficking – Institutions and Instrument* (2016), at 16.

⁸⁹ 'The foundation of the JIT concept' 9 *EUROJUST News* (2013), 1, at 2.

⁹⁰ <https://www.europol.europa.eu/about-europol>

⁹¹ 'The foundation of the JIT concept' 9 *EUROJUST News* (2013), 1, at 2.

⁹² Eurojust, *Strategic Project*, *supra* note 61, at 31.

⁹³ European Commission Staff Working Document of 26 February 2016, SWD(2016) 38 final, at 49.

⁹⁴ Eurojust, *Strategic Project*, *supra* note 61, at 71.

⁹⁵ Article 4 of Council Decision 2008/976/JHA of 16 December 2008, OJ 2008 L 348/130

⁹⁶ S. Sina, *et al.*, *Wildlife crime*, *supra* note 25, at 39.

⁹⁷ <https://www.unodc.org/southeastasiaandpacific/en/vietnam/2019/04/wildlife-crime/story.html>

⁹⁸ Interpol and CITES, *Controlled Deliveries. A Technique for Investigating Wildlife Crime* (2007), at 24.

⁹⁹ Interpol and CITES, *supra* note 98, at 7.

¹⁰⁰ Interpol and CITES, *supra* note 98, at 6.

¹⁰¹ http://www.eurojust.europa.eu/press/News/News/Pages/2018/2018-06-28_handbook-on-controlled-deliveries.aspx

¹⁰² R. Ogdon, J. Mailley, and The Society for Wildlife Forensic Science, *A review of wildlife forensic science and laboratory capacity to support the implementation and enforcement of CITES* (2017), at 26.

operating forensic testing under external audited quality systems¹⁰³ meaning a possible obstacle at the end of criminal procedures.

7. BEYOND CRIMINAL PROCEDURE

In order to effectively apply the proposed methods to fight organized IWT successfully, States have to strengthen the knowledge, capacity and cooperation between institutions and actors in the field.¹⁰⁴

Enforcement officials should participate in international and joint trainings on how they can provide the judiciary with the necessary information for effective prosecution.¹⁰⁵ It is crucial staff at all levels be adequately trained and skilled to meet those challenges and hazards associated with combating wildlife and forest offences.¹⁰⁶

Some training on wildlife trafficking is already included in the programme of EU training institutions such as European Union Agency for Law Enforcement Training (CEPOL), the Academy of European Law (ERA) and others.¹⁰⁷

States should provide sufficient material and human resources to enhance the

capacity of law enforcement authorities. This should be handled at state level as the needs are different in source, transit and destination countries and depends on whether it is a widespread or minor issue in the certain region.¹⁰⁸

‘One way of enabling effective cross-border cooperation would be to improve the level of communication (including passing on good practices) and information exchange, particularly on administrative measures and sanctions between Member States, Europol and the Commission.’¹⁰⁹

Communication and cooperation should also be enhanced at national level amongst cross-border bodies, law enforcement agencies, financial intelligence units and administrative authorities so they can work together as multi-agency enforcement task forces to tackle organized IWT.¹¹⁰

7.A. UMBRELLA BODIES SUPPORTING THE FIGHT AGAINST WILDLIFE CRIMES

Such organizations are not entirely unprecedented. The United Kingdom established a multi-agency body called Partnership for Action Against Wildlife Crime (PAW), which currently¹¹¹ has 107 governmental and nongovernmental partners who work together in order to raise awareness of wildlife legislation

and the impacts of wildlife crime, help and advice on wildlife crime and regulatory issues, and to make sure wildlife crime is tackled effectively.¹¹²

National Wildlife Crime Unit (NCWU) is the conduit between police forces and other PAW partners who assists in the detection of wildlife crime (including IWT) by obtaining and disseminating information from a wide range of organizations, assisting police forces in wildlife crime investigation and by producing analysis which highlights local or national threats.¹¹³ ‘The NCWU Investigative Support Officers offer free assistance to police forces and partners across the whole of the UK.’¹¹⁴

Besides the well-working umbrella body, the UK provides a good practice example to the world by other actions tackling wildlife crime such as high-level conferences, establishing and/or financially supporting various initiatives, as well as information dissemination and capacity building activities.¹¹⁵

While the great impact of umbrella bodies is confirmed, other solutions seem to be effective as well. The Netherlands is seen as one of the frontrunners in the EU in enforcement of wildlife trade regulations, because of its risk-based approach and well-functioning cooperation between customs, police, and administration.¹¹⁶

Slovakia has a training programme about environmental crimes for prosecutors in order to be more effective in wildlife crime cases. In Sweden, prosecutors trained in environmental law are grouped in a specialized environmental unit.¹¹⁷

7.B. RAISING PUBLIC AWARENESS

Prevention is better than cure since damage caused to the environment by committing wildlife crimes cannot be restored by punishing the perpetrator.

Non-governmental organizations like TRAFFIC, World Wildlife Fund (WWF) and IUCN play an important role in raising public awareness. Bottom-up communities are suitable for changing the attitude of careless individuals by educating them how to live an environmentally conscious life. In the long term, IWT can only be effectively tackled if we reduce untenable demand for the environment¹¹⁸: public education has a role in this regard.

¹⁰³ R. Ogden, J. Mailley, and The Society for Wildlife Forensic Science, *supra* note 102, at 24.

¹⁰⁴ L. Schlingemann, (Editor in Chief) *et al.*, *supra* note 1, at 7.

¹⁰⁵ L. Schlingemann, (Editor in Chief) *et al.*, *supra* note 1, at 37.

¹⁰⁶ UNODC, *Wildlife and Forest Crime Analytic Toolkit Revised Edition* (2012), at 91.

¹⁰⁷ E.g. https://www.era.int/cgi-bin/cms?_SID=4661088b822e629a5858b-4d0e54dd16d08852cd700632447682688&_sprache=en&_bereich=artikel&_aktion=detail&idartikel=125762

¹⁰⁸ BIO Intelligence Service, *supra* note 59, at 178.

¹⁰⁹ European Commission Staff Working Document of 26 February 2016, SWD(2016) 38 final, at 50.

¹¹⁰ Interpol, *Project Web*, *supra* note 76, at 4.

¹¹¹ As of July 2018.

¹¹² <https://www.gov.uk/government/groups/partnership-for-action-against-wildlife-crime>

¹¹³ <https://www.nwcu.police.uk/about/>

¹¹⁴ <https://www.nwcu.police.uk/about/structure-of-the-unit/>

¹¹⁵ S. Sina *et al.*, *Briefing*, *supra* note 56, at 5.

¹¹⁶ S. Sina *et al.*, *Briefing*, *supra* note 56, at 4.

¹¹⁷ BIO Intelligence Service, *supra* note 59, at 175-176.

¹¹⁸ The Marrakech Declaration, available at http://awsassets.panda.org/downloads/the_marrakech_declaration.pdf

8. CONCLUSION

In this paper we have shown why wildlife crime is a significant problem, that it is crucial to fight against organized IWT more effectively and how that could be achieved.

Detecting IWTs must not be left to chance. We propose a new approach towards these cases by introducing applicable OSINT techniques. We emphasize that law enforcement agencies and administrative authorities have to collaborate at national and EU level in order to eliminate the threatening phenomenon.

The judiciary would benefit substantially from clarification and harmonization of the definition of offences regarding IWT; the introduction of similar levels of penalty across the European Union; a common interpretation of the different specific texts existing under the label 'European environmental law'. In national legislation the burden of proof in relation to specific criteria can be hard: proving the criterion 'potential danger of the environment to a considerable degree' is particularly challenging.¹¹⁹ These will probably only be feasible by a clear recognition, beginning at national level, of the seriousness of those types of crime.¹²⁰

Tight time limits, procedural and communication complications usually discourage investigators from conducting IWT related criminal proceedings.

Obtaining evidence from abroad takes time, which can itself pose challenges to presenting a case within statutory time limits. 'In requests for information from abroad, it can be challenging to convey the procedural requirements in the laws of the requesting country that any evidence produced will have to meet (these requirements may be unknown in the foreign jurisdiction). For example, copy documentary productions may require appropriate certification to explain that they are copies.'¹²¹

Nevertheless, international cooperation should be seen as an opportunity rather than an obstacle. If implemented and executed properly, law enforcement cooperation in cross-border organized wildlife trade cases contributes to the effectiveness of international judicial cooperation, enabling countries to seek legal assistance, the transfer of proceedings in criminal matters, and cooperation for the purposes of the confiscation of criminal proceeds and assets.¹²²

The 5-year duration of the Action Plan is soon coming to an end when its result will need to be evaluated. However, it can already be seen that a decisive point is approaching. At this point, we need to choose either investing in human and financial resources in order to preserve our nature or resign ourselves to the 'inevitable' loss of the environment. We believe the right decision is quite obvious. We should increase the capacity of law enforcement otherwise biodiversity will suffer irreparable damage.

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¹¹⁹ Eurojust, *Strategic Project*, supra note 61, at 56-57.

¹²⁰ Eurojust, *Strategic Project*, supra note 61, at 36.

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SEMI-FINAL B

EU AND EUROPEAN FAMILY LAW

PARTICIPATING TEAMS

BOSNIA AND HERZEGOVIA, CZECHIA, FRANCE,
ITALY, PORTUGAL I, PORTUGAL II AND ROMANIA

1st place: Team Czechia
2nd place: Team Romania
3rd place: Team Portugal II

Special Award:
Team Italy

Selected papers for TAJ:
Team Czechia
Team Romania
Team Italy



7-8 MAY 2019 THESSALONIKI, GREECE - NATIONAL SCHOOL OF JUDICIARY

JURY MEMBERS

PETROS ALIKAKOS [GR]

PH.D., JUDGE, TRAINER OF THE GREEK SCHOOL OF JUDICIARY

This year the second time I joined a THEMIS Jury was for European Family Law – the first was few years ago as juror for the Semi-Final on Judicial Ethics. More or less I could say that I envisaged the same enthusiasm from the participants and the same commitment from the Jury members in their tasks.

But it is really not that simple. The whole procedure for a THEMIS Jury member is awesome: from the loneliness, while studying and commenting the papers, until the real action of the debate with the participants and the vivid discussion during the Jury's conference later on. Not of course to undermine the discussions with the participants and the trainers after the competition. Really, I believe that THEMIS is made not only to promote legal or judicial excellence. THEMIS is made also to promote the exchange of views between the Jurors, the participants and their trainers. The interaction among the above actors not only on European legal issues, but also in general judicial matters, is a cornerstone for the integration of the European Judiciary, given the fact that the Jurors and the trainers are usually national judges and of course the participants are the future national judges.

Regarding the selection of the written papers for the Journal, I would like to mention that for me the gravity was given to: 1. the scientificity of the research, 2. the originality of the topic, 3. the preoccupation with a modern issue and 4. the good effort to suggest legal solutions. It gives me a great pleasure to see our young and future peers to seek legal solutions to modern and controversial issues.

Personally, I praise the initiative to have a THEMIS annual journal. All this effort made during the Semi-Finals and the Final each year, from every player of the competition, is going to be gathered together, is going to be measured and monitored in a journal. It is a historical moment. It is also a way to see the flaws and make the competition better and better in the future!

MAARJA TORGA [EE]

JUDICIAL ADVISOR AT THE ESTONIAN SUPREME COURT,
PROFESSOR AT UNIVERSITY OF TARTU, FACULTY OF LAW

It was a great pleasure to participate as the member of a jury in the pre-moot dedicated to family law. What I found the most impressive in this moot was the originality of the problems that the teams had come up with. European family law is well researched and to find a novel way how to look at it is something that I was personally most looking forward to when I came to this moot. The teams did not disappoint in this respect – every memo contained a novel legal problem and oftentimes the teams had chosen legal topics that lacked any legal research by academics or practitioners. This meant that the teams had to come up with original solutions and could not rely on just legal writings.

Another thing that I was personally very impressed with was the way teams from different jurisdiction used their own legal systems to solve problems universal in all around the EU. While it is one thing to just describe how things are done in one country, it is quite another to provide a way how solutions found in one country could be fit into a universal system of rules applicable everywhere in the EU. In Europe we are often faced with problems which have sometimes already been solved in other jurisdictions. In order to have better law making and better practices in courts, a judge/legislator/practitioner should know of possible arguments/solutions which are used in other jurisdictions. That is the reason why it is important to share knowledge on the original solutions/institutes that we have in different parts of Europe. I think Themis Moot is one small way how such knowledge can be shared and of course the competition is a perfect way to also build mutual trust in each other's legal systems, which is another very important consideration to keep in mind when attending these types of competitions.

Lastly, I would also like to mention that I found the support from the host institution and the EJTN to be excellent. As a jury member, I felt throughout the process that I was in very good hands - something which I am sure all the teams and the other jury members felt as well.

ADRIENN VÁRAI-JEGES (HU)

JUDGE, HUNGARIAN ACADEMY OF JUSTICE

I have been a judge at the Central District Court of Pest, and it was a great honour for me to be a jury member of the THEMIS 2019 Semi-final B event in Thessaloniki this spring.

As a family law judge it was joyful and interesting work to prepare from the written papers. I had the chance to compare the legal institutions, the national laws, the national legal practises of the different states and analyse the relevant case law of the CJEU and ECHR on each selected issue.

At the beginning of my work – when I received and read all the written papers – I made up my goals in connection with the competition. They were as follows:

- to get to know one another
- to get acquainted with the participants' law systems as well as the legal practises of family law and international family law
- to learn the way others think, and finally
- to establish mutual trust among us, which is a very sensitive issue in family law matters.

To reach my goals I reviewed the relevant Hungarian rules and case law concerning each topic, then set up my questions to the teams on their national rules and way of thinking about their issue in the competition.

Participating in this contest and sharing the knowledge, the family law cases, the way of thinking helped us show the mutual trust and understanding among future family law judges.

These days there are several important questions related to court workload and family law; like how to decrease the strain of courts, how to help the parties in matrimonial cases, how to promote mediation and alternative solutions in family law cases, how to hear a child, and how to assist family members to get through family crises.

The article of the Italian team about “Agreements concluded by spouses in the matter of divorce or legal separation: the “dogma” of recognition and enforcement within the European area” gives us answers to these questions.

The topic of the article is a very well-chosen issue. Namely, private divorces have now clearly become more common in the European Union. The article gives us a very good overview of the situation in the different member states, moreover, makes a good effort to analyse the future solution according to BRllbis recast.

The article deals with the circulation and recognition of these kinds of agreements. It also considers the critical aspects and problems that are still open concerning the issue and suggests practical and useful solutions.

ZUZANA BRZOBOHATÁ
KLÁRA HEGEROVÁ
ŽANETA HOBLÍKOVÁ



TUTOR: TEREZA VALEŠOVÁ

“MISTER WARDEN, WHEN CAN I SEE MY DAD AGAIN?”

CHILDREN’S CONTACT WITH THEIR IMPRISONED PARENTS

68

The rights of the children are in the centre of attention of European institutions today, as well as the rights of imprisoned parents. In the European Union law, there is a common principle, which states that every child has the right to obtain and maintain contact with his parents to the extent, which is in his best interest. The question is what is in the best interest of a child if one of his parents is imprisoned? It is not easy to solve this problem because any decision concerning this subject matter will significantly affect the life of the child and will influence his further development. The purpose of this paper is to introduce the criteria that each judge solving this problem should carefully consider before reaching the final decision. The authors of the paper will also try to come up with recommendations on the measures that the Member States could adopt in order to protect the right to family life of the children as well as their imprisoned parents.

KEY WORDS

Contact rights

Imprisoned parent

Right to family life

Parental responsibility

The best interest of the child

Child visits in prison

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INTRODUCTION

“Mister Warden, when can I see my dad again”? The question that we put as a heading of our report refers to the problem of setting a contact between a child and his or her incarcerated parent.

Article 8 of The Convention for the Protection of Human Rights and Fundamental Freedoms and article 33 of The Charter of Fundamental Rights of the European Union enshrines the protection of the right to family life. Common principle in the European Union law states that every child has a right of contact with his or her parents to the extent which is in his or her best interest. But what is in the best interest of the child if one of the parents is arrested? And what aspects need to be considered, when a judge is deciding about the contact between the child and the imprisoned parent?

The aim of our paper is to introduce the criteria that each judge solving child – imprisoned parent’s contact case should carefully consider as well as to analyze the weight of these criteria in the decision-making process. As a conclusion the paper makes a sort of a guideline for judges to help them reach a judgment which will be truly in the best interest of a child.

It is crucial to point out that the starting and the most important point of the whole decision-making process in such

situations is the abovementioned best interest of a child. Even though this principle is well known when deciding about the contact between a parent and his or her child there seem to be a very strong tendency when deciding about the contact of an incarcerated parent to subconsciously or even bluntly punish this parent again by restricting the contact with his or her child. The very limited or even non-existent contact is often perceived as an inherent and justified part of the punishment itself. In that sense an incarcerated parent is regarded as someone, who by committing the criminal act, voluntarily deprived himself or herself of a right to see his or her child, forgetting completely about the best interest of this child.¹

How strong is the abovementioned tendency, is illustrated by one case of European Court of Human Rights (hereinafter “ECtHR”). Although it contains rather exceptional argumentation,² even ECHR stated in a case of an incarcerated mother complaining about the limited contact with her newborn son that *she was fully aware of the fact that she was pregnant when she embarked upon the criminal activity that led to her detention. Her detention in a closed prison with particular security arrangements had been made necessary by her own conduct [...]. Understandably, this state of affairs would have implications for her son. For the limited phone contact the ECHR went on that in the case in question it did not*

*exceed what follows from ordinary and reasonable requirements of imprisonment.*³ This line of argumentation that the Court further developed in his decision is fully concentrated on the incarcerated parent completely leaving out the best interest of the child. It is however the child (and his or her best interest) who should be in the forefront of the judge’s arguments when setting a contact with his or her incarcerated parent.⁴

This is unfortunately not always the case and there are many factors that come into play when deciding about the contact of an incarcerated parent with his or her child with various importance in the decision-making. Some of these factors are maybe not *prima facie* obvious or they differ from the usual set of criteria that are taken into account in cases related to contacts between parents and children. All of these lead us to the idea of making a practice guide for a judge. For the convenience of the reader we divided criteria that in our view a custody judge should take into account into four main categories that are (i) circumstances on a child’s side, (ii) nature of a criminal act, (iii) prison conditions and (iv) the extent of a contact. These criteria are discussed in following chapters.

1. CIRCUMSTANCES ON A CHILD'S SIDE

When a judge is deciding on contact of a child with his imprisoned parent, child’s circumstances should be taken into account at first. There is no legal regulation that gives the instructions on what these circumstances are. For example, the Czech Civil Code⁵ says that: “A child who is in the custody of only one parent has the right to contact with the other parent to the extent that it is in the interest of the child.” According to Art. 9(3) of Convention on the Rights of the Child: “parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.” Art. 4(2) of Convention on contact concerning children says that: “such contact may be restricted or excluded only where necessary in the best interests of the child.”⁶ So, the main guideline should be the best interest of a child. An interpretation of the best interest of the child can be found in General comment No. 14⁷ which provides: “It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs.”

³ ECtHR Kleuver v. Norway, application No. 45837/99, decision of 30 April 2002, available at [https://hudoc.echr.coe.int/eng#%22itemid%22:\[%22001-22377%22\]](https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-22377%22])

⁴ As some authors aptly commented: *the son has no responsibility whatsoever for the fact that his mother was on remand at the time of his birth [...]. He is however the one who has to suffer from the separation from his mother* – see Stephanie Lagoutte in Peter Scharff Smith: *When the Innocent are Punished: The Children of Imprisoned Parents*, Springer: 2014, p. 298.

⁵ Art. 888 of Act No. 89/2012 Coll., Civil Code of the Czech Republic.

⁶ In the context of contact between the imprisoned father and his daughter, ECtHR has interpreted the concept of the best interest of the child in case *T. v. Czech Republic*, Appl. no. 19315/11, Judgement of 17 July 2014. ECtHR stated that interruptions to family relationships should be exceptional. It is necessary to do everything in order to maintain personal relationships as well as to do everything for family renewal when the right moment comes.

⁷ General Comment of Committee on the Rights of the Children No. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration, Art. 3, (1), The best interest of the child.

¹ The children of prisoners are even sometimes referred to as the ‘orphans of justice’, the ‘forgotten victims’ of crime and the ‘Cinderella of penology’ – see J. Murray. *Effects of Imprisonment on Families and Children of Prisoners* In *The Effects of Imprisonment*, 2005, A. Liebling and S. Maruna, available at: https://www.researchgate.net/publication/254316808_The_effects_of_imprisonment_on_families_and_children_of_prisoners

² For other approach see from recent cases for example *T. V. The Czech Republic*, application No. 19315/11, Judgment of 17 July 2014, or *ASSUNÇÃO CHAVES V. PORTUGAL*, application No. 61226/08, Judgment of 31 January 2012, both available at the database of ECtHR (<https://www.echr.coe.int/Pages/home.aspx?p=home&c=>)

In this chapter, we identify criteria that are related to a child and should be considered by a judge while deciding a case of establishing regular contact with imprisoned parent.

The **quality of relationship** between a child and imprisoned parent should be considered primarily. This approach is recommended by The Committee on the Rights of the Children, which declared that the quality of the relationship and the need to retain it must be taken into consideration in decisions on the frequency and length of visits and other contact.⁸ Knowledge on this issue can be given by expert report (processed by an expert appointed by the court - usually a psychologist), previous judgments connected with particular child or report made by social service agency.

If a child didn't live with imprisoned parent, it is necessary to find out what was the reason for this and how often their contact has taken place. The quality of their contact is also important. There is a difference if the parent is helping a child with the homeworks or supporting him on his football match during their contact or just sitting at home and ignoring the child or even worse for example forcing a child to steal. If a child has been in custody of someone else than imprisoned parent or didn't meet this parent because of his or her lack of interest, the necessity of contact in prison is much lesser.

Another important circumstance is, whether the imprisoned parent has full **parental responsibility** as the right to contact with a child is, at least in the Czech Republic, a part of it.¹⁰

An important issue for judge's consideration is **child's mental state**. According to French Court Cassation, child's mental state should be determined by psychological expert report.^{11,12} In general it should be said that parent's incarceration almost always means a mental burden for the child unfortunately. Sharratt say that parent's incarceration can cause post-traumatic disorder to a child. She adds that mental problems can be aggravated by secondary stigma, bullying, victimization and social isolation as a result of their association with the pris-

oner. This can lead to conduct problems or problems at school.¹³ Organization Eurochips highlights that some studies have shown that good quality contact and open communication with imprisoned parent are important for child's resilience. However, disrupted contact, confusion about the situation can impact negatively on children.¹⁴ According to Sharratt, the contact of a child with a prisoner parent can positively influence child's mental state, because a child can reassure that a parent is safe and well.¹⁵

Another important issue is, how the child can be influenced by the **form of custody** after parent's imprisonment. The best situation for the well-being of the child is when he or she stays with the parent not in prison. As at least in the Czech Republic, the number of imprisoned men is significantly higher than the number of imprisoned women¹⁶, it can be assumed that the child will remain in the mother's care more often. Eurochips organization states that in case of a mother's incarceration, grandparents take care of children in most cases (instead of fathers).¹⁷

The most mentally demanding situation for a child occurs when he or she has to go to new and unknown environment – to foster family or to institutional care. Beginnings in foster family can be hard for the child but this kind of custody can provide feeling of safety, which is the most necessary need for a child. If a child doesn't have any other close relatives who care about him or her, maintaining contact with imprisoned parent is very important. Unfortunately, there can be serious obstacles that make contact difficult (bad child's mental state as a result of the whole situation, parent's lack of interest, financial and logistic problems, etc.).

Deciding judge should also consider whether there is a **person who is able to accompany a child into a prison**. Huge problem can arise when a child is in custody of the parent not in prison, grandparents or other relatives, and relationships in a family are not good.¹⁸

The abovementioned relationship issue is closely related to another important circumstance which should be considered. A judge should find out how **custody of a child** has been provided before a parent's incarceration. Parke and Clarke-Steward⁹ say that: *"to understand the impact of parental incarceration, it is important to determine the nature of a family living arrangements prior to incarceration."* It is a big difference if a child has been in imprisoned parent's custody prior the incarceration or in custody of someone else (second parent, grandparents, other person, foster) or an institu-

⁸ General Comment of Committee on the Rights of the Children No. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration, Art. 3(1)(c), Preservation of the family environment and maintaining relations.

⁹ R. Parke and K. A. Clarke-Steward, *Effect of Parental Incarceration on Young Children*, available at <https://www.urban.org/sites/default/files/publication/60691/410627-Effects-of-Parental-Incarceration-on-Young-Children.PDF>, at 2.

¹⁰ Art. 858 of Act No. 89/2012 Coll., Civil Code of Czech Republic.

¹¹ Decision of Court Cassation, No. 06-12655, March 13 2007.

¹² This french decision was pointed out by the Constitutional Court of the Czech Republic in decision No. II. ÚS 22/17, 8 August 2017.

¹³ K. Sharratt, *Children's Experiences of Contact with Imprisoned Parents: A Comparison between Four European Countries*, available at <http://eprints.hud.ac.uk/id/eprint/19764/1/SharrattChildrens.pdf>.

¹⁴ Eurochips, *Children of Imprisoned Parents, European Perspectives on Good Practice*, available at <http://childrenofprisoners.eu/wp-content/uploads/2016/01/Children-of-Imprisoned-Parents-European-Perspectives-on-Good-Practice.pdf>, at 44.

¹⁵ K. Sharratt, *Children's Experiences of Contact with Imprisoned Parents: A Comparison between Four European Countries*, available at <http://eprints.hud.ac.uk/id/eprint/19764/1/SharrattChildrens.pdf>, at 10.

¹⁶ In 2015, only 6,9% of the total number of prisoners in the Czech Republic were women. ČTK, *Počet uvězněných lidí v Česku? Rada Evropy se zhržila*. available at <https://eurozpravy.cz/domaci/armada-a-policie/242153-pocet-uvaznenych-lidi-v-cesku-rada-evropy-se-zhrzila/>.

¹⁷ Eurochips, *Children of Imprisoned Parents, European Perspectives on Good Practice*, available at <http://childrenofprisoners.eu/wp-content/uploads/2016/01/Children-of-Imprisoned-Parents-European-Perspectives-on-Good-Practice.pdf>, at 52.

¹⁸ Research made in the Czech Republic showed that the conflict between imprisoned parent and a care person is the second biggest obstacle for maintaining relationship with their children. T. Vašíčková, *Support and Assistance to Children of Imprisoned Parents in the Czech Republic*, Diploma thesis, Charles University, Prague, 2013, available at <https://is.cuni.cz/>, at 77.

The problem of the parent's unwillingness to accompany a child to prison for visit was dealt with by Constitutional Court of the Czech Republic in the current decision concerning the child – imprisoned parent contact. Czech Constitutional Court argued that if parent not in prison doesn't want to accompany a child to a prison, there's necessity of authoritative regulation of contact by judicial decision.¹⁹ The Eurochips organization remarks that if a caregiving person can provide stable support for child and has open communication with them, then child often copes better with parent – imprisonment situation.²⁰ It can be assumed that professional foster families will deal with it better as they have legal obligation to support child-parent relationship and are well trained usually. Children in institutional care are dependent on willingness of social workers or NGOs. The common problem for all kinds of care is that someone has to pay for travel expenses. It would be logical that an imprisoned parent should pay for it. However, he has very limited earning capacity in the prison. Therefore, the travel cost usually goes to the one who cares for the child.

De lege ferenda the state could introduce a state contribution in order to cover these expenses and help children to see their imprisoned parents more often.

As the General comment No. 14²¹ states: *"The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests."* According to this comment the judge should consider if contact between a child and his imprisoned parent has a special impact on **child's identity**. This question can arise if imprisoned parent is a foreigner and is the only one who communicates with a child in foreign language.

As a result of the Day of General Discussion on Children of Incarcerated Parent, United Nation's Committee on the Rights of the Child recommended that timing of visits should not negatively interfere with other elements of the child's life such as schooling.²² The same approach is supported by European Council.²³ Eurochips organization says that teachers are concentrated on education of a child but can provide emotional support as well.²⁴

¹⁹ Decisions of Constitutional Court of the Czech Republic No. I. ÚS 3296/17, 20 December 2017 and No. II. ÚS 22/17, 8 August 2017.

²⁰ Eurochips, *Children of Imprisoned Parents, European Perspectives on Good Practice*, available at <http://childrenofprisoners.eu/wp-content/uploads/2016/01/Children-of-Imprisoned-Parents-European-Perspectives-on-Good-Practice.pdf>, at 43.

²¹ General Comment of Committee on the Rights of the Children No. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration, Art. 3(1).

²² Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents". United Nations Committee on the Rights of the Child, 30 September 2011, available at <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/DGD2011ReportAndRecommendations.pdf>, at 39.

²³ Recommendation CM/Rec(2018)5 of the Committee of Ministers to Member States Concerning Children with Imprisoned Parents, adopted 4 April 2018, p. 5, point 18.

²⁴ Eurochips, *Children of Imprisoned Parents, European Perspectives on Good Practice*, available at <http://childrenofprisoners.eu/wp-content/uploads/2016/01/Children-of-Imprisoned-Parents-European-Perspectives-on-Good-Practice.pdf>, at 43.

Pedagogical experts say that the teacher should know the developmental specifics of the child, should be able to diagnose his or her hidden dispositions and invisible needs.²⁵ The role of the school is also very important in terms of the overall proper upbringing of the child.²⁶ Accordingly child's school **timetable** as well as timing of other **child's activities** which make them feel good and are beneficial for child's development and well-being should be taken into account.

A judge should find out **an opinion of a child**.²⁷ An interference with the child's participation rights may lead to the violation of Article 8 of European Convention on Human Rights which enshrines the right to family life. It is necessary to emphasize that even if Article 12 of Convention on the Rights of the Child says that a child shall be provided an opportunity to be heard in any judicial and administrative proceedings affecting the child, *either directly, or through a representative or an appropriate body*,²⁸ the practice in real cases varies. There are decisions such as Case of M. M. v. Croatia²⁹ or Case of N. TS. and others v. Georgia³⁰ in which ECtHR constituted an interference to Article 8 of European Convention on Human Rights by not listening to a child directly by national courts.

²⁵ J. Kropáčková, *Dítě jako subjekt předškolního vzdělávání*, in Z. Syslová, R. Burkovičová, J. Kropáčková, K. Šilhánová and L. Štěpánková, *Didaktika mateřské školy*, (2019), at 55

²⁶ J. Kropáčková, *Předškolní pedagogika. Úloha dospělého v předškolním vzdělávání*, in E. Opravilová and J. Kropáčková, *Předškolní pedagogika*, (2016), at 179

²⁷ Convention on the Rights of the Child adopted by United Nations General Assembly Resolution 44/25 of 20 November 1989, Art. 12.

²⁸ The same approach is included also in Recommendation CM/Rec(2018)5 of the Committee of Ministers to Member States Concerning Children with Imprisoned Parents, adopted on April 4 2018, p. 4, point 1.

²⁹ ECtHR, *M. M. v. Croatia*, Appl. No. 10161/13, Judgement of 3 December 2015.

³⁰ ECtHR, *N. TS. and Others v. Georgia*, Appl. No 71776/12, Judgement of 2 February 2016.

³¹ ECHR, *Sahin v. Germany*, Appl. No 30943/96, Judgement of 8 July 2003.

³² *Ibid.*, at 16, point 73.

³³ Decisions of Czech Constitutional Court No. IV. ÚS 827/18 April 10 2018, No. II. ÚS 1931/17 December 19 2017.

³⁴ Decision of Slovak Constitutional Court No. II. ÚS 659/2017 October 24 2017.

On the other hand, in Case of Sahin v. Germany³¹ an opinion of a minor has been gained by an expert and it was found sufficient. In this case ECtHR stated that: *"It would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not*

*having a custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned."*³² Czech Constitutional Court points out that it is necessary to assess which form for finding the child's opinion is the most appropriate in each case individually. However direct questioning of a minor by a judge in any case concerning them should be, at least in the Czech Republic, preferred.³³ On the other hand Constitutional Court of the Slovak Republic expressed an opinion that the situation when courts haven't heard the minor directly in proceeding concerning them is not, without taking into account other relevant circumstances (such as child's age or hearing the child by an expert), sufficient reason for pronounce violation of applicant's fundamental rights.³⁴

A **child's age** might be taken in consideration as well. Miller says that developmental stages play a significant role in child's ability to comprehend parental involvement in a criminal justice system. The age is a major determining factor of how a child will respond.³⁵ But, every child needs loving parents, no matter if he is 2 or 16 years old.

The court should take into a consideration whether a **child is aware of parent's incarceration** or not. Research made in the Czech Republic showed that 56 % of asked prisoners think that their child is too small to understand, 16 % of prisoners is ashamed, 10 % don't know how to explain the situation to the child, 9 % of prisoners think that the main reason why their child doesn't know about imprisonment is a wish of caring person.³⁶ Parke and Clarke-Steward say that even if there can be a good reasons for not telling the truth about the imprisonment to the child, children of prisoners are more likely to have negative reactions when they can't talk about it.³⁷ According to Czech Constitutional Court concealing the real reasons for the absence of a parent can lead the children to the wrong and vulnerable guess that their parents have lost interest and left them.³⁸ It is possible that a child has no relevant information about parent's imprisonment from current caregiver as he or she doesn't agree with prison visits. In this situation, it is up to judge to consider if this "silent" situation is in the child's best interest or not.

On the other hand, the necessity of informing a child arises out of child's participatory rights.

It is necessary to emphasize that above-mentioned criteria are dependent on each other. For better orientation in text above, mentioned criteria can be divided into two categories - "**relationship category**" and "**situation category**".

As the quality of the relationship between a child and imprisoned parent is probably the most important, **relationship category** should be examined first. The quality of the child – parent relationship influences how the child will adapt to the parent's imprisonment. A warm relationship is a major premise for hope, that there will be a chance for family renewal when parent will be released from prison. If there is no relationship between the child and his imprisoned parent for example because parent's lack of interest or a relationship is pathological, prison visits would only hurt a child. Indicators of the quality of imprisoned parent – child a relationship are facts about previous custody arrangements or the extent and the quality of previous mutual contact.

After and if a court concludes that there is a relationship which should be protected and maintained, it is necessary to examine the criteria of "**situation category**". In other words, it is necessary to find out if the actual situation of a child

allows setting such contact without harming a child and what can help to mitigate the negative impacts of prison visits. Therefore a court should be aware of child's mental state. In this context, an expert report made by psychologist can be useful for evaluating child's mental state, but there are also other pointers (based on longer observations) which can help, like reports from school, pediatrician, social worker, etc. Age of a child is also important for judge's final decision, but it is crucial to evaluate it in relation with other criteria. In other words, the age of the child can't be the only one reason for not setting a contact in prison. Important question is, if there is a person, who can accompany the child and provide him a mental support during them (it can be the other parent but also grandparent, aunt, social worker, NGO's worker, etc.). Last, but not least, visits in prison should not significantly interfere with child's regular schedule, because school or free time activities as well as friends can help a child to feel "normal".

Interviewing a child can help a court to evaluate all abovementioned criteria, but such an interview with a child must be conducted sensitively, considering the child's age and maturity.

2. NATURE OF THE CRIMINAL ACT COMMITTED BY THE INCARCERATED PARENT

One of the criteria rises from the question whether a judge should take into account the nature of the criminal act committed by an incarcerated parent and if the answer is positive – to what extent it should happen. Is it important for the custody judge to know why the parent is behind the bars? What did he or she commit and against who? Is it relevant for the judge to know in which phase is the criminal proceeding against the parent?

Naturally a judge deciding over the contact between an incarcerated parent and his or her child does not in any way act as (or substitute) a criminal judge and does not decide over a sentence the parent in question should serve or (in a judge's opinion) deserve to serve. In this kind of proceeding the judge is not there to punish the parent again, but to find out what is in the best interest of a child. A judge should start from the premise that for a parent and a child the right to be together means the essential element of their family life³⁹ and that article 8 of the Convention includes a right for the natural parents to have measures taken with a view to their being reunited with their children and an obligation for the national authorities to take such measures⁴⁰. Our team concluded that in order to respect these principles and act in the best interest of a child it is important for a judge even in this type of proceeding (regarding a contact between a parent

³⁵ ECtHR, *T. v. The Czech Republic*, App. No. 19315/11, Judgement of 7 July 2014, point 105.

⁴⁰ ECtHR, *OLSSON v. Sweden (No. 2)*, App. No. 13441/87, Judgement of 27 November 1992, point 90.

³⁵ K. Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, available at https://www.researchgate.net/publication/226430580_The_Impact_of_Parental_Incarceration_on_Children_An_Emerging_Need_for_Effective_Interventions, at 483.

³⁶ T. Vašíčková, *Support and Assistance to Children of Imprisoned Parents in the Czech Republic*, Diploma thesis, Charles University, Prague, 2013, available at <https://is.cuni.cz/>, at 74.

³⁷ R. Parke and K. A. Clarke-Steward, *Effect of Parental Incarceration on Young Children*, available at <https://www.urban.org/sites/default/files/publication/60691/410627-Effects-of-Parental-Incarceration-on-Young-Children.PDF>, at 4.

³⁸ Decision of Constitutional Court of the Czech Republic No. II. ÚS 22/17, August 8 2017.

and a child) to look deeper into the nature and circumstances of the committed criminal act and possible effects that such an act could have on the child.

First of all a judge should take into account what *kind of crime* has been committed. Two types of situation can be imagined – a crime committed by a parent that does not have any connection with his or her parenthood, which is a very broad category typically consisting of property related offences or economic and trade related offences but also offences against life, health, personal liberty or dignity not concerning the closest family of a child. Irrespective of the fact if such an offence was a small scale theft or a highly sophisticated white-collar scheme, it does not play any further role in the process of deciding a form or an extent of a contact between an incarcerated parent and his or her child as far as the criminal act did not involve a child or her or his closest relatives. In such situations a judge can leave this criterion (a nature of a criminal act) behind and concentrate on other relevant aspects of a given case. On the contrary the situation where the criminal act is somehow connected with a child is much more difficult to fully assess. It is not rare that a judge must decide to what extent (or even if) to set a contact between a child and his or her parent that is imprisoned because he or she was convicted of a crime committed against the second parent or a close relative to the child or even the child itself. Such cases are obviously more delicate and require a thorough deliberation.

When the crime was committed *against the other parent* (or in general against a close relative to the child) or even the *child* itself, the first thing to consid-

er is to clarify who was the intended and the factual victim of the crime and (if the victim was a relative) how close relationship the child had with this victim-relative. Nevertheless even if the crime was committed directly against the child, it does not have to always lead to the conclusion that the contact is not in his or her best interest. For example in the Czech republic a parent may be imprisoned for not paying maintenance payments on a child. In such situation the victim of the crime is the child, but there might be still many cases where a contact between the incarcerated parent and his or her child is in the best interest of the child.

However, more common is a situation where the victim of the Criminal Act committed by the incarcerated parent was the other parent (or another person – usually a relative - who took primary care of the child). It can often be a parent to whom the child is much attached or has a very strong positive relation. In such cases it is not just morally deplorable, but it leaves the child without a carer (or someone to whom the child was attached), and thus it significantly interferes and disrupts the healthy psychological development of a child and so – indirectly – the child itself must be regarded as a victim of the crime. In our view this is the most important aspect regarding the nature of a criminal act that need to be taken into account when deciding over the existence, extent and form of a contact.

Other elements that should not be discarded are the *broader circumstances* of the criminal act. Useful source of information for the custody judge in this regard should be the criminal judgment though of course an expert report on

the character and mental (pre)condition of the incarcerated parent gives a court more solid basis in that respect.

On the one hand circumstances of a crime can indicate, for example, a manipulative behavior of the incarcerated parent that can negatively affect development of his or her child, or unreal perception of reality of the incarcerated parent and future prospects that can hurdle building a steady and normal relationship with the child. Inclination to violence by the incarcerated parent is very common tendency, it is nevertheless crucial to assess whether the violence is exercised by the parent in general or just in certain situation or towards a certain (group of) people. In other words, the question is - how is this inclination to violence shown in a relation with a child and whether some kind of means (for example a supervision of a professional during the contact) can neutralize this attribute.

On the other hand circumstances of a crime can be also mitigating. For example, when the incarcerated parent was previously himself a subject to a violence from a second parent or the criminal act was committed in a (alleged) protection of a child or when the parent acted without previous deliberation – impulsively, in affect when such „mishandling“ of strong emotions does not have to have an impact on a relationship with a child. All these circumstances can facilitate the decision of the custody judge over the existence, extent and form of a contact in question.

After all, one of the crucial decisive factor remains the opinion of a child for which a rich and constant case-law of

ECtHR exists. In that respect, it is, however, important for the custody judge to comprehend how the child perceive the crime committed by his or her parent (does the child has its own explanation of what happened?), how he was informed about the crime (was the child a direct witness?) or how the crime affected the life of the child up to now. All these questions are relevant in deciding the best way how to maintain a contact between a child and his or her incarcerated parent.

At last, an incarcerated parent does not only refer to a parent in prison who is serving his (final) sentence, but also to a parent who is in custody only waiting for the outcome of the criminal proceeding, i. e. still *de iure* an innocent person. While we certainly feel that from the point of view of criminal law there is a huge difference between a convicted and a prosecuted person, from the perspective of a custody judge who must define an extent and a form (or even an existence itself) of a contact between such parent and his or her child, the difference is not that crucial. For example the Czech Constitutional court held - in a case of a father in (pre-trial) custody - that the principles governing a relationship between an imprisoned parent and his or her child are fully applicable to the situation of parents in custody. However any interference by a court with a right of an accused person holding in custody must be all the more considerate given the fact that a person is in accordance with a presumption of innocence regarded innocent⁴¹.

In conclusion, the most important factor to consider among those related to the

⁴¹ Finding of Czech Constitutional court No. ÚS 3296/17 #1, December 20 2017, point 30, available at <https://nalus.usoud.cz/Search/ResultDetail.aspx?id=100283&pos=1&cnt=1&typ=result>

criminal act committed by the incarcerated parent is the intended and factual victim of the crime. The question is whether the victim was someone from a child's family and thus indirectly the child itself or someone not related to the child at all with no attachments to a child. Another highly important issue to take into account (when deciding over the contact between an incarcerated parent and his or her child) is the effect that the crime had on a child and his or her life up to that date, as well as his or her perception of it. In these cases probably an expert report from the field of children's psychology and psychiatry is highly advisable if not practically indispensable. Other relevant aspects are the broader circumstances of the crime that can indicate more about the character of a parent (for example inclination to violence, manipulative behaviour, illusory apprehension of reality or "just" mishandling of strong emotions) and thus can significantly influence the perception of the custody judge of what is in the best interest of the child. Finally, for better assessment of the situation it is necessary to take into account the precise phase of the criminal proceeding against the incarcerated parent.

3. PRISON CONDITIONS

As far as the judge concludes that both, child's circumstances and the nature of criminal act, don't impede determining a contact of a child with the imprisoned parent, conditions of prison where a parent is serving sentence should be considered. There are several possibilities how to determine contact of a child with

imprisoned parent such as personal visits, video calls, telephone calls or correspondence.

Undoubtedly, the best way how to maintain and strengthen relationship between child and his incarcerated parent is to enable them personal contact as often as possible. Although Article 24.4 of European Prison Rules stipulates that *"the arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible"*⁴², most prisons do not provide satisfactory conditions for children visits and visiting a parent in prison might be rather traumatic experience than pleasant reunion. For that reason, before determining the contact between the incarcerated parent and his child in the form of personal visits, the judge should first consider conditions of parent-child visits and the overall environment of particular prison.

Initially, a judge should seek whether the parent-child visits should be contact or not (also called open and close visits). There are no doubts that contact visits which usually exclude any physical barrier are preferable, especially for younger children. Contact visits seem to be friendlier and more informal, thus more likely to establish, maintain or deepen parent-child relationship. During contact visit parent and child might personally greet each other (e.g. give a hug), a child can sit on parent's lap, hold his hand or they can even play games together. Physical contact during open visits should not be limited to a fixed period of time unless there is a reasonable suspicion a minor is being used to bring

contraband to prison.⁴³ The ideal form of contact visits might be visits outside the prison area which can provide more relaxed atmosphere for family reunion. However, these are usually allowed only as a disciplinary reward and might be conditioned by the prison regime, behaviour of prisoner, surroundings of the prison, weather and other factors.

Unfortunately, there are many prisons, where even parent-child personal contact is strictly prohibited, and imprisoned parent sits behind a glass partition during the whole visit. This physical barrier is usually justified by security reasons. Such visiting conditions were subjected to judicial review of ECtHR in case of *Ciorap v. Moldova*, where the Court stated that *"the limitations on the manner of maintaining contacts with the outside world, including the installation of physical barriers such as a glass partition, may pursue the legitimate aim of protecting public safety and preventing disorder and crime, within the meaning of the second paragraph of Article 8 of the Convention."*⁴⁴ Nevertheless, within the meaning of the second paragraph of Article 8 of the Convention, to forbid personal contact during the visit, two other conditions shall be completed – the interference should be in accordance with the law and necessary in a democratic society which means there is a real risk of collusion, reoffending, escaping or smuggling contraband into

the prison. As far as these conditions are not met, impeding physical contact of a child and his parent leads to the violation of the Article 8 of the Convention.⁴⁵

Secondly, the judge should consider prison environment. Considering that the aim of parent-child visits is to maintain the relationship between the child and the parent, visiting rooms should be adapted for more activities than chatting at the table. Especially for younger children it can be difficult or even impossible to sit for few hours and talk to a person they don't meet that often. Therefore, a designated children space equipped with toys and games should be available for children as well as for their parents. Moreover, playing with younger children during the visit might help to overcome the initial shyness of a child or parent, leave behind the thought of being in prison and constitute new common experiences. As an example of Czech prison with children friendly environment can be mentioned Jiříce or Bělušice prison, where children visits can take place in the garden or at playground built by prisoners themselves.⁴⁶ According to Czech ombudswoman non-contact visits should take place in sufficiently large spaces to allow the visitors and imprisoned to talk face-to-face and to provide them at least some privacy. Visiting rooms should also be adequately technically and materially equipped.⁴⁷

⁴³ Collection of Statements of the Czech Ombudsman. Prison Service. File no. 873/2009/VOPMČ, 2010.

⁴⁴ ECtHR, *Ciorap v. Moldova*, Appl. no. 12066/02, Judgement of 19 June 2007.

⁴⁵ In case *Ciorap v. Moldova* domestic authorities failed to consider whether the nature of security measure is necessary. Taking into account that the applicant was accused of fraud and his good behavior during the detention, the Court concluded that there has been a violation of Article 8 of the Convention, since allowing the applicant to meet his family would not have created a security risk.

⁴⁶ Novinky.cz. Skype nebo Den otců, i tak vězni udržují kontakt s rodinou (2018), available at <https://www.novinky.cz/domaci/461903-skype-nebo-den-otcu-i-tak-vezni-udrzuji-kontakt-s-rodinou.html>.

⁴⁷ Česká justice. Návštěvy ve věznicí seděly před odsouzenými jako v divadle, zjistila ombudsmanka. (2019), available at <http://www.ceska-justice.cz/2019/01/navstevy-ve-veznici-sedely-pred-odsouzenymi-jako-v-divadle-zjistila-ombudsmanka/>.

⁴² Council of Europe: Committee of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, 2006.

The importance of prison environment for parent-child visits is also known to the Council of Europe whose Committee of Ministers stated in recently issued Recommendation concerning children with imprisoned parents (hereinafter referred to as "Recommendation concerning children with imprisoned parents") that "A designated children's space shall be provided in prison waiting and visiting rooms (with a bottle warmer, a changing table, toys, books, drawing materials, games, etc.) where children can feel safe, welcome and respected. Prison visits shall provide an environment conducive to play and interaction with the parent."⁴⁸ According to the Committee of Ministers, hygiene, ventilation, light, a childfriendly atmosphere, utilities for taking care of infant children and furniture which is adapted to the use by children of different ages are the minimum standards that ought to be respected. The emphasis should also be put on child-friendly prison staff.⁴⁹ During a visit children should also have possibility to consume food and drink they brought to the prison. In case that bringing own food and drinks to visiting room is prohibited, there should be possibility to buy at least a small snack from a food machine or canteen inside the prison.⁵⁰

Thirdly, the judge should consider the process in prison that the child must go through before getting to visiting room. Article 24.2 of European prison rules prescribes that communication and visits may be subject to restrictions and monitoring but they shall allow an acceptable minimum level of contact.⁵¹ Recommendation concerning children with imprisoned parents more specifically provides that "Any security checks on children shall be carried out in a child-friendly manner that respects children's dignity and right to privacy, as well as their right to physical and psychological integrity and safety. Any intrusive searches on children, including body cavity searches, shall be prohibited."⁵² Although there is no doubt that security checks of all visitors are important to ensure safety in prison (children can be misused to bring drugs or other prohibited items to prison), children should be searched sensitively by appropriately trained staff, because they can be psychologically harmed easily. The Committee of Ministers mentions as a good example searching children in a playful manner or suggests analogies with searches for air travel to normalize the whole process.⁵³

⁴⁸ Council of Europe: Committee of Ministers. Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents, 2019.

⁴⁹ Committee of Ministers, Explanatory Memorandum to Recommendation CM/Rec(2018)5 concerning children with imprisoned parents, CM(2018)27-add2, 21 February 2018.

⁵⁰ Mgr. Lucie Rybová. Děti vězněných rodičů: naplňování práv a potřeb dětí, které mají rodiče ve výkonu trestu – teorie a praxe. available at <http://www.helcom.cz/cs/zastupci-chv-prezentovali-situaci-deti-s-rodicem-ve-vykonu-trestu-na-prvni-odborne-konferenci/>.

⁵¹ Council of Europe: Committee of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, 2006.

⁵² Council of Europe: Committee of Ministers. Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents, 2019.

⁵³ Committee of Ministers, Explanatory Memorandum to Recommendation CM/Rec(2018)5 concerning children with imprisoned parents, CM(2018)27-add2, 21 February 2018.

Security searches do not have to be the only problem that can occur before getting to visiting rooms. In case of *Horych v. Poland* ECtHR dealt with situation where appellant's minor daughters in order to get to visiting room in a ward for dangerous detainees had to walk through the entire prison, moreover, they also had to past prison cells situated on both sides of the corridor which exposed them to staring of inmates and other reactions to the girl's presence. The appellant argued that this constituted an exceptionally traumatic experience for his daughters so that he gave up receiving visits from them. In this case the Court noted that "visits from minors in prison require special arrangements and may be subjected to specific conditions depending on their age, possible effects on their emotional state or well-being and on the personal circumstances of the person visited. However, positive obligations of the State under Article 8 includes a duty to secure the appropriate, as stress-free for visitors as possible, conditions for receiving visits from his children, regard being had to the practical consequences of imprisonment". In the end the Court concluded that there had been a violation of Article 8 of the Convention, because the restrictions on the applicant's visiting rights⁵⁴, taken together with failure to ensure proper conditions for visits from his daughters, did not achieve balance between the requirements of the dangerous detainee regime and the appellant's right to respect for his family life.⁵⁵

⁵⁴ Appellant also complained about frequency of visits and that most of visits were non-contact.

⁵⁵ ECtHR, *Horych v. Poland*, Appl. no. 13621/08, Judgement of 17 April 2012.

To sum it up, before setting down regular parent-child contact in penitentiary the judge should focus in detail on how visits in particular prison are organized. First, a judge should find out whether the child and parent will be allowed to have a physical contact during the visits or whether they will be separated by bars or glass partition. In case that visits should be non-contact, other aspects such as child's age, maturity and mental health shall be thoroughly considered, because seeing a parent in prison behind a partition might cause a child undue emotional suffering. Another important criterion to be considered is prison environment. Visiting rooms should be equipped at least with some games, toys and books to make the time spent together more pleasant and interactive. Attention should also be paid to the behaviour of prison staff. Last but not least the judge should seek a process that a child has to go through to reach visiting room such as mode of security searches and location of visiting room within the prison building, because it is not desirable that minor children go through the entire prison including cells and get in touch with other prisoners.

Provided that conditions for regular personal visits in prison are not met, the judge should consider alternative means of contact. Relevant alternative to face-to-face visits are video calls.

Recommendation concerning children with imprisoned parents stipulates that *“In accordance with national law and practice, the use of information and communication technology (video-conferencing, mobile and other telephone systems, internet, including webcam and chat functions, etc.) shall be facilitated between face-to-face visits and should not involve excessive costs.”*⁵⁶ Although technologies enabling video calls for many years and there are some European prisons including Czech ones (e.g. Světlá nad Sázavou prison) experimenting with Skype-type communication, national governments and most prisons seem to be a bit reserved as far as practicing this progressive form of face-to-face contact is concerned.⁵⁷ It is worth mentioning, that video calls might be extremely useful means of communications for children situated in children’s homes who cannot visit their parents personally on a regular basis as a result of lack of social workers and finance as well as for children who live far away from the prison.⁵⁸

In cases where personal visits and video calls are not suitable or possible, parent-child contact can be set in a form of telephone calls. Difficulties of telephone calls might be that they are less personal and, in most cases, listened in or recorded so that child’s privacy is being violated. Since in some countries telephone calls are unduly expensive and therefore inaccessible to many prisoners, Committee of Ministers put stress on their financial availability. On the other hand, contact via telephone is still cheaper than commuting to prison and it can be used more often.

Another form of parent-child contact can be by means of e-mails or letters. Since this form of contact is less personal, it could be suitable for children whose parents are not in prison for a long time or might be used as a complementary means of communication combined with other ways of contact mentioned above. While establishing contact in a form of correspondence, the judge should consider mainly the age of child and his ability to write and read as well as the parent’s literacy.

4. EXTENT OF A CONTACT

In the Czech Republic, although the law provides that visits of convicts should be usually organized during the daytime on weekends or holidays, a number of prisons - mostly for capacity reasons - organize visits at weekdays. This raises question whether the judge can establish a parent-child contact on specific days in favor of a child interest regardless of the prison’s visiting days. Undoubtedly, if the right to respect for private and family life proclaimed by the Article 8 of the Convention is to be respected, prison staff should be more flexible and visiting days should be organized with respect for prisoner’s children and families’ private lives and their everyday duties. Therefore, a parent-child contact should primarily be established on days which comply with needs and capabilities of a child. Visits on weekdays should be ordered only exceptionally and on the grounds of prison’s justifiable reasons or at the request of prisoner’s family.

Another significant problem of parent-child contact is that in most countries’ prisoners’ right for visits from their relatives is limited by law up to a few hours per month⁵⁹. However, in some cases, especially when it concerns younger children, more often and intense contact might be required in order to maintain family relations. This raises a question, whether a judge can exceed statutory monthly visit period when determining a frequency and length of child’s contact

with an imprisoned parent. It is necessary to stress that a judge is during his decision-making process bound not only by law, but also by ratified international treaties and in case of conflict international treaty prevails. Provided that more frequent parent-child contact is in the best interest of the child proclaimed by the Convention on the Rights of the Child, a judge should probably establish contact which is beyond the limits of the national criminal law.

Another argument in favor of the more intense contact (not limited by the provision of the criminal law) stems from the division between the public and private law⁶⁰.

However, such extended contact – fully in compliance with the best interest of the child - may turn out to be unenforceable. The prison surely can respect the civil judgment establishing a contact beyond the limit of the national criminal law, but if it refuses to do so, there are no legal means to enforce the cooperation of the prison. According to the provisions of criminal law dealing with the execution of the sentences⁶¹, the incarcerated person is entitled to only few hours of visits per month and the prison – who moreover does not take a part in the civil proceeding concerning a parent-child contact – is not strictly speaking bound by this civil judgment. From the point of view of the prisons there might also be significant obstacles (capacity reasons, strict regime of the prisoners) to such benevolent parent-child contacts.

⁵⁶ Council of Europe: Committee of Ministers. Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents, 2019.

⁵⁷ Committee of Ministers, Explanatory Memorandum to Recommendation CM/Rec(2018)5 concerning children with imprisoned parents, CM(2018)27-add2, 21 February 2018.

⁵⁸ Česká justice. Český helsinský výbor prosazuje videonávštěvy mezi vězni a dětmi (2015), available at <http://www.ceska-justice.cz/2015/01/cesky-helsinsky-vybor-prosazuje-videonavstevy-meziv-vezni-a-detmi/>.

⁵⁹ According to § 19 of the Czech Law on the Execution of the Sentence a sentenced person has right to receive visits of close people for a period of 3 hours per calendar month and in most prisons, this right has to be done at once.

⁶⁰ According to § 1 par. 1 of the Czech Civil Code the application of private law is independent of the application of public law.

⁶¹ Czech Law on the Execution of the Sentence

Even though a judge can theoretically exceed the statutory limits of contact, the extent of a contact should be rational, with respect to possibilities and capacity of particular prison and its regime. The judge should not even play down the fact that a parent is serving a sentence for a criminal act.

Although a judge should also consider prison's visiting days, he should always bear in mind that contact with imprisoned parent cannot limit a child in his everyday life and duties such as compulsory school attendance. Therefore, a contact between a child and his or her incarcerated parent should be established mainly on weekends and holidays and prison management should do maximum to make the contact possible. In the end, parent-child contact should correspond to the best interest of a child within the meaning of the Convention on the Rights of the Child which may lead to exceeding the statutory time limits set for visits in prison.

CONCLUSION

A decision-making process concerning contact of a child with an incarcerated parent should comprise of assessing numerous factors relating to a child, parent and prison where a parent serving a sentence. We divided relevant criteria into four categories which are the following: (i) circumstances on the child's side, (ii) the nature of criminal act, (iii) prison conditions and (iv) the extent of a contact. Although each category has a different significance, all of them are led by the principle of the best interest of a child proclaimed by the Convention of the Rights of the Child and right to respect for private and family life within the meaning of Article 8 of the Convention.

Firstly, a custodial judge should consider parent-child relationship. If a judge finds out that a parent was deprived or limited in parental responsibility, wasn't interested in child's life or that the relationship was pathological, there is no reason to establish a parent-child contact in prison which would be a burden rather than a benefit for the child. On the contrary, warm relationship or favourable previous mutual contact are examples of aspects that may lead to conclusion that a regular contact with an incarcerated parent is appropriate. After dealing with the quality of parent-child relationship, a child's mental state substantiated by expert opinions should be assessed. Other relevant aspects are child's age or attitude to the accompanying person who should be child's psychological support before, during and even after the visit. The distance of prison from child's place of residence should also be considered, because it may cause a significant obstacle in determining the frequency of contact.

Provided that a judge concludes that quality of parent-child relationship does not prevent him from establishing regular contact, he should move to subsequent category of relevant factors. At the forefront of the second category is the nature of criminal act. Initially a judge should find out whether the crime was committed against a child, someone from the child's family or against other person with whom a child has an emotional connection. In case that the crime was committed against someone not related or somehow close to the child, the judge can move to the third category and consider prison conditions. Since the crime was committed against child or people close to the child, a judge should go deeper and ascertain the child's perception of crime and its impact on his subsequent life. Broader circumstances of a crime are also relevant, because they can indicate more about parent's character and its possible effect on a child. In case that criminal proceeding against a parent has not finished yet, the principal of presumption of innocence shall be respected.

Lastly, prison conditions should be assessed. Although a judge should examine the entire course of visit, the most important seems to be the fact, whether visits in particular prison are contact or not. In case that contact visits are not possible, the judge should look at child's age and mental health to find out whether the child is able to participate non-contact visit with no negative consequences.

The judge should also consider prison environment, more specifically whether visiting rooms are properly adapted to children's visits, the mode of security searches, location of visiting rooms within the prison building and whether behaviour of prison staff towards minor visitors, but also towards visited parent, is appropriate.

Parent-child contact should correspond to the best interest of a child within the meaning of the Convention on the Rights of the Child which may lead to exceeding the statutory limits stipulated by the criminal law. However, the extent of a contact should be reasonable, with respect to possibilities and capacity of particular prison and its regime not only because the civil judgment establishing a contact exceeding the statutory limits may prove to be *de facto* unenforceable. The judge should bear in mind that contact with imprisoned parent cannot limit a child in his everyday life and duties, on the other hand the prison's visiting days should be also considered.

Even if an importance of criteria mentioned above varies, they are all dependent on each other and they should be assessed coherently. During the decision-making process a judge should always bear in mind that a child did not commit any crime and should not be punished for crimes committed by his or her parent. Parent-child contact should be established only in cases where it corresponds to the best interest of a particular child and no negative consequences on child's mental health are expected to occur.

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FAMILIES WITHOUT BORDERS

THE RECOGNITION OF ADOPTIONS MADE BY SAME-SEX COUPLES IN THE EUROPEAN UNION

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This paper sets to analyse the means for automatic recognition of domestic adoptions made inside the EU seeing that the 1993 Hague Convention is not applicable and that there are no EU regulations incident in this matter, thus making it an area falling under the competence of each Member State. Though recognition is rarely refused, the possibility for a state to argue public policy reasons remains, a strong example being the situation of adoptions made by same-sex couples. In the current state of EU law, the fundamental right to move freely inside the EU implies also the right to have the civil status awarded in a Member State recognised when moving to another Member State and could therefore take precedence over any refusal based on those public policy reasons. Moreover, the conclusion should be the same when taking into account the child's best interest as a principle safeguarded by EU law. Nevertheless, this paper makes a plea for the utility of an EU instrument regulating the automatic recognition of adoptions made in another Member State in order to establish a common standard regarding adoption procedures.

KEY WORDS

Freedom of movement
Adoption
Same-sex parents
Parental responsibility
Judicial cooperation
Child's best interest

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1. INTRODUCTION

The European space was redesigned through the four essential principles of the internal market – the free movement of goods, services, capital and persons – and, consequently, family life inside the EU has developed a larger cross-border dimension based on the ease of EU cross-border mobility. Often, family life is created outside national borders and/or it is transferred from one Member State to another.

Moreover, society itself has gone through notable changes as to how family life is defined. A growing concern throughout the EU is granting same-sex couples the right to a family life in similar conditions as those provided for opposite-sex couples, considering that children reared by same-sex parents present no differences in their level of self-esteem, with gender identity, or with their well-being and they do not show any particular emotional problems compared to children with heterosexual parents¹ and, even more, they appear as physically healthier and present a stronger family cohesion with their parents.²

The present paper will focus on the exercise by a same-sex couple of parental responsibility resulting from an adoption order made in a Member State of the EU

when the said couple tries to move to a different Member State whose national law refuses to recognise such adoption orders under public policy reasons. This is frequently the case of Member States which have a traditional view over the notion of family life and whose domestic law provisions reserve a set of prerogatives to opposite-sex couples, adoption included. Challenges raised by adoptions made by same-sex couples are far from being hypothetical, seeing that, for example, in the UK, in 2018, 1 out of 8 adopted children were placed under the care of same-sex adoptive parents.³

Nevertheless, although falling into the Member State's margin of appreciation, with family law being a particularly sensible area, such a refusal to recognise a family status legally acquired in a different Member State could interfere with European citizens' right to move and reside freely inside the EU; as a result, they could be discouraged to exercise the aforementioned rights and create a family life in the state of residence when facing the risk of being unable to have the new family status recognised in their state of. In fact, the Court of Justice of the European Union has fairly recently analysed the right to move and reside freely inside the UE in relation to the right to a normal family life for same-sex couples.⁴

Consequently, we will focus our analysis on identifying the current European instruments providing a potential solution

for this particular situation. Furthermore, we will try to determine to which extent the freedom of movement could represent in itself grounds in compelling a Member State to recognise an adoption order made in another Member State in order to guarantee the effective exercise of rights resulting from EU citizenship. Lastly, an examination of the child's best interest is in order considering that the exercise of parental responsibility is centred on ensuring his welfare.

2. GENERAL NOTIONS

2.A. ADOPTION AND PARENTAL RESPONSIBILITY

Parental responsibility means all rights and obligations towards a child and its assets. Although this concept varies between the Member States of the EU, it usually covers custody and visiting rights.⁵ Putting it in very simple terms, parental responsibility gives its holder the right to make decisions for the child's care and upbringing. In general, parental responsibility is directly linked to biological parenthood. Nevertheless, this is not the only source of parental responsibility and a number of other scenarios can be imagined. For instance, an also frequent hypothesis is the acquirement of parental responsibility in relation to a child through an adoption process.

Adoption normally takes place after a judicial procedure. Different states have distinct procedures involving specific authorities. In general, the judicial procedure implies a verification of the

requirements provided by the national law. If the court confirms the compliance with the formal and material conditions imposed by the law, it adopts an order through which a child's legal ties with his biological parents are usually severed and the approved adopters become his legal parents and sole holders of all the rights and obligations deriving from the newly established parental responsibility.

Despite the fact that it seems easy to define at first glance, with adoption being a notion allegedly well-known, in a global context the situations are rarely as simple as described, considering that cross-border elements often get involved. Taking only the European Union as a point of reference, after the creation of the free market inside its borders, alongside with the freedom of movement as a fundamental right of EU citizens, adoptions presenting cross-border elements became very frequent.

For the coherence of this paper, we will limit our analysis to defining domestic adoption as opposed to intercountry adoption.

2.B. INTERCOUNTRY ADOPTIONS

When the adopters and the adopted child usually reside in different countries the adoption is considered to be intercountry and, given that those countries are parties⁶ to Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993⁷ (hereinafter the 1993 Hague Convention) its provisions will govern not only the procedure for the

¹ Ellen C. Perrin, *Study: Same-Sex Parents Raise Well-Adjusted Kids*, 12 October 2005, available at <https://www.webmd.com/mental-health/news/20051012/study-same-sex-parents-raise-well-adjusted-kids>

² Simion Crouch, *Children of same-sex couples are happier and healthier than peers, research shows*, 7 July 2014, available at <https://www.washingtonpost.com/news/morning-mix/wp/2014/07/07/children-of-same-sex-couples-are-happier-and-healthier-than-peers-research-shows/>

³ Nick Duffy, *1 in 8 adoptions in England are by same-sex couples*, 16 November 2018, available at <https://www.pinknews.co.uk/2018/11/16/same-sex-adoptions-england-2018/>

⁴ C-673/16, *Coman*, (EU:C:2018:385)

⁵ https://e-justice.europa.eu/content_parental_responsibility-302-en.do

⁶ All 28 Member States of the EU have adopted and ratified the 1993 Hague Convention.

⁷ Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, 29 May 1993, 33, available at: <https://www.refworld.org/docid/3ddcb1794.html>

adoption, but also the recognition of the adoption. In fact, one of the fundamental advancements brought by the 1993 Hague Convention in this area of family law is the automatic recognition⁸ in other convention countries of an adoption complying with the conditions it sets.

However, despite it being a powerful instrument in the efforts to simplify cross-border adoptions, the 1993 Hague Convention fails to include under its scope domestic adoptions, a more frequently occurring situation at EU level. In terms of scale, the UN has estimated that domestic adoptions outnumbered intercountry adoptions, a pattern that also applies to Europe as a whole. *Exempli gratia*, between 2004 and 2014, domestic adoption represents 57% of the total adoptions in the EU, intercountry adoption between EU Member States only 3% and 40% intercountry adoption from non-EU countries.⁹

2.C. DOMESTIC ADOPTIONS

An adoption has a domestic dimension when it is governed exclusively by the national law of a certain country, 'in circumstances where the 1993 Hague Convention does not apply'.¹⁰ Nevertheless, it would be incorrect to assume that such an adoption excludes any cross-border element. On the contrary, inside the EU area of free movement it so often happens that, following an adoption that took place in a Member State where both the adopters and the

adopted child usually reside, the newly created family decides to move to another Member State (whose national one of the adoptive parents is, for example); even though it implies an international component, the adoption is still considered a domestic one considering that the abovementioned criteria is met.

Taking into account that such a situation is not covered by the provisions of the 1993 Hague Convention, the recognition of domestic adoption orders from one Member State to another is not automatic, situation which can have potentially harmful consequences for the lawful exercise of parental responsibility derived from the adoption procedure.

3. THE CURRENT STATUS OF RECOGNITION PROCEDURES IN THE EU

3.A. RECOGNITION OF ADOPTION ORDERS ACCORDING TO THE NATIONAL LAW OF MEMBER STATES

Although the recognition of domestic adoption orders issued in another Member State is not automatic, it can be attained when following the procedure provided by the national law of the Member State where the recognition is sought. More often than not, this procedure proves to be a mere formality and it usually takes the form of an exequatur, a

judicial procedure through which a foreign judgment is provided with enforceability in the national legal order allowing its legal effects to produce outside the state of origin.

Although Regulation (EU) No 1215/2012¹¹ abolishes exequatur for judgments resulting from procedures concerning civil and commercial matters in consideration of the EU's objective stated in paragraph (3) of the Regulation's preamble,¹² adoption is not covered by this instrument as it falls under the notion of the status of a person.¹³ Moreover, a Member State is still in right to refuse recognition under certain conditions¹⁴ (one of the main reasons for refusal remains the public policy of the Member State addressed).

Refusal to recognise a domestic adoption order made in another Member State remains not only possible, but also probable, in the event that the conditions under which the adoption took place prove to be in contradiction with the public policy of the Member State addressed. Such is frequently the case of joint adoptions made by same-sex couples or of adoptions of the other spouse's child by the same-sex partner, seeing that at EU level there is currently no consensus regarding the way Member States decide to define a status for same-sex relationships alongside with all the rights that normally derive from said status.

3.B. REGULATION (EC) NO 2201/2003¹⁵

The recognition of judgments relating to parental responsibility is subject to the Regulation (EC) No 2201/2003. Paragraph (5) of its preamble states that 'In order to ensure equality for all children, this Regulation covers **all decisions on parental responsibility**, including measures for the protection of the child, independently of any link with a matrimonial proceeding'.

However, under article 1 par (3) letter (b), decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption are expressly excluded from the Regulation's scope. As a result, the rights and obligations arising from an adoption decision whose recognition is not mandatory according to the Regulation appear to be excluded as well from the Regulation's scope.

In light of the previous analysis, at EU level, as there is currently no legal instrument which regulates the recognition of an adoption order made in another Member State, the recognition of domestic adoption orders falls under the competence of each Member State, according to its own national law. Consequently, a difference of treatment is inevitable when a family exercises its right to free movement inside the EU considering that national adoption laws touch to a particularly sensitive matter and thus imply significant variations from one

⁸ Article 23 (1) of the 1993 Hague Convention states that 'An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognised by operation of law in the other Contracting States'.

⁹ Briefing of June 2016 Adoption of children in the European Union, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583860/EPRS_BRI\(2016\)583860_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/583860/EPRS_BRI(2016)583860_EN.pdf)

¹⁰ *Cross border recognition of adoptions*, p. 30, a research paper by Ruth Cabeza, Claire Fenton-Glynn and Alexander Boiché, for the European Parliament, EPRS, European Added Value Unit, Cross-border recognition of adoptions, European Added Value Assessment (EAVA), 30 November 2016, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581384/EPRS_STU\(2016\)581384_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581384/EPRS_STU(2016)581384_EN.pdf)

¹¹ EP and Council Regulation 1215/2012, OJ 2012 L 351/1

¹² 'The Union has set itself the objective of maintaining and developing an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters. For the gradual establishment of such an area, the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, particularly when necessary for the proper functioning of the internal market.'

¹³ Article 1(2) (a), Regulation (EU) No 1215/2012

¹⁴ Article 45, Regulation (EU) No 1215/2012

¹⁵ Council Regulation 2201/2003, OJ 2003 L 338/1

Member State to another, according to each state's public policy and traditions.

Under those circumstances, adopters moving to another Member State can find themselves in a position where their right to make decisions for the child is not acknowledged. This situation presents multiple inconveniences and raises serious questions as to the extent to which the child's best interests are taken into account considering that this leaves a large margin of appreciation for the Member States in recognising such adoption decisions which results into a lack of uniformity inside the EU.

3.C. A BRIEF OVERVIEW OF EU MEMBER STATES' NATIONAL LAW PROVISIONS ON ADOPTION BY SAME-SEX PARTNERS

At the moment, it is possible for same-sex partners to adopt a child in Belgium, Luxembourg, the Netherlands, Spain, Germany, France, Finland, Portugal and the UK, independent of their civil status as a couple. Married or legally registered same-sex partners can also adopt in Denmark, Ireland, Malta, Austria and Sweden; step-child adoption is possible in Estonia, Italy, Slovenia.

As it can be observed, Member States' national law provisions on adoption by same-sex couples are yet to reach a higher level of reconciliation and intra-EU conflicts are bound to occur when such a couple as well as the child in question try to have the family status awarded by a certain Member State recognised when moving to another Member State.

A number of potential risks spring immediately to mind, particularly the obstacle such a discrepancy represents for the creation of an area of freedom, security and justice (as one of the main objec-

tives of the EU) as well as the potential conflict of status with human rights as guaranteed by both the values of the EU and the ECHR.

For a better grasp of the situation, let us consider the following fictional example.

Felicity and Julia met in 2010 in Townsville where Julia moved from Pandora following a promotion as headmistress of Hogwarts. Townsville and Pandora are two of the 28 member states of Westeros. Felicity and Julia got married in Townsville in 2012 and later on they also adopted little Oliver Twist, a 7 year old boy who was a Townsville national, just as Felicity. The order of adoption made by the judicial authorities of Townsville was dated 21st of March 2014.

However, due to cutbacks at Hogwarts and also in order to provide the best education for Oliver, in the spring of 2019, Felicity and Julia decided to move to Pandora where some of the most prestigious schools in Westeros were located.

When submitting the application form to sign up Oliver to Xavier's Academy, Felicity and Julia were confronted with a refusal on the grounds that their adoption order could not be recognised according to Pandora's national law and that they could not lawfully exercise parental responsibility on Pandorian territory.

Seeing that the adoption process took place in Townsville, which is also a member state of Westeros, Felicity and Julia brought an action against Xavier's Academy requesting the Tribunal of District 1 of Pandora to recognise the order of adoption issued by the Townsville court and, subsequently, to also recognise their right to exercise parental responsi-

bility. Arguing public policy reasons, the Tribunal declines their request, seeing that its national law precluded it from issuing adoption order for same-sex couples as well as to recognise such orders made in any other state. An appeal was formed and the Court of appeal must now render a judgment analysing potential grounds of recognition of the adoption order in consideration of Westeros law, despite the restrictions incident in the Pandorian national law.

Considering that Westeros is the EU, Townsville is the equivalent of the UK and Pandora that of Romania, an analysis of potential solutions can be developed when taking this hypothetical example as a starting point.

Therefore, as it can be noticed, this family finds itself in the situation that falls under the current legal gap EU law is confronted with. The adoption is a domestic one – both Felicity and Julia were usual residents of Pandora at the time of the adoption, as was Oliver, the adopted child – and, consequently, the 1993 Hague Convention does not apply; they cannot argue the automatic recognition of their adoption order. Moreover, their problem cannot be surmounted by invoking an EU instrument such as the Regulation 2201/2003 considering that its scope excludes mandatory recognition of such adoptions as well. As a result, they have to demand the recognition of their adoption order through the procedure provided by Pandora's national law. When doing so, they are faced with a refusal of recognition due to public policy reasons. Hence, Felicity and Julia are un-

able to exercise parental responsibility in regards to their child Oliver, even though their family status was lawfully awarded in another Member State.

3.D. AN EU ANALYSIS OF THE POTENTIAL CONSEQUENCES OF THE CURRENT LEGAL GAP

Following the European Parliament's Resolution of 19 January 2011 on international adoption in the European Union,¹⁶ in 2015, the European Parliament's Committee on Legal Affairs (JURI) began work on a legislative initiative report on cross-border recognition of adoptions with specific recommendations to the Commission (rapporteur, Tadeusz ZWIEFKA, EPP, Poland). The European Added Value Assessment (EAVA)¹⁷ accompanying the report identifies the following potential risks determined by the absence of EU instruments to regulate the recognition of domestic adoptions.

This situation is highly problematic and generates economic, social and legal costs for adopters as well as for public administrations, and most importantly, puts the best interest of the child at stake. It can be argued that the current legislative gap creates a situation where the best interest of adopted children (who are the most vulnerable children in society) is not adequately protected in the EU. The lack of domestic legal recognition of adoptions may harm children's right, including their right to family life, non-discrimination, inheritance rights and right to nationality.

The current legal gap also creates an unjustified distinction between legal effects of Hague Convention adoptions and do-

¹⁶ European Parliament Resolution of 19 January 2011

¹⁷ The European Added Value Assessment from 30 November 2016 accompanying the European Parliament's legislative own-initiative report, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2016/581384/EPRS_STU%282016%29581384_EN.pdf

mestic adoptions with a foreign element. Whilst Hague Convention adoptions are subject to automatic recognition, domestic adoptions are not automatically recognised in another EU Member State. This more specifically impacts negatively on families that exercise their rights to free movement under EU law.¹⁸

All things considered, including the current status of EU law as interpreted by the CJEU's case-law, we will focus on examining to which extent the recognition of an adoption decision rendered by a Member State can be required for the other Member States of the EU.

4. THE FREEDOM OF MOVEMENT AS A POTENTIAL GROUND FOR THE MANDATORY RECOGNITION OF ADOPTION ORDERS – THE COMAN CASE

4.A. BRIEF OVERVIEW OF THE FACTS

Less than a year ago, on the 5th of June 2018, the Grand Chamber of the Court of Justice of the European Union ruled that *'In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, [...], in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life [...] Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from*

refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.'

Evidently, the aforementioned judgment had a direct impact on the right of Union citizens to move and reside freely in the territory of the Member States. Nevertheless, following the Grand Chamber's reasoning one cannot help but notice that the consequences of this evolution of EU law are yet to be fully explored. Provided that the Court's arguments can be transferred to other family law matters than same-sex marriage, the national law of the Member States (recognition of adoption orders included) can find itself strongly influenced by this recent judgement.

In the present case, Mr Coman, a Romanian national residing in Brussels, married Mr Hamilton, an American citizen, in Belgium in 2010. Wanting to take up residence in Romania, they addressed a demand to the local authorities. Consequently, they were faced with the refusal to grant a right of residency on the grounds that the Romanian national law does not recognise marriage between people of the same sex and that such a marriage does not fall under the notion of family reunion. A civil action on the grounds of sexual discrimination was brought against the authorities.

Subsequently, considering the elements of the main action, a demand for a preliminary ruling was addressed to the Court of Justice of the European Union. The Romanian judge inquired whether

the Directive 2004/38/EC¹⁹ requires the host Member State to grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a citizen of the European Union, providing the term "spouse" used by the directive includes the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State.

4.B. THE FREEDOM OF MOVEMENT AS GROUNDS FOR THE MANDATORY RECOGNITION

Firstly, according to its constant case-law, the Court stated that the Directive 2004/38 cannot represent grounds for Mr Hamilton, as a third-country national, to gain a derived right of residency. However, in certain cases, **such a right can be granted on the basis of Article 21(1) TFEU** (the right to move and reside freely within the territory of the Member States) and, in the light of its context and objectives, the provisions of the Directive 2004/38 are applicable by analogy to the present case. Therefore, they may not be interpreted restrictively and they must not be deprived of their effectiveness (paragraph 24 of the Attorney General's conclusions in the Coman case).

The freedom of movement for persons is one of the four principles of the EU and a fundamental right of a citizen of the Union. Moreover, the Court highlights the fact that the „citizenship of the Union is intended to be the fundamental status of nationals of the Member States" (Coman, paragraph 30) and **in consideration of that status, a citizen of the Union may**

rely on the right on the right of free movement and residency provided for in Article 21(1) TFEU 'including, when appropriate, against his Member State of origin' (Coman, paragraph 31).

Furthermore, paragraph 32 of the judgement states that *'The rights which nationals of Member States enjoy under that provision include the right to lead a normal family life, together with their family members, both in the host Member State and in the Member State of which they are nationals when they return to that Member State.'*

Whereas this paragraph could seem less relevant than those clearly stating the obligation for a Member State to recognise the effects of a marriage lawfully concluded in another Member State, between people of the same sex, in order to grant the spouse who is a third-country national the right of residency, it is nonetheless an argument of great value that could open a whole range of possibilities considering that it refers to family life and family members in general and that it is not limited to same sex marriage.

For instance, taking into account the topic of this paper, the question arises whether the right of free movement could represent grounds forcing Member States to also recognise other civil procedures such as a second parent adoption or a joint adoption by same-sex couples, with the premise being that the Member State in question refuses to recognise the procedure in itself through its national law provisions. And furthermore, would this recognition also be limited to granting a right of residency for the child or could it be extended to

¹⁸ Idem, page 4.

¹⁹ Directive 2004/38/EC, OJ 2004 L158/77

other matters as well, such as the exercise of parental responsibility in front of the local authorities of the Member State concerned? The Court's reasoning is more subtle than that.

Rather than stating that the recognition of a civil status acquired in another Member State should be automatic, the Court merely pleads for a mandatory recognition of the effects deriving from that status in order to guarantee the full effectiveness of the rights an EU citizen has according to primary law, more precisely the freedom of movement in this given case. However, although the Court limits its analysis to the object of the questions submitted to its attention, the reasoning could be further developed.

In other words, the Court states that the refusal of recognition 'for the sole purpose of granting a derived right of residence to a third-country national', based on the fact that the national law does not recognise the procedure concerned, is contrary to EU law. Nevertheless, the Grand Chamber also implies that the freedom of movement comprises a form of 'portability of personal status'²⁰ of the EU citizen; in absence of recognition of such a right, the freedom of movement would be severely limited with the risk being that it becomes voided of its content. Otherwise, citizens would be discouraged to exercise their right to move freely inside the EU and create a family life in a Member State, knowing the family status acquired in the said Member

State could be deprived of its effects when moving to another Member State.

It is from this point of view that the following mechanism could be imagined, seeing that a case similar to the hypothetical one chosen as an example could be submitted to the Court's attention in the foreseeable future. Taking into account the fact that Felicity, Julia and Oliver were awarded a family status according to Townsville's national provisions, the non-recognition of this personal status in Pandora due to public policy reasons interferes with the right to move and reside freely in the Westeros area. It is not unreasonable to assume that Julia would not have left Pandora and created a family in Townsville knowing that she would be unable to transfer that acquired status alongside with its legal effects when returning to her national state. In addition, Felicity and Oliver would also be strongly dissuaded to leave Townsville in order to establish their residence in Pandora, seeing that their family relationship would not be recognised.

Consequently, both parents would be unable to ensure the best upbringing and care for the adopted child considering that the exercise of their parental responsibility would be denied in the state of destination based on reasons pertaining solely to the latter's traditions and public policy provisions. But could the freedom of movement be a potential ground for the automatic recognition of adoption orders made in another Member State?

4.C. LIMITATIONS TO MEMBER STATES' COMPETENCE IN THIS FIELD

In the Coman case, the Court emphasises on the fact that although a person's status is a matter that falls within the competence of the Member States, in exercising that competence, Member States must comply with EU law.²¹ A different interpretation would result into a non-uniform application of EU law, thus affecting the rights of citizens of the Union depending on the national law of the Member State in question.

For that reason, in the Coman case, the Court stated that a Member State's refusal to recognise '*for the sole purpose of granting a derived right of residence to a third-country national, the marriage of that national to a Union citizen of the same sex, concluded, during the period of their genuine residence in another Member State, in accordance with the law of that State, may interfere with the exercise of the right conferred on that citizen by Article 21(1) TFEU to move and reside freely in the territory of the Member States*' (par. 40). Such a restriction, follows the Court, can only be justified if it is based on objective public-interest considerations and if it is proportionate to a legitimate objective pursued by national law.²²

Several governments having submitted observations showed that such a restriction is justified on grounds of public policy and national identity, considering the fundamental nature of the institution of

marriage and the intention of a number of Member States to maintain a conception of that institution as a union between a man and a woman, which is protected in some Member States by laws having constitutional status. A similar reason can be brought regarding adoption by same-sex couples, seeing that several Member States' national laws forbid such procedures on their territory and refuse to recognise their effects when concluded in other countries.

Nonetheless, the Court stands by the rules set in its previous interpretations of the notion of public policy and it states that 'that the concept of public policy as justification for a derogation from a fundamental freedom **must be interpreted strictly**, with the result that **its scope cannot be determined unilaterally by each Member State without any control by the EU institutions**. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.'²³ As a result, the Court concludes that an obligation to recognise such marriages does not undermine the national identity or pose a threat to the public policy of the Member State concerned.²⁴

Moreover, as illustrated with the fictional case as well as with part of the analysis developed up to this point, problems can arise especially relating to adoptions made by same-sex couples, as it is in relation to these situations that Member States are more likely to argue public policy reasons in order to refuse recog-

²⁰ This notion was used in the paper *Different families, same rights? Freedom and Justice in the EU: Implications of the Hague Programme for Lesbian, Gay, Bisexual and Transgender Families and their Children* by Dr. Matteo Bonini Baraldi for ILGA-Europe, December 2007, available at <https://www.ilga-europe.org/resources/ilga-europe-reports-and-other-materials/different-families-same-rights-implications-hague>.

²¹ C-148/02, *Garcia Avello*, (EU:C:2003:539), at para. 25; C-353/06, *Grunkin and Paul*, (EU:C:2008:559), at para. 16; C-438/14, *Bogendorff von Wolffersdorff*, (EU:C:2016:401), at para. 32.

²² C-353/06, *Grunkin and Paul*, (EU:C:2008:559), at para. 29; C-359/13, *Martens*, (EU:C:2015:118), at para. 34; C-438/14, *Bogendorff von Wolffersdorff*, (EU:C:2016:401), at para. 48.

²³ C-438/14, *Bogendorff von Wolffersdorff*, (EU:C:2016:401), at para. 67; C-193/16, *E*, (EU:C:2017:542), at para. 18; C-673/16, *Coman*, (EU:C:2018:385), at para. 44.

²⁴ C-673/16, *Coman*, (EU:C:2018:385), at para. 46.

dition of the adoption orders. Needless to say that such a situation creates all the premises for discrimination based on sexual orientation and it is in strong disagreement with human rights as guaranteed by both the ECHR as well as the Charter of Fundamental Rights of the European Union²⁵ (hereinafter the Charter).

5. THE PROTECTION OF FAMILY LIFE

5.A. THE EUROPEAN STANDARD

In the *Coman* case, the Grand Chamber's efforts to balance the interests at stake are easily noticeable when following its reasoning. Hence, towards the end of its judgment, the Court also refers to its role to ensure that, when implementing EU law, Member States also respect the fundamental rights as they are provided by the Charter. Consequently, the Court states that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with those fundamental rights guaranteed by the Charter.²⁶

Furthermore, in order to ensure an even stronger protection of the rights in question, the Court takes another step in that direction and brings up the ECtHR's case-law, seeing that *the rights guaranteed by*

*Article 7 thereof have the same meaning and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, as is apparent from the Explanations relating to the Charter of Fundamental Rights in accordance with Article 52(3) of the Charter.*²⁷

As to the scope of the ECHR, the ECtHR's role in the interpretation of the Convention is a fundamental one, seeing that the ECHR is a living instrument whose scope is subject to variation under present day conditions. Hence, as the ECtHR itself shows *'the State, [...] must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life'*.²⁸

According to the ECtHR's case-law, the right to a family life may involve the recognition by the state of the family life already established.²⁹ This would be in accordance with the ECtHR's solution in *X, Y, Z vs. UK*³⁰ where for the first time the Court has recognized the existence of a family even without a blood tie. Moreover, it was stated that it is essential for the members of a family to live together in order for them to develop normally³¹

As far as adoption is concerned, what is essential to keep in mind is that adoptions are not made for parents to have a child, but for a child to have a family.³² Therefore, the recognition of a family status acquired through an adoption procedure should ensure the safeguarding of the child's best interest. In fact, the ECtHR very recently gave priority to the best interest of the child while expressing its opinion that the superior interest of the child and the right to respect for private life, as guaranteed by article 8 of the ECHR, are reasons strong enough to justify the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother.³³

5.B. THE BEST INTEREST OF THE CHILD

1. Notion

As it was pointed out in doctrine, the child's welfare is determinant in the assessment courts make with other relevant factors being taken into consideration only if they have a direct bearing to the best child's interest. Therefore, 'welfare' is seen mostly as an objective notion which includes inter alia physical, emotional, educational needs, the likely effect on the child of any change in circumstances, any harm he could risk, ascertainable and conscious wishes and opinions of the child implied.³⁴

2. EU Mechanisms of Protection for the Child's Best Interest

(a) Legal instruments

The protection of the child has to be seen as one of the essential objectives of the European Union as stated in the Treaty on The European Union at the article 3 par.3 after mentioning the internal market which constituted the first step in its formation: *'It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.'*

Furthermore, article 24 paragraph (2) of the Charter makes the child's best interests a primary consideration in all actions relating to children taken by public or private institutions.

Therefore the protection of the child's rights is one of the EU's priorities. This objective was strongly reiterated and seen as actual on the 12th European Forum on the rights of the child where it was stated that *'The principle of best interests of the child must be the primary consideration in all actions or decisions concerning children.'*³⁵ This idea shall be regarded not only as a declared ambition with no practical implications, as the European Union has truly developed a major system on protecting rights of children, The Commission adopted for this purpose 'An EU Agenda for the Rights of the Child' in order to step up the efforts in protecting and promoting the rights of children in all relevant EU policies and

²⁵ European Union: Council of the European Union, *Charter of Fundamental Rights of the European Union (2007/C 303/01)*, 14 December 2007, C 303/1, available at: <https://www.refworld.org/docid/50ed4f582.html>

²⁶ C-165/14, *Rendón Marín* (EU:C:2016:675), at para. 66; C-673/16, *Coman*, (EU:C:2018:385), at para. 47

²⁷ C-673/16, *Coman*, (EU:C:2018:385), at para. 49

²⁸ ECtHR, *Kozak v. Poland*, Appl. no. 13102/02, § 98, Judgement of 2 March 2010. All ECtHR decisions are available at: <http://hudoc.echr.coe.int/>

²⁹ Harris, O'Boyle, & Warbrick, *Law of the European Convention of Human Rights*, Oxford University Press, Oxford, 2009, pp. 372.

³⁰ ECtHR, *X, Y and Z v. The United Kingdom*, Appl. no. 21830/93, Judgement of 25 April 1997

³¹ ECtHR, *Marckx v. Belgium*, Appl. no. 6833/74, § 31, Judgement of 13 June 1979

³² ECtHR, *Fretté v. France*, Appl. no. 36515/97, § 42, Judgement of 26 February 2002

³³ Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, p16-2018-001, 10 april 2019, paragraph 46

³⁴ S. Harris-Short, J. Miles, *Family Law. Text, Cases, and Materials* (2007), at 587-588

³⁵ 12th European Forum on the rights of the child, *Where we are and where we want to go*, from Albert Broschette Conference Center, 2-3 April 2019

actions. These actions follow the adoption of the Lisbon Treaty where new legal provisions create an obligation for the EU to take measures focusing on the realisation of children's rights.³⁶

As it can be observed from the above-mentioned facts, each and every action of the European Union takes into consideration in an extremely serious manner the idea of the best interest of the child and this idea is powerfully reiterated in the case-law of the CJEU that can provide insights in how the problem addressed by this paper could be solved by the Court.

Therefore, the child's best interest can justify in this case the prevalence of the child's right to reside in Member State, even though the state would de facto restrict this right on grounds of public policy taking into consideration its perspective on traditional family.

(b) Relevant Case-law

Two cases envisage the CJEU's point of view regarding the best interest of the child. By placing the spotlight differently in each of the cases, the CJEU creates a unique portrait of what the best interest of the child consists of and of the means Member States should use for its safe-keeping.

i) Importance

In the first of these cases³⁷ *Dynamic Medien* had argued that *Avides Media* should be precluded from selling a certain type of image storage media by mail order due to the fact that the Ger-

man Law on the protection of young persons³⁸ prohibits the sale under those conditions.

In the present case, the Court has stated that in principle such a provision in the law of a member state constitutes a measure having equivalent effect and examined the possible justification of such a measure. Afterwards, the Court has observed that public morality and public policy (which are grounds that can justify such a measure) have a direct link to the protection of young people as an objective, being closely related to ensuring respect for human dignity (paragraphs 36, 37). The Court has also acknowledged that in the absence of harmonization of legislation in such a matter, Member States can determine at a discretionary level to which extent they intend to protect the interest concerned (paragraph 44) and has examined the importance of the protection of the child's best interest.

The Court has examined whether the best interest of the child is a legitimate objective which can justify the restriction of the free movements of goods, one of the fundamental freedoms on which European Union is based on and stated that a measure having equivalent effect can be justified under the scope of protection of the child, as a legitimate interest. The child's welfare was seen as a priority and the measure designed to protect the child from material and information injurious to their well-being; therefore, it would seem that in this particular case the child's best interest was

considered important enough to justify such an exception to EU rules ensuring the free movement of goods.

ii) Interpretation

On the other hand, when it comes to interpretation, in the case *J.McB v L.E.*³⁹ the CJEU was clear in its appreciation and stated that the Charter itself has to play a role in the interpretation of EU law and, that Article 7 of the Charter must be read in a way which respects the obligation to take into consideration the child's best interests, and taking into account the fundamental right of a child to maintain on a regular basis personal relationships and direct contact with both of his or her parents.

One of the first significant aspects of this judgement is that it introduces the idea that the best interest of a child implies the child's right to have personal relationships and direct contact with both of his parents. Therefore, the national legislation should allow parents to effectively exercise their rights and obligations regarding the child. This perspective of the CJEU over the best interest of the child has an early echo in the case-law of ECtHR⁴⁰ stating that it is fundamental for a parent to maintain strong relationship with the child, this being mostly the essence of the family life; therefore, the measures which limit these relationships have to be exceptional. Moreover, the rights of the parents can be restricted if this is in accordance to the best interest

of the child, but not vice versa.⁴¹ Secondly, the judgment underlines that the Regulation has to be interpreted in accordance with the Charter, as it implies respecting fundamental rights. Therefore, it can be stated that the child's right to reside in EU would be subject to an unjustified restriction following the refusal of recognition of an adoption of a child by a same-sex couple on grounds of public policy. In order to guarantee child's right to reside in EU this right has to be interpreted in accordance with Charter, and therefore with child's best interest, a reasoning similar to the *Coman* case, showing the Court's attachment to these principles.

In point of fact, very recently,⁴² the Court decided, in accordance with its well established case-law⁴³ that even when exercising their discretion in complying with EU law (more precisely provisions related to the right of entry and residence for EU citizens' family members), Member States' authorities are to 'make a balanced and reasonable assessment of all the current and relevant circumstances of the case, taking account of all the interest in play and, **in particular of the best interest of the child concerned**' (paragraph 68). In other words, as long as a family ties are established, in consideration of the child's best interests, Member States have the obligation to create legal mechanisms in order to effectively guarantee the child's right to a normal family life.

³⁹ C-400/10, *J. McB. v. L.E.*, (EU:C:2010:582)

⁴⁰ ECtHR, *Olsson v Sweden*, Appl. no 10465/83, A/130, Judgement of 24th March 1988

⁴¹ F. Sudre, J-P Marguenaud, A. Guttenoire, M. Levinet, *Les grands arrêts de la Cour européenne des Droits de l'Homme* (2011), at 434

⁴² C-129/18, *SM*, (EU:C:2019:248)

⁴³ C-540/03, *Parliament v Council*, (EU:C:2006:429), at para. 58; C-403/09 PPU, *Detiček*, (EU:C:2009:810), at para. 54; C-133/15, *Chavez-Vilchez and Others*, (EU:C:2017:354), at para. 70; joined cases C-356/11 and C-357/11, *O and Others*, (EU:C:2012:776), at para. 81; C-165/14, *Rendón Marín*, (EU:C:2016:675), at para. 85; C-304/14, *CS*, (EU:C:2016:674), at para. 41

³⁶ EU Framework of Law for Children's Rights, Directorate General for Internal Policies, Citizen's Rights and Constitutional Affairs (2012)

³⁷ C-244/06, *Dynamic Medien Vertriebs GmbH v Avides Media AG*, (EU:C:2008:85), at para. 41

³⁸ Gesetz zum Schutze der Jugend in der Öffentlichkeit (Act to Regulate the Public Protection of Young Persons)

6. SOLUTIONS FOR THE EU

6.A. THE EUROPEAN CERTIFICATE OF ADOPTION

Through the European Parliament Resolution No. 2015/2086, 2 February 2017 an instrument was proposed in order to simplify the recognition of adoption procedures concluded in a Member State seeing that this currently falls under the Member State's competence in absence of EU law provisions. Article 11 states that an European Certificate of Adoption will be issued by the authorities of the Member State where the adoption was made.

However, in its present form, as resulting from the aforementioned Resolution, this future Regulation could still present a series of shortcomings seeing that it seems to leave Member States a considerable margin of appreciation as to the recognition of adoption orders.

We would suggest that the Preamble of the Regulation should stipulate the importance of the mutual recognition of adoptions between Member States no matter the sex and the sexual orientation of the parents, in order to protect the

child's best interest. In such a situation, it would be difficult for Member States to refuse the recognition of an adoption made by a same-sex couple on basis of public policy reasons.

6.B. THE (POTENTIAL) MODIFICATION OF THE REGULATION NO 2201/2003

An alternative version would be modifying Regulation No 2201/2003 in order to include in its scope of application judgments relating to parental responsibility resulting from adoptions as well. As a result, automatic recognition of adoption order made in another Member State would represent the rule and the refusal of recognition the exception, under article 23 of the Regulation.

As this article mentions public policy reasons as potential ground for non-recognition, the risk of a refusal of recognition based on public policy reasons pertaining to the adoptive parents' sexual orientation remains. However, the child's best interest should also be considered when making use of this provision and seeing that the child's right to a normal family life could be affected, the Member States' margin of appreciation is therefore limited.

6.C. LIMITS TO AUTOMATIC RECOGNITION

On the other hand, an automatic recognition of an adoption order made in another Member State, under any conditions, is not an appropriate option no less considering that family law is an area traditionally falling under Member States' competence, with the EU's intervention being a limited one, in accordance with article 81 par. 3 of the TFEU.

If Member State were to be deprived of any possibility to refuse the recognition of an adoption order, their national sovereignty would be severely influenced. As a result, legal tourism could be encouraged and EU citizens would formally conclude adoptions in a different Member State only to have it immediately recognised in their state of origin and thus eluding their national law provisions.

Therefore, when such is the case, a Member State should be able to decline a request of recognition of an adoption made under those conditions and demand that a set of criteria be met in order to recognise an adoption order such as the period of time that has passed since the adoption took place (the adoption should not have been only recently concluded) or adoptive parents' connection with the state where the adoption was made (at least one of the parents should be a resident of the said state as to avoid only a formal presence of the parents on that state's territory in the sole purpose of concluding the adoption).

7. CONCLUDING REMARKS

All things considered, the EU is currently faced with a seriously problematical situation. Due to a legal gap, domestic adoptions made in a Member State are not automatically recognised in another Member State, seeing that neither the 1993 Hague Convention, nor the existing EU regulations are incident in this matter. Accordingly, the recognition of such adoption orders falls under the competence of each Member State with significant costs for the EU.⁴⁴

Moreover, differences of treatment can inevitably occur from a Member State to another as a result of the state's large margin of appreciation in regulating this area of family law according to its own traditional view over the notion of family life.

However, seeing that the recognition proves to be a mere formality in most cases, situations that are susceptible of interfering with a state's public policy are more problematic considering that refusal is often based on this particular reason. Such is the situation of adoptions by same-sex couples where Member States' legislations are yet to reach common ground regarding the possibility of concluding such an adoption and to its effects. This situation can have a negative impact for both the adopters and the adopted child who would be unable to lead a normal family life under the same conditions in each and every Member State of the EU.

Therefore, in a broader context, taking into account the undeniable tendency for globalization, a common solution should be considered, especially considering that the freedom of movement is an essential right deriving from EU citizenship. As a consequence, the refusal of recognition of an adoption order issued in a Member State could interfere with the right to move and reside freely inside the EU of same-sex couples and of their adoptive children seeing that they would be unable to fully exercise the prerogatives attached to the family status acquired in a Member State, thus leaving their lawfully established status without any legal effects when moving to another Member State whose legislation refuses recognition.

Taking into consideration that a comparable hypothesis was analysed by the CJEU in the Coman case regarding recognition of a marriage concluded by a same-sex couple in a Member State, we strongly believe that the Court's reasoning could be transferred to this situation as well in order to reach a similar solution. In other words, the freedom of movement, as established through EU primary law and interpreted by the CJEU, could represent grounds compelling a Member State to recognise a form of portability of the personal status lawfully attained according to another Member State's legislation in order to ensure the respect of EU law.

A different conclusion would seriously affect the exercise of the right to move freely inside the Union due to the fact that EU citizens could be strongly discouraged to exercise that right knowing they incur the risk of having the recognition of their new family status refused in their Member State of origin or even in a different Member State they would consider residing in.

On the other hand, the refusal of recognition of an adoption order made under those terms should mainly be considered from the child's point of view. In other words, even in the absence of any EU rules under which the Member State's margin of appreciation as to the refusal reasons would be limited, the fact that the national provisions forbid an adoption by same-sex couples and its recognition when concluded in a different state could not represent grounds for that state's authorities to refuse to recognise the effects of the lawfully established family status since it would severely harm the child's best interest. Differently put, when refusing to recognise the effects of such an adoption order, the state in question refuse to acknowledge the exercise of parental responsibility by the adoptive same-sex parents although, following the adoption procedure, these are the only established legal ties the child has.

Would then the child be left with no one to exercise that parental responsibility and make all the decisions in order to ensure his welfare? Clearly, such a situation cannot be considered and the refusal of recognition under those terms would be contrary to the child's best interest, a vital principle for all Member States under both EU law as well as the ECHR to which all Member States are party.

Nonetheless, to prevent these risks and their negative impact on EU citizens' family life, we strongly believe that an EU instrument regulating the automatic recognition of adoptions made in another Member State would be highly useful in establishing a common standard regarding adoption procedures which would thus guarantee the respect of the same set of basic principles in all Member States and which could eventually result into a reconciliation of national legislations in this area of family law.

⁴⁴ Approximately €1.65 million per annum, according to the EAVA cited above.

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AGREEMENTS CONCLUDED BY SPOUSES IN THE MATTER OF DIVORCE OR LEGAL SEPARATION: THE “DOGMA” OF RECOGNITION AND ENFORCEMENT WITHIN THE EUROPEAN AREA

The Paper examines the issue of agreements concluded by spouses in the matter of divorce and legal separation, and of their circulation within the European Union, specifically taking into consideration the provisions of the Brussels IIa Regulation. The Authors examine the legal framework provided for by the Regulation and the new rules contained in its “recast”, recently approved by the European Union (Regulation No. 1111 of 2019). The aim is to verify how and if the new provisions have filled the previous lack of regulation, also underlined by the European Court of Justice.

Indeed, ways of amicable settlement of matrimonial disputes have been introduced in many Member States. In that regard, the Authors drafted a comparative chart of domestic provisions, showing both differences and similarities of discipline among Member States. Above all, it has been noted how “private divorces” could represent an effective tool to reduce arguments and costs for families; notwithstanding their widespread diffusion, the circulation of agreements was hindered. As underlined in the Paper, the circulation of agreements is not only a matter of mutual trust between Member States, but it is also a matter of freedom for families: Brussels IIa “recast” satisfies this need. Therefore, the analysis deals, critically, with agreements of “private divorce” concluded in the Member States and their circulation throughout Europe, back then and from now on.

KEY WORDS

Private divorce agreements - Circulation - Recognition - Enforcement - Cross-border families - Brussels IIa recast

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1. AGREEMENT AS THE BEST SOLUTION FOR FAMILY DISPUTES

Family disputes, especially cross-border ones, generally present many problems, also because the legal aspects are complicated by the emotional involvement of parties, by the personal stories of the family, and by the involvement of children. The level of conflict is indeed particularly high and the situation is more complicated in case of cross-border disputes. This is why the European Union promotes mediation in the context of family disputes and suggests the use of alternative dispute resolution tools. The legal systems of the Member States have taken these suggestions and introduced, in the field of family quarrels, instruments of alternative dispute resolution.

Taking into account different instruments of alternative dispute resolutions, most of the Member States' law provide for items that quicken the arrangement of the agreements and, at the same time, reduce the use of contentious instruments. As a consequence, the judicial system can result relieved.

Today it is common ground that friendly agreements are the best solution for family disputes: first, the agreement generally guarantees the spontaneous execution of his content; secondly, the agreement guarantees greater stability over time; finally, the judge's decision defines the dispute but does not resolve the conflict. On the contrary, the agreement makes up the couple conflict and allows the partners to reach a new balance.

A common *datum* to the Member States is the introduction of judicial instruments of settlement of the dispute in an amicable manner. In these cases, the court makes it possible for spouses to use tools to reach an agreement (e.g. mediation, the use of experts, etc.). Thus, the agreement is approved by the court with a decision.

However, many Member States have also introduced, over time, new instruments that we could call "*new generation tools*" for agreements: in these cases, spouses are allowed to conclude their amicable agreements without going to court. The rationale behind these tools is as follows: a) to encourage a friendly solution by simplifying the possibility of reaching agreements, guaranteeing greater autonomy and a system that costs less; b) to prevent spouses who have already reached an agreement from having to go to court anyway, with an economic and time burden; c) to guarantee spouses who have reached an agreement, greater confidentiality, as they can avoid having to go to court. In recent years, this possibility has also been envisaged for concluding a separation or divorce agreement, thus reaching new types of agreements that some interpreters have named "*private divorce*".

Anyway, in these cases, special protection measures are generally provided for when the spouses have children. This is a common principle that has been borrowed by the UN Convention on the Rights of the Child¹ and it is now taken into account by most of the Member States in the regulation of the agreements between spouses.

In this regard, any agreement or private and voluntary regulation have to be checked in the light of the best interest of the children, which has always to be fulfilled. As a consequence, it can be noted that a higher level of liberalization is recognized in cases of divorce in absence of minors.

1.A. AGREEMENTS CONCLUDED IN THE MATTER OF LEGAL SEPARATION AND DIVORCE

Traditionally, European legal systems have provided for the possibility for parents to enter into amicable agreements concerning parental responsibility, generally with the intervention of a judge. Only in recent years, some Member States have also introduced for spouses the possibility to conclude agreements on legal separation and divorce.

This possibility has brought down a *taboo*: that the matter of status, particularly marriage, was not at the parties' disposal. These agreements are different from those concluded before judicial authorities. Agreements concluded before the judge are subject to judicial authority's control and are included in a decision. On the contrary, the extrajudicial agreements substantially maintain "*contractual*" character and are not contained in a judge's decision. In out-of-court agreements, a public authority is generally required to intervene according to the applicable national law, but it is not a judicial authority.²

In relation to these measures, an issue arises in regard to their enforceability.

The judges' decisions are indeed enforceable, also if reproducing agreements reached by the spouses during the trial. Instead, the enforceability regime of private agreements differs from country to country in regard of the civil law national system. Hence, the differences are also due to the varied nature of the tools that are provided.

More specifically, another element that could determine a difference with regard to the enforceability could be the legal nature of the agreement. Indeed, many Member States provide for the intervention of a public authority or a notary.³ In the latter case, the enforceability could be ensured under certain terms and conditions. Instead, if the instrument used results in a mere private agreement, such as a contract, the enforceability could not always be ensured.

To clearly understand this phenomenon in Europe, it is worth checking which Member States have introduced such mechanisms and what exactly the applicable law provides.⁴

1.B. THE SITUATION IN EUROPE: MEMBER STATES THAT PROVIDE FOR SEPARATION/DIVORCE AGREEMENTS

On the basis of the previous analysis, it has been found that, beyond the European Legislation actions, in many Member States have been introduced various kinds of agreements that can be signed by the spouses before different authorities.

² Viarengo, 'International Divorce Proceedings in Italy: Issues Arising in the Case Law', 5 *Rivista italiana di Diritto Pubblico Comunitario* (2016), at 701-724

³ Caliaro, 'Divorce abroad before notary or administrative authority', 6 *Lo Stato Civile Italiano* (2017), at 26-27.

⁴ See on this issue I. Queriolo, *Eu law and family relationships* (2015).

¹ United Nations Convention on the Rights of the Child 1989, UNTS 1577.

This *datum* demonstrates that the national concrete experiences in matter of separation/divorce and regulation of the subsequent relationships between spouses have carried a substantial need of bringing to an evolution the legal instruments developed to these purposes.

The rapid evolution of national legislations has been, in certain cases, faster than the related legal provisions of European Union. Therefore, the new tools introduced by the Member States gave the way to the need and opportunity to re-arrange also the European regulation of the matter.

In particular, different key points have arisen, thus highlighting the foremost cooperation issues that shall be solved in a European Law perspective. Specifically, the focus shall be on the enforceability system of the above-mentioned agreements. Indeed, the issues are, firstly, how the agreements are enforced under national laws in the different Member States, and secondly if the involvement of an authority is required for enforceability.

Eventually, it could be noted that there are some Member States who enforce these agreements as contracts and some others that treat them as decisions.

1. A comparative analysis

Therefore, in order to assess which is the aforementioned *status* of the Member States' legislations with regard to separation and divorce extrajudicial agreements, a comparative analysis shall be conducted.⁵

The following list highlights the current *state of the art* in those Member States that have introduced some extrajudicial tools in the matter object of analysis.

Belgium: it is provided for the possibility to conclude private agreements before a notary. As a general rule, these agreements can be considered as contracts, but if they are approved by a judge, they are enforceable as decisions.

Estonia: agreements are authenticated by the notary or by the vital statistics office and whether confirmed by a notary they are enforceable under the same conditions of the courts' decisions.

Finland: the agreements shall be confirmed by the Local Social Committee to be valid and enforceable. In the latter case agreements are enforceable as Courts' decisions, otherwise they are not enforceable.

France: the registration of the agreements by the notary is required for their enforceability. Otherwise, in some cases the judge could approve the agreements determining a change of their legal nature. While the agreements normally have, indeed, a private nature, in the latter case they are ruled as courts' decisions.

Germany: the agreements have a mere private nature and they can produce their effects only on a practical basis between the spouses, as they are not enforceable.

Italy: the agreements can have a different legal nature and enforceability regime on the basis of the adopted proce-

dure. In a first case, the agreements are signed with lawyers and submitted to the Public Prosecutor Office for security clearance. On the other hand, in case the spouse have children under 18 years old or with disabilities, the Public prosecutor's security clearance has a substantial nature and is finalized to ensure the protection of children's interests. Regarding to their legal nature, the agreements signed under the aforementioned procedures are private instruments with the same effects of jurisdictional decisions.

Latvia: it is provided for the possibility to sign agreements with a private legal nature. In order to guarantee the enforceability of such agreements, these have to be confirmed by the court. Otherwise the agreements are treated as contracts.

Malta: private agreements can be signed and they have the same enforceability of contracts.

Netherlands: the agreements are authenticated by a notary and their enforceability is related to their object. In particular, financial agreements are enforceable with bailiff. On the other hand, agreements related to children have to be enforced with a judicial procedure.

Portugal: agreements have normally a private nature and can be signed under voluntary mediation. The agreements are instead enforceable when approved by the Civil Registrars: in this case they are enforced as courts' decisions.

Romania: the spouses can sign agreements with a private nature that can be enforced when are authenticated and the enforcement can be held by the bailiff.

Slovenia: reached under notary records and with the same legal nature, the agreements are enforceable. As alternative, the parties shall submit the agreements to the court.

Spain: the agreements have a private nature but for their enforceability the notarization in public deed or by summary trial is needed.

Sweden: it is provided for the possibility to sign private agreements and the enforceability depends on the subject of the agreement itself. The agreements in matter of division of the property in case of divorce shall be registered at the Tax Agency, while those on matter of parental responsibility or maintenance of the children shall be approved by the Social Committee. In the latter case agreements are enforced as Courts' decisions.

1.C. THE SITUATION IN ITALY

In the Italian legal system spouses can conclude an agreement in the matter of separation or divorce without the intervention of a judicial authority.⁶ Under Italian law (law no. 162 of 2014), spouses can decide to conclude an agreement resorting to the so called "*negoziatio assistita*".⁷

⁶ Irti, 'Gestione condivisa della crisi familiare: dalla mediazione familiare alla negoziazione assistita', 2 *Diritto di famiglia e delle persone* (2016), at 665.

⁷ Legge 10 novembre 2014, n. 162, Conversione in legge, con modificazioni, del decreto-legge 12 settembre 2014, n. 132, recante misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell'arretrato in materia di processo civile. (14G00175) (GU Serie Generale n.261 del 10-11-2014 - Suppl. Ordinario n. 84).

⁵ The informations about national legal systems are available at <https://e-justice.europa.eu>

This legal arrangement of “*assisted negotiation*”, is an alternative dispute resolution procedure, similar to mediation, aimed also at reducing the workload of our courts. It is a proceeding that allow the parties to cooperate in good faith and fairness to solve amicably their dispute, with the assistance of lawyers and within the time limit agreed by the parties.

More specifically, the assisted negotiation consists in an agreement undersigned by the spouses (the so-called “negotiation agreement” – *convenzione di negoziazione*) by means of which the couple who would like to separate, assisted by its Italian lawyers specialized in family law, can agree both upon the economic matters (e.g. the use of the family house or the provision of alimony/child support) and the matters connected to the placement of the children. As soon as the negotiation agreement is drafted and executed, the lawyers must authenticate the signatures, file the document to the competent Prosecutor Office and wait for its security clearance.

In particular, the security clearance of the Prosecutor Office only regards formal aspects when the couple does not have children, while when minors are involved the Prosecutor Office checks if the agreement corresponds to the children’s interest.⁸

As an alternative, the spouses can decide to declare their will to separate before the Public Officer (the public registrar) of the municipality of residence of one of the two spouses or of the municipality where the deed of marriage has been registered. This second alternative can

be carried out also without the assistance of a lawyer. However, there are two limitations to take into consideration: this “declaration” before the Public Officer can be chosen only by couples who do not have minors, or not self-sufficient or handicapped children and, moreover, it does not allow for the insertion of economic provisions in the declaration, as, for example, alimony or child support.

It has to be clarified that the introduction of such instruments does not mean that unavailable rights are freely at the parties’ disposal. In this regard, the control of the Public Prosecutor guarantees that, in presence of minors or children with disabilities, the protection of their rights is in any case ensured, as well as it is ensured the fulfillment of public policy and mandatory rules. Whereas, the procedure completed before the Civil Registrar is different when there are no minors; in the latter case the Public Prosecutor’s control does not exceed the control of mere procedural rules.

The aforementioned legal tools have been object of concern, also in the occasion of comparative analysis and debates, for the absence of a Public control and also for the absence of a third party (for instance a mediator). It has been indeed observed that a third party could work to ensure equality between parties.

Similar perplexities have been moved regarding to the protection of the children’s interests in the absence of a third subject. In relation to that issue, it has to be clarified that in the case in which the spouses agree to solve the conflict on a voluntary basis, hence they are legitimate to make all the possible choices for

their children, as well as they do during their matrimonial relationship. Should a private agreement occur, that would mean that the conflict is overcome and, therefore, parents can physiologically fulfil their duties, in the interest of their children. In any case, for any potential conflict that could arise, a third party, such as the Court, could be summoned.⁹ In this regard, a possible model to be adopted could be that provided for by the French system.¹⁰

COMPARATIVE TABLE

Legal systems that provide for «private agreements» in the matter of legal separation/divorce

Member State	Authority before which the agreement is concluded	Enforcement under national law	Legal nature
Belgium	Notary	Private contracts, unless are approved by a judge	Private agreements
Estonia	Notary Vital statistics office	As decisions if confirmed by the notary	Authenticated Private agreements
Finland	Local Social Welfare Board	Enforceable if confirmed by the Local Social Welfare Board	Private agreements (if confirmed by SWB – private agreements enforceable as court’s decisions).
France	Notary Lawyers	Registered by the notary: enforceable Approved by the Court	Private agreements Court decision
Germany	Private agreements	Not enforceable	Effects only on a practical basis between parents

⁹ Parini, La negoziazione assistita in ambito familiare e la tutela dei soggetti deboli coinvolti, *Nuov. giur. civ.* (2015), at 602.

¹⁰ In France, in case a conflict arises the parties submit the question to the Court in order to ensure the Judge’s intervention as a third part. In this hypothesis, the agreements loses its private nature and it is considered as having the same legal nature of Courts’ decisions.

⁸ *Ibid.*, at art. 6, par. 2 and 3

Italy	Lawyers Registrar	Signed with lawyers and lodged at the Public Prosecutor office. Signed before the Public Officer: lodged at the belonging registrar office for confirmation	Lawyer agreements: private agreements with the same effects of jurisdictional decisions Before Administrative Authorities: private agreements with the same effects of jurisdictional decisions
Latvia	Confirmed by the Court	Enforceable if confirmed by the Court	Private agreements
Malta	Private agreements	Same enforceability of contracts	Private agreements
Netherlands	Notary	enforceable with bailiff or with a judicial procedure	Authenticated agreements
Portugal	Registrar Voluntary mediation	Agreements are enforced as decision if approved by the Civil Registrars	Private agreements
Romania	Notary	Enforceable by bailiff if authenticated	Authenticated private agreements
Slovenia	Notary	Enforceable if recorded by notary	Notarial records
Spain	Notary, Registry	Enforceable by summary trial or execution of public deed.	Private agreements
Sweden	Tax Agency Social Committee	Enforceability system depends on the subject. (e.g. registration at the tax Agency; approval by the social Committee)	Private agreements

2. RECOGNITION AND ENFORCEMENT OF AGREEMENTS CONCLUDED IN THE MATTER OF LEGAL SEPARATION OR DIVORCE: HOW DOES IT WORK TODAY?

The analysis of the European domestic legislations shows clearly that many national systems provide for the possibility of «private divorces», that is out-of-court agreements on legal separation and divorce. A relevant question, at this stage, arise: how do these agreements could circulate in Europe?

2.A. RECOGNITION AND ENFORCEMENT OF DECISIONS BEFORE THE RECAST OF BRUSSELS IIA REGULATION

Legal separation and divorce within the European area are ruled by two main different regulations.¹¹ The first one is Regulation No 2201 of 2003, so called “Brussels Ila”, which deals with the jurisdiction and the recognition of decisions.¹² The analysis will focus mostly on this regulation, because it is the proper instrument to rule the circulation of decisions and agreements, also of divorce and “private divorce”, in European Union.

As described forward in depth, Brussels Ila Regulation has been edited with the approval of a new version “recast”, but it will entry into force only on 1st August 2022 (Regulation No 1111 of 2019).¹³ Therefore, until that date we must take into consideration the normative discipline provided for by the former version of Brussels Ila Regulation.

The second one is Regulation No 1259 of 2010 (so called “Rome III”), which contains rules on applicable law in these issues.¹⁴ Particularly, this regulation applies to divorce and legal separation in transnational situations involving a conflict of laws. The main connecting factor in these cases is the choice of law made by the parties.¹⁵ This instrument is very relevant for the matter, but it deals with the substance of the issue and not specifically with the question of circulation of decisions and agreements.

Among the other legal sources, we have to notice that patrimonial issues involved in divorce and legal separation are excluded from the content both of Brussels Ila and Rome III. Indeed, these aspects are governed by Regulations No 1103¹⁶ and No 1104¹⁷ of 2016, that rule jurisdiction, applicable law, recognition and enforcement of decisions in the matter of matrimonial property regimes and of property consequences of registered partnerships.

¹¹ F. Mosconi, C. Campiglio, *Il Diritto internazionale privato e processuale* (2017), at 123 ff.; Franzina, *The law applicable to divorce and legal separation under Regulation (EU) no. 1259/2010 of 20 December 2010*, 3 *Cuadernos de Derecho Transnacional* (2011), at 123. On the debated question of recognition of decisions of divorce in Italy before and after the reform of 1995 see Picone, *L'art. 65 della legge italiana di riforma del diritto internazionale privato e il riconoscimento delle sentenze straniere di divorzio*, in 36 *Rivista di diritto internazionale privato e processuale* (2000), at 381 ff.

¹² Council Regulation 2201/2003, OJ 2003 L 338/2003.

¹³ Council Regulation 1111/2019, OJ 2019 L 178/1.

¹⁴ Council Regulation 1259/2010, OJ 2010 L 343/2010.

¹⁵ V. M. Bogdan, *Concise introduction to EU Private International Law* (2016), at 157.

¹⁶ Council Regulation 1103/2016, OJ 2016 L 313/3.

¹⁷ Council Regulation 1104/2016 OJ 2016 L 197/3.

Also maintenance obligations are excluded from Brussels IIa and Rome III: these economic matters are provided for by Regulation No 4 of 2009.¹⁸ This regulation applies to maintenance obligations arising from a family relationship, marriage or affinity, and it deals with the matter of jurisdiction, applicable law and recognition of judgments in that field.

As stated before, Brussels IIa is the most important regulation to our aims. It concerns jurisdiction, recognition and enforcement of decisions in matrimonial matters and in the matter of parental responsibility. The purpose of this regulation is to remove obstacles to the application of the fundamental principle of free circulation in the European Union. Indeed, rules on judicial cooperation in civil law matters are inspired by principle of mutual trust between Member States of the European Union, in order to let the national decisions circulate within European borders. So, a divorce pronounced in Italy can be recognized in Greece, and *vice versa*.

Regarding jurisdiction, Brussels IIa provides for several competent courts, leaving the choice to the parties. Rules on jurisdiction are based, firstly, on the habitual residence of one or both spouses. Recognition of a judgment, instead, is provided for by article 21; according to this provision, a judgment relating to divorce, legal separation or marriage annulment given in a Member State can be recognized in other Member States. However, the judgment cannot be recognized if such recognition is contrary to

the public policy of the Member State, if it was given in default of appearance, or if it is irreconcilable with a former judgment given in a proceeding between the same parties.¹⁹

Still, there is an important difference between decision concerning matrimonial affairs (separation, divorce, annulment of marriage) and decision concerning parental responsibility (e.g. custody, access or visitation rights). Parental responsibility's decisions are submitted to enforcement; instead, decision relating to matrimonial affairs, are submitted to recognition. This distinction is very significant for the problem of recognition of agreements concluded in the matter of legal separation or divorce.

Therefore, it is necessary to verify if agreements in the matter of separation or divorce fall under the scope of Brussels IIa. Can we consider an agreement of separation or divorce concluded without a judge as a case of "decision released by a judicial authority", according to the provisions of the regulation?

2.B. CIRCULATION OF AGREEMENTS

The issue of the circulation of agreements is to be faced distinguishing the possible types of agreements. A first type of agreement is the one approved by a judicial authority with a decision: for example, the "separation by mutual consent" approved by the judge. Any agreement issued by the court following an examination of its substance in ac-

cordance with national law is to be recognized or enforced as a "decision".

In these cases, the agreement reached by the spouses is approved by the judge and included in a formal act that constitutes a decision: these agreements certainly fall within the scope of application of the Brussels IIa.

However, we also have other types of agreements in which no judicial authority intervenes: on one hand, agreements concluded by spouses without the intervention of any authority, on the other hands agreements that are merely private. In these cases, there is no decision, no court: it is clear that we fall outside the scope of the regulation.

However, there are also agreements which are neither a decision nor merely private documents, because they have been registered by a public authority competent to do so. Such public authorities can include – for example - notaries or civil registrars. These agreements acquire binding legal effect in the Member State of origin following a formal intervention of a public authority, without the intervention of a judicial authority.

These agreements are not mere private agreements, and, at the same time, they are not a decision: that's why they are also called "*private divorces*". Can they circulate under Brussels IIa?

An useful provision to our intents can be found in article 46 of Brussels IIa, where it is argued that "documents which have been formally drawn up or registered as authentic instruments and are enforceable in one Member State and also

agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognized and declared enforceable under the same conditions as judgments".²⁰

However, there is a problem: at first glance, this provision seems to refer only to "*enforceable*" agreements and that is not the case of agreements or decisions of divorce, which are, as seen before, only "*recognizable*". In this regard, solely agreements in the matter of parental responsibility should be enforceable. Following this reasoning, article 46 would not include in its field of application merely recognizable agreements, such as those on separation and divorce.

In any case, even overcoming this issue, another problem would remain: art. 46 can work only within the "field of application" of Brussels IIa. Still, it is possible to interpret article 46 in an evolutionary way. Indeed, at the time of the introduction of art. 46 there were no instruments in the Member States allowing to stipulate agreements of "private divorce". The question was not at stake: the provision was thought only for agreements regarding parental responsibility.

Since it is also necessary to give to provisions a useful sense, in accordance with the social evolution, we could propose a modern interpretation of art. 46 of Brussels IIa, that would include also agreements of "private divorce" within the "agreements recognized and declared enforceable under the same conditions as judgments". This interpretation would be also in line with the aim of Brussels IIa, that is to recognize divorce agreements concluded within the European Union,

¹⁸ Council Regulation No 4/2009 OJ 2016 L 7/1.

¹⁹ Commission, Directorate-General for Justice, *Study on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment*, 26th July 2018, available at <https://publications.europa.eu/en/publication-detail/-/publication/463a5c10-9149-11e8-8bc1-01aa75ed71a1/language-en>.

²⁰ Council Regulation 2201/2003, *supra* note 10.

in order to increase judicial cooperation in family law, to encourage the use of mediation, to avoid disputes,²¹ to create mutual trust between Member States, and then to remove obstacles to free circulation in the European Union.

2.C. ECJ, CASE 372/16, SAHYOUNI V. MAMISCH, 20TH DECEMBER 2017

At the moment, the Court of Justice has not explicitly addressed the issue concerning the scope of Brussels IIa with regard to the question if the Regulation also covers agreements that have not been concluded before a jurisdictional authority. Nevertheless, some important observations could be found in the decision made by the ECJ in the case C-372/16 *Sahyouni v. Mamisch* (judgment of the Court of the 20th of December 2017).²²

In this decision, very controversial and debated among legal scholars,²³ the Court of Justice dealt with the request for recognition in Germany of a divorce concluded in Syria, based on Sharia and pronounced on the sole basis of the unilateral declaration of a spouse before a religious court. The Court of Justice's decision concerns the application of Regulation No 1259 of 2010 (Rome III) and not

Brussels IIa, but is useful also for the purpose of our analysis because, according to recital n. 10 of Rome III, "the substantive scope and enacting terms of that regulation should be consistent with Regulation No 2201/2003".²⁴ Therefore, the meaning of the word "divorce" is the same in both Brussels IIa and Rome III.

The Court, in its decision, *inter alia*, states at point n. 47:

"While it is true that a number of Member States have, since the adoption of Regulation No 1259/2010, introduced into their legal systems the possibility for divorces to be pronounced without the involvement of a State authority, it is nevertheless the case ... that the inclusion of private divorces within the scope of that regulation would require arrangements coming under the competence of the EU legislature alone".²⁵

More precisely, the Court argued that "in the light of the definition of the concept of 'divorce' in Regulation No 2201/2003, it is clear from the objectives pursued by Regulation No 1259/2010 that the regulation covers exclusively divorces pronounced either by a national court or by, or under the supervision of, a public authority".²⁶

According to the Court reasoning, it doesn't seem that "private divorces" could fall under the scope of Brussels IIa. Nevertheless, if we analyze deeper the central object of the ruling, we can outline some differentiations. Surely, according to the ECJ, unilateral declarations of divorce are not ruled by European regulations; the same could be said for agreements concluded without any intervention of public authorities. However, it seems possible to argue that ECJ didn't refer also to "mixed" agreements, in which divorce is pronounced on the basis of a private agreement, but also with the "constitutive (final) intervention of a court or public authority".²⁷

Indeed, several proceedings recently introduced by Member States result in "mixed" agreements. In these cases, the divorce is pronounced under the control of a public authority. Therefore, this scenario should be comprehended in European regulations, like the scenario of divorces pronounced directly by a judicial or a public authority.

2.D. WHICH NATIONAL AUTHORITY RELEASES THE CERTIFICATE [ART. 39]?

Brussels IIa leaves open also another important question, related to the certificate necessary for the recognition and

enforcement of decisions in matrimonial matters and in the matter of parental responsibility in a different state.

In this regard, art. 39 of Brussels IIa states that "The competent court or authority of a Member State of origin shall, at the request of any interested party, issue a certificate using the standard form set out in Annex I ... or II".²⁸ The question is: which national authority is competent to release the certificate in case of agreements?

On this point, Brussels IIa seems to leave a margin of discretion to each Member States. Some Member States have defined the issue of competence with a legislative intervention; Romania, for instance, established that the certificate is released by the judge that would be abstractly competent for the case. In Germany, instead, the only way to get a divorce is to turn to a judge, therefore the certificate shall be issued by the court where the marriage was dissolved.²⁹

Italy has not ruled on the issue through a specific legislative intervention, but with administrative recommendations – issued in 2018 by the Ministry of Interior³⁰ and the Ministry of Justice.³¹ If the agreement was concluded with the assistance of lawyers, as in the case of assisted negotiation, the competent authority to release the certificate is the Prosecutor

²¹ Commission, *Practice Guide for the application of the new Brussels II Regulation* (2005).

²² Case C/372-16, *Soha Sahyouni v Raja Mamisch*, Judgment of the Court (First Chamber) of 20 December 2017 (EU:C:2017:988).

²³ On this issue, see at instance Gössel, 'Open Issues in European International Family Law: Sahyouni, "Private Divorces" and Islamic law under the Rome III Regulation', 3/4 *The European Legal Forum* (2017); A. Negri, *La sentenza Sahyouni c. Mamish della Corte di giustizia di Lussemburgo: un'occasione per tornare a riflettere sulla portata del principio di non discriminazione nell'ordinamento dell'Unione Europea* (28th September 2018), Research Paper No. 18-02- University of Milano-Bicocca School of Law, available at <https://ssrn.com/abstract=3300076> or <http://dx.doi.org/10.2139/ssrn.3300076>.

On the topic of freedom of religion and circulation of familiar status see 2019 Marongiu Buonaiuti, *Libertà di religione e circolazione internazionale degli status personali e familiari*, in *La tutela internazionale della libertà religiosa: problemi e prospettive* (2019), at pp. 193 ff.

²⁴ *Ibid.*, at para. 40.

²⁵ *Ibid.*, at para. 47.

²⁶ *Ibid.*, at para. 48.

²⁷ *Ibid.*, at para. 22.

²⁸ Council Regulation 2201/2003, *supra* note 10.

²⁹ V. German Missions in the United Kingdom, *Name declaration after divorce or death of a spouse* (2018), available at <https://uk.diplo.de/blob/507000/28fda69822ffa009623f61931efea121/nd-divorceddeath-data.pdf>.

³⁰ V. Ministry of the Interior, *Circular n. 13/2018* (2018), available at <https://dait.interno.gov.it/documenti/circ-013-servdemo-20-07-2018.pdf>.

³¹ V. Ministry of Justice, *Circular of 22 May 2018*, (2018), available at https://www.giustizia.it/giustizia/it/mg_1_8_1.page?jsessionid=2olmiGBWzRLOEmKmjVQtw0t?facetNode_1=0_3&facetNode_2=0_4&contentId=SDC116080&previousPage=mg_1_8.

Office who gave the security clearance.³² While, if the agreement was concluded before a Public Officer, the competent authority for the certificate should be that very same Public Officer.

2.E. THE CASE OF “BREXIT” AND 1970 HAGUE CONVENTION

What will it happen when (and if?) UK will exit from European Union, also in case of “no deal”? The new date of the so called “Brexit” should be 31th October 2019 and the topic is currently very “hot”, also in relation with the application of the content of European regulations. Referring to parts of regulation n. 2201/2003 related to child abduction, parental responsibility and maintenance obligations, “Brexit” will be not such relevant, because UK is already a contracting party of 1980 Hague Convention on the Civil Aspects of International Child Abduction International,³³ of 1996 Hague Convention on Parental Responsibility and Measures of Child Protection,³⁴ and of 2007 Hague Convention on Child Support and Other Forms of Family Maintenance.³⁵ In both these two cases, the scenario will be not so difficult for the future relationship with UK, because all 27 Member States of European Union are also contracting parties to the Conventions.

Moreover, relating to recognition of legal separations and divorces (and then relating to private agreements in this field), UK is already a party to 1970 Hague Convention on Recognition of Divorces and Legal Separation,³⁶ that is the legal instrument that is at stake when a transnational situation of divorce or legal separation involves an EU Member State and a non-EU State. Also 12 Member States of European Union in addition to UK are already parties of this Convention. In this case, the situation will be ruled directly by 1970 Hague Convention. Instead, other EU Member States that wish to become contracting party to 1970 Hague Convention in order to have an international agreement with UK after “Brexit”, will have to be authorized by the European Union. Then, they must also apply the specific acceptance procedure provided for by article 28 of 1970 Hague Convention.

3. RECOGNITION AND ENFORCEMENT OF AGREEMENTS CONCLUDED IN THE MATTER OF LEGAL SEPARATION OR DIVORCE: HOW WILL IT WORK TOMORROW?

On the 25th of June 2019, the European Council adopted the new “recast” version of Brussels IIa Regulation (Regulation No. 1111 of 2019), and the new rules will apply three years after the publication of the regulation in the official journal.³⁷

In this new regulation, the scope of application is expressly extended to the agreements on legal separation and divorce, and specific provisions are inserted.

The aim is to provide clearer rules on the circulation of authentic instruments and agreements, that will be allowed to circulate (accompanied by the relevant certificate).³⁸

3.A. THE NEW BRUSSELS IIA REGULATION “RECAST” (REGULATION NO. 1111 OF 2019)

Taking into account the “new” provisions we are interested in, we’ll start by noticing the addition of “agreements” inside article 2, entitled “Definitions”.³⁹ This new article provides a definition of “agreement”, namely «a document which is not an authentic instrument, has been concluded by the parties in the matters falling within the scope of this Regulation and has been registered by a public authority as communicated to the Commission by a Member State ... ». Pursuant to this new provision, agreements in the matter of separation or divorce now fall clearly under the scope of the regulation.

The choice made by the new regulation is not to extend the scope to all types of agreements: indeed, a recital clarifies that the regulation does not allow free circulation of *mere private agreements*. However, agreements that are neither a decision nor an authentic instrument but have been registered by a public authority competent to do so can circulate.⁴⁰

An agreement can benefit of free circulation only if it has “binding legal effect”

³² V. Gazzetta Ufficiale, d.l. 12th September 2014, n. 132, (2014), available at <https://www.gazzettaufficiale.it/eli/id/2014/09/12/14G00147/sg>.

³³ Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 1980.

³⁴ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996.

³⁵ Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, ²⁰⁰⁷.

³⁶ Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, 1970.

³⁷ See on the topic Zanobetti, ‘Un nuovo atto di diritto internazionale privato in materia matrimoniale, di responsabilità genitoriale e di sottrazione minori: il regolamento UE 2019/1111’, *Giustizia Civile* (2019), available at <http://giustiziacivile.com/famiglia-e-successioni/editoriali/un-nuovo-atto-di-diritto-internazionale-privato-materia>; Honorati, ‘The proposed revision of the Brussels II-bis regulation: more protection for minors and more effective execution of decisions’, in *2 The International Journal of Private and Procedural Law* (2017), at 247-282.

³⁸ Council of European Union, More effective rules to deal with cross border matrimonial matters and parental responsibility issues, Press Release (25th June 2019), available at <https://www.consilium.europa.eu/en/press/press-releases/2019/06/25/more-effective-rules-to-deal-with-cross-border-matrimonial-matters-and-parental-responsibility-issues/>.

³⁹ Council Regulation 1111/2019, *supra* note 13.

⁴⁰ *Ibid.*, at Recital n. 14: “(...) This Regulation should not allow free circulation of mere private agreements. However, agreements which are neither a decision nor an authentic instrument, but have been registered by a public authority competent to do so, should circulate. Such public authorities might include notaries registering agreements, even where they are exercising a liberal profession.”

in the Member State where it was concluded: if it does so, it can be treated as equivalent to “decisions” for the purpose of the application of the rules on recognition. Therefore, we can affirm that the new regulation includes agreements that acquire binding legal effect in the Member State of origin following a formal intervention of a public authority or of another authority as communicated to the Commission by the Member State for that purpose.⁴¹

Such agreements, as said before, could settle the marriage dissolution itself, maintenance obligations, property regimes of the ex-couple, parental responsibility, depending on the possibilities offered by the national legislations of the Member State in which the agreement is concluded.

ognition and enforcement.⁴² Precisely, agreements on divorce should be recognized without any further proceedings, and, similarly, settlements regarding parental responsibility should be considered decisions and thus recognized and enforced⁴³ without any special procedure being required (for example: an *equatur*). More specifically, agreements that *have binding legal effect* in one Member State should be deemed equivalent to “decisions” for the purpose of the application of the rules on recognition.

As for decisions, there are some cases which give way to the refusal of the recognition or the enforcement of the agreement or authentic instrument, for example contrast with public policy, presence of irreconcilable decisions, authentic instruments or agreements.⁴⁴

In order to be granted recognition or/and enforcement, parties are required to present a specific certificate, which has to be issued by the Member State in

which the agreement or the authentic instrument have been formed;⁴⁵ the certificate differs from the ones laid down for decisions.⁴⁶

At a first analysis, it would seem that couples opting for a less formal way of exiting their marriage would have the same benefits in terms of circulation of the settlement than the ones seising a court, or at least that may have been the intention of the drafters. Nonetheless, we will proceed pointing out some critical aspects.

3.B. CRITICAL ASPECTS AND UNSOLVED ISSUES

1. *The Quest for the Golden Agreement, or Agreement Shopping*

The new regulation clarifies that agreements can be concluded only before authorities that are competent according to the rules of jurisdiction.⁴⁷ However, since these are “just” agreements, it cannot be excluded that spouses - by mutual agreement - may try to overcome the jurisdiction’s rules, if necessary also taking advantage of the system used.

For example, spouses can resolve to turn to a notary, which, in some Member States, is both a public officer and a private professional, thus being “at disposal” of the parties, even if the Member State lacks jurisdiction.

In such a case parties have indeed agreed on their divorce, but in the wrong “setting”: does this flawed agreement have any value? Can it circulate throughout Europe nonetheless?

Given that the “flaw” derives from the violation of rules regarding jurisdiction, we should consider the Court of Justice’s ruling in similar cases; for example, in the case of violation of the rule sets out by article 19 of the Brussels Ia Regulation, in the matter of *lis pendens*. There the reasoning of the Court was the following:

“The rules of *lis pendens* ... must be interpreted as meaning that where, in a dispute in matrimonial matters, parental responsibility or maintenance obligations, the court second seized, in breach of those rules, delivers a judgment which becomes final, those articles preclude

According to Regulation No. 1111 of 2019, basically, agreements and authentic instruments should be considered equivalent to “decisions” as for their rec-

⁴¹ *Ibid.*:“(…) Other agreements which acquire binding legal effect in the Member State of origin following the formal intervention of a public authority or other authority as communicated to the Commission by a Member State for that purpose should be given effect in other Member States in accordance with the specific provisions on authentic instruments and agreements in this Regulation”. See on this point Zanobetti, ‘Un nuovo atto di diritto internazionale privato in materia matrimoniale, *supra* note 37.

⁴² *Ibid.*:“Authentic instruments and agreements between parties on legal separation and divorce which have binding legal effect in one Member State should be treated as equivalent to ‘decisions’ for the purpose of the application of the rules on recognition. Authentic instruments and agreements between parties in matters of parental responsibility which are enforceable in one Member State should be treated as equivalent to ‘decisions’ for the purpose of the application of the rules on recognition and enforcement.”

⁴³ *Ibid.*, art. 65.

⁴⁴ *Ibid.*, art. 68.

⁴⁵ *Ibid.*, art. 66:“The court or competent authority of the Member State of origin as communicated to the Commission pursuant to Article 103 shall, upon application by a party, issue a certificate for an authentic instrument or agreement: (a) in matrimonial matters using the form set out in Annex VIII; (b) in matters of parental responsibility using the form set out in Annex IX. The certificate referred to in point (b) shall contain a summary of the enforceable obligation contained in the authentic instrument or agreement. 2. The certificate may be issued only if the following conditions are met: (a) the Member State which empowered the public authority or other authority to formally draw up or register the authentic instrument or register the agreement had jurisdiction under Chapter II; and (b) the authentic instrument or agreement has binding legal effect in that Member State. Notwithstanding paragraph 2, in matters of parental responsibility the certificate may not be issued if there are indications that the content of the authentic instrument or agreement is contrary to the best interests of the child. The certificate shall be completed in the language of the authentic instrument or agreement. It may also be issued in another official language of the institutions of the European Union requested by the party. This does not create any obligation for the court or competent authority issuing the certificate to provide a translation or transliteration of the translatable content of the free text fields. If the certificate is not produced, the authentic instrument or agreement shall not be recognized or enforced in another Member State.”

⁴⁶ *Ibid.*, Annexes VIII and IX. See Zanobetti, ‘Un nuovo atto di diritto internazionale privato in materia matrimoniale, *supra* note 37.

⁴⁷ Also, on jurisdiction, see Honorati, *supra* note 37, at 99.

the courts of the Member State in which the court first seized is situated from refusing to recognize that judgment solely for that reason. In particular, that breach cannot, in itself, justify non-recognition of a judgment on the ground that it is manifestly contrary to public policy in that Member State” (case C-386/17).⁴⁸

Indeed, article 24 of the Brussels IIa Regulation “Prohibition of review of jurisdiction of the court of origin” states that, not only jurisdiction may not be reviewed by the Member State asked for recognition, but also that violation of rules relating to jurisdiction does not serve as a reason for refusal of recognition. According to the article above-mentioned, and to the Court reasoning, we could assume that also agreements concluded in violation of the rules relating to jurisdiction do have value, and therefore can be recognized too.

Still, the rationale behind the prohibition of later review of jurisdiction of the court of origin, and behind the reasoning of the Court, is to enhance and protect mutual trust between judicial authorities in the European Union: should we grant the same trust to private’s work?

Eventually, granting circulation to agreements concluded in Member States lacking jurisdiction would mean allowing spouses to conclude agreements all over Europe, in accordance with their own desires; in other words, European citizens would be granted a blank check as for their divorce: they could look for the most convenient Member State where to dissolve their union, and there buy their tailored exit deal.

Still, even if the Member State in which is sought recognition cannot refuse such a request, the Regulation “recast” sets a precaution: according to art. 66 co.2, the certificate, necessary for the agreement to circulate, may be issued only if the Member State which empowered the public authority or other authority to formally draw up or register the authentic instrument or register the agreement had jurisdiction under Chapter II of the same Regulation.

Therefore, even if there is a chance that flawed agreements circulate, Member States are required to conduct a prior screening in regard to jurisdiction: also the circulation of agreements and of their certificate is governed by the principle of mutual trust.

2. The Risk of Prevarication

Another critical point regards the risk of prevarication between spouses; contrarily to judicial proceedings, agreements in themselves do not provide for a safe space and there might be no measures in order to prevent the weaker party to accept an unjust deal. We should not underestimate the power here granted to spouses, who can dissolve their marriage just by themselves, with no need for a court to be seized.

Such a freedom bears a great risk of abuse at the expenses of the weaker spouse, who could be talked into signing a bad agreement by their counterparty, with more financial means. For example, the risk of prevarication can result in lessened maintenance obligations, leaving the weaker spouse in a difficult economic situation.

Whereas, in all judicial decisions, even the ones that incorporate an agreement between parties, there is a prior screening with regards to the balance of the mutual obligations, agreements work perfectly only in case of equal powers between parties, while in case of unbalance they might allow for abuses.

The regulation does not require for agreements to be valid and to circulate to be just; there is no provision setting out precautions regarding this issue.

In this void of precautions, it is up to the Member States’ own legislations to provide for eventual procedural precautions or later controls in order to make sure that no unfairness takes place in those agreements.

An agreement solely drafted by spouses might to prove unjust, but Member States can draw up a legal frame in which parties are free to stipulate an agreement and, at the same time, be assisted in doing so – one example could be the already mentioned Italian “assisted negotiation”. Indeed, in this assisted procedure, parties negotiate with the help of lawyers, one for each of them: that could be a solution in order to protect the weaker spouse’s interests.

3. Hearing of the Child

The new regulation introduces a general obligation⁴⁹ for the child to have an opportunity to be heard.⁵⁰ This general provision doesn’t apply to agreements, that could involve parental responsibility too. In fact, Recital n. 71 clarifies that “the obligation to provide the child with

the opportunity to express his or her views under this Regulation does not apply to authentic instruments and agreements.”⁵¹ However, the same recital clarifies that “Although the obligation (...) does not apply to authentic instruments and agreements, the right of the child to express his or her views continues to apply pursuant to Article 24 of the Charter of Fundamental Rights of the European Union and in light of Article 12 of the UN Convention on the Rights of the Child as implemented by national law and procedure. The fact that the child was not given the opportunity to express his or her views should not automatically be a ground of refusal of recognition and enforcement of authentic instruments and agreements in matters of parental responsibility”.

On this matter the regulation Regulation No. 1111 of 2019 stipulates that “The recognition or enforcement of an authentic instrument or agreement in matters of parental responsibility *may* be refused if the authentic instrument was formally drawn up or registered, or the agreement was registered, without the child who is capable of forming his or her own views having been given an opportunity to express his or her views.”⁵²

This provision raises some doubts. In agreements concluded without the intervention of a judicial authority there is no space for the hearing of a minor conducted by a judge. So, who should listen to the child?

⁴⁹ See also Honorati, *supra* note 37, at 102.

⁵⁰ Council Regulation 1111/2019, *supra* note 13, art. 21.

⁵¹ *Ibid.*.

⁵² *Ibid.*, art. 68 co. 3.

⁴⁸ Case C-386/17, Stefano Liberato v Luminita Luisa Grigorescu, Judgement of the Court ((First Chamber) of 16 January 2019 (ECLI:EU:C:2019:24).

4. CONCLUSIONS

4.A. IN GENERAL - EUROPEAN POLICIES SHOULD ENCOURAGE ADR IN FAMILY LAW

Family disputes, especially cross-border ones, generally present many problems and EU Family law should encourage the implementation of agreements and negotiations tools that avoid judicial proceedings. In this regard, EU Law should take into account the evolution of the national laws in the different Member States, and, consequently, improve itself. Indeed, it is the experience derived from judicial proceedings that lead to the introduction of new tools of resolution in spouses' disputes.

As a matter of fact, ADR are bringing substantial advantages⁵³ in the solution of family conflicts.

First of all, extrajudicial instruments allow parties to save time and money: this tools are definitively faster than judicial proceedings, as they only depend on the activities of the involved parties.

Furthermore, an ADR it is certainly cheaper considering that in addition to the rapidity it does not determine the activation of the judiciary system.

Moreover, ADR ensure to parties more privacy, while the judicial proceeding is public and potentially blown-out among third subjects. In relation to this latter aspect, it has to be pointed out that in some Member States are actually provided specific instruments to guarantee the privacy of the parties also in case of judicial proceeding. Nevertheless, the aforementioned option is still not provided in

other legal systems, therefore there is no juridical uniformity in this regard.

Last but not least, it also supports the public interest to deflate judicial charges and expenses. In the light of the above, the system requires an improvement in order to settle the differences and the problems that currently cause difficulties for the complete implementation of European cooperation in this matter and for a proper integration of the different legal systems.

The ADR's implementation in the national legal systems and the increasing role also given to these instruments in the European Family Law and Private International Law shall be deemed to encourage the interpersonal aspects between spouses in order to ensure that equality and respective rights of the parties are protected.

Therefore, ADR should be oriented to encourage effective communication practices between parties. In this regard, it has been indeed highlighted the prominence of good faith and fairness principles fulfilment.

In the light of all the above-mentioned concerns, should be advocated the development of a common European culture oriented to the collaborative resolution of conflicts between spouses in execution of common legal principles of protection of the parties and of the children. For this reason, ensuring the circulation and recognition of private agreements in matter of separation and divorce is a fundamental step in the perspective of an implementation of these kind of instruments.

4.B. TODAY - EVOLUTIONARY INTERPRETATION OF ART. 46 OF BRUSSELS IIA REGULATION

The core of the European legal framework in the matter of recognition and circulation of decisions and agreements is Regulation No. 2201 of 2003. The purpose of the regulation is to remove obstacles to free circulation within the European Union.

Art. 46 of the regulation seems to refer only to "enforceable" agreements in the matter of parental responsibility; however, it would be necessary to adopt an evolutionary interpretation and include in the scope of application of the provision also "recognisable" agreements in matrimonial matters, and, therefore, also agreements of "private divorce".

Still, in the *Sahyouni case*, the European Court of Justice stated that unilateral declarations of divorce are not ruled by European regulations and, in an *obiter dictum*, added that the same applies to "not unilateral" agreements concluded *without* the intervention of public authorities.

However, this seems to be a very strict interpretation, as it seems to exclude also private agreements from the scope of application of European regulations.

As seen before, Regulation No. 1111 of 2019 will entry into force only in 2022. Therefore, it is necessary to find a *practical solution* to the problem of circulation of "private divorces", according to the *current* European legal system. A growing number of Member States provides for a normative discipline to the phenomena

of out-of-court agreements in the matter of divorce and legal separation. This new trend highlights an even more important social question, that is the need for quick, peaceful, and long-lasting agreements in these matters.

Until the Regulation in its "recast" version will not into entry into force, private agreements in this field should be ruled, in our view, according to article 46 of Brussels Ila Regulation, interpreted in the evolutionary way described before, and also in the light of the case law of European Court of Justice.

That means that Member States have to allow the circulation of private agreements both on parental responsibility, and on legal separation and divorce, if concluded with the intervention of a court or public authority. To this regard, it should be noted that also the Advocate General in its Opinion on *Sahyouni case* excluded agreements concluded only by private parties from the scope of Brussels Ila, but at the same time affirmed that "a look at the preparatory discussions which led to the adoption of Regulation No 1259/2010... show that the issue of private divorces was specifically raised. However, that silence does, to my mind, indicate, as both the Hungarian Government and the Commission argue, that, during the adoption of that regulation, the EU legislature had in mind only situations in which a divorce is pronounced by a State-administered court or *by another public authority*".⁵⁴

Therefore, we can conclude that "mixed agreements", concluded with the supervision or control of a public authority,

⁵³ F. STEFFEK, *Mediation in the European Union: An Introduction*, 2012.

⁵⁴ Opinion of Advocate General Saugmandsgaard Øe, delivered on 14 September 2017, Case C/372-16, *Soha Sahyouni*, *supra* note 22, at para. 65.

could be ruled, also today, by Regulation Brussels IIa. Instead, unilateral declarations and mere-private agreements of divorce and legal separation should be considered falling out of the scope of application of the Regulation Brussels and they should not definitely circulate within the European Union space.

4.C. TOMORROW - AGREEMENTS AND PROTECTION OF THE WEAKEST

Brussels IIa "recast" represents, surely, a progress, as it would expressly allow for spouses to opt for an agreement as a way of exiting their marriage; still, we must be wary of the issues that agreements could raise.

The protection of the weaker parties, be them one of the spouse or the children, is, at the moment, left to the initiative of the Member States. Member States should provide families with a legal frame that allows a certain degree of flexibility and freedom in order for parties to reach a suitable agreement and, at the same time, set protective measures.

Taking into consideration the position of the weaker spouse, we noted that agreements do not provide, *per se*, a safe space, as there is no judicial control over the agreement that spouses reach; agreements, indeed, could offer to the strongest party an advantageous way out, at the expenses of the weakest one.

Still, Member States could implement counterchecks, protective measures, to make sure that within the agreement, which is private indeed, a certain balance is assured.

The first, and *minimum*, level of protection could be offered by the mandatory presence of lawyers, who assist the spouses in reaching the settlement of their relationship. The Italian legislator opted for this very solution, in the so called "*negoziazione assistita*".

Still, it is to be noted that lawyers represent a cost for spouses, therefore Member States could also think of other figures, apt to offer some guidance in the negotiation (ex. consultants).

Another procedure that could provide a safe space is mediation; Member States could introduce a specific mediation procedure, especially designed for family disputes, where mediators are instructed on how to deal with marriage crisis, how to tone down the sometimes inevitable arguments and, above all, how to help spouses to reach a just agreement.⁵⁵

4.D. CHILDREN NEED TO GET A MICROPHONE

Last but not least, we must remember that the spouses' interests might not be the only one at stake.

We must consider, indeed, the interests of the children of divorcing parents too; would those interests be properly taken care of in an agreement?

In cases where there are also children to provide for, Member States usually demand to some public authorities to check if the child's best interest has been protected; here the child is the weakest party of all, and to set out some sort of protection is more compelling than in any other case.

Therefore, in presence of children, agreements usually present some additional and later public supervision.

Apart from domestic legislations, and in addition, the Regulation No. 1111 of 2019 requests that the public authority who is competent to issue the certificate needed for the circulation of the agreement, checks if the agreement is in accordance with the best interests of the child;⁵⁶ the provision states that "in matters of parental responsibility the certificate may not be issued if there are indications that the content of the authentic instrument or agreement is contrary to the best interests of the child."

Still, a later public supervision does not make up for the lack of active participation of the child in the whole proceeding: as we have seen, children have the right to express their views in proceedings that involve them according to article 24 of the Charter of Fundamental Rights of the European Union and in light of article 12 of the UN Convention on the rights of the Child.⁵⁷

Considering the very nature of private agreements, where only spouses play a role, in such a setting, who would hear the child?

Is it right to suppress the voice of children in exchange for a more expedite divorce for their parents? The Regulation "recast" does not require for an agreement to circulate to actively involve children, even if such an obligation results from other law sources.

In fact, even if the Regulation provides a protection for the child, listing as a reason for denying recognition and enforcement the fact that he or she has not been heard, it is to be noted that this only *may* be a reason for stopping the circulation of the agreement.⁵⁸

Indeed, there might be the case in which agreements, with their annexed certificates, circulate without the children being heard; the specific certificates do provide for a tick box contemplating the case in which the child has not been given a genuine opportunity to be heard.⁵⁹

Therefore, children's hearing must be assured by Member States, who are left with the important, and somehow seemingly contradictory task of granting a hearing in a private setting.

⁵⁵ Council Regulation 1111/2019, *supra* note 13, art. 25: "Alternative dispute resolution: As early as possible and at any stage of the proceedings, the court either directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings."

⁵⁶ Council Regulation 1111/2019, *supra* note 13, art. 66.

⁵⁷ *Ibid.*, Recital n. 71. On the topic of relationship between fundamental rights and private international law see Davì, *Diritto internazionale privato e diritti umani*, in *La tutela dei diritti umani e il diritto internazionale*, *Atti del XVI Convegno annuale SIDI, Catania, 23-24 giugno 2011* (2012), at 209 ff..

⁵⁸ *Ibid.*, art. 68.

⁵⁹ *Ibid.*, annex IX.

Taking into account the procedure already existing in Italy, the so-called assisted negotiation, and lacking any rule at the moment, we would recommend to the parties of the agreement, nonetheless, to provide for a possibility for the child to be heard, for example by a social assistant.

In such a case, once parties have reached an agreement, that regards also parental responsibility, they could turn to an expert, who, once acquainted with the content of the deal, could listen to the child's opinion on it.

In the long-term though, Member States should set specific procedures for marriage crisis that involve children; we should not forget that when there is less conflict between parents and they are able to reach an agreement, children benefit too, therefore we could assume that an agreement is, in itself, in the child's best interest.

Nonetheless, children need to have the possibility to be heard, as it is their own right. Therefore, we could think of settlement procedures that involve a third party, as the above-mentioned mediation, where the mediator, properly prepared, could not only deal with the spouses, but also hear the child.

Mediation, indeed, could represent a more private and flexible setting where to solve family disputes and, at the same time, grant the presence of a third and impartial party.⁶⁰

Conclusively, we would like to add that, as agreements could stop the arguing and hugely benefit families and children, Member States should take into consideration the funding of the procedures that could lead to an amicable settlement, be them a negotiation or a mediation.

To conclude on a practical note, family disputes' resolution needs both procedures and means, as marriage crisis is a feature common to each and every one.

The problems we have examined are related both to the current text of the regulation and to the newly adopted one. When dealing with families' legal issues, effort and commitment must be offered to the fullest extent; the goal is to reach a balance between families' needs and Member States concerns, in order to ensure sufficient protection of of each individual's fundamental rights and, at the same time, to enhance the free circulation of decisions and agreements.

"I'd rather be an optimist and wrong, than a pessimist and right."

Albert Einstein

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SEMI-FINAL C

EU AND EUROPEAN CIVIL PROCEDURE

PARTICIPATING TEAMS

FRANCE, GERMANY, GREECE, ITALY, MONTENEGRO,
ROMANIA AND SLOVENIA

1st place: Team Romania
2nd place: Team Germany
3rd place: Team France

Selected papers for TAJ:
Team Romania
Team Germany



11-13 JUNE 2019 FLORENCE, ITALY
ITALIAN SCHOOL FOR THE JUDICIARY [SSM]

JURY MEMBERS

CARLOS M. G. DE MELO MARINHO (PT)

COURT OF APPEAL JUDGE; SENIOR EXPERT IN EU LAW,
JUDICIAL COOPERATION AND E-JUSTICE

I had the pleasure and the honour of joining, as chairman, several juries of the EJTN's Themis Competition.

This Contest is far from being a common training-oriented activity.

Its events are unforgettable moments that can change or strongly mark the lives of the participants.

Not even the members of the jury can escape this effect.

Contrarily to what could be expected on a preliminary approach, the 'fight' between teams gather instead of separating.

The implied need for intense contact, the all-day-long share of moments with colleagues coming from all over Europe reveal how we are similar, how our systems, values, dreams, limitations and difficulties are common, how natural it is to cooperate. Beyond the papers and presentations, the participants discover that their tasks are coincident and need to be articulated for the sake of the citizens. They find out that borders are senseless in the area of Justice despite the surprising difficulties emerging nowadays on the domains of building union and common paths.

It's easy to imagine that many of the relationships that we see emerging and growing during the days of the Themis events will remain for the years to come.

Probably, the most part of the participants will never forget the revealing moments that show them that their professional space is much wider than they would expect and that they are going to be European judges and prosecutors and not only magistrates of a national area of jurisdiction.

For sure, the establishment of vivid and intense personal contacts associated with the direct involvement of the competitors on the building of the themes and papers standing on the idea of the need for a common space of justice in Europe make them better professionals.

The demand for deep study and investigation on an EU Law subject produces the motivation for future work on this technical area and generates curiosity and attentiveness to normative changes and evolution.

For the members of the jury, the Themis events are privileged moments for sharing, learning and assessing future prospects for the performance of the European magistrates. They allow them to better realise, on a very updated basis, how are being trained the decisive legal professionals involved.

The balance is clearly positive. The high technical skills and human dimension of the new generations allow us to be optimistic.

The experiences collected show us that the Themis Competition idea stands on a very effective formula that we need to preserve and enlarge.

Under this context, as to the EJTN, it is an act of justice to say that this Network deserves enthusiastic congratulations for the results already obtained.

HALDI KOIT (EE)

ADVISOR AT THE MINISTRY OF JUSTICE OF ESTONIA,
LECTURER IN PRIVATE INTERNATIONAL LAW

2019 was the second time I was asked to be a Jury member in the Themis competition EU and European civil procedure semi-final. Due to the high level of competition and interesting topics analysed in the 2018 semi-final, I gladly accepted.

For lawyers and judges European civil procedure tends to be only one small field to be dealt with out of hundreds – which is well understood and how it logically should be. However, with the ever-growing expansion of the EU and the right to free movement, the importance of this small field is increasing by the day! Then again, this continuously developing branch of law, tends to be overly complex and should not thus be overlooked. Private international law should not be pushed aside, to be learnt when that specific type of case ends up on a practitioners table!

When reading the papers submitted, I was looking for a team with motivation to learn and interest in the topic they've chosen. Coming from a legislative and an academic background, I also wanted to make sure that the team is also up to date with the developments – i.e. latest proposals in the field, ongoing discussions, recent studies etc, thus the chosen field had to be also topical.

This year's semi-final C brought with it 7 teams hungry for knowledge and self-development, motivated to familiarize themselves with the chosen topics. Interestingly the cross-border taking of evidence and digitalisation stood out as a topic of interest for almost half of the teams. Coincidentally, the field is being discussed thoroughly in the Council and European Parliament due to the ongoing negotiations for the recast of the Taking of Evidence Regulation No 1206/2001.

I and the resto of the Jury members chose the paper of the German team "Towards European e-Justice - The Need for Harmonization of Digital Standards in EU Procedural Law in Civil Matters" for publication, since it was forward-looking and the team was thinking outside the box while not losing the sceptical nature of a lawyer. The paper gives an in-depth overview of the possibilities going digital gives for a judge hearing a civil case, at the same time it criticizes some overly ambitious projects and calls for caution. I'm sure the paper will provoke most, if not all, of its readers to go outside of their comfort-zone with using modern technology to their advantage, seeing its benefits instead of the harms. I hope the publication of this paper helps the e-Justice to develop even further!

Finally, I take this possibility to call upon the readers, who haven't done so yet, to take part of EJTN's Themis competition in the upcoming years! It is a great opportunity to learn about European law, but also about dealing with stressful situations, answering uncomfortable questions the Jury might pose, but more importantly – the competition gives a possibility of finding contacts, colleagues and friends from all around Europe to reach out to in the future. And this in turn helps build mutual trust which is the foundation of European law and the Union itself!

GORAN SELANEC (HR)

JUSTICE OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF CROATIA

Allow me to start by expressing my gratitude to the EJTN for placing their trust in me and allowing me to be a member of the Semi-final Jury of this unique competition. This year was my second year as a jury member and both years have brought me a lot of professional enjoyment. It has simply been a great experience so far.

The key aspect making this competition such a rewording experience is unique opportunity to observe young professionals grow quickly under pressure brought by the specific framework and of the competition. For a seasoned lawyer, it is always a cause of professional satisfaction to share that excitement one can feel in young professionals who have invested considerable time, effort and energy in order to conquer a particular legal puzzle they have been tasked with and then stand before their peers to defend their legal arguments. As someone who has some mooted experience, both as a trainer and a jury member, I was always genuinely respectful of fact that a young person has actually made that decision to spend not only months of their time but also significant amount of their personal vigour to research, analyse, deconstruct a particular legal issue in order to be able to construct their unique legal proposition only to put to the test before those unknown others who are part of that same jury. The reword, of course, is not winning. It is that realization one frequently gains only after the journey had finished and the emotions had settled. The realization that the decision to embark on a journey itself resulted in many personal and professional benefits that will last for a long time if not for life. Personally acquired knowledge, collegiality, mutual trust, team-work, skill to work under pressure and withstand stress, travels, new friends, more knowledge passed by the others, good times, relations that last long after - just to name those that quickly come to mind.

As a jury member I enjoy using my experience and knowledge in order to enhance those aspects of the competition - to make things more exciting - that will later on amplify that realization that the journey itself has been the key reword. In that sense, all participants are equally winners. The fact that this competition creates this unique collegial equality has been a great source of professional satisfaction for me.

However, what I have been enjoying the most in the EJTN competition is a particular realization that is accessible primarily to jury members. It is simply astonishing to see how quick you adjust to the unexpected brought by us in the jury and how far your knowledge expands in a matter of one day. Opportunities to grow so fast and so effectively in such short period of time will not be frequent in your professional careers. Hence, cherish this experience. Also, many thanks to organisers, national and Brussels based, but Arno in particular, who have designed a competition framework that provides you with such experience and us, jury members, with the opportunity to help you make it more memorable to you.

GEORGE CRISTIAN IOAN
ANDREEA CORNELIA MURĂTURĂ
ANDREEA LIVIA RICU



TUTOR: AMELIA ONIȘOR

ESCAPING THE MINOTAUR OF DEBT: HOW TO FIND THE RIGHT PATH IN THE LABYRINTH OF INSOLVENCY?

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The Brussels I Regulation and the European Insolvency Regulation (as well as their Recast versions) were intended to dovetail almost completely with each other. It is very important to establish whether an action is covered by one of the two regulations given that the choice of forum and of the law governing the substantive issues can drastically change the outcome of the procedure. The purpose of this paper is to establish the demarcation of the scope of these two regulations. The aim is to analyse the criteria that are used to identify the borderline between the regulations at issue i.e. whether an action derives directly from the insolvency proceedings or is closely connected with them. The emphasis is placed on the meaning of these equivocal criteria as well as on the relationship between them. In the end, the purpose of this study is to encourage a better harmonization of the scope of these regulations.

KEY WORDS

Brussels I Regulation
EIR
Insolvency
Application
Analogous Proceedings
Dovetail

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1. INTRODUCTION

In one of the most famous works on political theory of all times, *The Prince*, Machiavelli stated: 'For one change always leaves a dovetail into which another will fit',¹ which essentially means that the change of a thing will cause the change of another one. Of course, Niccolò Machiavelli was born in Florence in 1469 and wrote about the Italian society of those times. However, his words have stood the test of time and are currently quoted to refer to current political changes. This is because Machiavelli drew inspiration from generally valid models taken from the Antiquity, like all Renaissance people of his time. Thus, when we refer to a major political change nowadays, these words remain relevant. For instance, we can expect that the change of a fundamental European Union (hereinafter the 'EU') regulation will trigger the change of another one, especially when the scope of the former is closely linked to that of the latter. This is the case when we analyse the relationship between the regulations providing for cooperation in civil and commercial matters, on the one hand, and the regulations governing insolvency proceedings, on the other hand.

Ever since the founding treaties were drafted, European political leaders of those times pursued the creation of an institutional framework that emphasizes cooperation between member states

in various fields, one of them being civil and commercial matters. Thus, the 1968 Brussels Convention² was adopted with the aim of providing legal certainty to parties, through uniformity, encouraging judicial cooperation and facilitating administration of justice.

Later on, the Treaty of Amsterdam granted the European institutions competence to legislate in the area of judicial cooperation in civil and commercial matters, which enabled them to legislate in this area of practice by means of a regulation. Thus, the Regulation 44/2001³ was adopted in 2000. Ten years later, with the intent of insuring easier and faster circulation of judgments in civil and commercial matters within the EU, this regulation was replaced by Regulation 1215/2012.⁴ However, there were no significant changes concerning the scope of application of the rules regarding judicial cooperation in civil and commercial matters. Its scope, as it will be further analysed, has to be interpreted in relation to the autonomous concepts of EU law as well as to the other regulations' area of application, like the regulations governing insolvency, which can interfere with its scope.

Insolvency proceedings were excluded from the outset from the 1968 Brussels Convention and following regulations. Regulation 1346/2000 was adopted in order to insure the proper functioning of the internal market and the efficien-

cy and effectivity of cross-border insolvency proceedings.⁵ Mainly, the goals of Regulation 1346/2000 were to streamline cross-border insolvency proceedings, introduce rules for better coordination of debtor's assets measures, and prevent forum shopping.⁶

The regulation has been in force for almost 15 years and the regime has been deemed as a positive innovation concerning cross-border bankruptcies. Initially, the scope of the European Insolvency Regulation (hereinafter the 'EIR'), mentioned in Article 1(1), as it was interpreted by the Court of Justice of the European Union (hereinafter the 'CJEU') in *Eurofood* case, provided that the insolvency proceedings must have four characteristics: they must be collective proceedings, based on the debtor's insolvency, which entail at least partial divestment of that debtor and prompt the appointment of a liquidator.⁷ These four requirements marked the traditional concept of insolvency proceedings. Since the beginning, this definition sounded a little bit old and outdated, given that the regulation was based on a convention signed in 1995.

In its report on the application of the EIR of 12 December 2012, the Commission emphasized the idea that it needed an update (starting with revising the definition on insolvency proceedings) because there were new trends and approaches in this area in the member states. The scope of the EIR no longer covered a wide

range of national proceedings aiming at resolving the indebtedness of companies and individuals. For example, at that time, 15 member states had pre-insolvency or hybrid proceedings which were currently not listed in Annex A of the EIR. Also, a considerable number of personal insolvency procedures were not covered by the EIR because they did not match the definition provided by Article 1(1) of the regulation. Moreover, the scope of the EIR did not cover a wide range of national proceedings due to the economic crisis of 2008-2009 which has had a major impact on the way that member states regulated their national proceedings regarding insolvency issues.⁸

Thus, on 20 May 2015 Regulation 2015/848⁹ was adopted, also known as the EIR Recast. This regulation has considerably extended the scope of the rules regarding insolvency proceedings, which resulted in a significant modernization of this area of practice.

The demarcation between the scope of the Brussels I Regulations and the EIR/EIR Recast has always been a controversial problem. This issue existed ever since the adoption and entering into force of these regulations and it is not, by any means, new. Yet, it represents a continually evolving issue.

Originally, the Schlosser Report stressed that the Brussels Convention and the proposed Convention of insolvency proceedings 'were intended to dovetail

¹ N. Machiavelli, *The prince* in Bartleby.com (ed.), *The Harvard Classics*, Vol. 36, (2001), available at <https://www.bartleby.com/36/1/2.html>.

² 1968 Brussels Convention on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters, OJ 1972 L 299/32.

³ Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1.

⁴ EP and Council Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012 L 351/1.

⁵ Council Regulation 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000 L 160/1.

⁶ P. Manganelli, *The Modernization of European Insolvency Law: An Ongoing Process*, Vol. 11 (2016), available at <https://digitalcommons.law.umaryland.edu/jbtl/vol11/iss2/3/>, at 157.

⁷ Case C-341/04, *Eurofood IFSC Ltd* (EU:C:2006:281), at para. 46.

⁸ Commission Report of 12 December 2012 on the application of Council Regulation 1346/2000 on insolvency proceedings, COM (2012) 743 final, available at <https://ec.europa.eu/transparency/regdoc/rep/1/2012/EN/1-2012-743-EN-F1-1.Pdf>, at 4.

⁹ EP and Council Regulation 2015/848 of 20 May 2015 on insolvency proceedings, OJ 2015 L 141/19.

almost completely with each other'.¹⁰ Consequently, the CJEU defined the relationship between these two instruments in several decisions¹¹ as a *dovetail* one,¹² stating in the *Nortel* case that 'actions excluded, under Article 1(2)(b) of Regulation 44/2001, from the scope of that regulation in so far as they come under "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" fall within the scope of Regulation 1346/2000. Correspondingly, actions which fall outside the scope of Article 3(1) of Regulation 1346/2000 fall within the scope of Regulation 44/2001'.¹³

However, the CJEU admitted, in the *German graphics* case, that some judgments 'will not fall within the scope of any of these regulations'.¹⁴ Thus, the problem continued to evolve, since some insolvency related actions were considered as falling in a gap between the EIR and Brussels I Regulation. Practice has shown that a perfect dovetail relationship cannot always be established because there are some obstacles, like the thriving of pre-insolvency and hybrid proceedings, the binding force of Annex A of the EIR and the definition of insolvency related actions.

It is very important to establish whether an action is covered by one of the two

regulations, given that this has an impact on recognition and enforcement and on creditor – debtor relationship. The choice of forum can drastically change the outcome of the procedure, as can filing an action in the context of insolvency, rather than based on the general rules of civil or commercial law.

The differences in regulating jurisdiction between the EIR and Brussels I stem from their fundamental provisions. The EIR grants jurisdiction to open the main proceedings to the courts where the debtor's center of main interest is situated (COMI). The law that applies in the main proceedings is determined in the same manner. The Brussels I Regulation, however, establishes jurisdiction based on the debtor's place of domicile, as a general rule. Article 27 of Brussels I provides that proceedings having the same cause of action between the same two parties are brought in the courts of different EU states, then any court other than the one first seized must stay its proceedings until jurisdiction of said court is established. Once jurisdiction is established, the courts will proceed to decline their jurisdiction to the first seized court. This legislative structure can easily be abused however, via the so-called *Italian torpedo*, a method to force the other party into settling by simply instituting proceedings in a country with a rather slow moving court system.¹⁵ However, the EIR

avoids such practices, by establishing that courts other than the first seized may open insolvency proceedings, and a dissatisfied party can only use national appellate remedies.¹⁶ The difference in potential outcomes seems even clearer when analysing the EIR Recast which aims at creating rescue friendly insolvency regime,¹⁷ enabling better coordination between practitioners, explicitly regulating the legal status of groups of companies and establishing clear relationships between principal and secondary procedures.

To illustrate how these differences could affect the outcome of a procedure, we can use the following case: Company A, incorporated in Romania, carried on business publishing and selling law books. In January 2016, it published 50.000 copies of 'The Treatise on EU Insolvency Law'. However, Company A did not take into account that, during the same week, 'The Treatise on EU Civil and Commercial Law' was launched. Naturally, the public gravitated towards the latter, since although the two treatises completed each other, the second one was double in size, whilst having the same price. Sadly, in March 2017, Company A applied for the opening of insolvency proceedings, in Romania, and a liquidator, Mr. T. Hemis, was appointed. He soon found out that several of the company's assets were sold one month before liquidation, at one third of their price, to Company B, located in Italy. Naturally, he brought his action before the Bucharest Tribunal and requested to set aside this more than unprofitable transaction.

If the judge appointed to the case decided that the EIR was applicable, since the debtor's actual center of interest was located in Romania, he would have jurisdiction over the case and Romanian legislation concerning insolvency would be applicable. Thus, Mr. T. Hemis would very probably win his case, given that Romanian legislation provides, under Article 117(2) of Law 85/2014, that any transfers of property that were finalized six months prior to the opening of insolvency proceedings are to be declared void, if the debtor's cost clearly exceed the benefits obtained.

By contrast, if the judge decided that Brussels I Recast Regulation was applicable, with the consequence of establishing Italian jurisdiction on the case, it seems that the situation changes drastically. First of all, the Romanian judge must dismiss the action because of the absence of the Romanian courts' jurisdiction over the case. Second, Mr. T. Hemis must fill another action in Italy in which, for a company already in great debt, the cost of fighting the judicial battle might seem even greater than the fruits of the fight itself. Third, the length of the procedure might exceed expected time amounts. Fourth, the legislation that governs the substantial matters of the case might raise uncertainty, since it is not established from the outset (the Italian judge would have to determine the applicable law based on Regulation (CE) nr. 593/2008,¹⁸ also known as Rome I). Moreover, Company A will not benefit from special conditions of insolvency substantial regulations concerning pro-

¹⁰ P. Schlosser, *Report on the Convention of 27 September 1968*, OJ 1979 C 59/71, available at <https://publications.europa.eu/en/publication-detail/-/publication/8ae9647d-0ed3-4eef-abd3-4b48961bb609/language-en>, at 19.

¹¹ Case C-649/13, *Nortel Networks SA v Cosme Rogeau* (EU:C:2015:384); see also Case C-157/13, *Nickel & Goeldner*, (EU:C:2014:2145) and Case C-213/10, *F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'* (EU:C:2012:215).

¹² This means that they should slot into one another leaving no spare space.

¹³ Case C-649/13, *Nortel Networks SA v Cosme Rogeau* (EU:C:2015:384), at para. 26.

¹⁴ Case C-292/08, *German Graphics Graphische Maschinen v Alice van der Schee* (EU:C:2009:544), at para. 17.

¹⁵ G. McCormack, *Reconciling European Conflicts and Insolvency Law*, 15 *European Business Organization Law Review* (2014) 309, at. 313.

¹⁶ *Ibid.*

¹⁷ M.-T. Epeoglou, *The Recast European Insolvency Regulation: A Missed Opportunity for Restructuring Business in Europe*, 6 *UCL Journal of Law and Jurisprudence* (2017) 33.

¹⁸ EP and Council Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6.

tection of assets. Thus, Mr. T. Hemis might think twice before filling such an action.

Given this extremely important consequences, the CJEU's preoccupation to demarcate the scope of these regulations persists nowadays, as we may notice from three judgements issued as recently as 2018 and 2019, specifically *Feniks*,¹⁹ *Wiemer & Trachte*²⁰ and *NK v Paribas*.²¹ Furthermore, these judgements analyse Regulation 1346/2000 and not the EIR Recast, bearing in mind that the former came into force in June 2017 and was not applicable *rationae temporis* to these particular cases. In the *NK v Paribas* case, the Court mentions the EIR Recast, analysing the criterion regarding actions which derive directly from insolvency proceedings or which are closely connected with them, criterion explicitly regulated by Article 6 of the EIR Recast. One may wonder if the Court would have had a problem demarcating the scope between the two regulations if the EIR Recast would have been applicable in these particular cases. In order to answer this question, only the future case-law of the CJEU can provide a clear answer. However, based on the present state of both EU law and the current trends concerning its evolution, both interesting insights and potential changes in case-law can be foreseen.

Our paper is structured in three parts, the first one analysing the Brussels I Recast Regulation as common law in civil and commercial matters, on the one hand, and the scope of the EIR recast, on the other hand. The purpose is to observe criteria, stemming from the current provisions and the CJEU's case-law, used in

distinguishing actions which fall within the scope of any of these two regulations (2). In the second part, a line of demarcation between the area of application of these regulations will be established, using the innovative interpretation provided by the CJEU. We will see that the recent case-law managed to crystallize and clarify the test that must be used in order to decide which of the two regulations is applicable. In addition, there is enough evidence to believe that the CJEU's case-law evolved due to the interpretation offered on the occasion of *NK v BNP Paribas* judgement (3). In the end, the main purpose of our paper is to establish whether the *status quo* of the CJEU's case-law manages to harmonize the scope of these two regulations and, if not, to propose several improvements to the enforcement of the existings regulations, so that better judicial cooperation will be achieved (4).

2. THE TRADITIONAL DEMARICATION BETWEEN THE SCOPE OF THE BRUSSELS I REGULATION AND THE EIR/EIR RECAST

There was always a concern regarding the demarcation of the scope of these two regulations. In order to establish the 'border line', we must firstly identify the area of application of the Brussels I Regulations, which benefits from a broad interpretation, according to the CJEU's consistent case-law (A). Secondly, we will assess the criteria which entail the enforcement of the EIR and EIR Recast (B).

2.A. THE BRUSSELS I REGULATIONS AS COMMON LAW IN CIVIL AND COMMERCIAL MATTERS

Regulation 1215/2012, known as Brussels I Bis or Brussels I Recast Regulation, determines its scope according to the criteria that were originally set forth by the previous Regulation 44/2001 and the 1968 Brussels Convention.²² The concept of civil and commercial matters must be regarded as independent and must be interpreted by reference to the objectives and scheme of the regulation and to the general principles which stem from the national legal systems. This conclusion was drawn by the Court of Justice since the *Eurocontrol* case where it stated that the terms used to define the area of application of the Brussels Convention 'should not be interpreted as a mere reference to the internal law of one or other of the states concerned'.²³

Moreover, as soon as the Brussels Convention was adopted, it became clear that the concept of civil and commercial matters should not depend on the nature of the courts having jurisdiction on the merits. This idea is well illustrated by the cases dealing with civil actions brought before criminal courts. According to the CJEU, one must distinguish between criminal matters, which are part of public law and evoke the exclusive competence of the state, from civil actions brought before criminal courts, which must be regarded as civil claims that are

intended to settle a dispute between private parties. The reason why someone brings a civil action before criminal courts is to receive adequate compensation for the harm they suffered as a result of a fraudulent conduct of someone else. Consequently, the legal relationship between the parties must be regarded as a private law relationship and must fall within the scope of the Brussels I Recast Regulation.²⁴

Unsurprisingly, the Brussels I Recast Regulation excludes the matters which are neither civil nor commercial, such as revenue, customs or administrative matters or those related to the liability of the state for acts and omissions in the exercise of state authority (*acta iure imperii*). What is more, even though the regulation is meant to cover 'all the main civil and commercial matters', some well-defined matters fall outside its scope for specific reasons.²⁵ The Jenard Report identified four principal justifications for the exclusions laid down by the 1968 Brussels Convention. First of all, the report explained that certain aspects of civil and commercial matters (state, capacity, matrimonial regimes and inheritance) were excluded because the domestic laws were so diverse that it was very difficult to reach common ground.²⁶ Second, some matters were excluded because of the existence of parallel negotiations with a specific purpose. That was the case for bankruptcy which was subject to negotiations for a distinct

¹⁹ Case C-337/17, *Feniks sp. z o.o. v Azteca Products & Services SL* (EU:C:2018:805).

²⁰ Case C296/17, *Wiemer & Trachte GmbH* (EU:C:2018:902).

²¹ Case C-535/17, *NK v BNP Paribas Fortis* (EU:C:2019:96).

²² Council Regulation 1215/2012, *supra* note 4, recital (34); see also Case C-111/08, *SCT Industri AB i likvidation v Alpenblume AB* (EU:C:2009:419), at para. 24.

²³ Case C-29/76, *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol* (EU:C:1976:137), at para. 3.

²⁴ Case C-523/14, *Aannemingsbedrijf Aertssen NV and Aertssen Terrasements SA v VSB Machineverhuur BV and Others* (EU:C:2015:722), at para. 32.

²⁵ Council Regulation 1215/2012, *supra* note 4, recital (10).

²⁶ P. Jenard, *Report on the Convention of 27 September 1968*, OJ 1979 C 59/1, available at <https://publications.europa.eu/en/publication-detail/-/publication/e69d7939-d016-4346-9651-963a63f53381/language-en>, at 10.

convention.²⁷ However, it would take a long time to reach an agreement on the insolvency rules, given the particularities of this field (the size and complexity of insolvency proceedings, the state's concern to maintain the public confidence in the enforceability of obligations, the diversity of approaches of domestic laws: pro-debtor or pro-creditor legal systems, etc.).²⁸ Third, social security was not meant to be governed by the Brussels Convention because it was considered a topic related to public law.²⁹ Finally, the exclusion of arbitration was justified by the existence of specific international conventions, either in force or under negotiation.³⁰

Some of these reasons remain relevant nowadays, while the meaning of the others has evolved within the new institutional context of the European Union. This is because the enlargement of the European competence in private international law has led to the enforcement of specialized regulations dealing with a particular subject (inheritance, maintenance obligations, insolvency etc.). Therefore, the scope of the Brussels I Recast Regulation now depends not only on the autonomous meaning of civil and commercial matters given by the Court of Justice, but also on each of the European regulations likely to govern the excluded subject matter.

For instance, when Regulation 44/2001, known as the Brussels I Regulation, was adopted on 22 December 2000, it excluded from its scope of application 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'. In the same time, the subjects excluded under Article 1(2) (b) of the Brussels I Regulation formed the scope of application of Regulation 1346/2000 on insolvency proceedings which was previously adopted on 29 May of the same year. Consequently, the area of application of the Brussels I Regulation had to be interpreted in relation to the regulation concerning insolvency proceedings.

In the *German Graphics* case, the Court started from the idea that the two regulations were drafted so as to avoid any overlaps between their scope of application. Since the recitals in the preamble to Regulation 44/2001 indicate the intention on the part of the Community legislature to provide for a broad definition of the concept of civil and commercial matters, the Court held that this instrument must be interpreted as covering the majority of civil and commercial matters, apart from those specifically excluded from its area of application. By contrast, the scope of application of Regulation 1346/2000 should be narrowly interpreted as being limited to insolvency proceedings and judgments which are closely connected with such proceedings.³¹ Therefore, the Brussels I

Regulations should be regarded as *lex generalis*, while the EIR and EIR Recast act as *lex specialis*.³²

The Court admitted that certain matters may not fall within the scope of any of the two regulations.³³ The consequence is that such cases will be governed by national jurisdictional rules³⁴ and will be likely to affect the proper functioning of the internal market. The *Radziejewski* case³⁵ confirms the possibility to find gaps between the scope of the two European instruments. This case concerned the Swedish debt relief procedure which does not entail the divestment of the debtor, with the result that it is not covered by the EIR. Moreover, the debt relief decision was adopted by an administrative authority which cannot be classified as a 'court or tribunal', within the meaning of the Brussels I Regulation. Consequently, neither of the two regulations apply to this procedure.

Furthermore, the vague delineation between the scope of the two instruments has led to the emergence of *border cases*, where there were arguments for applying either of the two regulations. These cases required the intervention of the Court of Justice to tilt the balance in favour of one of the regulations. This is why, when the new Regulation 2015/848 on insolvency proceedings was adopted, the drafters took the difficulties of ar-

ticulating the system of insolvency proceedings with the Brussels I regime into consideration.³⁶ The following section addresses the scope of the EIR and EIR Recast, given the fact that it can severely influence the borders of the Brussels I regime.

2.B. THE NARROW SCOPE OF THE EIR AND EIR RECAST

The structure of insolvency legislation in any given state tends to reflect its culture to a larger extent than one might initially expect. A plethora of social, economic and cultural biases are relevant to understand the significant variations in national insolvency legislations. These range from general attitudes towards debt forgiveness and the social stigma associated with defaulting to openness towards using credit, and the political system.³⁷ These generic assertions lead us to two important conclusions: establishing jurisdiction or the applicable law of one member state rather than the other can significantly affect the outcome of an insolvency procedure; defining the scope of application of the EIR is no easy task, since clear criteria have to be set in an attempt to harmonize, rather than suppress, the variety of approaches in the EU concerning what insolvency is and how it operates. Thus, neither taking a purely 'universalist', nor 'territorialist' approach can adequately balance the issues concerning insolvency, leading to the mod-

²⁷ *Ibid.*, at 11.

²⁸ I. F. Fletcher, *The Quest for global Insolvency Law: A Challenge for Our Time*, 55 *Current Legal Problems* (2002) 429.

²⁹ P. Jenard, *supra* note 26, at 12.

³⁰ *Ibid.*, at 13.

³¹ Case C-292/08, *German Graphics Graphische Maschinen v Alice van der Schee* (EU:C:2009:544), at para. 22-25.

³² B. Wessels, *The Changing Landscape of Cross-Border Insolvency Law in Europe*, 12 *Juridica International* (2007) 116, available at <https://www.juridicainternational.eu/the-changing-landscape-of-cross-border-insolvency-law-in-europe>.

³³ Case C-292/08, *German Graphics Graphische Maschinen v Alice van der Schee* (EU:C:2009:544), at para. 17.

³⁴ G. McCormack, *supra* note 15, at 334.

³⁵ Case C-461/11, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm* (EU:C:2012:704).

³⁶ Commission Report of 12 December 2012, *supra* note 8, at 10.

³⁷ N. Martin, *The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation*, 28 *Boston College International and Comparative Law Review* (2005) 1.

ified universalism solution, which stems from both the EIR and the EIR Recast.³⁸

More important, the variety in approaches towards insolvency in national legislation explains why the CJEU uses an autonomous definition for insolvency proceedings. No universally compatible definition can be extracted from the national law of any given member state. This is even clearer when analysing actions that are accessory to insolvency, which raised the most issues thus far. The legislative differences concerning insolvency in the member states lead to the impossibility of finding a compromise between concentrating all accessory actions in the states where the insolvency procedures were opened or treating them as independent actions. In *Gourdain* case,³⁹ the CJEU proposed two criteria for verification, which remain in use, namely *direct derivation* from the insolvency proceedings and the *close connection* with these proceedings.

In order to determine the scope of the EIR, the first aspect to be considered must be the manner in which the two conditions, namely whether the actions derive directly from insolvency proceedings and are closely connected with them, are addressed in the CJEU's case-law. The best starting point would probably be the *Seagon* case,⁴⁰ given that it concerns the action to set a transaction aside by virtue of insolvency, which has sufficient contrasts in its legal nature and regime to raise several fundamental issues.

The focal issue was that this type of actions, although taking place in the context of insolvency procedures, are essentially based in the *actio pauliana*, which is a staple of civil law. The Court had previously established in *Reichert* case that the French *action paulienne* is a personal action, which falls under the scope of the Brussels Convention.⁴¹ Thus, the main debate at hand was whether the action to set a transaction aside could be derived or closely linked to insolvency proceedings, since a similar *actio pauliana* could have been successfully brought before a court, regardless of insolvency.

The case in the main proceedings concerned an action to set aside the transfer made by the insolvent company Frick, established in Germany to the company Deko, established in Belgium. Mr. Seagon, in this capacity as liquidator in respect of Frick's assets brought an action requesting to set that transaction aside and the repayment of money.

In its judgement, the CJEU fundamentally argues that the action to set aside transactions falls under the scope of Regulation 1346/2000, since it is related to the goal insuring that insolvency procedures are effective.⁴² However, this line of arguing answers the question, without directly addressing the core legal issues, since the CJEU merely states that action must be directly derived and closely linked to insolvency proceedings. It seems to take as granted that these conditions are fulfilled as far as the ac-

tions to set a transaction aside is brought by a liquidator and is based on a provision of the Insolvency Code of Germany (Insolvenzordnung).

However, by referencing Advocate General (hereinafter the 'AG') Colomer's conclusions⁴³ as a starting point, several rules can be derived to help establish that a certain procedure falls under the scope of the EIR, rather than the Brussels I Regulation. Even if a certain action that is filed in the context of insolvency has a correspondent in regular civil actions, it may still be derived from insolvency. In addition to that, as it will be further address, even if an action can be brought before a court both inside and outside of insolvency proceedings, it may still fall under the notion of a derived and closely linked procedure. Essentially, in order to be derived from the insolvency procedure, an action should either have an autonomous nature or gain an autonomous nature in the context of insolvency. Moreover, it is also important to check if the rules applicable to an action are specific to insolvency procedures (e.g. different limitation periods, confining the action to the liquidator).

Based on these considerations, it seems that a difference should be drawn between the *collective actio pauliana*, which protects the interest of the general body of creditors, and the *individual actio pauliana*, which merely protects the creditor that brings fraud claims before a court.⁴⁴ The first type of actions should fall in the scope of the EIR. The second

type, due to its individual and general nature, will most likely not, thus being governed by the Brussels I Regulation.

In the *Seagon* case, paragraph 129 of the Insolvenzordnung 1994 provided for an action that, although being conceptually based on an *actio pauliana*, could only be brought before a court in an insolvency procedure. It was only available to the liquidator, protecting the general interest of the creditors. Moreover, it had exceptional limitation periods. In this context, the mere fact that it led to individual, rather than collective proceedings was not sufficient to overturn the conclusion that it is closely linked and directly derived from the ongoing insolvency procedures.

AG Colomer, arguing that the link is both direct and sufficient, makes an assertion that should be further explored. In concluding his remarks, he underlines that the action is closely linked to the judicial declaration of insolvency, which only the liquidator has legal standing to apply for, thereby demonstrating its undeniable connection with the insolvency proceedings.⁴⁵ An important issue is inadvertently raised, namely, how important is the fact that the liquidator is part to the proceedings. Is his participation sufficient to determine the conclusion that a certain action falls under the scope of the EIR? This question will be further addressed by CJEU in several cases, as we will see below.

³⁸ E. Ghio, *European Insolvency Law: Development, Harmonisation and Reform; A Case Study on the European Internal Market*, 18 Trinity College Law Review (2015) 154.

³⁹ Case C-133/78, *Henri Gourdain v Franz Nadler* (EU:C:1979:49).

⁴⁰ Case C-339/07, *Christopher Seagon v Deko Marty Belgium NV* (EU:C:2009:83).

⁴¹ Case C-261/90, *Reichert and Kockler v Dresdner Bank* (EU:C:1992:149), at para. 35.

⁴² Case C-339/07, *Christopher Seagon v Deko Marty Belgium NV* (EU:C:2009:83), at para. 21.

⁴³ Opinion of AG Ruiz-Jarabo Colomer delivered on 16 October 2008 in Case C-339/07, *Christopher Seagon v Deko Marty Belgium NV* (EU:C:2009:83).

⁴⁴ T. Linna, *Actio pauliana – actio europensis? Some cross border insolvency issues*, 10 Journal of private international law (2015) 69.

⁴⁵ Opinion of AG Ruiz-Jarabo Colomer delivered on 16 October 2008 in Case C-339/07, *Christopher Seagon v Deko Marty Belgium NV* (EU:C:2009:83).

The importance of the two criteria set forth in *Gourdain* case is also illustrated by the fact that one of the main goals of the proposal for a recast insolvency regulation was clarifying that the courts opening insolvency proceedings also have jurisdiction for actions which derive directly from insolvency proceedings or are closely linked with them.⁴⁶ Consequently, the wording of recital 6 of Regulation 1346/2000, which referred to proceedings which are *delivered directly on the basis of the insolvency proceedings* has been changed in the EIR Recast. The current form of recital 6 in Regulation 2015/848 now mentions proceedings which are *directly derived from insolvency proceedings*. Although this change might seem minor, it seems to have the purpose of codifying the case-law of the CJEU hitherto. More importantly, Article 6 of the EIR Recast has expressly codified this principle of *vis attractiva concursus*. Thus, it seems to fill the void left open by Article 3 of Regulation 1346/2000, which fostered multiple controversies for the CJEU to address, by virtue of analogy. Nevertheless, there is still no guidance as to what is a *directly or closely linked action*.⁴⁷ It seems that the drafters intended to secure that this concept remains broad enough for its meaning to be determined on a case by case basis. This seems compatible with the CJEU case-law thus far, since there were no clear attempts to exhaustively define the notion. Yet, some important principles can be drawn.

In the following section we will analyse these principles through cases where specific actions walk the thin line that separates the EIR and the Brussels Regulations. Several questions can be raised when consulting the relevant case-law, since it seems unclear whether some legal aspects concerning an action can independently deem the EIR applicable. Moreover, some may have a privileged position in balancing the applicable regulation. Many actions have multiple facets and a variety of specific characteristics, some specific to insolvency, whilst others, not so much.

3. DIFFUSE BORDER LINES BETWEEN THE APPLICABLE REGULATIONS

Although the Court of Justice established several criteria to distinguish between the scope of the regulations at issue, there conditions proved to be insufficiently clear, given the wide range of actions which can be brought before national courts. In the first sub-section, we will analyse some particular actions which fall within the area of application of the EIR (A). In the second sub-section, the focus will be shifted on the actions which did not meet the *Gourdain's* criteria and were thus considered to fit into the Brussels I Regulations (B).

3.A. PARTICULAR CASES CONCERNING THE EIR'S SCOPE OF APPLICATION

The aforementioned question, regarding the role of the liquidator and the importance of his participation is also fuelled by the grounds of the *SCT Industri* case. In this case, the CJEU took a different route than the one in *Seagon*, investing more effort to clearly explain the scope of application of the EIR. The case at issue concerned an action regarding the registration of ownership of shares in a company, transferred to a different member state, which was regarded as invalid since the national courts did not recognize the powers of a liquidator from another member state. Given that the case was brought in the context of insolvency proceedings it fell under the exception provided by Article 1(2)(b) of Regulation 44/2001. In this sense, the Court used two major arguments. Picking up on AG Colomer's reasoning it was asserted that the shares were transferred on the basis of provisions that derogate from the general rules of private law and, in particular, from property law.⁴⁸ It may seem that this aspect would suffice in determining both a direct link and a close relationship to the insolvency procedures.

However, the CJEU went on to invoke a second argument. Namely, it established that significance should be given to the fact that the efforts of the liquidator had a significant impact on the action. In this sense, the Court held that the action in the main proceedings was the direct and necessary consequence of the exercise, by the liquidator – an individual who intervenes only after the insolvency proceedings have been opened – of pow-

ers which he derives specifically the law governing such proceedings.

The fact that the action is based on the exercise of powers by the liquidator concerning the administration of the debtor's assets indicates that said action is derived and sufficiently close to insolvency. However, this concerns his substantial contribution to the insolvency proceedings. The question is left open on the relevance of the fact that a certain action is brought by the liquidator, rather than the debtor himself.

This exact issue was addressed by the CJEU in *German Graphics*. In this case, a company based in Germany sold several machines to a buyer in the Netherlands. However, the seller was both prudent enough to instil a reservation of title clause and sufficiently negligent to subsequently fall into involuntary liquidation. Thus, a liquidator was appointed. In an attempt to serve the general interest of the creditors, said liquidator applied for protective measures concerning the machines, basing his claim on the reservation of title clause.

The main difference in this case was that, unlike *Seagon*, the action was not only available to the liquidator, and could have been brought before a court before involuntary liquidation. The involvement of the liquidator was not required in order for the claim to be admissible. The fundamental contention on which the CJEU bases its decision is that the scope of application of Regulation 1346/2000 should not be broadly interpreted, as opposed to the notion of civil and commercial matters.⁴⁹

⁴⁸ Case C-111/08, *SCT Industri AB i likvidation v Alpenblume AB* (EU:C:2009:419), at para. 27.

⁴⁹ Case C-292/08, *German Graphics Graphische Maschinen v Alice van der Schee* (EU:C:2009:544), at para. 25.

⁴⁶ Commission Report of 12 December 2012, *supra* note 8, at 13-14.

⁴⁷ G. McCormack, *supra* note 15, at 333.

Reasoning that the action had an independent nature, since it did not depend on the opening of the insolvency proceedings and was not based on the law of insolvency, the CJEU went on to address the involvement of the liquidator. In this sense, his mere participation, given its conjectural nature was not sufficient to consider that the action was closely linked and derived from the insolvency procedures.⁵⁰ It can be further deduced that if the liquidator's participation is tantamount, and not conjectural, to a certain kind of proceedings, most likely, said proceedings will be derived from insolvency. However, this is not because of the participation of the liquidator per se. If he intervenes only after liquidation has begun, and the action is only available to him, the legal basis of the action should, most likely, be found in the provisions concerning insolvency. In other cases, where his participation is possible, yet not necessary, it may constitute merely an argument regarding the closeness of the procedures, but cannot, by any means, justify in and of itself, a direct link to the procedures.

Thus, the CJEU shifted the focus from the participation of the liquidator to the legal basis of the proceedings and the dependence on the opening of insolvency. The Court has previously held in a variety of cases, that the mere opening of insolvency cannot per se justify the application of the EIR. However, can an action be seen as deriving from and close to insolvency even if its admissibility does not depend on the opening of the procedures?

This issue was analysed in the *H. affaire*,⁵¹ which concerned an action brought by the liquidator in the insolvency proceedings against the managing director of that company for reimbursement of some payments deemed as imprudent. The legal basis for such an action, namely Article 64 of the GmbHG, had some very specific characteristics. It enabled bringing a claim against the managing director of a company once it became insolvent or after it had been established that the company's liabilities exceeded its assets. Such an action could have been filed both in and out of the context of insolvency proceedings. Moreover, there were no significant changes in its procedural requirements or effects, specific to being brought in the context of insolvency procedures, rather than not.

The CJEU clearly stated that these aspects, per se, do not preclude such an action being characterized as deriving directly from and closely linked to insolvency proceedings as long as it was actually brought in the context of such proceedings. In order to reach this conclusion, the Court, consistent with its case-law hitherto, went past looking at insolvency from the procedural perspective. It asserted that, although such an action does not depend on the formal opening of insolvency proceedings, it clearly derogates from the common rules of civil and commercial law. Moreover, the Court argued that since this action is similar to the actions to set a transaction aside at issue in *Seagon* and *F-Tex*, treating it differently merely because it can be initiated regardless of the existence of insolvency proceedings would create a double standard.

However, the most important statement the CJEU makes is that the same action, where it is brought outside the context of insolvency proceedings may fall within the scope of Regulation 44/2001. Thus, it seems the same action fulfils the twofold test when it is brought in the context of insolvency proceedings yet does not when no such proceedings are opened. In such cases the prior opening of insolvency proceedings is a deciding factor in asserting the applicability of the EIR.

Moreover, this should be seen in the context of the CJEU's previous case-law. In the aforementioned case of *SCT Industry*, it was asserted that the link with the insolvency proceedings was not weakened by the fact the insolvency proceedings had been closed when the action was brought before the Austrian courts. As such, the existence of current insolvency proceedings is not able to affect the determination of the applicable regulation.

Thus, the case-law seems to lead to the conclusion that there can never be only one criterion to assert, on all occasions, that an action is derived from insolvency proceedings and closely connected with them. The twofold test cannot be answered on a 'yes or no' basis but on a teleological approach, since small changes to the factual circumstances of any given case can affect the outcome of the test.⁵²

The participation of the liquidator, in itself, is insufficient to deem the EIR applicable, as shown in *German Graphics*. The opening of the insolvency procedures should, similarly, not be the primary focus, as it has been shown *Nickel & Goeld-*

ner and *SCT Industry*. Lastly, according to *H.* the fact that an action can be brought outside of insolvency, cannot exclude the EIR's application.

However, with a closer look, a set of clear rules can be inferred. Firstly, if the right or the obligation which forms the basis of the action finds its source in the derogating rules specific to insolvency proceedings, it falls under the scope of the EIR. When an action could not be brought outside the insolvency proceedings and finds its legal basis in those proceedings, it will fall under the scope of the EIR.⁵³ However, even when an action can be brought both in and out of the context of insolvency proceedings, as long as it derogates from the common rules of civil and commercial law, it still falls under the EIR if it is, as a matter of fact, brought in the context of insolvency proceedings. Otherwise, the action will still fall under Regulations 41/2001 or 1251/2015.

In order to assert its closeness to insolvency proceedings, the focal point should be the nature of the factual analysis, based on the merits of the case, that the national court will have to undergo, in order to reach a decision in the case. In the case of *Valach and others*, the action brought concerned the liability in tort of the members of a committee of creditors which rejected a restructuring plan in insolvency proceedings. The link between this court action and the insolvency proceedings was deemed as sufficiently close, given that in order to settle the dispute, it was necessary that the national courts analyse the extent of that committee's obligations in the insolvency proceedings and the

⁵⁰ M. A. Lupoi, *A Report of Recent ECJ Cases on Regulation (EU) NO, 44/2001*, 1 International Journal of Procedural Law (2014) 289, at 296.

⁵¹ Case C-295/13, *H. vs. HK* (EU:C:2014:2410).

⁵² M.-T. Epeoglou, *Down the Slippery Slope: Insolvency Related Actions According to Decisions C-641/16 & C-649/16*, 39 Business Law Review (2018) 88, at 91.

⁵³ M. A. Lupoi, *supra* note 50, at 295.

compatibility of the rejection with those obligations. Since such an analysis presents a direct and close link with the insolvency proceedings, it is closely connected with the course of those proceedings.⁵⁴

In 2018, the *Wiemer and Trachte*⁵⁵ case rekindled the flame of establishing the scope of the EIR concerning an action to set a transaction aside by virtue of the debtor's insolvency. The question aimed to establish whether the jurisdiction to solve such an action, brought against a defendant whose registered office or habitual residence is in another member state, was exclusive. Before addressing this issue, the Court underlined that according to its previous case-law such an action fell under the scope of the EIR. Reaffirming the principle that concentrating all the actions directly related to insolvency before the courts of the member state with jurisdiction to open insolvency proceedings is consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings having cross-border effects and the goal of avoiding forum shopping, the Court established the exclusive nature of the jurisdiction.

The reasoning was based on the following structure: since actions to set aside a transaction are directly derived and close to insolvency, consequently falling under the EIR, and two of the main goals of the EIR are avoiding forum shopping and *lex fori concursus*, the jurisdiction is exclusive concerning this type of actions. Thus, given the general viability of this line of arguing, the exclusive nature of the jurisdiction should be seen as a

general principle, applying to all actions directly derived and close to insolvency or winding up proceedings.

The following section examines the cases where the Court of Justice opted for the application of the Brussels I Regulation and the reasoning behind this choice.

3.B. THE EXTENSIVE APPLICATION OF THE BRUSSELS I REGIME

The two criteria provided by the *Gourdain* case are quoted by CJEU as the test to be used in order to determine whether a claim falls within the scope of the Brussels I Regulation or of the EIR. However, the Court did not clarify at the outset which circumstances are relevant to assess whether an action derives directly from insolvency proceedings and is closely connected with them. The uncertainty was further increased due to the lack of clarity regarding the logical relationship between those two criteria, as to whether they are cumulative or alternative.

Starting with the definition of the jurisdictional criteria, the CJEU explained that, in order to determine whether an action derives directly from insolvency proceedings, the decisive criterion to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. Therefore, it must be determined the cause of action in the main proceedings. In other words, one must assess whether the right or the obligation which forms the basis of the action finds its source in the common rules of civil and commercial law or in the dero-

gating rules specific to insolvency proceedings.⁵⁶

In the *Nickel & Goeldner* case, the action in the main proceedings was brought by the insolvency administrator of the company Kintra who requested for the payment of a debt. The legal basis of that action consisted in the services comprising the international carriage of goods provided by Kintra for Nickel & Goeldner Spedition. The Court found that this action could have been brought by the service provider itself before the opening of insolvency proceedings, because it derives from the contractual relationship between the parties, not from insolvency proceedings. The fact that, after the opening of insolvency proceedings, this action is brought by the insolvency administrator who acts in the interest of the creditors, does not change the nature of the debt requested. As such, because the action at issue is governed by the common rules of civil and commercial law, not by the specific rules of insolvency proceedings, it must fall within the area of application of the Brussels I Regulation.⁵⁷

Regarding the second criterion, that is whether the actions are closely connected with insolvency proceedings, the Court insisted on the closeness of the link between a court action in the main proceedings and the opening of insolvency proceedings. However, this definition was not clear enough and, therefore, the national courts felt the need to question whether the link between a specific

action and insolvency proceedings was sufficient to justify the exclusion of that action from the scope of the Brussels I Regulation.

A recurrent problem in EU law is finding the rules applicable to an action to set a transaction aside (*actio pauliana*), as it was already mentioned. It must be noted that the answer varies depending on whether the action was filed in the context of insolvency proceedings or outside that context. In the recent case *Feniks*, no insolvency proceedings against the so-called insolvent debtor Coliseum were begun and thus the applicability of the EIR was excluded.⁵⁸ However, once the insolvency proceedings are opened, it is not clear whether the link between these proceedings and the *actio pauliana* at issue is sufficient to justify the exclusion the Brussels I Regulation. The legal uncertainty is increased by the diverse classification of *actio pauliana* in the national legal systems. Some member states conceive *actio pauliana* as a procedure for asset execution, whereas in other states this action is governed by the substantive law applicable to contracts and obligations or it is regarded as a general remedy linked to validity or opposability of legal acts.⁵⁹

In *F-Tex* case, for instance, the Court analysed whether the action in the main proceedings was closely connected with insolvency proceedings. The facts of this case refer to NPLC company which, when insolvent, paid the debt to one of its creditors, Jadecloud-Vilma. After the in-

⁵⁶ Case C-157/13, *Nickel & Goeldner Spedition v Kintra* (EU:C:2014:2145), at para. 27; see also Case C-649/13, *Nortel Networks SA v Cosme Rogeau* (EU:C:2015:384), at para. 28 and Case C-641/16, *Tünkers France and Tünkers Maschinenbau GmbH v Expert France* (EU:C:2017:847), at para. 22.

⁵⁷ Case C-649/13, *Nortel Networks SA v Cosme Rogeau* (EU:C:2015:384), at para. 29-31.

⁵⁸ Case C-337/17, *Feniks sp. z o.o. v Azteca Products & Services SL* (EU:C:2018:805), at para. 31-33.

⁵⁹ Opinion of AG Michel Bobek delivered on 21 June 2018 in Case C-337/17, *Feniks sp. z o.o. v Azteca Products & Services SL* (EU:C:2018:805).

⁵⁴ Case C-649/16, *Valach and others v Waldviertler Sparkasse Bank AG* (EU:C:2017:986), at para. 38.

⁵⁵ Case C296/17, *Wiemer & Trachte GmbH* (EU:C:2018:902).

solvency proceedings were opened, the liquidator assigned to F-Tex all NPLC's claims against third parties, including the right to demand from Jadecloud-Vilma the return of the sums acquired by the latter. The parties agreed that F-Tex was not legally obliged to enforce the claims thus taken over, but if it decided to do so, it would have to pay the liquidator 33% of the proceeds obtained from its action. When F-Tex brought an action before the Lithuanian courts claiming the repayment of the sums acquired by Jadecloud-Vilma, the Court of Justice was asked whether this action is covered by the Brussels I Regulation or whether it should be regarded as a matter excluded from its scope of application.

The Court found that, unlike the liquidator in *Seagon* case,⁶⁰ F-Tex, acting as an assignee, was not obliged to enforce the claims taken over or to act in the interest of the creditors. On the contrary, the assignee acted in his own interest and for his personal benefit. The fact that F-Tex had to pay the liquidator a percentage of the proceeds obtained from the claims assigned should be regarded only as a method of payment for the assignment. What is more, F-Tex was not bound to set the transaction aside within the insolvency proceedings, as its right could not be affected by the closure of these proceedings. Therefore, according to the Court of Justice, the exercise of the right acquired by an assignee is not closely connected with insolvency proceedings and should not be excluded from the area of application of the Brussels I regime.⁶¹

When it comes to the logical relationship between those two criteria (whether the action derives directly from the insolvency proceedings and is closely connected with such proceedings) there are two main arguments in favour of the cumulative theory. On the one hand, the grammatical interpretation validates this approach, given the fact that the Court uses the conjunction 'and' between those criteria. On the other hand, the Court of Justice held that the Brussels I Regulation is applicable only when none of those criteria were fulfilled.

A particular field where the Court analysed both criteria in order to assess whether the Brussels I or the Brussels I Recast Regulation is applicable refers to the actions based on the rules on delict. In *Tünkers France and Tünkers Maschinenbau* case, the action in the main proceedings concerned a request for damages for unfair competition. Expert Maschinenbau manufactured components for the automobile industry, whereas Expert France was granted exclusive distribution rights in France. After the insolvency proceedings regarding Expert Maschinenbau were opened, the insolvency administrator transferred a part of its business to Tünkers Maschinenbau (hereinafter the 'TM') and its subsidiary Tünkers France (hereinafter 'TF'). Consequently, Expert France brought an action for damages against TM and TF claiming that the two companies attempted to take over its clientele.

The Court found that the action in the main proceedings aimed to establish the liability of TM and TF for the fraudulent acts of unfair competition. According to the Court, the claimant acted exclusively in its own interests and did not challenge the validity of the assignment carried out in the course of the insolvency proceedings by the insolvency administrator, as opposed to *SCT Industri* case.⁶² Therefore, the action at issue was based on the rules on tort of civil and commercial law, not on the rules specific to insolvency proceedings, with the result that the action did not derive directly from insolvency proceedings. Moreover, despite the connexion between the action for damages and the insolvency proceedings against Expert Maschinenbau, that link was considered neither sufficiently direct or sufficiently close so as to exclude the application of the Brussels I Regulation.⁶³

However, in a recent case *NK v BNP Paribas*,⁶⁴ one can validly ask whether the Court has operated a revival of its historic jurisprudence regarding the test to be used in order to determine whether a claim falls within the scope of the Brussels I Recast Regulation. The case originated in the malpractice of a Dutch bailiff who embezzled funds of about 200 clients of the bailiff practice, for which he was responsible. The company of which he was the sole shareholder and administrator as well as himself were subjected to insolvency proceedings. In the context of these proceedings NK, the liquidator, brought an action for damages against the Belgian bank, BNP Paribas

Fortis, which has allegedly breached its statutory obligations, by cooperating with the cash withdrawals made by the bailiff (*Peeters-Gatzen* action).

According to the opinion of AG Bobek, the Court should reassess its case-law in the sense that the first criterion, that is whether the action derives directly from insolvency proceedings, must be decisive. The second criterion regarding the closeness of the action to the insolvency proceedings should rather serve as a verification tool. He explained that the most important aspect is the cause of action in the main proceedings, namely whether the action is based on the common rules of civil and commercial law (rules on tort, on contract or on unjust enrichment) or on the specific rules of insolvency. According to AG Bobek, the fact that the action is closely connected with insolvency proceedings is not a free-standing criterion. The sufficient link between the action in the main proceedings and insolvency can be assessed by answering to the key question, namely whether that action can be brought in absence of insolvency proceedings. If the answer is yes, there is not a sufficient link so as to justify the exclusion of that action from the scope of the Brussels I Regulation. However, in order to reach this conclusion, the Court need to rely on the legal nature of the claim at issue which is assessed in the context of the first criterion.⁶⁵

⁶² Case C-111/08, *SCT Industri AB i likvidation v Alpenblume AB* (EU:C:2009:419).

⁶³ Case C-641/16, *Tünkers France and Tünkers Maschinenbau GmbH v Expert France* (EU:C:2017:847), at para. 22-30.

⁶⁴ Case C-535/17, *NK v BNP Paribas Fortis*, C-535/17 (EU:C:2019:96).

⁶⁵ Opinion of AG Michel Bobek delivered on 18 October 2018 in Case C-535/17, *NK v BNP Paribas Fortis*, C-535/17 (EU:C:2019:96).

⁶⁰ Case C-339/07, *Christopher Seagon v Deko Marty Belgium* (EU:C:2009:83).

⁶¹ Case C-213/10, *F-Tex SIA v Lietuvos-Anglijos UAB 'Jadecloud-Vilma'* (EU:C:2012:215), at para. 42-47.

The Court held that 'only actions which derive directly from insolvency proceedings or which are closely connected with them are excluded from the scope of the Brussels Convention'.⁶⁶ Even though the Court quoted its traditional case-law, one may wonder whether the reasoning in *NK v BNP Paribas* does not depart from it. When using the word 'or', the Court implied that either of the two traditional criteria is sufficient in order to determine the applicability of the EIR, which means that they are alternative. Certainly, it must be noted that none of the two criteria were met in this case, but the Court created the precedent for justifying the applicability of EIR even when only one of the two criteria is met. Regarding the first condition, the Court found that Peeters-Gatzen action is an action for liability for a wrongful act which is based on the common rules on torts. Although this action has some particular features when it is brought in the course of insolvency proceedings (the liquidator acts the interests of all the creditors and the proceeds of this actions accrue to the estate), these characteristics form the procedural context of the action and do not change its legal nature. As far as the second condition was concerned, the Court held that the existence of a link with insolvency proceedings was undeniable, but it was not sufficient, given that an action such as the one in the main proceedings may be brought by the creditors individually, whether before, during or after the conduct of the insolvency proceedings.⁶⁷ Only the time will tell whether the case-law had evolved due to the interpretation offered by the Court of Justice on this occasion.

4. CONCLUSIONS

Nowadays, national courts find themselves in a tortuous labyrinth, with two exits at the end: the Brussels I Regulations or the EIR/EIR Recast. When trying to exit this limbo, they need to identify the proper criteria to determine the application of one of these regulations and properly apply them to the facts of the case. Without some clear and predictable conditions, they will decide on a case by case basis, which will result in very diverse and unpredictable case-law. This will impact not only the parties involved in the proceedings, but also the purpose of uniform enforcement of EU law.

Bearing in mind the aim of judicial cooperation, it is clear that a goal to achieve full cross-border legal certainty will always exist. The EU legislative organisms are consistently trying to harmonize through regulations, according to social changes in this area of practice. But this task is very difficult since legislative changes are both varied and frequent in all 28 member states.

In order to overcome this difficulty, one proposal envisages the *Commission drafting guidelines* to help the member states comply with the rules on insolvency proceedings. This guide would be a useful instrument for creating a complex mechanism of cooperation between member states regarding numerous issues in this area. By means of this guide, the Commission could clarify some highly contested issues. Article 6 of the EIR Recast has been both praised, for incorporating the CJEU's case-law into the regulation, and criticized, since it leaves

practitioners to deal with issues of interpretation concerning what an action deriving from insolvency is.⁶⁸ The guidelines could provide some orientation. It should be a map to help the practitioner exit the labyrinth. Indeed, many answers can be found in the CJEU's case-law yet systematizing it can create a great difference. There are several examples of this type of practice that have worked, namely in the fields of personal data or competition law. Moreover, in the same manner that Annex 1 of the EIR Recast is drafted, with the help of national authorities, an annex to the guideline could be devised. Unlike Annex A, which is exhaustive according to recital 9 of the EIR Recast and the case-law concerning the EIR,⁶⁹ this non-exhaustive list could contain the procedures that are derived from insolvency according to national law and the CJEU case-law, by enlisting, for example, the actions to set aside a transaction that national laws provide and their legal basis. By doing so, uncertainty will diminish for both insolvency practitioners, when trying to determine jurisdiction in order to file the action, and the national judges, especially when they will have to deal with hybrid actions.

Insolvency rules involve a wide variety of measures, from early intervention before a company finds itself in serious difficulty, to restructuring or liquidation of assets. Bearing in mind that cross-border features of insolvency have increasingly grown in number in the past years, is essential to have a well-functioning framework covering all these measures, given the size and complexity of insolvency

proceedings. According to Article 25(1) of the EIR Recast, 'the Commission shall establish a decentralized system for the interconnection of insolvency registers. That system shall be composed of the insolvency registers and the European e-Justice Portal, which shall serve as a central public electronic access point to information in the system.' Currently, these registers are in the process of being connected. When all EU countries' registers will be available via this service, it will provide a predefined set of mandatory information on insolvency proceedings wherever they are opened in the EU.⁷⁰ Even though the interconnected insolvency registers will have a major impact on the transparency of insolvency proceedings, they will not contain any information about analogous proceedings. In this respect, another proposal is that *the interconnected insolvency registers shall include a particular section where relevant information about actions which may derive directly from the insolvency proceedings or which may be closely connected with them will be published*. As such, not only the national courts will know whether there are analogous proceedings in another member state but will also facilitate the uniform applicability of the EIR Recast in similar proceedings.

Moreover, it must be noted that, on 20 June 2019, *Directive 2019/1023* on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of

⁶⁸ Maria-Thomais EPEOGLU, *The Recast European Insolvency Regulation: A Missed Opportunity for Restructuring Business in Europe*, op. cit., p. 58.

⁶⁹ CJEU, Judgment of 22 November 2012, *Bank Handlowy w Warszawie*, C-116/11, EU:C:2012:739.

⁷⁰ Insolvency registers, available at https://e-justice.europa.eu/content_insolvency_registers-110-en.do.

⁶⁶ Case C-535/17, *NK v BNP Paribas Fortis*, C-535/17 (EU:C:2019:96), at para. 26.

⁶⁷ *Ibid.*, at para. 29-36.

debt, otherwise known as the *Directive on restructuring and insolvency*,⁷¹ was adopted. Unlike the previous ventures of the EU in the field of insolvency regulation, which kept largely to establishing procedural rules to aid cooperation between member states, this legislative act focuses on the substantial aspects of insolvency.

This is quite a brave step that few might have foreseen when the EIR was adopted, not without controversies. The directive focuses on both pre-insolvency proceedings and proper liquidation. Moreover, some rules, such as Article 3, go even further, by establishing that debtors will have access to early warning tools to enable them to identify circumstances that give rise to a likelihood of insolvency.

The Directive remains, as expected, quite conservative in regard to the degree of actually establishing uniform substantial insolvency rules. However, some key points are addressed. First of all, stays on enforcement actions are regulated to insure the success of restructuring negotiations. Moreover, the Directive contains rules preventing creditors who are subject to the stay from withholding performance, terminating, accelerating or in any other way modifying essential executory contracts. One of the more courageous proposals, consisting in regulating cross-class cram down was also adopted, insuring that the procedures cannot be stalled by minority creditors.

Without further elaboration, the sheer fact that a directive like this exists shows a significant deal about where regulating insolvency in the EU is heading. It seems that more and more states understand (especially after the financial crisis of the late 2000s), that very significant discrepancies in the manner in which insolvency is regulated can be extremely detrimental to the overall commercial environment.

However, none of the adopted provisions can properly assist in solving the issue that this paper aims to analyse, namely the relation between the *lex generalis* (i.e. Brussels I Recast) and *lex specialis* (i.e. EIR Recast) which concerns actions accessory to insolvency. However, there is not much room for critique concerning the Directive 2019/1023, from this standpoint - its main focus was not to resolve these issues. As it has been previously pointed out, the Directive mainly focuses on substantial issues in transnational insolvency. The problem of properly establishing jurisdiction on borderline cases is fundamentally a procedural one.

Nonetheless, the Directive remains important, not only given that its applicability gives even more importance to properly establishing jurisdiction, but also because it may seem that the member states are opening up to the possibility of regulating some issues concerning insolvency that are rather sensitive. Thus, it is not completely excluded that, in the future, the current EIR might be amended with comprehensive rules concerning accessory actions, with the aim of exhaustively addressing the issue.

In the end, we must admit that the new EIR Recast is unquestionably a text that has benefited from the practical implementation of its predecessor. In addition, it includes important innovations that have been widely welcomed. They will in turn have to undergo the fire of the practice. The effectiveness of insolvency procedures in the EU depends, however, on the harmonization of the scope of application of both the Brussels I Recast Regulation and the EIR Recast. This purpose will be achieved only by stronger cooperation mechanisms between member states.

⁷¹ EP and Council Directive 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132, OJ 2019 L 172/18.

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TOWARDS EUROPEAN E-JUSTICE

THE NEED FOR HARMONIZATION OF DIGITAL STANDARDS IN EU PROCEDURAL LAW IN CIVIL MATTERS

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In today's digitized and interconnected world, the workload for courts is ever growing and becoming more complex. In this context, efficiency gains are crucial to maintain a competitive justice system. The use of legal tech brings important advantages in these respects. The EU already embarked on a transformative process as regards electronic means of communication. This paper discusses the respective EU Commission proposals amending Regulations (EC) 1393/2007 and 1206/2001. Further, the present state of technical possibilities will be presented focusing on virtual reality and artificial intelligence as well as their opportunities for the justice system. Finally, the implementation of a robo-judge – being the most extreme form of legal tech – will be measured against the right to fair trial. It is important, that the EU embraces its competences to accompany technological developments in its Member States. With respect to the use of artificial intelligence however, this paper argues that limitations are warranted to ensure fairness, transparency and accountability.

KEY WORDS

e-Justice
Legal Tech
Artificial Intelligence
Robo-judge
e-communication
Digital Courtroom

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INTRODUCTION¹

Europe is changing every day. European societies are transforming towards a quicker, more interlinked and more digital people. Digitization creates new needs, challenges, but also opportunities. Innovative start-ups with new ideas and solutions pop up in all parts of Europe to contribute to the transformation process. Businesses bring forward their strategies in the digitization process, being aware that a successful transformation is decisive for their future on the market.

The question of competitiveness in the field of digitization, however, is not limited to the private sector. It is also a challenge for our legal system, in particular if it shall not be pushed aside by more efficient and modern methods of alternative dispute resolution (ADR). A decade ago, the EU Council adopted the first quinquennial action plan for the creation of a European e-Justice in the years 2009-2013.² The concept of e-Justice was defined as the use of information and communication technologies in the field of justice comprising the fields of civil, criminal and administrative law.³

The 2009-2013 plan focused on providing technical infrastructure and information tools that are quintessential to

an e-Justice system at a European scale. At the heart of the action plan was the multilingual European e-Justice Portal.⁴ Next to access to information, via this portal, the action plan also promoted the creation of the necessary technical infrastructure such as reliable electronic authentication schemes. The second action plan for the years 2014-2018 further developed the topics of access to information, access to court and communication between judicial authorities.⁵ For the latter, the project 'e-CODEX'⁶ was put on the agenda. The platform serves as a communication tool enabling an effective and secure exchange of information across borders. The third and current action plan for the years 2019-2023, renamed 'Strategy on e-Justice', reiterates the continuing evolution of tools in the fields of access to information, access to court and e-communication.⁷

Meanwhile, however, even more sophisticated and more disruptive technologies emerged on the horizon. The use of artificial intelligence (AI), virtual reality (VR) or other legal tech domains could fundamentally change our concepts of adjudicating. The current EU Council's e-Justice strategy remarks that these technologies 'should be closely monitored, in order to identify and seize opportunities with a potential positive impact on e-Justice.'⁸ The strategy also invites EU Member

States to report on their use of AI-tools.⁹ Some pioneer states already shape the digital judicial future. Estonia, for example, being the EU's leader in digitization, has launched the most ambitious project to date. Its aim is to design a 'robot judge' which is to adjudicate on small claims disputes with up to 7,000 EUR in litigation value.¹⁰ The broad concept is that the disputing parties will provide documents and relevant information via upload for the AI to issue a decision.¹¹ This finding may be subject to review by a human judge at the appellate stage.¹²

This paper argues for a harmonization of digital standards at the European level. Thereby, one has to acknowledge the limits of harmonization between procedural autonomy of the Member States and the room for action offered by the concepts of effectiveness and direct effect of EU law. Thus, this paper assesses the possibilities within these limits. In the first part, we explore the various existing tools of digitization in court (1.). In the second part, we examine possibilities to further implement legal tech in civil procedure (2.).

1. DIGITIZATION TOOLS IN COURT

Adapting the justice system to the demands of digitization first and foremost requires the tools to enable electronic communication between parties. This is the reason why the vast majority of EU Member States have already introduced possibilities to electronically serve documents.¹³

Apart from e-communication, the courtroom itself forms part of the digitization agenda. Member States more and more frequently make use of digital tools to support the logistic organization of court proceedings. Digital display boards are put in place in courthouses to announce and eventually update hearing schedules. Further, some States, like Spain, allow for the videotaping of oral hearings in civil proceedings and make them available online to the parties and their representatives via a secured interface.¹⁴ While further advancements to remotely conduct parts of the procedure – such as the taking of evidence – are approached, the remote holding of entire hearings has not yet been fully attained.

¹ We would like to thank the jury members of the THEMIS Semi-Final C 2019 for the fruitful discussion on our paper. Special thanks go to Haldi Koit for her valuable remarks and input in the publication of this paper.

² EU Council, *Multi-Annual European E-Justice Action Plan 2009-2013*, OJ 2009 C 75/1.

³ *Ibid.*, at paras 1, 15.

⁴ The portal, accessible at <https://e-justice.europa.eu/home.do> last accessed 14 July 2019, is a vast information platform for citizens and practitioners alike, providing access to case law, legislation and links to all Member States on various judicial matters.

⁵ EU Council, *Multiannual European E-Justice Action Plan 2014-2018*, OJ 2014 C 182/2.

⁶ See <https://www.e-codex.eu/> last accessed 14 July 2019.

⁷ EU Council, *2019-2023 Strategy on e-Justice*, OJ 2019 C 96/4.

⁸ *Ibid.*, at para 30.

⁹ A non-exhaustive overview on AI developments in different Member States is provided by the Council of Europe (CoE), *Practical Examples of AI Implemented in Other Countries (2018)* www.coe.int/en/web/cepej/practical-examples-of-ai-implemented-in-other-countries last accessed 14 July 2019.

¹⁰ The project is still at its early stages, but officials hope to launch a pilot – however, limited to contract claims – later this year, see E. Niiler, *Can AI Be a Fair Judge in Court? Estonia Thinks So* (*Wired.com*, 25 March 2019) www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/ last accessed 14 July 2019.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ See for details European Justice Portal, *Service of Documents (2018)* https://e-justice.europa.eu/content_service_of_documents-371-en.do last accessed 14 July 2019.

¹⁴ Regional Government of Andalusia, Council for Justice and Interior Affairs, *Arconte Portal: Guía de uso para los Profesionales (Manual for Professionals, undated)* https://sede.justicia.juntadeandalucia.es/portal/export/sites/sedeelectronica/.content/galleries/downloads/Guia_PROFESIONALES_Portal_Descargas.V.3.1.pdf last accessed 14 July 2019.

The legal framework concerning digitization tools in court is based on the EU's task to develop a European area of justice as stipulated in Articles 3(2) TEU¹⁵ and 67 TFEU¹⁶. Accordingly, the EU, under Article 81(1) TFEU, 'shall develop judicial cooperation in civil matters having cross-border implications.' In doing so, the EU has increasingly adopted legislation on cooperation in the taking of evidence and the cross-border service of judicial documents. Additionally, regulating and promoting judicial assistance across borders influences the proper functioning of the internal market of the EU¹⁷ and has the potential to increase consumer protection.¹⁸ Harmonizing digital procedural standards will in turn foster these core policies of the EU as it creates legal certainty for businesses and consumers alike and strengthens the rule of law. EU Actions must however take into due regard the procedural autonomy of the Member States, as emphasized by the European Court of Justice (ECJ) *inter alia* in *Rewe-Zentralfinanz eG*¹⁹ and, more recently, in *Aquino*²⁰.

In the following, ways of digitizing judicial and extra-judicial communication will be explored with a special focus on the electronic service of documents (A.).

In a second step, the roadmap towards a possible digital courtroom will be outlined (B.). Here, the possibilities to hold hearings or to take evidence remotely will be discussed.

1.A. DIGITIZATION OF JUDICIAL AND EXTRA-JUDICIAL COMMUNICATION

The digitization of judicial and extra-judicial communication lies at the heart of the modernization process in the justice system of most Member States. It primarily involves the electronic service of documents (e-Service). The EU legal framework is laid down in Regulation (EC) 1393/2007 on the service of judicial and extrajudicial documents.²¹ The regulation, however, does not yet mention the possibility of electronic means of communication.

While Estonia, Slovenia or Portugal, for example, have been using vast e-Service systems for years, almost all EU Member States have engaged in a modernization process by now.²² In fact, most States generally allow for the electronic service of documents with only few conditions, such as electronic signature or consent of the addressee (e.g. Greece, France, Slovakia, Romania, Latvia, Italy and Bul-

garia). Others, such as Sweden, Finland and the Czech Republic allow e-Service only in limited cases. Spain and Hungary, on the other hand, have opted to make e-Service mandatory for some entities, such as legal representatives, notaries or registrars. However, major differences remain, and some Member States have just started their e-Service process. Germany, for instance, only recently introduced an electronic mailbox designed specifically for lawyers. Therein, the reception of electronic documents is mandatory, the sending, on the other hand, is still optional. Belgium has yet to embark on its own process and foresees e-Service 'in the near future.'²³ It must be noted, that there are also Member States, e.g. Ireland, the Netherlands, Luxembourg and Cyprus, that do not permit the electronic service of documents at all.

Within the jurisdiction of the EU, too, the ECJ has made available the possibility to electronically submit court documents. According to Article 48(4) of its Rules of Procedure, the ECJ decided to explicitly allow the lodging and service of procedural documents by electronic means.²⁴

Most recently, within the framework of its regulatory fitness and performance (REFIT)²⁵ program, the EU Commission brought forward a proposal to amend Regulation (EC) 1393/2007.²⁶ Key element of the proposed recast is the establishment of a digital infrastructure between Member States to enable electronic communication in judicial and extra-judicial cooperation.²⁷ The proposal was already subject to a first reading at the European Parliament (EP)²⁸ and is currently being discussed at the EU Council, where most recently ministers for Home and Justice Affairs debated on the aspects of digitalization in June 2019.²⁹ The EU Council envisages the adoption of a common approach in December 2019.³⁰

While the need for a digital infrastructure is generally undisputed, the discussion particularly concerns the way of implementation in two aspects. First, there is the question of mandatory or voluntary establishment and use of a common IT-System at EU level. Those in favor of a mandatory character, like the EU Commission, claim that this ensures the

¹⁵ Consolidated Version of the Treaty on European Union, OJ 2012 C 326/13 (TEU).

¹⁶ Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2012 C 326/47 (TFEU).

¹⁷ Cf European Parliament, *Legislative Resolution of 13 February 2019*, P8_TA(2019)0104 (13 February 2019) at para 1.

¹⁸ Cf Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, *An Evaluation Study of National Procedural Laws and Practices in Terms of their Impact on the Free Circulation of Judgments and on the Equivalence and Effectiveness of the Procedural Protection of Consumers under EU Consumer Law (2017)* para 36 <https://publications.europa.eu/s/lmsp> last accessed 14 July 2019.

¹⁹ Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (EU:C:1976:188), at para 5. See further D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? (2010)*.

²⁰ Case C-3/16, *Aquino* (EU:C:2017:209), at para 48.

²¹ Regulation (EC) No 1393/2007 of the European Parliament and of the Council, OJ 2007 L 324/79.

²² See on this and the following the respective States' profiles on the European Justice Portal, *supra* note 13.

²³ European Justice Portal, *Service of Documents: Belgium* (2018) at para 6 https://e-justice.europa.eu/content_service_of_documents-371-be-en.do?member=1#toc_6 last accessed 14 July 2019.

²⁴ ECJ, Decision of 16 October 2018 on the lodging and service of procedural documents by means of e-Curia, OJ 2018 L 293/36.

²⁵ For more information see European Commission, *REFIT Platform (2017)* https://ec.europa.eu/info/sites/info/files/refit_platform_brochure.pdf last accessed 14 July 2019.

²⁶ European Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)*, Com(2018)379 final (31 May 2018) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52018PC0379> last accessed 14 July 2019 [hereinafter: Commission Proposal].

²⁷ See in particular art 3a of the Commission Proposal, *ibid*.

²⁸ EU Parliament, *Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents)*, 2018/0204(COD) first reading http://www.europarl.europa.eu/doceo/document/A-8-2019-0001_EN.html.

²⁹ EU Council, Meeting Minutes Policy Debate (24 May 2019) No 9566/19.

³⁰ EU Council, *Justice and Home Affairs Council Configuration (JHA)* (2019) <https://www.consilium.europa.eu/en/council-eu/configurations/jha/> last accessed 26 July 2019.

highest level of efficiency.³¹ In addition, members of the Council – who currently are still split on the question – point to past experiences that showed that a voluntary approach results in seldom use since there are no sufficient incentives and leverage.³² Those against a mandatory approach argue for more flexibility for Member States to determine the implementation of changes.³³ While following the principle *nothing is agreed until everything is agreed*, the EU Council hold prospect of a compromise. The mandatory character of the IT system could be put under the condition of a longer transition period for Member States and additional possible exemptions allowing the use of paper-based service in certain – yet to be defined – cases.³⁴

In our opinion, a mandatory approach is preferable in order to prevent fragmentation among Member States. Member States might also be less inclined to make use of a system presenting potential impasses. Further, if Member States are required to keep two co-existing systems in light of an incoherent implementation, this could be more cost-intensive.

Second, the discussion turns around the centralization or decentralization of the IT-system, also closely linked to the question of cost burden. The majority of the Council Members seem to agree with the Commission's proposal and with the EP to establish a decentralized system.³⁵

This would respect individual characteristics of existing national IT-systems, which might be interconnected with the IT-system at-hand.³⁶ Arguments against a decentralized system are mainly based on the grounds of costs incurring on Member States.

In our view, the argument against decentralization due to higher costs for Member States³⁷ is not pertinent. The EU may and should provide a budget for the establishment of the IT System regardless of its decentralized character. As pointed out in the Commission's Proposal, the Connecting Europe Facility (CEF) disposes of significant funds ready to be deployed in setting up the respective IT-systems.³⁸ This could help overcome differences in the technological development of Member States and ensure a sufficient level of cybersecurity which should not fall short on budget grounds. In the same vein, in terms of cybersecurity, a decentralized system would also be less vulnerable to potential threats. Finally, as the EU Council generally looks favorable to using e-Codex as software solution in the case of a decentralized IT-system,³⁹ the overall costs could even be reduced since many Member States already implemented e-Codex.

1.B. DIGITAL COURT PROCEEDINGS: TOWARDS A DIGITAL COURTROOM?

Implementing a digital courtroom in the justice system of EU Member States is generally possible from a technical point of view. To remotely conduct the taking of evidence or take part in a remote hearing, the tribunal and the parties would have to be equipped with the necessary tools.

1. EU-Level Harmonization

In this context, the EU Council published a guide on cross-border video-conferencing that portrays the relevant technical, organizational and legal aspects.⁴⁰ Therein, the technical training of the legal staff is encouraged to ensure a smooth process. Yet, the guide does not aim at laying out the circumstances for an entire hearing to be conducted remotely. It rather refers to the situation to hear a witness from a remote location or, more generally, the remote taking of evidence. Thus, for the relevant legal framework, the guide points to Regulation (EC) 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, adopted by the EU Council on the basis of Article 81(2) TFEU.⁴¹

In 2018, the European Commission advanced a proposal of amending Regulation (EC) 1206/2001, which is also currently being discussed at the EU Council.⁴² The proposal argues for a transmission of requests and communications to be carried out more rapidly, for mutually recognised digital evidence, and more frequent use of modern electronic technology in the taking of cross-border evidence.⁴³ This proposal is also in line with the EU justice agenda for 2020 aimed at reinforcing civil procedural rights of citizens.⁴⁴ In particular, Article 17a of the proposal establishes direct taking of evidence by video-conference if available in the premises of the respective court, which aims at fostering a smoother cooperation between courts of Member States. Article 18a of the Commission's proposal ensures that digital evidence taken according to the law of a Member State is not rejected as evidence in other Member States, thus removing legal barriers to the acceptance of digital evidence.

The EP introduced a number of amendments to the text proposed by the Commission during its first reading. It stressed the need for the regulation to stay technologically neutral, suggesting use of distance technology communication instead of video-conferencing only and underlining the importance of

³¹ See Commission Proposal, *supra* note 26, at point 2.

³² See EU Council, *supra* note 29, at para 11.

³³ *Ibid.*

³⁴ *Ibid.*, at para 15.

³⁵ *Ibid.*, at para 12.

³⁶ See *ibid.* and Commission Proposal, *supra* note 26, at point 2.

³⁷ See EU Council, *supra* note 29, at 12.

³⁸ See Commission Proposal, *supra* note 26, at point 4.

³⁹ See EU Council, *supra* note 29, at para 13.

⁴⁰ EU Council, *Guide on Video-Conferencing in Cross-Border Proceedings* (2013).

⁴¹ *Ibid.*, at 25.

⁴² See EU Council, *supra* note 29.

⁴³ European Commission, *Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*, COM(2018) 378 final (31 May 2018) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018PC0378> last accessed 14 July 2019.

⁴⁴ European Commission, *The EU Justice Agenda for 2020: Strengthening Trust, Mobility and Growth within the Union*, COM(2014) 144 final (11 March 2014) 8 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0144&from=EN> last accessed 14 July 2019.

ensuring professional secrecy.⁴⁵ Furthermore, the EP suggested that the use of video-conference be subject to the consent of the person to be heard, depending on the respective national laws of the requesting Member State. Moreover, it left a loophole for the courts of Member States to refuse direct taking of evidence on the grounds of fair trial. In a way, the EP amendments more or less relativized the initial ambition of the Commission's proposal.

Further, Regulation (EC) 861/2007⁴⁶ governs the aspect of a future digital courtroom and touches without doubt on the territorial sovereignty of the Member States concerned.⁴⁷ The Regulation in its Articles 8 and 9 allows the use of video-conferencing for oral hearings and the taking of evidence in cross-border proceedings. The question of court hearings exclusively conducted via remote communication tools has not yet been picked up by the EU legislator. The case is different, however, for ADR mechanisms. Saving time and costs, remote communication has been embraced more enthusiastically in ADR. The EU set the framework for an out-of-court resolution of online disputes through two legislative acts aimed at improving consumer protection: Directive 2013/11/EU and Regu-

lation (EU) 524/2013.⁴⁸ The latter establishes an online dispute resolution (ODR) platform, whereas Directive 2013/11/EU lays out the requirements for recognizing ADR entities and for conducting ADR procedures.

Internationally, the use of remote means of communication in ADR proceedings, such as arbitration, is widely acknowledged. As the United Nations Commission on International Trade and Law (UNCITRAL) illustrates in its Notes on Organizing Arbitral Proceeding:

Hearings can be held in-person or remotely via technological means ([...]). The decision whether to hold a hearing in-person or remotely is likely to be influenced by various factors, such as the importance of the issues at stake, the desirability of interacting directly with the witnesses, the availability of the parties, witnesses and experts as well as the cost and possible delay of holding a hearing in person. The parties and the arbitral tribunal may need to consider technical matters [...].⁴⁹

It becomes clear that the decision to favor a remote hearing instead of a hearing in person depends on different aspects and should be decided on a case-by-

case basis. In light of the importance of party autonomy in arbitral proceedings, the UNCITRAL Notes emphasize that both the arbitral tribunal and the parties decide on whether to hold a hearing remotely or in-person. This option contributes to the attractiveness of arbitral proceedings in contrast to traditional court proceedings.

2. Digital Courts and the Right to Fair Trial

The legal ramifications of conducting court hearings remotely are certainly greater with respect to the ordinary courts. This concerns in particular the principle of public and effective access to court as well as the role of the judge in ensuring equality of arms. The implications of substituting a hearing in-person via remote access on these principles will be discussed in turn.

Public access to court guarantees in the first place that proceedings are not conducted secretly but considers the court's accountability before the public.⁵⁰ Then, it also maintains the confidence of the public in the court system through its visibility.⁵¹ In the case that a hearing is conducted remotely, it would have to be made sure that any interested third party could assist in the hearing. This could either be ensured by effectively holding the hearing at the courthouse with the judge being present in person and the respective parties being present remotely.⁵² As for the public, there would not be any difference as to a normal hearing

since they also could assist the hearing in-person. Another option is to provide a link to the court's website where interested members of the public could join the procedure online. As Article 6(1) of the European Convention on Human Rights (ECHR)⁵³ explicitly provides, the public's access to court can be restricted to ensure the parties' right to privacy. From a technical point of view, the number of participants could also be capped at a certain ceiling depending on the importance and public interest in the case.

Equality of arms denotes a fair balance between the parties. Whereas in arbitral proceedings parties usually take a homogenous position in terms of resources and capacity, ordinary court hearings face different situations. Quite frequently, more resourceful and knowledgeable parties encounter small and less adapted parties, especially when it comes to proceedings with laypersons who are not represented by a lawyer.⁵⁴ Thereby, judges have the special task to ensure the equality of arms by giving explanatory information or even short legal notices to the parties. Their appreciation of inequalities between the parties could be rendered more difficult in light of the natural distance created by the remote communication. Additionally, judges might be tasked further to provide technical assistance to parties taking part in remote hearings as the conduct of the hearing generally lies in the judge's competence.

⁴⁵ European Parliament, *Report on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1206/2001 of 28 May 2001 (COM(2018)0378-C8/0242/2018-2018/0203(COD))* http://www.europarl.europa.eu/doceo/document/A-8-2018-0477_EN.html?redirect last accessed 31 July 2019.

⁴⁶ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007, OJ 2007 L 199/1.

⁴⁷ A. Stadler, '§ 128a Verhandlung im Wege der Bild- und Tonübertragung', in H.-J. Musielak and W. Voit (eds), *Zivilprozessordnung* (16th edn, 2019) at para 8; D. von Selle, '§ 128a Verhandlung im Wege der Bild- und Tonübertragung', in V. Vorwerk and C. Wolf (eds), *BeckOK ZPO* (32nd online edn, 1 March 2019) at para 16.

⁴⁸ Cf Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013, OJ 2013 L 165/63, at para 12.

⁴⁹ UNCITRAL, *Notes on Organizing Arbitral Proceedings* (2016), at para 122 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-notes-2016-e.pdf> last accessed 14 July 2019 (bold emphasis added).

⁵⁰ ECtHR, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Civil Limb)* (2018) at para 345 www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf last accessed 14 July 2019.

⁵¹ Cf ECtHR, *Malhous v Czech Republic (GC)*, Appl. no. 33071/96, *Judgement of 12 July 2001*, at para 55.

⁵² This is the case in Germany, cf art 128a GCCP.

⁵³ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No 5 (ECHR).

⁵⁴ Cf Balke, 'Moderne Kommunikationsmittel für den Zivilprozess: Was heute schon geht' [2018] *AnwBl Online* 394, at 396.

However, parties could choose a remote hearing optionally and unanimously to exclude any inequalities from the very beginning. Further, as to the technical equipment, it could be set as a prerequisite that only party representatives may participate in remote proceedings since they will more likely dispose of the necessary technical infrastructure. If the presence of a party is required, the party could be ordered to remotely attend the hearing alongside its representative.

Finally, the technical requirements shall not deprive any party from an *effective access to court*. Thus, parties who do not possess the necessary technical infrastructure or knowledge should be offered to decline a remote hearing.

In any scenario, parties could have the possibility to return to an analogue procedure as recourse. At the Forum 'Digital Civil Process', held by the German Lawyers Association on 8 November 2017, the request to implement such an 'escape clause' was submitted.⁵⁵

3. Conclusion

Overall, there are no general impediments against the optional introduction of holding court hearings remotely. Provided the interoperability and cybersecurity of the remote proceeding, the technical adjustments to be made concern the availability of the digital courtroom to the public within the demonstrated limits. Further, the involvement of laypersons in the proceedings could incite restricting remote hearings to parties who are represented by a lawyer. Apart from them, parties such as legal persons or merchants may demonstrate a higher aptitude to participate in remote hearings.

While taking into account the possible drawbacks of video-conferencing in the taking of evidence, the EU nevertheless provides litigating parties with greater flexibility and furthers procedural economy (*Prozessökonomie*).⁵⁶ Proceedings could be conducted more cost and time efficiently as parties, witnesses and experts could be available at more convenient time and at any place.⁵⁷ Thereby, the EU could significantly contribute to the attractiveness of European courts as a legal forum.

On the other hand, extensive use of remote communication could disrupt the paradigm of a traditional civil procedure, which today is still based on 'face-to-face relationships in civil litigation'.⁵⁸ Although, the technical infrastructure will have to be installed and may prove to be cost-intensive at the beginning.⁵⁹ In addition, courts may have to step up their IT-support to maintain an efficient and secure functioning of remote communication means.

As we can see, there is a legal framework for introducing video-conferencing into civil procedure that exists at both the EU and the national level. With regard to the principles of subsidiarity and proportionality in the context of Article 81 TFEU, there is indeed a need to regulate and modernize judicial cooperation in cross-border civil and commercial proceedings at the EU level. Regulations (EC) 1206/2001 and 861/2007 present a big step in this direction. Most Member States have not yet developed a sufficient cooperation between their courts nor have they managed to adjust their justice systems to the current level of technological development.⁶⁰

Thus, one of the main problems of implementing electronic procedural provisions is that whereas procedural laws have been updated the judiciary itself is still lacking such modernization.⁶¹ Most Member States' courts and authorities still communicate in a predominantly paper-based way and use video-conferencing for the taking of evidence only marginally, even in domestic proceedings.⁶² There are few exceptions, as in case with Portugal, where videoconferencing is widely used.⁶³ However, the overall progress has been slow so far as many Member States are not yet ready or willing to undertake the transformation in a timely manner. This poses a clear call for the EU to further harmonize and simplify civil proceedings, in particular as regards the taking of evidence in cross-border disputes.

2. LEGAL TECH IN CIVIL PROCEDURE

With new technology having inexorably altered our everyday life over the spread of almost two decades now, it is no wonder that it crept into almost every part of our modern society. The judiciary, too, should move to the 21st century, building on the various steps of digitization,⁶⁴ and make use of legal tech, such as e-evidence (A.) and AI (B.).

⁵⁵ M. Werner and M. Wollweber, 'Der digitale Zivilprozess: 15 Forderungen der Anwaltschaft' [2018] *AnwBl Online* 386, at 387.

⁵⁶ von Selle, *supra* note 47, at para 1.

⁵⁷ See F. Specht, 'Chancen und Risiken einer digitalen Justiz für den Zivilprozess' [2019] *Multimedia und Recht* 153; H. Schultzy, 'Videokonferenzen im Zivilprozess' [2003] *Neue Juristische Wochenschrift* 313, at 318.

⁵⁸ M. Kawano, 'Electronic Technology and Civil Procedure: Applicability of Electronic Technology in the Course of Civil Procedure', in M. Kengyel and Z. Nemessányi (eds), *Electronic Technology and Civil Procedure* (2012) 3, at 23 and 27; von Selle, *supra* note 47, at para 1.

⁵⁹ See Specht, *supra* note 57, at 154; Stadler, *supra* note 47, at para 1.

⁶⁰ European Commission, *supra* note 43.

⁶¹ In particular about the German situation writes N. Fischer, 'Electronification of Civil Litigation and Civil Justice: The Future of the Traditional Civil Procedure Facing the Electronification', in Kengyel and Nemessányi (eds), *supra* note 58, 89, at 93.

⁶² European Commission, *supra* note 43.

⁶³ See CoE, European Commission for the Efficiency of Justice (CEPEJ), *European Judicial Systems. Efficiency and Quality of Justice* (Ed. 2014).

⁶⁴ See above pt 1.

2.A. E-EVIDENCE: A NEW ERA IN THE TAKING OF EVIDENCE?

This exposure to digitization in our everyday life also impacts how and what kind of evidence parties would eventually submit in civil litigation. The purpose of this part is to examine electronic evidence and its legal implications (1.) as well as future developments (2.).

1. What is Electronic Evidence and What are Its Implications?

For the purpose of this paper, 'electronic evidence' is defined as any data or information stored in electronic format or on electronic media.⁶⁵ Based on the 2016 Report of the European Committee on Legal Co-Operation on the use of electronic evidence in civil proceedings a distinction ought to be made between three types of evidence: evidence from public websites, e.g. blog posts, images uploaded in social networks; evidence of content, e.g. e-mails or digital documents held on a server and not public; user identity and data to help identify a person by finding out the source of the communication.⁶⁶

According to this report, a number of national legal provisions have been adopted with regard to electronic evidence and its use in civil procedure with certain differences among the Member States. However, the Committee concluded that in many cases, there were no substantial differences to the rules applying to evidence in general.⁶⁷ In fact, some Member States regulated only specific aspects of electronic evidence.⁶⁸ In general, the legislative framework concerning electronic evidence in civil matters is mainly a national one. E.g., in Germany, Article 371a(1) GCCP provides that the general rules concerning the evidentiary value of documents shall be applied *mutatis mutandis* to electronic documents with a qualified electronic signature.

The case is different for criminal matters. Last year, the EU Commission proposed to establish a legal framework for production and preservation orders for electronic evidence.⁶⁹ Thereby, Member States shall be able to investigate and request any type of stored data with additional thresholds depending on whether content or non-content data is concerned.⁷⁰ State prosecutors may then

collect and access more information, particularly in fields where the crime scene itself is situated in the digital world.

In civil proceedings, however, the production of evidence lies in the hands of the parties. Using information technology for the taking of evidence reaches the 'heart' of the trial and may influence the 'cultural core' of civil litigation.⁷¹ On the one side, the use of electronic evidence could improve citizens' rights and access to justice. Admitting electronic evidence to the procedure could facilitate parties to satisfy their burden of proof. This could be particularly important in matters where the relevant facts may only be displayed electronically, e.g. in case of software malfunctioning. On the other side, electronic evidence as such may be less reliable due to its aptitude to modification and potential lack of transparency. It could therefore be more challenging for tribunals to ascertain the authenticity of the piece of evidence, especially when judges do not possess the necessary technical knowledge.

All in all, in our view, the right to fair trial (Article 6 ECHR) commands courts of the Member States to adopt a 'technologically neutral approach' towards evidence: electronic evidence should be neither privileged nor discriminated as to other types of evidence, but be admitted only on the basis of its authenticity.⁷²

2. Future Developments

Legal tech can provide litigating parties with many more possibilities to present evidence apart from already existing tools, such as video-conferencing as outlined above. Further, e-evidence is not limited to the production of stored data. One could go further and think about the new categories of evidence using VR in the process of taking of evidence.

For the purpose of this paper, VR is defined as the creation of synthetic environments in order to perceive a given scenario in a realistic way. Thereby, a distinction can be made between immersive virtual environments and collaborative virtual environments.⁷³ The former provide the user with the perception of a defined environment and surrounds the spectator with realistic details, such as the scene of a car accident. This synthetic environment may be altered by inserting new or additional data into the programme and thus, enables the comparison of different scenarios brought forward by the parties. A judge vested with an immersive virtual environments tool could then test the likelihood and plausibility of the parties' accounts.

⁶⁵ Cf Collaborative Research Project EVIDENCE, D3.1 Overview of Existing Legal Framework in the EU Member States, WP 3 Deliverable (2015) at 7 <http://s.evidenceproject.eu/p/e/v/evidence-ga-608185-d3-1-411.pdf>. For a definition see CoE, European Committee on Legal Co-Operation (CDCJ), *Guidelines of the Committee of Ministers of the Council of Europe on Electronic Evidence in Civil and Administrative Proceedings – Explanatory Memorandum*, CM(2018)169-add2 (2018) https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680902e0e last accessed 14 July 2019.

⁶⁶ See S. Mason and U. Rasmussen, *The Use of Electronic Evidence in Civil and Administrative Law Proceedings and its Effects on the Rules of Evidence and Modes of Proof*, CDCJ(2015)14 final (2016) <https://rm.coe.int/1680700298> last accessed 14 July 2019.

⁶⁷ *Ibid.*, at 10.

⁶⁸ *Ibid.*

⁶⁹ See European Commission, *Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters*, COM(2018) 225 final (17 April 2018) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52018PC0225>. For more information see Procedure 2018/0108(COD) (2019) https://eur-lex.europa.eu/procedure/EN/2018_108 all last accessed 14 July 2019. Member States' reactions to the proposal were controversial. Germany, for example, voted against it in the EU Council.

⁷⁰ European Commission, *ibid.*, at para 20.

⁷¹ G. E. Kodek, 'Modern Communications and Information Technology and the Taking of Evidence', in Kengyel and Nemessányi (eds), *supra* note 58, at 261.

⁷² See ECtHR, *García Ruiz v Spain* (GC), Appl. no. 30544/96, Judgement of 21 January 1999, at para 28; CoE CDCJ, *supra* note 65.

⁷³ J. N. Bailenson and others, 'Courtroom Applications of Virtual Environments, Immersive Virtual Environments, and Collaborative Virtual Environments' (2006) 28 *Law & Policy* 249, at paras 251 ff.

Collaborative virtual environments aim at facilitating communication between different interlocutors represented by avatars inside a synthetic environment. There, users socially interact and live a genuine communication experience. Disadvantages inherent in video-conferencing, such as local distance or time-lagged transmission, may thus be marginalized.

Experience through VR-tools could become a new category for pieces of evidence. Yet, we have to acknowledge the risks of potential misuse, for example if a party secretly modifies the data creating the VR to its benefit. Also, general technical inequalities in terms of knowledge or financial capacities have to be considered, as goes for all new technologies. Further, users have to be aware of technological bias. When the VR is too perfect, the distinction to the real world may be hampered. Judges could then be – also subconsciously – manipulated in their decision-making.

3. Conclusion

Electronic evidence is still a relatively new terrain in civil procedure. This in turn creates an ambiguous approach among practitioners and legal scholars towards its use. While some of them underline the ‘reliability’ of the electronic evidence due to its objectivity and precision,⁷⁴ others focus on the lack of authenticity or means to prove it. One should not forget the cost of introducing electronic evidence into civil procedure and enhancing its role there. There is still a long way to go and new developments, such as VR, are promising, but must be put to the test.

2.B. AI IN THE JUDICIAL SYSTEM: ALL RISE FOR ‘ROBO-JUDGE’?

In this paper, AI is understood as comprising all advanced forms of automated data analysis in judicial services and procedures.⁷⁵ While various forms of AI are already employed in the private sector, most prominently by insurers, legal departments and law firms, State actors generally remain reluctant to incorporate AI in their operations.⁷⁶ Few examples of AI used by courts can be observed with respect to criminal justice proceedings, predominantly in non-EU

Member States.⁷⁷ The possible forms of use of AI in civil proceedings – with Estonia’s robo-judge being the most extreme – are various and will be displayed (1.), following a balancing of opportunities and risks (2.). The use of AI in the judiciary will then be measured against the core principles of civil procedure, namely the right to fair trial, as stipulated in Article 6 ECHR (3.).

1. AI and its Forms of Use in the Judicial System

Firstly, AI presents great potential through its predictive⁷⁸ capacities. With respect to the administration of justice, predictive analytics are primarily used by lawyers.⁷⁹ But the judiciary, too, can use such tools to its advantage. In 2016, a group of British academics developed an algorithm to predict the outcome of cases of the European Court of Human Rights (ECtHR) based on natural language processing. The program was designed to predict whether a violation of Articles 3, 6, or 8 ECHR had occurred

or not, and it did so with 79% accuracy.⁸⁰ The researchers believe that such a text-based predictive program is a ‘useful assisting tool’ as the system ‘can also be used to develop prior indicators for diagnosing potential violation of specific Articles in lodged applications and eventually prioritise the decision process on cases where violation seems very likely.’⁸¹ ‘Predictive justice’ software may therefore facilitate the case-management of the courts and ease their dealing with an ever growing caseload.⁸²

Secondly, AI may be used in judges’ decision-making process. Even now, judges rely on scales in order to harmonize their case law, for example, with respect to compensation claims for personal injury but also in family matters. Here, too, AI can be of help and calculate the amount of compensation due based on scales or tables already in use as well as relevant case law.⁸³ AI may also assist judges in their judgment preparation by producing a suggested reasoned draft decision

⁷⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ‘Building Trust in Human-Centric Artificial Intelligence’ COM(2019) 168 final (8 April 2019) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0168&from=ES> last accessed 14 July 2019.

⁷⁵ See van Ettekovén and Prins, ‘Data Analysis, Artificial Intelligence and the Judiciary System’, in V. Mak, E. Tjong Tjin Tai and A. Berlee (eds), *Research Handbook in Data Science and Law* (2018) 425, at 425. See also CoE CEPEJ, *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment* (adopted 4 December 2018) at 69-70 <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c> (defining AI as ‘[a] set of scientific methods, theories and techniques whose aim is to reproduce, by a machine, the cognitive abilities of human beings.’).

⁷⁶ X. Ronsin and others, *In-Depth Study on the use of AI in Judicial Systems, Notably AI Applications Processing Judicial Decisions and Data* (2018) in CoE CEPEJ, *supra* note 75, 13, at 16.

⁷⁷ Eg in the US where criminal judges in multiple states use the privately developed software COMPAS, an algorithm that assesses the potential recidivism risk of the defendant and proposes the criminal sentence to the judge. The algorithm bases its result on over 100 factors, *inter alia* age, sex and criminal history. See, also on the criticism surrounding the program, S. Corbett-Davies and others, *A Computer Program Used for Bail and Sentencing Decisions Was Labeled Biased Against Blacks. It’s Actually Not That Clear*. (Washington Post, 17 October 2016) https://wapo.st/2edSBbl?tid=ss_mail&utm_term=.33de8ecad627 last accessed 14 July 2019.

⁷⁸ The term ‘predictive’ denotes that AI is used to predict the outcome of a case, i.e. the possibilities of its success or failure, based on a statistical modelling of case law using both natural language processing and machine learning methods. For more details, including criticism on terminology, see Ronsin and others, *supra* note 76, at paras 56 ff. See further J.-M. Sauvé, *La justice prédictive* (Colloque organisé à l’occasion du bicentenaire de l’Ordre des avocats au Conseil d’Etat et à la Cour de cassation, Paris, 12 February 2018) www.conseil-etat.fr/content/download/126837/1283810/version/1/file/2018-02-12_Justice%20opr%C3%A9dictive.pdf last accessed 14 July 2019.

⁷⁹ Ronsin and others, *supra* note 76, at para 58. Software examples include *Prédictice*, *Case Law Analytics* and *JurisData Analytics* (all France); *Luminance* (UK); or *ROSS* (USA). See *ibid.*, at para 18.

⁸⁰ See Aletras and others, ‘Predicting Judicial decisions of the European Court of Human Rights: A Natural Language Processing Perspective’ (2016) *PeerJ Computer Science* 2:e93.

⁸¹ *Ibid.*, at 3.

⁸² Cf van Ettekovén and Prins, *supra* note 75, at 426.

⁸³ Ronsin and others, *supra* note 76, at paras 98 ff. See, however, the pilot project conducted at the courts of appeal in Rennes and Douai (France) in spring 2017, which tested predictive software in litigation appeals, but found *inter alia* no ‘added value of the tested version of the software for the work of reflection and decision-making of the magistrates.’ *ibid.*, at para 98.

based on the given information.⁸⁴ Fully automated AI decision-making processes can already be observed in ODR as a form of alternative dispute resolution (ADR).⁸⁵ Estonia's initiative of a 'robo-judge' builds on these methods, yet seems to wish to incorporate them into the ordinary courts.

The forms of use of AI are broad and often more subtle than one might imagine. Taken to its extreme, i.e. AI in form of a 'robo-judge' is appalling to many. However, with Estonia's recent efforts, this extreme no longer remains the too far away fairytale that it perhaps once was.

2. Opportunities and Risks

Every policy-maker's decision is based on a weighing of opportunities and risks of the measure involved, so with the introduction of AI into the (civil) judicial system, too, such a balancing must take place. Since AI is already used by private actors, e.g. to offer simple legal advice on the Internet,⁸⁶ citizens are offered quicker and easier ways of access to justice, which in turn leads to an increase in the workload of the judiciary. In light of this

growing pressure, the State itself should make use of digitization.⁸⁷ The use of AI is thus first and foremost aimed at generating efficiency gains through the facilitation of practitioners' work, including case-management and decision-making, thereby also reducing time and costs.⁸⁸ This in turn fosters the right to fair trial.⁸⁹ Another prominent argument in favor of AI is its contribution to more consistency in legal decisions,⁹⁰ closely linked to an increase in the objectivity of decision-making as 'equal cases [are decided] more equally, unequal cases more unequally'⁹¹ and unconscious judicial bias could be unmasked.⁹²

On the other hand, the use of AI in the legal sphere also implies a number of risks. For one, any software or algorithm is only as good as its programming. This raises a whole litany of issues accompanied by an inherent risk of abuse with respect to the collection and processing of data: Which data is used in an algorithm and how are various factors weighed? Every step in the development and use of a program must be accompanied with sufficient safeguards to ensure *inter alia* human oversight, technical safety,

transparency and accountability.⁹³ While some say AI eliminates human bias, others find the neutrality of algorithms to be 'a myth, as their creators consciously or unintentionally transfer their own value systems into them.'⁹⁴ AI furthermore comes with the risk of a so-called 'automation bias'; i.e. the tendency of humans to rely on automated decision-making systems while not searching for or ignoring contradictory information.⁹⁵ Finally, since algorithms are fed with retrospective data, AI may also hinder the development of the law through an evolving jurisprudence. In fact, AI may cement current and thus hinder the formation of new case law.

3. AI and the Right to Fair Trial with Respect to Civil Proceedings

The principle of procedural autonomy of EU Member States⁹⁶ finds its limits in the rights conferred by EU law,⁹⁷ which includes the EU Charter of Fundamental Rights⁹⁸ and thus by referral also the ECHR.⁹⁹

In addition, all EU Member States are members of the Council of Europe and States parties to the ECHR,¹⁰⁰ hence directly subject to the obligations enshrined therein. The use of AI in civil proceedings has immediate implications on the right to fair trial as provided in Article 6(1) ECHR. Its core guarantees include a fair and public hearing before an independent and impartial tribunal established by law. The use of predictive justice- and automated calculation-tools by judges during their decision-finding and -making process appears to be in line with these core principles. After all, the decision-making process remains in the hands of a human judge.

The assessment, however, is more complicated with respect to a 'robo-judge', i.e. a fully automated civil proceeding at first instance.

⁹³ See EU High-Level Expert Group on Artificial Intelligence (AI HLEG), *Ethics Guidelines for Trustworthy AI* (April 2019), at 14 ff <https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai> last accessed 14 July 2019. According to these guidelines, for AI to be trustworthy it must be lawful, ethical and robust, *ibid.*, at 5. The guidelines do not focus on the first component (lawfulness) but instead 'proceed on the assumption that legal rights and obligation that apply to the processes and activities involved in developing, deploying and using AI systems remain mandatory and must be duly observed', *ibid.*, at 6. They are addressed to all stakeholders and their application remains voluntary, *ibid.*, at 5. See also CoE CEPEJ, *supra* note 75, at 11.

⁹⁴ Ronsin and others, *supra* note 76, at para 147.

⁹⁵ Cf M.L. Cummings, *Automation Bias in Intelligent Time Critical Decision Support Systems* (AIAA 1st Intelligence Systems Technical Conference, 20-22 September 2004, Chicago, Illinois) at 2 <https://arc.aiaa.org/doi/pdf/10.2514/6.2004-6313> last accessed 14 July 2019.

⁹⁶ See *supra* notes 19, 20 and accompanying text.

⁹⁷ Aquino, *supra* note 20; Case C 161/15, *Bensada Benallal* (EU:C:2016:175), at para 24 with further references.

⁹⁸ Charter of Fundamental Rights of the European Union (adopted 7 December 2000, as amended 12 December 2007, entered into force 1 December 2009), OJ 2012 C 326/391 (CFR). By virtue of art 6(1) TEU, the CFR enjoys the same legal value as the treaties and thus forms part of primary EU law.

⁹⁹ Art 52(3) CFR provides: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

¹⁰⁰ See CoE, *47 Member States* (2018) www.coe.int/en/web/portals/47-members-states last accessed 14 July 2019. The ratification of the ECHR is a prerequisite for joining the CoE.

⁸⁴ Sourdin and Cornes, 'Do Judges Need to Be Human? The Implications of Technology for Responsive Judging', in T. Sourdin and A. Zariski (eds), *The Responsive Judge* (2018) 87, at 94-95.

⁸⁵ See for more details Sourdin and Cornes, *ibid.*, at 92-93; Ronsin and others, *supra* note 76, at 44 ff.

⁸⁶ The UK-based website DoNotPay.com, for example, offers a way to appeal a parking ticket in certain cities through a chatbot.

⁸⁷ See eg Prins, 'Digital Justice' (2018) 34 *Computer Law & Security Review* 920-23 (arguing that the conditions for the functioning of the constitutional State contain an inherent obligation for all State powers to make use of digitization).

⁸⁸ Van Ettehoven and Prins, *supra* note 75, at 433-35.

⁸⁹ Administering justice 'within a reasonable time' is a key element of the right to fair trial, see art 6(1) ECHR.

⁹⁰ CoE CEPEJ, *supra* note 75, at 5.

⁹¹ Van Ettehoven and Prins, *supra* note 75, at 435.

⁹² Sourdin and Cornes, *supra* note 84, at 96 with further references.

(a). An 'Impartial and Independent Tribunal' Firstly, the question presents itself whether one could still speak of a 'tribunal' in the sense of Article 6(1) ECHR. The term is still perceived in a traditional sense as a body composed of one or more human judges. This is demonstrated by the fact that the criteria for assessing a tribunal's key components – independence and impartiality – are focused on the person of the judge herself, e.g. when taking into account their behavior, appointment and terms of office.¹⁰¹ The European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their Environment, too, seems to exclude AI from the term 'tribunal'.¹⁰² However, the ECtHR in its constant jurisprudence interprets the ECHR as a 'living instrument [...] which must be interpreted in light of present-day conditions'¹⁰³ meaning that its provisions are subject to evolution and change in their understanding in accordance with social, ethical, technological and scientific developments.¹⁰⁴ Following this interpretative approach, it is thus likely that the Court will accept a fully automated proceeding at first instance via a 'robo-judge' with respect to the criterion of a 'tribunal'.

Questionable remains, however, whether a 'robo-judge' can substantially meet the key criteria of impartiality and independence. Following the principle of separation of powers, judges must be independent vis-à-vis other State powers as well as vis-à-vis the disputing parties.¹⁰⁵ With regard to impartiality, i.e. the absence of prejudice or bias,¹⁰⁶ the ECtHR employs a twofold approach. On the one hand, the Court takes into account subjective criteria such as a particular judge's behavior and personal conviction. On the other hand, it draws on objective criteria by ascertaining whether the tribunal itself has offered sufficient guarantees to cast away any doubt about its impartiality.¹⁰⁷ While the traditional criteria for independence and impartiality address the judge as a human subject, AI as a program appears to be free of such problems. Issues with AI arise nevertheless, although on a different level, namely its programming which poses risks of interference and abuse. It must therefore be ensured that the underlying development process meets the criteria of independence and the algorithm itself is construed in an impartial way.¹⁰⁸

¹⁰¹ See ECtHR, *supra* note 50, at 32 and 42, 44 ff.

¹⁰² CoE CEPEJ, *supra* note 75, at 12 ('[The user] must also be clearly informed of any prior processing of a case by artificial intelligence before or during a judicial process and have the right to object, so that his/her case can be heard directly by a court within the meaning of Article 6 of the ECHR.').

¹⁰³ ECtHR, *Tyrer v United Kingdom*, Appl. no. 5856/72, Judgement of 25 April 1978, Series A no 26, at para 31.

¹⁰⁴ ECtHR, *Mamatkulov and Askarov v Turkey* (GC), Appl. nos. 46827/99 and 46951/99, Judgement of 4 February 2005, at para 121; *Christine Goodwin v United Kingdom* (GC), Appl. no. 28957/95, Judgement of 11 July 2002, at para 75; *Marckx v Belgium*, Appl. no. 6833/74, Judgement of 13 June 1979, Series A no 31, at para 41. See further, also on the criticism surrounding the 'living instrument'-doctrine Theil, 'Is the "Living Instrument" Approach of the European Court of Human Rights Compatible with the ECHR and International Law?' (2017) 23 *European Public Law* 587.

¹⁰⁵ ECtHR, *Beaumont v France*, Appl. no. 15287/89, Judgement of 25 June 1994, Series A no 296-B, at para 38; *Sramek v Austria*, Appl. no. 8790/79, Judgement of 22 October 1984, Series A no 84, at para 42.

¹⁰⁶ ECtHR, *Wettstein v Switzerland*, Appl. no. 33958/96, Judgement of 21 December 2000, at para 43.

¹⁰⁷ Cf ECtHR, *supra* note 101, at 45 ff.

¹⁰⁸ See EU AI HLEG, *supra* note 93, at 18; CoE CEPEJ, *supra* note 75, at 11.

Finally, it must be noted that a lack of independence or impartiality can be remedied if the decision taken is subsequently subject to review by a higher instance invested with full jurisdiction, i.e. a review of the merits as well as the facts of the case.¹⁰⁹ Incorporating the possibility of full review by an appellate court after an AI-operated proceeding at first instance will thus satisfy the conditions for an impartial and independent tribunal under Article 6(1) ECHR.

(b). 'Fair and Public Hearing'

Another factor is the element of a 'fair and public hearing' under Article 6(1) ECHR. As the ECtHR has emphasized, '[b]y rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society.'¹¹⁰ While it is inconceivable how a fully automated proceeding can encompass a public oral hearing, it must be noted that in the jurisprudence of the Strasbourg Court a lack of publicity, too, can be remedied at the appeal stage, if the appellate court has full jurisdiction over the matter.¹¹¹

¹⁰⁹ ECtHR, *De Haan v the Netherlands*, Appl. no. 22839/93, Judgement of 26 August 1997, at paras 52-55 with further references to case law.

¹¹⁰ ECtHR, *Malhous v Czech Republic*, *supra* note 51. See also ECtHR, *Diennet v France*, Appl. no. 18160/91, Judgement of 26 September 1995, Series A no 325-A, at para 33; *Sutter v Switzerland*, Appl. no. 8209/78, Judgement of 22 February 1992, Series A no 74, at para 26 with further references.

¹¹¹ ECtHR, *Ramos Nunes de Carvalho e Sá* (GC), Appl. nos. 55391/13, 57728/13, 74041/13, Judgement of 6 November 2018, at para 192 with further references to case law.

¹¹² ECtHR, *supra* note 101, at 52; *Donadze v Georgia*, Appl. no. 74644/01, Judgement of 7 March 2006, at para 35 (in French).

Fairness, on the other hand, requires *inter alia* that the observations of the parties must be 'heard', i.e. duly considered by the court.¹¹² It remains to be seen to what extent natural language processing-driven AI will be able to satisfy this condition. The element of fairness, however, will be the crucial obstacle to overcome as a lack thereof cannot be remedied at the appellate stage.

(c). Conclusion

On the basis of the ECtHR's 'living instrument'-doctrine, the concept of a 'robo-judge' *prima facie* seems compatible with the right to fair trial as enshrined in Article 6(1) ECHR, however, only if a fully automated proceeding renders the right as effective as a 'traditional' proceeding does. This becomes especially relevant with respect to the condition of fairness requiring that observations of the parties must be duly considered by the court.

FUTURE OUTLOOK

The EU and its Member States are generally prepared to manage the digital transformation process successfully and do not hesitate to invest the necessary funding and effort into innovative solutions. As regards e-communication, important modernization steps are in progress and the EU should pursue their implementation affirmatively. Electronic service of documents should be mandatory for communication between judicial authorities, as intended in the Commission's recast proposal to Regulation (EC) 1393/2007. Communication between authorities and parties should be conducted electronically by-default. Member States should engage more proactively in facilitating and modernizing taking of evidence in cross-border disputes and pursue the ambitious proposal that the Commission introduced for Regulation (EC) 1206/2001.

In the legal tech domain, the current legal landscape does not yet reflect the present state of technical possibilities. Instead, there is a growing imbalance between the technical reality and a legislation that is becoming more and more outdated.

In its e-Justice strategy, the EU Council evokes that the 'implications [of artificial intelligence, annotation by authors] in the field of e-Justice need to be further defined.'¹¹³

It is important, that the EU embraces its responsibility to accompany technological developments from a legal point of view. While the benefits of a more efficient justice system may seem obvious, the technological evolution itself is more ambivalent in nature. Therefore, building trust in e-Justice and protecting the fundamental rights of the individuals concerned requires a clear and robust legal framework. E-Justice should be reliable, accessible and trustworthy for everyone. Further, it is equally important that Member States themselves with their judicial institutions may accord trust in e-Justice following the core principle of mutual trust and cooperation.

As outlined above, the use of legal tech presents important advantages in terms of efficiency and consistency. Therefore, we would like to encourage its further development in so far as it is aimed at facilitating practitioners' work. In today's digitized and interconnected world, the workload for courts is increasing and cases become more and more complex. In this context, the gain in efficiency is crucial to maintain a competitive justice system. In our view, this can only be achieved through coordinated action at the EU level where the technical and financial resources as well as the necessary know-how can be bundled.

With respect to the use of AI however, limitations are warranted when it comes to its most extreme form, aiming at substituting the human judge.¹¹⁴ In fact, in its recent policy and investment recommendations for trustworthy AI, the Independent High-Level Expert Group on Artificial Intelligence set up by the EU, calls on policy-makers to adopt a risk-based approach to regulating AI.¹¹⁵ Policy proposals should duly consider the level of autonomy granted in AI-based decision-making.¹¹⁶

Notably, the Expert Group strongly discourages that the principle of human agency should be given up pointing to potential moral hazards.¹¹⁷ Given the lack of details concerning the realization of the Estonian 'robo-judge' at first instance, it remains highly questionable whether and how necessary safeguards concerning fairness, transparency and accountability can be implemented. In the near future, the human judge cannot and also should not be replaced.

¹¹⁴ In the same vein, EU AI HLEG, *supra* note 93, at 15-16; Sourdin and Cornes, *supra* note 84, at 94 and 113-14.

¹¹⁵ EU AI HLEG, *Policy and Investment Recommendations for Trustworthy AI* (June 2019) at 37-38 <https://ec.europa.eu/digital-single-market/en/news/policy-and-investment-recommendations-trustworthy-artificial-intelligence> last accessed 14 July 2019.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, at 41.

¹¹³ EU Council, *Draft e-Justice Action Plan for 2019-2023*, 11724/4/18 REV 4 (31 October 2018) at para 15.

SEMI-FINAL D

JUDICIAL ETHICS AND PROFESSIONAL CONDUCT

PARTICIPATING TEAMS

AUSTRIA, BULGARIA, FINLAND, FRANCE, GERMANY, HUNGARY,
ITALY I, ITALY II, PORTUGAL I, PORTUGAL II AND SPAIN

Equal 1st Place: Team Hungary & Team Finland

3rd place: Team Italy II

Special Award:

Team Bulgaria

Team Hungary [Awarded by the National Institute of Justice]

Selected papers for TAJ:

Team Austria

Team France

Team Portugal I

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2-5 JULY 2019 SOFIA, BULGARIA - NATIONAL INSTITUTE OF JUSTICE

JURY MEMBERS

JEREMY COOPER (UK)

PROFESSOR, RETIRED JUDGE AND CONSULTANT TO THE UNODC
ON JUDICIAL INTEGRITY, CONDUCT AND ETHICS

I was a member of the Jury for Semi Final D which took place at the National Institute of Justice in Sofia, Bulgaria. Teams from 9 different member states presented papers and led discussions on the topic Judicial Ethics and Professional Conduct. This was the third occasion on which I had sat as a THEMIS jury member. It was once again a thoroughly stimulating and challenging experience for the participants, but also for the Jury. The topics selected by the Teams varied widely with the emerging significance of artificial intelligence in judicial adjudication figuring prominently as the most popular topic. Many of the topics chosen reflected significant contemporary concerns such as the need to protect judges from the malign impact of social media and the role of the judiciary in articulating the fundamental importance of judicial independence. As always, the quality of the papers was uniformly high and the engagement of the Teams in the subsequent discussions with the Jury lively and intense. Several of the presentations used multi-media in an entertaining and innovative way. The Bulgarian Team's adoption of the era of silent cinema in their presentation earned them a special award from the Jury.

The Jury used a complex scoring system, guided by the EJTN assessment methodology. We found this to be an effective way of separating the best Teams from the very best, but even operating such a system we were unable to separate the two top Teams – Finland and Hungary – from one another. After a telephonic consultation with the EJTN Secretary General we took the unprecedented step of announcing the teams as joint winners, with an automatic journey to the Grand Final Competition to be held in Bordeaux in September.

It is interesting to note that no Team excelled in all three components of the competition - written paper, oral presentation, discussion – for example none of the three papers we have selected for publication in this journal was written by a winning Team. What probably distinguished the best Teams was their management of the discussion, their understanding of the thrust of the very challenging Jury questions, their subsequent teamwork and their ability to think and respond reflectively under pressure.

The THEMIS competition remains a sparkling jewel in the EJTN crown. It is a forum for intellectual fireworks and a fabulous training ground to help new judges develop their skills in a public forum. But is also shown to be a great place for networking, making new friendships and above all for re-enforcing general confidence that the courts of the European union are in good hands!

TAMARA TROTMAN (NL)

JUDGE, COURT OF APPEAL OF HAGUE;
PRESIDENT OF 'JUDGES FOR JUDGES' FOUNDATION

Judicial Ethics and Professional Conduct is one of the key topics of the THEMIS Competition. It underlines the importance of cultivating and developing an understanding of the sensitivities of professional ethical issues throughout one's entire career as a judge.

It therefore was a privilege to be a member of the Themis-jury in Sofia this year. It has been incredibly enriching to read, hear and have discussions with each other about the different topics regarding Judicial Ethics. Matters in your own system that you may have taken for granted sometimes become less self-evident when you discover the solutions other judiciaries have found for the same issues.

"A judge is aware that his professional behaviour, his private life and his conduct in society have an influence on the image of justice and public confidence."¹ But how do you strike a balance between the rights of the judge as a citizen and the constraints linked to his function?"² And if public confidence is a must, how can it be earned or retained best? How much 'freedom of expression' should a judge have?

¹ ENCJ report: Judicial Ethics – Principles, Values and Qualities", p. 2.
(<https://www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf>)

² ENCJ report: Judicial Ethics – Principles, Values and Qualities", p. 5.

The three young judges of team Austria explore this theme in their thought-provoking paper. The jury selected this well-written paper for publication because of its original and creative approach. The authors shed a light on the Austrian tradition of silence and explain clearly why they are of the opinion that their more liberal understanding of the freedom of expression of judges is not only in line with international standards but also fosters public trust in the judiciary. Drawing up a code of conduct as they did, requires you first to really think through the problem at hand. And the end result is a starting point for every reader to think about what 'reserve and discretion' mean in these modern times of transparency and accountability.

And what should judges do when confronted with serious rule of law backsliding? In concluding I therefore would like to emphasize one of the conclusions of the ICJ in their recent submission to the UN Special Rapporteur on the Independence of Judges and Lawyers that judges should be able to exercise their freedom of expression, in order to address: threats to the independence of the judiciary; threats to judicial integrity; fundamental aspects of the administration of justice; or to otherwise promote and protect universally recognized human rights and fundamental freedoms and the rule of law. Whether or not the matter is otherwise seen as politically controversial.³ Remaining silent is therefore not always the better option, sometimes a judge needs to speak out.⁴

Back to the Austrian 'themistopoloj' and read why in their opinion judges should step out of their ivory tower and into the glass house with self-confidence.

LAURIS LIEPA [LV]

LAWYER, AUTHOR AND LECTURER AT THE FACULTY OF LAW
[UNIVERSITY OF LATVIA] AND THE RIGA GRADUATE SCHOOL OF LAW

2019 was my seventh year in THEMIS competition. I have had an opportunity to serve as a jury member as well as to coach participating teams of young judges from Latvia. Themis is a unique project, that requires young magistrates to demonstrate both, academical excellence and practical skills. Participant teams shall submit research papers on issues, relevant and topical to European judiciary and legal systems of our continent. Team papers shall demonstrate superb academical quality and young magistrates and prosecutors shall defend their conclusions in a fierce debate with competing teams and jury members.

In the course of past seven years overall quality of participating teams, submitted research papers and the debate has accelerated. Choice of problems for team research and debates reflect many areas of common interest for representatives of different European countries. The selected topics demonstrate not only areas of interest for judiciary, but also their relevance to society in general. Consequently, participants have recently been examining such issues as judiciary and media, impact of social networks on courts, relevance of technologies in judicial processes.

The jury of 2019 competition in Deontology had remarkable list of high-quality research papers. One theme prevailed over many other important topics – opportunities and risks related to inevitable impact of automation and use of technologies in judicial work. Team of young magistrates from Portugal had presented their thesis in relation to use of artificial intelligence in judicial process. Jury concluded that the paper is outstanding, both in terms of style as well as substance, describing the complex topic in a capturing and understandable manner and presenting useful conclusions. This versatile text provides insight into jurisprudence of ECHR and CJEU, summarising overall concerns of yet unassessed impact of technology on judicial rulings. Simultaneously, the team has summarised currently available technical solutions, has indicated useful means of their application and has come to an overall encouraging conclusion on welcoming of impact of technologies to judicial work.

The presented team paper once again emphasizes the most valuable part of THEMIS program: a power of persuasive argumentation, ability to provide convincing reasoning and brilliant use of a rear opportunity for judges to change their natural position in proceedings – to step into shoes of debating parties and presenting their important share - a powerful and lasting impact on future of legal profession.

³ ICJ: Judges' and Prosecutors' Freedoms of Expression, Association and Peaceful Assembly Submission to the United Nations Special Rapporteur on Independence of Judges and Lawyers for his upcoming report to the Human Rights Council (February 2019), p. 11 (<https://www.icj.org/wp-content/uploads/2019/02/Universal-SRIJL-Judges-Advocacy-non-legal-submission-2019-ENG.pdf>)

⁴ ENCJ report: Judicial Ethics – Principles, Values and Qualities", p. 6.

ROBERT RENZLER
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TUTOR: MICHAEL ORTNER

REVISITING THE 'TRADITION OF SILENCE'

A NEW APPROACH TO FREEDOM OF EXPRESSION OF JUDGES

This paper analyses the various restrictions imposed on judges' freedom of expression by national statutes and self-binding international and national documents. The so-called 'tradition of silence' – according to which judges should only speak through their judgments and refrain from any other form of public expression – must be revisited due to changes in modern societies such as modern forms of communication on social media.

We will argue that the right to a fair trial and the principle of impartiality, which might at first glance conflict with a judge's right to express her opinion, are already well-protected and ensured by national procedure law (e.g. recusal of the judge, motions to disqualify the judge). Moreover, public trust in the judiciary will be fostered through a new approach based on transparency and honesty.

Therefore, the 'tradition of silence' should be replaced by a more liberal approach to freedom of expression. In conclusion, we will propose a Code of Conduct offering more clear-cut guidelines for judges on what kind of public statements should be allowed and what kind of statements should be prohibited. Judges adhering to this new Code of Conduct should not be afraid of disciplinary actions when expressing their opinions openly in public.

KEY WORDS

Freedom of Expression
Fair Trial
Impartiality
Disciplinary Action
Social Media
Transparency

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1. INTRODUCTION

*'As a lawyer and as a citizen, I'd always rather know what justices and judges think rather than have enforced silence and pretend they have no views. We are in a relatively new era of public statements by justices, and I applaud it.'*¹

In line with the above-mentioned statement of Erwin Chemerisky, dean of Berkeley Law School, we will propose a new approach of how to deal with freedom of expression of judges in a more liberal and less restrictive way. Our approach differs from what we call the 'tradition of silence' of judges, which has been promoted in many legal systems until today and is based upon many restrictions regarding free speech of judges within and outside their office. In a nutshell, we will argue that concepts such as the duty of discretion or other restrictions imposed on judges by legal statutes, regulations or codes of conduct render the participation of judges in public discourse and their exchange of views less transparent and procedural guarantees such as independence and impartiality less verifiable.

A judge inevitably has personal opinions. Adhering to the traditional understanding, it is paramount to 'conceal' these opinions from the public, thereby distrusting the public to be able to distinguish between the professional level, where a judge has to fulfil her role and to apply the existing law as part of the judiciary, and the personal level, where she should be able to participate in democratic discourse as a citizen.

In Austria, the discussion on limits of judges' freedom of expression has been fostered by the high-profile criminal case of former minister Karl-Heinz Grasser, who had been charged with corruption. The husband of the judge trying Grasser's case and a judge himself, made several statements via Twitter expressing an open dislike of Grasser's role as a politician before the case was assigned to his wife in criminal court (*'Husband's tweet case'*). He tweeted *'still relevant'* in a comment to a song *'Karl-Heinz'*, which includes lines such as *'when will you finally go to jail, Karl-Heinz...'*² Based on these tweets Grasser's lawyers accused the judge of being biased, even though the tweets were posted by her husband and not herself. The Higher Regional Court rejected Grasser's motion to take the judge off the case.³

These developments led to a vivid discussion in the general media⁴ and among the Austrian Association of Judges (*Österreichische Richtervereinigung*) on public statements made by judges, especially in the context of the use of social media. The Austrian Association of Judges on an institutional level adheres to the 'tradition of silence' in order to promote independence and impartiality of the judiciary and follows a rather cautious approach regarding the individual judges' freedom of expression. However, the Association itself is active in promoting the judges' rights and speaking out in the political debate.

In our opinion, social media has by now become part of our everyday lives and has changed our ways of communication and exchange of views. Many new challenges on how to deal with judges' freedom of expression have arisen due to the means of communication via social media; however, we will argue that the 'tradition of silence' does not fit with these new patterns of communication nor the modern understanding of checks and balances within a representative democracy and should therefore be revisited.

Judges should be able to participate in public discourse also via social media platforms as private individuals and should not be completely excluded from the cyberspace as social networking has been regarded as being within the ambit of the fundamental right to freedom of speech in several jurisdictions.⁵

We will therefore in a next step break down the discussion to the level of fundamental rights. The individual citizen's right to a fair trial under Article 6 ECHR seems at first glance to lead to restrictions on a judge's right to freedom of expression under Article 10 ECHR in the light of the 'tradition of silence', which follows the presumption that the principles of independence and impartiality can only be guaranteed by a silent judge. Subsequently, this paper will analyse the interplay between these two fundamental rights taking into account the ECtHR's jurisprudence on Article 6 ECHR and Article 10 ECHR, the international and national legal frameworks and national jurisprudence including disciplinary law. Finally, we will propose a Code of Conduct on freedom of expression of judges based on our more liberal approach.

¹ Chemerisky, Justices Have Free Speech Rights Too, *The New York Times* (16 July 2016).

² *'Wann geht der karlheinz endlich in hefn, der karlheinz wann muas der endlich ins loch'*; Kurier, *Grasser blitzt mit Ablehnungsantrag gegen Richterin ab* (7 December 2017), available at <https://kurier.at/chronik/oesterreich/grasser-blitzt-mit-ablehnungsantrag-gegen-richterin-ab/301.151.581>.

³ The Austrian Supreme Court is competent to decide on the matter of impartiality only if the defendant appeals the final decision of the Regional Court on the merits. An interim decision on the matter of impartiality only by the Austrian Supreme Court is not possible under Austrian criminal procedure law.

⁴ Die Presse, *Grasser lehnt Richterin ab: Wirbel um Twitter-Einträge* (6 December 2017), available at https://diepresse.com/home/innenpolitik/5334041/Grasser-lehnt-Richterin-ab_Wirbel-um-TwitterEintraege; Der Standard, *Tweets über Grasser bleiben vorerst folgenlos* (28 January 2017), available at <https://www.derstandard.at/story/2000097152811/grasser-tweets-vorerst-folgenlos>; Salzburger Nachrichten, *Ehemann twitterte: Befangenheitsantrag gegen Buwog-Richterin* (6 December 2017), available at <https://www.sn.at/wirtschaft/oesterreich/ehemann-twitterte-befangenheitsantrag-gegen-buwog-richterin-21403891>.

⁵ Eltis and Mersel, 'Revisiting the Limits of Judicial Expression in the Digital Age: Striving towards Proportionality in the Cyberintimidation Context', 38 *National Journal of Constitutional Law* (2018) 247, at 254.

2. REVISITING THE 'TRADITION OF SILENCE'

The 'tradition of silence' exercised by judges, who should – according to this concept – only speak through their judgments and refrain from any other form of expression in their public function as well as in their private function, has been especially prevalent in common law countries. In mid-1950s Britain, Lord Russell of Liverpool was refused permission by the Lord Chancellor to publish his book *'The Scourge of the Swastika'*, a sensational history of Nazi war crimes as long as he continued to hold judicial office. The following year, the then Lord Chancellor Lord Kilmuir refused to permit senior judges to participate in a BBC radio programme on the subject of eminent judges of the past.⁶ He was of the opinion that the judiciary should not get involved in broadcasts: *'... every utterance which [a judge] makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the scope of criticism. It would moreover, be inappropriate for the Judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment.'* These so-called *'Kilmuir rules'* regarding the prohibition on judicial engagement with the media were abolished in 1987, but they are still an excellent example of how the 'tradition of silence' was deeply anchored in the common law tradition.

The reasons for the silence of judges in common law as well as in civil law tradi-

tions have been manifold: avoiding the appearance of bias and prejudice, excluding grounds for recusal or disqualification of judges for off-bench expression (*iudex suspectus*), preserving the dignity of the office and guaranteeing the right to a fair trial under Article 6 ECHR.

It is still uncontested nowadays that judges must refrain from any comments on pending cases before them. Regarding their private lives outside the office, what can and what cannot be said by judges, however, is not as clear-cut any more. The means of communications and the ways of expressing one's opinion have changed rapidly over the last decades. New challenges have arisen due to judges' social media usage on internet platforms such as Facebook and Twitter, ranging from smaller issues whether judges can become online 'friends' with attorneys⁷ to bigger problems whether judges can counter cyber-intimidation and besmirching of the judiciary.⁸

3. THE RIGHT TO A FAIR TRIAL

The right to a fair trial (Article 6 ECHR) states that in determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The most important facet regarding our topic is the right to be tried by an independent and impartial institution of decision-making. The two key concepts of

independence and impartiality, which we will try to define in a first step, are closely linked.⁹

Independence has to be guaranteed through the separation of powers in relation to all other public institutions as well as to the procedural parties.¹⁰ Appearances are also of importance, whereas the essential criterion is whether an objective observer would see no cause for concern about the judge's conduct in the circumstances of the actual case.¹¹

Judicial independence leads to the concept of judicial discretion, which is the power of the judiciary to make decisions based on the judge's discretion. Judicial discretion can lead to a range of possible decisions and is only constrained by legislation.

Impartiality means the absence of prejudice or bias.¹² It is on the one hand measured in a subjective way, as subjective attitudes such as personal conviction and behaviour could lead to a biased decision, on the other hand in an objective way, as certain objective circumstances lead to doubts in the judge's impartial-

ity.¹³ When following the subjective approach, the impartiality of a judge must be presumed until there is proof of the contrary.¹⁴

3.A. THE RIGHT TO A FAIR TRIAL IN SELECTED CASE LAW OF THE ECtHR

In the case *Wettstein v. Switzerland*¹⁵ the ECtHR ruled that there was an appearance of bias and therefore a violation of Article 6 ECHR as two practising lawyers who were part-time judges of an administrative court had been involved in legal cases against the applicant in the past. The ECtHR held that it follows a subjective as well as an objective approach when ascertaining impartiality. It found that there were no indicators for a subjective bias of the acting judges. As far as the objective approach is concerned, the ECtHR pointed out that *'What is at stake is the confidence which the courts in a democratic society must inspire in the public.'* Thus, the standpoint of the procedural parties regarding impartiality of the judges is important, but not decisive. The criterion is whether this fear is objectively justified such as in the above-mentioned case.

⁹ ECtHR, *Guide on Article 6 of the European Convention on Human Rights* (30/04/2019), para 79 at 20, available at https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf.

¹⁰ ECtHR, *Mosteanu and Others v. Romania*, Appl. no. 40756/06, 41508/07, 50806/07, Judgment of 26 November 2013; ECtHR, *Sovtransavto Holding v. Ukraine*, Appl. no. 48553/99, Judgment of 25 July 2002; ECtHR, *Beaumont v. France*, Appl. no. 15287/89, Judgment of 24 November 1994; ECtHR, *Sramek v. Austria*, Appl. no. 8790/79, Judgment of 22 October 1984. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

¹¹ ECtHR, *Clarke v. the United Kingdom*, Appl. no. 23695/02, Judgment of 13 May 2008; ECtHR, *Sacilor Lormines v. France*, Appl. no. 65411/01, Judgment of 9 November 2006; ECtHR, *Sramek v. Austria*, Appl. no. 8790/79, Judgment of 22 October 1984; T. Öhlinger and H. Eberhard, *Verfassungsrecht* (10th ed., 2014), at 445.

¹² ECtHR, *Wettstein v. Switzerland*, Appl. no. 33958/96, Judgment of 21 March 2001; ECtHR, *Micallef v. Malta* [GC], Appl. no. 17056/06, Judgment of 15 October 2009; ECtHR, *Nicholas v. Cyprus*, Appl. no. 63246/10, Judgment of 9 January 2018.

¹³ ECtHR, *Guide*, *supra* note 9, para 95 f at 22; T. Öhlinger and H. Eberhard, *supra* note 11, at 445f; ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], Appl. no. 55391/13, 57728/13, 47041/13, Judgment of 11 November 2018.

¹⁴ ECtHR, *Micallef v. Malta* [GC], Appl. no. 17056/06, Judgment of 15 October 2009; ECtHR, *Buscemi v. Italy*, Appl. no. 29569/95, Judgment of 16 September 1999.

¹⁵ ECtHR, *Wettstein v. Switzerland*, Appl. no. 33958/96, Judgment of 21 March 2001.

⁶ Rubin, 'Judicial Free Speech versus Judicial Neutrality in Mid-Twentieth Century England: The Last Hurray for the Ancien Regime?', *27/2 Law and History Review (LHR)* (2009) 373, at 374.

⁷ Wilson, 'Let's Be Cautious Friends: The Ethical Implications of Social Networking for Members of the Judiciary', *7 Washington Journal of Law, Technology & Arts (Wash. J. L. Tech. Arts.)* (2012) 225, at 225f.

⁸ Eltis and Mersel, *supra* note 5, at 247f.

In the case *Micallef v. Malta*¹⁶ the ECtHR stated that close family ties between the opposing parties' barrister and the judge objectively justified the applicant's fears that the presiding judge lacked impartiality although there had been no evidence for a subjective bias. The ECtHR emphasized that *'even appearances may be of a certain importance or, in other words, "justice must not only be done, it must also be seen to be done". What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw.'*

In the case *Nicholas v. Cyprus*¹⁷ the son of one of the judges who had decided on the applicant's case had been married to the daughter of a managing partner of the law firm representing the defendant. Also in this case the Court held that there had been a violation of Article 6(1) ECHR. The ECtHR clarified that in the vast majority of cases concerning issues of impartiality it has focused on the objective test. It explained that

in order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. The existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. ... In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public.

In these three cases, subjective reasons for bias were not detectable nor questioned by the applicants. The focus of the reasoning was on the objective approach as the ECtHR argued that the courts inspire a certain confidence in the legal system in democratic societies and that this confidence is at stake if there is an objectively justified fear of partiality. It also pointed out the importance of rules of withdrawal which have to be guaranteed under national procedure law such as the duty of the judge to disclose any circumstances which could give rise to an appearance of bias at the beginning of the proceedings.

3.B. THE RIGHT TO A FAIR TRIAL IN THE AUSTRIAN NATIONAL LEGAL FRAMEWORK

The right to a fair trial is embedded in various provisions under national procedure law. Criminal procedure law as well as civil and administrative procedure law include provisions concerning impartiality of judges and rules of withdrawal and recusal. In the interest of the credibility of the judiciary, the Austrian Supreme Court established a strict standard for impartiality.¹⁸ It is sufficient for a party to prove that there are objectively justified reasons which lead to an appearance of partiality. The Supreme Court also held that, in the interest of the reputation of the judiciary, the standard of assessing impartiality has to be strict, but it should not lead to means for the procedural parties to reject judges who they consider inconvenient.

A balanced procedure is guaranteed by the principle of a fixed allocation of cases.¹⁹ This jurisprudence of the Austrian Supreme Court is in line with the jurisprudence of the ECtHR on Article 6 ECHR.

As far as secondary employment beyond the public office is concerned, judges must avoid all kinds of employment that would lead to appearances of bias.²⁰

To sum up, the Austrian national jurisprudence on impartiality is following the same approach as the ECtHR. It is obvious that the strict rules focusing on appearances of partiality being sufficient for causing a violation of Article 6 ECHR may lead to interferences with the freedom of speech. Public statements by judges guaranteed by their fundamental rights under Article 10 ECHR may cause appearances of partiality. In the 'tradition of silence' this dilemma led to a restriction of the judges' right to free speech which was imposed by the law (e.g. concerning secondary employment § 63(2) RStDG²¹) or imposed by judges themselves in form of a self-binding Code of Conduct. In our opinion, it is questionable whether this approach balances the two fundamental rights adequately and gives the necessary weight to the judge's own right of free speech in a liberal society.

3.C. IMPARTIALITY BEING GUARANTEED BY PROCEDURAL RULES OF WITHDRAWAL AND RECUSAL

In our opinion, a judge – always outside of the courtroom and excluding pending cases – should within the given legal frameworks be able to express her opinions freely and openly and make use of her fundamental rights like any other citizen. Of course, it then might happen that a judge has to decide a case regarding certain issues on which she has expressed her opinion before in a certain way. The judge should in such a case recuse herself to avoid the appearance of bias and prejudice. Nevertheless, the approach of openness and transparency will lead to a better understanding of judges as citizens and will not diminish the citizens' trust in the judicial system as will be elaborated on later.

Also, the ECtHR pointed out that the rules of recusal and withdrawal are important when regarding impartiality. As there are several procedural provisions governing the recusal and withdrawal of judges in the national legal systems, there are already well-functioning rules that guarantee impartiality.

¹⁹ Supreme Court (Austria), 26 February 1998, RIS-Justiz RS0109379. Fixed allocation of cases means that all cases within a court are distributed according to objective criteria in advance, such as initial letters of the surname of the first party or rotation principles which lead to a balanced workload.

²⁰ Decree of the Ministry of Justice (Austria), BMJ-Pr517.00/0004-Pr 6/2015.

²¹ Austrian Judiciary and Public Prosecution Act - Richter- und Staatsanwaltschaftsdienstgesetz (Austria), BGBl. Nr. 305/1961.

¹⁶ ECtHR, *Micallef v. Malta* [GC], Appl. no. 17056/06, Judgment of 15 October 2009.

¹⁷ ECtHR, *Nicholas v. Cyprus*, Appl. no. 63246/10, Judgment of 9 January 2018.

¹⁸ Supreme Court (Austria), 22 November 2011, 4 Ob 186/11y.

Due to these rules, the judge has to recuse herself in certain circumstances and the parties have the right to file a motion for disqualification as well. In combination with the strict approach focusing on appearances, impartiality is already ensured in a very practicable way and it is questionable if judges should be constrained by the legislator or themselves via self-constraint on their free speech in order to avoid the appearance of bias.

A more openly exercised right to free speech of judges – also via social media, where their statements are distributed among a larger public – would lead to more recusals by judges and more motions to disqualify judges by parties. Dealing with such recusals and withdrawals would not lead to any challenges for our legal system as we already have the procedural instruments on how to deal with such situations. Not every motion to disqualify would lead to actual withdrawal, as according to the Austrian Supreme Court's jurisdiction the rules of withdrawal cannot be interpreted as a means of getting rid of judges considered inconvenient by the parties. More withdrawals would lead to more rotation among judges regarding the cases assigned to them, which would also cause no problem for the legal system as there will be a sufficient number of other judges without appearances of partiality in the case in question. As long as those rotations are predetermined up front, like it is already done in the case assignment plan deriving from the fixed allocation of cases at each court, no breach of any fundamental right, especially not the right to a fair trial, will be constituted. One

must keep in mind that recusals or motions to disqualify could lead to longer proceedings. However, in practice the decision on a recusal can be dealt with by the president of the court within a minimum of time. If the motion for recusal is dismissed, the trial can continue immediately. If the recusal is granted, the case would be allocated to another judge who will reschedule the case as soon as possible. Parties have to file a motion to disqualify the judge as soon as they know about the circumstances constituting a possible bias. If they omit to file a motion to disqualify, they lose their right to file it at a later stage of the trial.²² The judge as well has to recuse herself at the very beginning of the case. The delay resulting from recusals or motions to disqualify therefore is neglectable in a majority of cases.

Being aware of the importance of independence and impartiality of the judicial system from political or other influences, we think that these two valuable principles can be best achieved by transparency and not by restrictions. As the enactment of the rules of impartiality is also regarded as a process which ensures a certain confidence of the public in the functioning of the legal system as a whole, more transparency would encourage this confidence of the public. In a system following the 'tradition of silence', the procedural parties do not know the judge's opinion on general issues whereas in our model the judge might have expressed his opinion in a public way. An openly expressed statement having a negative impact on the appearances of the judges' impartiality would lead to a recusal of the judge her-

self.²³ This would also ensure the public trust as the judge is seen to be acting within the legal framework. If the judge does not withdraw herself in such a case, the party has still the right to file a motion to disqualify her which might be granted if the statement really objectively justifies appearances of bias. This new approach might lead to a certain 'cleansing effect' establishing a higher trust in transparency and the functioning of our legal system. Every time a judge recuses herself from a case the public trust is fostered, as the judiciary as a whole has shown that it is willing to uphold the right to a fair trial and will comply with it even before one of the parties files a motion to disqualify the judge.

4. FREEDOM OF EXPRESSION OF JUDGES

It is uncontested by various international, European and national legal frameworks that judges, as all other citizens, enjoy freedom of expression as a basic human right. However, immediate ethical and deontological exceptions are to follow on how judges must behave in a special way in order not to undermine principles that are considered more important than their individual human rights such as impartiality and independence of the judiciary or dignity of

the office. These restrictions to judges' freedom of speech are considered to be necessary not only by legislatures, but also by judges themselves as the following examples of self-binding soft law documents will show.

The Universal Charter of the Judge, which was adopted by the International Association of Judges, states in Article 3(5): *'Judges enjoy, as all other citizens, freedom of expression. However, while exercising this right, they must show restraint and always behave in such a way, as to preserve the dignity of their office, as well as impartiality and independence of the judiciary.'* Furthermore, Article 6(2) and 6(4) of the above-mentioned Charter require: *'The judge must refrain from any behaviour, action or expression of a kind effectively to affect confidence in his/her impartiality and independence... He/she must avoid any possible conflict of interest.'*²⁴

Similarly, the Resolution on Judicial Ethics, adopted by the Plenary Court of the European Court of Human Rights in 2008, asks judges in Article 1 to *'refrain from any activity or membership of an association, and avoid any situation, that may affect confidence in their independence'* and in Article 2 to *'avoid conflicts of interest as well as situations that may be reasonably perceived as giving rise to a conflict of interest'* and goes on to request in Article 6 that *'Judges shall exercise their*

²³ A judge could certainly evade certain cases by expressing her opinions on a lot of topics. However, as such a behaviour clearly violates professional ethics, we would assume that most judges would not make use of such unfair practises in order to avoid workload. Due to the fixed allocation of cases a new case will be assigned to the judge immediately. Therefore the workload cannot be evaded.

²⁴ International Association of Judges, *The Universal Charter of the Judge*, available at <https://www.iaj-uim.org/universal-charter-of-the-judges/>. See similar provisions in Opinion No. 18 of the Consultative Council of European Judges on *'The Position of the Judiciary and its Relation with the other Powers of State in a Modern Democracy'* at para 42, available at <https://rm.coe.int/16807481a1>.

²² RIS-Justiz RW0000843.

freedom of expression in a manner compatible with the dignity of the office.²⁵

The Bangalore Principles of Judicial Conduct, issued by the Judicial Group on Strengthening Judicial Integrity, specify in Article 4(11) that 'subject to the proper performance of judicial duties, a judge may: (a) Write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters; ... (d) Engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.'²⁶

The Consultative Council of European Judges (CCJE) highlights in Opinion No. 7 that judges should not express themselves in the press or make public statements in the press on cases they are in charge of.²⁷ In Opinion No. 3 the CCJE underlines that judges should not be isolated from the society in which they live in and that they should enjoy the fundamental rights and freedoms protected by the ECHR. However, a reasonable balance between the degree to which judges may be involved in society and the need for them to be and – may be even more important as the question of appearance is always raised in these contexts – be seen as independent and impartial while exercising their duties must be struck.²⁸

The jurisprudence of the ECtHR is in line with the premise that on the one hand judges, like all human beings, enjoy the right to freedom of expression enshrined in Article 10 ECHR as well as other basic human rights such as freedom of thought, conscience and religion (Article 9 ECHR) or freedom of assembly and association (Article 11 ECHR), whereas on the other hand it might be legitimate for the member states to impose a certain duty of discretion on judges regarding their judicial status.

4.A. FREEDOM OF EXPRESSION OF JUDGES IN THE CASE LAW OF THE ECtHR

In case of a member state's interference with the right of freedom of expression guaranteed by Article 10 ECHR, this interference must generally be prescribed by law, it needs to serve a legitimate aim and it must be proportionate. The member states are granted a certain margin of appreciation concerning the freedom of expression of civil servants under the ECtHR's case law. However, any interference with the freedom of expression of a judge in particular calls for close scrutiny of the ECtHR.

In cases concerning judges and their right to freedom of expression under Article 10 ECHR the ECtHR considers the judge's statement in question in the light of the special circumstances of the case

such as the office held by the applicant, the content of the impugned statement, the context in which it was made and the nature and severity of the penalties imposed.²⁹

In the most prominent recent case regarding freedom of expression of judges, *Baka v Hungary*³⁰, the Grand Chamber found a violation of Article 10 ECHR. Judge Baka, in his capacity as the President of the Supreme Court and the President of the National Council of Justice (*office held by the applicant*), publicly criticized several controversial legislative and constitutional reforms in Hungary such as the reform of the lowering of the mandatory retirement age for judges from 70 to 62 (*content of the impugned statement*). He had an explicit legal obligation to express his opinion on parliamentary bills affecting the judiciary (*context in which the statement was made*). By changes of the constitution, Baka's six-year term of office was brought to a premature end and the Grand Chamber considered that the facts formed prima facie evidence of a causal link between Judge Baka's views expressed publicly in his professional capacity and the termination of his mandate (*severity of the penalties imposed*). The ECtHR highlighted the 'chilling effect' on the exercise of freedom of expression and the risk of discouraging judges from making critical remarks on reforms concerning the judiciary for fear of losing their judicial office and held that the interference on Judge Baka's right to freedom of expression had not been necessary in a democratic society.

Another well-known case³¹ regarding a high-ranking judge took place in Liechtenstein, where Judge Wille, the President of the Administrative Court (*office*), expressed his opinions on constitutional matters in a public lecture (*context*). He argued that the Constitutional Court was competent to decide on the 'interpretation of the Constitution in case of a disagreement between the Prince (Government) and the Diet'³² (*content*). The Prince of Liechtenstein, who disagreed with the applicant's statement, informed Judge Wille after this lecture via a letter that he would not reappoint him as President of the Administrative Court (*penalty*). The ECtHR underlined that Judge Wille's opinion could not be regarded as an untenable proposition, since it was shared by a considerable number of lawyers in Liechtenstein. Furthermore, the lecture did not contain remarks on pending cases or severe criticism or insults to the Prince. Therefore, considering the above-mentioned criteria and the close scrutiny-test, the interference was not necessary in a democratic society and Article 10 ECHR had been violated.

In *Kudeshkina v. Russia*³³, a judge at the Moscow City Court (*office*) gave interviews to newspapers and a radio station when running as candidate in a general election to the Russian Duma (*context*). She expressed doubts as to the independence of the Russian judiciary and alleged that '*instances of pressure on judges were commonplace*' (*content*) referring to her own experience in a certain case.

²⁹ Venice Commission, *Report on the Freedom of Expression of Judges*, adopted by the Venice Commission at its 103rd Plenary Session (Venice, 19-20 June 2015), CDL-AD(2015)018, at para 67.

³⁰ ECtHR, *Baka v. Hungary* [GC], Appl. no. 20261/12, Judgment of 23 June 2016.

³¹ ECtHR, *Wille v. Liechtenstein* [GC], Appl. no. 28396/95, Judgment of 28 October 1999.

³² The unicameral Parliament of Liechtenstein is referred to as 'Diet' (*Landtag*).

³³ ECtHR, *Kudeshkina v. Russia*, Appl. no. 29492/05, Judgment of 26 February 2009.

²⁵ ECtHR, Plenary Court, *Resolution on Judicial Ethics*, available at https://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf; see also ECtHR, Judicial Seminar 2018, *The Authority of the Judiciary, Background Document*, available at https://www.echr.coe.int/Documents/Seminar_background_paper_2018_ENG.pdf, at 16.

²⁶ Judicial Group on Strengthening the Integrity of the Judiciary, *The Bangalore Principles of Judicial Conduct* (2002), available at https://www.unodc.org/res/ji/import/international_standards/commentary_on_the_bangalore_principles_of_judicial_conduct/bangalore_principles_english.pdf.

²⁷ Consultative Council of European Judges, *Opinion No. 7 on 'Justice and Society'* (2005), at 34, available at <https://www.coe.int/en/web/ccje/opinion-n-7-on-justice-and-society>.

²⁸ Consultative Council of European Judges, *Opinion No. 3 on 'Principles and Rules Governing Judges' Professional Conduct, in particular Ethics, Incompatible Behaviour and Impartiality'* (2002), at 27, available at <https://rm.coe.int/168070098d>.

Judge Kudeshkina was eventually not elected to the Duma and at the same time the President of the Moscow Judicial Council sought her removal from office claiming that she had behaved in a manner incompatible with the authority of a judge during the election campaign (*penalty*). The ECtHR found that the applicant had raised a very important matter of public interest which had to be open to free debate in a democratic society and that her statements were not entirely devoid of factual grounds. The ECtHR held that her right under Article 10 ECHR had been violated, as the penalty of dismissal from judicial service was disproportionately severe and could have a 'chilling effect' on judges wishing to participate in discussions on the effectiveness of the judicial system.

In all three above-mentioned cases the ECtHR considered the consequences of the interference for society as a whole and assessed whether the limitations had a 'chilling effect' as well as the consequences for the individual judge such as financial consequences and the loss of their office. The question of whether the impugned statement could be seen as part of a public debate influenced the outcome of the ECtHR's assessment as well as the motive of the judge behind her statement or the appropriateness of the expressions.³⁴ In all three cases the judges expressed their opinions and concerns on important political matters

of general public interest such as constitutional reforms affecting the judiciary, the system of checks and balances or the independence of the judiciary from governmental influence.

So far, only a limited number of types of expressions of judges has been covered by the ECtHR's jurisprudence. No case has been decided by the ECtHR on matters such as judges protesting in the streets in their robes, judges calling for a strike, judges expressing their opinions on social media such as Facebook or Twitter, judges being politically active in town councils or being members of associations³⁵.

4.B. FREEDOM OF EXPRESSION OF JUDGES IN THE NATIONAL LEGAL FRAMEWORKS

In various member states of the Council of Europe such as France, Germany or Italy there are no constitutional provisions concerning the freedom of expression of judges and no specific restrictions of expression of judges on a constitutional level either.³⁶

On a statutory level, however, most member states impose restrictions on the judges' behaviour in general and on their right to freedom of expression in particular. These restrictions on the judges' right to freedom of expressions concern statements made in both the judge's official and in her personal capacity.

1. The Austrian Example

Section 57(3) of the Austrian Judiciary and Public Prosecution Act (*RStDG*) reads as follows: '*Judges and prosecutors have to conduct themselves in and outside of office in a manner not endangering the confidence in the administration of justice or the reputation of their professions.*'

The '*Declaration of Wels*' ('*Welser Erklärung*'),³⁷ which is a self-binding Code of Conduct adopted by the Austrian Association of Judges, states in Article 1 that judges are the guarantors of the rule of law and that fundamental rights are the foundation of their behaviour and their decisions. Article 9 of the Declaration of Wels requires that judges also carefully and critically examine their behaviour and statements made outside of office in the private realm in order not to give way to the danger of appearances of partiality.

The Austrian Judiciary and Public Prosecution Act as well as the '*Declaration of Wels*' follow the '*tradition of silence*' and are concerned about the confidence of the public in the judiciary. Both want to avoid any appearance of partiality of judges. To avoid such appearances the '*Declaration of Wels*' explicitly prohibits judges from participating in a political party.³⁸ It is interesting to note that the self-binding Code of Conduct goes further than the legal provisions of the Austrian Judiciary and Public Prosecution Act in requiring a self-imposed and therefore a more rigid self-restraint on judges' freedom of speech. Moreover,

what poses a problem to the sanctioning of improper behaviour by judges is the vaguely formulated wording of section 57(3) *RStDG*, which leaves much room to *ex post* interpretation by the disciplinary senate and the appellate court.

The Austrian disciplinary law states that a judge who violates her professional or official duty may be subjected to a disciplinary punishment.³⁹ In contrast to criminal offences, disciplinary law regulates no specific categories of offences *ex ante*.

We will illustrate the inconsistency arising from the vague wording of the legal framework by the following selection of case law.

(a) Statements during public hearings

The Supreme Court stated that when applying section 57(3) *RStDG* one must always keep in mind that the conduct of the judge concerned must diminish the reputation of the judiciary as a whole in its professional capacity in order to constitute a disciplinary offence. Criticism towards another court aiming to stop influence from that court, be it unduly rough and coarse, is in principle not apt to diminish the reputation of the judiciary as a whole.⁴⁰

In another ruling, the Supreme Court held that unseemly criticism from a judge on the professional capacity of other judges could constitute a disciplinary offence.⁴¹

A statement from a judge towards the

³⁴ Dijkstra, 'The Freedom of the Judge to Express his Personal Opinions and Convictions under the ECHR', 13/1 *Utrecht Law Review* (2017) 1, at 8.

³⁵ In *Maestri v. Italy*, Appl. no. 39748/98, Judgment of 17 February 2004, the ECtHR found a violation of Art. 11 ECHR concerning a judge who had been a Freemason. The Italian authorities imposed a disciplinary sanction on the judge. The ECtHR held that the condition of foreseeability of the relevant provisions had not been satisfied and therefore the interference had not been prescribed by law. It found a violation of Art. 11 ECHR, however, without ruling on the issue of compatibility of being a Freemason and a judge at the same time; see ECtHR Background Document, *supra* note 25 at 8.

³⁶ Venice Commission, *supra* note 29, at para 11-12.

³⁷ Österreichische Richtervereinigung, *Welser Erklärung* (2007), available at <https://richtervereinigung.at/ueber-uns/ethikerklaerung/>.

³⁸ Summer, '10 Jahre Welser Erklärung Art. IX. Außerdienstliches Verhalten', 9 *Österreichische Richterzeitung (RZ)* (2018) 191.

³⁹ § 101 *RStDG* (Austria), BGBl. Nr. 305/1961.

⁴⁰ Supreme Court (Austria), 18 March 2002, Ds 8/01, RIS-Justiz, RS 0116181.

⁴¹ Supreme Court (Austria), 4 March 2014, Ds 26/13, RIS-Justiz RS0129297.

presiding judge in an ongoing trial, that he *'sits in the trial for nothing'*, constitutes a disciplinary offence, because it does not follow the judge's duty to be objective, even if he meant to address the issue of efficient trial management and over-excessive questioning by the presiding judge and the public prosecutor.⁴²

(b) Statements outside of office

The Supreme Court also held that it unsettles the trust of the public in the judiciary if a judge implies that the judiciary as a whole or certain judges are bribable.⁴³

A judge who advocated the monarchy as a form of government by singing the emperor's anthem was found guilty of a breach of official duties by the Austrian Supreme Court in 1921.⁴⁴

Insulting statements from a judge out of office and with no relation whatsoever to his professional capacity, which were made in an understandable heat of the moment, were found not to be matters for disciplinary actions, although such statements might in principle be punishable under criminal law.⁴⁵

As there are rather few published cases concerning free speech of judges,⁴⁶ we will now draw the attention to discipli-

nary law concerning public officials such as policemen. A policeman who communicated via WhatsApp in an inappropriate and aggressive way (he condemned the voters of a certain political party and insulted the public in general) was found guilty for committing a disciplinary offence. This conduct was considered to be harming the dignity of his office.⁴⁷ Another policeman who posted insulting comments about a refugee on Facebook was also found guilty for committing a disciplinary offence.⁴⁸ In these two cases the insulting and inappropriate content of the statements was crucial for the conviction.

(c) Contact with the media

Judges who maintain contact with the media concerning their own cases do not only breach their duty but also endanger the public confidence in the judiciary. Especially when the statement involves a certain evaluation of the parties' behaviour in court, the judge's comment constitutes a disciplinary offence.⁴⁹ Thus a judge who talks to the media about her cases (or who posts about those cases on social media) might commit a disciplinary offence.

In another case a judge who had referred to his official position as president of a district court in a letter to the editor

implicitly incited the public to commit crimes and encouraged criminals in an ironic way to commit their offences in a ruthless manner. He accused the Federal President of exercising his power of pardoning in a biased way in favour of perpetrators committing severe crimes. The Supreme Court ruled that this behaviour constitutes a breach of official duties.⁵⁰

As these decisions show, it is difficult for a judge to determine in advance which statements might lead to a disciplinary offence. Decisions by the highest courts on disciplinary matters, interpreting the rather vague legal disciplinary provisions of the national legal framework, are often taken on a case-to-case basis. Thus, a potential collision with the principle of legal certainty arises.

2. The German Example

To illustrate that the uncertainty of what constitutes a disciplinary offence is not only limited to the Austrian legal framework, we will give a brief insight into the German legal system. The German Judiciary Act provides the same special obligations for judges under its section 39 as the above-mentioned Austrian Judiciary and Public Prosecution Act: *'(Preservation of independence): In and outside their office, as well as in political activities, judges have to conduct themselves in a manner not endangering the confidence in their independence.'*

The so-called principle of moderation (*'Mäßigungsgebot'*⁵¹), a principle developed for duties of civil servants, is mainly relevant for conduct outside the office, when a judge should not mention her office when she expresses political opinions in public with the exception of legal questions. The judge must in particular not cause the impression of giving an official statement when expressing her private opinion.⁵²

The German Association of Judges (*'Deutscher Richterbund'*) highlights the importance of moderation and restraint of judges both in office and otherwise in their recommendation concerning judicial ethics in Germany.⁵³

⁵⁰ Supreme Court (Austria), 20 December 1976, Ds 8/76.

⁵¹ See for instance the case Bundesverwaltungsgericht (Germany) 1988 NJW 1748.

⁵² Karpen, Mölle and Schwarz, 'Freedom of Expression and the Administration of Justice in Germany', IX/1 *European Journal of Law Reform* (2007) 63, at 89.

⁵³ Deutscher Richterbund, *Judicial Ethics in Germany* (2018), available at https://www.drj.de/fileadmin/DRB/pdf/Ethik/1901_DRB-Broschuere_Richterethik_EN_Judicial_Ethics.pdf.

⁴² Supreme Court (Austria), 22 September 1997, Ds 5/97, RIS-Justiz RS0108406.

⁴³ Supreme Court (Austria), 1 July 1994, Ds 1/94. He called the judiciary a *'prostitute of politics'*.

⁴⁴ Supreme Court (Austria), 7 October 1921, Ds 24/21.

⁴⁵ Supreme Court (Austria), 21 September 1976, Ds 3/76, not in line with Supreme Court (Austria), 26.04.1982, Ds 5/81.

⁴⁶ Decisions of the first instance, the disciplinary senate, are not published in the RIS-database. Therefore we only have access to the Supreme Court's decisions regarding disciplinary law. The Legal Information System of the Republic of Austria (RIS) is a platform and database providing information on Austrian law such as legislation in its current version (federal and state), law gazettes (federal and state) and case law. The database covers the jurisprudence of the Austrian Supreme Court and other courts. Only selected cases are published in full version.

⁴⁷ Disciplinary Commission (Austria), 41041-DK/2017.

⁴⁸ Disciplinary Commission (Austria), 42018-DK/2017.

⁴⁹ Supreme Court (Austria), 17 April 2013, Ds 2/13, RIS-Justiz RS0128651.

Judges should refrain from expressing themselves in such a way as to damage the trust and respect entrusted in the judiciary. The German Association of Judges, in contrast to the Austrian Association of Judges, has not yet adopted an Ethical Code of Conduct. The German Association of Judges, however, plans to adopt such a Code of Conduct in the near future, because in their opinion the German Judiciary Act is much too vague and offers no guidelines for judges on how to behave properly within office and in their free-time.⁵⁴

5. CONCLUSION

5. A. RIGHT TO A FAIR TRIAL

The right of an accused in criminal proceedings or of the parties of civil proceedings to be tried by an independent and impartial judge is no acceptable justification to limit the freedom of expression of an individual judge in any case she does not preside or sits on the panel. The judiciary as a whole is responsible to organize the structure of the courts in a way that there are always judges available, who do not appear to be biased. There will always be judges who do not express their views in public on each and every topic. The duty of discretion only applies to cases assigned or known to the individual judge because of her office and not to abstract discussions. Therefore, the functioning of the judiciary will not suffer with regard to the right to a fair trial by fostering the right of judges to express their private

opinions outside of their office. As mentioned before, the only consequence of more recusals or motions to disqualify a judge might be more extensive proceedings, which however in our opinion poses only a marginal problem.

5. B. PUBLIC TRUST

We believe that the public voicing of personal opinions by judges will not be detrimental to the public trust and therefore cannot be used to legitimize a limitation of the right of free speech of judges. In the modern society patterns of communication have changed. Topics that were formerly discussed in small groups or discussed in a two-way communication via letter or e-mail are now distributed on social media and reach a larger group of people including strangers or unknown recipients. It has become popular to present one's opinions openly to a larger public. Our new approach takes this changed pattern of communication and presentation into account and allows judges in their private capacity to participate in public debates just as everyone else.

In a representative democracy, the legislative branch is legitimized and held accountable by elections. Therefore, transparency is paramount to enable the people to make an informed choice and keep a representative democracy working as intended. The foundation of a representative democracy is the enlightened individual, who has the information needed to make an informed choice and the trust by the people in each individual to make an informed decision

for herself.⁵⁵ Hence one of the pillars of a working democracy is the objective information of the public and the mutual trust of the citizens that everyone is capable of making an informed choice.

Regarding environmental matters, the European Union and many other states signed the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. In its preamble, the signatory states recognized the desirability of transparency in all branches of government, because transparency in decision-making and accountability strengthens the public support.⁵⁶ Based on this understanding, all signatory states were of the opinion that transparency in the decision-making process fosters the acceptance of democracy and decisions made within.

The same principle applies to the judiciary. Every judgment must state its reasoning and include an accurate assessment of evidence. The recipients of a decision must have the impression that it is the result of an exhaustive process and that the judge took into consideration all the information available, that she weighed all the factors in a reasoned and just manner and did not let the outcome be influenced by anything hidden or clandestine. The more the judge has laid open her decision-making process and the information she used – in a nutshell: everything which led to her judgment – the higher

the acceptance for her decision and also for the judiciary as a whole will be.

The three above mentioned examples of democracy, the Aarhus Convention and judicial reasoning clearly show that transparency is a cornerstone of many well-functioning systems.

The 'tradition of silence' does not facilitate the public trust. The (partly self-) imposed restrictions on the judges' public voicing of opinions may lead to the impression that the judiciary has something to hide and is not willing to participate in the open public discourse. By participating in the public discourse, the judiciary is also able to counter the impression of those who think that the judiciary sits in its ivory tower and is detached from the 'real' everyday life of the 'common' people.

Even when some judges voice shocking, unpopular or disturbing opinions, other judges will also engage in the discussion and therefore act as safeguards. The public then sees that the judiciary is able and willing to deal with a plurality of opinions.

Applying the reasoning from section 63(2) RStDG, which states that a judge must refrain from making any reference to being a judge, when she engages in secondary employment, the above stated only applies to the behaviour of a judge outside of her office.

⁵⁵ Kant, *Beantwortung der Frage: Was ist Aufklärung* (1784), Chapter one: 'Enlightenment is man's emergence from his self-incurred immaturity. Immaturity is the inability to use one's own understanding without the guidance of another. This immaturity is self-incurred if its cause is not lack of understanding, but lack of resolution and courage to use it without the guidance of another. The motto of enlightenment is therefore: Sapere aude! Have courage to use your own understanding!' But to be able to use the own understanding, it is paramount, that information is available to the people.

⁵⁶ United Nations Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (1998), available at <https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

⁵⁴ Jahn, *Richterbund will Ethik-Kodex für gesamte Justiz*, available at <https://rsw.beck.de/cms/?toc=njw.root&docid=387758>.

Based on the principles of a working democracy the enlightened citizen is capable to distinguish between a judge's office and her private opinions, even if she finds out about the judge's official position on the internet. We are fully aware that we have high expectations towards the enlightened citizens, but by doubting this ability we would doubt democracy itself. A judge will always base her decisions on the law.

When participating in the public discourse, the judge has to make clear that she makes that statement in her private capacity. There are several ways of how judges could make such a distinction. Firstly, the judge does not mention her public office when making public statements. Secondly, she uses a disclaimer and finally she states both the professional and the deviating private opinion on a topic at the same time and distinguishes clearly between them.

If a judge is being publicly criticized in her professional capacity, there must be a way that she can take legal action or protect herself against wrongful accusations. It is the duty of the employer to protect the judges from such wrongful allegations, especially if such offences are not within the ambit of criminal law. One solution would be that the Ministry of Justice files a claim against the offender. If the official authority decides not to do so, the judge herself can take legal action.

5.C. COMPATIBILITY OF THE NEW APPROACH WITH THE INTERNATIONAL LEGAL FRAMEWORK

At first glance, our new approach seems not to be in line with the various and often self-binding soft law documents of the international legal framework. However, we do believe that it depends on an interpretation of the dignity of the office and of public trust. As mentioned in the conclusion above, our new approach of a more liberal understanding of the freedom of expression of judges fosters public trust and is therefore not detrimental on how the public perceives the dignity of the office and the judiciary as a whole. The principle of impartiality is not endangered by judges speaking out more freely on a variety of topics. National procedural law ensures the impartiality of judges due to rules of recusal and the right of parties to file motions to disqualify a judge.

Already under the existent international legal framework, judges are welcome to speak out on topics regarding the judiciary such as legislative and judicial reforms. In our opinion it would be a waste of resources and know-how if judges, who might be experts or at least informed citizens even beyond matters concerning the judiciary on various topics regarding civil society, are not allowed to voice their opinions on these other topics more freely without the sanction of disciplinary measures or the self-restraint due to the 'tradition of silence'.

The 'special function' of judges in a democratic society does not necessarily lead to a restriction of the right to freedom of expression in order to avoid damaging the dignity of the office or public trust. If this 'special function' is interpreted in a positive way as judges being persons of trust, judges should be allowed to add their opinion to a plurality of opinions and gain the public's trust in the discussion.

Moreover, what we tried to introduce in order to avoid conflicts of our approach with the preservation of the dignity of the office is the division between the public function and the private realm of the judge. We are fully aware that any such distinction is not clear-cut. Any interested citizen might find out the real profession of a judge via the internet even when a judge acts in private and does not refer to his official position. However, what we want to highlight is the importance of this distinction for the judge. From her point of view she should clearly distinguish between comments made in an official function and comments which are merely her private opinion. We do believe that – even if this distinction seems *prima facie* formal and artificial – the informed public will acknowledge that it makes a difference whether a judge says something with reference to her profession and her office or whether a judge deliberately speaks out without any reference to her profession and her office and therefore acts in her private realm.

5.D. 'HUSBAND'S TWEET CASE'

When applying the outlined principles to the 'Husband's tweet case', the husband of the judge trying ex-minister Grasser's criminal case, who made several critical statements via Twitter already under the existing legal framework is not prohibited to post such statements. If the judge would have tweeted these statements herself, she would of course have been biased. Therefore, she would have had to recuse herself and therefore would not have posed an obstacle to independence and impartiality of the Austrian judiciary.⁵⁷

6. CODE OF CONDUCT

In conclusion, we are of the opinion that the 'tradition of silence' must be revisited and replaced by a more liberal approach based on transparency. As we already highlighted in the sections above regarding the ECtHR's case law and especially the Austrian and German disciplinary law, judges lack special rules of conduct on what kind of private statements are allowed and what kind of statements are prohibited either by legal provisions or by self-binding Codes of Conduct. Therefore, we will propose the following Code of Conduct for judges offering more clear-cut guidelines:

Having regard to Articles 6 and 10 of the European Convention of Human Rights, which ensure the right to a fair trial and freedom of expression;

⁵⁷ As rules of recusal and motions to disqualify differ among the member states, the ECtHR might grant a wide margin of appreciation concerning this issue.

Taking into account the key principles of independence and impartiality of the judiciary as preconditions for the rule of law;

Considering the importance of the principle of transparency for a liberal democracy;

Considering the importance of the public's trust and confidence in the judiciary;

The Austrian Themis team presents the following Code of Conduct on judges' freedom of speech:

1. Freedom of Expression

Judges, as all other citizens, are entitled to the fundamental right of freedom of expression.

2. Limitations

2.1. Judges shall exercise this fundamental right within the limits of criminal and civil law.

2.2. Judges shall not make public statements on pending cases that are attributable to them.

2.3. Judges shall not make public statements on cases known to them due to their public office.

2.4. Judges shall not make public statements in their professional capacity except on topics regarding the judicial system.

3. Private Statements

In their capacity as private citizens, judges are allowed to make any kind of statement which is not prohibited under Article 2(2)–(4) of this Code of Conduct, as long as they do not make any reference to their professional capacity or make it clear that it is their private opinion.

4. Disciplinary Law

Judges should not be subject to any disciplinary measures for statements other than those prohibited under this Code of Conduct.

EXPLANATORY NOTES

Ad Article 1:

In line with the prevalent jurisprudence of the ECtHR and national courts as well as the Universal Charter of the Judge, this Article is a declaration of the legal *status quo*.

Ad Article 2 para 1:

Just like any other citizens judges must exercise the right to freedom of expression within the limits of criminal law. They are liable under civil law for cases such as private damage claims concerning injury of reputation.

Ad Article 2 para 2 and 3:

Due to the duty of official secrecy, judges are not allowed to comment on their pending cases or cases known to them due to their public function even after a decision has been rendered and become legally binding. This provision is based on *de lege lata*.

Ad Article 2 para 4:

In order to comply with the principles of independence, impartiality and dignity of the office, judges should not make any public statements while exercising their public function. Especially appointed judges are assigned to release press statements on cases assigned to their court and are in charge of media coordination. These media judges perform their function in addition to their function as a judge. Their task is to inform the public on judgments, preliminary rulings

and on any other decisions in an objective and neutral way. This exemption should enable judges to introduce their professional experience into the public discourse and to allow objective criticism not only by professional representatives such as Associations of Judges.

Ad Article 3:

This Article constitutes the core of our liberal approach revisiting the 'tradition of silence'. Apart from the above-mentioned limitations, judges as any other citizens are allowed to make any statements whatsoever. It is obvious that judges within office and outside of office have to act within the limits of criminal and civil law. To uphold the public trust in the judiciary, it is of utmost importance that every recipient of a judge's private opinion knows of the private nature of the statement. Therefore, judges must pay attention that the recipient understands that a statement was made in the judge's private realm. This provision also includes the right of a judge to become online 'friends' with representatives of other legal professions.

Ad Article 4:

In line with our criticism on the case-to-case basis of decisions regarding disciplinary offences, the vague wording of the disciplinary statutes and the nature of punishment as *ultima ratio* of behaviour control, no disciplinary action against judges should be taken when exercising their right to freedom of expression.

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PERFORMANCE VS ETHICS: AN IMPOSSIBLE CHALLENGE FOR TODAY'S JUDGES?

Like many public-sector organisations in various European countries, the judiciary has come to adopt in the past decades New Public Management practices and processes. In this article, we analyse the challenges the notion of performance represents to judicial ethics and professional conduct. Driven by numbers, indicators and the need for efficiency, performance can represent a threat to the independence of the justice system and to professional conducts. However, the notion of performance also bears various similarities to traditional judicial duties, such as the proper administration of justice. Therefore, in order to prevent a potential shift towards a purely quantitative conception of justice, it seems necessary to adjust the notion of performance to the specificities of the justice system.

KEY WORDS

Performance
Judicial ethics
Professional conduct
Quantity
Quality
Independence.

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1. INTRODUCTION

In October 2018, the French General Inspectorate for the Administration of Justice, a body working for the Ministry of Justice, published a report entitled “Mission on the attractiveness of the functions of Prosecutor”, the aim of which was to identify and give qualitative solutions to the attractiveness of these functions. In December 2018, the French Audit Court released its own report on the Administration of Justice, called “Methodological approach to Justice costs”, the aim of which was to find a way to set quantitative standards to evaluate the needs of French courts and provide adequate financial resources. It notably pointed out “a progression in court subsidies, yet a degradation in performance”.

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This coincidence summarises the ambiguous discourse that European States have about their Justice Administrations, and judges and prosecutors themselves: on the one hand, a need for qualitative and humane Justice; on the other, the will to master costs and to provide efficient Justice.

“Performance” is not a legal word. It used to be a word referring to sport and entertainment: those who ordinary perform tend to be musicians, actors or athletes, because when they perform in front of an audience, they actually do a job. However, their work contains an extra spark - a pianist “performs” because any mistake he makes can potentially ruin everything. The piece he plays has to be played *perfectly*. Therefore, the second common usage of the word “performance” applies to the world of mechanics: as a machine

cannot do wrong, it naturally “performs”. When related to machines, the definition of performance changes slightly: a machine does its work perfectly when it produces the quantified amount of work it was programmed to produce. Thus, performance means two things: an extraordinary way to produce something – the entertainment meaning –, and a fully accomplished way to produce something – the mechanical meaning.

Ethics seem to be far from the idea of performance. They are a matter of quality rather than quantity. In the judicial field, ethics are halfway between the professionalism of judges and prosecutors and the idea of Justice that a society commonly shares. Judicial ethics traditionally merge into values: independence, impartiality, integrity, legality, etc - Judicial ethics can be defined as standards of behaviour in the judicial field, the way judges and prosecutors have to behave. Judicial ethics are dictated by the status of judges and prosecutors, their office within the State, their role as a constitutional and counter-power, designed to have balanced institutions. Above all, these standards are professional, yet there are some morals in them too. Together, they create a guideline for judicial officers, and this guideline provides the extra spark that transforms the simple application of Law into Justice.

The 1980s triggered a movement which is now a burning issue for European chanceries: “the need to rationalise judicial production [was] a reaction to the dramatic increase in judicial demand.”¹ Two different yet simultaneous things were expected of judges and prosecutors from then on: they had to solve

more cases with the same tools as before – subsidies, time and workforce. To help them do so, a new form of management gradually made its way into the Justice Administration: “New Public Management”. This concept, which emerged in the 1970s, became the dominant paradigm against which all public administrations/services should be tested: this included not only the justice system, but also hospitals and universities. It supposes that public administrations are not really different from private companies: as they have limited allowances and workforces, and as they need to produce results, their action can be quantified and optimised in a very pragmatic way. In other words, just like private companies, public administrations have to be productive and to *perform* well.

This managerial policy gave new meaning to the word “performance” and ushered in a new era of thinking about the justice system, which was to have a real impact on the professional conduct of judges and prosecutors. As Justice can be thought of in terms of offer and demand, judges and prosecutors would necessarily have to change the way they worked. By quantifying the variables of a case – complexity, persons involved, time, costs of investigation, etc. – courts could be compared and best practices identified. From the 1980s, “the question was less to know whether Justice had done well, than to know if it had efficiently drained away the flow of cases it had been given.”²

The importation of the managerial model into the traditional rule-of-law model was supposed to remedy the crisis facing

the latter: a budgetary crisis, overcrowded courts due to society becoming more and more litigious, the digital and technological evolution, etc. The managerial model was said to be fully in tune with the modern world: it is fast and efficient whereas the rule-of-law model is bureaucratic, rigid and slow. Moreover, the strength of the managerial model lies in its emphasis on the benefits that will be reaped thereof. Indeed, who would not want a faster and less costly justice system? Its success also originates from its apparent political or ideological neutrality. Yet, behind a purely technical and pragmatic discourse lurks another form of governance: a governance by numbers,³ not by laws, whose new normative ideal is to attain measurable objectives and which transforms the judge into an executive agent compelled to produce.

However, a managerial type of justice calls judicial ethics into question. Independence and impartiality are at stake, as the way subsidies are allocated is often a decision of the executive power. Professional conduct is questioned as well: if courts and judges themselves are forced to compete, there may be a risk of standardisation of decisions, in order to go more quickly, at the cost of quality justice. Furthermore, the chosen criteria to measure performance raise the issue of defining good justice: is efficient justice good justice? Will the judge still be an inspiring democratic figure if his role is nothing more than managing risks? On the other hand, won't his authority be undermined if he is expected to negotiate with offenders?

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¹ A. Garapon, *La raison du moindre État. Le néolibéralisme et la justice*, Odile Jacob, 2010, p.54.

² *Ibid.*, p 55.

³ On this concept, see the seminal book by A. Supiot, *Governance by Numbers. The Making of a Legal Model of Allegiance*, Hart Publishing, 2017.

Therefore, what could possibly emerge from this apparently problematic co-existence of, or indeed competition between, the two models? Can they be compatible or reconcilable at all? What is happening to the judiciary, the guardian of the Rule-of-Law model, when it has to abide by a managerial organisation?

The first reaction towards change is often criticism. As a matter of fact, performance does seem to threaten judicial ethics (I). However, criticism without reflection is pointless, all the more so since performance is now part of the judge's expected professional conduct. Indeed, many alliances between performance and judicial ethics already exist, which may lead to a renewed approach of the latter if mutual adjustments are made (II).

2. PERFORMANCE: A THREAT TO JUDICIAL ETHICS?

As it apparently cannot coexist with independence (A), and as it deeply changes the way magistrates work and by this, the idea of justice itself (B), performance seems to be a threat to judicial ethics.

2.A. PERFORMANCE: A THREAT TO THE INDEPENDENCE OF JUSTICE?

Before analysing the potential threats posed by the notion of performance, it is important to remember that determining a budget is a particularly sensitive issue when it comes to Justice. The principle of the separation of powers and the cardinal principles of independence and impartiality should be respected. As the

legislative and/or executive branches play an active role in this process, it may be seen as a form of intrusion, as a threat to the above principles or even sometimes as a way to exercise pressure on judges and prosecutors. The results-oriented approach that is now used in many European budgetary procedures and Financial Acts might reinforce this possible abuse. Indeed, this logic implies that the judicial budget is determined according to different programmes that are divided into specific objectives, which in turn contain a number of performance indicators. At the end of the day, the budget depends on the capacity of judges to comply with the objectives laid down. For example, in the Netherlands, an output-based budget system has been implemented since 2005. A production time is determined upstream for judgments, sentences, hearings or court orders and a "minute price" is associated with it. The budget is thus determined this way: number of cases resolved in each category x minutes per case x minute price. If a court produces less than what was decided, it has to pay back part of its allocated budget. If a court produces more, it gets more money.⁴ The main threat to this situation is that the legislative or executive branch uses economic and managerial arguments to indirectly put pressure on and/or influence the administration of justice. Several questions thus arise when thinking about budget: on the one hand, which actors should participate in determining the judicial budget? Should judges administrate themselves in order to respect their independence? On the other hand, who should decide and define the indicators to be used to evaluate the performance

of Justice? And how should they be determined in order to respect the principle of independence?

The French government decided to go from a resource-based approach to a result-based approach at the beginning of the 21st century, taking a step forward to New Public Management principles. In 2001, a new budget procedure was thus adopted called the "*Loi organique des lois de finances*" hereinafter LOLF. According to this new procedure, the national budget is determined according to "missions" and "programmes". There is one "Justice Mission" (*Mission justice*) which is divided into five different programmes:

- Judicial justice (programme 166)
- Penitentiary administration
- Judicial protection of youths
- Access to law and justice
- Administration of justice and related agencies.⁵

Each programme has its own associated objectives, corresponding to various programme activities, each of them comprising several indicators. The French Audit Court's report on the Administration of Justice highlights several difficulties. Two of them are particularly important in view of the principle of independence. The first problem concerns the implementation of an annual "management dialogue" (*dialogue de gestion*) – which promotes exchanges between the administration, heads of courts and the government in defining financial and human needs within each court. The Audit Court underlines the diversity

of actors that participate in this process and the lack of coordination between them so that they are not able to make proposals on time and the final decision rests with the government.

The second problem concerns the performance indicators used to determine the objectives, programmes and Justice budget. The above report highlights that the current tools used to analyse and follow court activities in France lack reliability and that they largely depend on the quality of the data⁶ entered. As the performance indicators are based on them, one might wonder about their reliability. In addition, it appears that the data is only based on statistics, which means that indicators have a quantitative approach. In turn, it would mean that justice is now mainly evaluated according to a quantitative logic. For example, the first objective of "Judicial justice" (programme 166) is to render qualitative decisions on civil matters in a reasonable time. Eight indicators have been selected to measure the quality of decisions: four of them measure deadlines and stocks (the average processing time, managing case flows), two measure the productivity of judges and civil servants (number of cases solved) and two indicators measure the lack of quality (percentage of application for interpretation, rectification of a factual error, appeal and cassation).⁷ If celerity is important, how are the other ethical principles taken into account in these indicators? It seems that they are set apart from this approach of judicial performance.

⁵ T. Kirat, "Performance-Based Budgeting and Management of Judicial Courts in France: an Assessment", *International Journal For Court Administration*, April 2010, pp. 1-2.

⁶ Cour des comptes, *Approche méthodologique des coûts de la justice, Enquête sur la mesure de l'activité et l'allocation des moyens des juridictions judiciaires*, December 2018, p.65.

⁷ D. Marshall "L'impact de la loi organique relative aux lois de finances (LOLF) sur les juridictions", *Revue française d'administration publique*, 2008, n°125, p.124.

⁴ M. Visser, R. Schouteten and J. Dijkers, "Controlling the Courts: New Public Management and the Dutch Judiciary", *Justice System Journal*, 2019, p.5.

One also has to raise the issue of the actors that define performance indicators. Again, this process can be a way to influence and/or put pressure on the administration of justice. In 2005, the French Senate published a study on the implementation of the new Financial Act in the judicial system. It pointed out that many judges complained about the fact that they had not been associated with the procedure of defining indicators.⁸ More especially, if quantity is put forward compared to quality, one may legitimately think that traditional judicial ethics are undermined. For example, in 2012, seven appellate court judges signed a Manifesto in which they underlined that “the quality of the administration of justice is under pressure, many cases do not receive the attention they deserve, and irresponsible choices have been made to meet outcome criteria”.⁹ In a survey commissioned in 2013 on the nature and development of judicial work in the Netherlands, “71.2 percent of judges indicated that they “often” or “sometimes” make concessions to the quality of the work in order to execute the assigned tasks within the allocated time”.¹⁰

While a result-based approach threatens the principle of the independence of Justice, it can also threaten the independence of judges as stakeholders in a jurisdictional act. While evaluating judicial work seems to be important to some extent in respect of career development,

one may question the use of performance indicators such as the number of cases resolved, the number of actions against court decisions or even worse, the number of judgements that are being reversed by a higher court.¹¹ Furthermore, some countries – such as France – have put in place a “performance bonus” for judges and prosecutors. If this new policy can be construed as a tool to emulate professionals and provide incentives, it clearly goes against the specific judicial ethos (“*l’esprit de corps*”), as it individualises and differentiates judges. Secondly, this new logic pushes judges towards one goal: to be more efficient or quickly progress and earn money. But where does it set their independence and impartiality? Thirdly, the use of such logic ignores the fact that judges never act on their own but “as part of a team”. While they may take the final decision on their own, they largely depend on court clerks, lawyers or security forces on a daily basis. Finally, using judicial numbers and statistics contributes to a movement that questions the social self-regulation of Justice and by which judicial actors are now asked to be accountable.¹² If judges have to show their efficiency only through numbers and statistics, what place does their independence and impartiality occupy?

⁸ Cour des comptes, *Approche méthodologique des coûts de la justice, Enquête sur la mesure de l’activité et l’allocation des moyens des juridictions judiciaires*, December 2018, p. 62.

⁹ M. Visser, R. Schouteten and J. Dikkers, “Controlling the Courts: New Public Management and the Dutch Judiciary”, *Justice System Journal*, 2019, p. 6.

¹⁰ *Ibid.*, p.8.

¹¹ B. Frydman, « Concilier le management avec les valeurs du judiciaire? », *Working Papers Centre Perelman de Philosophie du Droit*, 2012/04, available at http://www.philodroit.be/IMG/pdf/concilier_le_management_avec_les_valeurs_du_judiciaire_BF_10_mai_2012.pdf.

¹² A. Vauchez, “Le chiffre dans le “gouvernement” de la justice”, *Revue française d’administration publique*, 2008, n°125, pp. 111-120.

2.B. PERFORMANCE: A THREAT TO PROFESSIONAL CONDUCT AND THE ROLE OF JUDGES?

Performance is now expected of judges, and their efficiency is assessed through numbers and statistics. So as to fully understand the impact of performance-based policies on judicial independence and impartiality, it is necessary to understand the context in which these policies were born. Once this context is understood, examples of new professional conduct will be examined. Finally, an interpretation of the new office of judges will be analysed.

According to Michel Foucault,¹³ the 1970s were the decade when neoliberalism started being the philosophical and economic reference of European governments. In this mode of “governmentality”, States do not seek to set moral standards, to promote or hamper peculiar lifestyles: States just seek to “govern less”, and to legislate to a minimum, so that people can produce wealth easily. While in the 17th century, laws had to regulate markets, the neoliberal government of the 1970s allowed the market to set its own truth, and simultaneously sets the paradigm according to which laws should be created. In the neoliberal State, laws are not driven by ideological and political views, they just need to be efficient. The idea is, more or less, to let Adam Smith’s “invisible hand” rule politics.

The rule-of-law which had accompanied the creation and stabilisation of European States during the 19th century had given special treatment to Justice administration: because the rule of law protected individual rights and freedoms, it could be slow, opaque and for-

midable. The way justice was done was as important as the final decision. The symbolic angle was prevalent. From the 1970s and the spread of neoliberal ideas amongst administrations, there was no need for the Justice administration to be symbolic, in the same way that there was no need for other administrations. It was simply expected to be efficient, and laws help it to be so. In 2019, the French *Conseil Supérieur de la Magistrature* (Council for the Judiciary) released a new version of its *Collection of Deontological Duties*. In a chapter on “Professional Conscientiousness”, point 9 reads: “[The judge] is careful to reconcile case flow management with the solving of cases, the requirement of reasonable time, the respect of procedure and legal rules, and the quality of the service given to the public”.¹⁴ Thereby, performance is now rooted in the professional conduct expected of a judge. An ethical judge or prosecutor cannot but have a rational and managerial overview of his own work. Judges have to make decisions, and these decisions will be all the more ethical when they are given quickly. Performance is now a legal expectation, as stated in article 6§1 of the European Convention on Human Rights which reads a “reasonable time”. It is also expected on an ethical level, as highlighted in the *Collection of Deontological Duties*.

These new expectations of Justice administration have a massive impact on the professional conduct and ethics of judges. They may be tempted to work with new tools, such as Big Data, and standardise their response to criminal cases.

¹³ M. Foucault, *Naissance de la Biopolitique*, Seuil, Paris, 2004.

¹⁴ Conseil supérieur de la magistrature, “Collection of Deontological Duties”, January 2019, available at <http://www.conseil-superieur-magistrature.fr/publications/recueil-des-obligations-deontologiques>.

The tools of predictive justice are often shown as modern solutions, in order to accelerate the process of decision-making, and thus to enhance performance. Thanks to a gigantic compilation of previous decisions, algorithms could analyse a case and propose a solution, based on a jurisprudential average. In Estonia, this new tool is supposed to replace civil judges for cases involving less than 7,000 euros by the end of 2019.¹⁵ This example raises many ethical questions. In France, these algorithms are touched upon as a potential future tool for judges to reduce legal uncertainty, and to help enforce equality before the law.¹⁶ The problem is, as judges are expected to solve cases in an ever-reduced amount of time, they can be tempted to follow the algorithmic answer without questioning it. The result would be dehumanisation and a great threat to the traditional independence of Justice. Moreover, decisions would become more and more homogenised, when personalization is expected. Trial waiver systems help complete this dehumanisation.

Trial waiver systems are procedures in which a full trial is avoided. They serve to reduce costs, and save time for judges. Born in the U.S.A., plea-bargaining is the most famous example. In this procedure, the prosecutor deals with the defendant: the trade is an agreement to plead guilty in exchange for a lighter sentence, or an agreement to plead guilty to at least one

charge in exchange for the dropping of others. In this very deal, the motto of neoliberalism can be found: what is sought is not particularly Justice, but a quick answer, and the market is the quickest solution to solve a problem. According to a 2015 report, "The disappearing trial", by the British NGO "Fairtrials", Austria, England and Wales, Ireland, Italy and Scotland were the only European countries to use trial waiver systems before 1990. In 2016, almost every European country featured them.¹⁷ These procedures, especially plea-bargaining, can be a threat to independence on two levels. Firstly, for judges themselves: in a context of overflowing courts, judges who oversee and approve the transactions between the prosecutor and the defendant can be tempted to simply confirm what has been decided, so as to save time. In the bigger picture, these procedures enhance the power of prosecutors, and reduce the role of judges, at the expense of a fair trial. As it gets more efficient, justice administration also becomes less independent of the executive power.

This way of managing Justice administration has been criticised: by judges and prosecutors themselves, who have experienced these transformations as a reduction of the specificity of their job.¹⁸ Criticism also comes from intellectuals and academics, who notably point out that this phenomenon implies a depoliticisation of Justice administration.¹⁹

Judges become managers of human relationships.

Focusing on numbers and promoting algorithms and trial waiver systems means that the very role of judges is indeed changing. Michel Foucault showed that in the 1970s, in order to govern less, political powers ceased to set political priorities first and ways to tackle these issues afterwards; they instead started by identifying problems which could be tackled easily, and made laws to deal with them afterwards. This new way of governing works "not thanks to a Law which organises, but thanks to judicial practices which make concrete solutions happen ; not through legal texts anymore, but through pre-existing habits called "best practices" or "rules of conduct".²⁰ Hence the massive spread of trial waiver systems. Thus, the question is no more "what could the judge's role be in bringing justice?" but rather "how can the judge solve this case quickly?" In managerial justice, judges are not inspiring figures who speak the democratic words of liberties; they become managers of human relationships, speaking the economic word of efficiency. To some extent, with managerial justice, judges merely help ease human relationships, by accelerating the outcome of people's problems. And as the whole of society has been judicialised, more and more inter-individual situations which were extra-judicial in the 20th century are now judicial cases. Therefore, in the name of efficiency, judges may even be evicted from procedures if their role seems no

longer necessary. The process of decision-making is far less important than the final response. Divorce is a good example. In France, divorcing couples have been able to divorce without seeing a judge since 2017, if they agree on the act of divorcing and its consequences. The judge's oversight and independence, which facilitate an efficient procedure, is totally missing.

Consequently, judges face the remarkable situation of reshaping their own ethics, as the question of their very purpose is raised. Efficiency seems to be the major expectation judges face, perhaps at the cost of every value which composed their former ethos. Rumours of suppressing the French National School for the Judiciary in order to merge the training of judicial judges with that of administrative judges seems logical in this perspective.²¹

However, is this evolution wrong? The management system is now widespread in Europe, and European judges tend to accept it. For instance, in 2012-2013, the European Network of Councils for the Judiciary (ENCJ) wrote a report on "Minimum standards regarding evaluation of professional performance and irremovability of members of the judiciary". The aim of this project, supported by representatives of 14 member institutions (Belgium, Bulgaria, England and Wales, France, Ireland, Italy, Lithuania, the Netherlands, Northern Ireland, Poland, Portugal, Romania, Slovenia and Spain) was "the identification of rele-

¹⁵ T. Coustet, "La réalité derrière le fantasme de la justice robot" *Dalloz Actualité*, April 2019, available at <https://www.dalloz-actualite.fr/flash/realite-derriere-fantasme-de-justice-robot#.XTDOMugzbIV>.

¹⁶ L. Cadiet, « L'Open Data des décisions de justice », *Mission d'étude et de préfiguration sur l'ouverture au public des décisions de justice*, November 2017, available at http://www.justice.gouv.fr/publication/open_data_rapport.pdf.

¹⁷ FAIRTRIALS ONG, Report "The disappearing trial", pp. 30-31.

¹⁸ N. d'Hervé, « La magistrature face au management judiciaire », *RSC*, 2015, p. 49.

¹⁹ C. Vigour, "Justice : l'introduction d'une rationalité managériale comme euphémisation des enjeux politiques", *Droit et société*, 2006/2-3 (n°63-64), p. 425.

²⁰ A. Garapon, « Michel Foucault, visionnaire du droit contemporain », *Raisons politiques*, 2013/4 (N° 52), p. 39-49.

²¹ P. Moulot, "Emmanuel Macron veut-il supprimer l'École Nationale de la Magistrature ?", *Libération*, 17 April 2019, available at https://www.liberation.fr/checknews/2019/04/17/emmanuel-macron-veut-il-supprimer-l-ecole-nationale-de-la-magistrature-en-plus-de-l-ena_1721885 https://www.liberation.fr/checknews/2019/04/17/emmanuel-macron-veut-il-supprimer-l-ecole-nationale-de-la-magistrature-en-plus-de-l-ena_1721885.

vant minimum standards in the field of assessment of professional performance and irremovability of judges and prosecutors, in order to make it possible to evaluate those standards at a larger stage by means of a set of indicators to be used as a tool for self-evaluation of the different judicial systems".²² Considering performance as a part of their own professional conduct instead of considering it as an enemy may be a solution. This new horizon needs to focus on practices rather than principles. Does society need to judge *everything*? Obviously not. Is it not beneficial to everyone that Justice becomes faster? It would seem so. According to the French judge Nicolas d'Hervé, the agreement of judges to move towards New Public Management depends on "the degree of responsibilities they have [...], seniority [...], and the office they hold. [...] Finally, their agreement will depend on their individual professional culture and personal sensitivity".²³

For him, these changes are possible but they will need a strong and fair collaboration between judges and prosecutors. Performance and judicial ethics can be allies, if mutual adjustments are set up.

3. PERFORMANCE: A RENEWED APPROACH TO JUDICIAL ETHICS?

Traditionally depicted as an anathema to judicial ethics, performance is nonetheless not so alien to core judicial duties despite what might seem at first blushing (A). If possible alliances do exist between performance and judicial ethics, their respective origin and culture make it necessary for them to adjust in order to preserve the singularity of the justice system and to fulfil their promises (B).

3.A. PERFORMANCE AND JUDICIAL ETHICS : POSSIBLE ALLIANCES

Understood as something that works well, the notion of performance bears various similarities to, or indeed may be equated with, old-established ethical obligations such as the proper administration of justice or conscientiousness. This concern is well-known and widely entrenched across national, European and international judicial traditions. Thus, in France, the Collection of Ethical Duties states, under the heading "efficacy and diligence", that "the judge must carry out his/her tasks with diligence and, if need be, inform his/her superior of the obstacles he/she might encounter before his/her service deteriorates".²⁴

Various European instruments also recall these duties, with a growing and unabashed reference to managerial terms. The most famous instance in this regard is probably the European Commission for the Efficiency of Justice (CEPEJ), which publishes a report every year analysing the functioning of judicial systems and ensuring that public policies relating to the courts are geared to greater efficiency. The European Network of Councils for the Judiciary (ENCJ) also published a report identifying minimum standards in the field of assessment of professional performance, such as "the efficiency and effectiveness of the actions taken in the exercise of judicial functions; the ability to organise judicial work in identifying issues or carrying out other tasks and functions; the managerial culture", etc.²⁵

Likewise, the European Court of Human Rights has developed abundant case-law on reasonable time, whose breach may give rise to compensation.²⁶ Interestingly, in placing focus on the behaviour of judicial authorities, the Court refers to a benchmark provided by the European Commission for the Efficiency of Justice.

This is also instilled at the very beginning of a judge's training in France. The National School for the Judiciary offers a class on the "administration of justice" in its curriculum, which aims at raising awareness on these issues. The basic skills to be acquired are the ability to organise, manage, innovate, adapt and take into account the institutional environment.

The content of the training includes, amongst other things, the means and the economy of justice.

In practice, the logic underlying the proper administration of justice or performance has given rise to various reforms:

- The reform of the judicial map, which was launched in 2007 in France and consisted in gathering courthouses together with a view to increasing productivity. The criteria of the number of cases and the allocation of the means available to the justice system were promoted to the rank of general interest objectives, thereby dismissing other considerations such as the geographical distance this might create for justice users.

- The promotion of what is known in France as "Real-Time Treatment" of criminal proceedings, which was hailed as a response to the slowness and inefficacy of criminal justice. This fast-track procedure implies that, as soon as an investigation is completed, investigators phone the prosecution service and give a report on the case in hand. The prosecution must then decide how the case should be dealt with.

²² NCJ Report "Development of minimal judicial standards", p. 5.

²³ N. d'Hervé, « La magistrature face au *management* judiciaire », *RSC*, 2015, p. 49.

²⁴ Conseil supérieur de la magistrature, *Recueil des obligations déontologiques*, Chapter V, p. 20, available at <http://www.conseil-superieur-magistrature.fr/publications/recueil-des-obligations-deontologiques>.

²⁵ https://www.encj.eu/images/stories/pdf/workinggroups/final_report_encj_project_minimum_standards_iii_corrected_july_2014.pdf.

²⁶ See, amongst others, ECHR, 8 Dec. 1983, *Pretto v. Italy*, n° 7984/77; ECHR, 25 March 1999, *Pélissier et Sassi v. France*, n° 25444/94; ECHR, 22 May 2003, *Gouveia da Silva Torrado v. Portugal*, n° 65305/01; ECHR, 29 March 2006, *Cocchiarella v. Italy*, n° 64886/01; ECHR, 24 Sept. 2009, *Sartory v. France*, n° 40589/07; ECHR, gd. ch., 10 Sept. 2010, *McFarlane v. Ireland*, n° 31333/06.

• The development of alternative dispute resolution (ADR), *i.e.* the procedure for settling disputes without litigation, such as mediation. ADR procedures are praised for being less costly and more expeditious. They have reached their climax with the 2019 Justice Reform in France,²⁷ which encourages mediation at any stage in proceedings, whenever the judge deems it possible, even in fields where it was previously proscribed, such as divorce. The reform goes even further since it makes it compulsory for the parties to try and settle their dispute before they go to court, as long as it does not exceed a certain amount (around 5 000 Euros).

A similar development consists in releasing the judge from some of his/her traditional functions. Thus, as mentioned previously, spouses can now get a divorce without the intervention of a judge when they both agree to it,²⁸ and from now on, it will be up to a notary to receive the consent to medically-assisted reproduction.²⁹

On the criminal-law side, the new mantra is to give more power to prosecutors in order to avoid a judge having to decide a case. Thus, as in the example of the plea bargaining procedure mentioned earlier, the judge does little more than approve the sentence negotiated between the prosecutor and the offender.

• One of the most recently debated development has been the advent of digital technology within the realm of justice, which entails a profound symbolic revolution and is a source of both hope and concern. Predictive justice is often acclaimed as a remedy to cure the three evils of any judicial system: costs, delays and predictability. Indeed, predictive justice may bring about quick and predictable solutions, especially for simple disputes. Moreover, no ethical duty would oppose the use of new technologies as long as they improve the quality of justice and do not jeopardise individual freedoms.³⁰

In this sense, the recent reforms on the dematerialisation of various proceedings such as orders for payment have moved in the right direction. Some countries are even in the vanguard of progress in paving the way for algorithms. The most ambitious project to date emanates from the Estonian Ministry of Justice, which is designing a “robot judge” that could adjudicate small claims disputes of less than 7 000 €. ³¹ The project is still in its infancy and should start later this year with a pilot focusing on contract disputes. In practice, both parties will upload documents and other relevant information, and the robot judge will issue a decision that can be appealed to a human judge. Be that as it may, and even though digital technology can to a large extent improve access to courts and information, the law cannot be reduced to an information agency. It is above all a social and human experience.³²

All these reforms have been implemented for the sake of efficacy, diligence, the proper administration of justice and indeed performance. Therefore, to a certain extent, both notions – the proper administration of justice and performance – converge. In this sense, performance almost resonates as a contemporary notion for an old professional duty.

The gradual replacement of the proper administration of justice by performance is not insignificant: management has now become a professional duty in its own right. The latest version of the French Collection of Ethical Duties is particularly telling in this regard. The terms used to describe judges’ missions draw directly from managerial vocabulary: management, flows, objectives, budget, etc. Interestingly, for the first time in 2010, the dialogue instituted between the French Ministry of Justice and Chief Justices regarding the means granted to courts has been renamed “dialogue of performance” whereas it was previously known as “management dialogue”.

However, it would be illusory to think that performance and the proper administration of justice are interchangeable or equivalent notions. As we have seen, performance has been fathered by management and bears its stigma. In order to prevent a shift towards a purely quantitative conception of justice, which might become a measurable notion through benchmarking, indicators and audits, it is necessary to adjust the notion of performance to the specificity of the judicial system. This is not a lost cause. As has been pointed out, performance is a loose concept, “a subjective, variable, and contextual datum even though it is presented as a homogeneous label”.³³ Thus, the ambiguity and vagueness inherent to the notion of performance makes it adjustable.

²⁷ The *loi de programmation 2018-2022 et de réforme pour la justice*, which entered into force on March 23rd 2019.

²⁸ See the *loi du 18 novembre 2016 de modernisation de la justice du 21^{ème} siècle*.

²⁹ See the 2019 *loi de programmation 2018-2022 et de réforme pour la justice*.

³⁰ See chapter V, p. 20 of the French Collection of Ethical Duties, which remains – purposely? – silent on the definition of a justice of quality.

³¹ See E. Niiler, “Can AI be a fair judge in court? Estonia thinks so”, *The Wired*, 2019 <https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/>.

³² See A. Garapon, « Le numérique est un remède à la lenteur de la justice », *Dalloz Actualité*, 4 May 2018 : <https://www.dalloz-actualite.fr/interview/antoine-garapon-numerique-est-un-remede-lenteur-de-justice#.XOUZKcgzaUI>. More generally, on this topic, see A. Garapon & J. Lassègue, *Justice digitale*, PUF, 2018.

³³ J. Duval Hamel, « La ‘gestionnarisation’ de la justice », in *Le nouveau management de la justice et l’indépendance des juges*, B. Frydman & E. Jeuland (dir.), Dalloz, 2011, p. 133.

3.B. PERFORMANCE AND JUDICIAL ETHICS: A NECESSARY MUTUAL ADJUSTMENT

The current definition of performance, under the growing influence of management, tends to be purely quantitative. It is cost-oriented and prone to silencing the traditional missions of the justice system, making judicial debates more technical and stripping them of their political dimension. It is primarily focused on the way in which the judiciary carries out its tasks. The production of judgments becomes more important than their content. In other words, it equates justice with expenses and leaves behind the question of the search for meaning.

More precisely, we have seen in the first part of this paper the risks performance can represent for ethical duties and the role of judges. However, one should not throw the baby out with the bath water. Instead of dismissing the idea of performance altogether, one should set forth the fundamental principles that any managerial reform should respect.³⁴

Independence from other powers. This foundational principle dictates that the management of justice be exercised by the judiciary itself or by an authority within it. In any event, it should be independent from the executive power, notably the Ministry of Justice. For it to be successful, the management of justice must be self-management, which is not self-evident inasmuch as its funding comes from other powers. Management should not be an alibi to strengthen controls over the judiciary. In this regard,

the Consultative Council of European Judges (CCEJ) rightly recalled in its opinion on the funding and management of courts with reference to the efficiency of the judiciary that “although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must be taken with the strictest respect for judicial independence.”³⁵ Thus, in Estonia or Slovakia, for example, the Supreme Courts directly present budget proposals to the Ministry of Finance. The CCEJ particularly suggests that the independent authority responsible for managing the judiciary could be the main actor through which views would be expressed and negotiated.

Such an authority already exists in various European countries, in the form of Judicial Councils. In this regard, the Special Rapporteur on the independence of judges and lawyers dedicated its last report to Judicial Councils, encouraging their creation.³⁶ Such Councils are independent of the executive, are competent for the appointment, assessment and promotion of judges and prosecutors and are granted means to audit, investigate and deal with complaints. They appear to be a neutral and most effective

intermediary to first receive proposals from heads of courts and then synthesise them to present a final proposal to Parliament or the government while taking care that the search for performance and efficiency does not harm cardinal principles. In addition, going through one actor could resolve the diversity and coordination problem.

Moreover, managing being a job in its own right, would it not be preferable to create a body of justice administrators, based on the model of court managers, who already exist in various jurisdictions?³⁷ This would imply discharging chief justices of all acts related to administrative management, as opposed to acts related to procedural management and court organisation, which should remain a matter to be dealt with by judges.³⁸

Independence of the judge as the author of a jurisdictional act. The logic of management tends to reinforce hierarchical relationship: it assumes that there are managers and *manages*. Therefore, in order to find or frame a decision, there is a risk that first-instance judges would consult other judges, who are higher up on the judicial ladder and may well have to decide the same case as part of an appeal.

Consequently, indicators which make the assessment of judges, and therefore their career development, dependent on the rate of appeals of their decisions should be banished. It would be more relevant to take any deviant behaviour into account.

Respect for a legal procedure. Justice must be done according to procedural rules determined by legal statutes and not on the basis of internal management imperatives. In this regard, special attention must be paid to the allocation of cases within a court, which is a matter of constitutional law in various legal traditions. Thus, article 13 of the Belgian Constitution reads that “no one can be reassigned, against his will, to a court other than that designated by law” – which is supposed to be the “natural judge” of the case.³⁹

Respect for Due Process. Last but not least, managerial recipes will have to make do with the right to a fair trial. Not only does this imply that “everyone is entitled to a fair and public hearing within a reasonable time”, according to article 6.1 of the European Convention on Human Rights, but it must be ensured that the obsession with digits and standardisation that characterises management does not lead to a violation of the adversarial principle. Judges should take scales and ready-made models with a pinch of salt.

³⁷The Council of Europe established and supported the second forum of court managers in March 2019. It focused on the introduction of HR guidelines prepared by the EU4Justice project, the public data sharing regulations, civil servant assessment criteria, effective communication and innovation management. See <https://www.coe.int/en/web/cdcj/-/court-managers-forum>.

³⁸See L. Cadiet, « La théorie du procès et le nouveau management de la justice : processus et procédure », in *Le nouveau management de la justice et l'indépendance des juges*, B. Frydman & E. Jeuland (dir.), Dalloz, 2011, p. 111.

³⁹On this notion, see E. Jeuland, « Le renouveau du principe du juge naturel et l'industrialisation de la justice », in *Le nouveau management des juges et l'indépendance de la justice*, op. cit., p. 87.

³⁴See B. Frydman, *Concilier le management avec les valeurs du judiciaire?*, Working Papers du Centre Perelman de Philosophie du Droit, 2012/04, available at <http://www.philodroit.be>.

³⁵Opinion N° 2 (2001), available at <https://rm.coe.int/1680747492>.

³⁶Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers*, 38 session, 2 May 2018.

In elaborating these principles, it should be borne in mind that there are two visions of the justice system.⁴⁰ A macro-vision, which guides the public policies of the judiciary so that it offers the best possible service to all users, by measuring its overall performance. And a micro-vision which espouses users' perception and therefore fluctuates with daily experience or with the perception people have through the media. This puts the justice system at a disadvantage since judicial decisions do not aim to please the public. A balance therefore needs to be struck by using a variety of methods, both quantitative and qualitative.

Ironically, the notion of "quality" is not alien to New Public Management, whose very purpose is to proceed with quality control. This may explain why it established itself so easily within the judicial system. Indeed, the above examples show that, to a large extent, it has brought about satisfactory results. Thus, it is often said that the plea-bargaining procedure leads to a more muted and productive dialogue between the prosecution and the offender, whereas the latter might feel less at ease in explaining the facts and his past during a criminal trial. Likewise, can we consider that a carefully thought-out and crafted decision is a good decision if it is handed down a long time after the facts?

However, quality, as understood by New Public Management, is a measurable notion. It is a quantity, or at least a measure referring to a scale of levels or thresholds. Therefore, the requirements related to a reasonable time can sometimes be seen as a criterion of qualitative justice while sometimes being an obstacle to the improvement of that very same quality.

This tension within the notion of quality is used by management in a strategic way to modify practices in public establishments. New Public Management attempts to dissimulate its goal – that of increasing productivity – under the more laudable cloak of the enhancement of the quality of justice, thereby thwarting any possible protest. Therein lies its insidious character.

Eventually, in order to become a new source of legitimacy for judges and a relief in their daily tasks, performance must be what it claims to be, *i.e.* efficacious and productive. In other words, if it is to be accepted, it must be considered as a means and not an end in itself. What must be combated is not its values but the use one makes of it.

Quality must not be equated with quantity and excellence cannot solely mean high productivity. The Real-Time Treatment of criminal cases is a good example of the adverse effects of an innovative practice. Even though more criminal cases have been dealt with, the actual decision is taken so quickly – over the phone and on the sole basis of an investigator's report – that it has led to lesser oversight by the prosecution over the investigation and therefore to an increase in mistakes or shortcomings in proceedings. This in turn entails that more cases are closed with no action taken and more offenders are acquitted by the courts. Such productivity is therefore detrimental to substantial quality.

Only a thoughtful assessment, involving judges⁴¹ and combining both quantitative and qualitative data, and entrusted to a national agency for the evaluation of justice could avoid absurd and counter-productive results.⁴²

⁴⁰ See J.-P. Jean, "Justice as a public service", available at : <https://rm.coe.int/justice-as-a-public-service-jean-paul-jean-prosecutor-court-of-appeal-/168078e545>

⁴¹ See F. Paychère, "How to measure court performance while safeguarding the fundamental principles of justice?", available at: <https://rm.coe.int/how-to-measure-court-performance-while-safeguarding-the-fundamental-pr/168078e550>. Likewise, "in evaluating the performance one should *not only* apply a judicial perspective, but also include a more organisational and sociological perspective. The judiciary isn't an island and on an organisational level has to deal with new social and economic developments" (F. van der Doelen, "Lessons from evaluating the modernisation of the Dutch judiciary 1996-2010", available at <https://rm.coe.int/lessons-from-evaluating-the-modernisation-of-the-dutch-judiciary-1996-/168078e543>).

⁴² Nicolas d'Hervé, « La magistrature face au management judiciaire », RSC, 2015, p. 49.

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ARTIFICIAL INTELLIGENCE AND THE JUDICIAL RULING

The growing development of Artificial Intelligence (AI) has made it a useful tool in various domains, from communications to healthcare. where some fundamental tasks are already performed by AI systems. Its use in the Judiciary, however, raises pressing ethical questions. Foremost of said questions seems to be: can AI ever substitute the human judge? Short of such a radical issue, AI potential for use in the judiciary is not negligible, be it as data-retrieval and analysis tool, as an auxiliary to the judge in pointing deviations from past decisions or spotting unconscious bias, or even as a means to low the number of cases pending in court through its use as Alternative Dispute Resolution for cases relating to small amounts disputes. If present uses are still limited by public mistrust and technological constraints, several experiments in European countries aim at a future introduction of such systems as part and parcel of the Judiciary. Anticipating this, CEPEJ issued the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment. The present paper tries to address some of the ethical questions raised by AI uses in the Judiciary in the context of said Charter and recent ECtHR rulings.

KEY WORDS

Artificial Intelligence
Judicial ruling
Ethics
Article 6 ECHR
Article 8 ECHR
European Ethical Charter on the Use of AI in Judicial Systems

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INTRODUCTION, FRANKENSTEIN'S MONSTER'S SOUL

We, in our wealthy western societies, live in a world made possible by Science. We live longer than our ancestors, in better health, eating better food and in safer societies than ever before in human History.

However, Science, and its main by-product – technology – are perceived with growing mistrust. And, after nuclear energy, the cloning of mammals, and genetically modified organisms, the main threat seems to stem from developments in Artificial Intelligence (AI). As more and more sectors of human life and comfort increasingly rely on robots and AI-operated machines, from medical diagnostics to self-driving cars, we hear growing calls for alarm: “Bank of England Economist Warns Thousands of Jobs at Risk from Robots”; “How Artificial Intelligence Could be Violating our Human Rights”, are some recent newspaper headlines that illustrate the fact that AI is the scare word of the day.

As it has been for some time, in one form or another, at least since the Luddite movement of the first half of the 1810s; the fear of AI is but another expression of technophobic thought. The revolutionary idea of Robert Owen to mechanize the weaving looms in his factories, announced by *The Hull* in 1817, found in Darwin’s theory of Evolution the fuel that would ignite what became a perceived dispute between Man and Machine, as prefigured in an 1863 essay, “Darwin Among the Machines”, by Samuel Butler. One could indeed see the rise of the machines in factories as a threat to one’s livelihood, for an untiring machine

could physically outperform any man, for hours on end; is it surprising, then, that a machine perceived to be as, or more, intelligent than any human being, should be feared as a possible substitute for Mankind itself?

In this brief essay, we intend to explore a specific context where AI can be expected both to reveal itself as an indispensable tool, and to raise more objections to its deployment: that of the Judiciary. With the possible exception of the various art forms, the Judiciary is undoubtedly that area of human activity where one expects human nature to manifest itself to its fullest: one expects the judge to apply both reason and emotion to his judgments, one complementing the other so that neither prevails. Balance is not only expected, it is to be desired. But are reason and emotion a part of intelligence? Can a machine be reasonable in its decisions? Or can it never be more than merely logical?

Not surprisingly, the ethical questions raised by the growing implementation, worldwide, of AI systems in several capacities in the Judiciary, was promptly addressed by the Council of Europe in the European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment (Ethical Charter), issued by the European Commission for the Efficiency of Justice (CEJEP). Its tentative responses to an essentially unpredictable technological field will be part of the analysis to be found herein, as it seems to hesitate between embracing the science and technology of AI, or succumbing to the alarmist potential popularized in science-fiction films. As such, it reflects some of the European citizens’ suspicion about science. As the then European Union’s Science

Adviser microbiologist Anne Glover stated in a 2012 interview with Science Insider (February 14, 2012), ‘If you take people’s opinions, for instance by looking at the Eurobarometer, people seem to be reluctant to accept innovative technologies. They are suspicious almost just because it’s new. (...) There should be more communication about the rewards of the technologies.’

As scientists and programmers try to perfect artificially intelligent systems that can operate in the judiciary, helping judges render better decisions, providing people with fairer and more equal justice, or even handing down decisions to a human party, they are trying to get such systems to choose an action that best satisfies conflicting goals: and the ability to choose such an action ‘is not an add-on to intelligence that engineers might slap themselves in the head for forgetting to install; it is intelligence.’¹

1.A THEORETICAL FRAMEWORK

1.A. THE AI IN THE FOURTH REVOLUTION

We’re living in a hyperhistory, described by Luciano Floridi as ‘the stage of human development when third-order technological relations become the necessary condition for development, innovation, and welfare’, based on ‘technologies as

users interacting with other technologies as prompters, through other in-between technologies’. This shapes the self-understanding of human identity as informational organisms or inforgs, embodying a fourth revolution.² In this century, we are witnessing a new spring for AI on a daily basis: it is in our smartphones, in commercial logistics, search engines, electronic games, social networks, aviation, health and bank systems, in legal and judicial contexts.

Roughly speaking, AI is known as intelligence demonstrated by a computer machine or software. This notion leads to other questions: what is intelligence? Where are the boundaries between thought and computing (3)? Does the human brain function as a computer or are the mental processes indivisible? Can machines learn as humans do? These questions pose deep philosophical problems (epistemological, ethical, metaphysical), aggregate different areas of science (cognitive, biology, logic, psychology, linguistics, mathematics, cybernetics, engineering) and energise several schools of thought (evolutionists, symbolists, computationalists, bayesians, analogisers). Naturally, this is not the place for, nor do the authors have the presumptuousness to, face all these enquiries. Nonetheless, the task proposed in this paper will demand some small detours into other less familiar issues for trainee judges, and try to clear up some misconceptions.

¹ () Steven Pinker, *Enlightenment Now: The Case for Reason, Science, Humanism, and Progress* (2018) at 300.

² () L. Floridi, *The Fourth Revolution: how the infosphere is reshaping human reality* (2014), at 31. From the perspective of our self-understanding, Floridi describes present times as a fourth stage after the Copernican (humans let the immobile centre of the Universe), the Darwinian (humans were not unnaturally apart from the animal kingdom), and Freudian ones (conscience is not Cartesian transparent).

³ () See William J. Rapaport, ‘What is a Computer? A Survey’, *Mind & Machines* (2018).

1.B. BIG DATA

It has been estimated that humanity had accumulated approximately 12 exabytes⁴ of data in its entire history up until the time when the use of computers became widespread.⁵ In the 21st century, between 2006 and 2011 alone, the data available had grown to over 1.600 exabytes. Nowadays, we live in the zettabyte Era,⁶ and it tends to grow exponentially since the use of data will generate more data.⁷ Some estimations purport that by 2020, for every person on earth, 1,7 megabytes of data will be created every second;⁸ the IDC White Paper (2018) predicts for 2025 an increase of the total global data up to 175 zettabytes.⁹ This ocean of data needs to be collected, stored, managed, and analysed computationally. In other words, data, to be big, needs models, through which algorithms extract inferences about patterns, trends and correlations.¹⁰

As Professor Jack M. Balkin highlighted, “*Big Data is the fuel that runs the Algorithmic Society; it is also the product of its operations*.”¹¹ In contrast to humans, AI systems are comfortable with a large number of data sets.

It allows the AI system to find new patterns and to label new examples, expanding the collection of all perceived history. For instance, to surpass the ambiguity of natural language, a translation algorithm will have a better performance if it has billions of words stored in its training set, instead of just a couple million. The increase in data will improve the machine's ability to achieve its goals.

1.C. HUMAN VERSUS ARTIFICIAL INTELLIGENCE

As James H. Moore pointed out in 1985, the advances of new technologies involve not only *policy vacuums* but also *conceptual vacuums* which needed to be filled.¹² Generally speaking, intelligence is associated with reasoning, memory, understanding, learning and planning: a «general intelligence» with the ability to perform intellectual tasks. There are many disputed definitions of intelligence in psychology, including the «multiple intelligences» theory, proposed by Howard Gardner.¹³

Shane Legg & Marcus Hutter proposed a definition of intelligence as a measure of ‘an agent’s general ability to achieve goals in a wide range of environments’. However, there is no agreed definition.¹⁴

Ontologically, AI is based on a previous design to develop a task and achieve specific goals. The AI is limited to a set goal, even if it has astonishing learning capacities, which nevertheless are still aimed at obtaining a specific result, usually based on an inductive approach. Due to the realm of perception and its meaning, human intelligence is epistemologically broader.¹⁵ AI systems have shown difficulties in dealing with semantic content, mainly with the open texture of natural and legal language. In the latter case, *ambiguity* (when the same legal concept have different meanings in different contexts), *vagueness* (neutral concepts that can possess intrinsic properties which are by themselves sufficient condition both to assign and not to assign the specific term), *variable standards* or *evaluative-open concepts* (“due care”, “public interest”), or *defeasibility* (e.g. the forbidding rule about motor vehicles in the park does not apply to ambulances),¹⁶ are some attributes of legal norms and language that require special attention to the particular case. As Mireille Hildebrandt pointed out, ‘meaning depends on the entanglement of self-reflection, ra-

tional discourse and emotional awareness that hinges on the opacity of our dynamic and largely inaccessible unconscious.’¹⁷

However, if one accepts that meaning in law is normative and objective, in the sense of being reference-related and inter-subjectively valid,¹⁸ AI systems would be an undeniably helpful tool in this quest. Some small-scale algorithms have already been successful in resolving the open texture problem, such as 1980s’ Case-Based Reasoning, although it hasn’t advanced substantially since. Considering the growth of Big Data and the integration of suitable models and data sets with the deep learning capacities of AI, it is conceivable that significant advances are still to come in this area. The main problem, in our view, is not in dealing with semantic content. In the judicial point of view, the core issue is to be found in the fundamental externally justificatory demands of legal discourse, where the opacity of the AI reasoning systems poses justified fears. In short, one should not overestimate human intelligence or underestimate the AI potential. Being two different kinds of intelligence they are not commensurable. As Luciano Floridi pointed out, AI pursues neither a *descriptive* nor a *prescriptive* approach to the world. It *inscribes* new artefacts that interact with nature, becoming part of it.¹⁹

⁴ () Putting in perspective, 1 exabyte corresponds to a 50,000 year-long video of DVD quality.

⁵ () L. Floridi, *supra* note 2, at 13.

⁶ () One zettabyte corresponds to 1000 exabytes.

⁷ () If one takes 30 normal steps forward it will be moved around 30 meters. If one takes 30 exponential paces, doubling the length each time (first step one meter, second step two meters, third step four meters...) at the 29th step one would had reach the moon. The 30th step would bring the traveller back to earth, C. Chace, *The Artificial Intelligence and the Two Singularities* (2018), at 45.

⁸ () See Domo, Report Data Never Sleeps 6.0, available at <https://www.domo.com/learn/data-never-sleeps-6>.

⁹ () IDC White Paper, *The Digitization of the World From Edge to Core* (2018), available at <https://www.seagate.com/files/www-content/our-story/trends/files/idc-seagate-dataage-whitepaper.pdf>.

¹⁰ () Consultative Committee of the Convention for the Protection of individuals with Regard to Automatic Processing of Personal Data, Guidelines on the Protection of Individuals with Regard to the Processing of Personal Data in a World of Big Data, Council for Europe (2017), at 2.

¹¹ () J. M. Balkin, *The Three Laws of Robotics in the Age of Big, Data* (2017) at 6, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2890965.

¹² () James H. Moore, ‘What is Computer Ethics?’, *Metaphilosophy*, 16 (1985) at 266.

¹³ () Namely, linguistic, musical, logical-mathematical, spatial, bodily-kinesthetic, intrapersonal, and interpersonal intelligences, Howard Gardner, *The Theory of Multiple Intelligences* (2011).

¹⁴ () Shane Legg, & Hutter Marcus, Universal Intelligence: A Definition of Machine Intelligence (2007), at 12, available at <https://arxiv.org/pdf/0712.3329v1.pdf>.

¹⁵ () Wenceslao J. Gonzalez, «From Intelligence to Rationality of Minds and Machines in Contemporary Society: The Sciences of Design and the Role of Information», *Minds & Machines* (2017) at 8-12.

¹⁶ () Generally speaking, defeasibility is what happens when even though the scope of the rule is correctly determined and its applied to a given case to produce the conclusion C, it is possible to formulate the reason R and reject the conclusion C, see F. Beltran & G. B. Ratti, ‘Validity and Defeasibility in the Legal Domain’, *Law and Philosophy*, 29 (2010), at 601-626.

¹⁷ () Mireille Hildebrandt, *Law as Computation in the Era of Artificial Intelligence. Speaking Law to the Power of Statistics* (2017) at 10, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2983045.

¹⁸ () Matthias Klatt, *Making the Law Explicit - The Normativity of Legal Argumentation* (2008), at 211 ff.

¹⁹ () L. Floridi, *supra* note 2, at 142.

The difference between human intelligence and AI is about the same as the difference between «general, full or strong AI» (AGI) and the «narrow or weak AI». AGI is related to AI systems which could carry out the same cognitive functions as humans (only probably better), applied to all problem solving or human activities. In other words, a strong AI would be an emulation, not just a simulation, of human intelligence, with volition and maybe even consciousness.²⁰ Nowadays, it is still science-fiction, despite the growing optimism that AGI will be achieved in this century. The actual AI systems are weak, or narrow, focusing on single subsets or in a pre-programmed way of working. Although the prevalent AI is narrow, it is nonetheless getting stronger and increasingly raising ethical concerns that could shake some basic foundations of human knowledge.²¹

1.D. TRUSTWORTHY AI

In obtaining a reliable model of an AI agent, the quantity of the data fed to it is a crucial factor. But the quality of said data is even more so, for a lack of attention to data quality could easily lead to take correlation for causation, thus wrongly predicting a link between two unrelated phenomena and creating false positives/negatives. Knowledge is more than information; it requires explanation and understanding, not just truth or correlation.²² The EU took the lead with the Draft Ethics Guidelines for Trustworthy AI by the High-Level Expert Group on Artificial Intelligence (henceforth AI-HLEG) proposing the cornerstone concept of «trustworthy AI», admittedly influenced by the paper of Luciano Floridi *et alii*.²³ The final version, made public on 8 April 2019, concludes that «trustworthy AI» should be ‘...lawful, complying with all applicable laws and regulations; it should be ethical, ensuring adherence to ethical principles and values; and it should be robust, both from a technical and social perspective, since, even with good intentions, AI systems can cause unintentional harm’.²⁴

In an auxiliary paper, the AI-HLEG offered a comprehensive definition for AI:²⁵

‘[AI] refers to systems designed by humans that, given a complex goal, act in the physical or digital world by perceiving their environment, interpreting the collected structured or unstructured data, reasoning on the knowledge derived from this data and deciding the best action(s) to take (according to pre-defined parameters) to achieve the given goal. AI systems can also be designed to learn to adapt their behaviour by analysing how the environment is affected by their previous actions.’

This definition assumes a new kind of intelligence through machine processing or computation, aimed at achieving set goals. Just as aeroplanes do not fly like birds, or submarines do not swim, so AI is not human intelligence *redux*. As the AI-HLEG points out, rationality does not exhaust the notion of intelligence, even though it is a significant part of it. This has a significant symbolic effect when it comes to the process of judicial decision: even if the judge is bound by the law, where his authority is given by the state, he is not exercising its power as an automaton, but as a human being before another human being.

1.E. MACHINE LEARNING AND DEEP NEURAL NETWORKS

Stuart Russel and Peter Norvig stated that the computational learning theory relies on this fundamental principle: ‘any hypothesis that is seriously wrong will almost certainly be “found out” with high probability after a small number of examples because it will make an incorrect prediction. Thus, any hypothesis that is consistent with a sufficiently large set of training examples is unlikely to be seriously wrong, that is, it must be probably approximately correct.’²⁶ Machine learning involves a set of techniques mostly dealing with a mix of statistics and computer engineering, from which the required computational algorithms are developed. It uses mathematical models with data sets, mainly obtained from Big Data, where the parameters are configured during the learning phase, through different learning methods.²⁷ Algorithms are not able to create neutral or non-discriminatory and independent predictions about future events since they are contingent from its previous design.

There are three main types of learning: *supervised*, *unsupervised* and *reinforcement learning*. In *supervised* machine learning the AI system is given pre-labelled data and required to work out the rules that connect them. Thus the agent observes a data set, interprets it as a set of possible input-desired output examples and creates a model of the un-

²⁰ () Christof Koch, chief scientific officer of the Allen Institute for Brain Science in Seattle, considers that consciousness is a property of matter well organized, just like mass or energy. If one could emulate a human brain, there would be consciousness, see <https://www.technologyreview.com/s/531146/what-it-will-take-for-computers-to-be-conscious/>.

²¹ () Such as the Human Brain Project, launched in October, 2013, as an interdisciplinary European project involving several researchers of more than 100 institutions of 24 countries. This European project seeks to leverage cutting edge information and communication technologies, creating a multi-level brain simulation platform (see: <https://www.humanbrainproject.eu/en/brain-simulation/>). This project raises medical hopes for the diagnosis and treatment of brain diseases, but also some ethical apprehensions. As Daniel Lim puts it, if we could emulate a human brain in a computer, there would be a new personhood, Daniel Lim, ‘Brain simulation and personhood: a concern with the Human Brain Project’, *Ethics and Information Technology* (2013), at 13.

²² () L. Floridi, *supra* note 2, at 130.

²³ () Luciano Floridi/Josh Cows/ Monica Beltrametti/Raja Chatila/Patrice Chazerand/Virginia Dignum/ Christoph Luetge/Robert Madelin/Ugo Pagallo/Francesca Rossi/Burkhard Schafer/Peggy Valcke/ Effy Vayena, ‘AI4People—An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations’, *Minds and Machines* (2018). The draft was released on 18 December 2018.

²⁴ () High Level Expert Group on AI, *Ethics Guidelines for Trustworthy AI* (2019), available at: <https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai>.

²⁵ () High-Level Expert Group on AI, *A Definition of AI: Main Capabilities and Disciplines* (2019), available at: <https://ec.europa.eu/digital-single-market/en/news/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines>.

²⁶ () Stuart J. Russell & Peter Norvig, *Artificial Intelligence: A Modern Approach* (2016), at 714.

²⁷ () Constance de Saint-Laurent, ‘In Defence of Machine Learning: Debunking the Myths of Artificial Intelligence’, *Europe’s Journal of Psychology*, 14 (2018), at 737; Xávier Rosin & Vasileios Lampos, ‘In-depth study on the use of AI in judicial systems, notably AI applications processing judicial decisions and data’, in *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment*. Strasbourg, CEPEJ (2018), at 51, available at <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>.

derlying function so that the difference between the desired and predicted outputs is as small as possible for previously unseen patterns. The supervisor then compares the desired and the predicted outputs, adjusting the model.

In the *unsupervised learning* or self-organising systems, the machine is given no pointers and has no desired outputs. It has to identify the inputs and the outputs as well as the rules that connect them, even though there is no specific feedback: e.g. a self-driving taxi can develop the concept of «good traffic days» and «bad traffic days» without any previously labelled examples.

By *reinforcement learning*, the system gets feedback from the environment through artificial punishments or rewards. The decision made before the reward is solely the agent responsibility; there is no supervisor or human intervention.²⁸ The ability to learn provides the AI system with the adaptability for

solving problems in a complex and rapidly changing environment, achieving significant breakthroughs and challenging the dividing line between creativity and reason made by machines.²⁹

Deep learning through artificial neural networks is the most challenging and unique among machine learning algorithms as it exhibits many similarities with the biological neural networks. The deep learning and neural networks require a large amount of data and are extremely efficient in finding complex patterns. They use several layers of processing, each taking data from previous layers through fundamental units called artificial neurons and passing an output up to the next layer. The nature of the output may vary according to the nature of the input, which can be weighted and not just turned on or off.³⁰

2. THE IMPLEMENTED SYSTEMS

2.A. THE EXPERIENCES WITHIN THE EUROPEAN UNION

There are several possible classifications of AI reasoning methods and techniques. To pinpoint in what way those technical categories can be seen as judicial AI tools, one could tackle some examples such as advanced case-law search engines, online dispute resolution, tools of assistance in drafting deeds, analysis tools (predictive or scales), categorisation of documents (such as contracts), or chatbots to offer legal information or legal support. Not all of the pinpointed examples can be transposed to a judicial decision point of view. There have been some academic projects as well, using reasoning methods to predict judicial decisions that are worthy of mention, as we will see further on.

Some EU Member States already have some sort of AI judicial tools implemented or have a public political strategy to develop AI technologies, including AI in the administration of justice. In 2016, the UK made public a report in *“Robotics and artificial intelligence”*;³¹ in 2017, Finland launched a strategic plan to turn the country into a leader in the application of AI;³² in 2018, France also made public a report ‘For a meaningful artificial intel-

ligence towards a French and European strategy’ (2018).³³

In the UK one can find *Luminance*, a tool of text analysis based on machine learning technology (pattern-recognition, as pointed out by the company,³⁴ that reviews documents and learns from the interaction between lawyers and documents; or *HART* (Harm Assessment Risk Tool), the algorithm that predicts the level of risk of suspects committing further crimes in a certain period of time,³⁵ through an algorithm of “random forest”, combining certain values, the majority of which focus on the suspect’s offending history, as well as age, gender and geographical area. In France, there are some tools such as *Doctrine*, *LexisNexis* and *Dalloz*, simple search engines for court decisions and other legal texts. More interesting are the software tools *Prédicite* and *Case Law Analytics*, both analysis tools with the aim of predicting the outcome of a specific case³⁶ (or “trend” analysis tools).

France also conducted an experiment to test predictive justice software (the *Prédicite* software tool) on various litigation appeals in 2017, in the two courts of appeal in Rennes and Douai. The results were not optimal. The aim of the experiment was to try to reduce excessive variability in court decisions in the

²⁸ () Ezequiel López-Rubio, ‘Computational Functionalism for the Deep Learning Era’, *Minds & Machines* (2018), at 4; Stuart J. Russell & Peter Norvig, *supra* note 26, at 694-695.

²⁹ () In 1996, William McCune solved the Robbins axiom in Boolean algebra, with the help of the Equational Prover program, succeeding where the best mathematicians had failed for 60 years (see, The New York Times, ‘Computer Math Proof Shows Reasoning Power’, December, 10 (1996), available in <https://archive.nytimes.com/www.nytimes.com/library/cyber/week/1210math.html>). In 1997, the IBM’s Deep Blue chess program succeeded in defeating world champion Gary Kasparov in a six-game match. In 2011, the supercomputer Watson was used in the famous American TV quiz show Jeopardy, outperformed its two human opponents. The Watson program is currently used in healthcare, as a diagnosis and treatment assistant, and in several educational projects. In 2015, the AlphaGo, developed by Google, became the first computer program to win a 9-dan professional in the board game Go (by 4 to 1). It learns by examining hundreds of thousands of online games played between humans, using it as data for a machine-learning algorithm. AlphaGo played against different versions of itself, fine-tuning its strategies by deep reinforcement learning. It was considered by the *Science* magazine one of the breakthroughs of 2016 (see <https://www.sciencemag.org/news/2016/12/ai-protein-folding-our-breakthrough-runners>). The AlphaGo Zero computer program, with only a little period of training, beat its predecessor AlphaGo by 100-0. In 2018, Alvin Rajkomar and Eyal Oren signed the study ‘Scalable and accurate deep learning with electronic health records’, *Npj (Nature Partner Journals), Digital Medicine*, 1, n.º 18 (2018), available at <https://www.nature.com/articles/s41746-018-0029-1>, where it shows the performance of a predictive deep learning algorithm, that analysed clinical records of 216,221 patients. It predicted with a level accuracy between 75 and 94% the risk of in-hospital mortality (93%-94%); 30-day unplanned readmission (75-76%), prolonged hospital stay (85-86%) and discharge diagnosis (90%).

³⁰ () C. Chace, *supra* note 7, at p. 14.

³¹ () House of Commons Science and Technology Committee, *Robotics and artificial intelligence* (2016), available at <https://publications.parliament.uk/pa/cm201617/cmselect/cmsctech/145/145.pdf>.

³² () Ministry of Economic Affairs and Employment of Finland, *Work in the age of artificial intelligence* (2018), available at http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/160980/TEM-jul_21_2018_Work_in_the_age.pdf.

³³ () https://www.aiforhumanity.fr/pdfs/MissionVillani_Report_ENG-VF.pdf (visited on 29 May 2019).

³⁴ () The company website at <https://www.luminance.com/>.

³⁵ () As described by Cambridge University (<https://www.cam.ac.uk/research/features/helping-police-make-custody-decisions-using-artificial-intelligence>), this algorithm helps the police to decide, after taking someone into custody, whether let the person free on police bail or keep him/her locked until going to court.

³⁶ () See the websites <https://predictice.com/> and <https://www.caselawanalytics.com/>

name of citizen's equality before the law. However, the experiment did not add any valuable insight as to the role of AI in decision-making. It seems that the software got confused between lexical occurrences and the causalities that had been decisive to the judges in the decisions used as "data fuel", leading to absurd results.³⁷

In Austria AI has been used as a tool to structure information for the quick and efficient analysis and handling of documents:³⁸ the AI tool analyses incoming mail without any manual contact by the court's staff, extracting metadata, identifying and recognizing procedures to file documents and its categorization; it functions as a tool for digital file management (particularly important in the management of unstructured documents); as a tool for analysis in investigating data (analysing and classifying metadata from any form of data and recognition of communication flows and relationships; and as a tool for automatic anonymization of court decisions (personal data of the parties).

University College London also conducted an investigation³⁹ to predict judicial decisions of the ECtHR using only the textual information extracted from relevant sections of ECtHR judgments. The training data consisted of textual features extracted from given cases and

the output was the actual decision made by the judges: it predicted the outcome with 79% accuracy. The authors concluded that 'the information regarding the factual background of the case as this is formulated by the Court in the relevant subsection of its judgments is the most important part obtaining on average the strongest predictive performance of the Court's decision outcome', and that 'the rather robust correlation between the outcomes of cases and the text corresponding to fact patterns contained in the relevant subsections coheres well with other empirical work on judicial decision-making in hard cases and backs basic legal realist intuitions'.

Another fruitful field of application of AI solutions is in small claims civil litigation. Many countries within the EU have already put in place – or so intend to – some sort of Online Dispute Resolution (ODR) service. The Netherlands, United Kingdom, Latvia and Estonia are some of them. Estonia intends⁴⁰ to create a totally human-independent system that renders decisions in small claims up to €7.000,00. In theory, the two parties would upload documents and other relevant information and the AI technology (ODR) would issue a decision; that decision can be appealed to a human judge.

The UK ODR platform for small claims resolution is not a truly AI solution, since it is

a human judge that decides the dispute. The main difference between this method and the traditional decision-making method is that all contact between the user and the court is through the online platform. The other difference from a traditional approach is that there are online facilitators, that is, in Professor Richard Susskind's own words, 'individuals who will look at claims and bring the parties together negotiating and perhaps acting as mediators after some kind of guidance'.⁴¹

Latvia also has an ODR solution in claims up to €2.100,00: it is a almost totally written procedure, submitted online by the claimant, and it only applies to small claims for recovery of money or for recovery of maintenance, and the application need to comply with specific rules on these proceedings (a certain form model or, for instance, the claimant has to indicate if he or she requests a court hearing to consider the matter). As the British ODR, the decision is rendered by a judge and not by any sort of AI tool.⁴²

The European Commission provides an ODR platform as well, to help resolve consumer disputes originating on online purchases without going to court. It can be used for any contractual dispute arising from online purchases of goods or services where the trader and consumer are both based in the EU, Norway, Iceland, and Liechtenstein. This ODR is regulated by the Regulation (EU) n. ° 524/2013 of the European Parliament

and of the Council of 21 May 2013. It is an ADR (alternative dispute resolution) and the platform merely works to facilitate communication between the parties and a dispute resolution body, without going to court. One of the biggest advantages of this ODR is that it provides automated translations between all EU languages, as well as information and support throughout.⁴³

The Netherlands' ODR is the oldest one in Europe that we are aware of. The *e-Court* is a private initiative ADR launched in 2010 and, as the model intended by Estonia, is a fully automatic AI decision render. The creditor submits the required information (documents) and the decision is rendered without any human intervention. Nevertheless, to initiate enforcement proceedings, the users of e-Court still have to obtain an enforceable title, and this title is issued by humans. In fact, the automated online-made decisions are sent to a public court, where the clerks manually recalculate the awarded amounts.⁴⁴

Also worth mentioning is *Rechtwijzer*, another Dutch-made ODR solution: its mission was to reduce the burden of the legal process of divorce by reducing its adversarial nature. The process started with a diagnosis phase, then the intake phase for the initiating party and, at last, the other party was invited to join and undertake the intake process. This platform was a channel of communication between the parties to work on agree-

³⁷ () Xavier Rosin & Vasileios Lampos, *supra note 27*, at 42.

³⁸ () *How is Austria approaching AI integration into judicial policies?* a presentation from Georg Stawa, President of the CEPEJ and Head of Department for Strategy, Organizational Consulting and Information Management, Federal Ministry for Constitution, Reforms, Deregulation and Justice (2018), available at <https://rm.coe.int/how-is-austria-approaching-ai-integration-into-judicial-policies-/16808e4d81>.

³⁹ () Nikolaos Aletras, Dimitrios Tsarapatsanis, Daniel Preoțiu-Pietro, Vasileios Lampos, *Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective* (2016), available at <https://peerj.com/articles/cs-93/>.

⁴⁰ () For more details, see the article available at <https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/>.

⁴¹ () For a brief and clear explanation of UK's ODR, see the website <https://www.judiciary.uk/reviews/online-dispute-resolution/what-is-odr/>.

⁴² () For a more analysis see https://e-justice.europa.eu/content_small_claims-42-lv-en.do?member=1.

⁴³ () The online address of the ODR platform: <https://ec.europa.eu/consumers/odr/main/?event=main.home2.show>.

⁴⁴ () For more details, H.W.R. (Henriëtte) Nakad-Weststrate, H.J. (Jaap) van den Herik, A.W. (Ton) Jongbloed and Abdel-Badeeh M. Salem, *The Rise of the Robotic Judge in Modern Court Proceedings*, conference paper on the 7th International Conference on Information Technology (2015), at 59-67.

ments on the topics needing resolution. Even though it was a solution based on the negotiation of the parties, they were also informed about the legal rules concerning the agreements negotiated (dividing property, child support, etc.). At the end of the online process, these agreements would be reviewed by a neutral third party (a lawyer). The *Rechtwijzer* project ended in 2017 and there seems to be no official explanation for its demise.⁴⁵

2.B. WHAT IS BEING DONE IN THE EU

Aside from what is already put into practice, in April 2018 the EU Member States signed a declaration of Cooperation on Artificial Intelligence,⁴⁶ where the countries agreed to build a EU towards achievements and investments in AI, as well as progress towards the creation of a Digital Single Market. That same month the European Commission issued a communication on Artificial intelligence for Europe.⁴⁷ In that communication, the Commission argues that EU 'should have a coordinated approach to make the most of the opportunities offered by AI and to address the new challenges that it brings',⁴⁸ granting explicit support in AI research on *inter alia* 'public administrations (including justice)'.⁴⁹ Later that year, the CEPEJ launched an 'European ethical Charter on the use of Artificial Intelligence in judicial systems and their

environment'.⁵⁰ Despite the path taken by the EU over these past years, there is still a long way to go concerning the use of AI technology in judicial decisions within the EU.

3. SOME ETHICAL AND LEGAL CHALLENGES

3.A. THE EUROPEAN ETHICAL CHARTER ON THE USE OF ARTIFICIAL INTELLIGENCE IN JUDICIAL SYSTEMS AND THEIR ENVIRONMENT

Bearing in mind that the implementation of AI is not something for the far future but something for our time, the CEPEJ formally adopted the five fundamental principles on the use of AI in judicial systems and their environment previously mentioned in Chapter 1.⁵¹ These principles aim to guarantee respect for the ECHR and the Convention on the Protection of Personal Data (CPPD) by framing public policies on this field, and assuring that the processing of AI respects principles such as the transparency, impartiality and equality, certified by an external and independent expert assessment.

These principles, however, are not to be written in stone. The CEPEJ intends to subject them to monitoring and supervision with the aim of a continuous

improvement of practices. For now, the five principles are: *respect for fundamental rights*: ensure that the design and implementation of AI tools and services are compatible with fundamental rights;⁵² *non-discrimination*: specifically prevent the development or intensification of any discrimination between individuals or groups of individuals;⁵³ *principle of quality and security*: with regard to the processing of judicial decisions and data, use certified sources and intangible data with models elaborated in a multi-disciplinary manner, and in a secure technological environment;⁵⁴ *principle of transparency, impartiality and fairness*: make data processing methods accessible and understandable, and authorise external audits;⁵⁵ and *principle "under user control"*: precludes a prescriptive approach and ensures that users are informed actors and in control of the choices made.⁵⁶ These five principles tackle some of the main ethical issues posed by the use of

AI tools in a judicial system and their environment, as well as the principles and legal barriers that surround this field within the EU.

3.B. THE USE AND AUTOMATIC TREATMENT OF PERSONAL DATA

Article 9(1)(a) of the CE's CPPD⁵⁷ provides the principle that '[e]veryone has the right not to be subject to a decision affecting him significantly, which shall be taken solely on the basis of automatic processing of data, without his point of view being taken into account. Notwithstanding this principle of prohibition, Article 9(2) states that "paragraph 1(a) shall not apply if the decision is authorised by a law to which the controller is subject and which also provides for appropriate measures to safeguard the rights, freedoms and legitimate interests of the data subject' (in a similar sense, see article 22 of the General Data Protection

⁴⁵ () For more details, see the text available at <https://law-tech-a2j.org/odr/rechtwijzer-why-online-supported-dispute-resolution-is-hard-to-implement/>.

⁴⁶ () Available at <https://ec.europa.eu/jrc/communities/en/node/1286/document/eu-declaration-cooperation-artificial-intelligence>.

⁴⁷ () Available at <https://ec.europa.eu/digital-single-market/en/news/communication-artificial-intelligence-europe>.

⁴⁸ () *Supra* note 47, at 3.

⁴⁹ () *Supra* note 47, at 8.

⁵⁰ () CEPEJ, *European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment* (2018), available at <https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>.

⁵¹ () *Supra* note 50, at 7-12.

⁵² () The processing of the data must serve clear purposes, in compliance with the ECHR and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data; the use of AI to assist in judicial decision-making must not undermine the guarantees of the right of access to the judge and the right to a fair trial, i.e., equality of arms and respect for adversarial process; ethical-by-design approach, meaning that the ethical choices are made in the design phase and never left to the user

⁵³ () The AI users must ensure that the methods do not reproduce or aggravate such discrimination; there must be taken measures in the development and deployment phases when processing sensitive data, ensuring that when discrimination has been identified, must be taken measures to limit or neutralise these risks, as well as awareness-rising among stakeholders; AI use to combat discriminations is encouraged

⁵⁴ () Through a multidisciplinary approach – designers of machine learning, justice system professionals and researchers in the fields of law and social sciences; data used on the machine learning process should come from certified sources and should not be modified until they have been used, and the whole process must be traceable; secure environments to ensure system integrity and intangibility

⁵⁵ () A balance between the intellectual property, the need for transparency, impartiality, fairness and intellectual integrity, applying to the whole process; it should be able to be certified and audited by independent authorities; public authorities should grant certification, regularly reviewed

⁵⁶ () User autonomy should be increased; the possibility of review judicial decisions and the data used to produce the result; informed consent, meaning that the user must be informed in a clear way if the AI tools are binding, the alternative options available, the right to legal advice and the right to access a court within the meaning of Article 6 of the ECHR; literacy programmes on the use of the AI tools

⁵⁷ () As amended by the Protocol adopted in May 2018.

In *Z. v. Finland*,⁵⁸ concerning Article 8 of ECHR, the court stated that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to privacy and family life, just as '[r]especting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general'.⁵⁹

Recently, the court stressed⁶⁰ the fact that it has consistently held that systematic storage and other use of information relating to an individual's private life by public authorities entails important implications for the interests protected by Article 8. Thus any interference will be in breach of the ECHR unless it is in accordance with the law and shows itself to be necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8(2) ECHR). The court also stressed that it is well established case law that accordance with law requires it to be accessible,

foreseeable and accompanied by necessary procedural safeguards affording adequate legal protection against arbitrary application of the relevant legal provisions.⁶¹

3.D. SOME RECENT DECISIONS OF THE ECtHR AND THE ECJ

One of the biggest challenges put forward by the use of AI in judicial systems and their environment is the compliance with the rights and principles enshrined within the ECHR. As stated in the Ethical Charter, these solutions have to comply with such individual rights as 'the right to a fair trial (particularly the right to a natural judge established by law, the right to an independent and impartial tribunal and equality of arms in judicial proceedings) and, where insufficient care has been taken to protect data communicated in open data, the right to respect for private and family life'.⁶²

The use of AI has to comply with a myriad of concepts and interpretations of the ECHR articles developed by the Strasbourg's court. First of all, it is crystal clear that the right to a public hearing is a fundamental principle.⁶³ Moreover, the right to a court is perceived as an element of the right to a fair trial, enshrined in Article 6(1), and it is no more absolute in

criminal than in civil matters.^{64,65} The fundamental right to a court may imply one of two things, in the use of AI in judicial ruling: the redefinition of the concept of 'court', in which an 'artificially intelligent' court may have space; or, on the other hand, that the AI can only be used as a mere assistant tool.

A court, even an "AI ruled" court, must always be established by law, which reflects the principle of the rule of law, otherwise will lack democratic legitimacy (66). On the other hand, judicial independence, that also has to be assured by an "AI ruled" court or when the judge uses AI tools to decide, calls for particular clarity of the rules applied in every case and for clear safeguards to ensure objectivity and transparency, as to avoid any appearance of arbitrariness in the assignment of the cases.^{67,68}

The ECtHR has established that impartiality must be assessed on the basis of a subjective approach, in order to determine the personal conviction of a judge on such an occasion, but also according to an objective approach, to ensure that sufficient safeguards are offered

to exclude any legitimate doubt in this respect.⁶⁹ The test of a 'subjective approach' may be hard, if not impossible, to conduct on an AI court or tool. But maybe that is one of the most attracting features of an AI based technology: it has no subjectivity at all. From a practical perspective, when using an AI based tool, this part of the test should not be applied or, otherwise, it is also another concept to be redefined by the ECtHR. Finally, the Court has established that impartiality is also guaranteed by the identification of the judges who rendered the decision.⁷⁰ This is a factor of undeniable relevance if and when a case should be decided by an AI.

The adversarial principle and the principle of equality of arms are seen as fundamental components of the concept of a "fair hearing". As recently stated by the Court, 'They require a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents'.⁷¹

⁵⁸ () *Z. v. Finland*, Appl. n. ° 22009/93, Judgement of 25 February 1997. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>

⁵⁹ () As to regarding public access to personal data, the court recognises that 'a margin of appreciation should be left to the competent national authorities in striking a fair balance between the interest of publicity of court proceedings, on the one hand, and the interests of a party or a third person in maintaining the confidentiality of such data, on the other hand. The scope of this margin will depend on such factors as the nature and seriousness of the interests at stake and the gravity of the interference'.

⁶⁰ () *Surikov v. Ukraine*, Appl. n. ° 42788/06, at 70-74, Judgement of 26 January 2017.

⁶¹ () *Supra* note 60, at 71.

⁶² () *Supra* note 50, at 8.

⁶³ () *Vernes v. France*, appl. n. ° 30183/06, Judgement of 20 January 2011. However, it may suffer from adjustments justified by the interests of the private life of the parties or the safeguarding of justice (*Diennet v. France*, n. ° 18160/91, 26 September 1995) or by the nature of the matters submitted to the judge in the context of the proceedings in question (*Miller v. Sweden*, n. ° 55853/00, 8 February 2005; *Göç v. Turkey*, n. ° 36590/97, 11 July 2002).

⁶⁴ () *Deweere v. Belgium*, appl. n. ° 6903/75, §49, Judgement of 27 February 1980.

⁶⁵ () In *Golder v. United Kingdom*, the court recognized a right of access to a court but also stated that it is not absolute, admitting some implied limitations (appl. n. ° 4451/70, §38, Judgement of 21 February 1975). But even where there are implied limitations, some other aspects of the right enshrined on Article 6(1) must be observed, such as the right to be heard before a court within a reasonable time (cfr. *Kart v. Turkey*, n. ° 8917/05, 3 December 2009).

⁶⁶ () *Kontalexis v. Greece*, appl. n. ° 59000/08, Judgement of 31 May 2011.

⁶⁷ () *DMD GROUP, a.s. v. Slovakia*, appl. n. ° 19334/03, Judgement of 05 October 2010, at 66.

⁶⁸ () *Miracle Europe KFT v. Hungary*, Appl. n. ° 57774/13, Judgement of 12 January 2016, at 58. The Court considered that where the assignment of a case is discretionary in the sense that the modalities are not prescribed by law, it puts at risk the appearance of impartiality, by allowing speculation about the influence of political or other forces on the assignee court and the judge in charge, even where the assignment of the case to the specific judge in itself follows transparent criteria.

⁶⁹ () *Ivanovski v. "the Former Yugoslav Republic of Macedonia"*, Appl. n. ° 29908/11, Judgement of 21 January 2016.

⁷⁰ () *Supra* note 63, at 41-44. The court found a violation due to the lack of impartiality of the administrative body resulting from the absence of an indication of its composition.

⁷¹ () *Prebil v. Slovenia*, Appl. n. ° 29278/16, Judgement of 19 March 2019.

Another important right enshrined in Article 6(2) is the presumption of innocence. The ECtHR perceives it as the right to be presumed innocent until proven guilty according to the law. It is 'viewed as a procedural guarantee in the context of a criminal trial itself', but the presumption of innocence also 'imposes requirements in respect of, inter alia, the burden of proof; legal presumptions of fact and law; the privilege against self-incrimination; pre-trial publicity; and premature expressions, by the trial court or by other public officials, of a defendant's guilt'.⁷² It is a paramount principle when some sort of automatism or artificial intelligent tools are used in criminal cases.

Combining almost all provisions of the rights enshrined in Article 6, the Court was very recently challenged in *Sigurdur Einarsson a. o. v. Iceland*⁷³ with potential violations of said article in a criminal proceeding where the defendant alleged, *inter alia*, that he had been denied full access to the file held by the prosecution. The criminal proceedings concerned a potential criminal conduct in connection with the collapse of one of the country's largest banks during the financial crisis that hit Iceland in 2008. The investigation lasted almost three years and led to an extensive collection of data (including data seized due to a court search warrant). To conduct a search of the electronic data, the prosecution used an AI tool called "Clearwell", an e-discovery system, whose results were exported and tagged as "investigation

documents". The applicants complained that they never had the opportunity to review the documents submitted to the court and that they had been denied the possibility of searching the same data using the electronic system applied. This substantiates, in their view, a violation of the principle of equality of arms (relying on Article 6(1) and (3)(b)) because they should have had the same opportunities as the prosecution to access and select evidence from the collection of documents gathered by the police during the investigation.

The Court didn't find any violation of Article 6 on mass data that was not tagged, stating that to that extent the prosecution did not hold any advantage over the defence (it was not a situation of *non-disclosure*). Regarding the tagged data, this was reviewed by the investigators (manually and through "Clearwell") in order to pick which material should be in the investigation file. The Court recognized that this selection was made by the prosecution alone without the involvement of the defence or any judicial supervision, as well as that further searches by the defence through the data would have been technically possible and appropriate for a search for potential disculpatory evidence. The Court thus concluded that 'any refusal to allow the defence to have further searches of the "tagged" documents carried out would in principle raise an issue under Article 6 § 3(b) with regard to the provision of adequate facilities for the preparation of

the defence'.⁷⁴ The case law of *Sigurdur Einarsson a. o. v. Iceland* is paramount when analysing the combination of AI tools and the rights enshrined in Article 6: it established a clear principle that where AI tools are used to deal with massive data and information is extracted through that mechanism, the principle of equality of arms (Article 6(1)) and the right to have adequate time and facilities for the preparation of defence demands that the defendant (in a criminal case or in a civil claim, as stated in *Deweer v. Belgium*) has the right to participate in the cherry picking of information and has the right to conduct his/her own search through the data using the same tool as the prosecution.

Regarding the European Union, in the joined cases C-293/17 and C-294/17, the Council of State of the Netherlands requested a preliminary ruling from the ECJ, where it was asked whether Article 6(2) of the Habitats Directive⁷⁵ could be interpreted as meaning that measures such as procedures for the surveillance and monitoring of farms whose activities cause nitrogen deposition and the possibility of imposing penalties, up to and including the closure of those farms, are sufficient for the purposes of complying with that provision. The answer was pos-

itive, provided that is ensured the scientific accuracy of the software.⁷⁶

3.E. ETHICAL CONCERNS: OPACITY AND ANCHORING

The black box problem, arising mainly in deep neural networks, is what happens when the AI agent gives a result in a way that humans or even its creators cannot understand or explain how it was achieved, even though the accuracy outperforms human decisions or predictions. Its use in judicial ruling could be a threat to some nuclear concepts in judicial decision, such as causation and intention.⁷⁷ Moreover, it could lead to suspicions about the parameters or variables used in the AI agent, casting doubts on judicial independence. If we want to preserve the essential core of judicial ruling, we must not accept a simple "computer says no" answer. However, just as one cannot ask the human judge to open up his brain and describe how he got to his ruling, we cannot expect full transparency from AI algorithms that can only be achieved at the expense of its performance. The full transparency of the AI agent would probably not be understandable for the majority of people; to which we should add the issues concerning the intellectual property rights over the algorithms. More important

⁷² () *Kangers v. Latvia*, Appl. n. ° 35726/10, Judgement of March 2019. Also, *Lolov v. Bulgaria*, Appl. n. ° 6123/11, Judgement of 21 February 2019; *Allenet de Ribemont v France*, 10 February 1995; *Viorel Burzo v. Romany*, Appl. n. s 75109/01 and 12639/02, Judgement of 30 June 2009; *Lizaso Azconobieta v. Spain*, Appl. n. ° 28834/08, Judgement of 28 June 2011.

⁷⁴ () *Supra* note 75, at 85-91. Despite the mentioned conclusion, the court dismissed a violation of Article 6(3)(b) because it found that the applicant did not formally seek a court order to have access to those documents, and thus it was not denied a fair trial overall. The judgement had a dissenting opinion on this part from Judge Pavli. Particularly interesting, at 10: 'It is worth recalling at this point that what is at stake in this case is a fundamental tenet of criminal due process, namely equality of arms. In the light of this cardinal principle, the majority's overall approach seems insufficiently attuned to the complexities of electronic disclosure in criminal (or for that matter, civil) proceedings involving high-volume data; to the use of modern technological tools in this context; and to their combined implications for equality of arms. The assumption that standard rules of disclosure ought to apply unchanged in this context is one that, at the very least, needs to be tested.'

⁷⁵ () Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

⁷⁶ () *At para. 137*.

⁷⁷ () Yavar Bathaee, 'The Artificial Intelligence Black Box and the Failure of Intent and Causation', *Harvard Journal of Law & Technology*, 31, 2 (2018), at 938.

⁷² () *Kangers v. Latvia*, Appl. n. ° 35726/10, Judgement of March 2019. Also, *Lolov v. Bulgaria*, Appl. n. ° 6123/11, Judgement of 21 February 2019; *Allenet de Ribemont v France*, 10 February 1995; *Viorel Burzo v. Romany*, Appl. n. s 75109/01 and 12639/02, Judgement of 30 June 2009; *Lizaso Azconobieta v. Spain*, Appl. n. ° 28834/08, Judgement of 28 June 2011.

⁷³ () Appl. n. ° 39757/15, Judgement of 4 June 2019.

than knowing how an AI agent gets its results is assuring it has enough explanatory power, for instance, through the use of unconditional counterfactuals as a mean to provide explanations and surpass the opacity of the black box.⁷⁸ Regardless of the technique employed or the uses of the AI agent, it should always be guaranteed the adversarial process in the judicial decision-making, in order to assure transparency and reinforce people's confidence in the rule of law.

Another ethical concern is related to a possible anchoring effect. If the AI decision is evidence-based, the judge will tend to follow it, relinquishing his own decision. And the more he trusts his AI assistant's expertise, the more the judge will be depending on the machine for his rulings.⁷⁹ Nonetheless, if the AI agent is «trustworthy», in the sense meant by the AI-HLEG, this is actually good news. With this powerful ally, the judge would make better decisions, faster, and more fairly, provided that the dialectical nature of the procedure would be assured⁸⁰ and that the AI's assistance could always be challenged by the parties.

FINAL REMARKS

Steven Pinker once noted that 'intelligence is a contraption of gadgets: software modules that acquire, or are programmed with, knowledge of how to pursue various goals in various domains'. When defined as the 'ability to deploy novel means to attain a goal', intelligence is a common property of machines and humans alike, and those two very different forms of its manifestation, artificial and human, will hopefully allow for a fruitful coexistence and cooperation in the Judiciary.

Volition, values and affection play a significant role in human decision-making. AI does not have intentionality or a real attitude, but only set tasks and goals; it does not make real judgements based on principles, rules, priorities or values. Even if the algorithm learns some principles, values and rules, the range would be limited to those which are significant to the model in order to accomplish its goal. On the other hand, human intelligence goes beyond this strictly cognitive domain, because it is connected to actions and rests on a large collection of values.⁸¹ Applying the law is more than a simple logical syllogism, as Justice Oliver

Wendell Holmes once implied. Judging is a mix of skills, including research, language, logic, creative problem solving and social skills.⁸² Nonetheless, interpretation and application of law necessarily imply argumentation, oral or written, and explanatory capacities in which logic analysis play an important role.⁸³ AI systems could be helpful devices to the judicial ruling, above all in preventing biases or transient emotional instability affecting the decision. Judges are subject to personal and work-related stress and burnout, which can naturally shake the decision-making objectivity,⁸⁴ where AI is less prone to these flaws.⁸⁵

We should encourage the use of AI agents that are less susceptible to inspire mistrust as a way of incrementing the judiciary's productivity.⁸⁶ One should not bet on a "legal singularity", in which AI assistance to the judicial ruling will get it right all the time, thus eradicating any legal uncertainty. However, all the help in trying to achieve this purpose should be prudently welcome.

⁷⁸ () Sandra Wachter, Brent Mittelstadt, Chris Russell, *Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR*, available at <https://ssrn.com/abstract=3063289>. A counterfactual is a conditional sentence in the subjunctive mood, such as 'if you had broken the bone, the X-ray would have looked different'. It carries the suggestion that the antecedent of such a conditional is false. Since counterfactuals could be related to all kind of possible worlds, it's important that the world we are using is close to the real world, that is, it should be the closest possible world, see Simon Blackburn, *The Oxford Dictionary of Philosophy* (1996), at 85-86.

⁷⁹ () Ian Kerr, Carissima Mathen, *Chief Justice John Robert is a Robot*, p. 8, paper presented on 5th April, at the WeRobot 2014 Conference, available at <http://robots.law.miami.edu/2014/wp-content/uploads/2013/06/Chief-Justice-John-Roberts-is-a-Robot-March-13-.pdf>.

⁸⁰ () João Marques Martins, 'A system of communication rules for justifying and explaining beliefs about facts in civil trials', *Artificial Intelligence and Law* (2019).

⁸¹ () Wenceslao J. Gonzalez, *supra note 15*, at 10.

⁸² () Richard A. Posner, *Cómo Deciden los Juices*, Marcial Pons, 2011, pp. 16 e ss. (Victoria Roca Pérez spanish translation of *How Judges Think* (2008)).

⁸³ () E. Bulygin, 'What can one expect from Logic in the Law? (Not everything, but more than something)', *Ratio Juris* (2008), at 21. As Bulygin points out, 'that logic cannot give a full account of any legal system is obvious; I wonder who (...) could expect it to. I know of no legal philosopher who would raise such a claim. What logic, or rather logical analysis, can do, however, is to clarify legal concepts and thus introduce greater order, thereby deepening our understanding of legal phenomena.'

⁸⁴ () Take, for instance, a study which concluded that judges were more likely to accept prisoner's requests for parole at the beginning of the day than at the end, Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso, 'Extraneous factors in judicial decisions', *PNAS*, 108, 17 (2011), available at <https://www.pnas.org/content/pnas/108/17/6889.full.pdf>.

⁸⁵ () Past experiences had shown that AI decision-making could reveal structural biases, such as the Correctional Offender Management Profiling for Alternative Sanctions – COMPAS, that was used for predicting the likelihood of defendants committing a future crime, which was considered racially biased against African American defendants. However, these shortcomings can always be corrected.

⁸⁶ () Thomas Julius Buocz, 'Artificial Intelligence in Court: Legitimacy Problems of AI Assistance in the Judiciary', *Retskraft – Copenhagen Journal of Legal Studies*, 2, 1 (2018), at 50.



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