



THEMIS ANNUAL JOURNAL 2021

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FOREWORD

MARKUS BRÜCKNER
EJTN SECRETARY GENERAL



It is with great pleasure that I present the 2021 *Themis Annual Journal*, the third issue of a publication that is helping to propel the highly acclaimed EJTN THEMIS competition to new levels and give the opportunity for the EU magistrates to present their original approaches in European law.

Themis has 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 the steps were then taken to adapt and enlarge its format to the needs of the new generations of magistrates.

EJTN steadfastly believes in the need to keep developing a common European judicial culture and building mutual trust. THEMIS is a veritable treasure in the EJTN training offer for future and early-career judges and prosecutors in order to contribute to these overall goals. This competition answers the need to have a holistic approach to judicial training by cultivating practitioners’ knowledge, skills and attitudes.

The recent period has been a great challenge for all of us, but we adapted quickly and organised the semi-final in an online format. I hope you all have taken this opportunity to learn new skills and discover how you approach uncertain situations. I believe that the EU judges will need to not only master the EU law but also the IT tools and new technologies that are becoming an integral part of the judiciary. After watching the video presentations prepared by the teams, I am delighted to see that they have mastered the challenges of a totally remote way of working. Unfortunately, the participants did not have the chance to meet in person and have the true Themis experience.

Also, in its second online version, the THEMIS competition is open to future European countries’ magistrates undergoing entry-level training within the judicial profession. It remained a platform for debating legal topics, sharing common values, exchanging new experiences, discussing new perspectives and practicing judicial skills. Like every 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. The THEMIS competition enables approximately 200 participants each year to deepen their understanding of EU law topics and to interact with other European judicial trainees.

Each year’s THEMIS competition featured 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 Vinković, 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 "M. Brückner". The signature is written in a cursive, flowing style.

Markus Brückner
Judge, EJTN Secretary General

FOREWORD

ARNO VINKOVIĆ
THEMIS PROJECT MANAGER



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 2021, the topics addressed were the following:

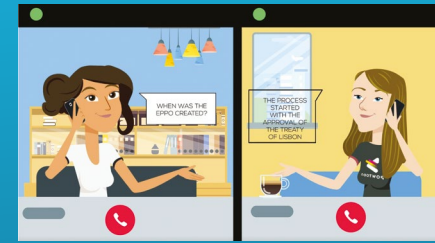
- EU and European Criminal Procedure
- EU and European Family Law
- EU and European Civil Procedure
- Judicial Ethics and Professional Conduct
- Grand Final: Access to Justice

DESCRIPTION OF ACTIVITY

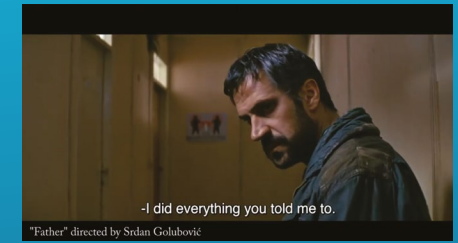
The EJTN THEMIS Competition is a unique contest format, open to judicial trainees from across Europe. It is designed to develop the critical thinking and communication skills of future magistrates from different European countries. The competition is a forum of discussion on different European law topics,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

A genuine enthusiasm exists for the THEMIS Competition. In 2021, 23 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; a video presentation; and, a discussion with the jury and other teams. The participating teams were able to display their creativity in making engaging content that also included short feature films, role-play and animation. This has proven that the issues concerning EU law can also be approached in new formats.

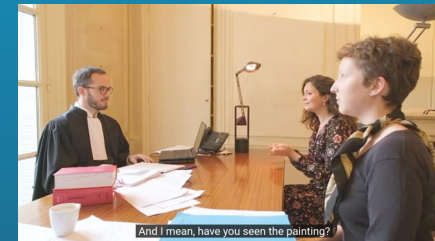
The jury members assessed the overall quality and the originality, the critical thinking and the anticipation of future solutions, the reference to relevant case law, but also the communication skills and the consistency.



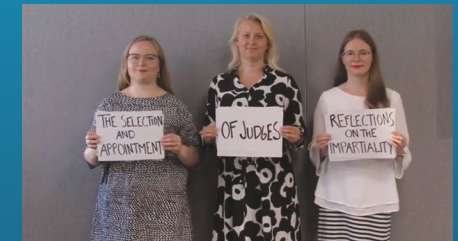
eSemi-final A
TEAM PORTUGAL: *European Delegated Prosecutor: the twilight zone within the EPPO*



eSemi-final B
TEAM SERBIA: *In the Claws of Poverty*



eSemi-final C
TEAM FRANCE: *Expanding the Use of Mediation in Europe: from Promotion to Protection*



eSemi-final D
TEAM FINLAND: *The Selection and Appointment of Judges – Reflections on the Impartiality*

In Hindi, TAJ means 'crown' and this journal presents the selection of best publications selected by the jury members in a given THEMIS year. 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. Original approaches and innovative legal solutions are considered of the highest merit in this competition. 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.

I would like to take this opportunity to thank Judge Markus Brückner, EJTN Secretary General and Ms Carmen Domuta, Head of EJTN Programmes Unit, who have supported the idea of the Themis Annual Journal and have done their best to make it a reality. Also, I would like to thank all the jury members, who provide deeper understanding of the topic and share their experience in it; the tutors and the national coordinators, 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.

Arno Vinković
THEMIS Project Manager

SEMI-FINAL A

EU AND EUROPEAN CRIMINAL PROCEDURE

PARTICIPATING TEAMS
BULGARIA, HUNGARY, PORTUGAL

1st place: Team Bulgaria
2nd place: Team Portugal
3rd place: Team Hungary

Selected papers for TAJ
Team Portugal

10

11



4 - 5 MAY 2021, ONLINE

JURY MEMBERS

CHRISTINE GÖDL (AT)

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

This year's THEMIS competition had to be done in an Online format once again. Nevertheless, the Teams taking part delivered excellent papers and perfectly prepared presentations. Despite restrictions due to the Pandemic, the team-members managed to coordinate their activities and to present themselves professionally in the online meeting with the jury. As a jury member, I am particularly thankful to the EJTN-team for organising and preparing the THEMIS competition in an online format in order to offer the possibility to compete with other teams from all over Europe to future judges and prosecutors even in times of a global pandemic. This shows that European and international cooperation is strong and vivid also in a virtual way.

DAVID J DICKSON (UK)

HEAD OF EXTRADITION, SCOTTISH PROSECUTION SERVICE

This year saw the Themis event online for the second time. Unfortunately the number of participants was lower than in previous years. It is therefore with heartfelt praise that the teams which did participate put so much effort in to both their presentations and their ability to answer some searching questions from the jury. The teams dealt with the inevitable restrictions due to the pandemic and it must have been difficult to coordinate their work on the topics upon which they all so ably presented. It must also have required even greater thought by team members on how to present the results of their hard work in a manner that was informative. Each team rose to the challenge and delivered interesting papers on areas of real interest to the practitioner. They are all to be congratulated.

PETROS ALIKAKOS (GR)

PRESIDENT OF THE COURT OF FIRST INSTANCE AT
IOANNINA, NATIONAL SCHOOL OF JUDICIARY

It is the fourth time (second for criminal law) that I am participating as a juror in the great THEMIS competition (you can call me a veteran...). The first time it was Ethics, second Family law, and the last two times Criminal law. For the last three competitions I had the pleasure to collaborate with Arno Vinkovic. Arno has endorsed the competition with love and dedication. THEMIS competition is a brilliant idea, that hopefully this time of the pandemic wasn't interrupted. The online version of the competition had a severe effect on its immediacy and on its core role to build bridges of collaboration between future judges and prosecutors of the EU member states. It was also difficult for the secretariat and Arno to shape the contest online, even though they had the experience of 2020. And indeed the outcome was great. I believe that we kept the high level of THEMIS and came up to its standards in these critical times.

This year in the semi final for the EU criminal law we had only three teams. So with this small number we couldn't get the big variety of topics of the past. The teams corresponded to the needs of the pandemic era, by providing solutions to many problematic aspects of the judicial system and to the issue of better cooperation between the EU member states in criminal matters. I can tell that these 3 teams did a great job dealing with the tele hearings in criminal cases, the new institution of EPPO (European Public Prosecutor) and the EIO (European Investigative Order). I can admit that as a juror and as a European judge I am proud of them and their work. I am sure that THEMIS is well founded as a competition in our European Judicial Training. THEMIS can bring together the future of the European Judiciary, so as to say our hopes - as judges and prosecutors. THEMIS can be the tool for forming better and brighter members of the judiciary. Again I would like to close this note with my hope for me to have the time and the power to serve THEMIS again and again in the future!

ELIANA DE MATOS TEIXEIRA SANTOS OLIVEIRA
MARIA DESIDÉRIO PEREIRA DIAS
MÓNICA ALEXANDRA SOARES PEREIRA



Team PORTUGAL

EUROPEAN DELEGATED PROSECUTOR: THE TWILIGHT ZONE WITHIN THE EPPO

The EPPO was created to tackle and prevent crimes against the financial interests of the European Union. However, some questions arise concerning the functioning of the EPPO, particularly regarding the EDP.

From the analysis of the Council Regulation (EU) 2017/1939 of 12.10.2017, implementing enhanced cooperation on the establishment of the EPPO, it is not clear that the EDP has enough autonomy in conducting the criminal proceedings.

Analyzing the pre-trial proceedings of the criminal case regarding the investigation and the decision to prosecute or dismiss, and the relevant jurisprudence of the Court of Justice of the European Union and European Court of Human Rights, we intend to assert if the EDP has autonomy and to what extent, and the possible consequences resulting from that autonomy or lack thereof.

Finally, we conclude for the lack of autonomy of the EDP, showing the main problems and suggesting possible solutions to solve them, and recommend, when assessing the implementation, impact, and functioning of the EPPO under the review clause foreseen in the Regulation, some possible legislative changes.

KEY WORDS

European Public Prosecutor's Office [EPPO]
European Delegated Prosecutor [EDP]
Independence
Autonomy
Financial Interests of the European Union
Pre-Trial Proceedings

1. INTRODUCTION

Article 86.º of the Treaty on the Functioning of the European Union (henceforth TFUE) represented a remarkable evolution of Member States in judicial cooperation in criminal matters and, without it, the implementation of the European Public Prosecutor's Office¹ (hereinafter EPPO) would not have been possible.

The EPPO was implemented to combat crimes affecting the financial interests of the European Union². However, now that the EPPO is finally a reality and started functioning last 1st of June within the 22³ participating Member that chose to establish enhanced cooperation on the establishment of the EPPO, it remains to be seen how it will all work together, foreseeing that a few problems may arise.

Within the next pages, we intend to focus on the EPPO and its operation, specifically, with the European Delegated Prosecutor (henceforth EDP) and the streamlining in his performance in his national Member State with the instructions issued by the Permanent Chamber and the Supervising European Prosecutor.

We believe that the problem we propose to analyze and respond to is relevant at two levels: on the one hand, understanding the degree of independence and autonomy that the EDP has while carrying out the investigation and, consequently, the hierarchical relations between the EDP, the Permanent Chamber, and the Supervising European Prosecutor; on the other hand, the impact that the lesser (or greater) degree of autonomy and independence of the EDP has on the achievement of objectives under which the EPPO was established.

Due to the importance that the pre-accusatory phase assumes in the context of criminal proceedings together with the decision to prosecute or dismiss a case, we will focus on the identification of problems we consider that may arise in these two procedural steps and will conclude with some solutions and/or alternatives. These problems will arise within the articulation of powers between the EDP, the Permanent Chamber, and the Supervising European Prosecutor.

¹ Council Regulation (EU) 2017/1939, of 12.10.2017, implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), published in the Official Journal of the European Union L283 of 31.10.2017, available in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:283:FULL&from=PT>.

² 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, available in <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32017L1371&from=pt>.

³ Hungary, Poland, and Sweden decided not to join the EPPO, and Denmark and Ireland have an opt-out regarding the areas of freedom, security, and justice.

2. THE EUROPEAN PUBLIC PROSECUTOR OFFICE

As we highlighted before, EPPO emerges as a necessary response to defend the financial and economic interests of the European Union which, progressively, have been the target of fraud and irregularities, which have caused millions of euros in losses to the European Union⁴.

To adopt more appropriate measures to protect these interests, not only in terms of prevention and detection of situations of fraud and irregularity but also of effective punishment of offenders, *Corpus Juris* emerged, which represented the first step into the implementation of the EPPO and dates back to 2001, when the European Commission first proposed the creation of a Public Prosecutor to protect the financial interests of the European Union⁵.

Later in 2009, the Treaty of Lisbon came into force (also known as Treaty on the Functioning of the European Union and hereinafter TFUE), which provides in articles 86 and 329 the enhanced cooperation mechanism to implement the EPPO. Since not all Member States agreed to implement the EPPO, the enhanced cooperation mechanism allowed

17 Member States to trigger the process of discussion around the structure of the EPPO. Finally in 2017, after a long and tricky discussion at the European and National level, came the approval of the Council Regulation (EU) 2017/1939 of 12 of October of 2017 (henceforth Regulation), implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office⁶, which established the mandate of the EPPO and defined the structure and principles under which the EPPO would conduct its activity in the 22 Member States⁷ that agreed to adopt this newly European Institution. Furthermore, on the 14th of October of 2019, the Council appointed, and the European Parliament confirmed Laura Kovesi as the first European Chief Prosecutor for a non-renewable term of seven years.

The Regulation establishes the EPPO as a Union Body, with legal personality, that cooperates with Eurojust and relies on its support (article 3 and 100). According to Regulation, the EPPO is an independent institution of the European Union, and its main goal is to direct, coordinate and supervise criminal investigations and to prosecute suspects in the courts of the Member States for the perpetration of crimes affecting the financial interests of the European Union (articles 4 and 6).

Without hindering the national systems that the Member States have in place concerning how criminal investigations are organized⁸ on the crimes affecting the financial interests of the Union, the EPPO strives for an improved criminal performance towards offenses while trying not to "go beyond what is necessary in order to achieve those objectives and ensures that its impact on the legal orders and the institutional structures of the Member States is the least intrusive possible" (recital 12) respecting the principles of legality, proportionality, impartiality and loyal cooperation (article 5).

Concerning the material competence of the EPPO, article 22 (1) of the Regulation establishes that the EPPO shall be competent in respect of the criminal offences affecting the financial interests of the Union that are provided for in Directive (EU) 2017/1371, as implemented by national law, irrespective of whether the same criminal conduct could be classified as another type of offence under national law, with some exceptions that either restrict or enlarged the EPPO material competence.

Regarding the structure of the EPPO, the European Commission proposed a decentralized structure where the tasks assigned to the EPPO were divided between the European Public Prosecutor (on a centralized level) and the Deputy

European Public Prosecutor (on a decentralized level within the Member States). Our subsequent analysis needs to emphasize that according to the European Commission⁹ "the Deputy Prosecutors would have a vital role to play, anything the chief Prosecutor could do he could delegate to his Deputies. In practice, they would be the channel through which he acted, because in most cases it would be a Deputy Prosecutor who would handle investigations or prosecutions".

A. STRUCTURE

Although the European Commission first intended to have a decentralized structure for the EPPO¹⁰, the final version of the Regulation established a centralized structure that operates at the European level, with functions of supervision and coordination of the ongoing investigations and prosecutions handed to the EDP in the Member States¹¹.

According to article 8 (2) of the Regulation at the centralized level, the EPPO has the European Chief Prosecutor and the Deputy European Chief Prosecutors (article 11), the European Prosecutors (article 12), the College (article 9), and the Permanent Chambers (article 10) and, at the decentralized level, the EPPO has the EDPs (article 13), who conducts criminal investigations and prosecutions in the Member States.

⁴ See article 1 (1) and (2) of The Directive (EU) 2017/1371, of 05.07.2017, on the fight against fraud to the Union's financial interests by means of criminal law, available in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1371&from=pt>.

⁵ In 2001, the European Commission published the Green Paper that first presented the foundations of the European Public Prosecutor Office. Although other relevant documents inspired the creation of the European Public Prosecutor Office - namely the *Corpus Juris* in 1997 and the *Corpus Juris* 2000 (Florence Proposal) -, the Green Paper was the first institutional proposal for the creation of this new and important institution. For more developments on this subject, you can see *The European Public Prosecutor's Office (EPPO) - Past, Present and Future*, Francesco de Angelis, available in <https://eucrim.eu/articles/the-eppo-past-present-and-future/> and the Green Paper of the European Commission available in https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/green_paper_en.pdf

⁶ Available in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1939&from=EN>

⁷ Hungary, Poland, and Sweden decided not to join the EPPO, and Denmark and Ireland have an opt-out regarding the areas of freedom, security, and justice.

⁸ See recital 15 of the Regulation.

⁹ See page 30, paragraph 4.2.1.2. of the Green Paper 2001, available in https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/green_paper_en.pdf.

¹⁰ As we mentioned above, according to the Green Paper 2001 the European Commission proposed a decentralized structure for the EPPO since this model - in the opinion of the European Commission - was a more suitable answer to the tasks that were assigned to the EPPO and since the most important task of the EPPO is the pre-trial stage of the criminal proceedings, was the European Delegated Prosecutor must pursue his task according to the national law - see paragraph 4.2.1.2. Green Paper of the European Commission available in https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/green_paper_en.pdf.

¹¹ Concerning the structure and operationalization of EPPO activities, also see recitals 20, 21, 22, and 23 of the Regulation.

The two mentioned levels of the EPPO must operate quickly and efficiently to allow the execution of criminal investigation and prosecutions while abiding by the criminal procedural law of the Member States and the principles contained in the Union Treaties, Charter of Fundamental Rights of the European Union, and in the Regulation.

At the central level, the fundamental competencies consist in the supervision and coordination¹² of the ongoing investigations that the EPPO develops in the 22 Member States and in the organization and coordination of the relations between the different bodies that compose the EPPO. In the first case, those tasks are primarily executed by the Permanent Chambers and in the second case by the College.

Despite his/her representative and organizational functions, the European Chief Prosecutor presides the College and the Permanent Chambers, supervises all ongoing investigations, and decides in cases of conflict between the different bodies of the EPPO. For each of his/her competencies, the European Chief Prosecutor is assisted by the Deputy European Chief Prosecutors, who oversee all the powers and tasks that are delegated to them¹³ and substitute the European Chief Prosecutor in meetings and other events that he cannot attend.

Permanent Chambers and European Prosecutors work together to coordinate and supervise ongoing investigations and prosecutions carried out by the EDPs. These two EPPO bodies give instructions and directives to the EDPs and decide on the termination of investigations, prosecutions, and other decisions concerning the criminal proceedings that fall within the competency of the EPPO. In some specific cases¹⁴, and after the approval of the Permanent Chamber, the Supervising European Prosecutor can decide to personally conduct an ongoing investigation that was first assigned or not to the EDP. The powers granted to the Permanent Chamber and the European Prosecutor can be summarized in three words: coordination, supervision, and decision. These powers granted to the Permanent Chamber and the European Prosecutor are the translation of the two levels of activity of the EPPO: to coordinate, supervise, and decide about the ongoing investigations and prosecutions handled by the EDPs in the Member States.

B. EUROPEAN DELEGATED PROSECUTOR

As we mentioned earlier, the EDP carries out the ongoing investigations and prosecution within the Member States. In other words, EDPs are the national link between the EPPO and the judiciary and non-judiciary bodies in their Member States. Considering their powers and functions, we must agree with the European Commission¹⁵ when saying that the EDPs have a vital role in playing within the EPPO: they are the ones who know the criminal proceedings and the best course of action in the Member States, regarding the investigation and prosecution of the crimes that affect the financial interests of the European Union.

The EDPs are responsible for the ongoing investigations and prosecutions that are initiated by them or that are assigned by the Permanent Chambers. While carrying out the investigation, and although such investigations are put in place on behalf of the EPPO, the EDPs must act abiding by the national law of their Member States¹⁶. Therefore, so that they can perform their duties, the Member States must provide the EDPs with the same independent investigative powers that they assign to their national prosecutors or, in the Member States that do not recognize such powers, they must approve legislation to assign them to the EDPs¹⁷. Since the EDPs can maintain their role as national prosecutors¹⁸ - in which case they have “two-hats”¹⁹ -, the coordination between these two roles will be interesting to see in

¹² See recital 22 of the Regulation.

¹³ For example, the European Chief Prosecutor can delegate to the Deputy European Chief Prosecutor the presidency of a Permanent Chamber (Article 11.º § 2 and Article 10 § 1 of the Regulation).

¹⁴ Article 28 (4) of the Regulation.

¹⁵ Page 30, paragraph 4.2.1.2. of the Green Paper 2001, available in https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/green_paper_en.pdf

¹⁶ Recitals 69, 71, and 81 of the Regulation.

¹⁷ See Hans-Holger Herrnfeld, in “The EPPO’s Hybrid Structure and Legal Framework - Issues of implementation - a Perspective from Germany”, that concludes that “... *While the references to “national law” are therefore primarily intended to refer to the “regular” criminal procedural law of the Member States, the wording of the relevant provisions of the EPPO Regulation does not exclude the possibility for Member States to set out specific provisions in their national criminal procedural law that will apply only to the investigations conducted by the EPPO.*” According to the author, for the EDPs to investigate on behalf of the EPPO, the Member States must implement the adequate legal framework to allow the effective and independent investigation of crimes by the EDPs, by assigning them the adequate powers to request and conduct at the national level all investigative measures that are needed.

¹⁸ Article 13 § 3 of the Regulation.

¹⁹ “*The EDPs are national prosecutors who are simultaneously members of the EPPO. as a consequence, when they are not dealing with crimes within the competence of the EPPO, they continue to carry out their ordinary tasks: this peculiar status is usually referred to as ‘double hat’, meaning that when EDPs wear the national hat they continue to be national prosecutors for all intents and purposes, whereas when they wear the European hat they have to follow instructions from the central Office.*”, see The European Public Prosecutor’s Office: King without kingdom? - Fabio Giuffrida (https://www.ceps.eu/wp-content/uploads/2017/02/RR2017-03_EPPO.pdf)

the future²⁰. Probably, as most authors²¹ predict, this "duplication of powers" will propel a reform of the prosecutor's role at a national level to standardize their functions across the Member States and, in consequence, in the EPPO.

While carrying out investigations, the EDPs act in abidance by the directives and instructions of the monitoring Permanent Chamber and the Supervising European Prosecutor. When the EDPs believe that an instruction of the monitoring Permanent Chamber violates national law or European law, they may propose to the monitoring Permanent Chamber to revoke or amend the instructions received²². If the monitoring Permanent Chamber, after consulting the Supervising European Prosecutor, decides not to revoke or amend the contested instruction, the EDP may submit a request to the European Chief Prosecutor for review²³.

Adding to his or her responsibilities concerning ongoing investigations, the EDP has the power to initiate an investigation or evoke a case²⁴, he or she is responsible for bringing a case to judgment and has the power to present trial pleas, participate in taking evidence and exercise the available remedies according to national law²⁵. All these responsibilities and powers must be executed following European law, national law, and the instructions of the monitoring Permanent Chamber and Supervising European Prosecutor.

3. INDEPENDENCE AND AUTONOMY ACCORDING TO COURT OF JUSTICE OF THE EUROPEAN UNION AND EUROPEAN COURT OF HUMAN RIGHTS²⁶

Implicit in the idea of what the Rule of Law means²⁷, although not stated in article 86 (1) of the TFEU, the EPPO also has the independence of a judicial body, with legal personality and the capacity to exercise it. Accordingly, the European Chief Prosecutor, the both Deputy Prosecutors, the European Prosecutors, the EDPs, the Administrative Director, as well as the staff of the EPPO, cannot "*neither seek nor take instructions from any person external to the EPPO, any Member State of the European Union or any institution, body, office or agency of the Union in the performance of their duties under this*

Regulation." and "*shall respect the independence of the EPPO and shall not seek to influence it in the exercise of its tasks.*" (Article 6 (1) of the Regulation).

Independence is the fundamental element of judicial authority in a Rule of Law – as confirmed by article 6 (1) of the European Convention on Human Rights (henceforth ECHR)²⁸ – so that they can adequately perform its specific function, exclusively, by the principle of separation of powers²⁹. Bearing in mind Prosecutors must serve society, have a pivotal role in the defense of human rights, must perform their duties with respect for the presumption of innocence and the right to a fair trial and equality of arms, it is, therefore, essential to guarantee their independence and effective autonomy³⁰. Only then can they act with total justice, impartiality, and objectivity in a decision that will make the difference between dismissing or prosecuting a case and following the ECHR³¹.

²⁰ Regarding this matter, if the EDP needs legal assistance in criminal matters of a State or Organization that does not recognize the EPPO, the EDP will issue the request as a national prosecutor and not as an EDP. This follows from article 13 (1) of the Regulation.

²¹ "In the context of the fight against fraud affecting the EU's financial interests, we are witnessing a progression towards the integration of criminal law systems. The European Union and its Member States are walking a path marked by difficulties, but it is essential to advance towards a greater degree of liberty, security, and justice.", in M. Ángeles Pérez Martín, "The European Public Prosecutor Office - Protecting the Union's Financial Interests through criminal Law", available in <https://eucrim.eu/articles/the-european-public-prosecutors-office-spain/>; also, José P. Ribeiro de Albuquerque, in "Building federal? A instituição da Procuradoria Europeia e os Estatutos dos Ministérios Públicos dos EM da EU: parâmetros mínimos de independência", Ebook_Os Novos Desafios da Cooperação Judiciária e Policial na União Europeia e da Implementação da Procuradoria Europeia, pages 162-163, available in: https://www.jusgov.uminho.pt/wp-content/uploads/2018/02/Ebook_18-de-Maio_Os_novos_desafios_da_cooperacao_judiciaria_e_policial_na_Uniao_Europeia_e_da_implementacao_da_Procuradoria_Europeia_comp.pdf.

²² Article 47 §1 Internal Rules of the EPPO.

²³ Article 47 §2 Internal Rules of the EPPO.

²⁴ Article 13 §1, second paragraph of the Regulation and Article 41 § 1 Internal Rules of the EPPO.

²⁵ Article 13 §1, third paragraph, Article 35 §1, Article 36 §1 and Article 39 §1 of the Regulation and Article 56 and Article 60 Internal Rules of the EPPO.

²⁶ Hereinafter ECtHR.

²⁷ See the Rule of Law Checklist of the Venice Commission of the Council of Europe, pages 39-40.

²⁸ In the past years, the ECtHR issued decisions highlighting that for an "institution" - such as a prosecutor's office - to be considered as a "tribunal" under article 6 (1) the ECHR, must fulfill some requirements. For example, in the Case of Vasilescu vs Romania, 22.05.1998, the ECHR concluded that "*The Court reiterates that only an institution that has full jurisdiction and satisfies several requirements, such as independence of the executive and also of the parties, merits the description "tribunal" within the meaning of Article 6 § 1*" (paragraph 41), and in Case of Ringeisen v Austria, 16.07.1971, the ECtHR concluded that "... *the Court observes that the Regional Commission is a "tribunal" within the meaning of Article 6, paragraph (1) (art. 6-1), of the Convention as it is independent of the executive and also of the parties, its members are appointed for a term of five years and the proceedings before it afford the necessary guarantees...*" (§ 95)

²⁹ See, José P. Ribeiro de Albuquerque in "EPPO – Building federal..."; *op. cit.*, p. 136-172.

³⁰ "... *sufficient autonomy must be ensured to shield prosecutorial authorities from undue political influence. In conformity with the principle of legality, the public prosecution service must act only based on, and under the law. This does not prevent the law from giving prosecutorial authorities some discretion when deciding whether to initiate a criminal procedure or not (opportunity principle). Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion and should be in a position not to apply instructions contradicting the law. The concerns relating to the judiciary apply, mutatis mutandis, to the prosecution service, including the importance of assessing legal regulations, as well as practice*", in The Rule of Law Checklist, *op. cit.*, page 40.

³¹ As stated by ECtHR in several cases, the ECHR also applies to the pre-trial stage, such as the inquiry or the investigation. See the case of Imbrioscia v. Switzerland, 24.11.1993, § 36, case of Dvorski v. Croatia, 20.10.2015, § 76, and the case of Ibrahim and others v. The United Kingdom, 13.09.2016, § 253. Also, Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial, in https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf

The EPPO independence is established at an external level before the European institutions and the national authorities, but also at an internal level. This last aspect is, what we believe, to be more troublesome in regard, specifically, to the EDP independence or lack thereof, opposite the powers that the Permanent Chambers and the Supervising European Prosecutor must conform the EDP action³².

Concerning this matter, the CJEU and the ECtHR have carried out the task to determine the concepts of “judicial authority” or “judicial functions” or even “judicial bodies”.

About the CJEU jurisprudence, this issue is recurrent in decisions concerning judicial cooperation in criminal matters, referring that “independence requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive”, adding that “concept of an ‘issuing judicial authority, within the meaning of Article 6(1) of Framework Decision 2002/584, must

be interpreted as including the Prosecutor General of a Member State who, whilst institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords him a guarantee of independence from the executive in connection with the issuing of a European arrest warrant” (Case C-509/18, paragraph 52 e 57).

The concept of “judicial authority” includes not only judges or judicial bodies, but also all the authorities that participate in the administration of criminal justice and whose “action is taking place with a judicial review that tends to be immediate” (Case C-508/19, paragraph 93 and C-509/18, paragraph 29)³³. Moreover “[t]he independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267.^o TFEU, in that, in accordance with the settled case-law referred to in paragraph 38 above, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence” (Case C-64/16, paragraph 43; also, Case C-216/18, paragraph 54).

Furthermore, the CJEU jurisprudence has stated that for a national authority to be considered a “judicial authority” it must exercise its functions with total autonomy, “without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions” (Joined Cases c-508/18 and C-82/19 PPU paragraph 87; see, also, Case C-64/16, paragraph 44 and Case C-216/18 paragraph 63). Recently the CJEU highlighted “that the public prosecutor’s office may, in accordance with the rules governing its powers and status, be required to verify the incriminating and exculpatory evidence, to guarantee the lawfulness of the pre-trial procedure and to act exclusively according to the law and the prosecutor’s convictions cannot be sufficient to confer upon it the status of a third party in relation to the interests” of the remained parties involved in the criminal investigation (Case C-746/18, paragraph 56).

The organization and internal functioning of the Public Prosecutor Office in the attribution and reassignment of cases must also correspond to an impartial criterion, otherwise, the Public Prosecutors will have the power to refuse orders that are illegal or contrary to their moral conscience through appropriate internal procedures, expressly established, and guaranteed by law.

Any Member State’s administrative organization and hierarchy systems that

fall short of these requirements will not ensure all guarantees required to be considered a “judicial authority”, particularly all those related to independence.

Given the disparity in understanding concepts and internal systems in the various Member States that call into question the general principles and the rights, freedoms, and guarantees of a fair and independent judicial system, the Consultative Council of European Prosecutors, in 2018, through the Opinion number 13, sought, in the light of the various instruments already referred, to standardize global norms and principles of independence, responsibility and ethics of prosecutors, work advisors and the attitude with which they should act. The following aspects represent some of the key elements to have in consideration when talking about independence³⁴:

- The independence, responsibility, and ethics of prosecutors should be included in a statute for prosecutors provided for in national law or even in the constitutions of Member States, with guarantees equal to that of judges.
- The actions of the prosecutors may not be subject to any undue or illegal interference by other public or non-public authorities (external independence), although they are not prevented from receiving instructions and general guidance on the priorities of their activities arising from the law, in an express manner, that is transparent, and which does not put at risk the prosecutor’s own career.

³² “In order to determine whether a tribunal can be considered to be “independent” as required by Article 6 § 1, appearances may also be of importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused”, in Guide on Article 6 of the European Convention ..., op. cit., page 24. Also, case of Şahiner v. Turkey, 25.09.2001, § 44.

³³ The paradigm of understanding if the Public Prosecutor is considered a judicial authority is changing. Although there is still little jurisprudence, the CJEU in cases C - 324/17 and Case C-584/19 has decided that “Article 1(1) and Article 2(c) of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters must be interpreted as meaning that the concepts of ‘judicial authority’ and ‘issuing authority’, within the meaning of those provisions, include the public prosecutor of a Member State or, more generally, the public prosecutor’s office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor’s office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor’s office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order” (Case C-584/19). It is a fact that there is a difference between the EAW and the EIO, that is, the EIO is less intrusive in essence therefore it is more likely to not violate the guarantees enshrined in Article 6 of the Charter.

³⁴ See, Consultative Council of European Prosecutors (CCPE), Opinion No. 13(2018) of the CCPE, «Independence, accountability, and ethics of prosecutors», Strasbourg, of 23 November 2018, available in <https://rm.coe.int/opinion-13-ccpe-2018-2e-independence-accountability-and-ethics-of-pros/1680907e9d>.

- They must be able to exercise their functions objectively, freely, and impartially and decide independently of the mode of action of each legal system and following the hierarchical relationship (internal independence).
- The internal instructions within the Prosecution Service must be given in writing and in a transparent manner, to promote public confidence, providing clear mechanisms that allow lower-level prosecutors to refuse orders from their superior when they consider them illegal or unwarranted.
- The prosecutors' decisions may be subject to a judicial appeal or a hierarchic superior.

Subsequently, it can be concluded, without a doubt, that the EPPO is a body with complete independence from the other European Institutions, as well as from the Member States, and not subject to nor can request external instructions in its performance.

Even though there is no doubt the EPPO is independent, according to precedent considerations, we can also conclude the EDPs are not completely autonomous. Since the EPPO functions as a hierarchical structure and EDPs perform their functions according to the instructions of the Permanent Chamber and the Supervising European Prosecutor - which we consider substantially restricts their power of action -, we cannot ascertain the EDPs freely exercise their powers and independently decides what may be the course of action in an ongoing investigation.

The lesser or greater autonomy of the EDPs will vary depending on the breadth of the guidelines and instruction issued by the Permanent Chamber and the Supervising European Prosecutor to shape the performance of the EDPs and in the decision process of the Permanent Chamber to prosecute or dismiss a case.

4. THE NEED TO IMPROVE THE EUROPEAN DELEGATE PROSECUTOR LEGAL STATUTE – PROBLEMS AND CONSEQUENCES

Concluding that the EDP lacks autonomy within the hierarchical framework of the EPPO, it has a significant impact on the performance of the EPPO and, consequently, in the pursuit of the objectives for which it was established. Despite the anticipation of some possible problems, we must underline that we will only be able to analyze with greater assertiveness such width of guidelines and instructions and, therefore, the impact that they have on EDPs powers when the EPPO initiate its activity.

Nevertheless, we think the more restricted, detailed, and personalized instructions the Permanent Chamber or Supervising European Prosecutor gives the lesser is the autonomy of the EDP. Less autonomy of the EDP can undoubtedly lead to serious consequences regarding ongoing investigations and concerning the prosecution or dismissal of a case.

A. PROCEDURE ON INVESTIGATION AND INVESTIGATION MEASURES

Regarding the investigation and investigative measures, as already mentioned, the EDP is obliged to initiate and follow up the ongoing investigations in cases where it may have been committed a crime³⁵ that falls within the scope of EPPO's material competence.

To gather inculpatory as well as exculpatory evidence on the pre-accusatory phase of the criminal procedure, the EDP has at his disposal a very wide range of investigative measures that he/she can adopt. However, some measures may be prohibited depending on whether the offense under investigation is or is not punishable by a maximum deprivation of liberty of not less than four years - Article 30 (1) of the Regulation³⁶.

Following what we mentioned above, EDPs have the power to order or request investigative measures related to: (a) search any premises, land, means of transport, private home, clothes and any other personal property or computer system, and take any conservatory measures necessary to preserve their integrity or to avoid the loss or contamination of evidence; (b) obtain the production of any relevant object or document either in its original form or in some other specified form; (c) obtain the production

of stored computer data, encrypted or decrypted, either in their original form or in some other specified form, including banking account data and traffic data with the exception of data specifically retained in accordance with national law pursuant to the second sentence of Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council; (d) freeze instrumentalities or proceeds of crime, including assets, that are expected to be subject to confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgment ordering confiscation; (e) intercept electronic communications to and from the suspect or accused person, over any electronic communication means that the suspect or accused person is using; and (f) track and trace an object by technical means, including controlled deliveries of goods.

In addition to these investigative measures, the EDPs can order or request any other investigative measures foreseen in the national law of their Member States applied to similar criminal proceedings.

³⁵ I.e., according to Article 22 of the Regulation, falls within the scope of the EPPO the investigation and prosecution of crimes previewed in Directive (EU) 2017/1371 of the European Parliament and of the Council, of 5 July 2017, and also "... offences regarding participation in a criminal organization as defined in Framework Decision 2008/841/JHA, as implemented in national law, if the focus of the criminal activity of such a criminal organization is to commit any of the offences referred to in paragraph 1."

³⁶ See Peter Csonka, Adam Juszcak, and Elisa Sason in "The Establishment of the European Public Prosecutor's Office – The Road from Vision to Reality", available in <https://eucrim.eu/articles/establishment-european-public-prosecutors-office/>.

The mentioned investigative measures can only be ordered or requested by the EDPs if there are reasonable grounds for considering that the specific measure in question may provide information or evidence useful for the investigation and if the same objective cannot be achieved by proportional means, being that all procedures and modalities for the application of the measures are governed by the applicable national law.

In the matter of obtaining and preserving the evidence, some challenges may arise that can call into question the efficiency and swiftness of the investigation. These challenges can be solved depending on the degree of functional autonomy that EDPs have while running ongoing investigations.

Moreover, despite the Regulation assigning these powers to the EDP, what will be his or her freedom of action? Does the EDP have to request instructions from the Permanent Chamber or the Supervising European Prosecutor each time he or she intends to carry out or request regarding any of these evidence procedures? Will the instructions given by the Permanent Chamber or by the Supervising European Prosecutor be generic guidelines to all investigations, or will they be for each specific investigation? And what is the extent of the instructions to be given, will it be the intention of the Permanent Chamber and the Supervising European Prosecutor to outline all the EDPs performance in the scope of the investigation, or the EDP can conform his or her performance according to what seems appropriate, and necessary to obtain fast and effective results?

There are investigative measures that are difficult to obtain, on the one hand, because they require a set of measures before obtaining them (such as authorization by a judge), and on the other hand, because in the face of more time-consuming action by the national authorities they can easily be hidden and, on a threshold, destroyed.

Given the nature of crimes within the scope of EPPO's competence - criminal offenses that damage financial interests of the European Union - it may, for example, be necessary to conduct searches in any premises of the suspects or defendants to seize accounting books relevant to the investigation, searches to seize computer data stored in computer devices located in any premises, or even to intercept electronic communications of the suspects or defendants.

These investigative measures affect fundamental rights of suspects and defendants, such as the right to a private and family life, provided for in article 7 of the European Charter of Fundamental Rights (henceforth ECFR) or the right to data protection, provided for in article 8 ECFR. Therefore, since EDPs must follow the rules and procedures of national and European law³⁷, in most Member States, the abovementioned investigative measures can only be obtained and later used in trial with the prior authorization of a judge, as a way of ensuring that the restriction of these fundamental rights obeys a weighting judgment and criteria of absolute necessity, adequacy, and proportionality. In other words, it means that these investigative measures will never be promptly executed since EDPs are legally bound to a previous step of

validation before the court of the Member State where the investigation measures are put into practice.³⁸

Given the above, the question that arises is what should EDPs do in these cases? Should they previously ask for instructions or validation from the Permanent Chamber or the Supervising European Prosecutor before they execute or ask for court validation of the mentioned investigative measures? If EDPs must ask for instructions to the Permanent Chamber or the Supervising European Prosecutor before the execution of a certain investigative measure, it will further delay the performance of the investigation and may endanger the obtaining of evidence in due time. EDPs have the immediacy³⁹ of the investigation, the knowledge of the language of the Member State where the ongoing investigations are carried out, and, more importantly, the knowledge of national law⁴⁰, therefore being the most capable entity to decide what is the more suitable investigative measure. For this reason, there are no pertinent reasons that could lead the Permanent Chamber or the Supervising European Prosecutor to restrict EDP's actions due

to the need to issue such specific instructions in each process.

It is also true that the Regulation says nothing about the extent of the powers that Permanent Chambers and Supervising European Prosecutors have on giving instructions to EDPs. In fact, from the analysis of the Regulation itself, it appears that the scope of action of Permanent Chambers and Supervising European Prosecutors will be quite wide, which results from the fact that EDPs are obliged to comply with the instructions issued, and may, in the event of non-compliance, be removed from the investigation⁴¹. Such instructions may be that EDPs do not carry out a certain investigative measure because Permanent Chambers or Supervising European Prosecutors understand that it is not relevant, which may damage the investigation; they may also be for the EDPs to perform a certain investigative measure considered pertinent by Permanent Chambers or Supervising European Prosecutors, in which case the final investigation may also be harmed due to the length of the procedures.

³⁷ Article 30 (5) of the Regulation

³⁸ See Case C-746/18, paragraphs 52-55.

³⁹ The principle of immediacy means the direct and immediate knowledge of the case and follows from the principles of orality and the immutability of the court. The ECtHR considers this principle to be an important guarantee to assure a fair criminal proceeding. See case of P.K. v. Finland, 09.07.2002, case of Cutean v. Romania, 02.12.2014, §§ 60-73, case of Cerovšek and Božičnik V. Slovenia, 07.03.2017, §§ 37-48; see also, the opinion of the Advocate General in Case C-38/18, 14.03.2019 (CJEU).

⁴⁰ "The benefits of the "national link" seem obvious. European Prosecutors, who are experienced in the legal system where the case is being investigated, prosecuted, and tried, are handling the case without facing any language barriers. To balance this "national way" of handling cases and to make sure that no bottlenecks arise if the supervisory role is entrusted to one European Prosecutor only, the Regulation foresees that it is the Permanent Chambers that monitor and direct the investigations and prosecutions (Art. 10(2)). Art. 12(1) accordingly clarifies that the European Prosecutors supervise the investigations and prosecutions conducted by the European Delegated Prosecutors on behalf of the Permanent Chambers and in compliance with any instructions the Permanent Chambers have given under Art. 10(3-5)."; see The Establishment of the European Public Prosecutor's Office - The Road from Vision to Reality (Peter Csonka, Adam Juszczyk and Elina Sason) (<https://eucrim.eu/articles/establishment-european-public-prosecutors-office/>)

⁴¹ Article 28 (3), b) of the Regulation.

Internal Rules of Procedure of the EPPO⁴² foresees that EDPs can ask for a review of the instructions given by Permanent Chambers or Supervising European Prosecutor, but only in cases where the instructions are contrary to European law, the Regulation, or the applicable national law⁴³. In this case, if an instruction from the Permanent Chamber or the Supervising European Prosecutor does not violate European law, the Regulation, or the applicable national law, but the EDP believes it is not suited to the ongoing investigation, or it is suited but the Permanent Chamber or the Supervising European Prosecutor thinks otherwise, he or she cannot react against that instruction. Consequently, the feasibility and purpose of the investigation itself will be at risk due to the impossibility of obtaining the necessary evidence to prosecute or due to obtaining evidence that is not relevant to the ongoing investigation (delaying it), which, consequently, frustrates the objectives for which the EPPO was created: prosecution on time of crimes that harm the Union's financial interests.

A second aspect, where EDPs functional autonomy is quite relevant, concerns the possibility of EDPs issuing arrest warrants. According to article 33 (1) of the Regulation, the competent EDP may order or request the detention of suspects or defendants under the national law applicable in similar national cases. And in cases where it is necessary to detain or surrender a person who is not in the Member State where the competent EDP

is located, the latter may issue or request a European Arrest Warrant⁴⁴. Thus, if the EDP wants to order a pre-trial arrest of someone in his or hers Member State, he or she applies the national law, and if the person is in another Member State, the EDP shall issue a European Arrest Warrant.

The arrest warrant, whether national or European, relates to the need to detain a suspect or defendant to carrying out a criminal procedure or serving a precautionary measure. About the need to carry out a criminal procedure, this may refer to bringing the defendant into questioning when there is a high probability that he/she will not appear voluntarily for that purpose. Considering precautionary measures, they aim to prevent the verification of a specific cautionary necessity such as the risk of the defendant escaping to another country, the continuation of criminal activity or even the interference with the ongoing investigation.

Because the arrest of a suspect or defendant implies a restriction of their fundamental right to liberty⁴⁵, as noted above, as a way of ensuring that the restriction of this right obeys the criterion of legality, necessity, adequacy, and proportionality, the arrest warrant will have to be issued by a Court at the request of the EDP.

If the EDP identifies a cautionary necessity in an ongoing investigation that must be prevented, and if the cautionary necessity demands an arrest warrant, any delay on the part of the competent

authorities in its authorization and execution may lead to the escape of the defendant. For instance, if the EDP has information that leads to the conclusion that the defendant may escape to another country if the procedure suffers a delay because the EDP is waiting for an instruction of the Permanent Chamber to later submit a request at the Court of his or hers Member State, the waiting may signify the evasion of the defendant to a Third State with which the Member State has no extradition protocol. In which case, there are no other legal procedures that allow the detention of the defendant. For these reasons, it is well understood that the decision to order or request an arrest warrant does not comply with the obligation of the EDP to obtain prior instructions from the Permanent Chamber or the Supervising European Prosecutor.

However, the Regulation does not mention the powers of the Permanent Chamber nor of the Supervising European Prosecutor to instruct EDP's in the matter of arrest warrants or other precautionary measures. The adoption of the precautionary measures seems essential to the effective pursuit of the investigation, either because the failure to prevent such cautionary necessities may mean the destruction of relevant evidence or because it may mean the defendant's escape.

Another issue may arise related to the European Arrest Warrant. As we mentioned above, about what should be understood by "judicial authority" and "judicial decision" within the meaning of article 1, paragraph 1 and article 6 (1) of the Council Framework Decision 2002/584 / JHA of 13 July 2002, the CJEU already ruled on the requirements that must be fulfilled to a judicial authority of

a Member State comply with the article.

For example, in cases where the EDP, under the national law of his Member State has the power to directly order a European Arrest Warrant, without the prior intervention of a judge, and does so by direct instruction from Permanent Chamber or Supervising European Prosecutor, will he be considered a "judicial authority" considering the recent CJEU rulings?

According to CJEU jurisprudence, a "judicial authority" must be independent of the executive branch, autonomous, and must have the power to make a free assessment as to the merits and requirements leading to the decision to issue an arrest warrant. Thus, a judicial decision can only be considered as such when issued by a judicial authority or when not originally issued by a judicial authority was the object of judicial control by a Court. Only then is the principle of the highest degree of confidence between the Member States respected. If the requirements are not fulfilled, the judicial authority of the executing Member State may refuse to execute the European Arrest Warrant.

The EPPO is an independent body, with a separation between its activities and the executive powers of the European Union and of the Member States, so, in principle, it is secure to sustain that the above-mentioned conditions are fulfilled for an EPPO decision to be considered a "judicial decision" issued by a "judicial authority". But can we say that these assumptions uphold when it is the EDP who orders the European Arrest Warrant according to direct instruction from Permanent Chamber or Supervising European Prosecutor?

⁴² College Decision 003/2020, available in <https://www.eppo.europa.eu/sites/default/files/2020-12/2020.003%20IRP%20-%20final.pdf>

⁴³ See Article 47 (1), Internal Rules of Procedure.

⁴⁴ The European Arrest Warrant is issued under the Framework Decision 2002 / 584 / Council JHA (paragraph 2).

⁴⁵ Article 5 (1, c) and (3) of the ECHR and Article 6 of the CFREU.

Following the jurisprudence of the CJEU, the Court accepts that judicial bodies with a hierarchical structure may be considered as “judicial authorities” since the hierarchical structure does not conflict with the principles of independence and autonomy. However, it is also mentioned that the underlying reason for the requirements is the necessity to ensure that there is judicial supervision that translates into a free assessment of the merits and requirements of the decision to issue a warrant. Thus, it could be difficult for the Permanent Chamber or the Supervising European Prosecutor to decide, in a considered and informed way, whether the EDP should issue or not a European Arrest Warrant when they do not have the immediacy of the case. And, to that extent, it can be understood that there is no such necessary and indispensable free assessment.

B. TERMINATION OF THE INVESTIGATION: PROSECUTE OR DISMISS

Considering the general principles of criminal procedure, and regardless of the Member State in question, we can say beyond a doubt the power to prosecute or dismiss a case is the most important for the Prosecutor. This statement is as true for a national Prosecutor as it is for

the EDP, as this decision-making power is decisive for assessing its degree of functional autonomy and has several practical consequences.

Article 35 (1) of the Regulation establishes that once the investigations are concluded, the EDP submits a report to the Supervising European Prosecutor containing a summary of the case and a draft decision whether to prosecute before a national court⁴⁶ or to consider a referral of the case⁴⁷, dismissal⁴⁸ or simplified prosecution procedure⁴⁹. After examining the report submitted by the EDP, the Supervising European Prosecutor forwards that report with his or her own assessment of the proceedings to the monitoring Permanent Chamber, which will convey a final decision on the matter. The monitoring Permanent Chamber can decide not to take the decision proposed by the EDP, in which case it will undertake its own view of the case before taking a final decision or giving further instructions to the EDP^{50,51}.

Nevertheless, the last part of article 36 (1)⁵² of the Regulation foresees that if the EDP submits a report to the Supervising European Prosecutor proposing to bring the case to judgment, the monitoring Permanent Chamber cannot decide to

⁴⁶ Article 36 of the Regulation.

⁴⁷ Article 34 of the Regulation.

⁴⁸ Article 39 of the Regulation.

⁴⁹ Article 40 of the Regulation.

⁵⁰ Article 35 (2) of the Regulation.

⁵¹ “In principle, the Chamber is not bound either by the draft decision of the EDP or by the assessment of the supervising European Prosecutor, since it can undertake its own review of the case before taking a final decision or giving further instructions to the EDP”, see Fabio Giuffrida in “The European Public Prosecutor’s Office: King without kingdom?” in <https://www.ceps.eu/ceps-publications/european-public-prosecutors-office-king-without-kingdom/>.

⁵² It reads as follows: “...The Permanent Chamber cannot decide to dismiss the case if a draft decision proposes bringing a case to judgment.”

dismiss the case. From the reading of this article, and according to some Authors⁵³, this power of EDP does not allow derogations. If this is the case, is it possible to assume the EDP genuinely has autonomy in the decision to prosecute?

Some authors⁵⁴ support article 36 (1) of the Regulation is *lex specialis* to article 35 (2) of the Regulation. Although it seems clear that if the EDP decides to prosecute, the monitoring Permanent Chamber cannot decide against it, it can give further instructions to the EDP to execute more investigative measures.

Reverting to the previous question, even though the monitoring Permanent Chamber can instruct the EDP to deliver additional investigative measures, does the monitoring Permanent Chamber have the power to dismiss the case when the EDP decides to prosecute? And, if it is possible, does that power reflect less autonomy to the EDP?

Article 10 (3) a) and b) of the Regulation foresees the power of the monitoring Permanent Chamber to bring a case to judgment under article 36 (1), (3), and (4) or to dismiss a case under point (a) to (g) article 39. Concerning the power to dismiss a case, article 39 (1) establishes that where prosecution has become

impossible, pursuant to the law of the Member State of the handling European Delegated Prosecutor, the Permanent Chamber shall, based on a report provided by the European Delegated Prosecutor handling the case in accordance with Article 35(1), decide to dismiss the case on account of the following grounds: (a) the death of the suspect or accused person or winding up of a suspect or accused legal person; (b) the insanity of the suspect or accused person; (c) amnesty granted to the suspect or accused person unless it has been lifted; (e) expiry of the national statutory limitation to prosecute; (f) the suspect's or accused person's case has already been finally disposed of concerning the same acts; and (g) the lack of relevant evidence.

Making a combined and systematic analysis of articles 10 (1) a) and b), 36 (1) and 39 (1) of the Regulation, it seems possible to interpret that, despite article 36 (1), last part, the monitoring Permanent Chamber would always have the power to dismiss the case in one of the situations of article 39 (1). Mainly because the last sentence of article 36 (1) of the Regulation is *lex specialis* to article 35 (2) of the Regulation, but not to article 39 (1).

⁵³ See Peter Csonka, Adam Juszczyk and Elisa Sason, op. cit., “[i]t should be noted, however, that the Permanent Chamber cannot decide to dismiss a case if the handling European Delegated Prosecutor proposes to bring a case to judgment (Art. 36(1)),” and Fabio Giuffrida, op. cit., “(...) if the EDP is of the opinion that a prosecution shall be launched, the Permanent Chamber cannot decide to dismiss a case, it can only “postpone it, e.g. by asking for further evidence.”

⁵⁴ “The provision contains a *lex specialis* rule to that Article 35 (2). It was introduced in the final stages of the negotiation process to further strengthen the role of the EDPs. Some delegations argued that it would be incompatible with the status of the prosecutors under national law if the Chamber could simply decide to dismiss a case where the handling EDP consider the case to require prosecution. This second sentence of paragraph 1 of Article 36, however, does not exclude the possibility that the competent Permanent Chamber takes a different position on whether to go ahead with the prosecution of the case: while this provision is intended to prohibit the Chamber from simply dismissing the case, the Chamber can instruct the EDP to reconsider his/her draft decision and/or request the EDP to provide further evidence and to submit a revised report.”; see “EPPD Regulation Commentary”, Hans-Holger Herrnsfeld, page 334, paragraph 11.

So, for instance, if we have a situation in which the EDP decides to prosecute, but the monitoring Permanent Chamber considers there is no relevant evidence⁵⁵ in the process (article 39, paragraph 1, g) of the Regulation), can the monitoring Permanent Chamber decide to dismiss the case? And if so, what is the impact on the functional autonomy of the EDP and the effectiveness of the pursuit of the EPPO objectives?

Taking into account that the EDP carries out the investigation, has the immediacy of the evidence carried out to the investigation, has a deep familiarity of national law and language of his/her Member State, it can cause some perplexity that the monitoring Permanent Chamber may decide against the EDP decision, considering the monitoring Permanent Chamber's knowledge of the case is limited to the summary presented by the EDP and the Supervising European Prosecutor and in a different language of that used in the proceedings.

In these situations, the question that follows is going to be the criteria used by the monitoring Permanent Chamber to decide against the decision of the EDP?

It can also cause some bewilderment the opposite situation: if the EDP decides to prosecute, but the monitoring Permanent Chamber - alerted by the Supervising European Prosecutor - concludes the accused was granted amnesty⁵⁶, the monitoring Permanent Chamber cannot decide for the dismissal of the case?

Dismissing a case due to the lack of relevant evidence is a good example of the wide margin of discretion the monitoring Permanent Chamber has, since the understanding of what means "lack of relevant evidence" may differ⁵⁷ depending on who examines the evidence that was carried out to the investigation during the pre-accusatory phase.

How can the monitoring Permanent Chamber meet the necessary conditions to decide in a different direction from the EDP, abide by the criteria of objectivity, impartiality, and legality required in a process of this nature and that complies with the Rule of Law?

As it is not possible to determine what will be the criteria adopted by the monitoring Permanent Chamber when deciding to dismiss a case, and since some of the paragraphs of article 39 (1) of the Regulation present some margin of discretion, it may be possible that in some cases the decisions of the monitoring Permanent Chamber violate European Union law⁵⁸.

As anticipated above, can occur a situation in which the EDP submits a report to dismiss a case, but the monitoring Permanent Chamber decides against it. In this case, the problems mentioned above equally occur but with aggravating factors. A decision to prosecute means to bring the case to judgment, aiming to convict the defendant for crimes committed and punishing him with imprisonment or, in less serious cases, a fine, which has serious consequences.

Consequently, the decision to prosecute must obey the criteria of objectivity and impartiality, as this is the only way to guarantee that the defendant has a fair, equitable, and legal process. Otherwise, we run the risk of violating the various legal provisions⁵⁹ that protect the right to a fair trial, which must be interpreted in the sense that it must apply to all stages of the proceedings⁶⁰.

So, as to the question of whether the EDP lacks autonomy in terms of the decision to prosecute or dismiss a case, we must reply affirmatively. As to the impact that less autonomy of the EDP has on the pursuit of the goals of the EPPO, we can only ascertain that the unawareness of the monitoring Permanent Chamber of the national law and language in which the proceedings are developed can damage the justice of the final decision of the Chamber on this matter.

5. CONCLUSION

The EPPO represents an important step towards the European integration project in the context of criminal cooperation.

The need to ensure the coherence and uniformity of action and protection of the European Union's financial interests dictated that the EPPO's internal structure was organized hierarchically. The essential element of the EPPO's activities is the EDP, which, because it is linked to the guidelines and instructions issued by the Permanent Chamber and the Supervising European Prosecutor, leads us to affirm that the EDP is not truly autonomous in the EPPO's internal structure.

As mentioned above, this lack of autonomy of the EDP predicts several problems in the functioning of the EPPO and raises several practical questions. The most important of all is: how does this lack of autonomy affect the efficient and effective functioning of the EPPO?

In the investigation phase, which is essential to any criminal procedure because it is here that all evidence is obtained in order to prosecute or dismiss a case, it is up to the EDP to assess the facts and proceed to obtain and collect the evidence accordingly with the guidelines and instructions of the Permanent Chamber, but always in compliance with the national law of the Member State where the investigation is ongoing.

⁵⁵ Article 39 (1) (g) of the Regulation.

⁵⁶ Article 39 (1) (c) of the Regulation.

⁵⁷ Like some authors conclude "Relevant evidence is lacking not only if no relevant evidence at all supports the incrimination of the suspect, but also if there is insufficient support for the allegation. Depending on the specifics of national law, prosecution before national courts may only be permissible if a preponderance of inculpatory evidence exists, or only if a high likelihood of conviction exists, based on a preliminary analysis of the evidence.", see "EPPO Regulation Commentary", Hans-Holger Hensfeld, page 365, paragraph 36.

⁵⁸ Namely, given the material scope of the EPPO's, articles 83 and 86 (2) of the TFEU, Directive (EU) 2017/1371, and the Regulation.

⁵⁹ Such as article 2 and article 3 (1) TFEU, article 47 and 48 of the CDFEU, and article 6 of the Convention.

⁶⁰ See footnote 30.

Also, the EDP is only able to request a review of the instructions of the Permanent Chamber when he or she considers them to be contrary to European Union law, including the Regulation, or to the national law applicable under the terms of article 47 of the EPPO's Rules of Procedure, which does not solve the problem in our opinion. Consequently, it is necessary to understand how the EDP can carry out investigations in the most efficient way if it is not free to act according to his or hers understanding?

A second step in the criminal procedure, for which we believe it is equally essential that the EDP has functional autonomy, is related to the decision to prosecute, or dismiss the case. As mentioned, the EDP has the immediacy of the evidence produced in the investigation, having extensive knowledge of the law of the Member State and its language, being the most competent to make this decision. However, the EDP only prepares a report with a summary and draft decision for the Supervising European Prosecutor, who refers everything to the Permanent Chamber with his or her own assessment of the case if it so chooses. The final decision is made by the Permanent Chamber, except for Article 36 (1) of the Regulation, when the EDP proposes to prosecute, but which we have already stated is open to interpretation. This is another problem.

How to avoid or solve these problems?

First, it is important that the Permanent Chamber and the Supervising European Prosecutor are aware of the obstacles that excessive intervention can cause in the swift and effective development of investigations and should regulate their interventions accordingly. Therefore, their intervention with the EDP must be restricted to the minimum essential and indispensable, and should only issue general, abstract, and generic guidelines that aim to establish uniform procedures between the EDPs of all Member States, and not instructions for each case, except when it is essential to that specific case. Although it seems like an amazingly simple solution, the truth is that this would permit a much more efficient, less bureaucratic, and sharper articulation between the EDP and the Permanent Chamber and the Supervising European Prosecutor.

On the other hand, since it is the EDP who has the immediacy of the investigation, the Supervising European Prosecutor, in his or her assessment, and the Permanent Chamber, in its decision, should respect the recommendation of the EDP. Only in exceptional and reasoned cases should the Permanent Chamber decide differently from the EDP proposal. In such cases, it ought to use the power provided for in Articles 35 (2) and 46, paragraph 2, and access the casefile and carry out its own analysis, to ensure wide knowledge of the entire casefile, before making its final decision or giving further instructions to the EDP.

Only in this way, can it be said that in these cases the Permanent Chamber delivered an informed and considered opinion, respecting article 6 of the ECHR.

To fully conform with these solutions, the European Union should begin to create a minimum standard of what should be understood by 'Court' and 'Public Prosecutor'. Also, the European Union should create common criminal procedural rules to uniformize criminal proceedings across the Member States, most importantly regarding the collection of evidence.

Finally, article 119 (1) provides for an evaluation of the Regulation up to five years after the EPPO has started its functions (article 120 (2), paragraph 2) to assess its impact, as well as its effectiveness and efficiency and their work practices. At that time, if these problems subsist, an alteration to the Regulation (article 119 (2)) should be considered, eventually, granting Permanent Chamber an advisory and non-decision-making role in these matters, and exercising the control of EDP's performance only through the Supervising European Prosecutor.

Member States recognize the importance and necessity of the EPPO, but, at the same time, the EPPO represents a decrease in their sovereignty, because the power to conduct investigations into crimes of the PIF Directive is now transferred to the EPPO as well as the power to decide whether to prosecute or dismiss a case and the Member States do not have any say in none these matters.

These financial interests are also interests of the Member States, either because they contribute to the European Union's budget or because they receive financial assistance from it, which makes it less likely that they will accept giving more autonomy to EDP. But the cost of groundless prosecution or dismissal when there are grounds to prosecute or dismiss is far greater than any fear Member States may have about the actions of EDPs, when fundamental principles of European Union and International law are at stake, such as the right to a fair and equitable process.

Judicial cooperation measures in criminal matters, like their equivalents, aim at greater European integration between the Member States, united by the same principles and objectives. Today we know that there is still a long way to go to overcome the fragmentation that exists in the third pillar of the European Union, and the reality is still far from what was imagined. The EPPO was not immune to these vicissitudes: the idealized project is far from the intended reality. The European Delegated Prosecutor is the link between the imagination and the reality of what the EPPO is and what it should be, and if it is not granted full autonomy, the dream will hardly come true.

SEMI-FINAL B

EU AND EUROPEAN FAMILY LAW

PARTICIPATING TEAMS

ALBANIA, HUNGARY, PORTUGAL, ROMANIA, SERBIA

1st place: Team Serbia
2nd place: Team Romania
3rd place: Team Albania

Selected papers for TAJ:
Team Serbia
Team Romania

36

37



1 - 3 JUNE 2021, ONLINE

JURY MEMBERS

THALIA KRUGER (BE)

PROFESSOR AT UNIVERSITY OF ANTWERP, MEMBER OF THE EDITORIAL BOARDS OF THE BELGIAN TIJDSCHRIFT INTERNATIONAAL PRIVAATRECHT AND DROIT DE LA CONSOMMATION/CONSUMENTENRECHT

The Themis Competition 2021 was an online event in early summer at a time when most of us were already quite fed-up with being online, “zoomed-out” as an Australian colleague said in a different context. However, the event was such a lot of fun. Arno did his best to make it lively by putting jury members on the spot with questions we did not have time to prepare for. He had all sorts of tricks to make the online event lively and full of suspense – even a wheel of fortune.

The sessions were remarkably well organised. The technology went smoothly, audio and camera worked, thanks to good support by the EJTN. On my side there was an issue with my internet provider (Murphy just called them on that day), but Arno and other jury members were great at handling it and at staying calm (unlike myself, who have still not forgiven the service provider).

But the best of all were the participants. Three elements particularly struck me of this year’s teams. First they are tech-wizz kids. They made such professional videos! It was a pleasure to watch them and to have the opportunity, even if not the obligation, to watch them more than once. Second, they are good speakers that manage to capture an audience, that can think on their feet and respond to questions in an engaging way. Third, they came up with interesting, even unexpected topics. Family law is indeed broader than I thought! They managed to navigate between domestic law and EU or European Human Rights law.

The Themis competition is a great way of connecting people. As jury members we met old friends and made new ones. Participants had to ask questions to each other, this not only forced them to dive into different topics, but also allowed a friendly-competitive learning atmosphere.

MATTHIAS NEUMAYR (AT)

VICE PRESIDENT OF THE AUSTRIAN SUPREME COURT OF JUSTICE

I was happy to accept the honorable invitation to take part as a juror in this year’s THEMIS European Family Law semifinals. I would like to thank the EJTN for the trust that has been placed in me. I have to admit that it was also very promising for me that the semifinals were scheduled in Thessaloniki: I was excited to be able to be in Greece again after many months.

Well, we know it turned out differently again. The still rampant pandemic prevented me from meeting in person with my fellow jurors Thalia and Boriana, with the members of the teams and their tutors and with EJTN’s Arno. Therefore, the planned “exchange” was rather limited. All the more thanks to the EJTN team, which despite these circumstances carried out the competition in an original way – as best it can. Because of this type of implementation, we had the pleasure of not only having the individual topics prepared in the form of written papers, but also in the shape of short films. One could clearly see that the teams put a lot of energy into these impressive works. The films of the two teams, which were also at the top in the overall ranking, are still in my memory today, both the acting as well as the concept and the direction. The Serbian team based its work on the award-winning film “Father” by Srđan Golubić and followed up with a discussion by three judges on the case law of the ECHR in comparable cases. In the written paper I then read about the Vučković case, which is said to have become pending before the European Court of Human Rights on December 7, 2020, application number 56789/20. It took me some time to realize that Team Serbia had even made up a fictional case before the ECHR.

The Romanian team packed its case in TV reports from “THEMIS-TV” about a dispute in court over the legal relationship of a sperm donor to the child descending from him. This team has also dealt specifically with the case law of the ECtHR and with various international agreements in order to get relevant information for the decision of the case.

I have participated as a juror at Moot Courts a number of times. The format of THEMIS is really challenging, because each team can choose the topic they want to take a closer look at. A juror is confronted with a wide range of topics – Including those that he would not have directly assigned to European family law. It is a challenge for both the teams and the jurors to deal with complex topics in a language that is not their mother tongue. And it is necessary to think far outside the box of your own legal system.

THEMIS is a project of “togetherness” in the European judicial area. We all very much hope that we will be able to personally experience this “togetherness” again in the next few years!

BORIANA MUSSEVA (BG)

ASSOCIATE PROFESSOR OF PRIVATE INTERNATIONAL
LAW AT SOFIA UNIVERSITY “ST.KLIMENT OHRIDSKI”,
ATTORNEY-AT-LAW

This year I had the privilege to be once again part of the jury of the eThemis competition in EU and European Family Law semi-final. I experienced the wonderful contact with the pursuit of knowledge and professional excellence of our young and enthusiastic future European countries' magistrates. For this great opportunity I would like to express my deep gratitude to EJTN.

As a practicing attorney at law in cross border civil cases, I usually deal with complex legal issues before a panel of judges, trying to convince them that my arguments are correct, and my claims are well-founded. I admit, sometimes the judges do not seem to me very much involved in the real case, in the complex interplay between the interests and values involved. In such situations, I wish that we could change roles. Thus, the judges could be able to understand how they would feel or act having the perspective, the goals, or the point of view of the party to the proceedings and the responsibility of the attorneys. In my view the eThemis competition in EU and European Family Law alongside its holistic approach to judicial training cultivating classical knowledge, skills and attitudes provides the unique opportunity to this perspective legal taking.

The EU and European Family law is very vibrant field of law full of legal, cultural, ethical, political, and economic challenges. Proving these observation the participating teams focused on issues like domestic violence (“Within four walls: a portrait of court’s challenges vis-à-vis domestic violence” of team Albania), the online teaching in the context of the right to education (“We don’t need no coviducation” of team Hungary), the discrepancy between the rights of the unaccompanied migrant children and their effective protection in the EU Member States (“Unaccompanied minor migrants” of team Portugal), the recognition of the relationship between the donor and “his child” (“Best interests of the child: the guiding light, or the North Star? Recognition of a judgement concerning the personal relationship between a donor and “his child” in Romania” of team Romania) and the deprivation of parental rights due to poverty (“The deprivation of parental rights due to poverty” of team Serbia).

The diversity of the papers dealing with contemporary legal matters with EU and European dimensions made everyone learn something new and experience the power of the streamlined expertise. It was wonderful to see the potential of these young people and their determination to become perfect judges serving not only their country but also the European Judicial Network.

Having in mind the new developments in the field, in particular the upcoming new Regulation 2019/1111 I am more than confident that the more the EU private international law develops the more its success depends on smooth and authentic communication between the judges. Getting in contact at the earliest stage possible, sharing and experiencing common values and aims, establishing circle of trust and understanding, gaining respect and building friendships – that is what eThemis competition in EU and European Family Law semi-final is mostly about. And I hope it will last forever in the souls and hearts of our young European magistrates, tempted by the challenges of cross-border family law matters.

MINA VULIĆ
ALEKSANDRA LOZIĆ
MILICA JOVANOVIĆ



Team SERBIA

IN THE CLAWS OF POVERTY. DEPRIVATION OF PARENTAL RIGHTS DUE TO POVERTY

The situations in which the parent performs rights and duties arising out of the content of parental rights unscrupulously (the failure to provide needed, age-appropriate care) represent the legal basis for partial deprivation of parental rights. It will not be a difficult task for the judge to make a decision when he concludes on the basis of the presented evidences that the parent is endangering the child's health by not providing child with an adequate meal, although he is able to provide such. However, it is completely different situation when the judge is aware that the parent, due to objective reasons, such as poverty, is unable to do so. The question is whether in everyday life and practice a clear distance can be made between poverty and child neglect, as well as whether the Member States of the European Convention on Human Rights respect the right to private and family life by providing resources (both material and intangible) to support parents for the effective exercise of parental rights, which measure should be a part of every modern democratic society. Consequentially, the questions that arise here are: what is the extent of protection that is provided to families, which measures are taken by state bodies in order to preserve them, can the family be separated due to poverty and can every decision made by the court in a legal procedure be considered to be a fair one?

KEY WORDS

Best interests of the child
Parental rights
Poverty
Deprivation of parental rights
Family
Foster parent

1. INTRODUCTORY CONSIDERATIONS

Deprivation of parental rights is the strictest civil sanction in the area of parental rights - since it deprives parents of their basic authority, but also of their right to care for their own children. This is the reason why such a sanction needs to be clearly and precisely legislatively defined. Although the standpoint that a parent can be deprived of parental rights due to poverty has long been abandoned, the way courts interpret the relevant norms of the Family Act¹, and their application in each particular case, remain a huge dilemma. The Parliamentary Assembly of the Council of Europe (PACE) has made it clear that there are too many concerns in Europe connected to the issue of depriving children of their parents due to poverty.²

According to PACE (although it acknowledges the absence of adequate official statistics) children from vulnerable groups are disproportionately more represented in the public care of Member States whilst not a single piece of evidence indicates that children of poor parents are more likely to be abused or neglected.³ The European Court of Human Rights (hereinafter the 'ECtHR') case-law also gradually reflects this reality.⁴ Today, this topic is current more than ever, due to the negative economic consequences of the pandemic caused by *Covid-19* disease, which has affected countries all over the world, including Europe. Separation of families due to poverty is more common in practice, due to the fact that liberalization trends intensify the 'privatization' of childcare responsibilities.⁵ In this context, the ECtHR needs to contribute towards the resolution of such a serious issue of endangerment of human rights.

¹ In this regard, the necessity of explicit provisions in the form of law when it comes to suspension or restriction of human rights is a standard set by the most important acts of international law. Universal Declaration of the United Nations on Human Rights, Article 29. ICCPR, Article 17.

² D. Valeska, *ECtHR Condemns the Punishment of Women Living in Poverty and the 'Rescuing' of Their Children* (2016), available at <https://strasbourgobservers.com/2016/03/17/ecthr-condemns-the-punishment-of-women-living-in-poverty-and-the-rescuing-of-their-children/>.

³ CoE, PACE, Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member states, Doc. 13730, 13 March 2015, par. 4.

⁴ ECtHR, *Olsson v. Sweden*, Appl. no. 13441/87, Judgment of 30 October 1992. ECtHR, *Kutzner v. Germany*, Appl. no. 46544/99, Judgment of 26 February 2002. ECtHR, *Wallova and Walla v. The Czech Republic*, Appl. no. 634, Judgment of 26 October 2006. ECtHR, *Savini v. Ukraine*, Appl. no. 39948/06, Judgment of 18 December 2008. ECtHR, *A.K. and L. v. Croatia*, Appl. no. 37956/11, Judgment of 08 January 2013. ECtHR, *R.M.S. v. Spain*, Appl. no. 28775/12, Judgment of 18 June 2013. ECtHR, *Soares de Melo v. Portugal*, Appl. no. 72850/14, Judgment of 16 February 2016. ECtHR, *Achim v. Romania*, Appl. no. 45959/11, Judgment of 24 October 2017. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>.

⁵ D. Roberts, 'The Dialectic of Privacy and Punishment in the Gendered Regulation of Parenting', 5 *Stanford Journal of Civil Rights & Civil Liberties* (Stan. J. C.R. & C.L.) (2009) 191, at 192-93.

2. THE FACTS OF THE HYPOTHETICAL CASE⁶

Mrs. Slavica Vučković (born in 1983) and Mr. Nenad Vučković (born in 1981) are spouses. They lived in a family household in the village of Topli Do, in the municipality of Pirot (Republic of Serbia), in a modest ground floor three-room dwelling, together with their three children: minor M.V. born in 2009; minor J.V. born in 2011; and minor V.V. born in 2013. During 2018 they both lost their jobs. Since that moment they would leave their home every day in pursuit of daily wage jobs. Sometimes they would suc-

ceed, but most of the times they would fail. While they were looking for work, the eldest child looked after the younger siblings. Due to pending unpaid bills, their water and electricity supply was cut off. When Slavica, the wife, was required to render sexual services in return for a job opportunity, she suffered a nervous breakdown and was admitted to a psychiatric facility for treatment. The competent Social Welfare Centre (hereinafter the 'SWC') then intervened for the first time and established that the children lived in unsanitary conditions, and that it is in their best interests to be placed in a foster family. Consequently, the SWC initiated in front of a domestic Civil court (family department) the proceedings to deprive Mr. and Mrs. Vučković of their parental rights. During the proceedings, it was established that the children lived in an unpainted dwelling, that they were malnourished, and did not attend school regularly - all of which was subsumed under unscrupulous exercise of parental rights by Mr. and Mrs. Vučković who, in the opinion of the SWC, did not take proper care of their children. The father's claim that he took care of the children as much as he could, due to the fact that he was trying to find some work every day, and that he was not eligible for any social benefits by the state, was assessed as his attempt to avoid his own responsibility. During the court procedure Mrs Vučković was mentally fully recovered.

The decision of the competent national court, among other issues, decided that Mrs. Slavica Vučković and Mr. Nenad Vučković shall be deprived of all parental rights over the minor children, namely M.V., J.V. and V.V, except the right

⁶ These refer to the aforementioned hypothetical case, processed by the authors of this paper in order to analyse and illustrate the subject matter, on a mock-case study, and the relevant data were arbitrarily designed and used for the sole purpose of this particular case.

to maintain personal relations, to have contact with their children under supervision and according to a model determined by the competent guardianship authority, as well as the right (obligation) of child support.⁷

3. RELEVANT LEGAL SOURCES

The protection of human rights within the United Nations has begun with the adoption of the 1948 Universal Declaration of Human Rights. Although this is a non-binding instrument, (because it is not a treaty and it is not subject to ratification), it still served as a basis for the international human rights treaties that followed after that (the International Covenant on Civil and Political Rights (hereinafter the 'ICCPR') and the International Covenant on Economic, Social and Cultural Rights (hereinafter the 'ICESCR')). As the provisions of this document referred to all men and women, it was considered that children were included as well.⁸

On the other hand, the Convention on the Rights of the Child (hereinafter the 'UNCRC'), adopted under the auspices of the United Nations (1989), was the result of a long process, based on a series of circumstances and developments directed

at an understanding of children, childhood, and attitudes towards children. In a single instrument, it covers all human rights which are granted to a specific group of people, which is also the reason why the UNCRC became the most important international document on the rights of the child.⁹ Additionally, special treatment of the right to respect for family life and children's rights is also guaranteed by the European Convention on Human Rights (hereinafter the 'ECHR'), as well as by two special conventions within the Council of Europe (hereinafter the 'CoE'): the European Convention on the Exercise of Children's Rights and the Convention on Contact concerning Children¹⁰.

The Constitution of the Republic of Serbia specifically proclaims the right of the child to the enjoyment of human rights 'appropriate to his or her age and mental maturity', and it also emphasizes that the family itself enjoys special protection.¹¹ The Family Law of the Republic of Serbia is a special legal act related to issues in the field of family law. It gives content to the general legal standards of the Constitution of the Republic of Serbia and ratified international conventions. In order to do so, it provides a legal framework which regulates the protection of the family and the rights of the child, (e.g. the right of the child to live with the parents who will take care of him or

⁷ According to the regulations of the Republic of Serbia, when parents are deprived of parental rights, parents can be completely or partially deprived of all rights from the content of parental rights, apart from the right (obligation) of child support. The Family Law, Official Gazette of the Republic of Serbia, No. 18/2005, 72/2011 - other law and 6/2015, Article 81 paragraph 4.

⁸ O. Jović, *Children's Rights: Between Idea and Reality* (2009), at 11.

⁹ N. Vučković-Šahović, *Children's Rights and the Convention on the Rights of the Child* (2001), at 21.

¹⁰ Web link where the Conventions is published <https://rm.coe.int/168007cdaf>

¹¹ Families in need of social assistance in order to overcome social and other life difficulties and create conditions for meeting basic living needs, have the right to social protection, the provision of which is based on social justice principles, humanism and respect for human dignity, which is based on the principles of social justice, humanism and respect for human dignity: The Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 98/2006, Article 66 and 69.

her,¹² the right of parents to exercise parental rights jointly and by agreement,¹³ the limits of state intervention when the standard of parental care is violated,¹⁴ etc.). In fact, the state has recognized parental care as the best form of child protection, giving the family a *sui generis* character of an 'auxiliary public institution', responsible for the support and development of a healthy and productive new generation of the population.¹⁵

4. ARGUMENTS OF THE NATIONAL COURT HYPOTHETICAL DECISION ON THE PARTIAL DEPRIVATION OF VUČKOVIĆ'S PARENTAL RIGHTS

This part of the Paper is designed as a presentation of the hypothetical decision (of the National Court) on the Deprivation of Vučković's Parental Rights and in this regard legal arguments in favor of such decision are given:

The UNCRC, which is directly applicable in the Republic of Serbia, guarantees the entire spectrum of children's rights (the right to life, identity, development, education, freedom of expression, the right to privacy, etc.). The Republic of Serbia has established a special Ministry within the Government to take care of the fam-

ily (Ministry of Family Welfare and Demography), as well as dedicated sectors of state administration to take care of the protection of the most underprivileged families (social assistance, food assistance through soup-kitchens and temporary accommodation). The Republic of Serbia established a system of social protection which is based on assistance to parents in exercising their responsibilities on the matter of raising a child (financial benefits, monthly social benefits ('child allowance') for the coverage of the bare necessities, and scholarships for the most successful students), as well as a special sector which takes care of the protection of children's rights within the Office of the Ombudsman. Additionally, there are school psychologists, pedagogues, and specialized clinics for free health care for children. Furthermore, a judicial protection of children's rights and the appreciation of their opinions in procedures which concern them have also been constituted, completing in that way the protection mechanism, created in order to achieve the necessary framework for the protection of children, known as the 'Three P' - *Provision, Protection and Participation*. The rights of parents are being recognized only to the extent required for the protection of the personality, rights and interests of the child.¹⁶ The legal framework of the Republic of Serbia is based on the principle that a child shall not be separated from his or her parents against their will, except in cases when the competent authorities, along with judicial supervision, determine in accordance with the applicable law and procedures, that such sep-

aration is necessary for the best interests of the child.¹⁷ The family environment is considered as the best environment for the proper development¹⁸ and rearing of children and youth, bearing in mind that there may be situations where children are exposed to abuse and neglect within their own families, in which case the state must act.

The SWC has initiated the procedure of removal of the children from the family environment when Mrs. Vučković was admitted to a mental health hospital (the matter was communicated to the SWC by the hospital), since at the time the father was away from home due to his pursuit of work. The SWC established that the living conditions of the three minor children of the Vučković couple were inadequate for proper development of children - unsafe dwelling lacking sanitary facilities (no hot water, electricity or heating), as well as that the children are malnourished, poorly clothed and shod. All aforementioned, in the opinion of the SWC, was threatening the children's health which resulted in an urgent and immediate intervention of the social welfare service, because the welfare of the child is of the utmost importance at all times and it is the obligation of the state to take measures to protect children. The children were urgently placed in a shelter and a day later foster families were located and all of the children were provided with safe accommodation, reg-

ular meals, appropriate clothing and an atmosphere in which it was made possible for them to obtain an unhindered schooling and to have spare time for play and social development.

The authorities considered this necessary in order to comply with the Republic of Serbia's law.¹⁹ The UN Guidelines for Alternative Accommodation for Children and the Standards of Good Social Work Practice²⁰ insist that the state should make efforts to ensure the continuity of child's accommodation, i.e. that children stay in their homes whenever possible (we submit that this should be interpreted as referring also to accommodation with relatives, because it is a well-known family environment that can absorb child stress caused by leaving the family home), to return the separated children and young people home (family reunification) whenever safe and possible, as well as to ensure continuity also for those children who cannot return home, in another way, within a reasonable period of time. Foster care is a safe, secure and desirable way to care for children, because it represents a simulation of a 'lost' family, and many cases testify to children's healthier and more emotional relationships developed with foster parents due to their care and support, than those with their own parents, especially when children spend more than two-three years in foster homes.²¹ This fact should be especially appreciated when

¹² The Family Law, *supra* note 7, Article 60.

¹³ *Ibid.*, Article 70.

¹⁴ *Ibid.*, Article 67.

¹⁵ The interest of the public authority is to take care of its population, since the latter is one of the three constructive elements of any state - a state cannot exist without its population.

¹⁶ M. Draškić, *Family Law and the Rights of the Child* (2019), at 268.

¹⁷ Specially guaranteed by the UNCRC, Article 9, Point 1: 'State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.'

¹⁸ Preamble of the Convention on the Rights of the Child

¹⁹ 'The state is obliged to provide protection to a child without parental care in family environment whenever possible.' The Family Law, *supra* note 7, Article 6, Paragraph 6.

²⁰ *United Nations Children's Fund, 2009b; Save the Children UK, 2009*

²¹ N. Žegarac, *In the Labyrinth of Social Protection* (2014), at 95.

public authorities and parents make additional efforts, in order to return the children back to their parents as soon as possible.²²

After that, the procedure of partial deprivation of parental rights has been initiated because the medical commission stated that the mother's health condition was such that she would be virtually unable to perform normal life activities for a significant period of time, while the children's father did not have the financial means to provide the children with a dignified life. By prescribing clear norms in the Family Law and with adaptation of modern procedural solutions,²³ the Republic of Serbia has ensured to its citizens that the court, through court procedure in which all relevant evidence is considered, can achieve a fair balance between the social need - the preservation of the family, as well as the intended objective set by the Constitution – the

best interests of the child²⁴ while making a fair decision that respects the internationally recognized standards. The procedure of deprivation of parental rights in Serbian law is a specific civil procedure established in a way that leaves a wide margin of appreciation to judges, so that they can apply strict legal provisions, according to specific life situations.²⁵ In the present case, Mr. and Mrs. Vučković, as well as their minor children, were enabled to participate during the entire court proceedings, and the court has presented *ex officio*²⁶ all the evidence necessary to establish the relevant facts. The court addressed and analysed the personal characteristics of the parents and the children, their relationships, as well as their socio-economic circumstances in great detail, entrusting the experts with the work of gathering evidence. The Guardianship Authority,²⁷ in its expert Report submitted by a team of professionals of different profiles (the team

consisted of a psychologist, a pedagogue, a social worker, and a physician)²⁸ presented a difficult financial situation in which the children cannot lead a quality life.

The decision on Mrs. and Mr. Vučković's partial deprivation of parental rights was passed solely on the basis of the best interests of their minor children who, due to their age, psycho-physical conditions, and the need for proper development and education, must not remain neglected by their parents. The best interests of a child as a legal standard is assessed based on a number of subjective and objective circumstances, and the fact that connection with nucleus family must be preserved whenever possible (thus, in this particular case, Mr. Vučković was allowed to have regular contact with his children - which he has used sporadically, while the mother could not do so due to objective reasons, and it is not in the children's interest to spend time with their mother in a mental hospital).

As assessment factors, the court has especially emphasized the young age of these children, the needs of their cognitive, social, and emotional development, which will stagnate in case they spend time in a dark, smoky and unhygienic space, without regular school and after-school activities, with a lack of supervision by parents and disregard for their safety by leaving them alone and hungry during the day. A crucial point of emphasis was the assessed need to provide mental stability to children and acquaintance with the standard of living (informatics, sports, internet) which they had not had an opportunity to get familiarized with. The National court gave preference to the dignity of children's lives and preservation of their physical and mental integrity, when deciding that the parents Vučković should be partially deprived of their parental rights.

The traditional position of the Republic of Serbia is that poverty itself cannot be the reason for deprivation of parental rights, but rather that, as part of the assessment of the best interests of the child, the socio-economic conditions should be assessed as the last ones in a series of causes resulting when passing such a decision.²⁹

²² see ECtHR, *R.M.S. v. Spain*, *supra* note 4.

²³ The Family Law, *supra* note 7, Article 202 (subsidiary application of the domestic general law governing civil proceedings); Art. 204 (urgency of proceedings); Art. 205 (investigative principle); Art. 206 (exclusion of the public); Art. 207 (decision on costs at the discretion of the court, taking into account the reasons of fairness); Art. 208 (admissibility of revision).

²⁴ R. Vujović, *Deprivation of Parental Rights, Substantive Legal and Procedural Aspects* (2019), at 44.

²⁵ Notably due to: the principle of urgency (the court is obliged to try and conduct the procedure at a maximum of two hearings, if possible), the principle of exclusion of the public and confidentiality of data (it is ensured that the parties to the proceedings may present delicate facts from their private lives without fear of public condemnation or other undesirable consequences), as well as according to the investigative principle, i.e. that the court has broad powers for self-initiated gathering of evidence for the purpose of making a decision (the rule of civil procedure does not apply in the strict sense – the party that has a certain request bears the burden of proving the claims). The Family Law, *supra* note 7, Art. 204-206.

²⁶ The investigative principle, i.e. that the court has broad powers for self-initiated gathering of evidence for the purpose of making a decision (the rule of civil procedure does not apply in the strict sense – the party that has a certain request bears the burden of proving the claims). The Family Law, *supra* note 7, Art. 205.

²⁷ The national court did not seek an expert opinion on the competence of the parents from the same Guardianship Authority which filed the lawsuit for deprivation of parental rights, but the opinion was submitted by the expert body competent for the territory of another city.

²⁸ The necessity of a multidisciplinary approach in determining the elements on which the assessment of the best interests of the child in parental rights deprivation proceedings depends on is indicated in CoE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (2011), at 23. 'With full respect of the child's right to private and family life, close co-operation between different professionals should be encouraged in order to obtain a comprehensive understanding of the child, and an assessment of his or her legal, psychological, social, emotional, physical and cognitive situation.'

²⁹ See: Supreme Court of Cassation (Serbia), Decision no. Rev. 967/2016, dated 21 July 2016. and Supreme Court of Cassation (Serbia), Decision no. Rev. 2343/2017, dated 28 December 2017.

The Serbian authorities in the domain of children's rights, primarily their protection, accepted the principle of the so-called *welfare approach*, i.e. that every child must be provided with an equal chance for a successful development, to become a strong and stable person, to grow up in an atmosphere of happiness, love and understanding. Consequently, all the decisions made in the Vučković case were necessary for the welfare of the children.³⁰ The legitimate aim for passing such a decision was precisely the health and the right of children to their lives and development.³¹ The necessity of making such a decision is reflected in the danger of the children living in an environment that might lead to permanent detrimental consequences for their development and growth.³²

4. ARGUMENTS AGAINST THE HYPOTHETICAL DECISION OF THE NATIONAL COURT ON PARTIAL DEPRIVATION OF THE VUČKOVIĆ'S PARENTAL RIGHTS

In the following part of the Paper, above-mentioned hypothetical decision of the National Court will be presented and analysed considering the aspects and standards of the applicable European conventions, especially in the light of Article 8 of the ECHR:

The Initial legal basis for the justification of the reasons not to take away minor children from Mr. and Mrs. Vučković can be found in Article 8 of the ECHR,³³ in connection with which three hypothetical questions may be posed (*three-part*

test or three-step test) - as follows.³⁴ Was the state's intervention based on the law? Was there a legitimate aim for the intervention? Was it necessary in a democratic society, that is, if a 'burning' need to separate children from their birth family and place them in foster care truly existed? State interference is based on the law and is regulated by the Constitution and the Family Law.³⁵ Also, the legitimate aim to protect the best interests of minor children exists in the law.³⁶ However, the most disputable issue is whether the national authority's decision to relocate the children to a foster family was necessary in a democratic society, or whether the protection of children's rights and their best interests could have been achieved by less invasive measures, without separation of the family since, in accordance with Article 8 of the ECHR, the primary aim is to preserve family ties whenever possible.

A. FAILURES OF THE NATIONAL COURT

The Criticism against the National Court that the hypothetical decision was passed as such would be the following:

According to Article 3 of the UNCRC, the national court in its procedure was obliged to act in the best interests of the Vučković minor children.³⁷ This further implies that the court was obliged to motivate its decision, so that it could be determined from that rationale how, and by which criteria, the best interests of the children was assessed in the procedure, and how the results of this assessment were taken into consideration in comparison to other identified interests and possible positive and/or negative impacts of the decision - when it comes to the children and their future life.³⁸

³⁰ Moreover, the ECtHR in the ECtHR, *Kutzner v. Germany*, *supra* note 4, concluded: 'The Court will have regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one contracting state to another, depending on such factors as traditions relating to the role of the family and to state intervention in family affairs and the availability of resources for public measures in this particular area.'

³¹ In the ECtHR, *Achim v. Romania*, *supra* note 4, ECtHR states: 'The authorities had done everything that could be reasonably expected of them to ensure the children's return to their parents. ... the placement in care had been intended as a temporary means of providing for the children, and had helped improve their development and state of health.'

³² Deprivation of parental rights is not a fatal step as it may initially seem, considering that there is a possibility pursuant to The Family Law, *supra* note 7, Article 83, of reinstatement of parental rights when the reasons for the original decision on the deprivation cease to exist, i.e. when the parent, after a certain period, acquires full capacity to perform parental duties. In this regard it is not the obligation of the state to find employment for its citizens. The obligation of parents is to invest all their capacities and abilities to use the right to work provided and enabled by the state.

³³ ECHR, Article 8: 'Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic 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.'

³⁴ Precisely in connection with the application of the provision of Art. 8 of the ECHR, in the ECtHR, *A.K. and L. v. Croatia*, *supra* note 4, the ECtHR concluded the following: 'It is true that Article 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The relevant considerations to be weighed by a local authority in reaching decisions on children in its care must perforce include the views and interests of the natural parents.'

³⁵ See: The Constitution of the Republic of Serbia, *supra* note 12, Article 65, paragraph 2, Art. 60 par. 3, and Art. 6, all in connection with The Family Law, *supra* note 7, Art. 261-273. 'Exactly when the standard of parental care is violated, i. e. when, as a consequence of the parents' behaviour, the rights and interests of the child are violated, a situation arises in which the state intervenes.' For more see: M. Janjić-Komar and M. Obretković, *Children's Rights - Human Rights* (1996), at 106.

³⁶ Immediate intervention procedure - treatment of domestic SWC in accordance with the Law on Social Protection, Official Gazette of the Republic of Serbia, No. 24/2011, Article 56, Art. 68 and Art. 51, in connection with the Rulebook on the organization, norms and standards of work of the Social Welfare Centre, Official Gazette of the Republic of Serbia, No 59/2008, 37/2010, 39/2011, another Rulebook 1/2012, other Rulebook 51/2019 and 12/2020, Article 49.

³⁷ Prior to enactment of the UNCRC, this principle was proclaimed by Principle no. 2 of the United Nations Declaration of the Rights of the Child.

³⁸ Additionally, in connection with the above, in accordance with the General Comment of the Committee on the Rights of the Child No. 14 (2013) and the guidelines it contains, the decision maker, while determining the best interests of the child, should first define the elements he/she evaluates in passing a decision, and afterwards the criteria used in assessing these elements and their importance in the overall definition of the best interests of the child. The court is also expected to observe all defined elements in correlation, and in the context of specific circumstances, as well as to clearly explain how the specific element influenced the decision-making. UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, 29 May 2013, CRC /C/GC/14.

If the best interest of the child is not determined, the correct decision cannot be passed in the procedure which represents the undoubted influence of public authorities on family life (the deprivation of parental rights) either.³⁹

In this particular case, this has not been done. Firstly, none of the Vučković minor children were heard during the proceedings. Parties to the UNCRC should encourage the child to state his or her own opinion and should provide an environment which allows the child to exercise the right to be heard.⁴⁰ The participatory role in the process is legally guaranteed to the child.⁴¹ In that sense, the expression of an opinion is not an obligation of the child, but his or her right. According to Article 12 of the UNCRC, every child which is capable of forming his or her own views (opinion) has the right to express these views freely, and such views should be taken into account in line with the child's age and degree of maturity. The Committee on the Rights of the Child recommends that the child should be given an opportunity to be personally heard in any proceedings.⁴²

In the Republic of Serbia, the legal presumption is that a child older than 10 years can freely and directly express his or her opinion in any court and administrative procedure, when a decision concerning his own rights is to be made.⁴³ The lower age limit for the exercise of this right is not stipulated, for the right, as such, is being granted to a child capable to form his or her own opinion.⁴⁴ Despite the above stated, the national court relied exclusively on the expert opinion of the SWC when determining the children's opinions (in which the words said by the children were interpreted, without a detailed explanation of the manner in which the children expressed their thoughts and emotions), without investigating whether the children's opinion was understood and presented in a credible way.⁴⁵ In addition, the very fact that the children cried during the separation from their parents was completely disregarded, although it undoubtedly showed their desire not to be separated from their birth family. That desire of children to stay with their parents despite their poor financial situation was also a fact that was in accordance with the applicant's allegations they kept repeating during the court proceedings.

Secondly, the national court essentially based its entire decision on the Expert Reports of the competent SWC contained in the presented evidence, treating it as 'key evidence',⁴⁶ without detailed argumentation and without connecting it to other (un)presented evidence and circumstances of the case. Thirdly, the proposals of Mr. and Mrs. Vučković to question witnesses of the disputed circumstances - the active struggle to find work and the reasons why they had not received social assistance were flatly rejected as "superfluous". Fourthly, it was not particularly taken into consideration that no lack of parental capacity or dysfunction in the care and protection of their children had been established in either of parents (Mr. and Mrs. Vučković) as well as that no physical or permanent mental illness that would make it impossible for them to take care of their children was determined. Fifthly, the fact that the mother of the children has mentally fully recovered by the time of the court proceedings was not considered. Sixthly, the national court did not consider at all the facts that the children did not suffer from any disease caused by unsanitary conditions, that hygiene was maintained with water from the

yard pipe, that the children were extremely emotionally attached to their parents - regardless of the difficult living conditions and that they cried when the SWC separated them from their parents (all these facts were left out of the SWC report in order to justify the decision to partially deprive the parents of their parental rights). Seventhly, health, development, child-rearing, education, and socialization of the children weren't actually *seriously endangered* as a result of the poor living conditions of their family.⁴⁷ Eighthly, the allegations concerning the reasons why Mr. and Mrs. Vučković got into a poor financial situation (unpaid salaries and severance pay, inability to get a job through no fault of their own) were not particularly examined either. Ninthly, the national court did not consider Mr. and Mrs. Vučković's willingness and positive motivation to exercise their parental responsibility, regardless of their poor financial situation, nor has the court considered the special wish of children to live with their parents, which would preserve the family as the fundamental unit of society.⁴⁸

³⁹ See: ECtHR, *Kutzner v. Germany*, *supra* note 4; ECtHR, *Savini v. Ukraine*, *supra* note 4.

⁴⁰ UN Committee on the Rights of the Child, General comment No. 12 (2009): The right of the child to be heard, CRC/C/GC/12, 20 July 2009, Section III.

⁴¹ The Family Law, *supra* note 7, Article 65.

⁴² UNCRC (1989), Art. 12; The European Convention on the Exercise of Children's Rights, Article 3.

⁴³ The Family Law, *supra* note 7, Article 65 paragraph 4.

⁴⁴ M. Draškić, *supra* note 17, at. 267.

⁴⁵ In other words, the national court used the legal provision of the The Family Law, *supra* note 7, Article 65, paragraph 6, too broadly - in the part where it says that the court will determine the child's opinion 'in cooperation with the school psychologist or guardianship authority, family counselling authority or another institution specialized in mediation in family relations, and in the presence of a person chosen by the child', which practically means that the court ordered the Guardianship Authority as a 'specific expert witness' to determine the opinion of children and submit the entire report to the court, within a specified deadline. The argument of the national court that the legal obligation pursuant to The Family Law, *supra* note 7, Article 266 paragraph 3, point 3, to determine the child's opinion 'as well as in a place which is in line with its age and maturity', while the courtroom is not a room/place where children would feel comfortable and relaxed, is not justified enough. Therefore, an example of good practice is talking with a child through a conference call, using audio or visual recording device.

⁴⁶ In this specific case, the national court was, at least, obliged and could request a supplement or correction of the opinion or invite the expert witness to appear at the hearing (see The Law on Civil Procedure, Official Gazette of the Republic of Serbia, No. 72/2011, 49/2013, CC's decision 74/2013, 55/2014, 87/2018 and 18/2020, Article 270 and 271, par. 1-2, in connection with The Family Law, *supra* note 7, Article 202.

⁴⁷ In absence of reliable material evidence to the contrary, the ECtHR concludes exactly the same in the ECtHR, *Savini v. Ukraine*, *supra* note 4, stating that: 'Further, a number of specific conclusions (such as that the children lacked proper nutrition, were dressed inappropriately and were often left home alone) were based solely on the submissions by the municipal authorities, drawn from their occasional inspections of the applicants' dwelling. No other corroborating evidence, such as the children's own views, their medical files, and opinions of their paediatricians or statements by neighbours had been examined.'

⁴⁸ ICCPR, Article 23. ICESCR, Article 10 Paragraph 1.

B. FAILURES OF THE NATIONAL GUARDIANSHIP AUTHORITY

If we assume that the SWC has initiated the procedure of removal of the children from the family, without taking other measures, the omissions would be as follows:

Prior to the relocation of the children to foster families, and the initiation of proceedings for the partial deprivation of the applicant's parental rights, the SWC was (primarily in accordance with Article 27 paragraph 3 of the UNCRC) obliged to undertake a series of measures beforehand,⁴⁹ in order to assist the parents and to enable the proper development of children within their birth family. The SWC did not perform any of the transitional preventive measures for the strengthening of the family, such as: 1) contact with parents and children by professionals within the centre (home visits of professionals, counselling guidance for parents, counselling guidance for children); 2) other forms of intangible assistance (contact with extended family and friends,⁵⁰ day care services); 3) adequate material assistance (financial social assistance, one-off financial assistance⁵¹ for the repair or furnishing of the household); 4) preparation for separation of

children (provision of an explanation to the children of where they are going and of the reasons for their move, consultation with the children about the environment they could live in, introduction to foster parents, visit of the place of future residence before placement, where if the child is separated from the parental family after immediate intervention, as in this case, good practice requires that a planning meeting be scheduled as early as possible, within 48 hours).⁵² During the court proceedings, the Guardianship Authority did not adequately perform its specific procedural function, which is their obligation in such proceedings, and considering that the Republic of Serbia has made a special effort to regulate this by law in detail,⁵³ this omission of the SWC is even more relevant. Both parents expressed their desire to maintain regular contact with their children. However, they were unable to accomplish that due to objective reasons, as they did not have the financial resources for a bus ticket, or a telephone to communicate with their children, while there was also a lack of minimal assistance in the form of provision of free transportation to the place where the children were accommodated, and maintenance of a regular

telephone contact.⁵⁴ Subsequent active social assistance and counselling of Mr. and Mrs. Vučković⁵⁵ was also lacking, and such assistance was necessary in terms of continuous mental and psychological support, even though no absence of parental capacity was recognized. There was no adequate supervision of the proper role of foster parents (who should communicate intensively with the children for the purpose of informing them about their provisional role until their family crisis situation is resolved i.e. until the improvement of financial situation of their parents and full recovery of their mother, and the fact that they were not there to replace their biological parents for good).⁵⁶ The children were divided into two separate foster families⁵⁷ guided by the age criteria, without consideration of, in this case, a more important criterion – the emotional connection among the three underage children.

The context of the best interests of the child standard, from the moment when the children were placed in a foster family, had to be regularly re-examined. It was necessary to undertake active measures to establish a fair balance between the rights of the Mr. and Mrs. Vučković and their underage children, with constant work on the preparation of their return,⁵⁸ i.e. family reunification (all in accordance with the pre-prepared *aim of permanence*, which was not defined at all). Such a passive function of the Guardianship Authorities, and a unilateral function of foster families⁵⁹ (without the involvement of parents), caused irreparable non-pecuniary damage to Mr. and Mrs. Vučković and their children, in terms of lasting emotional distancing and everyday intimacy.

⁴⁹ Measures of a preventive nature in the Rulebook on the organization, norms and standards of work of the Social Welfare Centre, *supra* note 32, Article 9.

⁵⁰ Rulebook on the organization, norms and standards of work of the Social Welfare Centre, *supra* note 32, Article 70, paragraph 3. The planning of services and measures is based on the principle of the least restrictive environment. *Ibid.*, Article 70, paragraph 5.

⁵¹ The Law on Social Protection, *supra* note 32, Article 4, prescribes that every individual and family who would need social assistance and support in order to overcome social and life difficulties and establishment of conditions for meeting life needs, have the right to social protection. However, families who (through no fault of their own) get in a situation of poverty and misery (state economic crisis, job loss, 'bankruptcy', large loan debts, etc.), do not receive adequate and necessary material assistance solely due to inert and bureaucratically inclined state bodies of social protection.

⁵² N. Žegarac, *supra* note 19, at. 171-176.

⁵³ See: N. Petrušić *et al.*, *Guidelines for the Conduct of the Social Welfare Centre in the Context of Civil Court Proceedings Concerning the Rights and Interests of the Child* (2016).

⁵⁴ This right of the applicants and their children enjoys special protection, both in accordance with the relevant provisions of The Family Law, *supra* note 7, Article 61, as well as in accordance with the UNCR, Article 9, the European Convention on the Right to See the Child, Article 4, CoE, Recommendation Rec (2005)5 of the Committee of Ministers to member states on the rights of children living in residential institutions - Specific rights for children living in residential institutions.

⁵⁵ Thus, the ECtHR takes stand in the ECtHR, *Wallova and Walla v. The Czech Republic*, *supra* note 4, that if, from the facts of the present case, it was not apparent that the social security authorities have made serious efforts to overcome their difficulties and return their children as soon as possible there has been a violation of Art. 8 OHCRC. In addition, one of the possible alternative measures to assist the competent social authorities, instead of relocating children to foster families, as mentioned in this case, is to monitor the applicants' living conditions and hygiene, and to provide advice on what steps they can take to improve the situation and find solutions to their problems.

⁵⁶ It is about the so-called urgent foster care from the Ordinance on Foster Care, Official Gazette of the Republic of Serbia, No. 36/2008, Article 3.

⁵⁷ Which is opposite to the recommendations of the Ordinance on Foster Care, *supra* note 52, Article 6, Paragraph 1, point 3. See as well: GA Res. RES/64/142, 24 February 2010, Par. 17. and CoE, Recommendation Rec (2005)5, *supra* note 50.

⁵⁸ In the ECtHR, *Olsson v. Sweden*, *supra* note 4, the ECtHR concluded that: 'The nature and extent of such preparation may depend on the circumstances of each case, but it always implies the active action, understanding and cooperation of all actors.' Intensive cooperation and co-operation of all bodies acting in disputes concerning the relocation of a child is also proclaimed in CoE, Recommendation CM/Rec(2015)4 of the Committee of Ministers to member states on preventing and resolving disputes on child relocation, Principle no. 11.

⁵⁹ In a similar case - ECtHR, *R.M.S. v. Spain*, *supra* note 4, the ECtHR concluded: 'The applicant simply faced a lack of material resources, a situation in which the national authorities could assist to fix it in another way, and not to lead to a complete breakup of the family, which is the last measure which applies only in the most serious cases. The role of the competent social work authorities is to help people in a precarious situation to find ways to overcome their difficulties.'

C. FAILURES OF THE STATE

In this hypothetical case, the responsibility of the state certainly should not be absent:

The complete absence of any reaction by the state, in the sense of not taking any preventive measures in order to create conditions for the development of children within the family, certainly amounts to a violation of its positive obligation.⁶⁰ The state is responsible for ensuring the access to appropriate forms of support to the Vučković family when performing their function of guardianship.⁶¹ In accordance with Article 18 of the UNCRC, all in conjunction with Article 4 of the UNCRC, it is stipulated that the responsibility of parents or guardians is paramount; however, the state is obliged to provide them with appropriate assistance in exercising responsibility for raising a child, as well as to ensure the development of institutions, capacities and child protection services. The Republic of Serbia could and was obliged to implement this positive obligation by undertaking family policy measures prescribed (in detail) by the UN Guidelines for Alternative Care of Children, precisely in order to effectively fulfil the obligations undertaken by the UNCRC.⁶²

These Guidelines clearly stipulate that financial and material poverty (i.e. conditions directly and exclusively related to such poverty) must never be the sole justification for the removal of a child from parental care, for receiving a child into alternative care or for preventing his or her social reintegration.⁶³ In that sense, according to Point 10 of the Guidelines, the Republic of Serbia was obliged to exert special efforts in order to combat discrimination based on any status of the child or his or her parents, including, *inter alia*, poverty.⁶⁴ Contrary to that, children were 'recklessly' separated from their families and placed in foster care due to the poor economic status of their parents, without sufficient and adequate help and assistance offered to their family beforehand. Although foster care is defined in the legal literature as acceptance of someone else's child for free food and education, in modern legal systems it represents a special legal relationship between the foster child and the foster parent - an adult, (who is not his or her relative), who takes care of the child and to whom some of the rights and obligations, from the content of parental rights, are transferred. However, it should be performed in a way that ensures that the child does not interrupt the family relationship with his or her family.⁶⁵

The specific property of foster care is that the foster parent is entitled to compensation from the state based on his or her work, defined per child who is under his or her care, as well as to compensation for the costs of supporting the foster child. According to available information, a foster parent in the Republic of Serbia retains the right to the total amount of approx. €480.00, while the monthly income of socially vulnerable parents for one child, on account of the so-called 'Child allowance', averages about €33.00 (while the basic amount of social assistance benefits for individuals without any source of income and with one underage child is €73.00).⁶⁶ The latest Concluding Observations of the Committee on the Rights of the Child *inter alia*, recommend the Republic of Serbia to reconsider the adequacy of financial assistance to children, for the purpose of providing a minimum standard of living and access in terms of information, scope and procedures tailored to the beneficiary.⁶⁷ These Observations have not yet been followed.

D. VIOLATION OF ARTICLE 8 OF ECHR

All of the state bodies which act within proceedings for deprivation of parental rights are obliged, before passing any decision, to actively undertake all measures available (within their competence) which could primarily help parents with conscientious exercise of their rights and duties arising out of the content of parental rights, espe-

cially in specific situations in which eventual negligence is mainly a consequence of the undisguised poor financial condition of the parents. Opposite actions of state authorities, especially national courts and guardianship authority, as well as unjustified lack of state assistance to able-bodied but unemployed parents, who express the desire and positive motivation to exercise parental rights, and in cases where their lack of parental capacity was not determined, as well as when emotional closeness and attachment between parents and children is not violated, shall be an act contrary to the principle of the best interest of the child and an illegitimate violation of family life by the public authorities.

Although the hypothetical decision of the national court to partially deprive the spouses Vučković of their parental rights had a legitimate aim, taking into account all the above-mentioned failures of the Republic of Serbia and its competent authorities to take preventive and alternative measures, it cannot be qualified as proportionate to that aim, or necessary in the democratic society.⁶⁸ It is in the best interest of the child that the relationship with his or her birth family is preserved whenever possible, and that it may be terminated only under exceptional circumstances. The aforementioned means that everything must be undertaken to re-establish this relationship, and that any restriction of the right for preservation of family life must be understood in a way that implies its

⁶⁰ See more: ECtHR, *Guide on Article 8 of the European Convention on Human Rights – Right to respect for private and family life* (2020). The Republic of Serbia has taken on such an obligation and, according to, see: PACE, Resolution 2049 (2015), as well as: CoE, Recommendation Rec (2006)19 on policy to support positive parenting.

⁶¹ See: GA Res. RES/64/142, *supra* note 53, Par. 3.

⁶² *Ibid.*, Par. 32-52.

⁶³ *Ibid.*, Par. 15.

⁶⁴ *Ibid.*, Par. 10.

⁶⁵ M. Draškić, *supra* note 17, at 311.

⁶⁶ See: Cena Usluga Porodičnog Smeštaja, available at demo.paragraf.rs/demo/documents/editorial/statistika/27_stat.htm and Novčana Socijalna Pomoć, available at <https://csrkovacica.rs/novcana-socijalna-pomoc/>.

⁶⁷ UN Committee on the Rights of the Child, Concluding Observations on the Combined Second and Third Periodic Reports of the Republic of Serbia, CRC/C/SRB/CO/2-3, 3 February 2017, par. 52 d.

⁶⁸ The ECtHR also pointed this out in ECtHR, *Kutzner v. Germany*, *supra* note 4. 'The Court further reiterates that the order for public care of children should in principle be considered as a temporary measure, which should be revoked as soon as the circumstances of the case allow, and that all measures for temporary care should be in line with the permanent aim of unification of natural parents and children.'

discontinuation as soon as circumstances allow it.⁶⁹ The court must permanently, and at any moment, take care to achieve the optimal balance between the realization of the best interests of the child on one hand, while securing the conditions that are necessary to preserve parental capacity of the parents as much as possible on the other – the so called *proportionality test*.⁷⁰ In the present case, a fair balance between the parents (Mr. and Mrs. Vučković) interests and the state's interests was not achieved, especially taking into account the fact that some of the above-mentioned measures, designed to strengthen the family, which could have preserved the close relations among family members and the family itself as a whole, had not been undertaken towards Mr. and Mrs. Vučković, before deprivation of parental rights (as the most severe family law sanction).⁷¹ The national authorities did not make adequate and effective efforts to ensure the parents' right to live together with their children, and to enable the timely reunification of the family, unjustifiably shifting and narrowing the responsibility solely to them, and at the same time violating their right to respect for private and family life guaranteed by Article 8 of the ECHR.

6. CONCLUSION AND RECOMMENDATIONS

Every state is obliged to identify the needs of families of which its society is composed, as well as to provide them with protection. In that sense, one has to keep in mind that most often, the primary cause of the existing dysfunctions within a family is, to a greater or lesser extent, the poverty itself. The concept of poverty is accompanied by a set of stereotypes. On the other hand, due to an inadequate aid that is provided by the state and its repressive measures, parents of poor financial status are actually being additionally punished, which further opens up the issue of discrimination against the poor and raises the question in the future whether poor people will have the right to become parents. One should keep in mind that the issue of the best interests of children in cases of existing parental poverty cannot be the sole responsibility of any of the actors – neither the parents as individuals, nor the relevant institutions, nor the state as a whole. The solution here would be to move the focus from repressive to preventive actions, accompanied by an adequate interaction among all of the actors – with the aim of the effectuation of the aforementioned. The main priority should be to enable the child's physical, moral and intellectual development – so that he or she can become a healthy and successful member of society.

This should be done while the child still lives within his or her own family – whenever possible.

It is unacceptable for state authorities to deprive children of parental care due to the fact that their parents did not provide them with proper clothing, shoes, hygiene products or conditions for education, etc. (deeming it that way as neglect of their children), without taking into account the real reasons which actually brought parents to the point of them being unable to satisfy the basic needs of their children – their poverty. The Republic of Serbia has based its social policy on child protection, primarily, on providing financial support through alternative ways of caring for children (payment of compensation to foster parents), instead of focusing the material and personal assistance resources of social services to help the parents with financial difficulties. We found ourselves in a situation where foster parents receive an amount of financial aid that is three times higher than the one that the parents themselves get. If those funds were to be allocated in a different way, those parents could use them to provide for proper care and development to their children. Other than that, as we could see in this paper, the right of citizens to a fair trial is violated if neither the court's decision nor the decision of the competent SWC (like in the hypothetical *Vučković* case) offers an explanation to the parents on why their children are being relocated to an unknown environment, and why funds are being provided to unknown persons to take care of the children, instead of providing the parents with the money they need to provide adequate conditions for the development of their children.

One of the solutions would be for the state to prescribe measures that would give priority in employment to the unemployed parents (such measures should be established in accordance with the professional qualifications and health condition of the parents), which would solve the problem of subsistence not only for the parents, but for their children as well. Also, in order to prevent any eventual abuse, it is our proposal for the legislator to prescribe the procedure which parents should go through before the competent SWC in order to claim the right to material aid given by the state, as well as the right to have employment priority. It would namely be a procedure which would enable the existence of parental ability (or any lack thereof) to be determined, as well as an assessment of whether the parents are actually fit to perform their parental duties fully and if any possible relationship disfunction between the parents themselves and their children exists. All of the aforementioned should be based on the expert analysis provided by the SWC which can, by eliminating every other possible source, determine that it is in fact the poverty itself that is the true and sole problem the family in question is facing. Based on the conducted procedure, a fixed-term certificate would be issued, revision of which would be conducted once a year or biyearly – providing that no circumstance which would automatically annul its validity occurs in the meantime (e. g. evidence of child abuse).

⁶⁹ See: GA Res. RES/64/142, *supra* note 53, Par. 14.

⁷⁰ The same legal position was determined by the Supreme Court of Cassation of the Republic of Serbia in the *Sentence* from the judgment Supreme Court of Cassation (Serbia), Decision no. 1902/2019, dated 09 May 2019, pronounced at the session of the Civil Department, dated 03 July 2020.

⁷¹ In the EctHR, *Soares de Melo v. Portugal*, *supra* note 4, the EctHR concludes: 'Families living in poverty cannot be punished for their deprivation and their children should not be "rescued" from them. Instead, and because children are not the exclusive responsibility of parents, states must fulfil their supportive role and provide material and other forms of assistance to make family life possible.'

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BEST INTERESTS OF THE CHILD: THE GUIDING LIGHT, OR THE NORTH STAR? RECOGNITION OF A JUDGEMENT CONCERNING THE PERSONAL RELATIONSHIP BETWEEN A DONOR AND “HIS CHILD” IN ROMANIA

European Union law allows for the diversity between the legal regimes of the EU Member States in reproductive matters. States are left room to make their own choices in these moral and ethical issues. Given the importance of protecting children's rights, the manner in which Member States choose to regulate parental responsibility may be a matter of public policy. This runs the risk of non-recognition for judgments relating to the parental rights of third party-donors in member other Member States. This research aims to establish, first, whether the relevant Romanian legal provisions regarding the status of the third-party donor represent an issue of public policy and which are the steps to be taken into consideration in order to assess if the subject matter is a question of public policy. Afterwards, we will analyze the public policy from two different perspectives, if it is opposing to the parentage rights of the donor or if it is opposing to any personal connection with the child. Not the least, we will make an assessment of the public policy issues involved from the perspective of the best interests of the child.

KEY WORDS

Third party reproduction
Parental responsibility
Best interests of the child
Public policy
Recognition of a judgement
Access rights

1. INTRODUCTION

1.1. WHAT IS “THIRD PARTY REPRODUCTION” ?

Recently medical progress made it possible to procreate through medical assistance. The process of helping people to artificially have children without following the natural and conventional process of procreation is referred to¹ as “artificial reproductive techniques” (ART)². “Assisted human reproduction” (AHR) is defined as any procedure that involves the handling of eggs, sperm or both outside the human body.³ The Romanian Civil Code uses the notion of “assisted human reproduction using third party donor⁴. “Third-party reproduction” refers to involving someone in the process of reproduction other than the individual or couple which plans to raise the child as intended parent[s].

This includes using donated eggs, sperm, or embryos and gestational-carrier arrangements, in which the pregnancy is carried by someone other than the intended parent(s). Sperm donation⁵ enables a man to father a child for third-party individual(s) and is therefore categorized as a form of third-party reproduction⁶. For reasons of simplicity and consistency, we use the acronym AHR to refer to process of reproduction which involves sperm donation

1.2. A PRACTICAL APPROACH

For this purpose, we shall envision a fictional case in which Miss Jane Doe, who is habitually resident in the territory of a Member State of the European Union is yearning to be a mother and decides to undergo artificial insemination. She becomes pregnant and gives birth to a girl, whom she names Judy. Jane couldn't be any happier...until one day a man called Frank Foe, comes knocking at her door, wanting to meet his biological daughter. He tells Jane that he found out Judy was conceived using the sperm he donated

¹ Scaravelli G, Spoletini R, *The application of Artificial reproductive techniques (ART) worldwide epidemiology phenomenon and treatment outcomes* In: Watson R, R, *Handbook of Fertility*, 2015 pp 75-87..

² ART includes numerous procedures such as ovarian stimulation, oocytes and sperm donation, and intracytoplasmic sperm injection. Additional techniques such as ovulation induction and intrauterine insemination have become more frequent in the past three decades (*Pediatric Neurology Part I*, William D. Graf, Barry E. Kosofsky, in *Handbook of Clinical Neurology*, 2013).

³ Okun, N, Sierra, S, *Pregnancy Outcomes after Assisted Human Reproduction* in SOGC Clinical Practice Guidelines No. 302, January 2014, available at: [https://www.jogc.com/article/S1701-2163\(15\)30685-X/pdf](https://www.jogc.com/article/S1701-2163(15)30685-X/pdf)

⁴ Articles 441 and following

⁵ Following Art. 3 c) EU Tissues and Cells Directive (2004) a ‘donor’ means ‘every human source, whether living or deceased, of human tissues and cells.’ ‘Donation’ is defined as donating human tissues or cells intended for human application.

⁶ Sperm may be donated by the donor directly to the intended recipient woman or through a sperm bank or fertility clinic. Pregnancies are usually achieved by using donor sperm in assisted reproductive technology (ART) techniques which include artificial insemination, either by intracervical insemination (ICI) or intrauterine insemination (IUI) in a clinic, or intravaginal insemination at home. Less commonly, donor sperm may be used in in vitro fertilization (IVF) (more information at https://en.wikipedia.org/wiki/Sperm_donation).

years ago. Frank tells her that he wants to acknowledge Judy as his daughter and wants to be a part of her daughter's life.

Jane would not allow Frank to have any personal contact with her daughter and asks him to go away. And he goes... straight to court. A national court grants Frank the right to get access to information about his biological daughter's school progress as well as her medical history and a visitation right, allowing him to meet with his daughter twice a year considering such measures to be in the best interest of Judy⁷.

Some time later, the company Jane works for opens a subsidiary in Romania, where Jane is offered the position of chief executive officer for a five-year term. She takes the job and relocates to Romania with her daughter⁸. She enrolls Judy in a Romanian school and registers her at a Romanian family doctor. Frank is keen on seeing his biological daughter and very interested in her academic progress and her welfare. Upon discovering that Romania has a very strict policy in the field of assisted human reproduction and that according to Romanian law Frank has no parental rights with regard to Judy, Jane does not allow the biannual visits Frank was granted. Since he is no legal relative of Judy, Romanian authorities

would not give Frank any information about her school activities and health situation.

Frank is desolate because his efforts were futile. He remembers he has a court order which grants him rights of access to Judy. He wants to enforce this court order in Romania, as he knows that a judgment on parental responsibility given in a Member State is recognised in the other Member States. Frank submits an application for a declaration of enforceability to a Romanian court. To his further dismay, the court of first instance invokes the public policy exception, finding the recognition of this particular judgment to be manifestly contrary to the public policy of Romania which expressly excludes the legal parent-child relationship between the sperm donor and the conceived child and rules that the sperm donor has no parental responsibility⁹.

1.3. EUROPEAN UNION LAW

European Union law allows for the diversity between the legal regimes of the EU Member States in reproductive matters; states are left room to make their own choices in these moral and ethical issues. Yet, in the context of cross-border movement, EU Member States may experience that a completely isolated position in reproductive matters may no

be longer tenable in the EU's multilevel legal order¹⁰.

On the other hand, given the importance of protecting children's rights, the manner in which Member States choose to regulate parental responsibility may be a matter of public policy. Therefore, judgments relating to the parental rights of third party-donors given in other Member States risk not being recognised, a problem which arises in our fictitious case too.

1.4. OVERVIEW OF EUROPEAN COURT OF HUMAN RIGHTS AND SOME DOMESTIC CASE LAW

As the law of parentage is striving to meet the challenges of new reproductive technologies and the considerable legal diversity as to medically assisted reproduction all over the world, the question arises whether it should be possible for a judicial ruling related to parental rights of the sperm donors to be recognised. Consequently, if the answer is positive, further questions are to be answered. Could it be legally possible to establish a personal relationship between a donor and "his child"? If this personal relationship is granted legal consequences by a court in a given Member State, what are the effects of this possible decision? Could it be recognized in other Member States?

The current national legal situation as regards third party reproduction with sperm donation is quite diverse and not well-defined at this point. Moreover, European Court of Human Rights (ECtHR) struggles with a coherent approach on how to treat this topic.

In *Menesson*¹¹ and *Labassee*¹², the ECtHR approaches the subject of recognition of parent-child relationships that had been legally established abroad and finds that Article 8 of the European Convention on Human Rights¹³ (ECHR) is applicable in both its family life aspect and its private life aspect, but in these judgments the recognition of parent child relationships regards the legal parent, not the sperm donor. Even though in *Schneider and Campanelli v. Italy*¹⁴, the Grand Chamber established that there was no infringement of Article 8, such decision was very controversial and contrary to the first decision issued by the Court. In the *Paradiso* decision the Court held that the removal of the child by the Italian authorities constituted an interference with their family life in breach of Article 8 because the authorities had not properly considered the balance between Italy's public policy considerations, on the one hand, and the best interests of the child, on the other¹⁵.

⁷ This scenario is loosely based on the *Case of Re G and Re Z*, to which we will refer more extensively later. Without entering into too much detail for the moment, we point out that the English High Court granted two sperm (S and T) access rights to their biological children (G and Z) despite that "S and T are not to be treated in law as the parents of, respectively, G and Z for any purpose" (extract from the decision in the *Case of Re G and Re Z*, par. 113, available at: <https://www.ngalaw.co.uk/uploads/docs/538f17f6ad179.pdf>)

⁸ Jane does not need permission from Frank to take Judy out of the country, since he was only granted access rights. The court order neither establishes a parent-child relationship between Frank and Judy, nor does it grant him custody rights. The holder of custody rights (in this case Jane) decides on the place of residence for the child and has sole authority to take the child in and out of the country.

⁹ Articles 441 and 442 of the Romanian Civil Code

¹⁰ Nelleke R. Koffeman LL.M, *Legal Responses to cross-border movement in reproductive matters within the European Union, Paper for Workshop no. 7. Sexual and reproductive rights: liberty, dignity and equality of the IXth World Congress of the IACL CONSTITUTIONAL CHALLENGES: GLOBAL AND LOCAL Oslo, Norway, 16-20 June 2014*, p.19.

¹¹ ECtHR, *Menesson. v. France*, Appl. no. 65192/11, Judgment of 26 June 2014.

¹² ECtHR, *Labassee v. France*, Appl. no. 65941/11, Judgment of 26 June 2014.

¹³ Formally, the Convention for the Protection of Human Rights and Fundamental Freedoms

¹⁴ ECtHR, *Paradiso and Campanelli v Italy*, Appl. no.25358/12, Judgment of 24 January 2017.

¹⁵ However, the Court also noted that its decision should not be read to require return of the child to the applicants, as the child has no doubt developed a bond with the family with whom he has been living since 2013.

Also, in the case of *Foulon and Bouvet v France*¹⁶, the ECtHR has delivered a judgment protecting the rights of children born as a result of international commercial surrogacy to have their relationships with their biological parents legally recognised. The Court unanimously found that refusal by French authorities to transcribe the birth certificates of children born under surrogacy agreements in India violated the children's right to respect for private life under Article 8 of the ECHR.

In the Decision XII ZB 463/13¹⁷, the German Federal Court found that any consideration of whether a foreign court decision is contrary to German public policy must take into account the human rights guaranteed by the ECHR. A foreign judgment assigning parenthood to a child's intending parents, rather than to the surrogate mother as provided by German law, does not automatically constitute a breach of German public policy if at least one of the intending parents is genetically related to the child.¹⁸

In some situations, the legal standing of the sperm donor may be taken into consideration not only in judgment given on the exercise of parental responsibility, but also in judgments given on the legal parent-child relationship (parentage). The Svea Court of Appeal (Sweden) judgments, T 7894-15 and T 7895-15 established the paternity of a sperm donor, AF, in relation to two children, SJ & JJ, then aged five and three years respectively¹⁹. Grounds for the judgments were Chapter 1, Section 5 of the Swedish Children and Parents Code²⁰, which enables the Court to establish paternity if, *inter alia*, a genetic test shows that the man in question is the child's father, unless the sperm used for the pregnancy has been donated in accordance with Chapters 6 and 7 of the Genetic Integrity Act²¹. The sperm donor maintained that he had never met the mother of the two children and that they must have been conceived from sperm he had donated to a Danish Clinic. This factor, however, had no bearing on the Court in resolving the question of paternity which was determined by applying a literal interpretation of the Code.

Even though the European and national courts have a well-established case-law regarding the "best interests of the child" principle, there is a lack of case-law on surrogacy considered pertinent for the application of the public policy exception according to point (a) of Article 23 of Regulation (EC) No. 2201/2003 (Brussels IIbis Regulation)²².

1.5. FORESHADOWING

This research aims to establish, first, whether the relevant Romanian provisions are mandatory rules or public policy issues and the steps to be taken into consideration in order to assess if the subject matter is a question of public policy. Thereafter we will analyze the public policy from two different perspectives, if it is opposing to the parentage rights of the donor or if it is opposing to any personal connection with the child. Not the least, we will make an assessment of the public policy issues involved from the perspective of the best interests of the child.

2. THE PROHIBITION OF PARENTAL RIGHTS OVER THE CHILD BORN OUT OF ASSISTED HUMAN REPRODUCTION PROCEDURE (AHR): MANDATORY RULE OR A PUBLIC POLICY ISSUE?

2.1. THE PROVISIONS OF THE INTERNAL LAW.

According to Romanian law²³, there is no parentage relationship between a child and the donor under an assisted human reproduction procedure²⁴. However, such legal provision is applicable only if the parties sign a specific notarial agreement protecting the confidentiality of the donor²⁵.

The aim of this regulation is to provide for legal certainty regarding the civil status of the child and preserve the principle of confidentiality²⁶. The principle of confidentiality of any information regarding the involved parties, the child, the legal

¹⁶ ECtHR, *Foulon and Bouvet. v. France*, Appl. no. 9063/14 & 10410/14, Judgment of 21 July 2016.

¹⁷ Bundesgerichtshof, Beschluss XII ZB 463/13, 10 December 2014, Judgment available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=69759&pos=0&anz=1>.

¹⁸ This also applies where the foreign court decision establishes the parenthood of the registered civil partner of the genetic father of the child, as well as the genetic father. Article 8 ECHR would be infringed if the German authorities only recognised one of the intending parents because every child has the right to a legal parent-child relationship with two parents.

Wells-Greco, M, Dawson H, *Inter-Country Surrogacy and Public Policy: Lessons from the European Court of Human Rights* published in *Yearbook of Private International Law Vol. XVI - 2014/2015*, <https://doi.org/10.9785/9783504384784-013>.

¹⁹ Stoll, J. (2017) Establishing paternity by court judgment following sperm donation: Some reflections on two judgments rendered by the Svea Court of Appeal In: Jänterä-Jareborg, Maarit; Brattström, Margareta (ed.), *För barns bästa: Vänbok till Anna Singer* (pp. 317-344). Uppsala: lustus förlag.

²⁰ Swedish Code of Statutes SFS 1949:381.

²¹ (Swedish Code of Statutes SFS 2006:351, which stipulates the conditions for treatment, where the treatment may be carried out, choice of sperm donor, right to information, duty to provide information to a court, etc, full provisions available at <https://www.icj.org/wp-content/uploads/2013/05/Sweden-Genetic-Integrity-Act-2006-eng.pdf>.

²² Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

²³ Prior to the enactment of the RCC, that came into force in 2011, the Romanian legislator drafted various bills regulating the assisted human reproduction procedure. One of those bills was declared unconstitutional by the Constitutional Court. Among several criticisms regarding the bill, the Constitutional Court noted that each individual has the right of maintaining its spiritual identity, which under the family ties is transmitted to the children, as descendants. Nevertheless, the current provisions of the RCC which establish no parentage relationship between a child and the donor under an assisted human reproduction procedure are in force and thus it is presumed they are compliant with the constitutional standard.

²⁴ RCC, Article 441 (1).

²⁵ RCC, Article 442.

²⁶ Baïas, F, A, *Noul Cod Civil. Comentariu pe articole*, CH. Beck, Bucharest, 2011, pp.484, 488.

parents and the donor, is meant to protect the right to respect for private and family life encompassed under article 8 of the ECHR. In this respect, the ECtHR stated that “since *private life*, which is a broad term, encompassing, *inter alia* elements such as the right to respect for the decisions both to have and not to have a child²⁷ or the right of a couple to conceive a child and to make use of medically assisted procreation to that end, such a choice being clearly an expression of private and family life.”²⁸

2.2. MANDATORY RULE OR PUBLIC POLICY ISSUE?

A mandatory rule is a provision of law that the parties are not allowed to derogate from. The totality of mandatory rules which are comprised in a legal system forms the internal public order of the state²⁹. A general definition for the public policy of the state under private international law cannot be given.³⁰

The public policy of the state refers to a set of social, economical, political or moral principles which are so important to the constitutional and legal order of the state, that any foreign law applicable

as *lex causae* which violates these principles must be rendered inapplicable, in order to safeguard the stability of the constitutional and legal order³¹.

The public policy resembles the internal public order due to the fact that they both comprise mandatory rules. However, they differ due to the fact that not every mandatory rule comprised in the internal public order is a public policy issue; only mandatory rules which protect core values of utmost importance for the life of the society can be included in the notion of public policy³².

The domestic mandatory rules intend to preserve the proper functioning of the national community, while the public policy is protecting the principles on which the state is founded and its organisation. Thus, one may conclude that the scope of the public policy is much stricter and narrower than of the internal public order.

In the following paragraphs we intend to analyse the characteristics of the public policy under the international law in order to establish if the prohibition of parental rights over the child born out of AHR is a mandatory rule or a public policy issue.

2.3. THE PUBLIC POLICY CRITERIA

In order to conclude if a legal provision is protecting the public policy one must perform a four-step reasoning³³. The first aspect to be taken into consideration is to examine the value contained within the public policy. Secondly, in order to assess whether such value is of utmost importance in a society, a research in comparative law is required. After establishing if the preserved value is a central foundation of the legal domestic order, it should be established if the case has sufficient connection points with the *lex fori*. The final step is a proportionality assessment of the protected value under the domestic legal system and the values covered by the foreign decision.

2.3.1. The protected value

First of all, in qualifying a provision as a public policy rule, one must identify a fundamental value protected by such provision. Regarding the present subject, numerous values were identified by the legal literature such as, the inalienability of the human body, the inalienability of a personal status (e.g. parentage) by private agreement, the public policy against the commodification of children and the unlawful placement of children, the public policy against the exploitation of women, the protection of the family life of the mother and her child³⁴, the social family life of the established legal family, the interest of the child to

know his genetic affiliation, public policy against the infringement of the law of adoption, including terms of consent, termination of parental rights and the payment of funds and statutes and case law governing legal custody and physical placement focusing on the best interests of the child.³⁵

If we were to examine the specific domestic provision, the prohibition of parental rights of the donor over the child born out of AHR encompass the value of the social family life of the established legal family. In this respect, the ECtHR stated that “a biological kinship between a natural parent and a child alone, without any further legal or factual elements indicating the existence of a close personal relationship, is insufficient to attract the protection of Article 8.”³⁶ As a rule, cohabitation is considered a requirement for a family life relationship³⁷. Exceptionally, other factors may also be taken into consideration in order to analyse if a relationship has sufficient constancy to create *de facto* “family ties”. Similarly, the Supreme Court of United States has sometimes suggested that the American Constitution's protection of family relationships arises from the lived “intimacy of daily association,” implying that protection would not be triggered in the absence of established emotional bonds³⁸.

Consequently, the domestic rule seems to protect the rights of the legal parent

²⁷ ECtHR, *Evans v. the United Kingdom*, Appl. no. 6339/05, Judgment of 10 April 2007, par. 71; ECtHR, *A, B and C v. Ireland*, Appl. no. 25579/05, Judgment of 16 December 2010, par. 212.

²⁸ ECtHR, *S.H. and others v. Austria*, Appl. no. 57813/00, Judgment of 3 November 2011, par. 82; ECtHR, *Knecht v. Romania*, Appl. no. 10048/10, Judgment of 2 October 2012, par. 54.

²⁹ Predescu, B, M, C, *Drept internațional privat. Partea generală*, Wolters Kluwer, Bucharest, 2010 p.365

³⁰ *Idem*, p.365

³¹ For a much more ample definition of the public policy, with reference to its characteristics and functions, please read Predescu, B, M, C, *op.cit.*, pp. 361-376.

³² *Idem*, p. 376

³³ Dan Petrache, *Ordinea publică de drept internațional privat*, ed. Universul Juridic, 2019, pp.80.

³⁴ Including the non-relinquishment of a child against a mother's wishes.

³⁵ Wells-Greco, M, Dawson H., *op. cit.* p.324.

³⁶ ECtHR, *Anayo v. Germany*, Appl. no. 20578/07, Judgment of 21 December 2010, par.56.

³⁷ *Ibidem*.

³⁸ *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) cited in David D. Meyer, *The Constitutionality of Best Interests Parentage*, <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1184&context=wmborj>, p.871-872.

who expressed his intent to become a parent and behaved in such manner to develop strong personal ties to the child in the sense of a family as described above.

2.3.2. Comparative law research

In order to make a complete assessment of the value involved, one should also verify if the Romanian lawmaker's option regarding the prohibition of parental rights of the donor over the child is found in the legal tradition of other countries. Such valuation does not mean that the public policy has a regional or international nature³⁹. At this phase, the fact that a specific rule is replicated in various other legal systems may be an indication of the fundamental nature of such rule.

The status of children resulting from AHR has been under discussion for some years. The usual recommendation on this matter, including that of the Council of Europe, is that a child conceived by assisted human reproduction procedure with the consent of the mother's husband should be treated under the law for all purposes as the legitimate child of the husband.⁴⁰

In most European countries where such procedures are practiced, the identity of the donor is unknown to both the prospective parents and to their children and, even if they are informed about the circumstances of their conception, these children are not entitled to know the identity of their biological father⁴¹.

Furthermore, the Council of Europe recommends that all precautions should be taken to keep secret the identity of all the parties involved, and the identity of the donor must never be revealed even in court. The present trend is that the child should be informed by their parents of their conception, following the principle that an adopted child should be placed in position of this fact.⁴²

In addition, the Tissues and Cells Directive (2004)⁴³, deals with substantive AHR issues, but its harmonising effect is limited. It provides that Member States must endeavor to ensure voluntary and unpaid donations of gametes. Also, as a matter of principle, such donation must be anonymous, although this is without prejudice to legislation in force in Member States on the conditions for disclosure, notably in the case of gametes donation.

However, the current domestic regulations enacted by the Member States on the matter is not consistent due to the fact that sperm donors can be either anonymous or known to the couple. In most European countries (e.g. Spain France and Denmark), anonymity of the donor is preserved⁴⁴. In other countries, laws have been enacted to allow children access to identifying information about gamete donors. Sweden, Austria, the Australian state of Victoria, Switzerland, the Netherlands, Norway, the United Kingdom, New Zealand, Germany, Ireland, and Finland are countries that have mandates that donors be identifiable to their genetic offspring.⁴⁵ Of these, Finland, Sweden, and the United Kingdom have banned anonymous gamete donation, which tends to discourage donation⁴⁶.

Most centres disapprove donation by family members or friends, since this can cause problems in the family structure of the recipients, e.g. ambiguous emotions between the donor, the child and the legal parents.⁴⁷

In a case regarding two couples of lesbians who used as a donor a male friend, who was also in a relationship, the High Court of Justice Family Division from UK, decided that "each case is, however, fact specific, and on the facts of these cases, [...] the most important factor is the connection that each applicant was allowed by the respondents to form with the child"⁴⁸. Also, the court acknowledged that it was always part of the plans in both cases that there should be some contact between the children and their biological fathers. So, considering the former personal relationship between the parties and especially between the donor and the child, a court may establish or confirm personal ties between the biological father and his offspring.

2.3.3. The connection between the case and the legal regime of *lex fori*

The court of the state in which the recognition of a judgment is sought may consider the application of a domestic legal provision which envisages a public policy value if the case in which the judgment was delivered has sufficient links with the forum, as the preserved value is relevant only to a case which may impact the life of the *forum* to some extent.

³⁹ Dan Petrache, *op. cit.*, pp.83-84.

⁴⁰ Texts of the Council of Europe on bioethical matters Volume II Directorate General I – Human Rights Directorate Human Rights Policy and Development Department Bioethics Unit, Strasbourg, April 2014, p.107 available on <https://www.coe.int>, accessed on 16th May 2021.

⁴¹ Joseph G.Schenke, Assisted reproduction practice in Europe: legal and ethical aspects, p.177, Human Reproduction Update 1997, Vol. 3, No. 2 pp. 173-184 at <https://academic.oup.com>.

⁴² Joseph G.Schenke, *op. cit.*, p.177.

⁴³ Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, JO L 102, 7.4.2004, p. 48-58, paragraph 29 of the Preamble and article 14 (1)§. The Tissues and Cells Directive is made up of the parent Directive 2004/23/EC, OJ EU L 102/48 (07.04.2004) and two technical directives (Directive 2006/17/EC, OJ L 38/40 (09.02.2006) and Directive 2006/86/EC, OJ L 294/32 (25.10.2006)).

⁴⁴ Joseph G. Schenke, *op. cit.*, p.177.

⁴⁵ Margaret K. Nelson, Rosanna Hertz and Wendy Kramer, *Gamete donor anonymity and limits on numbers of offspring: the views of three stakeholders* available on <https://www.ncbi.nlm.nih.gov> accessed on 16th May 2021.

⁴⁶ Patrick Präg Email author Melinda C. Mills, *Assisted Reproductive Technology in Europe: Usage and Regulation in the Context of Cross-Border Reproductive Care* available on <https://link.springer.com/>, accessed on 16th May 2021.

⁴⁷ In other cases where the donor is not a relative or a friend, the donor's anonymity is crucial in order to protect family privacy; in most cases, anonymity is also in the donor's interest. A donor may feel that he may be considered legally liable for the child's welfare, or that there may be claims to inheritance rights. Joseph G. Schenke, *op. cit.*, p.176.

⁴⁸ Case No.:FD12P01675 of Royal Courts of Justice Family Division in the matter of the Children Act 1989 and matter of G (a minor) between S and D and E and in the matter of Z (a minor) between T and X and Y, 31.01.2013.

From this perspective, in the case analysed herein, the child and his legal family are not Romanian citizens and they have moved to Romania for a limited period of time. Consequently, from a factual point of view, the period of time the family intends to reside in Romania may be relevant. If the duration of the stay is sufficient to reflect some degree of integration and the child develops social relationships in Romania, this may suggest that the child has now its habitual residence in this country, which is in our opinion enough reason to consider that the legal standing of the child is important to some extent for the *forum*. However, acquiring habitual residence in the Romania is not the only means to provide connection with the *forum*. As the principle of “the best interest of the child” is fundamental in Romanian law, the mere physical presence of the child in a Romania may provide enough connection in order for the public policy to intervene, given the fact that children are presumed to be vulnerable.

2.3.4. The proportionality test

The most relevant step in assessing the incidence of public policy is the proportionality test. *Lex fori* needs to balance the protected value of the forum, in the case at hand, the family life relationship against, on one hand, the right of the child to establish his or her identity and, on the other hand, his or her right to private life. Establishing the public policy margin implies indicating a hierarchy between the conflicting values.

The ECtHR stated that protection of private life implies “that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship [...]; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned”⁴⁹. In the cases of *Mennesson* and *Labassee*, the French Government disregarded the biological link between the children and the father⁵⁰.

However, ECtHR emphasised the meaning and the importance of a family life for the child, stating that, “the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront.”⁵¹ In another case, ECtHR pointed out that “respect for family life implies [...] the existence in domestic law of legal safeguards that render possible as from the moment of birth the child’s integration in his family.”⁵²

Although recognising the right of children to know their identity, the ECtHR also held that “the institution of the family is not fixed, be it historically, sociologically or even legally” and states are required to have in place a legal framework that ensures family life can be meaningfully enjoyed by a child⁵³. A meaningful family life that serves the child’s best interests could be impaired if any parental rights would be recognised for the benefit of the donor, a third party for the family in which the child was born and raised⁵⁴.

AHR must be approached on its very specific facts. If a child is born as a result of such procedures, the child’s welfare must be a central priority. Any decision taken by a court on the subject has and will have a fundamental impact on the entire life of that child. If the child has been entrusted to the intending parents, recognising the right of the donor to take the child, recognising a paternal approach towards the child or placing him into care may not promote the child’s best interests. In conclusion, we argue that the prohibition of parental rights over the child born out of AHR is a matter of public policy according to Romanian law, as the rule meets the earlier mentioned public policy criteria.

⁴⁹ ECtHR, *Menesson. v. France*, Appl. no. 65192/11, Judgment of 26 June 2014, par.80, par.96. In that case, ECtHR stated that the lack of recognition under the domestic legal system of the parent-child relationship created a situation of “legal uncertainty” that “undermines the children’s identity within French society”.

⁵⁰ The Court then underlined that the situation of legal uncertainty concerning the parent-child relationship of the children born from such procedures particularly impacted the recognition of their nationality and inheritance rights, and thus crucial aspects of their identity. Ilaria Anrò *Surrogacy from the Luxembourg and Strasbourg perspectives: divergence, convergence and the chance for a future dialogue* p.19 at http://www.ceje.ch/files/7414/6366/2490/Geneva_JMWP_09-Anro.pdf.

⁵¹ ECtHR, *Kroon v the Netherlands*, Appl. no. 18535/91, Judgment of 27 October 1994, par. 40. cited in M. Wells-Greco, H. Dawson, p.339.

⁵² ECtHR *X,Y&Z v. UK*, Appl. no. 21830/93, Judgment of 22 April 1997, par.47 cited in M. Wells-Greco, H. Dawson, p.339.

⁵³ ECtHR, *Mazurek v France*, Appl. no. 34406/97, Judgment of 1 February 2000, par. 52. Some scholars recognised that public policy favours recognizing a mother and a father for each child, consistent with the goal of serving best interests. Susan Frelich Appleton *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation* published in *Family Law Quarterly*, Vol. 49, No. 1 (Spring 2015) p. 93–116. © 2015 by the American Bar Association, p.99.

⁵⁴ Trying to see how the internal legal systems interpreted by domestic courts coexist with the ECtHR perspective, Baroness Hale proposed the following: «where it was necessary to strike a balance between competing Convention rights, the Court should be particularly cautious about interfering with the way in which the national courts have struck the balance when they have been applying the Convention principles and have reached a decision which is “on its face reasonable and not arbitrary». B. Hale *Argentorum Locutum: Is the Strasbourg or the Supreme Court Supreme?*, [2012] *Human Rights Law Review*, p. 65-78, 77.

3. ROMANIA'S PUBLIC POLICY WITH REGARD TO DONOR'S PARENTAL RIGHTS

3.1 THE EXACT SCOPE OF THE PUBLIC POLICY

The question that now arises is whether the public policy of Romania in the area of assisted human reproduction is limited to the non-recognition of the legal parent-child relationship between the donor and the conceived child or it precludes the assertion of any right to access.

As we stated above, according to the RCC⁵⁵, AHR does not establish between the donor and the child a parent-child relationship⁵⁶ and, therefore, the donor has no parental responsibility⁵⁷. In order to clarify any confusion which may arise due to both translation and innate differences between the various legal systems with regard to the notions of "parent-child relationship" and "parental responsibility".

By *parent-child relationship* we refer to the legal relationship between a parent and his child as a result of filiation.

The existence of a parent-child relationship means that a person is considered the legal mother or legal father of a child. The legal parentage (legal motherhood/fatherhood) is based either on biological maternity/paternity or on adoption. By *parental responsibility*, we refer to the totality of parental rights and duties relating to a child which are granted to a person. The person who exercises parental responsibility is usually the legal parent of the child, but in some cases a court may decide that that parental responsibility must be exercised by another person (a relative, a family friend or an authority or institution). Some of the most important parental rights which fall within the scope of parental responsibility are the rights of the access to a child, by visitation or by taking the child out of the habitual residence for a period of time and the rights to decide on matters regarding the person of the child such as his or her school or place of residence.

Even though these notions seem to overlap, as parental responsibility is generally exercised by the legal parent, the notions of parent-child relationship, these notions remained distinct. For example, if someone wants to appear on the child's birth certificate as legal parent, he makes a parentage application (paternity applications being the most common).

On the other hand, if someone wants to be allowed to visit the child against the wishes of the child's legal parents, he makes an application for parental responsibility in the form of right of access. The distinction is very important since only the latter judgment can be recognised under Brussels II bis Regulation, as its Article 1(3)(a) states that the Regulation shall not apply to the establishment or contesting of a parent-child relationship.

The preclusion of the donor from asserting any parental rights, such as the right to have contact with the child, is the corollary of the former having no form of parental responsibility. The Romanian legislator's intention was to exclude not only the legal relationship based on ties of filiation, but also any other effect of the genetic parentage between the donor and the child, along with the right to have personal contact. As a result, in Romania, genetic parentage *per se* is not a sufficient reason to grant the sperm donor the right to have personal contact with the child.

In addition, Article 445 of the RCC states that all information regarding AHR is confidential, thus any information about the donor can only be transmitted to the child, his descendants, medical practitioners or competent authorities, with prior authorisation from the court, if access to such information is impera-

tive to prevent an imminent risk of *grave harm* to the child's or his descendants' health. Such an impermissible regulation denotes the interest that the RCC takes in protecting the intimacy of the family who resorts to AHR. By contrast, in countries such as Austria and Germany the conceived child has the right to receive information about the sperm donor after he turns 14⁵⁸, respectively 16⁵⁹, while in Sweden, a person conceived through sperm donation has the rights to access the data on the donor after reaching "sufficient maturity"⁶⁰.

As the public policy of Romania expressly excludes such information about filiation, taking into consideration the interest that the Romanian legislator takes in protecting the intimacy of the family who resorts to AHR and having concluded that the blood relationship is not by itself sufficient reason to grant parental rights, the non-recognition of any parental right based solely on the genetic relationship deriving from assisted human reproduction innately appears to be a matter of public policy in Romania.

3.2. COMPLIANCE WITH ECHR. COMPARISON TO ADOPTION

Before concluding that the public policy of Romania forbids the recognition of a judgment which grants a sperm donor rights of access, we shall examine whether the provisions of the RCC which ban the donor from any right of access to the

⁵⁵ Article 441 and the following are comprised in Book II "Family" - Title X "Kinship" - Chapter II "Filiation" - Section 2 "Assisted human reproduction using a third party donor" of the RCC.

⁵⁶ The woman who undergoes the procedure is the legal parent of the child and so is her partner, provided he consents to the procedure.

⁵⁷ The Romanian legislator is inconsistent with the use of terms while referring to the ensemble of parental rights and duties. The term "responsibility" is also used in the Child Protection Act (Romanian law no. 272/2004, regarding the protection and promotion of children's rights, published in the Official Journal of Romania on 21 June 2006; Article 5(2); Article 6(d); Article 36), given the external source of inspiration for this law, but generally the notion of "authority" is preferred.

⁵⁸ Article 20 (2) of the Federal law that regulates medically assisted reproduction, published in the Austrian Federal Law Gazette No. 275/1992.

⁵⁹ Article 1(10)(1) of Act to Regulate the Right to Know One's Heritage in Cases of Heterological Use of Sperm, published in the German Federal Law Gazette No. 48/2017.

⁶⁰ Chapter 6, Section 5 of The Genetic Integrity Act (Swedish Code of Statutes no. 2006:351) of 18 May 2006.

child conform to the ECHR and to the case-law of the ECtHR⁶¹.

One might argue that these regulations, which deny the biological father any right of contact with his child, violate his right to respect for his family and private life, as provided under Article 8 of the ECHR or Article 7 of Charter of Fundamental Rights of the European Union⁶². In this respect, it should be emphasised that Article 8 of the ECHR is the minimum protection standard and from this perspective the following analysis will be circumscribed to such provision.

The ECtHR has not ruled on the parental rights of sperm donors so far. However, the principles set out in the *Case of I.S. v Germany*⁶³ shall prove pivotal in our analysis. Herein, the ECtHR ruled that the German courts which did not allow the applicant the right to have contact with her biological children whom she had priorly given up for adoption shortly after giving birth, did not violate the applicant's right to private life. The children had been adopted by another family with whom they developed personal ties; they were emotionally attached to their adoptive parents and had no memory of their biological mother. Firstly, we seek to draw a parallel between the bio-

logical parent who gives the child up for adoption at a very young age to another family and the sperm donor who agrees that a child carrying his genes will be born in another family. Secondly, if the line of argument will prove to be consistent, we analyze the need to apply *mutatis mutandis* the reasoning of the ECtHR in the aforementioned judgement to the particular situation of the sperm donor.

At the outset, we shall address whether the sperm donor's rights to access fall under the scope of Article 8(1) ECHR⁶⁴.

In Romania, as a similarity to the signing of the adoption papers, by which the biological parent consents to the termination of the legal relationship between him and the child, at the moment of the sperm donation, the donor signs a deed, by which he is informed that the act of sperm donation does not establish a parent-child relationship and that the individual/couple who benefit from the donation is/are the legal parent(s) of the child. Consequently, the relationship between the donor and the children conceived using his genetic material should not fall within the scope of "family life". However, since his status as a biological father might be viewed as an important part of his identity and legacy as a human

being, his relationship with his biological children falls within the scope of "private life" and attracts the protection of Article 8, which is not an absolute right, as this right may be subjected to limitations⁶⁵. The preclusion of the donor from asserting the right to have contact with his biological child is clearly a limitation of the donor's right to respect for private life prescribed by the Romanian law. As such, it must be decided if this limitation has a legitimate aim and is necessary in a democratic society.

One can notice that the Romanian provisions⁶⁶ aim at protecting the legal parents' right to respect for private and family life. Hence, the emergence of a virtual stranger⁶⁷ who is asserting parental rights could be a major stressor, placing excruciating burden on the family relationship. Nonetheless, the law also aims to protect the child's right to undisturbedly develop and bond with his legal parents.

Concluding that provisions of the RCC pursue the legitimate aim of protecting of the rights and freedoms of others, we shall now determine whether such drastic rules are necessary in a democratic society.

Firstly, the act of sperm donation is from the outset done for the benefit of the family in which the child will be born, which is a mere convention between the sperm donor and the fertility clinic⁶⁸. Consequently, he is involved in a contractual relationship, not in a family relationship. By contrast, the individual/couple who benefit from the donation enter into this procedure with the intent of establishing a family relationship with the conceived child, and thus should be protected against any subsequent second thoughts of the donor, who might request to establish a connection with his biological offspring despite not having initially intended a family relationship with the conceived child.

Reverting to the rationale of the ECtHR, in such case, the birth of a child in regard to whom the donor has no parental rights is, as well, the result of an act that the donor takes in full knowledge of the legal consequences. According to the scope of the RCC, the interests of the family into which the child is born to enjoy and build a family life together with the child, undisturbed by attempts by the donor to establish contact prevail.

⁶¹ Article 20 of the Romanian Constitution states that constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to and where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence.

⁶² The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. In accordance with Article 52(3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR

⁶³ ECtHR, *I.S. v. Germany*, Appl. no. 31021/08, Judgment of 5 June 2014.

⁶⁴ Which reads: "everyone has the right to respect for his private and family life his home and his correspondence".

⁶⁵ According to Article 8(2) ECHR which reads "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic 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".

⁶⁶ The RCC which rule that sperm donation does not establish a parent-child relationship and impose confidentiality and thus do not provide a right to contact with and information about the children born via this procedure.

⁶⁷ We are referring to the hypothesis in which the donor is unknown, as this is the most common scenario.

⁶⁸ In accordance with Article 144 (1)(c) of the Healthcare Reform Act (Romanian law no. 96/2006, regarding reform in healthcare, published in the Official Journal of Romania on 14 April 2006) the donor shall sign a legalized deed by which he declares that sperm donation is an entirely altruistic act and is for humanitarian purpose.

The provisions of the RCC, which attach greater weight to the privacy and family interests of the family, are necessary in a democratic society, and thus in compliance with the ECHR.

As a consequence, we argue that the public policy of Romania prohibits the recognition of a foreign court order which grants the sperm donor access rights to the child conceived using his genetic material.

3.3. A VERY WELL KNOWN DONOR...

What if the court of the Member State which passed the judgment on parental responsibility held as grounds for its decision not only blood relationship, but also the fact that the known donor was previously part of the child's life? The future parent(s) and the sperm donor may enter into an agreement which entitles the donor to be a part of the child's life. Even though the donor is not the legal father of the child and does not enjoy a parent-child relationship, their connection could resemble a family relationship. The very bond which that sperm donor and the child have developed may be the determinant ground for which a foreign court grants the sperm donor further visitation and information rights on its basis in case the legal parents decide to terminate his contact with the child.

According to Article 17 (1) and (2) of the Child Protection Act, the child has the right to maintain personal and direct contact with his or her parents, relatives and any other person to whom the child is emotionally attached and has developed a bond which falls within the scope of "family life". Moreover, the following paragraph states that the parents cannot prevent the personal relationship between the child and any person with whom the child has enjoyed family life, unless this relationship could endanger the physical, mental and moral development of the child, while taking into consideration the child's best interests.

Consequently, the recognition of judgment passed in a Member State, similar to the *Case of Re G and Re Z*⁶⁹, would not violate the public policy of Romania. In that particular trial, the first plaintiff (S) applied for both a contact order and a residence order, while the second plaintiff (T) applied only for a contact order, in relation to their biological children (G and Z) born via AHR with their sperm. The plaintiffs did not contest the legal parent-child relationships and did not apply for paternity. They argued that even though they are not the legal fathers of their biological children, they should be entitled to maintain a personal relationship. The English High Court ruled in 2013 that the two sperm donors (S and T) who were not legal fathers⁷⁰, had the right to maintain contact with their biological children on the basis that they had, through previous contact, formed sufficient connection.

On the merits of the case, the Court took into consideration that S (who donated the sperm with which G was conceived) was an old friend of the legal parents (a lesbian couple) who lived in close proximity of the couple's home, was involved in the birth preparations and was invited to see the child immediately after birth. Afterwards, not only did the legal parents allow for regular visits, but also they asked the donor to provide sperm for one more child so that both their children have the same biological father. With regard to T (who donated the sperm with which Z was conceived), the High Court ruled that, irrespective of the legal status, the relationship that he had developed with the conceived child was linked to their biological kinship, since the legal parents (also a lesbian couple) wanted him to be a role model for the child. While they could have chosen any other friend to be a masculine role model for the child, they chose the biological father. Like S, T was involved in the birth preparations and had been allowed to regularly visit his biological child more than 50 times in the first 18 months of the child's life.

The High Court held that denying the biological fathers who were priorly involved in the upbringing of their children any further right of contact with his their children, would violate their right to respect for family and private life, under Article 8 ECHR. While admitting that the biological fathers' visitation rights would inevitably harm the legal parents' own right to respect for their family and private life, the judge argued that the disruption is outweighed by the other

factors, as it is in the best interest of the children to maintain the bond between them and their biological fathers.

As this judgment was not given on parenthood, but on parental responsibility, the judgment could have been recognised under the Brussels II bis regulation. Recognising a similar judgment in Romania would not transgress the provisions of the RCC, since the primary ground of the decision was not the biological identity of the donors. In such case, the sperm donors are not mere donors, but close family friends which are involved in child rearing, both emotionally and financially. Even though they were no legal relatives of the children and therefore had no maintenance obligation towards them, they still supported the mothers in preparation for the births⁷¹. While the biological identity of the donors is not the ground of the access rights, this was an important factor for which the initial contact with the child had been allowed by the legal parents in the first place. The termination of the ties between the child and the biological father by the legal parents was found unreasonable by the Court, as the children had developed a relationship with a fatherly figure, of which they were afterwards deprived by their legal parents.

It goes without saying that under no circumstances shall the Romanian judge review the decision as to its substance in order to qualify the factual and legal relationship between the child and the donor. The purpose of this procedure is to determine whether the public policy of Romania, the judge being bound

⁶⁹ Her Majesty's High Court of Justice in England, [2013] EWHC 134 (Fam), Judgment of 31 January 2013. Decision available at: <https://www.ngalaw.co.uk/uploads/docs/538f17f6ad179.pdf>

⁷⁰ "S and T are not to be treated in law as the parents of, respectively, G and Z for any purpose"; *Case of Re G and Re Z*, par. 113.

⁷¹ Both donors, were later heavily involved in the family lives of the couples, since one of them was asked to father another child for the couple so that both siblings have the same genetic parentage, while the other was asked by the legal parents to be a part of the child's life so that the latter has a masculine role model.

by the legal and factual grounds which were held by the foreign court which pronounced the judgment. This, of course, requires that the grounds are well substantiated and coherently presented so that it is clear for the Romanian judge that the access rights were granted based on the necessity to maintain a previously established personal bond between the sperm donor and the child and not solely as a consequence of the biological kinship.

4. PUBLIC POLICY AND THE BEST INTERESTS OF THE CHILD

The Brussels IIbis Regulation sets out the current rules governing the jurisdiction, recognition and enforcement of matrimonial and parental responsibility orders in the EU. The scope of the Regulation is confined to matrimonial matters (divorce, legal separation, annulment) and parental responsibility, including rights of custody, rights of access, guardianship, the placement of a child in a foster family or in institutional care⁷².

In accordance to Article 23 of the Regulation, a ground of non-recognition for judgments relating to parental responsibility is the public policy of the Member State in which recognition is sought taking into account the best interests of the child⁷³.

As we mentioned above, the recognition of a judgement relating to parental responsibility, respectively the right of the donor to have a personal relationship with the child could be contrary to the public policy in Romania, but we should take a step further and see if this right would be contrary to the public policy taking into account the best interests of the child.

Prior to deciding whether the notions of public policy and the best interest of the child are convergent, a certain evaluation of both concepts is needed. The concept “best interest of the child” is essential, yet vague and indeterminate. Although it existed for a long time, its importance grew when it was included in the United Nations Convention on the Rights of the Child (UNCRC)⁷⁴, ratified by all the Member States, but not by the EU itself⁷⁵. The Convention on the Rights of the Child has a progressive approach to

the ‘best interests’ of the child. It deals with the concept as a general principle and an umbrella provision for the whole Convention. The definition of what is indeed in the best interests of the child is rooted in the substantive articles of the Convention itself.

The concept of “all actions concerning children” implies that the best interests principle is applicable not only where a decision directly affects a child, but also when he is indirectly affected, as in cases where a child’s parent is at risk of being removed. The best interests principle operates as both a substantive right and an interpretative device⁷⁶.

4.1. THE STRASBOURG INTERPRETATION: A FUNDAMENTAL PRINCIPLE

Unlike the UNCRC, the ECHR does not expressly refer to “the best interests of the child”, but the ECtHR has developed a large body of case law dealing with children’s rights and has on numerous occasions analyzed the best interest of the child. At the core of the Court’s reasoning is the principle that where a child is concerned, the best interests of that child must be a primary consideration. While the Court continues to recognise the margin of appreciation of Member States to prohibit surrogacy agreements domestically, this decision limits the legal effect of such prohibitions where commercial surrogacy occurs abroad.

While a State may prohibit surrogacy agreements, once a child is born through surrogacy, the State’s laws cannot be used to prejudice the rights of the child⁷⁷.

For instance, in *Paradiso and Campanelli*⁷⁸ the Court in its first decision did not separate the position of the child from that of the parents (and rejected the application brought by the parents in the name of the child for lack of representation), the child’s best interests principle played a fundamental role in assessing the violation of the parent’s right to the respect of their family and private life. The Court held that the Italian authorities had failed to strike the correct balance between the interests and rights involved, disregarding the child’s best interest principle, and violating Article 8 ECHR.

In *Schneider v. Germany*,⁷⁹ the applicant had a relationship with a married woman and claimed to be the biological father of her son, whose legally recognised father was the mother’s husband. The applicant argued that the decision of the domestic courts to dismiss his application for contact with the child and information about the child’s development on the basis that he was neither the child’s legal father nor had a relationship with the child violated his rights under Article 8 of the ECHR.

⁷² Also, in accordance with the Treaty on the Functioning of the European Union, article 288, a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. Therefore, the current rules set out by Regulation 2201/2003 are directly applicable in Romania, and the situation presented in this paper falls within the scope of the Regulation because it is a civil matter related to the attribution and exercise of parental responsibility, according to article 1, paragraph 1, letter b and article 1, paragraph 2, letter a) rights of custody and rights of access.

⁷³ This paper does not cover the hypothesis provided under Article 41 of Brussels IIbis Regulation. The parties did not request for the issuance of a certificate concerning rights of access.

⁷⁴ *The best interests of the child – A dialogue between theory and practice*, Council of Europe, <https://rm.coe.int/1680657e56>.

⁷⁵ Article 3.1 of the UNCRC states that: [i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

⁷⁶ “Surrogacy from the Luxembourg and Strasbourg perspectives: divergence, convergence and the chance for a future dialogue” Ilaria Anrò, http://www.ceje.ch/files/7414/6366/2490/Geneva_JMWP_09-Anro.pdf.

⁷⁷ ECtHR, *Foulon and Bouvet. v. France*, Appl. no. 9063/14 & 10410/14, Judgment of 21 July 2016.

⁷⁸ N 16 above.

⁷⁹ ECtHR, *Schneider v. Germany*, Appl. no. 17080/0, Judgment of 15 December 2011

In finding a violation, the ECtHR focused on the failure of the domestic courts to give any consideration to the question of whether, in the particular circumstances of the case, contact between the child and the applicant would have been in the child's best interests. As regards the applicant's request for information about the child's personal development, the Court held that the domestic courts failed to give sufficient reasons to justify their interference for the purposes of Article 8 (2) and that, therefore, the interference had not been "necessary in a democratic society"⁸⁰.

Also, in *Odièvre v. France*⁸¹, when deciding whether Article 8 has been complied with in either of those situations, the Court seeks to determine whether a fair balance has been struck by the state between the competing rights and interests at stake. In this context, the Court frequently recalled that the expression "everyone" in Article 8 of the Convention applies to both the child and the putative father. On the one hand, people have a right to know their origins, that right being derived from a wide interpretation of the scope of the notion of private life. The Grand Chamber found no violation of Article 8 given that the French Government had meanwhile amended domestic legislation.

In *Godelli v. Italy*⁸², the applicant, who had been abandoned at birth, was unable to access information concerning her origins. Where the birth mother had opted not to disclose her identity, the Italian legislation did not provide any means for a child who was adopted and had not been formally recognised at birth to request access to non-identifying information on his or her origins or the waiver of confidentiality by the mother. The Court considered that the Italian authorities had overstepped their margin of appreciation.

In *Krisztián Barnabás Tóth v. Hungary*⁸³, after carrying out a careful weighing of the child's best interests, the domestic authorities refused to bring a paternity action on behalf of the applicant, whose child born out of wedlock had already been recognised by another man and adopted by his wife. The Custody Board's home visit conducted with the adoptive family concluded that the child had developed emotional ties with, and was integrated into, a family which provided her with the necessary care and support. Establishment of the applicant's paternity would deprive the child of her existing loving family and social environment, potentially causing such damage to her that this could not be outweighed by the putative father's interest in having a biological fact established. In those circumstances, the Court was satisfied that the domestic authorities carried out a thorough scrutiny of the interests of those involved – attaching particular

weight to the best interests of the child while not ignoring those of the applicant – and that there had been no violation of Article 8.

The ECHR reiterates the child's best interests⁸⁴ in *Chavdarov v. Bulgaria*⁸⁵, *A.M.M. v. Romania*⁸⁶ and *Krušković v. Croatia*⁸⁷.

4.2. THE LUXEMBOURG INTERPRETATION: A NOT SO FUNDAMENTAL PRINCIPLE?

The best interests of the child plays a fundamental role in the European Union law, for example in family reunification, jurisdiction in matrimonial matters and the matters of parental responsibility⁸⁸. Moreover, the Charter of Fundamental Rights of the European Union states in Article 24 paragraph 2: "in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

Nevertheless, the case law of the CJEU is not clearly outlined in this matter.

In the C.D. decision⁸⁹, the best interests of the child was not even mentioned and did not play any part, even if it was maintained that maternity leave was required by EU law in order to protect the child-mother relationship. The Court simply relied on a literal interpretation of the EU instruments invoked by the applicant, including a consideration of their rationale, which was rooted in a society where the only conception of motherhood was the biological one, and reached the conclusion that there was no legal basis for maternity leave. On the other hand, General Advocate Kokott made an effort to rely on the child's best interest principle.

⁸⁰ https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2015-handbook-european-law-rights-of-the-child_en.pdf The issue there was the legal recognition of children born through surrogacy agreement abroad.

⁸¹ ECtHR, *Odièvre v. France* [GC], Appl. no. 42326/98, Judgment of 13 February 2003.

⁸² ECtHR, *Godelli v. Italy*, Appl. no. 33783/09, Judgment of 25 September 2012.

⁸³ ECtHR, *Krisztián Barnabás Tóth v. Hungary*, Appl. No. 48494/06, Judgment of 12 February 2013.

⁸⁴ In *D. and others v. Belgium*, instead, the Court, even if it did not rely expressly on the child's best interests, recognized that the interference of the State, who refused to issue a travel document for the commissioning parents, was enacted in compliance with the aim to protect the child. ECtHR, *D. and Others v. Belgium*– Appl. no. 29176/13, Judgment of 8 July 2014.

⁸⁵ ECtHR, *Chavdarov v. Bulgaria*, Appl. No. 3465/03, Judgment of 21 December 2010.

⁸⁶ ECtHR, *A.M.M. v. Romania*, Appl. No. 2151/10, Judgment of 14 February 2012.

⁸⁷ ECtHR, *Krušković v. Croatia*, Appl. No. 46185/08, Judgment of 21 June 2011, par. 41.

⁸⁸ Article 15 of Regulation No 2201/2003, headed 'Transfer to a court better placed to hear the case', clearly provides that a court of a member state has to take into consideration where is in the best interests of the child when analyzing to stay the case or request a court of another Member State to assume jurisdiction. Furthermore, in CJUE Judgment of 27 October 2016 J. D., Case C428/15, ECLI:EU:C:2016:819, the Court states Article 15(1) of Regulation No 2201/2003 must be interpreted as meaning that:

- in order to determine that a court of another Member State with which the child has a particular connection is better placed, the court having jurisdiction in a Member State must be satisfied that the transfer of the case to that other court is such as to provide genuine and specific added value to the examination of that case, taking into account, inter alia, the rules of procedure applicable in that other Member State;
- in order to determine that such a transfer is in the best interests of the child, the court having jurisdiction in a Member State must be satisfied, in particular, that that transfer is not liable to be detrimental to the situation of the child, reaffirming the best interest of the child principle once again.

⁸⁹ ECJ, case C-167/12, C.D., [2014], ECLI:EU:C:2014:169.

4.3. “BEST INTERESTS OF THE CHILD”: SO WHAT DOES IT REALLY MEAN?

Though it is very hard to give a general and complete definition for this concept, a reasonable first building block towards establishing the meaning of this notion is the sum total of the norms in the Convention. This means, for instance, that it is in the best interests of the child to: receive education (Art. 28); have family relations (Art. 8); know and be cared for by his or her parents (Art. 7); be heard in matters concerning him or her (Art. 12), and to be respected and seen as an individual person (Art. 16); the right to live with his or her parents (Art. 9). In the same way, the Convention states what is not in the best interests of the child: for instance, to be exposed to any form of violence (Art. 19); to be subjected to any traditional practices prejudicial to the child’s health (Art. 24); to perform any work that is hazardous or harmful (Art. 32), or to be otherwise exploited or abused (Arts. 33-36)⁹⁰.

4.4. HOW TO BALANCE THE INTERESTS OF THE CHILD VERSUS THE PUBLIC POLICY? IS THE PUBLIC POLICY IN VIEW OF THE BRUSSELS IIBIS REGULATION AN AUTONOMOUS CONCEPT OR ARE THE PUBLIC POLICY AND THE BEST INTERESTS OF THE CHILD PRINCIPLE TWO DIFFERENT NOTIONS?

For the purposes of Article 8 ECHR, the public policy of a Contracting State cannot be understood as being made exclusively of national values and principles. Instead, public policy represents for the Court a focus point where national values and supra-national imperatives including the CRC, interconnect: public policy, in order to properly play a role in respect of the recognition of foreign judgments in matters of personal status and family relationships, should be treated “as the result of a dynamic process of osmosis between local and regional policies [...] i.e. a perspective where the point of view of the forum is no longer a merely national one, but embodies that state’s international undertakings concerning, inter alia, the protection of human rights.”⁹¹

In determining whether an interference with family life is justified, the Strasbourg Court “attaches special weight to the overriding interests of the child” and the circumstances as a whole. In order to assess the proportionality of an interference with a right, it is appropriate to examine its impact on that right, as well as the grounds and consequences for the applicant and the context. It is for the state to justify the interference⁹².

The “best interests of the child” principle should be considered a component of public policy in family matters and in the view of Regulation Brussels IIbis public policy is an autonomous concept, that should be always analysed through the “best interest of the child” principle. In this perspective, the assessment regarding the recognition of the foreign judgment could differ in the light of the “best interests of the child” principle.

This conclusion is also reached by a national court from Italy⁹³, which has stated that the recognition of a judgment relating to parental responsibility was not contrary to the public policy because there was a relevant interest of the child in enforcing the judgment in Italy.

Also, in Portugal, the criterion of the best interests of the child is applied independently of the public policy test, as shown by a decision of the Court of Appeal of Lisbon⁹⁴: “[...] in principle, against the request of surrender and enforcement of a decision by the Italian court, an opposition can be filed [...] given the primacy of the interests of the child”.

The welfare of the child should remain, however, the paramount consideration for judges in parental responsibility cases and more particular, in analysing the public policy in view of the Brussels IIbis Regulation.

The relevant date for assessing whether a foreign judgment contradicts the public policy is the date where recognition and enforcement are sought, so that changes, especially regarding the compliance with the interest of the child, e.g. an improvement of the child’s relationship to a parent, can be considered.

⁹⁰ *The Principle of the Best Interests of the Child – What it Means and What it Demands from Adults*, Lecture by Thomas Hammarberg, Commissioner for Human Rights Council of Europe Warsaw, 30 May, 2008, <https://rm.coe.int/16806da95d>.

⁹¹ Wells-Greco, M, Dawson H, *op.cit.*

⁹² Spielmann notes that the grounds “must be “relevant and sufficient”, the need for a restriction must be “established convincingly”, any exceptions must be “construed strictly” and the interference must meet “a pressing social need”.

⁹³ Corte d'appello Milan, February 24, 2003, *Rivista di diritto internazionale privato e processuale*, 2004, 622 et seq.

⁹⁴ 24.3.2009, RL 2273/07.9TMSLB-7, in www.dgsi.pt.

Even though the views of the child in the matter are not likely the only competing elements at stake when establishing the best interests of the child, they do represent an important factor in reaching the final decision. In accordance with the age, the maturity of the child and their competence or evolving capacity, the views of the child will be of crucial importance to the decision⁹⁵. Also, a child needs role models and the different characteristics, views and skills provided by each parent during the different phases of childhood. A stable relationship with both parents, and in this case the sperm donor, who is willing to have a personal relationship with the child is thought to "anchor" children and to aid in preparing them for adulthood and a responsible place in society.

In conclusion, a straightforward decision cannot be envisaged in this matter. The values at stake must be analysed in every concrete situation, in order to establish if the relationship with the sperm donor will ultimately result in providing a sense of identity for the child, additional love, security and stability or if it will confuse the child even more and create an unstable environment, improper for his/her development.

5. CONCLUSIONS

Firstly, regarding the scenario envisioned, the judge should analyse the public policy matter, taking into consideration the best interest of the child principle, or to put it in other words, the best interest of the child should be the guiding light or the north star in this matter. A key point in this decision is if the donor is known, respectively if the donor previously had any kind of relationship or connection with the child. If he doesn't have any connection to the child and he consented to the fact that the act of sperm donation is performed in the sole benefit of the individual/couple – the contracting parties, then a greater protection is established to actual family relationships than it does to one based solely on biological kinship. Thus, the judgement should not be recognized in a Member State with a similar legislation to Romania, being contrary to the public policy having in mind the best interest of the child.

On the other hand, a different conclusion should be reached if the child had a connection, a previous relationship with the sperm donor, him being actively involved in his life, having in mind that EU legislation provides on a prohibition of reviewing the merits of the initial case. In this case, it would be in the child's best interests to have a better sense of identity, additional love and stability and the judge should apply the mutual recognition principle, which is the cornerstone of the EU area of justice.

Consequently, in this matter, a straightforward conclusion cannot be drawn. The judge has to analyse, *in concreto*, if the sperm donor has a connection to the child prior to the decision and it is in the best interest of the child to have a personal relationship with the donor, for her or his emotional stability.

Firstly, the judge must verify whether the decision for which recognition is sought falls within the scope of the Brussels IIbis Regulation. Secondly, the national provisions regarding the exercise of parental responsibility of the Member State in which recognition is sought shall be verified. Afterwards, one must address whether a national regulation which precludes the sperm donor from asserting parental rights is just a mandatory rule or represents an issue of public policy. The next step is to determine if the foreign court based its decision solely on the biological kinship between the donor and the child or other reasons, such as a priorly developed personal relationship between the two, were held as primary grounds for the decision.

In the hypothesis in which the decisive argument for granting visitation rights was the filiation, the restrictive public policy of the Member State in which recognition is sought and the best interest of the child could converge to forbid the recognition of such a judgment.

On the other hand, if there were other grounds for granting visitation rights, such as the existence of sufficient prior contact, the judge of the Member State in which recognition is sought must determine whether under his national law the right of access to a child could be granted for similar grounds. If the answer is affirmative, we argue that the judge should apply the principle of mutual trust and recognise the judgment without any further requirements. However, if the answer is negative, the judge must decide by analysing if the recognition of the decision is in the best interest of the child. In this perspective, the best interest of the child appears as the guiding light for the judge confronted with recognition of judgment granting access rights to a sperm donor which raises public policy issues.

⁹⁵ "In particular when considering the best interests of the child, the Court places great weight on the exercise of the child's right to freedom of expression and the wishes of the child" ECtHR, *Hokkaen vs Finland*, Appl. no. 19823/92, Judgment of 23 September 1994.

SEMI-FINAL C

EU AND EUROPEAN CIVIL PROCEDURE

PARTICIPATING TEAMS

CROATIA, CZECHIA, FRANCE, GERMANY, ITALY, PORTUGAL,
ROMANIA, SPAIN

1st place: Team Czechia
2nd place: Team Germany
3rd place: Team Romania

Selected papers for TAJ:
Team Czechia
Team Germany
Team Romania



29 JUNE - 1 JULY 2020, ONLINE

JURY MEMBERS

ALEŠ GALIČ (SI)

PROFESSOR OF INTERNATIONAL PRIVATE LAW,
UNIVERSITY OF LJUBLJANA

I have been delighted to accept the EJTN's call to act as a juror in this year's Themis European Civil Procedure Semi-final. Surely, it is regrettable that it was not possible to meet my fellow jurors Danute and Apostolos, the members of the teams along with their tutors and EJTN's Arno in person. The pan-European lockdown caused by the Covid-19 pandemics took its toll. Nevertheless, this downside and challenge also proved to be an opportunity. First, the EJTN as well as participating teams must be lauded to have organised and participated in the event in this difficult time. In this manner, they have all shown that the Judicial training and the judicial cooperation in the EU and the will to keep it going cannot easily be shaken. Second, the new format of the Competition, which included a video presentation enabled the teams to demonstrate their digital skills and to avail themselves to the use of numerous opportunities offered by modern technologies.

I have participated in numerous moot courts and similar competitions, in different capacities: as a law student, as a tutor and as a juror. Comparing all these events, I can, without a shred of exaggeration, say that – for a juror at least – the THEMIS format is by far the most interesting and rewarding. The reason is this: In other competitions all teams deal with the same topic and the same legal problems, based on the same underlying facts, and thus, from the viewpoint of a juror, after reading all the papers there is quite some amount of repetition. However, in THEMIS format each team does a research on a topic of their own choice. This guarantees, already in and of itself that a juror will have a great opportunity to learn a lot and to broaden significantly his or her horizons.

All participating teams along with their tutors are the winners in the THEMIS competition. They should all be proud of their outstanding and inspiring performance and the displayed intellectual fervour and in-depth knowledge of EU law, international law and (comparative) national laws during the competition and the weeks or months of research, writing and preparing a video-presentation leading up to it.

DANUTĖ JOČIENĖ (LT)

JUSTICE OF THE CONSTITUTIONAL COURT OF THE
REPUBLIC OF LITHUANIA, PROFESSOR AT MYKOLAS
ROMERIS UNIVERSITY, VILNIUS, LITHUANIA

First of all, I would like to express my sincere gratitude to the EJTN for allowing me to be once again a member of the Semi-final Jury of the Themis Competition of 2021. This was my third time when I was asked to be a Jury member of this unique competition, this time [again] – for the Semi-final C: EU and European Civil Procedure. The organization of the Themis Competition of 2021 was again extremely complicated following the COVID-19 pandemic across the world which has moved our traditional face-to-face meetings into the online platform. Therefore, many thanks to brilliant skills of organisers, Mr Arno Vinković and IT team of the EJTN in particular, who have designed an excellent competition online framework both to you and us, Jury members.

Secondly, to confess you in all honesty, I have still been dreaming to return back to our traditional form of the Themis Competition and the possibility to meet you face-to-face.

Thirdly, I have to admit that acting as a Jury member for the second time for the Semi-final C: EU and European Civil Procedure and I'm starting "to fall in love" with this field of the EU law.

Fourthly, I was always genuinely respectful of fact that young lawyers participating in the Themis competition have 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 formulate their unique legal proposition. This year eight excellent Teams were participating in Semi-final C: EU and European Civil Procedure: Italy, Croatia, Czech Republic, France, Germany, Portugal, Romania and Spain.

When reading the papers submitted by the Teams, I was very positively impressed by very deep inter alia legal analysis provided in their written papers in the selected area. I was also extremely surprised by the topics they have chosen for their presentations. The topics were varying a lot from more classical topics on European Civil Procedure matters (e. g. Team Germany and Team Romania concentrating on Collective Redress and Representative Actions in Europe) to more complex legal and moral issues such as Team's Spain presentation on Disability and Incapacitation or Team's Portugal presentation on Force Majeure and Hardship in the context of a global pandemic.

The reward, of course, is not winning. The most important aspect of such competition is to meet people, to acquire new knowledge in the specific selected field, to enjoy collegiality, mutual trust between the team members, team-work, skill to work under pressure (coming from the serious Jury) and withstand stress and, of course, to get new friends across Europe.

It should also be noted that the Jury members chose unanimously the Team Czechia as a winner in this Semi-final. German paper "Collective Redress between access to Justice and Abusive Litigation" was also selected for publication purposes, since it was forward-looking, demonstrating an in-depth legal overview in the selected area. I also 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 not only to learn about European law, to develop deeper competence in the specific area of EU law, but, more importantly, to learn to act as a Team, to deal with stressful situations, to be able to answer uncomfortable and unpredictable questions the Jury might pose. The Themis Competition gives also a possibility of finding contacts, having good times, obtaining new communication skills (especially when the competition is held online) and new friends from all around Europe.

Therefore, in this Competition all participants are equally winners. I congratulate sincerely eight Teams which participated in my Semi-final C: EU and European Civil Procedure in 2021. You are all winners. This Themis Competition which was once again as in the year of 2020 held under the specific pandemic circumstances, has also created for me a great source of professional satisfaction.

APOSTOLOS ANTHIMOS (GR)

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HELLENIC SCHOOL OF JUDGES, LECTURER, EUROPEAN
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My participation as a Themis competition Jury member was a unique experience. In the course of my academic and professional duties, I have worked with students, postgraduates, trainee lawyers, lawyers, students of Judicial Institutes, court clerks, process servers, and judges. Initially, I had no high expectations about the Moot competition. I was under the impression that the whole issue was just another visibility attraction. I was wrong. The motivation and creativity of the national teams was astonishing. A refreshing and very promising blend of legal and social cultures was revealed to me.

Another aspect worth praising is the atmosphere surrounding the event: Unlike my premature estimates about the concept, which I presumed to be rather formal, if not rigid, I was positively surprised by the friendly climate, triggered by the THEMIS Project Manager, Mr. Arno Vinković, and my two colleagues, Prof. Danutė Jočienė and Aleš Galič. This was the catalyst for me and the participants. I felt in my element, and adapted myself to their approach.

All teams worked hard, and tried to achieve the best possible performance. It was of course a pity that the pandemic hampered yet again a face to face contact. Nevertheless, one could feel the pulse and appreciate the genuine efforts made by all national teams. The latter was evident in the discussion between us, and the national teams themselves. The members of the teams demonstrated a spirit of cooperation and fair play, although participating in a moot competition.

The topics selected were innovative and to a large extent uncharted territory. Readers of the Themis Annual Journal will only benefit from the articles included in this volume. New paths and fields of research will be opened. Without a doubt, the initiative to publish a selected number of papers in the journal has been a brilliant idea, boosting national judges to develop even further their writing skills in the European lingua franca.

The Themis competition was one of the highlights in my career. I experienced a genuine European cultural approximation, bringing us all together for a highly estimated cause, i.e., to understand each other's point of departure, and to work all together for an even closer legal cooperation, in the pursuit of the ultimate goal: the common vision for an ideal European Union.

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Team CZECHIA

SET-OFFS OF CLAIMS IN INSOLVENCY PROCEEDINGS AND THE PRINCIPLE OF PROPORTIONAL SATISFACTION OF CREDITORS

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The paper deals with a topic from the field of insolvency law, namely the issue of the set-off in the context of the debtor's insolvency in view of EU law. The issues presented here concerning set-offs with an international element are subsequently assessed precisely according to the fundamental principle of insolvency law, which is the principle of proportional satisfaction of creditors (*pari passu*). The article first examines the voidability of unilateral pre-insolvency set-offs, based on a broad comparison of selected Member States and English law. It then focuses on the different treatment of such set-offs across the selected states, highlighting the disparity in these treatments which leads to a distortion of the principle of proportional satisfaction of creditors. The conflict of laws rules of EU law in the context of insolvency law are not left aside. The paper concludes by proposing *de lege ferenda* solutions to the problems associated with pre-insolvency set-offs with an international element made by creditors, while these proposals are guided by the desire to find a way to effectively defend against pre-insolvency set-offs in order to maximize the fulfillment of the fundamental principles of insolvency law.

KEY WORDS

Insolvency
Bankruptcy
Proportional satisfaction of creditors
European insolvency law
Set-off
Voidability

INTRODUCTION

Insolvency law regulates the method of resolving a debtor's bankruptcy in insolvency proceedings before a court so as to organize property relations with persons affected by the debtor's bankruptcy or imminent bankruptcy to achieve the highest and proportional satisfaction of the debtor's creditors (*pari passu* principle) and the debt discharge of the debtor.¹ The debtor's bankruptcy, i.e. the debtor's inability to pay debts to several creditors, has a negative effect not only on the debtor himself, but also on his creditors, who may fail to satisfy their own debts due to the debtor's insolvency and may then become insolvent themselves. Insolvency law thus protects the economy and society from the negative consequences of bankruptcy by establishing rules for resolving bankruptcy that are based on the proportional satisfaction of all a debtor's creditors and the subsequent debt discharge of the debtor.

The regulation of bankruptcy is necessary in all countries with developed market economies and therefore necessarily affects European Union legislation, as one of the fundamental pillars of European integration is the single European market ensuring the free movement

of goods, people, capital and services. European economies are thus interconnected by mutual trade relations among entities from different states, and the bankruptcy of an entity from one state may affect entities from other states. Therefore, insolvency law is also regulated at the European level by Insolvency Regulation,² which unifies certain aspects of insolvency proceedings across the states of the Union.

The basic principle common to the insolvency law in all European states is the principle of proportional satisfaction of all of a debtor's creditors in insolvency proceedings. Under this principle, creditors do not satisfy their claims against the debtor individually, rather, in accordance with established procedure, they file their claims in insolvency proceedings in which they proceed collectively and satisfy their claims in proportion to their type and amount. However, even in the case of insolvency proceedings, the law offers each creditor the opportunity to satisfy their claim individually with the help of a set-off. For cross-border insolvency proceedings at the European level though, set-off entails some ambiguity.

The first ambiguity regarding set-off arises in cases where the creditor unilaterally sets off his claim against the debtor's

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¹ Section 1 of the Act No. 182/2006 Coll., of 30 March 2006 on Insolvency and Methods of its Resolution (hereinafter 'Czech Insolvency Regulation Act').

² Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (hereinafter 'Insolvency Regulation').

claim before insolvency proceedings have been opened, but at a time when the debtor is already in bankruptcy or imminent bankruptcy. Such set-off is undoubtedly an act that would result in the claim of one creditor being satisfied to the detriment of other creditors, that is to say, conduct which shortens the satisfaction of other creditors in breach of the principle of proportional satisfaction of creditors. Insolvency law then makes it possible on the basis of voidability to challenge such conduct of the creditor, as a result of which the abbreviating act is ineffective and the creditor who has enriched himself must issue enrichment to the proportional satisfaction of all creditors. Voidability challenges to pre-insolvency set-off in insolvency proceedings within a European context are made possible by the Insolvency Regulation with reference to the legislation in the individual Member States. Some legal systems explicitly regulate the possibility of challenges for the voidability of set-off (Germany) and some have introduced such a possibility by interpretation (Austria). The Czech legal system, however, does not provide explicit regulation of the voidability of unilateral set-off made by a creditor, and such a possibility is not even inferred by interpretation, with the Czech Supreme Court, on the contrary, explicitly stating that the voidability of such a set-off is not possible. However, one might argue that there is no reasonable justification for the stance of the Czech Supreme Court noted above and that precluding voidability challenges to unilateral set-offs made before the opening of insolvency proceedings weakens the principle of proportional satisfaction of creditors. The weakening of the principle of proportional satisfaction of creditors may be particularly evident in cases of insolvency proceedings with a Euro-

pean cross-border element, in which the voidability of certain set-offs is possible under the legal systems of other Member States but not under Czech law.

Another point of ambiguity regarding the set-off relates to the set-off of claims in insolvency proceedings, i.e. after the opening of insolvency proceedings. The Insolvency Regulation allows for insolvency set-offs with reference to the legal systems of the individual Member States. Set-off is then possible in two cases, namely if it is allowed by the law under which the insolvency proceedings take place or if it is allowed by the law governing the debtor's claim. However, the various legal systems of the Member States approach insolvency set-off differently, allowing set-off if different preconditions are met. As a result, the set-off of an array of claims in one insolvency proceeding may be governed by a number of different legal systems, which may give some creditors an advantage over others who are not allowed to set off under the law applicable to them, thus violating the principle of proportional satisfaction of creditors.

1. THEORETICAL FRAMEWORK

Insolvency law is based on independent principles and aims to settle the relationships of the debtor in bankruptcy in an effort to proportionally satisfy all of their creditors. With regard to the complexity of insolvency law itself and the European context, the theoretical basis for a better understanding of the above-mentioned ambiguities related to set-off and voidability in insolvency proceedings is further defined.

A. COLLECTIVE NATURE OF INSOLVENCY PROCEEDINGS

The purpose of insolvency law is to achieve maximum proportional satisfaction of creditors in the event of a debtor's bankruptcy, i.e. it seeks to maximize benefit in a situation that would otherwise necessarily lead to loss. To this end, creditors in insolvency proceedings proceed jointly in a prescribed manner when satisfying their claims against the debtor. Thus, insolvency proceedings differ significantly from civil and enforcement proceedings, which are based on individual enforcement of legal obligations in court. Insolvency law clearly sets out which creditor will be satisfied, how it will be done, and in what order,³ thus providing creditors and the debtor with legal certainty in a situation as uncertain as the debtor's bankruptcy. Creditors do not compete so much in insolvency proceedings as in civil and enforcement proceedings, as they file their claims⁴ in insolvency proceedings within the fixed time limit and all registered claims are (proportionally) satisfied in the prescribed manner. By contrast, in civil and enforcement proceedings the success of satisfaction depends on the order in which the claims are filed with the court and a previously filed claim may negatively affect the satisfaction of later claims.⁵ It follows from the collective nature of insolvency proceedings that the proceedings primarily focus on the relationship between creditors and only

secondarily on the relationship between creditor and debtor.⁶

Manifestations of the collective nature of insolvency proceedings, i.e. the principle of proportional satisfaction of creditors, expressed in Latin *as par conditio creditorum (pari passu)*, can be found in several pieces of legislation, and the literature also seeks to define the principle precisely.⁷ One suitable definition of the principle of *pari passu* is given in the Legislative Guide on Insolvency Law issued by the United Nations Commission on International Trade Law (UNCITRAL), which says it is 'the principle according to which similarly situated creditors are treated and satisfied proportionally to their claim out of the assets of the estate available for distribution to creditors of their rank.'⁸ The importance of the principle of *pari passu* can be seen on two levels. The basic manifestation of the principle is in the procedural position of individual creditors within creditor groups, as creditors belonging to the same creditor group have the same opportunities and equal status (principle of equality). In this respect, the principle is applied only after the opening of insolvency proceedings and is manifested exclusively during the given proceedings in the manner provided by law. Of greater importance is the fairness element of the principle of *pari passu*, i.e. ensuring a fair distribution of the debtor's monetized assets among creditors. In other words,

³ T. Jackson, *The Logic and Limits of Bankruptcy Law* (1986), at 20.

⁴ However, an exception is the so-called privileged claim in the sense of § 203 of the Czech Insolvency Act, which are not lodged in the insolvency proceedings, but only asserted against the debtor (or insolvency practitioner), and which are preferentially satisfied at any time during the proceedings.

⁵ Cf. P. Sprinz et al. (eds), *Insolvenční zákon. Komentář* (2019), at 1-3.

⁶ Warren, 'Bankruptcy Policy', 3 *The University of Chicago Law Review* (1987), at 785.

⁷ Cf. C. Jeremias, *Internationale Insolvenzaufrechnung* (2005), at 142; R. Goode, *Principles of corporate insolvency* (4th ed., 2011) at 235; M. Krumm, *Steuervollzug und formelle Insolvenz* (2009), at 31.

⁸ United Nations Committee for International Trade Law, *Legislative Guide on Insolvency Law* (2004), at 6, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf

there is no better way to fairly distribute the acquired assets of the debtor among several creditors who have claims of different amounts.⁹

B. GENERAL NOTES ON SET-OFFS AND VOIDABILITY

The problems defined above relate to the issues of set-off and the voidability of the set-off. It is necessary therefore first to briefly define what is generally meant by set-off and voidability. With regard to the practically identical concept of set-off and voidability across the laws of the Member States, the demonstration is made on the example of the Czech legislation.

Set-off is a means of extinguishing an obligation by settling mutual debts between parties who are mutual debtors without the parties actually paying each other. Example: Company A owes Company B an amount of EUR 1,000 from a particular obligation, while Company B owes Company A an amount of EUR 900 from another obligation. By set-off of the mutual debts, the mutual debts of both companies in the amount of EUR 900 cease to exist and only the debt of company B to company A in the amount of EUR 100 remains.

The reciprocal claims (or reciprocal debts) of the parties are therefore simply deducted from each other without any actual performance.

This leads to the extinguishment of the obligation (or its part), but not in the manner envisaged in the obligation. The obligation thus is not fulfilled in the agreed manner, but expires for another reason, which is set-off.

The general regulation of set-off is given in Section 1982 et seq. Czech Civil Code,¹⁰ which lays out the conditions for set-off. The basic condition for set-off is the existence of mutual debts of the same type, as well as a statement of set-off against the other party. Set-off can be made as soon as the claims are due. The law explicitly stipulates that by offsetting, both claims (debts) are canceled to the extent that they overlap, if they do not completely cover each other, the claims are set off in the same way as when fulfilled. Claims that can be enforced before the courts are eligible for set-off and those claims that are uncertain or indeterminate are not eligible.¹¹

The principle of set-off is similar across Member States, but the specific conditions for set-off may differ.¹² Some legal systems require the certainty of the claim (German, Czech), some presuppose authenticity in the sense of simply proving the undoubted existence of the claim (Austrian, Czech), some prohibit set-off by a claim denied by the debtor under substantive law (German) and so on. Only in some legal systems is the set-off form of security (French, Swiss) explicitly regulated.¹³

Within the insolvency proceedings, the set-off is regulated in Section 140 of the Czech Insolvency Act. The special legal regulation for set-off in insolvency proceedings follows the general legal regulation of the Czech Civil Code and specifies other conditions in the context of insolvency proceedings.

Voidability means the possibility of claiming the relative unenforceability of the legal act by which the debtor disposes of his property or deprives himself or herself of the possibility of acquiring property, if this thereby shortens the possibility for his or her creditor to satisfy an enforceable claim. Example: Company A owes Company B EUR 1,000 of an obligation. Company A then donates a machine worth EUR 1,000 to Company C. Company B wants to enforce the decision to satisfy a claim of EUR 1,000 against Company A, but finds that Company A no longer has assets that could be affected by the enforcement of the decision. Company B can therefore claim the relative unenforceability of the donation of the machine in the amount of EUR 1,100, as it has lost the opportunity to enforce the decision to satisfy its claim as a result of that donation. Company B can claim relative unenforceability against Company C, which will be obliged to give the benefit obtained to Company B to satisfy the claim against Company A.

Thus, it is possible on the basis of voidability to challenge the legal act against the entity that enriched itself while the legal act remains valid, but the creditor has the right to issue a property benefit that was shortened by the legal act.

Thus, the one who has been enriched usually keeps the acquired thing and gives the creditor its monetary value.

The general regulation of voidability is contained in Section 589 et seq. Czech Civil Code. The basic condition for voidability is the existence of an enforceable claim against the debtor and that the debtor's action reduces the satisfaction of such a claim. Relative unenforceability is established by a court decision on an action that can be brought against those who have legally acted with the debtor or who benefit from the legal act. Furthermore, the substance of the abbreviating legal acts and the time limits within which relative unenforceability can be invoked are determined.

A special legal regulation of voidability is then contained in the Czech Insolvency Act, specifically in Sections 235 through 242. The purpose of the special legal regulation of voidability in insolvency proceedings is retrospective protection of property. The debtor can thus objectively be in bankruptcy for a longer period before the insolvency proceedings are opened. In the meantime, the debtor may carry out legal acts that may subsequently disrupt the collective nature of the insolvency proceedings and reduce the value of the assets, thereby primarily damaging unsecured creditors and their level of satisfaction. The aim of voidability in the insolvency proceedings is thus to prevent breaches of the principle of proportional satisfaction of creditors.¹⁴

⁹ The principle of proportional satisfaction of creditors was known in old Roman law, see Levinthal 'The Early History of Bankruptcy Law', 3 *University of Pennsylvania Law Review* (1918), 223 (available at https://scholarship.law.upenn.edu/penn_law_review/vol66/iss3/2).

¹⁰ Act No. 89/2012 Coll., of 3 February 2012 the Civil Code (hereinafter 'Czech Civil Code').

¹¹ For further reading on set-offs in Czech law see J. Petrov et al. (eds), *Občanský zákoník: komentář* (2017) at 2133-2141.

¹² For further reading on systematic approaches to set-offs see R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002); W. Johnston et al., *Set-Off Law and Practice: An International Handbook* (3rd ed., 2018).

¹³ P. Kavan, 'Kompenzace pohledávek v českém právu' (2016) (PhD thesis on file at PF UP Olomouc, Czech Republic) at 76.

¹⁴ United Nations Committee for International Trade Law, *supra* note 8, at 135.

C. LEGISLATIVE COMPETENCE OF THE UNION IN THE FIELD OF INSOLVENCY LAW

At the Community level, the issue of insolvency proceedings is, as already mentioned, regulated by the Insolvency Regulation. This regulation was adopted on the basis of Article 81 of the Treaty on the Functioning of the European Union (TFEU), which states, 'The Union shall develop judicial cooperation in civil matters having cross-border implications' and to that end 'the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures,' in particular 'when necessary for the proper functioning of the internal market.'¹⁵ These measures aim, inter alia, at 'the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.'¹⁶ According to the preamble to the Insolvency Regulation, it was adopted to foster proper functioning of the EU internal market in which cross-border insolvency proceedings are efficient and expeditious.¹⁷ It should be noted that the EU internal market is one of the areas in which the shared legislative competence of the EU and the Member States under Article 4 TFEU applies. For shared legislative competence, Member States can only legislate to the extent that the EU has not enacted legislation in this area.¹⁸

It follows from the above that the EU is entitled to adopt measures (regulations, directives, recommendations) governing the conduct of insolvency proceedings in the Member States. However, its competence in this area is limited by two preconditions, namely (i) the need for a cross-border element; (ii) the interest in the proper functioning of the internal market (although in this context there has been some loosening with the adoption of the Lisbon Treaty, which inserted the words 'in particular' in the original wording of Article 81 TFEU).¹⁹ For the procedural regulation of set-off in insolvency proceedings with an international element, it can therefore be concluded that the EU has the power to issue binding legislative acts in this area.

2. SET-OFF AND VOIDABILITY

A. PRE-INSOLVENCY SET-OFF AND ITS VOIDABILITY

Every reasonable creditor strives to maximize its benefit from the business relationship and consistently enforces all its claims. If it then happens that the creditor is also a debtor to their own debtor, it may be advantageous to set off mutual claims and thus achieve the termination of the obligation or part thereof in this way rather than by fulfilling the obligation under the contract.

If the debtor is not bankrupt or in insolvency proceedings, the set-off is not fundamentally limited other than by the conditions stipulated by law for the set-off of claims. However, if the debtor is already in bankruptcy or imminent bankruptcy but no insolvency proceedings have yet been instituted against them, or if they would cause bankruptcy by the set-off, the set-off may be an abbreviating legal act, as only the creditor who made the set-off will be satisfied as a result of the set-off to the detriment of other creditors. In order to prevent harm to other creditors by the set-off and a breach of the principle of proportional satisfaction of all creditors, insolvency law offers the possibility of voidability (i.e. to claim unenforceability) of the pre-insolvency set-offs as well. In such a case, the enriched creditor is obliged to issue the enrichment to the proportional satisfaction of all creditors according to the principles of insolvency proceedings.

1. Set-off and Voidability in the Insolvency Regulation and in Selected Member States

At the level of European law, voidability is regulated by Article 9(2) of the Insolvency Regulation in conjunction with Article 7(2)(m) of the regulation. According to this legal framework, voidability is governed in principle by the mechanisms provided for in the rules of applicable law (*legis fori concursus*), i.e. the law of the state where insolvency proceedings are opened. The purpose

of this provision is to provide a defense mechanism against set-off that cannot be afforded legal protection, typically for cases where the motive was reduction of the debtor's insolvency estate.²⁰ The diversity of Member States' legislation on the issue of voidability of set-off can be seen as another problem and challenge for European legislation.

In terms of pre-insolvency set-off, this paper mentions several Member States and their approach to this issue. First of all, the *German insolvency law* expressly makes room for voidability of the pre-insolvency set-off, with attention paid to the possibility of set-off (Section 387 of the German Civil Code). The establishment of the possibility to set off before the opening of insolvency proceedings is assessed according to the general rules of voidability (Section 130 and Section 131 of the German Insolvency Act).²¹ *Austrian insolvency law*, on the other hand, does not contain an express provision concerning the voidability of pre-insolvency set-off but that possibility has been deduced by the case law of the Austrian courts.²² Another procedural approach to voidability of pre-insolvency set-off is provided by the *French legislation*. Here an insolvency practitioner brings action to deny the set-off itself and that, if successful, results in the voidness of the legal act in question.^{23, 24} A different approach to pre-insolvency set-off can be found in English law, where in case of the opening of insolvency

²⁰ A. Bělohávek, *EU and international insolvency proceedings: Regulation (EU) 2015/848 on insolvency proceedings. Commentary* (2020), at 304.

²¹ For further reading see Jeremias, *supra* note 7, at 148-149.

²² For further reading see B. König, *Die Anfechtung nach der Insolvenzordnung, Handbuch für die Praxis* (5th ed., 2014), at marginal No. 14/4.

²³ C. Saint-Alary-Houin, *Droit des entreprises en difficulté* (8th ed., 2013), at 448 et seq.

²⁴ For further reading on voidability in Czech law see T. Troup and A. Rakovský, *Zápočet v předvečer insolvence ve světle odpůrčího práva – I. Díl* (2018), available at <http://www.bulletin-advokacie.cz/zapocet-v-predvecer-insolvence-ve-svetle-odpurciho-prava-i-dil>.

¹⁵ Article 81(1) and (2) of the TFEU.

¹⁶ Article 81(2)(f) of the TFEU.

¹⁷ Preamble (3) of the Insolvency Regulation.

¹⁸ European Commission, *Areas of EU action*, available at https://ec.europa.eu/info/about-european-commission/what-european-commission-does/law/areas-eu-action_en.

¹⁹ J. Syllová et al., *Lisabonská smlouva. Komentář* (2010), at 376-377.

cy proceedings (set-off takes place by law, see the next chapter), the possibility of voidability of the pre-insolvency set-offs is excluded in principle with the exception of pre-insolvency set-offs that in some way go beyond the conditions of subsequent statutory set-off, i.e. set-offs that could not occur after the opening of insolvency proceedings (e.g. when the creditor had some qualified indication of the debtor's bankruptcy at the time of obtaining the claim and therefore was not in good faith).²⁵ It can therefore be concluded from the above examples that all these jurisdictions allow some form of defense against pre-insolvency set-offs made by the creditor.

2. Set-off and Voidability Under the Czech Law

Finally, there is the Czech insolvency law. The general rules of voidability are set out in Sections 240 to 242 of the Insolvency Act, while there is no specific provision on voidability of set-off. The case law of the Supreme Court of the Czech Republic has already established that only legal acts occurring before the opening of the insolvency proceedings can be opposed as voidable on the basis of the above-mentioned rules.²⁶ This has led some legal experts to seek a way to apply the regulation of voidability to unilateral pre-insolvency set-offs, which the Supreme Court ruled out in its case law (see below), concluding that all three general rules can, in principle, be applied.²⁷

However, the case law of the Supreme Court of the Czech Republic says rather the opposite. First of all, it is concluded that the set-off is not a way of fulfilling the obligation, but a way of terminating the obligation, and that therefore the set-off does not lead to any performance that could be challenged on the basis of voidability as provided for by the provisions of Section 240 of the Czech Insolvency Act. In other words, the Supreme Court is of the opinion that by set-off the parties do not receive any performance that could be used to satisfy the debtor's registered creditors, because it is not a performance (as in cases where the debtor has a claim against a third party). On the contrary, set-off is intended to extinguish mutual obligations, which is an equivalent act. Voidability of the set-off according to Section 240 of the Czech Insolvency Act is therefore conceptually completely excluded.²⁸

Consequently, it restricts the voidability of unilateral set-offs by the creditor through Section 241 of the Czech Insolvency Act, which deals with the acts performed by the debtor.²⁹ Thus, only the voidability of bilateral set-offs comes into consideration, as the activity of the debtor is required. The same conclusion can subsequently be drawn with regard to the last general rule, Section 242 of the Czech Insolvency Act, which also expressly mentions the acts of the debtor. The ability of the creditor in the Czech Republic to challenge for voidability of pre-insolvency set-offs is thus considerably limited, if not completely ruled out.

This conclusion can also be underlined by the fact that the Supreme Court does not allow any other options for voidability than according to the Sections 240 to 242 of the Czech Insolvency Act.³⁰ It is thus not possible to use Section 235 of the Czech Insolvency Act as a general clause on the basis of which it would be possible to challenge unilateral set-off.³¹ However, it is possible to raise voidability of the legal act which created the claim to be set-off.³²

Pursuant to Article 21 of the Insolvency Regulation, the insolvency practitioner appointed by the competent court has the power to perform all the acts entrusted to it by the law of the state where proceedings are opened. The voidability of set-off is thus, in principle, governed by the jurisdiction of the state in which the insolvency proceedings are conducted, including the persons who may bring a relevant action. Therefore, if insolvency proceedings with an international element are to be initiated on the territory of the Czech Republic, only the insolvency practitioner within the meaning of Section 239 of the Czech Insolvency Act may challenge legal acts for voidability. In cases where the insolvency practitioner would like to raise voidability for a unilateral set-off by a creditor within the Czech Republic, this would most likely not be possible. However, this problem is more interesting in cases where the set-off takes place according to the law applicable to the insolvent debtor's claim, i.e. in cases where the set-off may be governed by the jurisdiction of another

state that provides for such set-off (e.g. Germany). In these cases, set-off will be admissible, however, voidability will be ruled out due to different conditions of voidability for the creditor's pre-insolvency and unilateral set-offs.

3. Partial Conclusion

The diversity of approaches to the voidability of pre-insolvency set-offs made by creditors is mainly due to the different approaches of Member States to insolvency proceedings as such. The Czech Insolvency Act is interpreted by the case law of the Supreme Court exclusively according to its literal expression, without taking into account the specific principles of insolvency law (collective nature, *pari passu*). It has already been indicated above that in insolvency proceedings it is mainly a relationship between creditors and not a plurality of creditors' relations with the debtor. This distinction is fundamental in that it directly affects the understanding of the principle of *pari passu* and the nature of insolvency. Czech law is based on the classical civil concept of the debtor-creditor relationship, which also ultimately justifies precluding voidability of set-off under Section 240 of the Czech Insolvency Act. However, insolvency law, as opposed to private law, contains the already mentioned principles, which are based on the relationship between creditors, where they decide on the manner of resolution of the debtor's bankruptcy (which may affect the fate of the insolvency estate).³³

²⁵ Cf. Goode, *supra* note 7, at margin No. 918; Jeremias, *supra* note 7, at 119 et seq.

²⁶ Decision of the Czech Supreme Court of 28 February 2017, file number Rc 139/2018.

²⁷ T. Troup and A. Rakovský, *Zápočet v předvečer insolvence ve světle odpůrčího práva – II. Díl* (2018), available at <http://www.bulletin-advokacie.cz/zapocet-v-predvecer-insolvence-ve-svetle-odpurciho-prava-ii.-dil>.

²⁸ Decision of the Czech Supreme Court of 28 February 2017, file number 29 ICdo 12/2015.

²⁹ Decision of the Czech Supreme Court of 28 February 2014, file number 29 Cdo 677/2011.

³⁰ Decision of the Czech Supreme Court of 28 February 2014, file number 29 Cdo 677/2011.

³¹ For further reading on voidability see Sprinz et al., *supra* note 5, at 638-340.

³² P. Sprinz, 'Odpovratnost právních jednání bez přiměřeného protiplnění aneb rizika ex post úsudku o výši protiplnění', 1 *Obchodněprávní revue* (2020), at 20-26.

³³ To the nature of Czech insolvency proceedings see T. Richter, *Insolvenční právo* (2nd ed., 2017), at 111-126.

Furthermore, the Czech regulation of voidability of unilateral set-off by the creditor does not provide the option of using the rules under Sections 241 to 242 of the Czech Insolvency Act, because the Supreme Court concludes (purely from a literal reading of the law) that the debtor's action is necessary. However, there is no rational reason to protect these creditors and their possibility of set-off compared to consensual set-off, which can be challenged on the basis of voidability. Such an approach is a gap in law and needs to be closed by analogy.³⁴ Therefore, if the law provides for the voidability of (dishonest) bilateral set-offs (in which the debtor participates), there is no reason why this procedure could not be applied by analogy in cases of unilateral set-offs by creditors. However, the current case law does not yet share this view.

When comparing the legal frameworks for voidability of unilateral set-offs in Member States, it can be concluded that the differing rules lead to a violation of the principle of proportional satisfaction of creditors (*pari passu*). An appropriate means of remedying this situation would be to uniformly regulate the rules on the voidability of set-off in cross-border insolvency proceedings at the level of EU law. It would also be reasonable for a person actively entitled to make challenges of voidability to be able to use the rules of voidability under the law applicable to the debtor's claim, since it is precisely under that law that the set-off takes place.

B. SET-OFF IN INSOLVENCY PROCEEDINGS

The set-off is a traditional way of satisfying a creditor's claim and has a place also in insolvency proceedings. In the case of cross-border insolvency proceedings, the rules on set-off result both from directly binding European Union rules and from the national law of the Member States. However, with the simultaneous application of national and European rules, some foreign creditors may benefit. The section that follows therefore deals with the legal framework of set-off in insolvency proceedings at the level of Community law and contains a comparison of selected national regulations (Austrian, Spanish, French and others) with the objective of highlighting the problems arising from inconsistent regulation of set-off in national legal systems.

1. Set-off According to the Insolvency Regulation

The Insolvency Regulation is a source of Community law and, by its nature, is a directly applicable law in the territory of the EU Member States, which takes precedence over national law. The rules of set-off can be found in Article 9 of the Insolvency Regulation, which provides: 'The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.' However, this provision does not preclude the possibility of bringing an action for voidness or unenforceability pursuant to Article 7(2)(m) of the Insol-

veny Regulation.³⁵ European legislation thus leaves a relatively wide possibility of set-off, with two aspects being decisive in this regard. First, it will be the determination of the *legis fori concursus* within the meaning of Article 7 of the Insolvency Regulation, i.e. the determination of the law of the state of the opening of the insolvency proceedings which governs all procedural and substantive effects of the insolvency proceedings in relation to the persons and legal relationships (applicable law). A list of individual effects of applicable law can be found in Article 7 of the Insolvency Regulation, where letter d) stipulates 'the conditions under which set-offs may be invoked'. In this respect, and this is the second decisive aspect, it will be crucial to determine in which state the debtor's center of main interest (hereinafter 'COMI') is located and which will therefore be internationally competent to conduct insolvency proceedings under Article 3 of the Insolvency Regulation.

The second aspect explicitly mentioned in the Insolvency Regulation in Article 9(1) is the possibility for the creditor to claim set-off, if the law applicable to the debtor's claims allows for such set-off. Clearly, set-offs are mostly claimed between entities within one legal order. However, it may happen that the debtor has its COMI and consequently also the

legis fori concursus in one Member State, but its claim is governed by the law of another Member State. The creditor may thus proceed in accordance with the law applicable to the debtor's claim, against which it set-off its claim. Creditors from other Member States (with the exception of Denmark) can therefore benefit from this provision, the only corrective being the fulfillment of the conditions for such set-off under the law applicable to the debtor's claim to be set off and provided that the claim existed before the opening of the insolvency proceedings. Thus, the Insolvency Regulation does not lay down any specific conditions for set-off which may be encountered across the jurisdictions of the Member States and the scale of which is quite varied (e.g. creditor's application to the proceedings, creditor's lack of knowledge of the debtor's bankruptcy, etc.). The main purpose of this regulation is to protect the good faith of creditors who rely on a certain property status of the debtor at the time of the creation of its claim.³⁶ Sometimes legal certainty is also mentioned (perception of set-off as a form of guarantee).³⁷

In other words, this purpose can be expressed by the principle that the rights of a creditor acquired in good faith before the opening of insolvency proceedings cannot be restricted by a decision of

³⁵ Article 9 of the Insolvency Regulation follows almost identically in content the previous legal regulation of set-offs provided in Article 6 of Regulation (EU) 1346/2000 of the European Parliament and of the Council. Therefore, if the sources relating to the previous regulation are argued, this is done intentionally.

³⁶ M. Virgos and E. Schmit, *Report on the Convention on Insolvency Proceedings* (1996), at para 107 et seq. Although the report concerned the previous Regulation No. 1346/2000, in view of the minimal change concerning the adjustment of set-offs (Article 6 = Article 9 of the Insolvency Regulation), the conclusions of this report can also be applied to the current Insolvency Regulation.

³⁷ Opinion of advocate general M. Bobek delivered on 30 April 2019 in Case C198/18, *CeDe Group AB v KAN p. z o. o. (in insolvency)* (EU:C:2019:335), available at <https://curia.europa.eu/juris/document/document.jsf?jsessionid=9C658CCE7904155D8F184FDBBFC0EA44?text=&docid=213506&pageIndex=0&doclang=CS&mode=lst&dir=&occ=first&part=1&cid=5082427>.

³⁴ On analogy see F. Melzer, *Metodologie nálezání práva. Úvod do právní argumentace* (2 ed., 2011), at 230.

the insolvency court.³⁸ This purpose of the extended set-off concept, as set out in Article 9 of the Insolvency Regulation, can be accepted in principle.

However, other situations may arise outside this general framework. First, it may be that the law applicable to the debtor's claim does not allow for set-off, but such set-off is possible under the law applicable to insolvency proceedings (Article 7). In the event of such a conflict, the law which is more favorable to the set-off should be applied, i.e. the right allowing set-off.³⁹ Advocate General Bobek also commented on this issue, concluding in his Opinion that: '...the Insolvency Regulation should apply not only where the *lex concursus* entirely excludes the possibility of applying a set-off, but also in cases where the specific conditions of access to a set-off differ, so that, according to the *lex concursus*, set-off would not be possible in a specific case, whereas it would have been possible under the law applicable to the main claim.'⁴⁰ The unresolved question then remains whether the creditor can choose the method of set-off under the law applicable to the debtor's claim even if the *lex fori concursus* (applicable law) generally allows set-off, but under other conditions which may not be favorable to the creditor, or at what stage of insolvency proceedings he or she may do so.⁴¹

The Virgós-Schmit⁴² report also touches on the question of whether it is necessary to apply only the rules of civil law (general rules on set-off) of the applicable law or whether the rules of insolvency law must also be applied. The interpretation reached in the report seems logical and correct, i.e. it is necessary for the claim to be set off not only according to the regulations of general civil law, but also according to the insolvency law of such a legal system.⁴³

The Court of Justice of the EU has also ruled on the issue of set-off. It stated in one of its rulings that set-off is to be understood as meaning the simultaneous termination of two obligations between two persons, while it is both the method of payment (fulfillment of an obligation) and at the same time an enforcement of a claim. By applying the set-off, one party forces its debtor to pay.⁴⁴ Such an understanding of set-off must necessarily mean, in the context of insolvency law (its collective nature and the principle of *pari passu*), that set-off has a direct effect on the proportional satisfaction of creditors, since creditors holding set-off claims can obtain full satisfaction of their claims outside of the framework of insolvency proceedings.⁴⁵

2. Set-off in Selected Member States

Over time, the different national legal systems of the Member States have become aware of the effect of set-off on the debtor's insolvency estate and related issues, taking different positions on these issues in insolvency proceedings, the general wording of which will be explained in the following paragraphs. In principle, two approaches should be considered when reading the following lines.

Firstly, some legal systems prefer legal certainty in the form of creditor protection (perception of set-off as a kind of security or guarantee) whereas, secondly, other legal systems favor the aforementioned *pari passu* principle, i.e. protecting the debtor's insolvency estate for the highest possible proportional satisfaction of unsecured creditors.

German law provides for the regulation of pre-insolvency set-offs and their possible voidability. First of all, the institute of set-off is regulated in Section 94 of the German Insolvency Act, which stipulates, 'If a creditor is entitled to set-off under a law or agreement at the time of opening of insolvency proceedings, this right is not affected by insolvency proceedings.' Furthermore, the possibility of set-off is limited in Section 96(1)(3) of the German Insolvency Act, which provides that set-off is inadmissible if the insolvency creditor has acquired the possibility of set-off through a voidable legal act. This provision applies to both pre-insolvency and insolvency set-off. The legal regulation thus leaves the possibility of set-off even

after the opening of insolvency proceedings with a slight correction.⁴⁶ German insolvency law also directly regulates the inadmissibility of set-off with claims arising only after the opening of insolvency proceedings or in cases where the creditor obtained his claim from another creditor only after the opening of the proceedings (Section 96(1)(2)).⁴⁷

Austrian insolvency law provides for set-off in Section 19 of the Austrian Insolvency Act, which provides that claims which were eligible for set-off at the time the insolvency proceedings were opened need not be registered in the insolvency proceedings. It is therefore possible to set off during the insolvency proceedings at the discretion of the creditor. Furthermore, Section 20 sets out the conditions under which set-off is not permitted after the opening of insolvency proceedings. For example, set-off is not permitted if the insolvency creditor becomes a debtor of the bankruptcy estate only after the opening of insolvency proceedings or if the claim against the debtor in bankruptcy was acquired only after the opening of the proceedings. The same applies if the bankruptcy debtor has obtained a claim against the debtor in insolvency proceedings but must have known or should have known of the debtor's bankruptcy (para. 1). Austrian insolvency law thus links the institute of set-off to the moment of the opening of insolvency proceedings, which is more logical than the Czech legislation,⁴⁸ which does not do so, as the effects associated with the ban on disposing of assets belonging to the insolvency es-

³⁸ Most jurisdictions, in principle, support this approach by allowing set-offs in insolvency proceedings which have already begun, provided that the conditions for set-offs were met before the proceedings were opened, cf. Section 140 of the Czech Insolvency Act.

³⁹ Bělohávek, *supra* note 20, at 308.

⁴⁰ Bobek, *supra* note 37.

⁴¹ We leave this question for discussion.

⁴² Virgós and Schmit, *supra* note 36, at para 107 et seq.

⁴³ Cf. S. Leible and A. Sstaudinger, *Die europäische Verordnung über Insolvenzverfahren* (2000), at 533-575; Bělohávek, *supra* note 20, at 304.

⁴⁴ (perception of set-off as a form Pichonnaz and L. Gullifer, *Set-off in Arbitration and Commercial Transactions* (2014), at 72.

⁴⁵ Bobek, *supra* note 37, at paragraph 61.

⁴⁶ Troup and Rakovský, *supra* note 30.

⁴⁷ Set-off is not permissible if the insolvency creditor owes the bankruptcy estate something after the opening of insolvency proceedings, cf. Section 96(1)(1) of the German Insolvency Act.

⁴⁸ Section 140(2) of the Czech Insolvency Act sets the decisive moment for set-off to the decision on the method of resolving the insolvency.

tate essentially arise from the opening of insolvency proceedings. At the same time, it does not require the creditor to register in insolvency proceedings.

The *legislation of the Slovak Republic* is based on the principle that set-off is generally permissible for registered creditors, but with certain limitations arising from Section 54 of the Slovak Insolvency Act. The Slovak legislation excludes the possibility of set-off with a creditor whose claim arose before the declaration of audit on the debtor's property against a claim which arose to the debtor after this declaration. Furthermore, the Slovak legislation restricts the set-off of claims acquired by a creditor through a transfer (e.g. assignment or inheritance) after a declared audit against the debtor's property, as well as limits the set-off of claims acquired through a voidable legal act (para. 3). Other prohibitions can be found in Section 167c of the Insolvency Act, which prohibits the set-off of a creditor's claim that arose after the declaration of audit with the debtor's claim, which arose before the declaration of audit and vice versa. At the same time, the Slovak legislation explicitly stipulates that by registering the creditor's claim, the claim against the debtor becomes due (para. 1). This *ex lege* debt maturity can play a significant role in relation to the general conditions of compensability.⁴⁹ In principle, the Slovak legislation on set-off in insolvency proceedings does not address pre-insolvency set-offs and provides for a declaration of audit as a point in time limiting set-off.

The *French legislation on set-off* is a completely unique approach to the above. Following the declared bankruptcy of the debtor, the general rule applies here that the debtor may not pay on his obligations that arose before his bankruptcy (pre-insolvency obligations).⁵⁰ The only way to set off after the debtor's bankruptcy is a set-off made on the basis of a decision of the insolvency court, for which special conditions are set. Specifically, the condition of proximity of the set-off claims (*créances connexes*) and the condition of registration of the creditor's claim in the insolvency proceedings.⁵¹ French insolvency law thus considerably reinforces the importance of the principle of proportional satisfaction of creditors, since the preclusion of set-off after a declaration of bankruptcy increases (not reduces) the debtor's insolvency estate by any set-offs, unless the insolvency court decides otherwise.

The *English approach* to set-off in insolvency proceedings prefers the principle of legal certainty, placing creditors with a set-off claim in a position that is basically equal to that of a secured creditor. The moment a declaration of the debtor's bankruptcy is made, the set-off of mutual claims takes place automatically.⁵² The law thus does not give the creditor the opportunity not to set off his or her claim and at the very beginning of the insolvency proceedings it is certain that the insolvency estate will not change as a result of a possible set-off in the future.

However, the above procedure excludes cases where the creditor obtained a claim against the debtor after obtaining knowledge of certain exhaustively listed indications of the debtor's bankruptcy (e.g. the creditor knew about the debtor's bankruptcy and filing for insolvency proceedings).⁵³ Thus, the English concept, unlike other legal systems presented, represents an exception to the principle of proportional satisfaction of creditors (*pari passu*), as it gives creditors with a mutual claim a preferential position.

3. Partial Conclusion

First of all, it follows from the described approaches to set-off in the insolvency proceedings that the legal regulation is diverse for different EU states. Of import is the contrast between jurisdictions in the preference of *pari passu* over legal certainty or vice versa, in the context of the theoretical background described in the first section. Secondly, the comparison shows that, in principle, each jurisdiction protects in a certain way the possibility of set-off if conditions for it were fulfilled either before opening of the insolvency proceedings (Germany, Austria), before the declaration of bankruptcy (England, France) or before declaration of audit (Slovakia). The Czech legislation goes its own way, setting the decision on the method of bankruptcy resolution as a milestone.

Finally, the variety of conditions making set-off possible in various states is also evident (the need to be a registered creditor, the possibility of set-off on the basis of a court decision, the preclusion of set-off against claims arising after the opening of proceedings, *ex lege* set-off, the possibility of litigation regarding the amount to be set off, etc.).

It is clear that such divergent substantive legislation in the various Member States cannot be easily changed. Without an overall detailed knowledge of the particular insolvency laws, the specific conditions for set-off in insolvency proceedings already opened cannot be clearly established. What can be harmonized, however, are procedural issues which are consistent with the overriding common interest of creditors, the principle of *pari passu* and the collective nature of insolvency proceedings. It can therefore be concluded that it would be appropriate to regulate procedural elements of set-off at the level of Community law, either by means of a directive and subsequent implementation in the law of the Member States or by means of a regulation. Tying the possibility of set-off to a court decision may be consistent with the principles of private law (legal certainty, autonomy of the parties, protection of rights acquired in good faith) and with the principles of insolvency law (in particular *pari passu*).

⁴⁹ The maturity of the debt is one of the conditions for set-off. In other words, if the debt did not become due by law at the time the claim was registered, no set-off could take place. This approach thus supports the possibility of set-off, in contrast to legal jurisdictions, which do not provide such a possibility (Czech legislation only links the maturity of a debt to the declaration of bankruptcy).

⁵⁰ Article L622-7 of the French Code de Commerce.

⁵¹ *Ibid.* See also Troup and Rakovský, *supra* note 24.

⁵² Goode, *supra* note 7, at margin No. 901 and 907.

⁵³ Article 14.25 (6) of the Insolvency (England and Wales) Rules of 2016, available at <http://www.legislation.gov.uk/ukSI/2016/1024/article/14.25/made>. See also Troup and Rakovský, *supra* note 24.

With regard to the public insolvency registers, this approach could simply be justified by the fact that, from the moment the insolvency proceedings are opened, no creditor can be in good faith that a person is not bankrupt (material publicity of the public registers). It is clear that only the right to set-off before the opening of proceedings is protected and that this procedure is consistent with the Insolvency Regulation. However, the point at which the principles of insolvency law should come into play is bankruptcy from a substantive point of view (e.g. retrospective voidability), i.e. also *pari passu*. Therefore, if the set-off of a claim arising at a time when the debtor was already insolvent (with the creditor's knowledge of insolvency) is contrary to the principle of *pari passu*, this should also be reflected in the European law.⁵⁴ However, one must not forget creditors in good faith who were not aware of the debtor's insolvency at the time of the acquisition of the set-off claim, i.e. before the opening of the proceedings. They must be protected by the law.

The French solution, which allows set-off on the creditor's proposal and on the basis of a decision of the insolvency court, is therefore inspiring. The insolvency court would then assess the creditor's good faith at the time of the creation of its right to set-off. At the same time, it would also request the insolvency practitioner's opinion and the set-off could be decided at a later procedural stage. This would protect the debtor's insolvency estate from the (often uncontrollable) efforts of a dishonest creditor to obtain as much of the debtor's assets as possible for itself by means of a set-off, while preserving legal certainty in the possibility of set-off by honest creditors from the perspective of non-insolvency law.

CONCLUSION

The aim of this text is to highlight the different regulation of set-off possibilities across EU countries and the options available to oppose this form of legal action. The present conclusions are based on an economic analysis of the law (see Chapter 1). The following deals with pre-insolvency (unilateral, creditor) set-offs and their voidability. The possibility to challenge the unenforceability of these legal acts is a fundamental defense mechanism of insolvency law in most Member States. The conclusions regarding the divergent approach of Czech law have already been described in the partial conclusion of this section. However, it is worth highlighting again the differences in the rules of voidability in the different jurisdictions, which may undermine the principle of proportional satisfaction of creditors (*pari passu*) in cases where insolvency proceedings with an international element are opened. Community legislation should therefore consider the future unification of a rule allowing challenges to such set-offs by way of voidability across EU countries in a similarly broad way as the set-off rule in Article 9 of the Insolvency Regulation.

Thus, it may be suggested as a possible *de lege ferenda* solution that persons with active standing to bring a counterclaim (typically the insolvency practitioner) should also be able to avail themselves of the means of voidability under the law applicable to the debtor's claim, as set-off may occur under that law. The current state of the law, however, does not allow this procedure.

The next part of the text dealt with set-off in insolvency proceedings already opened, where the focus was again on the EU environment. The current wording of Article 9 of the Insolvency Regulation can be considered to broadly favor legal certainty in the sense that it protects the creditor's right to set-off according to the law applicable to the debtor's claim, i.e. the law on which the addressee of the legal rule could have expected the set-off to be available. It can therefore be argued that Article 9 of the Insolvency Regulation fulfils the element of legal certainty, but that legal certainty is consequently compromised in a practical sense as different States protect the possibility of set-off in different ways unless creditors are restricted in that regard by one of the aforementioned methods. This difference presents a major problem, and a proposal for a solution has been set out at the end of this section.⁵⁵

⁵⁴ Bobek, *supra* note 37.

⁵⁵ It is difficult to imagine an addressee of legal rules (within the EU) being able to distinguish between the various conditions of set-off in insolvency proceedings for the Member State where the insolvency proceedings are opened, or according to the law applicable to the debtor's claim. Therefore, they will not be able to assess the real impact in advance (including the impact of the possibility of opposing the set-off).

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JUSTICE AT YOUR SERVICE - COLLECTIVE REDRESS BETWEEN ACCESS TO JUSTICE AND ABUSIVE LITIGATION

For years, collective redress has not been a popular subject in EU politics. However, globalization and digitization make it necessary to establish minimum standards within the Member States in order to harmonize the existing patchwork of national procedures. Thus, in November 2020, the European Union passed the Directive on Representative Actions for the Protection of Collective Interests of Consumers, which will be implemented by the Member States until 25 December 2022. We seize this opportunity to evaluate existing collective redress measures in EU Member States and compare the framework of the Directive with the US class action. An analysis of the use of legal tech in consumer litigation reveals a best practice of user-friendly criteria for an efficient, digitally supported transposition of the Directive. In this context, we argue for a service-oriented harmonization of consumer collective redress. This will give effect to consumers' claims by overcoming the practical, procedural and financial hurdles they often face in individual litigation against companies.

KEY WORDS

Consumer law
EU harmonization
Collective redress
Access to justice
Legal tech
Diesel scandal

1. INTRODUCTION

In November 2020, the European Union passed a Directive on Representative Actions for the Protection of Collective Interests of Consumers¹ (in the following: "the Directive"). The EU Member States now face the task of implementing the proposed rules in accordance with their national legal traditions until 25 December 2022. This essay seizes the opportunity to provide historical context to the development of collective redress, to categorize existing collective redress mechanisms, to critique the policy choices made by the Directive and to propose guidelines for its harmonized implementation.

Our line of argument centres around the idea of justice as a service for consumers which allows to give effect to their claims by overcoming the practical, procedural and financial hurdles which consumers often face in traditional individual litigation against companies.

In order to understand the pillars of collective redress, certain dichotomies need to be explained and defined. The first one has to do with standing. If a collective claim is brought, that can happen by a group whose members actively ex-

press their desire to sue, which is called opt-in participation. Alternatively, a party who wants to bring a claim can decide to represent all potentially injured parties without their prior consent, provided that those passive group members do not actively revoke their participation in the suit. This is called opt-out participation.

Secondly, the suit can be brought by the collective of injured parties themselves being represented by a so-called "representative plaintiff". This is the system of the US class action. Alternatively, the European system of "qualified entities" in charge of bringing a claim is based on the idea that the protection of consumer rights is a public interest served by certain organizations without the intention of making profit.

These independent organizations would initiate litigation representing the injured consumers as a collective without financial self-interest. The second system is sometimes connected to a two-step mechanism of litigation, where the suit brought by the qualified entity only establishes liability in an abstract way and the consumer afterwards needs to bring an individual claim for damages.

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

The first part of the essay will present a historical introduction to collective redress. Afterwards follows a categorization of existing collective redress mechanisms in EU Member States. Thirdly, we will argue that consumer-friendly law enforcement is based on five essential criteria. These criteria should be considered during the implementation process of the Directive. Finally, we will provide suggestions for the implementation in our fifth chapter.

2. FROM US CLASS ACTIONS TO AN EU DIRECTIVE ON CONSUMER COLLECTIVE REDRESS

Collective redress is not a recent phenomenon. In common law countries, the roots of class actions have been found in a writ of Henry III from 1125.² The modern class action in the United States, probably the most established and widely used type of collective redress, was introduced in 1937 with Rule 23 of the Federal Rules of Civil Procedure. In those days, class litigation would only bind members of a class who actively participated in the litigation (opt-in mechanism) and class actions were not very effective for the first decades after their introduction into American procedural law.

This changed in 1966 with the revision of Rule 23. The civil rights movements of the 1960s had created a critical perception of the government's interest and ability to achieve social justice. The establishment of strict liability for producers, first introduced by the Supreme Court of California in 1963,³ was one judicial reaction to this movement. The introduction of an opt-out mechanism to the class action system gave rise to a spread of class actions as an attractive tool for the protection of civil rights.⁴ The case of *Roe v. Wade*,⁵ in which the U.S. Supreme Court decided that a Texas law prohibiting abortion was unconstitutional, is a famous example of such a class action.

Unfortunately, the popularity of class actions entailed a heightened potential for abuse in unmeritorious litigation. This was due to a combination of factors. First of all, at the certification stage, the courts did not take into account the merits of the case, which means that a class action could be initiated without having to prove that any damage had occurred.

The opt-out system created a pool of potential class members whose size could amount to millions of claimants, for example amongst customers of banks. Even if the loss suffered by the individual claimant was miniscule, the number of claimants would drive up the total amount of damages.

Under the US class action system, redress would not only include compensation of loss suffered, but also punitive damages, usually in the amount of three times the loss. The punitive damages were meant to serve as a deterrent against future infringements.⁶ This could lead to a single suit being able to threaten the economic viability of a company, which is why many companies would agree to early settlements rather than risking a court decision, even if their liability had not been established.⁷ During the 1990s, the judiciary became aware of that and expressed their concern. As Judge Posner stated in 1995:

“One jury [...] will hold the fate of an industry in the palm of its hand.[...] That kind of thing can happen in our system of civil justice (it is not likely to happen, because the industry is likely to settle – whether or not it really is liable) without violating anyone's legal rights.”⁸

Since then, the US Supreme Court has mandated the courts dealing with class actions to apply a more vigorous certification process for a class action, the requirements of which will be explained further below.

In contrast to the US, collective redress has traditionally played a rather insignificant role in the EU Member States. One reason might be that punitive damages are not part of the European legal tradition and therefore litigation might be regarded as less profitable than in the US. In addition, the requirements

for standing to initiate litigation in the US are comparatively low, which means that a class action will likely be decided on the merits if it passes the certification process, rather than being dismissed on procedural grounds.⁹

However, there are legal areas in EU law with a high number of potential claimants having suffered the same loss, such as final purchasers of products sold in violation of competition rules. The deterring effect for the defendant of private litigation by a high number of claimants might give useful effect to EU antitrust law which cannot be achieved by mere public oversight.¹⁰ It is therefore no coincidence that the European Commission first introduced the idea of collective redress through the Green Paper on damages actions for breach of EC antitrust rules in 2005:

“It will be very unlikely for practical reasons, if not impossible, that consumers and purchasers with small claims will bring an action for damages for breach of antitrust law. Consideration should therefore be given to ways in which these interests can be better protected by collective actions. Beyond the specific protection of consumer interests, collective actions can serve to consolidate a large number of smaller claims into one action, thereby saving time and money.”¹¹

Broadening the scope of this idea, the European Commission published a Green Paper in 2008 on consumer collective redress, addressing the low con-

² Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 *Arizona Law Review* (1997), 687, at 689.

³ *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57 (1963).

⁴ Fiebig, *The Reality of U.S. Class Actions*, 4/2016 *GRUR International Journal of European and International IP Law (GRUR Int.)* (2016), 313, at 314.

⁵ *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973).

⁶ Fiebig, *supra* note 4, at 319.

⁷ *Ibid.*

⁸ *In the Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, at 1298 (7th Cir. 1995).

⁹ Fiebig, *supra* note 4, at 320.

¹⁰ Case C-453/99, *Crehan* (EU:C:2001:465), at para. 27.

¹¹ European Commission, COM(2005) 672 final.

fidence of consumers to effectively bring claims in national courts for redress in cross-border purchases, especially in the areas of financial services, telecommunication, transport and tourism.¹²

The Green Paper argued that consumers are hesitant to litigate for small claims against businesses, highlighting the high cost and risk of litigation as well as the length and complexity of procedures as major hindrances.¹³ In contrast to that, 76% of consumers stated they would be more willing to sue if they could more easily join suits with other consumers.¹⁴

One suggestion of the Green Paper was to introduce collective redress mechanisms in all Member States. However, those mechanisms should avoid encouraging “a litigation culture such as is said to exist in some non-European countries, such as punitive damages, contingency fees and other elements.”¹⁵

This interest to avoid unmeritorious claims is a direct reaction to what is regarded as abusive litigation in US class actions. However, as was mentioned above, US courts have already addressed those dangers and have introduced a rigid certification process.

A. CLASS ACTIONS IN THE UNITED STATES

The most common means of collective redress in the United States is the class action as regulated by Rule 23 of the Federal Rules of Civil Procedure. In order to receive judicial certification to bring a class action, the plaintiff who seeks to represent a class must meet the following requirements:

1. Numerosity requirement

According to Rule 23(a), the plaintiff must demonstrate that there is a sufficient number of class members and that a joinder of plaintiffs would be impractical. In practice, approximately 40 members would generally be regarded as sufficient, whereas 21 members would likely not meet the numerosity requirement.¹⁶

2. Commonality requirement

The second requirement under Rule 23(a) is that there are questions of law or fact common to the class, which means that the class members “must have suffered the same injury”.¹⁷

3. Typicality requirement

Thirdly, the claims or defences of the representative parties must be typical of the claims or defences of the class. According to the US Supreme Court, the requirements of commonality and typicality have to be understood in conjunction to test “whether the maintenance of a class action is economical and whether the named plaintiff’s claim and the

class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.”¹⁸ This is necessary because of the opt-out principle in US class actions, which leads to most class members having no direct involvement in the case.

4. Adequacy requirement

The last requirement under Rule 23(a) is that the representative plaintiff must fairly and adequately protect the interests of the class. This is to ensure that there is no conflict of interest between the representative and the other class members.¹⁹ Such a conflict of interest could arguably arise in situations where law firms initiate class actions with the sole purpose of “blackmailing” defendants into early settlements in order to receive contingency fees without having to argue the case on the merits. The court in charge of certifying a class action must ensure that such a settlement is in the best interests of all class members.

5. Predominance and superiority requirement

According to Rule 23(b), the questions common to the class must predominate over any questions that affect only individual class members, and the use of class actions must be superior to other available procedural methods to fairly and efficiently adjudicate the controversy.²⁰ This requires a sufficient cohesion within the proposed class and that individual claims would put a higher burden on the judicial system and the individual plaintiffs.

All of these requirements are vigorously applied by the US courts before certification of a class action to make sure that there is no abusive litigation. Without certification, the representative plaintiff has no standing to represent the class and the action would be dismissed. There has even been speculation that the scope of application of class actions will be significantly limited in the future if these requirements are applied more strictly.²¹

B. EUROPEAN RESERVATIONS TOWARDS THE US CLASS ACTION

In spite of the efforts to limit abusive litigation in the US, European legislators are reluctant to adapt US-style collective redress mechanisms. Whilst the intended redress amongst EU Member States is limited to compensation in damages, the US class action allows to claim punitive damages in order to deter companies from repeating infringements.

However, punitive damages are a foreign concept in most EU jurisdictions and would hardly fit in with current civil procedure in most Member States. The deterrent effect of punitive damages can arguably be achieved by a robust system of public oversight through the issuing of fines in case of infringement, as applied in antitrust cases by the European Commission and the national competition authorities.

¹² European Commission, COM(2008) 794 final, at 4.

¹³ European Commission, COM(2008) 794 final, at 4.

¹⁴ *Ibid.*, at 6.

¹⁵ *Ibid.*, at 12.

¹⁶ *Stewart v. Abraham*, 275 F.3d 220, at 226 (3rd Cir. 2001); *Atkins v. Morgan Stanley*, 307 F.R.D. 119, at 137 (S.D.N.Y. 2015); *Saini v. BMW of North America, LLC*, 2015 WL 2448846 at *3 (D.N.J. May 21, 2015); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, at 1267 (11th Cir. 2009); *In re Florida Cement and Concrete Antitrust Litig.*, 278 F.R.D. 674 (S.D. Fla. Jan. 3, 2012).

¹⁷ *General Tel. Co. v. Falcon*, 457 U.S. 147, at 157 (1982).

¹⁸ *Ibid.*

¹⁹ Fiebig, *supra* note 4, at 319.

²⁰ Stöhr, *The Implementation of Collective Redress – A Comparative Approach*, 21 *German Law Journal* (2020), 1606, at 1610.

²¹ Fiebig, *supra* note 4, at 319.

Europeans seem particularly critical of the US opt-out mechanisms, in which class members must actively refuse to participate in class actions and are otherwise considered party to the proceedings. This is regarded as a violation of due process. For example, the German Bundestag argued that individuals must have the chance to actively and purposefully participate in legal proceedings in order to find satisfaction of their individual claims, which might not be completely congruent to those of the group.²²

In a similar vein, the European Commission received input via a stakeholder consultation on the matter in 2011:

“As regards the question whether an opt-in or an opt-out mechanism should be favoured, the majority of national governments, some sectoral regulators, almost all business representatives and most legal experts, especially lawyers, propose an opt-in system. In their view, opt-out-mechanisms violate basic principles of law as well as constitutional procedural guarantees of Member States and the ECHR.”²³

However, in response to that same consultation, the European Consumer Organisation BEUC painted a different picture, arguing that, “the possibility for a representative body, including consumer associations, to launch a collec-

tive action on behalf of all identified, identifiable and nonidentifiable victims (opt-out), without the requirement of an official mandate from each one of them, is necessary.”²⁴

An opt-out mechanism would allow the largest number of claimants to seek compensation. In contrast, only around 1% of all consumers qualifying for collective redress participate in existing opt-in procedures.²⁵

In our opinion, the risks for abusive litigation are not inherent in an opt-out mechanism. In Portugal, which introduced an opt-out collective action for damages in 1995, no incidents of abusive litigation in collective redress have been reported so far.²⁶

As to the question of punitive damages favouring unmeritorious litigation, we would argue that with the absence of such a concept in the EU, this does not pose a risk in the European context. The same is true for the matter of contingency fees, which are subject to national civil procedure and not specific to class actions.

As we will explain below, in the absence of effective collective redress, national civil procedure already allows for ways to circumvent the high hurdles which opt-in mechanisms pose for consumers.

3. SYSTEMS OF COLLECTIVE REDRESS

In most EU Member States, collective redress has unfortunately played a rather insignificant role.²⁷ Although 16 Member States have introduced consumer collective redress mechanisms, these turned out to be highly ineffective. For instance, the French *action de groupe*, which was introduced in France in 2014, has not produced a single court ruling so far, due to its high costs and the burden on consumers who have to actively register by way of an opt-in mechanism.²⁸ In Germany, only 15 model declaratory actions have been filed to date. In comparison: The German Government predicted 450 annual claims in 2018.²⁹

In general, collective redress has been an unharmonized subject in the EU. While some Member States developed a system of collective redress, others did not. Also, each Member State adapted its own mechanism, which differs from the scope of application to standing. Naturally, there are different types and variations of class actions, such as group actions, representative or model declaratory actions which should be distinguished.

A. NATIONAL MODELS OF COLLECTIVE REDRESS

In a study from 2018, the European Parliament analysed the existing mechanisms and differentiated three categories of Member States:³⁰ The first category entails Member States, which do not provide compensatory collective redress.³¹ Member States of the second category provide for such a redress only in specific legal fields.³² And finally, those who provide far-reaching collective redress form the third category.³³

For example, the comparison of the German, French and Portuguese model already reveals serious differences among the Member States:

In Germany, the so-called *model declaratory action* was implemented in 2018 as a response to mass consumer claims against *Volkswagen* during the so-called Diesel-scandal.³⁴ Consumers could register via an opt-in mechanism. A qualified entity, usually a consumer organisation, will then bring a declaratory action against a defendant. The result is binding for all registered consumers.

²² German Parliament, *Report of the Committee on Legal Affairs on the European Commission Consultation 'Towards a Coherent European Approach to Collective Redress'* (2011), BT-Drucks. 17/5956, at 9.

²³ Hess and University of Heidelberg, *Evaluation of contributions to the public consultation and hearing 'Towards a Coherent European Approach to Collective Redress'* (2011), at 8, cited in Fiebig, *supra* note 4, at 317.

²⁴ European Consumer's Organisation (BEUC), *Response to the European Commission Consultation 'Towards a Coherent European Approach to Collective Redress'* (2011), available at <https://www.beuc.eu/publications/2011-00352-01-e.pdf>, at 12.

²⁵ *Ibid.*

²⁶ European Consumer's Organisation (BEUC), *Myths and Realities of Collective Redress* (2008), available at https://www.beuc.eu/publications/beuc-x-2018-048_myths_and_realities_on_collective_redress.pdf, at 2.

²⁷ Cf. Stadler, *Grenzüberschreitender kollektiver Rechtsschutz in Europa*, 64 *Juristenzeitung (JZ)* (2009), 121, at 122.

²⁸ Nürnberg, *Die Durchsetzung von Verbraucherrechten* (2020), at 212.

²⁹ Cf. German Parliament, *Draft Bill of the Model Declaratory Action* (2018), BT-Drs.19/2439, at 19 et seq.

³⁰ European Parliament, *Collective redress in the Member States of the Union – Policy Department for Citizens' Rights and Constitutional Affairs* (2018), at 18.

³¹ e.g. Estonia, Romania, Luxembourg, Germany and Austria, *ibid.*

³² e.g. Belgium, Italy and Spain, *ibid.*, at 19.

³³ e.g. France, the Netherlands and Poland, *ibid.*

³⁴ Schneider, *Betriebsberater (BB)* (2018), 1986 et seqq.

However, for concrete compensatory measures, they will have to file a separate lawsuit. The benefit of such a two-step system is, that the consumers do not bear a cost risk in the declaratory proceedings. Additionally, they can benefit from the declaratory action directly or indirectly through the fostering of a settlement. In the event of an in-court settlement, the consumers can accept it or opt out and pursue their individual action.³⁵

On the other hand, the procedure is complex and the admissibility criteria are rather strict.³⁶ Qualified entities are required to organize the whole proceeding without direct financial interest in the outcome. As for the consumers the procedure is for free. Therefore, other models of obtaining direct collective redress remain more attractive to many consumers.

The French *action de groupe* allows claims only in connection to sales of goods, contracts of services, property leases and violations of antitrust law.³⁷ The only damages covered are economic, not physical or immaterial injuries. The *action de groupe* is also a two-step procedure.

Only nationally registered consumer organisations have standing to initiate proceedings as representative actions, injured parties do not qualify as claimants during the first step. The consumer organisation presents an individual case which serves as a model on which the court establishes fault on the side of the defendant and defines the group of potential claimants. Afterwards, individual consumers can join the proceedings in the second step via an opt-in mechanism in order to claim individual damages.³⁸

In contrast, Portugal's *actio popularis* law introduced an opt-out collective redress mechanism in 1995.³⁹ Every consumer and consumer organisation can bring a group action on behalf of all citizens holding the same legal interest without a complicated certification process. The court fees are limited and it is the task of the court or the public prosecutor to decide whether the collective action is legitimate.⁴⁰

In reality, where national procedural law does not provide a genuine framework for class actions or where existing procedures are complicated, expensive and time consuming, there still is a practical need and desire for collective redress mechanisms. That is the status quo in many EU member states today. For that reason, an already existing legal mechanism became widely used to circumvent the lack of effective collective redress.

B. THE EMERGENCE OF LEGAL TECH ASSIGNMENT MODELS

The individual assignment of claims is an established institute of civil law. However, if such assignments happen in numerous similar lawsuits, it becomes apparent that this can be a way to bypass the unavailability of class actions. Especially with the emergence of legal technology, which allows an online fact checking via algorithms and a partially automated processing of similar cases, the multiple assignment of claims became easier.

Member States like Germany, France and Austria already benefit largely from this legal instrument. In Austria, that mechanism was developed already in the 2000s and sometimes named the "Austrian-style class action".⁴¹ For a more detailed analysis and evaluation of the legality and potential of the new business models, it is necessary to differentiate between different types of allocation and assignment of claims.

C. DIFFERENT MODELS FOR THE ASSIGNMENT OF CLAIMS

So far, we found two main different models on how such an assignment of claims takes place in practice. First, it is possible that individual claims are acquired by a third party, usually a professional litigation funder, who bundles similar claims against the same undertaking or group of undertakings.

If alternative dispute resolution is not successful, these claims can be brought in one procedure provided a joinder of causes is possible under the relevant national procedural law.⁴²

This is the easiest case as it would not constitute a representative action and the legality of each assignment is not put in question. The main obstacles are rather of economic nature. A litigation funder must assess in advance the risks and costs in order to calculate the price to be offered to the original claimholders.

It is conceivable that the economic process and risk calculation will go to the detriment of the original claimholder who will often be a consumer. This option is especially viable, if numerous claims with a significant amount exist, as for example in the case of cartel damages, where this business model emerged.⁴³

However, due to the complexity and economic constraints, the success story of bundled cartel damages litigation cannot easily be transferred to other fields of consumer mass litigation. Therefore, this method will presumably not generally prevail as a consumer-friendly remedy.

³⁵ Cf. § 611 ZPO (German Code of Civil Procedure).

³⁶ According to § 606 ZPO, the entities must not pursue an economic interest and need to represent at least 10 consumers amongst other preconditions. 50 consumers must register after two months from the beginning of proceedings to make the action finally admissible.

³⁷ Art. L623-1 Code de la Consommation (French Consumer Code).

³⁸ Art. L623-8 Code de la Consommation (French Consumer Code).

³⁹ Lei no. 83/85 - Direito de participação procedimental e de ação popular (Portuguese Law on Procedural Participation and Actio Popularis).

⁴⁰ Miguel Sousa Ferro, Collective Redress: Will Portugal Show the Way?, 6 *Journal Of European Competition Law and Practice* (2015), 299, at 299.

⁴¹ European Parliament, *supra* note 30, at 119.

⁴² E.g., in Germany, § 260 ZPO provides for such a possibility.

⁴³ Cf. CDC Cartel Damage Claims, *Hydrogen Peroxide* (2020), available at <https://carteldamageclaims.com/our-cases/hydrogen-peroxide/>

Second, individual claims can be bundled by a legal service provider without the prior acquisition. In this case, the assignment takes place for free, while all procedural risks are covered by a litigation funder. If the claim is successfully asserted, the sum is then paid to the former claimholders minus a certain contingency fee, which varies between 20-30%.⁴⁴ Therefore, the consumer maintains an economic interest in the success of the proceeding. This model is primarily used by legal service providers operating with high numbers of relatively easy and legally unproblematic cases, such as air passenger compensation.⁴⁵

The efficient pursuit of numerous claims can place a high burden on the defendants. Recent developments reveal efforts by companies to attack the standing of legal tech companies. In Germany, the *Bundesgerichtshof* already had to intervene several times clarifying, that these business models are in principle compatible with professional law.⁴⁶ National courts are currently still occupied with the review of individual issues and the legality of assignments in particular cases.

For example, a German court recently stated that standardized assignments of claims to litigators are not only in accordance with the law, but that non-assignment clauses in airline contracts were even deemed void as they would mean an unfair disadvantage to consumers.⁴⁷

Usually, legal technology is used in the processing of facts and collection of debts but in court proceedings, each case is still litigated separately. Otherwise, legal problems of the accumulation of claims can call the legality of the assignments into question.

If on the other hand a number of bundled claims is litigated together in one court proceeding, that poses higher risk of a strict review of standing under national procedural law. The regional court of Munich recently declared the assignment of hundreds of cartel damages claims in the Trucks-cartel void as the assignment opposed the professional law of lawyers and therefore was deemed illegal.⁴⁸

The Munich court found that the legal service provider, which was a collection company, would have to represent opposing legal interests and therefore would act illegally if it represented all clients in one court proceeding.

D. CONFLICT OF OBJECTIVES BETWEEN LEGAL TRADITIONS AND FACILITATED ACCESS TO JUSTICE

The attitude towards the emergence of a new form of class action is clearly diverse all over Europe, but generally rather sceptical and cautious. Particularly in Germany, the commercialisation of the assignment model and the compatibility with national procedural law is especially controversial, as the legal service providers act as collection companies and not as lawyers.

The reason for this is the strict regulation of the profession of lawyers. While those are only exceptionally permitted to accept contingency fees and shall not benefit from third party funding,⁴⁹ registered collection companies benefit from more permissive regulations, which allow contingency fees⁵⁰ as well as third party funding.

However, both shall not represent opposing interests.⁵¹ Opposing interests between assignors are apparent when assigned claims are bundled with one law firm in one proceeding whilst each individual case is despite general similarities still composed of different facts and evidence.

As soon as alternative dispute resolution mechanisms such as in-court settlements become an option, the genuine interests of the assignors might differ. As a settlement would usually lead to a

generalized quota for all assignors, the economic revenue would be equal, but the original success rate of each individual claim depending on evidence, data, etc., will typically not be the same. Therefore, a settlement will be more attractive to some than to others. Nonetheless, it is necessary for an efficient court procedure that the legal service provider is authorized to settle a case on a generalized analysis of the merits.

To avoid the risk of illegality of assignments due to opposed interests, it might be a reasonable option that a litigation funder acquires all claims and then only one party would bear all procedural and economic risks and interests in the case which would preclude opposing interests.

If the involvement of a third party (the litigation funder) was not intended, it is equally conceivable that the legal service provider itself forms a corporation with all claimholders. These models would require a certain degree of organisation under company law but seem feasible.⁵² If all affected parties, assignors and assignee, form one corporation with a mutual goal, their common interest lies in the pursuance of court proceedings. It seems unjustifiable then to certify them opposed interests.⁵³

Besides, this nationally led discussion also ignores the possibility of forum shopping and the less strict professional law in other member states such as the

⁴⁴ Cf. for example Flightright, *Frequently Asked Questions* (2021), available at <https://www.flightright.co.uk/faq>, with a fee of 20-30 % plus additionally 14 % in case a lawyer needed to become involved.

⁴⁵ Cf. Remmert, Legal-Tech-Anbieter als Inkassounternehmen?, *Anwaltsblatt (AnwBl)* (2020), at 186, para. 3; Stadler, *supra* note 27, at 122.

⁴⁶ Cf. Federal Court of Justice (BGH), judgment of 27.11.2019 – VIII ZR 285/18, *Wenigermiete.de*, where the court held that a collection company can provide legal services as long as those are necessary to collect the assigned debts and do not involve further legal counselling; for the distinction between these cases and the bundling of claims cf. Meul and Morschhäuser, *Computer und Recht (CR)* (2020), 246, at 250.

⁴⁷ LG Nürnberg-Fürth, decision of 30.07.2018 – 5 S 8340/17, *Verbraucher und Recht (VuR)* (2019), 28; LG Frankfurt a. M., judgment of 19.11.2020 – 24 O 99/19, BeckRS 2020, 32499 para. 17; both decisions on the basis of § 307 I BGB (German Civil Code).

⁴⁸ LG München I, judgment of 7.2.2020 – 37 O 18934/17, *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* (2020), at 279.

⁴⁹ § 49b II 1 BRAO (German Federal Lawyers' Act), § 4a RVG (German Lawyers' Remuneration Act).

⁵⁰ BGH, judgment of 27.11.2019 – VIII ZR 285/18, *Wenigermiete.de*, para. 101 et seqq.

⁵¹ § 43a (4) BRAO and § 4 RDG (German Legal Services Act).

⁵² Katharina Engler, Warum Legal Tech-Dienstleister und Kunde eine GbR bilden und § 4 RDG leerläuft, *AnwBl* (2020), 513, at 515.

⁵³ *Ibid.*, at 515 et seq.

Netherlands.⁵⁴ Whereas in the *Schrems*-case, the ECJ has limited collective claims on the basis of the consumer law clause in Art. 18 Regulation (EU) 1215/2012 ("Brussels Ia Regulation"),⁵⁵ that does not limit the application of the Regulation otherwise. Art. 8 Nr. 1 Brussels Ia provides for a bundling of proceedings in one Member State in cases with multiple defendants to prevent irreconcilable judgments resulting from separate proceedings in different Member States. Then, all defendants can be sued in any of the affected Member State, provided that (at least) one of the defendants is domiciled in that respective Member State.

Thus, the larger the case (e.g. due to the tort) and the larger the number of affected legal entities, the more forums might be available to claimants. It is conceivable that in collective redress cases, defendants are often corporations which are internationally active. If different parties are (partially) responsible for a tort or a breach of contractual obligations, that would already allow forum shopping and bundling of all claims in the chosen Member State in accordance with the given procedural law under the *lex fori* principle. Consequently, forum shopping allows for a certain circumvention of particularly strict professional law requirements.

In addition, alternative dispute resolution, in particular out-of-court settlements, seem equally possible. The objection that out-of-court enforcement of bundled claims in the sense of real debt-collection would be unrealistic⁵⁶ is itself not very well substantiated: rather, there are numerous incentives for mostly large companies as defendants in collective redress proceedings to settle a case (clearing the books, upholding good reputation, fostering future economic relations, etc.) if only a realistic threat of court proceedings existed.⁵⁷

Thus, the question of the legality of assignment models in the EU involves multiple factors and an analysis of the national procedural law of all member states which would go beyond the scope of this article. It is precisely the conflict of goals between access to justice for a wider group of people, predominantly consumers, and the protection of the order of the legal profession that is often not sufficiently highlighted. This initially nationally oriented discussion has already been Europeanised by the introduction of the EU representative action at the end of 2020 and should now be resolved on a European level.

4. FIVE CRITERIA FOR CONSUMER-FRIENDLY LAW ENFORCEMENT

In view of the models presented above, an evaluation of the effectiveness of the status quo is mandatory in order to establish clear requirements for the implementation of the EU representative action. What is actually important to the consumer when it comes to enforcing his rights? The comparison of the different redress models shows that the popularity of the assignment models is mainly based on five criteria:

A. MINIMAL EFFORT FOR THE CONSUMER

Legal tech debt collectors all advertise the simplicity of their business model. It is said to take five to ten minutes to assign the service provider. This is an enticing proposition for consumers. The claims concerned are generally legally unproblematic, nevertheless their enforcement fails in practice. Obstacles are deliberately placed in the way of consumers to deter them from asserting their claims, the best-known example being the waiting time at the telephone customer service. Putting customers off is a well-known tactic. It usually takes several months before the consumer receives a useful response from the company, if one is received at all. The effort required from the consumer is therefore disproportionately high, considering the small amounts involved. Many consumers therefore refrain from asserting their claims right from the start.

This burden is now assumed by legal-tech tools. All the consumer has to do is enter the facts of the case with some simple clicks on their website. Their case is then checked by an algorithm in just a few minutes. If a claim exists, the declaration of assignment is signed and sent to the provider. From this point on, the consumer no longer has to worry about anything, especially not about any payments.

B. NO WIN, NO FEE

And this brings us to the most important aspect of consumer-friendly law enforcement: the costs. After all, the ordinary consumer wants to avoid lawyer and court fees at all expenses. Bearing in mind that the loser pays principle applies in all EU Member States, it may be generally very difficult for laypersons to estimate the probability of success and the overall costs of the law enforcement. Therefore, only few people seek legal advice in the first place.

Even consumers with legal support insurances covering such costs, may shy away from the effort. We argue that the main reason for this is the amount in dispute, above which one would start a legal dispute in the first place. The average amount in dispute at which people would go to court in the event of financial damage is currently 1,840 euros in Germany.⁵⁸

⁵⁴ Cf. with examples Stadler, *Abtretungsmodelle und gewerbliche Prozessfinanzierung bei Masseschäden, Wirtschaft und Wettbewerb (WuW)* (2018), 189, at 190.

⁵⁵ Case C-498/16, *Schrems* (EU:C:2018:37).

⁵⁶ Meul and Morschhäuser, *supra* note 46, at 250.

⁵⁷ Cf. Barry Rodger, *Competition Law: Comparative Private Enforcement and Collective Redress across the EU* (2014), at 286 et seqq.

⁵⁸ Institut für Demoskopie Allensbach, *Roland Rechtsreport* (2020), available at https://www.ifd-allensbach.de/fileadmin/Ifd/sonstige_pdfs/ROLAND_Rechtsreport_2020.pdf

Legal tech companies counter the consumer's fear of costly proceedings with purely success-oriented remuneration models: if the claim is successful, the consumer pays a contingency fee between 20-30% of the enforced claim.

If the claim cannot be successfully asserted, the consumer incurs no costs.

C. EXPERTISE AND SUCCESS GUARANTEE

The debt collection business model regularly becomes attractive to consumers once a certain reputation and success rate has been established. Legal tech companies advertise this convincingly. Established collection service providers, like flightright⁵⁹ or myright⁶⁰ indicate a success ratio above 90%. The significance of this percentage must be put into perspective, as it says nothing about the actual amount of the claim recovered. A partial victory is generally considered a success.

However, the companies indisputably benefit from their established reputation and expertise in the individual areas of law. This promotes a reputable opponent that the defending companies take seriously. Therefore, the willingness of companies to settle regularly increases which in turn increases the success rate of the 'debt collecting' companies.

D. USER-FRIENDLY DIGITAL INTERFACE

The simplicity of hiring the debt collection legal service providers is mainly due to the way the contract is concluded online. The consumer clicks through the website and fills in his data into the online forms. This usually takes 10 minutes as the websites of the legal tech companies are perfectly designed for fast processing. They are clear, easy to navigate and understandable. The path to concluding a contract is described in a few steps by animated and written instructions. Often there are also explanatory videos. The user-friendliness naturally encourages consumers to use such online offers.

E. AVAILABILITY AND TRANSPARENCY

At the same time, it is especially important for online offers to give consumers a feeling of availability and transparency. Customer hotlines and the publication of customer ratings on the websites are intended to achieve this. Some companies even benefit from a quality certificate of public consumer centres.⁶¹ After commissioning, consumers are also informed at regular intervals about the status of their procedure. A prime example of customer service, which is indeed praised by the majority of consumers.

In our opinion, these criteria set the standards to which future legal remedies must adhere in order to ensure competitiveness compared to commercial legal tech tools. Of course, the first three points are the most important ones. But points 4 and 5 should not be underestimated either, as they contribute to the improvement of the overall reputation and acceptance of Legal-Tech offers.

5. TRANSPOSING THE EU DIRECTIVE ON CONSUMER COLLECTIVE REDRESS

We argue that the above-mentioned criteria must necessarily be considered when transposing the Directive on consumer collective redress. In 2018, the European Commission concluded in its Communication "A New Deal for Consumers"⁶² that "existing individual redress mechanisms are not sufficient in 'mass harm situations' affecting large numbers of consumers in the EU." Consequently, the EU passed the Directive on representative actions for the protection of the collective interests of consumers in 2020.⁶³ However, in our opinion, the minimum harmonization will pose a problem in the implementation of the Directive.

The Member States have been given a wide margin of manoeuvre, which can jeopardise the aim of the Directive. We see four difficulties in particular that are likely to affect the effectiveness of the new EU representative action.

A. OPT-IN VS. OPT-OUT

The Directive proposed that Member States make the decision in favour of an opt-in or opt-out mechanism in accordance with their national legal traditions. We suggest that an opt-out system for consumers for such representative actions would be the most desirable system, as has also been argued by the BEUC.⁶⁴ Opt-in systems are very costly for consumer organisations due to their administrative requirements, which prevents actions even in cases with a positive outlook for the affected consumers. The issue with opt-out procedures of potential due process violations can be solved with explicit rules on information duties towards consumers, so that they can refuse participation in the action. For example, the representative plaintiff in US class actions is required to give notice to the group, "including individual notice to all members who can be identified through reasonable effort."⁶⁵

⁵⁹ Flightright, Die häufigsten Fragen, available at <https://www.flightright.de/faq#:~:text=Flightright%20ist%20das%20Fluggastrechte%2DPortal,Gericht%20liegt%20bei%2099%20Prozent.>

⁶⁰ Flightright, Abgasskandal, available at <https://www.myright.de/abgasskandal.>

⁶¹ [https://www.test.de/Conny-Mietpreisbremse-per-Inkasso-durchsetzen-5145113-0/.](https://www.test.de/Conny-Mietpreisbremse-per-Inkasso-durchsetzen-5145113-0/)

⁶² A New Deal for Consumers, COM(2018) 183 final, p. 3.

⁶³ Directive (EU) 2020/182, *supra* note 1.

⁶⁴ European Consumer's Organisation (BEUC), *European Collective Redress – What is the EU Waiting for?* (2017) available at https://www.beuc.eu/publications/beuc-x-2017-086_ama_european_collective_redress.pdf, at 10.

⁶⁵ Fiebig, *supra* note 4, at 321.

Especially for cross-border representative actions as proposed in Art. 6 of the Directive, the access to information would otherwise be overwhelmingly difficult to obtain for consumers in one Member State coordinating with qualified entities of another Member State. On the other hand, a balance must be struck with the information duties of qualified entities which should not be too high. They should particularly not deter them from taking collective redress actions under an opt-out scheme. That could possibly be reached by a mixed system under which notice must only be given to consumers with habitual residence in the member state where the action is brought whereas foreign consumers would have to either register or unregis-ter on their own motion. Such a system is for example applied by the Belgian law on collective redress.⁶⁶

However, a wider choice of an opt-out system seems unfortunately unlikely, given the fact that the majority of Member States seem to shy away from an opt-out implementation. In the EU, only Portugal and the Netherlands apply an opt-out system, while Belgium, Denmark and Slovenia have a mixed system.⁶⁷

The mixed system could indeed become a role-model also for other member states which are currently still reluctant to establish an opt-out system. Depending on its implementation, it could allow for a more differentiated approach to the enforcement of consumer law. For example, the decision whether an action is admitted as opt-in or opt-out could be left to a public authority as in the Danish case the ombudsman⁶⁸ or in Slovenia the first instance judge hearing the case.⁶⁹

It is conceivable that under such practice of a mixed model, already the mere possibility of bringing a case under the application of opt-out certification would discipline defendants and might increase the willingness to settle a case if claims are meritorious.

B. QUALIFIED ENTITIES

Following the legal traditions in most Member States, Art. 4 par. 2 of the Directive grants standing only to qualified entities, which have demonstrated financial and political independence and are acting on behalf of consumers. Such consumer organizations are already existent in many Member States.

Looking at the historical development of the class action in the US, the hurdles to be recognized as qualified entity should not be too high, either for domestic or cross-border cases, as that would hinder the effectiveness of the representative action. The fate of the German model declaratory action, which inspired the selected criteria, confirms this assumption.⁷⁰ In order to avoid further complexity, it is desirable that qualified entities registered in one Member State are more easily granted standing in other Member States.⁷¹ In contrast to the requirement of twelve months public activity proposed by the Directive, especially cross-border collective actions would benefit from qualified entities being able to form *ad-hoc* as subject-specific representatives of consumer interest.⁷² For that purpose, we suggest an alignment of the criteria for standing in domestic and cross-border cases.

C. FUNDING

Additionally, the financing of future mass trials will remain an important issue. The exact financing arrangements of those qualified entities is still unclear. The Directive requires in its Article 4 par. 3 e), that the qualified entities are independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties.

The Directive suggests entry fees or similar charges payable by the consumers interested to participate. We would advise against such fees, as otherwise the competitiveness of the class action with assignment-based collective redress mechanisms would be endangered.

In US class actions, the problem of conflict of interest is dealt with by the certification process taking place in the courts as explained above. A case-by-case assessment of potential conflicts of interests might be more efficient to prevent abuse than a sweeping rejection of litigation financing in such cases.

If the representative body bringing the action can support the claim that it is acting in the interest of the consumers, what would be the harm in receiving third-party financing? Furthermore, the empirical evidence for abusive use of collective action is lacking. Neither Portugal nor the Netherlands, which introduced an opt-out collective action in 2020,⁷³ have reported any cases of abusive litigation.

⁶⁶ Janek Tomasz Nowak, 'The New Belgian Law on Consumer Collective Redress and Compliance with EU Law Requirements', in E. Lein et al (eds), *Collective Redress in Europe - Why and How?* (2015), 169, at 182 et seq.

⁶⁷ European Consumer's Organisation (BEUC), *Where Does Collective Redress for Individual Damages Exist?* (2017), available at https://www.beuc.eu/publications/beuc-x-2017-117_collective_redress_country_survey.pdf.

⁶⁸ Cf. Danish Consumer Ombudsman, *Press Release on Collective Redress Mechanisms: the Danish Perspective and the EU Context* (2007), available at <https://www.consumerombudsman.dk/nyheder/consumerombudsman/media-releases/collectiveredress>.

⁶⁹ Cf. Jorg Sladič, Slovenian Law on Collective Actions: a Legal Transplant in Post-socialist Legal System, *European Journal of Consumer Law* (2016), 417, at 433.

⁷⁰ Peter Röthemeyer, *Die neue Verbandsklagen-Richtlinie, Verbraucher und Recht (VuR)* (2021), at 43.

⁷¹ *Ibid.*

⁷² Nürnberg, *supra* note 28, at 322.

⁷³ Nürnberg, *supra* note 28, at 266.

In addition, a routine attack on the standing of qualified entities must be avoided. Especially the judicial review envisioned in Art. 10 par. 3 of the Directive could be misused for delaying tactics.⁷⁴ This provision allows for the disclosure of all financial support and thus constitutes a significant formal obstacle. Given the effort involved, it should at least be ensured that the courts only grant such a review in cases of substantial doubt.

D. INFORMATION ON REPRESENTATIVE ACTION

Finally, the future internet appearance and marketing of qualified entities will be crucial for an effective collective redress mechanism. This concerns above all cross-border cases, where consumers have to gain information about foreign entities and register to representative actions in foreign legal systems.

Therefore, qualified entities must be easy to find online. The Directive obliges each Member State to not only communicate the list of qualified entities to the Commission, but also to make it publicly available, Art. 5 par. 1 of the Directive. Many Member States already comply with this requirement. Also, Art. 13 of the Directive provides, that Member States should ensure that qualified entities provide sufficient information about current representative actions on their website for consumers, which express their desire to participate in such actions.

Based on our view, such information should be available in all EU languages, at least in English and French. The consumer should not take more than five minutes to find and verify, whether a consumer association would actually be entitled to file a domestic and/or cross-border action. The Austrian Association for consumer action⁷⁵ or the German Consumer Center⁷⁶ are good examples of such simple websites.

6. CONCLUSION

In conclusion, the European development of class actions is strongly influenced by the fear against a US-style litigation industry. In our eyes, unfortunately, too much so. This is confirmed by the Directive on consumer collective redress, which aims to prevent the possibility of abuse through the restrictions on standing and the regulation of litigation funding. On the one hand, this is a legitimate goal, but on the other hand, the question arises as to whether precisely these mechanisms are suitable or necessary for this purpose.

After all, the development of collective redress mechanisms to date, especially the emergence of legal tech service providers, does not give rise to such fears. Nor will the implementation of the EU representative action. The Directive must first be implemented by 25 December 2022. The date of application will then be 25 June 2023. However, the Member States should use their large margin of discretion given by the Directive in order to implement a coherent and effective procedural system. A too strict transposition could, on the other hand, completely undermine the competitiveness of the class action.

⁷⁴ Röthemeyer, *supra* note 70.

⁷⁵ Verein für Konsumenteninformation, *Klagen: Konsumenten zu ihrem Recht verhelfen* (2020), available at <https://vki.at/klagen-konsumenten-zu-ihrem-recht-verhelfen/5197>

⁷⁶ Verbraucherzentrale Bundesverband e.V., *Mit einer Stimme für Verbraucherrecht*, available at <https://www.musterfeststellungsklagen.de/>

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REPRESENTATIVE ACTION IN EUROPE. THE STRUGGLE TO FIT IN.

Based on the concept of class action drawn across the ocean, in the recent decades, a concept specific to the old continent has emerged. It gradually became an easy tool for consumers, while meeting the requirements of a higher level of protection, offered by the EU legislation to the recipients of the representative action. Its aims to ensure effective access to justice and avoid the vulnerability of abusive litigation specific to the American system.

This paper presents, in its first part, a history of shaping the European concept of representative actions. Secondly, it analyzes the most important features of the legal instrument addressing this issue, i.e., Directive EU 2020/1828, on one hand, from the perspective of the qualified entities that have the role of the plaintiffs, and, on the other hand, diving into the procedure in itself. Finally, the paper aims to introduce the effects of a judgement ruled by the court in a representative action. In our analysis, we chose to also include several proposals for improvement, referencing solutions laid out by the Model Rules of European civil procedure and how they could complement the solutions laid out in the Directive.

KEY WORDS

Mass harm litigation
Qualified entities
Injunctive relief
Collective redress
Opt-in/opt-out mechanism
Res judicata

1. INTRODUCTION

In a Spanish village of whitewashed houses and steep winding cobbled streets situated on the edge of a hill in the Sierra Cabrera, Mrs. Fernandez was an online content creator. On 1st of June 2025, she bought a phone from the giant smartphone company "Cereza" on which she spent a month's income.

All the way in Romania, downtown Bucharest, Mr. Popescu was a cryptocurrency miner. On the 2nd of June 2025, he bought the same smartphone as Mrs. Fernandez.

They have both enjoyed their phones without encountering any malfunctioning for some time. But after being pushed to proceed with the update of the software system, little by little, they started to observe that the Facebook app wouldn't open up as quickly as before, their battery wasn't lasting as much as it used to and, overall, the phones were slowing down. Mrs. Fernandez started thinking that her phone was reaching its lifecycle and proceeded to buy a new one. Mr. Popescu blamed the deteriora-

tion of the phone's performance on its battery and replaced it with a new one.

Still unsatisfied about the solution, they found out that they were not the only ones experiencing difficulties with their phones. Mrs. Fernandez found an organisation called Consumer Aid, and learned that it filed a class action in Spain, asking Cereza to pay compensation of at least 60 euros on average to all affected users for deliberately slowing down their phones, a practice known as planned obsolescence¹. Consumer Aid advertised their class action on their website and Mrs. Fernandez was able to join the action in her country. Mr. Popescu made a quick mental estimation and came to the conclusion that he alone doesn't have the time and resources to bring an individual action to court against a giant tech company such as Cereza. Luckily for Mr. Popescu, the European institutions have made it possible for him to join the action in Spain or even Romania, by adopting in November 2020 the Directive 2020/1828 on representative actions for the protection of the collective interests of consumers ('the Directive').²

¹ Planned obsolescence describes a strategy of deliberately ensuring that the current version of a product will become out of date within a certain period of time, determining consumers to seek replacement of the product.

² Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409, 4.12.2020, p. 1–27.

2. PATH THROUGH HISTORY

Over the last decades, European institutions have been preoccupied to create a mechanism that would better respond to the aim of building an efficient judicial system, by providing more guarantees regarding access to justice. What finally came to take the form of representative action was inspired by the US class action, after provoking a European debate that shook the resistance of the European legal tradition to its core. Also known as collective action, it was originally aimed at the cessation and prohibition of infringements of European law by traders' harmful practice.

On the 11th of June 2013, the Commission issued a non-binding Recommendation on common principles for injunctive and compensatory collective redress mechanism in the Member States³, after previously issuing a Green Paper in 2008. The aim of the Recommendation was

to put forward a set of common principles for all Member States, while leaving room for national judicial solutions and redress systems. The initiative also recommended that all Member States should have collective redress system at a national level.⁴

In the REFIT Fitness Check of EU consumer and marketing law, published on 23 May 2017⁵, the European Commission concluded that the framework which sets standards for consumer protection, had, for the most part, a mechanism strong enough to enforce consumer protection and provide redress. However, there were some aspects that could use improvement.⁶ Therefore, the 'New Deal for Consumers' initiative⁷ was created in order to modernize EU consumer protection rules in light of then-recent high-profile cases such as *Dieselgate*.⁸ The new package was composed of two proposals for directives: The Directive on better enforcement and modernization of EU consumer protection, also known

as Omnibus Directive⁹, was adopted by the European Parliament in November 2019. The Directive on representative actions, which is the subject matter of this paper, was adopted in November 2020.

At that moment, in the area of consumer law, the Directive on Injunction¹⁰ was in place. Consumers rights were protected by qualified authorities and consumer organizations authorized to start proceedings in order to reach a ceasing of unlawful practices that are harmful to the collective interests of consumers. This type of collective redress takes the form of injunctive relief.

Still, there was no legal instrument that would allow consumers to obtain compensation for damages suffered. Therefore, the Commission proposed a new directive to modernize and replace the Injunctions Directive by implementing a mechanism that would provide redress measures for consumers in case of infringements of Union law.

The Commission had come to the conclusion that small value claims do not reach the point where they can be actually enforced as people are discouraged to start a proceeding because of the high costs of litigation as opposed to the value of the claim they would eventually obtain at the end of the trial, in some cases non-recoverable legal costs, lengthy procedure, and risks emerging from enforcement issues. Some Member States didn't have any procedural mechanism for representative actions, and the

Union concluded that European consumers should benefit at least from such a mechanism.

The aim of the Directive is to assure a high level of consumer protection by ensuring effective access to justice, while avoiding the vulnerability of the US class action system of abusive litigation. The more practical aim is to make representative actions available in all Member States in a homogenous manner. The directive brings forth a whole new mechanism made in Europe's own image that might just meet the challenges of an increasingly globalized and digitalized marketplace. It must be pointed out that the Directive allows Member States to have other types of collective actions at a national level, but obliges them to have at least one that meets with the requirements of the Directive.

Representative actions have certain advantages for individual consumers. The procedure is time-saving for individuals, as they don't need to appear in court or make lengthy preparations for the case. Also, the costs to conduct such an action is low for each group member, as opposed to what it would be, were they to bring separate actions to courts. The entities representing the group have experience in dealing with consumer cases, therefore they engage more resources and are better prepared to face a powerful multinational trader.

Regarding private international law aspects on collective redress, UNIDROIT,

³ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, p. 60–65.

⁴ Given the furious opposition against the assimilation of the North American class action into the European legal framework due to its shortcomings – abusive litigation, possible unconstitutionality of establishing power of attorney without authorization, different national legal systems-, the most challenging aspect was to find a manner to allow consumers to obtain redress outside small value claims, while complying such a mechanism with Europe's traditional values.

⁵ The Fitness Check covered the Unfair Contract Terms Directive 93/13/EEC, Consumer Sales and Guarantees Directive 1999/44/EC, Price Indication Directive 98/6/EC, Unfair Commercial Practices Directive 2005/29/EC and Injunctions Directive 2009/22/EC. See for results SWD (2017) 208 final and SWD (2017) 209 final of 23.5.2017, available at: http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332.

⁶ Further improving of the six Directives in force at the time required three strands of action: ensuring that judges and legal practitioners have better knowledge of all rights and duties of EU consumer and marketing law, ensuring stepped-up enforcement and easier redress when substantive law provisions are breached, and considering targeted amendments to simplify the regulatory landscape where fully justified.

⁷ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - A New Deal for Consumers, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0183&from=EN>

⁸ In September 2015, the United States Environmental Protection Agency found out that the German automaker Volkswagen had deliberately modified its diesel engines in order to meet required standards during regulatory testing, while emitting up to 40 times more NOx in real-life driving, affecting millions of consumers, as well as having health and environmental consequences.

⁹ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, p. 7–28.

¹⁰ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, OJ L 110, 1.5.2009, p. 30–36.

together with the European Law Institute (ELI) developed the Model rules of European civil procedure ('**Model Rules**')¹¹ as a means to promote the increasing procedural coherence of European civil procedural law, dedicating Part IX to collective proceedings. The rules, along with commentaries, were published in January 2021.¹²

In general, the model rules constitute a non-binding instrument which aims at devising a set of principles and rules to be later taken as the fundament for an innovative harmonization concerning legislatures from different states. The Model Rules represent an attempt to realise a feasible frame of reference for policy makers at a European and national level, promoting common standards that allow for an increase of mutual trust. The rules, which bear the status of soft-law, aim at transcending national jurisdictional rules and facilitate resolution of disputes arising from cross-border commercial disputes.

In the future, the rules may be used as a basis for the development of an EU directive. Of course, the EU legislator has to find an appropriate level of detail, in order to avoid over-regulation, and to leave room for Member States to integrate the uniform measures into their national procedures, but also to valorise the need for inter-states mutual trust in judiciaries¹³.

Due to globalization and digitalization, in the event of a mass harm incident, it is highly likely that consumers from different European countries would be affected. In cross-border litigation, issues regarding differences between national procedures would arise, especially since the Directive only sets down minimum standards, and in a three-years' time we will probably have different rules across Europe, making some member states more attractive for claimants than others. Harmonisation is desirable, although, in some fields highly impossible. We believe that a move towards harmonization and approximation is likely in the field of collective proceedings.

What drove us to explore the subject is Romania's own mechanism. It is arguable if the Romanian legal system has a rudimentary mechanism of representative action or a *sui-generis* action. The fact is that the mechanism in place¹⁴ resembles collective actions, but a procedural scheme for redress, beside the common one in the Code of Civil Procedure, is not available. The procedure is contained within two provisions and is applicable only to injunctive measures arising from abusive clauses in consumer contracts. The rudimentary domestic regulation has determined us to take an interest in the new Directive on representative actions, hoping, as future magistrates, to have the chance to deliver judgements that will be properly enforced, so that European consumers will benefit from.

In addition, we saw an opportunity to integrate the Model rules. These are the outcome of broad and lengthy expert study of best practices and common trends in national and international civil procedures. The working groups studied in-depth the different European traditions and the project benefited from the input of numerous institutional observers.¹⁵ Therefore, it seems that the project engaged a lot of resources that gave it a certain amount of credibility and higher chances to become a binding European framework alongside the Directive.

Our paper is structured in three parts, the first one touching upon the qualified entities designated to bring representative actions to court (A). The second part focuses on the procedure itself (B), and the last part on the effects of judgments given in this proceeding (C). We will focus our analysis on certain aspects that seem to be somehow problematic, and could benefit from future improvement inspired by the Model Rules, by amending the Directive.

3. DIRECTIVE (EU) 2020/1828

A. ENTITIES ALLOWED TO BE PLAINTIFFS IN REPRESENTATIVE ACTIONS

There are some aspects regarding Article 4 of the Directive (Qualified entities) that may benefit from some of the proposed provisions contained within the Model Rules, respectively Rule 208 and its commentaries.

From a procedural perspective, in a representative action, a certain number of plaintiffs with shared interest composing the class have been harmed by the same trader. The claimant of the action is the class itself, but the claim is brought to court by a single representative entity recognized by the legislator as acting on behalf of the group. Group members are not and do not become parties in the proceedings, although the judgement can be binding upon them. The individuals have little control over the action, unlike the case of joinder of parties.

Any entity that wishes to bring a representative action on behalf of the consumers must apply for the status of 'qualified entity' either in the Member State where it intends to bring the action, or, when it comes to cross-border actions, in Member States other than those where it intends to act.¹⁶

¹¹ The inspiration of this endeavour has been the Principles of Transnational Civil Procedure, published under the auspices of UNIDROIT and American Law Institute (available at: <https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles>). Unlike this, the model rules are concerned with developing more detailed rules, rather than principles, considering the *acquis* of binding EU law and common traditions in the European countries.

¹² <https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules>

¹³ Dr. U. Bux, *The European Law Institute/UNIDROIT Civil procedure projects as soft law tool to resolve conflicts of law – In-depth analysis*, at 14, available at: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/556972/IPOL_IDA\(2017\)556972_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/556972/IPOL_IDA(2017)556972_EN.pdf)

¹⁴ Article 12 and Article 13 of the Romanian Law no.193/2000 on unfair terms in consumer contracts.

¹⁵ The Hague Conference on Private International Law, the European Commission, the European Parliament, the Court of Justice of the European Union, various professional associations.

¹⁶ Christina Renner and Cecile Manong, *Collective actions in the EU: the past, the present, the future*, available at: <https://www.morganlewis.com/pubs/2020/03/collective-actions-in-the-eu-the-past-the-present-the-future>

As opposed to the American system, where standing is reserved to a group member, in the European Union, *locus standi* to bring the action to court belongs to non-profit organizations designated by Member States for this purpose.

The Directive also states in Article 4 paragraph 6 that a qualified legal entity can be designated on an *ad-hoc* basis, as long as it complies with the same criteria as entities designated in advance.

Imagine that a number of consumers are harmed by their fishing knots provider, the very small trader 'Knots Matter', so very different than our giant tech case-study Cereza. One of them is a lawyer with a hobby. He discovers that he hasn't caught a fish in months because of some production defects of its fishing instruments and he is thinking that others may have the same problem. He tries to reach an entity based in his country, but their case either presents no interest and he is ignored or postponed. Still, he doesn't want others to be robbed of the pleasure of a great leisure activity and he wants to do something about it.

Rule 208 (b) of the Model Rules provides for the possibility that an *ad-hoc* entity, established solely for the purpose of obtaining redress for group members can be authorized to act as a qualified claimant, as long as some requirements are met.¹⁷

The general term 'entity' was chosen in order to make clear that legal personality is not necessary¹⁸.

Therefore, we have a very well-prepared group member who is willing to establish an entity in order to introduce a representative action for the group he is part of. However, in practice, it may take plenty of resources to create a legal person and our lawyer does not have them.¹⁹ He could however create an entity without legal personality. The latter doesn't require registration and is usually created as a result of the common agreement of members. Since other criteria regarding funding and non-profit character are still to be met, these ad-hoc entities are still checked by each state in the most important aspects, according to Article 4 paragraph 6 of the Directive. Permitting entities without legal personality to act on behalf of harmed consumers would only speed up the proceeding in situations where time is a valuable aspect.

Regarding the conditions that need to be met in order for an entity to be designated, the directive has established more complex criteria than those previously laid out by Directive 2009/22/EC. It must be pointed out that the criteria apply only to entities designated for the purpose of bringing cross-border actions. Member States have the freedom to apply the same criteria to those entities qualified for the purpose of domestic representative actions.

¹⁷ Rule 209 of ELI/UNIDROIT Model Rules: A person or entity shall not be qualified as a claimant unless: (a) they have no conflict of interest with any group member, (b) they have sufficient capability to conduct the collective proceeding. In assessing this issue, the court shall take account of the financial, human and other resources available to the putative qualified claimant. If appropriate, the court may require security for costs (see Rule 243), (c) they are legally represented, (d) they are neither a lawyer or exercising an any legal profession.

¹⁸ Comment no. 3 under Rule 208 of ELI/UNIDROIT Model Rules, p. 372.

¹⁹ The members of an association must legalize a series of documents and submit the application of registration to a court of law.

The European representative action is very strict in regard to the funding of qualified entities.²⁰ As far as redress measures are concerned, although third-party funding is not prohibited, the qualified entities must ensure that there is no conflict of interests and that any funding from a party that may have an economic interest in the outcome of the action does not influence the entities to act in spite of the collective interest of the consumers. Traders' donations may count as eligible third-party funding, as long as they're done in the framework of corporate social responsibility initiatives. Nevertheless, the court or administrative authority solving the conflict must be able to block such practices by ordering the entity to refuse or change the source of funding. This ensures that the aforementioned bodies have the consumers' best interest at heart.

It is interesting that the court or administrative authorities are only to act in the manner described above, when a representative action for redress measures is filed; Article 10 does not refer to injunctive measures. The explanation probably resides with the fact that the two actions have different outcomes. It is always necessary to put an end to a conduct that affects consumers' rights, no matter how the representative entity is financed.

Regarding the estimated success of the representative action, there are several aspects that may discourage the use of this procedural mechanism.

A first one would be the criterion imposed in Article 4 (1) (c) of the Directive: the entity must be a non-profit one. The European Union feared that if the entity authorized to represent a group of harmed consumers is for-profit, it may be subjected to external influences and therefore would not act in the interest of the group.²¹

On top of this, under recital (10) of the Directive it is clearly stated that *punitive damages should be avoided*. It is in the European tradition that the public policy role belongs to the state, it being the only subject legitimized to impose punitive sanctions on the unlawful trader, which are usually reserved for criminal law litigation. Furthermore, to avoid possible bias, no financial incentives are to be awarded.

The European institutions expressed their concern regarding the risk of abusive litigation that comes with a profit driven action. They concluded that financial incentives, such as contingency fees of attorneys²² or the possibility to seek punitive damages, may transform the representative action to a powerful tool, with the aim to force those on the

²⁰ Article 4 (3): (...) that entity complies with the following criteria: (e) it is independent and not influenced by persons other than consumers, in particular by traders, who have an economic interest in the bringing of any representative action, including in the event of funding by third parties, and, to that end, has established procedures to prevent such influence as well as to prevent conflict of interest between itself, its providers and the interest of consumers.

²¹ European Commission, *supra* note 7, p. 10.

²² The European Bar Association forbids the *pactum of quota litis*. See Article. 3 (3) of Code of conduct for European lawyers, available at: https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf. In spite of it, according to a study on litigation costs of 2010, Estonia, Finland, Hungary and Spain allow contingency fees under certain conditions (C. Hodges, *The cost and funding of civil litigation. A comparative perspective* (2010), at 132-133).

defending side to settle a case, which, from a procedural aspect, may not be well-founded.²³

However, all these limitations lead to the question whether a non-profit organization is stimulated to bring certain cases to court. Model rule 209 does not require a qualified claimant to be a non-profit body, as it cannot be reasonably expected that sufficient private actors will become active in the enforcement of the interests of a group, if all kinds of financial incentives are excluded.

At the moment, it is uncertain whether the consumers will benefit from this proposal. Only time will tell if this solution regarding the financing of qualified entities will work within the European Union.

B. INSIDE THE PROCEDURE

To begin with, it is important to underline the main objective of the procedure established by the Directive. Collective redress was designed to be a procedural mechanism that allows, for reasons of procedural economy or efficiency of enforcement, many similar legal claims to be bundled into a single court action.

Furthermore, the connecting point between individual claimants may be the similarity of an alleged infringement of rights granted under EU law, wherein the potential loss of each individual is smaller than the potential cost for each claimant, which leads to a more cost-efficient collective redress scheme that al-

lows persons claiming damages to share costs. However, although the overall costs of the dispute are shared between the parties, the amount is not always the same, depending on the factual or legal issues regarding each individual claim. It is certain though, that the witnesses will be heard only once, and the evidence will be furnished jointly, so that the lawyer's workload will be for example at 10 hours/client/litigation, and not 10 hours*100 clients. Nonetheless, the balance is positive in collective litigation, provided that certain costs can be shared.²⁴ On average, the cost of an action for injunction in Europe amounts to approximately €12.000 for the organisation. This sum includes lawyers' and experts' fees. and, where applicable, also court fees. However, these costs vary significantly among respondents, and very much will depend on the characteristics and length of the cases, and on whether the action is brought before a public enforcement authority or a court (some participants indicated that injunction actions before their public enforcement bodies were free of charge). In some complex cases, the legal costs (including court fees) for consumer organisations went up to € 30.000- € 35.000 (in particular when the consumer organisation lost the case).²⁵

Returning to the aspect presented above, the essential condition regarding the representative action is the existence of a right belonging to a group of individuals. In other words, no individual rights are exercised through a

collective action, but a right belonging to a community. Thus, each legal issue taken individually raises the same issue of law. Most often, the group members were harmed by a single prejudicial act or a series of illicit acts closely related to each other. Precisely this characteristic relation of sharing common prejudice confers consistency and individuality to the group. This relationship is not specific to the institution of connection; it is focused exclusively on the homogeneity of the legal issue or its factual situation.

1. Injunctive and Redress measures

Going further, concerning the procedure itself, article 7 of the Directive provides at least two remedies for the qualified entities: injunctive and redress measures.

The injunctive measure presumes a remedy in the form of a court order addressed to a particular person, that either prohibits him from doing or continuing to do a certain act (prohibitory injunction), or orders him to carry out a certain act (mandatory injunction). The remedy is discretionary. It will be granted only if the court considers it just and convenient to do so.²⁶ Regarding this definition, the European Parliament and the Council have opted to lay down rules only on prohibitive injunction measures, as it is clear from the wording of Article 8 (1) of the Directive.

Article 8 (4) provides a prior procedure in the case of definitive injunction measures. Member States may introduce provisions in their national law or retain provisions in their national law under which a qualified entity is allowed to seek this above-mentioned type of measure after it has entered into consultation with the

trader concerned with the aim of having that trade cease the infringement. If the trader does not comply, the qualified entity may immediately bring a representative action for an injunctive measure.

On the other hand, the second type of measures enshrined in the Directive, respectively the redress measures, requires the trader to provide consumers with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law.

Regarding the two types of measures that may be sought, while the Directive establishes what type of measures are mandatory to be provided by the Member States, it also gives a certain degree of freedom to those Member States in organizing how the two measures shall come to practice. In that regard, Article 7 (5) of the Directive sets forth the ways in which the member states can organize procedural rules in regard to the above measures.

Firstly, the Member States may enable qualified entities to seek the measures within a single representative action, where appropriate. Therefore, the first important note is that Member States may regulate the above. In the absence of such regulation, the qualified entities will be allowed to seek only one type of measures per action. Allowing qualified entities to seek both measures with the same action appears to be a way to reduce the number of disputes before the courts. Additionally, stipulating how qualified entities may request the measure seems to be in line with the consumer's interest.

²³ European Commission, *supra* note 7, p. 8.

²⁴ C.I. Nagy, *Collective Actions in Europe. A comparative, economic and transsystemic analysis* (2019), at 14-15.

²⁵ Report – Bureau Européen des Unions de Consommateurs, *Stepping up the enforcement of consumer protection rules* (2020), at 16, available at: https://www.beuc.eu/publications/beuc-x-2020-083_enforcement_mapping_report.pdf

²⁶ Oxford dictionary of law, Oxford University press (2006), at 174-175.

A second thing to note is that Member States may regulate that the qualified entities are allowed to seek both measures within a single action only where it is deemed appropriate. Thus, it seems like a general authorization, i.e., without giving the court the ability to check if it is appropriate for both measures to be taken within the same action, is not allowed by the Directive. One such case would be when the proceedings are delayed by the request for redress measures, most likely due to additional evidence in need to be presented, while the injunctive measures must come into effect as soon as possible.

Thirdly, it is stated that Member States may provide that those measures are to be contained in a single decision. In order to comprehend the meaning of this provision, one must read the first part of article 7, where it is stated that Member States may enable qualified entities to seek both measures within the same action *where appropriate*. Consequently, the meaning of the above provision seems to imply that Member States are allowed to regulate that qualified entities need to request both measures within the same action, but they would still have to examine whether it is appropriate or not. The difference here is that it would not be in the court's hands to decide on this matter, but in the hands of the lawmakers. They would have to provide for a regulation which would clarify where it is mandatory to seek both measures with the same action.

We believe that Member States still have to take into account whether it is appropriate to seek relief for both measures within the same action, in order to be in conformity with the scope of the regulation.

Recapping, Member States have three options for regulating how the two measures may be requested, i.e., whether it needs to be filed separately or jointly. The first option is not to regulate the matter at all, in which case the national procedural rules would apply. The second option is to regulate just the ability of the qualified entities to file an action that contains both measures, without imposing such a request on them, but giving the court the ability to verify whether the above is appropriate to that specific case. The third option is to regulate beyond the second option, by obliging them to request both measures within a single action.

2. Opt-in or opt-out?

Article 9 enshrines the opt-in and opt-out system that is available for the consumers regarding the redress measure.²⁷ It states that the Member States shall lay down rules on how and at which stage of a representative action for redress measures the individual consumers concerned by that representative action explicitly or tacitly express their wish, within an appropriate time limit after the representative actions have been brought, to be represented or not by the qualified entity in that representative action and to be bound or not by the outcome of this action.

In other words, the opt-in approach involves groups including only individuals or legal persons who actively opt-in to become part of the represented group²⁸, in contrast to the opt-out approach, where the group is composed of all individuals who belong to the defined group, and claim to have been harmed by the same or a similar infringement of rights, unless they actively opt-out of the group.

The doctrine raised the issue of compliance with the fundamental rights of the opt-out mechanism²⁹, since representation without authorization may impair group members' private autonomy, consisting in the right to decide whether or not to enforce a claim and how to enforce it.

Nonetheless, the main counterargument is that in absence of this collective redress mechanism, many small claims would not get to courts of justice; the collective redress mechanism confers solely benefits to group members; there is no forced membership in the case of opt-out system, meaning that group members can leave the group by expressing explicitly their option to do so; while the right of disposition is constitutionally protected, access to justice is a fundamental right, so that the purpose of collective proceedings is to transform practically unenforceable rights to an efficient³⁰ and effective means of legal protection³¹.

A further criticism for the opt-out model refers to the right to be heard, given that absent members of a collective action would eventually be bound by a decision, without having participated in the proceedings. Nevertheless, if absent victims are adequately notified, and thus are offered an opportunity either to intervene or to disengage from the collective action, then we argue that their right to be heard is preserved.

Also, there were concerns over the compliance of mechanism with the right of access to a court guaranteed by article 47 (1) of the Charter³² and article 6 (1) of the European Convention of Human Rights (ECHR)³³. In its jurisprudence³⁴, European Court of Human Rights (ECtHR) established that the right of access to courts secured by article 6 (1) is not absolute, but may be subject to limitations; these are permitted implicitly since the right of access 'by its very nature calls for regulation by the State, which may vary in time and place according to the needs and resources of the community and of individuals'.

The ECtHR addressed the problem of representation without authorisation in the case of *Lithgow and Others v. The United Kingdom*³⁵, and on the basis of *Ashingdane's* case considerations it ruled, that the restrictions on access to a court do not restrict or reduce the access left to the individual in such a manner or to such an extent that the very essence

²⁸ A. Pato, *Cross-Border Collective Redress in the European Union and Private International Law Rules on Jurisdiction* (2017), at 71.

²⁹ *Ibid.*, at 71-72.

³⁰ T. Boosters, *Collective redress and private international law in the EU* (2017), at 15.

³¹ C.I. Nagy, *supra* note 24, at 24-25.

³² Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

³³ Available at: https://www.echr.coe.int/documents/convention_eng.pdf

³⁴ ECtHR, *Ashingdane v. United Kingdom*, Appl. no. 8225/78, Judgment of 28 May 1985, §57.

³⁵ ECtHR, *Lithgow and Others v. The United Kingdom*, Appl. no. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, Judgment of 8 July 1986, §194, 196, 197.

of the right is affected. At the same time, this limitation is compatible with article 6 (1) only if it pursues a legitimate aim and there is a relationship of proportionality between the means applied and the aim pursued. Applying the principles to the *Lithgow* case, the Court concluded that these conditions were met because individual rights were indirectly protected by the fact that the representative of the group was appointed to represent the interests of all and could be revoked in case of breach of duty. Furthermore, the Court held that the scheme 'pursued a legitimate aim, namely the desire to avoid, in the context of a large-scale nationalization measure, a multiplicity of claims and proceedings brought by individual shareholders' and there was 'a reasonable relationship of proportionality between the means employed and this aim.'³⁶

The above jurisprudence was confirmed in case *Wendenburg and Others v. Germany*³⁷. Here, in the context of a procedure before the German Federal Constitutional Court (Bundesverfassungsgericht), the ECtHR, referring to the *Lithgow* case, held that while 'the applicants were barred from appearing individually before that court', 'in proceedings involving a decision for a collective number of individuals, it is not always required or even possible that every individual concerned is heard before the court.'³⁸

3. Conditions for admissibility

Regarding the criteria for the admissibility of collective redress, the Directive sets out two guidelines, leaving it to the Member States to choose the proper content of the admissibility of such actions.

The references in the Directive concern, on the one hand, the assessment of the admissibility of the representative action by courts or administrative authorities, without regulating a precise scope. The only mention is that the assessment of admissibility will be made in accordance with the Directive and the domestic law of the Member States.

On the other hand, the Directive states that courts or administrative authorities may decide to dismiss manifestly unfounded cases from an early stage of the proceedings, also in accordance with the provisions of national law.

In comparison with the lacunar provisions of the Directive and by establishing as a decisive factor for the criteria of admissibility the national legislation of Member States, Rule 212 of the Model Rules establishes 4 cumulative conditions of admissibility. In the following paragraphs, we will try to outline the possible effects that the ratification of similar rules would entail, either at the level of recommendation in the EU, or at the final level of transposition of this Directive by Member States.

Thus, according to the aforementioned rule, the court may admit a collective proceeding if:

a. It will resolve the dispute more efficiently than a joinder of the group members' individual claims;

First of all, this criterion would be in full accordance with the very purpose of the Directive, namely that of simplifying and giving a note of effectiveness to collective proceedings, as opposed to an individual action.

Of course, this criterion would not avoid criticism. The subject of the collective action, respectively the qualified entity, is the one who, *ab initio*, assesses whether the initiation of a collective procedure is advantageous from the perspective of the costs involved in terms of potential benefits, sufficient number of consumers, etc.

This condition would shift the responsibility from the collective entity to the court or the administrative authority. However, this is not necessarily a negative aspect, as long as a court presents all the conditions of independence, impartiality and full observance of the law, in accordance with article 47 (2) of the Charter. Similarly, when talking about an administrative authority, this entity is constituted according to law, with specific attributes, subject to the control of the national forum, so that it presents greater credibility of correct evaluation of the criteria from letter a) than the qualified entity.

Secondly, this requirement is linked to the proper administration of justice. The only one entitled to assess this character is the court or the administrative authority.

These entities will take into account the complexity of the case, the likely cost to group members of pursuing their claims individually, and the value of each group member's claim for compensation, etc.

For these arguments, we consider it opportune to insert the condition from letter a) regarding the admissibility criteria.

b. All the claims for relief made in the proceeding arise from the same event or series of related events causing mass harm to the group members;

From a superficial analysis of this condition, it can be concluded that the same event could be a so-called 'single event mass harm', e.g., a mass accident such as a plane crash, a chemical plant explosion etc., or it could arise from a series of related events, e.g., a so-called 'single cause mass harm' such as the use of unfair contract terms, product liability cases, or liability for misleading information in capital market brochures.

Although the Directive does not expressly lay down this condition, preferring to leave it to the Member States to establish such a condition of admissibility, the uniqueness of the event giving rise to the mass damage or the connection of events giving rise to damage is the starting point in completing the puzzle of collective redress.

The starting point must be the reason that caused harm to the consumer which determines him to fully recover his prejudice. From this perspective, it can be said that this condition of admissibility is an implicit one.

³⁶ C.I. Nagy, *supra* note 24, at 26-27.

³⁷ ECtHR, *Wendenburg and Others v. Germany*, Appl. no. 71630/01, Judgment of 6 February 2003.

³⁸ C.I. Nagy, *supra* note 24, at 26-27.

Rule 212 imposes the obligation to establish this issue to the court or administrative authority. However, the result is the same if we start the other way around, i.e., if the qualified entity is the first one that engages in the case based on its own criteria.

We consider that this implicit condition would be an improvement of the directive's content, as long as the condition represents the core of the collective proceeding. For these arguments, we propose to insert explicitly the condition from letter b) regarding the admissibility criteria.

c. The claims are similar in law and fact; This condition is no longer implicit as the previous one. The requirement that the requests should have a sufficiently strong connection from the perspective of the factual situation and the legal framework is a softer condition. After all, it does not belong to the core of collective redress, being rather one of predictability, e.g. from the perspective of evidence. This condition concerns, on the one hand, the substantial, and on the other hand the procedural homogeneity. Regarding the latter, it is probable that, when the requests come from the same factual situation or from related events, however different in law or fact, it will be necessary to produce several pieces of evidence. In this situation, the very purpose of qualifying the promoted action as collective could be affected. The latter would generate high costs and no longer justify the union of individual consumer requests.³⁹

However, this condition would not complicate the issue of admissibility because its wording is a generic one, meaning that the factual and/or legal situation must be similar, without mentioning the degree of similarity. Thus, the courts or administrative authorities could decide, on a case-by-case basis, whether the collective redress passes the filter of admissibility, depending on the particularities of each case. This does not mean that the courts are held only by criteria such as the estimated amount of individual damages, the size of the group, and the chance of notifying all or almost all group members, whether members of the group have a realistic chance of bringing individual actions to justice. The courts or administrative authorities have full discretion to establish criteria related to the particularities of each case, as long as this similarity between the consumer's requests exists.

For these arguments, we consider it opportune to insert the condition from letter c) regarding the admissibility criteria.

d. Except in case of urgency, the qualified claimant has given the defendant or defendants at least three months to respond to a settlement proposal. The requirement in letter d) practically introduces a mandatory preliminary procedure in the case of representative actions, an aspect that fundamentally changes the requirements for exercising the action.

We appreciate that this condition would not improve the procedure, but would make it more difficult and inaccessible to consumers. On the one hand, this

condition would require the individual consumer to direct his efforts to contact, negotiate and try to reach an agreement with the perpetrator. On the other hand, it would prevent consumers from resorting to collective proceedings, because it would be possible to bring an individual action, which would require neither an attempt to reach an agreement with the professional nor the expiration of a forfeiture period, within which to seek a favourable settlement. The purpose for which the collective redress mechanism was created was to facilitate the procedure and make it much easier for all consumers affected by the same professional. Imposing such a condition would prevent the very purpose of the Directive from being fulfilled, which would be unacceptable.

For these arguments, we consider that this condition should not be considered as a supplement to the admissibility conditions.

As mentioned in this paper, consumers who have expressly or tacitly consented to join the opt-in procedure, cannot individually bring an action with the same object and against the same trader.

Rule 217, from our perspective, ensures the security the legal framework by establishing a presumption of waiving the collective proceeding if a member of the group promotes an individual action against a defendant during the opt-out period. In other words, if initiating individual proceedings without waiving the collective proceeding, a defendant will become aware that the claimant in the individual proceeding is part of the group as described in the collective action and may inform the court of this fact.

Consequently, the claimant in the individual action will be deemed to have renounced the collective redress.

For the argument of improving the security of the legal circuit, we appreciate that it would be opportune to complete the provisions of the directive with this recommendation of the Model Rules.

C. A LOOK TOWARDS THE EFFECTS OF THE JUDGEMENT

In relation to the effects of the decision on a representative action, we would like to begin our analysis by questioning if such a decision has *res judicata*. This question can be tackled on two fronts: firstly, referring to the injunction measures, the Directive does not expressly deal with the issue. In contrast, in regard to redress measures, the Directive does offer a solution. Initially, one needs to determine whether the decision has *res judicata* for a new representative action. The Directive provides for a direct solution in article 9 (4), where it states that a new representative action with the same cause of action and against the same trader could not be taken.

Secondly, in determining if the decision has *res judicata* for individual actions, filed by consumers legally represented, meaning having stated explicitly or tacitly their wish to be represented in a representative action, the Directive states that an individual action with the same cause of action and against the same trader cannot be permitted. Additionally, Member States have the duty to adopt such procedural rules that would ensure the requirement of the Directive is met.

³⁹ I.I. Neamț, *Considerații generale cu privire la acțiunea reglementată de art. 12-13 din Legea nr. 193/2000. Analiză de drept comparat*, Revista Română de Drept Privat nr. 6/2013, at 98.

The first thing to note is that the Directive does not make a distinction based on the solution given to the initial representative action. For that reason, a new action with the same cause of action and against the same trader cannot be filed in both situations, i.e., if the initial representative action was granted or denied.

Another important aspect is that the Directive does not regulate whether the judgement on a collective action seeking injunctive measures prohibits a new collective action seeking the same measures.

With the current wording, the national systems of member states will be the ones establishing whether the effect of *res judicata* should apply in case of injunctive measures. In tackling this issue, member states should take into consideration that the legal solutions at national level, based on the principle of procedural autonomy, will have to be compatible with the principles of equivalence and effectiveness, as laid out by the Court of Justice of the European Union⁴⁰.

In certain cases of rejection of the representative action, individual consumers do not lose the ability to file another action, even if it is based on the same cause of action and directed against the same trader. This solution is set forth in article 10 (4), which states that if the court finds that the qualified entity is not allowed to file the action because another person is entitled, the rights of the individual consumers are not affected.

The most notable right that this article refers to is the one to file an individual action against the same trader and having the same cause of action.

In regard to the effects of admitting representative actions seeking injunctive measures, art. 8 (1) regulates these effects indirectly, by stipulating that the court may order the trader to cease a practice or, where appropriate, to prohibit a practice by the trader, either as a provisional measure or a definitive one. These measures would come into effect only in relation to those consumers which did not opt-out. Regarding those who did opt-out, they can be represented by a qualified entity in a new representative action, even if it is with the same cause of action and against the same trader, or they have the ability to introduce an individual action against the trader.

Regarding the effects of admitting representative actions seeking redress measures, art. 9 (1) provides insight into these effects, stating that they will include remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid. Regarding the remedy of damages, the Directive does not state any provision regarding to how the sum the trader will have to pay should be expressed, as a global sum or as an amount per consumer.

To cover this gap, we would advise for rule 228 of the Model Rules to be used, meaning that the final judgment that sets the amount of compensation shall include: (a) the total amount of compensation payable in respect of the group or

any sub-group, if an exact calculation of this amount is impossible or excessively difficult, the court may estimate the amount; (b) the criteria for distributing the compensation to each group member, and the method of administration of the compensation fund.

Such a solution takes into account the fact that sometimes the particularities of the case make it difficult to have an exact calculation of individual group member's damages. Therefore, the court could estimate the damages to the group members as a whole, and thereafter distribute those damages according to the criteria specified in the same judgement.

Another aspect the Directive does not touch upon is the enforcement of the judgement where the representative action was admitted. As such, we would bring into attention rule 227 (3) of the Model Rules, which sets forth that a final judgment may be enforced by the qualified claimant; if the qualified claimant does not enforce the final judgment within a reasonable time, any group member, with the court's permission, may enforce the final judgment. We believe applying such a rule might contribute to the effectiveness and efficiency of the representative action mechanism, as it is detailed in recital (7), because having a clearly regulated way of enforcement ensures the consumers are receiving the benefits of the actions as soon as possible.

When referring to the effects of a decision in a representative action where the court denied the request for redress measures, the Directive touches on the matter of supporting the other party's legal costs, stating in article 12 (1) that the unsuccessful party in a representative action for redress measures is required to pay the costs of the proceedings borne by the successful party.

One important observation is that the Directive refers to the conditions and exceptions provided for by national law applicable to court proceedings. An additional rule expressly stated by the Directive is that individual consumers represented by a qualified entity in a representative action for redress measures will not pay the costs of the proceedings; the qualified entity is the one the Directive refers to as the unsuccessful party, in case the representative action is denied, even if the qualified entity acts in behalf of individual consumers, and only the qualified entity will be called to pay the counterparty's costs.⁴¹

In this regard, the matter is directly regulated only in relation to redress measures; regarding injunctive measures, the national system of Member States shall apply.

As to the effects of the decision as evidence, the Directive establishes in article 15 the rule that the final decision of a court or administrative authority of any Member State concerning the existence

⁴⁰ See, e.g., Case C-676/17, *Călin* (EU:C:2019:700), at para. 34-43, and the judgements cited.

⁴¹ In relation to this subject, in some legal systems of member states, the legislative solution takes the opposite approach, allowing consumers to be liable for costs under a representative action. In such scenarios, it is stated that 'when individual consumers expressly join the action by opting-in, it would be feasible to assume, even constitutionally, that they take on the risks attached to a possible failure'. However, the solution laid out in the Directive takes into account the fact that 'the information asymmetry between the members [individual consumers] and the group representative [qualified entity] may warrant that this risk be placed on the latter'; C.I. Nagy, *supra* note 24, at 98.

of an infringement harming collective interests of consumers can be used by all parties as evidence in the context of any other action before their national courts or administrative authorities to seek redress measures against the same trader for the same practice, in accordance with national law on evaluation of evidence. This applies to the hypothesis where the two actions are filed separately, and the qualified entity does not seek both injunctive and redress measures within the same action.

The rule takes into account the fact that in the representative action where injunctive measures are sought, the plaintiff still has to prove that the trader had a practice found to constitute an infringement of the provisions of Union law referred to in Annex I, and that it is the premise for the redress measure too. Therefore, once this is proven in front of a court, in the second proceedings, where the qualified entity would also try to seek redress measures, it would be more efficient not to have to prove again the same infringement, and rather use the decision as evidence. Consequently, in this situation, if the court concludes in a representative action that there wasn't any infringement of EU law, in a new representative action seeking different measures, a new court cannot state that there was in fact an infringement with the same cause of action and against the same trader, without taking into account any new evidence, because that would amount to irreconcilable judgements. Also, to be noted is that the judgement has to be final in order to be used as evidence in a subsequent trial.

In relation to this aspect, a few scenarios are required to be analysed. The first scenario is where in the representative action seeking injunctive measures, the qualified entity did manage to prove the practice of the trader. In such a case, in the representative action for redress measures or in the individual action filed by the consumers for obtaining redress measures, both the qualified entities and the consumers will be able to use the final decision, in which the injunctive measures were granted as evidence, in the new action. Therefore, by referring to *all parties* in article 15, the Directive not only refers to the qualified entities, but also to the individual consumers too.

The second scenario is where the qualified entity did not manage to prove the practice of the trader in the action seeking injunctive measures. Thus, in the action seeking redress measures, the trader will have the interest to use the first decision as evidence of him not having committed the practice for which the redress measures are asked, in accordance with the national procedural law.

One aspect to be taken into consideration is that the Directive addresses the effects on evidence of a judgement ruling on a representative action only in the relation between the injunctive measures and redress measures. It does not deal with the effects on evidence in relation to persons that were not *parties* to the proceedings, those *parties* being the qualified entity, the consumers that opted-in or did not opt-out, depending on the case, and the trader.

Therefore, the Directive does not cover how the consumers that did opt-out in an opt-out proceeding and the ones that did not opt-in in an opt-in proceeding, can benefit from the judgement in terms of evidence. It seems that those consumers cannot rely upon the Directive to use as evidence a judgement on a representative action that was admitted with the same cause of action and against the same trader but with the qualified entity representing other consumers in a new representative action.

However, the CJEU ruled in a specific area of consumer law (unfair terms), that where the unfair nature of a term included in the general business conditions (GBC) of consumer contracts has been recognized in an action for injunction, the national courts are required, of their own motion, and also as regards the future, to draw all consequences provided for by national law, in order to ensure that consumers, who have concluded a contract to which those conditions apply, will not be bound by that term⁴². The Court referred precisely to the effects with regard to all consumers who concluded with the seller or supplier concerned a contract to which the same GBC apply, including with regard to those consumers who were not party to the injunction proceedings. Therefore, the CJEU might be tempted to interpret article 15 in a large manner.

Of course, those consumers can rely on national rules regarding evidence, based on the principle of procedural autonomy, as EU law does not have an express provision regarding their situation.

4. CONCLUDING REMARKS

The Directive proves to be a highly anticipated addition to the European *acquis*, ensuring that consumers among Member States benefit from a mechanism designed to ease their access to justice, while maintaining a firm balance between consumers' and the traders' interests.

Coming as a direct response to situations that occur with expanding frequency in today's modernized society, such as in the *Dieseldgate* case, it fulfils its role in the 'New Deal for Consumers' initiative, providing more guarantees for consumers, guarantees that only add to those already provided within the EU's legislative framework.

It does so by prioritizing efficiency and effectiveness of the whole proceedings, by building upon the prior framework in the form of the Injunctions Directive, by modernizing the latter and expanding the range of measures the consumers have access to in a representative action, with the addition of the redress measure. Essentially, it fills the legislative gap existing prior to the adoption of the Directive, allowing groups of consumers to obtain compensations for damages suffered with the use of a mechanism provided for by the EU legislation.

⁴² Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* (ECLI:EU:C:2012:242).

Providing consumers with the ability to benefit from a representative action offers a viable alternative to situations where an individual action would not be feasible, either due to the small value of the claims compared to the potential litigation costs, or the length of the procedure, or even the risk of enforcement problems. The qualified entities would have the knowledge to tackle consumers cases in a more efficient manner, managing more resources and being more suited to take on a multinational trader. The Directive also offers consumers access to a mechanism that might not currently exist in the legislation of the Member States where they reside.

Therefore, in its attempt to regulate the matter of representative actions in a homogenous manner, the Directive's intent is to provide for a mechanism inspired from the US class action system, adapted to EU's own legislative background, hoping to solve the problems that come nowadays with an increasingly globalized and digitalized marketplace, where the possibility of mass harm incident is ever present.

While the Directive is a major step forward, certain aspects were left unregulated, and in an attempt to deal with this legislative gap, we have included a series of suggestions for rules that would complement the Directive in case of a future amendment, taking inspiration from the Model Rules of European civil procedure.

Firstly, we would argue that permitting entities without legal personality to act on behalf of harmed consumers would speed up the proceeding in situations where time is a valuable aspect, a solution that rule 208 of the Model Rules supports.

Another aspect would be to allow a profit organization to bring a representative action to court, a solution already adopted in rule 209 of the Model Rules, as questions arise to whether a non-profit organization is stimulated to bring certain cases to court.

In terms of admissibility of a representative action, we believe that the conditions set forth in rule 212 of the Model Rules would provide national courts with a filter to allow only the situations the drafters of the Directive had in mind to be judged under the specific procedure of representative actions. These conditions refer to verifying if: (a) the representative action will resolve the dispute more efficiently than a joinder of the group members' individual claims; (b) the claims for relief made in the proceeding arise from the same event or series of related events causing mass harm to the group members; (c) the claims are similar in law and fact.

Rule 217 of the Model rules provides with another beneficial addition to the mechanism regulated by the Directive, securing the legal circuit by establishing a presumption of waiving the collective proceeding if a member of the group promotes an individual action against a defendant during the opt-out period.

In relation to the effects of judgements, we would advise for rule 228 of the Model Rules to be used, meaning that the final judgment that sets the amount of compensation shall include: (a) the total amount of compensation payable in respect of the group or any sub-group; if an exact calculation of this amount is impossible or excessively difficult, the court may estimate the amount; (b) the criteria for distributing the compensation to each group member, and the method of administration of the compensation fund.

Finally, another aspect the Directive does not touch upon is the enforcement of the judgement where the representative action was admitted. As such, we would bring into attention rule 227 (3) of the Model Rules, which sets forth that a final judgment may be enforced by the qualified claimant, and if the qualified claimant does not enforce the final judgment within a reasonable time, any group member, with the court's permission, may enforce the final judgment.

As of 25 June 2023, the day the Member states must apply the legislation that will transpose the Directive, consumers like Mr. Popescu and Mrs. Fernandez can find comfort in knowing they are more protected by the European Union in their interaction with traders, because while they may not have a guardian angel watching over them, they do have a qualified entity working for them.

SEMI-FINAL D

JUDICIAL ETHICS AND PROFESSIONAL CONDUCT

PARTICIPATING TEAMS

FINLAND, FRANCE, POLAND, PORTUGAL, SERBIA, SPAIN

1st place: Team Serbia

2nd place: Team France

3rd place: Team Spain

Selected papers for TAJ:

Team Serbia

Team France

Team Spain



13 - 15 JULY 2021, ONLINE

JURY MEMBERS

JEREMY COOPER (UK)

PROFESSOR, RETIRED JUDGE AND CONSULTANT TO THE UNODC ON JUDICIAL INTEGRITY, CONDUCT AND ETHICS

This was the third year in succession that I had the privilege of chairing a THEMIS Semi-Final D on the generic theme of **Judicial Ethics and Professional Conduct**. The topics selected this year by the competing teams differed significantly from one another which led to a very stimulating competition, both for participants and jury members. The topics chosen reflected a range of topical, contemporary concerns including the role of judges and courts regarding vaccination against COVID 19; the dilemmas faced by judges asked to apply an apparently 'unjust law'; an assessment of the legislation requiring judges (though not others in public life), to make public declarations of their income, assets and interests; the question of how to respond to allegations of judicial misconduct without compromising judicial independence?; the limits on the protection that should be provided to judges, who misbehave in their private lives; and the critical constitutional interplay between the politics of judicial appointments and the protection of judicial independence and/or impartiality. Once again the teams had to defend their papers via an entirely on-line forum and did a good job responding to this challenge, at the same time coping with the restraints imposed by rules on social distancing and face coverings. Each team made a short video, using thoughtful and original methods to get their points across to the jury, whose questioning was as ever direct, succinct and challenging. In response, teams defended their position with confidence and flair, always in impeccable English.

There were three outstanding teams this year: Serbia, France and Spain. The professionalism of each of these teams' conduct throughout the competition was exemplary, and their mastery of their subject matter detailed and palpable. The jury decided at the outset that the teams had sufficient authority and self-belief, to be able to deal with exceptionally robust questioning, which proved to be a correct assumption! Interestingly, no team dominated in all three Categories – paper, video and presentation – and the process of adjudication of the final winners was unusually close, guided significantly by a very precise, intricate internal marking process, that we decided to adopt to help us achieve a result that fairly reflected all components of the competition.

CRISTINA SAN JUAN (UNODC)

JUDICIAL INTEGRITY AND RULE OF LAW SPECIALIST,
UNITED NATIONS VOLUNTEER, UNITED NATIONS OFFICE
ON DRUGS AND CRIME

This year, 2021, is the second year in a row that a member of the UNODC Judicial Integrity team has participated as a juror in THEMIS Semi-Final D. It was a real pleasure to collaborate with the EJTN Secretariat, with the other members of the jury - all experienced EJTN members and collaborators - and with the teams competing in this Semi-Final. It was also a great opportunity to share with the future European judges the work that the United Nations Office on Drugs and Crime is doing through the Global Judicial Integrity Network (www.unodc.org/ji) to support judges and judiciaries in promoting judicial integrity and preventing corruption within the justice system.

I would like to emphasize from this opportunity how much I have learned from each of the future judges about so many profound and important issues related to judicial ethics and professional conduct in this extremely enriching experience.

This is the second year that the competition has been converted to the virtual format due to the Covid-19 pandemic, but nevertheless, we could see how both the organization and the teams adapted perfectly to the virtual format and in spite of the distance they transmitted their enthusiasm in their projects during their participation. Each team chose a completely different and original topic from the others, which they defended in their written proposal, videos and during the Q&A session, but in each of them, we could see how they addressed very similar cross-cutting issues on ethics and judicial integrity.

It was very encouraging to see them delve into so many important and difficult issues facing the judiciary today, including those related to the Covid-19 pandemic, judicial independence and the appointment of judges, the disciplinary measures for judges and regulation of judicial conduct, the need for integrity also on judge's personal lives and the potential financial disclosure mechanisms for judges. It was also very encouraging to see the teamwork of each group, how they supported each other in the questions and answers and the sense of unity between the different participants despite the virtual distance.

GORAN SELANEC (HR)

JUSTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

The Global Judicial Integrity Network was established as a platform for judges and judiciaries to collectively address existing and emerging challenges to judicial integrity. It is a platform “of judges, for judges”, based on peer learning and mutual support.

It was therefore an honour to be able to participate as a member of the Semi-Final D jury and to see how all the teams embodied these principles in their work. The THEMIS competition is certainly a very relevant and commendable initiative carried out by the EJTN to encourage exchanges among future judges in Europe and an excellent training opportunity for them.

The UNODC Judicial Integrity team wishes all the teams that participated in the competition all the best in their future careers as judges and hopes that they will continue in the same spirit of collegiality, critical thinking and peer support. Furthermore, we would like to extend our thanks to the EJTN Secretariat for the opportunity to be part of this rewarding initiative for the second year in a row.

Once more I have a pleasure addressing you through journal after another successful year of EJTN mootings. Many kind thanks to organisers for providing me with opportunity to be part of this educational exercise. It is not mere courtesy when I say that I do not find mere professional pleasure in participating but also great benefit. I have been part of this exercise for several years now and I have managed to extend my professional knowledge through participation every year. It is combination of several elements that make this happen. First, one has to admit that organisers keep being up to date. Mooting assignments always reflect developments and dilemmas that are occurring in our professional life. Second, and equally if not more important, the mootings teams keep responding to those challenges with great ambition, skill and professional imagination. In principle, all teams manage to find some specific, unique approach to some legal dilemma entailed by the mootings task. It is from this particular fact - your uniqueness that is result of great effort that you invested in preparation - that us “judges” benefit professionally. Just as you (hopefully) learn from our “grilling” we equally learn from your papers, presentations and discussion. Thank you for that.

Being a part of this educational exercise for few years now also allows me to notice two patterns that I find particularly interesting. First, I believe that it deserves to be pointed out that it can be noticed that certain training styles started emerging. From my position of a moot judge I have noticed similarities in styles/approaches used by the mootings team coming from the same national schools. I have also noticed that some of those approaches tend to bring good results. This suggests that this project “let its roots” in many of national judicial academies participating in this mootings. It became their integral and valuable part and contributed to efforts they are investing in training younger generations of judiciary. This proves that the whole mootings project produces very tangible results. Second, I have also noticed that teams from those states that have not been part of the mootings competition before not only benefit a great deal but apparently find great enjoyment in this competition. I have noticed that teams from those national judicial academies that joined the competition recently have a rather steep learning curve. They not only become competitive in matter of couple of years but also very successful. This is another proof that this type of judicial education can produce great results. Moreover, it is great fun too.

Keep up the good work!

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Team SERBIA

DOES THE APPLICATION OF UNJUST LAWS UNDERMINE JUDICIAL INTEGRITY?

The authors intended to shed light on the neglected topic of judicial ethics – what should judges do when confronted with an unjust law or a legal rule which application results in an obviously unjust decision. The article brings into question strictly positivistic approach in application of the law, presenting different options that judges have while adjudicating. Focus of this article is the impact of these different solutions on the judicial integrity. Apart from the strict application of the law, which would be an obvious solution to the presented ethical dilemma, the article analyses direct application of international standards on human rights, evolutive interpretation of human rights, judicial subversion and resignation. These different approaches are presented in a hypothetical case, in which strict application of the law results in a manifestly unjust outcome.

KEY WORDS

Unjust law
Application of the law
Judicial integrity
Positivism
Evolutive interpretation
Judicial subversion

1. INTRODUCTION

"The hottest places in hell are reserved for those who, in a period of moral crisis, do nothing."

Dante Alighieri

In their daily work, judges are confronted with numerous ethical dilemmas which they endeavour to resolve by searching for answers in national codes of ethics or the rules incorporated in the Bangalore Principles of Judicial Conduct.¹ It would be safe to say that ethical standards, integrated in codes of ethics, give judges merely the guidelines to follow in given situations, thus representing a frame with a picture yet to be inserted. Codes of ethics predominantly (or, rather entirely) deal with aspects of judicial actions which are most obvious to a reasonable observer² - independence, impartiality, propriety, dignity, etc. However, dilemmas that judges are confronted with in their professional work and adjudication on daily basis, are sometimes so delicate and profound that codes of ethics and ethical standards do not provide direct answers for their resolution.

One of such dilemmas is how to proceed once a judge is confronted with a law or a legal rule the application of which in a specific case would obviously result in unjust outcome. The resolution of such a dilemma is far from simple, because it simultaneously raises an issue of what impact this may have not only on the integrity of the judge, but of the entire judiciary. This is due to the fact that integrity itself represents an essential category of the judicial ethics and implies multiple personal qualities expected of judicial office holders. A judge must adjudicate in a way which also demonstrates personal qualities of *'wisdom, loyalty, humanity, courage, seriousness and prudence, while having the capacity to listen, communicate and work (...), which are essential requirements to guarantee the right of everyone to have a judge'*³. Integrity of a judge is *sine qua non* judicial value which safeguards public confidence in the judiciary and exercise of democratic principles in the rule of law.⁴

¹ The Bangalore Principles of Judicial Conduct, 2002 (*The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002*), available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf

² Kozinski, 'The Real Issues of Judicial Ethics', 32 *Hofstra Law Review*, (2004) 1095

³ European Network of Councils for the Judiciary (ENCJ) - Judicial Ethics Report 2009-2010, at 11, available at <https://www.encj.eu/images/stories/pdf/ethics/judicialethicsdeontologiefinal.pdf>

⁴ Judicial ethics handbook, Bosnia and Herzegovina, February 2019, at 81-82

The most comprehensive and one might say the most important and most relied upon document incorporating judicial ethical standards that judges look upon when searching for way-outs is the Bangalore Principles of Judicial Conduct which, in the part dealing with integrity, in Article 3.2 stipulates that '*Justice must not merely be done but must also be seen to be done*'. Such a provision may additionally reinforce the said dilemma since, if integrity also implies that justice must be seen to be done, does it follow that an application of unjust law or legal rule is in compliance with integrity of a judge who enforces it? Nonetheless, the Commentary on the Bangalore Principles, in the section referring to integrity, underlines an obligation of the judge to apply the law, although it is mentioned that this rule is not an absolute one.

After the end of World War II, Europe has witnessed reconsideration of judge's obligations expressed in the Latin legal maxim *Dura lex, sed lex*, due to the fact that judges at the time justified their actions of applying Nazi laws by arguing that they were only applying the laws as they were enacted. The renowned German legal philosopher Gustav Radbruch thought that strict application of the law had contributed to the crimes committed, and that basic moral principles ought to be enshrined in the notion of legality.⁵ The thinking that morals are enshrined in the very notion of legality did not remain in theoretical sphere only, since in the after-war Germany judges did deliver sentences against the Nazi re-

gime informers, whose actions were not illegal according to the laws of that time, with judges referring to the fact that such laws were null and void because they violated the fundamental moral principles.⁶

Although from today's lenses the mentioned cases represent a rare and extreme example, we are of the opinion that this ethical dilemma is still current today, whenever judges are confronted with an unjust legal provision which is in conflict with fundamental requirements of justice.

Acceptable answers to similar questions have been sought in legal discussions throughout the United States for decades now.⁷ In this regard, a distinguished American law professor Grant Gilmore singled out several possibilities that a judge may have available in situations of this kind: to resign from the judicial office, to refuse to apply the law as immoral, to try and resolve the dilemma through legal gaps or to apply the law '*with death in his heart - because it is the law, duly established by the constituted authorities, and because, as a judge, he has no other choice*'.⁸

The authors of this paper will try to revive this old (albeit, in our region, blocked out) dilemma, and to illustrate the complexity of this issue to which there are no easy answers, in spite of what it may look like on the face of it. In this paper, we will endeavour to shed some light on possible approaches to resolving this ethical

dilemma by a judge, the impact the offered approaches might have on judge's integrity and, consequently, the entire judiciary.

2. FACTS OF A HYPOTHETICAL CASE

For the purpose of better understanding of the stipulated approaches, we will rely upon the facts of a hypothetical case, in which strict application of legal rules, at least in the opinion of the authors of this paper, results in manifestly unjust outcome:

The defendant M.S. was pronounced guilty by the first-instance court of charges of unlawful production and distribution of narcotics pursuant to Art. 246, paragraph 1 of the Criminal Code, and was sentenced to imprisonment of the mandatory minimum sentence of three years, because it was established that he had manufactured cannabis oil, which was classified as a narcotic drug. The defendant confessed to the crime, but defended himself by saying that he had manufactured the oil himself, and used it solely for his own needs; since he was suffering from pancreatic cancer, he used the oil to alleviate excruciating pains. The examination of the medical files confirmed that the defendant was really suffering from pancreatic cancer, that he was in final stages of terminal illness, and that his pains were considerably alleviated, whenever he used the cannabis oil.

The first-instance court assessed as extenuating circumstances that defendant manufactured the narcotic for his own use i.e. to alleviate his own pain, but did deliver the mandatory minimum prison sentence of three years, having in mind that the Criminal Code did not permit leniency below the mandatory minimum sentence for this criminal offence.

The defendant's lawyer appealed the sentence, and the Appellate Court scheduled a session of the court panel to decide on the appeal. The Appellate Court panel consisting of three judges initiated a legal debate on the case, which soon turned into an ethical discussion – whether the prison sentence delivered in this specific situation was a just solution, what were the possibilities available to judges in the labyrinth of justice that would uphold the judicial integrity at the same time?

3. STRICT APPLICATION OF THE LAW

When a judge is confronted with an ethical dilemma of whether or not to apply unjust legal provisions or the legal provision, which in this specific case produced an unjust result, apparently the sole option available to the judge is a strict application of the law. The obligation to apply the law is derived, primarily, from the Constitution of the Republic of Serbia, which prescribes that court decisions shall be rendered in the name of people; they are based on the Constitution, Law, ratified international treaties and regulations passed on the grounds of the Law.⁹

⁵ H. L. A. Hart, *Essays in Jurisprudence and Philosophy*, (1983) at 82

⁶ Judgment of 27 July 1949, Oberlandesgericht, Bamberg, 5 *Suddeutsche Juristen-Zeitung*, 207 (1950), 64 *Harvard Law Review*, 1005 (1951)

⁷ The Hart-Fuller exchange on law and morality - Hart, *Positivism and the Separation of Law and Morals*, 71 *H~Av. L. Rzv.* 593, at 614-629 (1958); Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 *HAiv. L. REv.* 630, 659 (1958)

⁸ G. Gilmore - *The ages of American Law (Storrs Lectures on Jurisprudence)* (1977) at 37-38

⁹ *Constitution of the Republic of Serbia* ("Official Gazette of the RS", No. 98/2006), Art. 145

The obligation of a judge to apply the law is also reiterated in the Commentary on the Bangalore Principles of Judicial Conduct, where it is explained that: *'When a judge transgresses the law, the judge may bring the judicial office into disrepute, encourage disrespect for the law, and impair public confidence in the integrity of the judiciary itself. This rule cannot be stated in absolute terms either. A judge in Nazi Germany might not offend the principles of the judiciary by mollifying the application of the Nuremberg Law on racial discrimination. Likewise, the judge in apartheid South Africa. Sometimes a judge may, depending on the nature of the judge's office, be confronted by the duty to enforce laws that are contrary to basic human rights and human dignity. If so confronted, the judge may be duty bound to resign the judicial office rather than compromise the judicial duty to enforce the law. A judge is obligated to uphold the law. He or she should not therefore be placed in a position of conflict in observance of the law. What in others may be seen as a relatively minor transgression may well attract publicity, bringing the judge into disrepute, and raising questions regarding the integrity of the judge and of the judiciary.'*¹⁰ Therefore, the Commentary sets the judge's duty to uphold the law as a solution to an ethical dilemma; on the other hand, it notes that that this duty is not to be understood in absolute terms, thus leaving a wide margin for its interpretation when resolving the ethical dilemma.

Strict application of a legal provision, whether unjust or not, implies a risk that the judge may become unaware of societal issues. In the Commentary on the Bangalore Principles, it is emphasised that *'the nature of modern law requires that a judge "live, breathe, think and partake of opinions in that world". (...) Increasingly, the judge is called upon to address broad issues of social values and human rights, to decide controversial moral issues, and to do so in increasingly pluralistic societies. (...) Legal standards frequently call for the application of the reasonable person test. Judicial fact-finding, an important part of a judge's work, calls for the evaluation of evidence in the light of common-sense and experience. Therefore, a judge should, to the extent consistent with the judge's special role, remain closely in touch with the community.'*¹¹

Relying on the principle of the division of powers, the former US Justice Antonin Scalia was also in favour of a strict application of the law. In his opinion, a judge has no possibility to change or "nullify the impact" of unjust law, and has a legal duty to apply the law as is, because in democratic states the legislative power lies with the people, who exercise that power through its elected representatives. Scalia would emphasise that judges cannot take over the role of a legislator and nullify the laws.

The only thing judges can do, through the reasoning of their decisions, is to bring the attention of the public to the injustices in a specific law, all with the aim that such law be amended in a regular procedure.¹²

If we now go back to our hypothetical case, the strict application of the law in this situation would mean that the second instance court must uphold the judgment pronouncing M.S. guilty, and sentencing him to three years of imprisonment. Namely, according to the Criminal Code of Serbia, it is irrelevant for the substance of the criminal offence of producing narcotics, the offence for which M.S. was pronounced guilty by the decision of the first-instance court, whether the defendant produced the narcotics for sale and gaining profit or for his own use, such as medical treatment.¹³ In addition, in a separate provision of the Criminal Code of Serbia, it is prohibited to mitigate the sentence of offenders of this criminal offence, and therefore the lowest statutory penalty that can be pronounced for the perpetrators of this criminal offence is three years of imprisonment.¹⁴

However, a question arises whether a strict application of these legal provisions imposed on the defendant who is terminally ill, who is dying and who

prepared cannabis oil solely for the sake of alleviating his own pain, will bring justice not only to the defendant, but also, will the general public view it as justice served? On the one hand, by applying the law conscientiously and objectively, judges ensure equality of all persons before the law, and in that sense, the judge's action is in line with the principles of judicial ethics. On the other hand, the heart of the matter in preserving integrity of the judiciary is the conviction of general public that justice has been served in each specific case.¹⁵ In our case, it would be hard to argue that sentencing a dying man to three years of imprisonment means that the justice has been served.

Thus, on the one hand, judges are duty bound to apply the law the way it has been enacted, and on the other hand, international and domestic ethical principles impose that such application of the law must be just and must be seen as just in the eyes of a reasonable observer.¹⁶ Therefore, on the issue of integrity, it begs a question of how one can justify the sentence delivered on the basis of obviously unjust law or a legal rule the outcome of which is strikingly unjust, and whether such a sentence undermines or maintains judicial integrity.

¹² Justice Antonin Scalia - *Of Democracy, Morality and the Majority*, Address and Response to Questions at the Gregorian University in Rome (May 2, 1996), in 26 ORIGINS 82, 89 (1996)

¹³ *Criminal Code of the Republic of Serbia* ("Official Gazette of RS", No. 85/2005, 88/2005 - corrigendum, 107/2005 - corrigendum, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019), Art. 246 Para. 1

¹⁴ *Ibid*, Art. 57 para. 2

¹⁵ *Bangalore Principles of Judicial Conduct*, *supra* note 1, Value 3, § 3.2

¹⁶ *Ibid*.

¹⁰ UNODC, *Commentary on Bangalore Principles of Judicial Conduct*, 2007, §108

¹¹ *Ibid*, § 32

4. DIRECT APPLICATION OF INTERNATIONAL STANDARDS ON HUMAN RIGHTS

When discussing the issue of applying an unjust law, we should reflect upon a possibility of direct application of international standards on human rights. The Constitution of the Republic of Serbia prescribes that ratified international treaties and generally accepted rules of the international law shall be part of its own legal system, and that laws and other general acts enacted in the Republic of Serbia may not be in contravention of the former ones.¹⁷ The rule of direct application of human rights enshrined in generally accepted rules of international law and ratified international treaties shall apply, and provisions on human rights shall be interpreted in accordance with international standards on human and minority rights, and the practice of international institutions which supervise their implementation.¹⁸ It is also envisaged that courts shall perform their duties not only in accordance with domestic legal rules, but also in accordance with generally accepted rules of international law and ratified international contracts.¹⁹

Consequently, one may conclude that judges in the Republic of Serbia, same as in other states of Europe, are obligated to apply the European Convention and legal rules developed by the European Court of Human Rights in its case-law.

No matter how extensive the case-law of the European Court of Human Rights may be, it cannot be applied to each situation where application of a certain norm may result in an unjust outcome. If we go back to our hypothetical case now, we will see that there is no legal opinion of the European Court of Human Rights which would indicate that imprisonment of a terminally ill person who manufactures cannabis oil in order to alleviate his own pain represents a violation of his/her own rights. Therefore, in this case, the judge's ethical dilemma still remains regarding an unjust solution that the application of domestic criminal justice norms entails.

5. EVOLUTIVE INTERPRETATION OF HUMAN RIGHTS

The European Convention itself incorporates about a dozen articles which deal with human rights, which is why it is proclaimed in the Court's practice that the Convention is a living instrument²⁰, and that its provisions on human rights are interpreted, amended and changed through the Court's practice. What happens once a judge is confronted with a dilemma whether or not to apply the obviously unjust domestic law, in case the Convention neither offers a legal rule that might be applied directly, nor has such a legal rule ever been set in the case-law through individual decisions delivered by the Court?

Is there a possibility for a judge to apply evolutive interpretation of human rights referring to the provisions of the Convention, giving them a new content and meaning?

Far back in the 1970's, Ronald Dworkin asked the following questions: '*Do judges always follow the rules, even in hard and controversial cases, or do they sometimes create new rules and apply them retroactively? For decades now, legal professionals have discussed the notion of what does respect for the rules actually mean. In these dramatic cases, the court stipulates the reasons, and not provisions, and refers to the principles of justice (...) Does it mean that the court still follows the rules, albeit of more general and abstract quality?*'²¹

This method of resolving the dilemma of whether or not to apply unjust rules may be met with suspicion by legal positivists or its very notion even be discarded as an option, at the outset. The Commentary on the Bangalore Principles, in already mentioned section on integrity, stipulates that judges are expected to apply laws consistently, and that whenever faced with a conflict of such rules and own notions of justice, a judge should resign. However, in the case-law of the European Court of Human Rights the so called *evolutive interpretation* of the provisions of the Convention²² is not unknown, even when it is completely in contravention with the domestic legal rule.

In the case of *Thlimmenos v. Greece*²³ the Court found violation of Article 14 which stipulates the prohibition of discrimination, taken in conjunction with Article 9 of the Convention which guarantees freedom of religion. Thlimmenos, a Greek citizen, was a Jehovah's Witness and a pacifist who, because of his religious belief disobeyed an order to wear the military uniform (as a conscientious objector) during the full-scale draft in Greece, and was therefore sentenced to four years of imprisonment. The Greek law did not recognise a possibility of conscientious objection, nor a similar judicial practice. Some time thereafter, having served approximately two years in prison, Mr. Thlimmenos passed an exam for a chartered accountant, and ranked the second out of sixty individuals who took the test. However, he was refused appointment by the authorities to a post of chartered accountant on account of his serious criminal conviction. Before the European Court of Human Rights, the applicant stated that the domestic laws made no difference between him as a pacifist and other perpetrators of similar criminal offences. In addition, he stated that such a criminal offence could not have posed an obstacle for carrying out the duties of an accountant, especially in view of the motives for the perpetrated offence. The State underlined that the authorities had no other option but to apply the enacted law, which was neutral in its stipulations, and neither made any distinction or imposed an obligation on the courts to investigate the circumstance of the specific case, but to implement the law to all and without any exceptions. The Court found that it

¹⁷ Constitution of the Republic of Serbia, *supra* note 9, Art. 194

¹⁸ *Ibid*, Art. 18

¹⁹ *Ibid*, Art. 142

²⁰ ECtHR, *Tyrer v. the United Kingdom*, Appl. no. 5856/72, Judgment of 25 April 1978

²¹ R. Dworkin, *Taking rights seriously*, (8th ed. 1996), at 23

²² Dzehtsiarou, 'European Consensus and the ECHR's Evolutive Interpretation', 12 *German Law Journal*, (2011) 1730

²³ ECtHR, *Thlimmenos v. Greece*, Appl. no. 34369/97, Judgment of 6 April 2000

was the State which violated articles of the Convention to which the applicant referred to by applying the specific provision of the law. Regardless of the fact that the State did not have a possibility to act outside the law, it did have an option both to apply and to interpret the Convention.

This example clearly points to the conclusion that the abovementioned question posed by Ronald Dworkin was not solely of academic nature. In this specific case, the Court 'gave permission' to the State to disregard its own legal rule, the application of which would be unjust (although it avoided using this term in the judgment, it was obviously the heart of the matter), and 'invited the State' to exercise its own interpretation of the Convention and draw a legal rule which had not been stipulated until then either in the wording of the Convention or through the case-law.

According to the opinion of the authors, this is exactly where evolutive interpretation of human rights is revealed, meaning that there is an option a judge may resort to while resolving his/her ethical dilemma. The European Court had just established such a method of interpreting the provisions of the Convention in order to ensure the development of human rights in accordance with the current times and social and technological developments.²⁴ However, the very fact that a judge may resort to evolutive interpretation still does not mean that his action of this kind will be in accordance with the principles of judicial ethics by which the judge shall be bound.

In our hypothetical case, had the judges applied the evolutive interpretation, they could have found that the application of the legal rule, which is manifested in the sentence of three years of imprisonment, was in contravention with Article 3 of the Convention, because the character of the sanction delivered was inhuman. The judges might have referred to the fact that the law did not distinguish between persons who produce narcotics for the sole purpose of sale and profit and those who do it for medical reasons, because it treats equally the persons who are in significantly different situations, which is contrary to Article 14 of the Convention, which prohibits indirect discrimination. At the same time, due to medical reasons, the domestic law allows for administration of some other narcotic drugs, which is not the case with cannabis oil.

Nonetheless, it would be far more difficult to provide a simple answer to the question whether this judge's action was in line with the Code of Ethics and the proclaimed judicial integrity. Integrity is the attribute of rectitude and righteousness.²⁵ Both terms point toward moral qualities. One could say that evolutive interpretation implies referring to specific moral principles in order to define the body of general legal rules, the like of provisions on human rights. If a judge is bound by judicial integrity to act in all situations, including his own conduct outside the court, not only in accordance with the law, but also in line with ethical rules, could he/she be denied an opportunity to incorporate moral elements when making judicial decisions?

On the one hand, the evolutive interpretation is a challenging move, since the judge declines to apply the domestic legal rule. As a consequence, there is a risk of attracting undesired attention of the public and impair public confidence in the integrity of the judiciary, bearing in mind the duty of the judge to apply the law, and not to contradict it, or try to amend it through his/her decisions. On the other hand, this is not purely and simply the opposing the law situation. Namely, in this case, the judge is confident that application of the law in the specific case would be contrary to legal principles of higher legal order i.e. provisions on human rights which are incorporated in the Constitution and international treaties. Therefore, by applying the *lex superior derogat legi inferiori* principle, the judge makes an endeavour to remain within the principle of legality. Having in mind that it is the role and duty of a judge to submit only to the Constitution and the law, one could not easily conclude that, in this specific case, this would mean violating any of the ethical principles.

However, in addition to already stated concern about the risk that, by its evolutive interpretation, the court has taken over the role of the legislator, a question may be posed whether the criminal court in our hypothetical case did have the power to interpret the provisions on human rights in such a manner.

In practice, the evolutive interpretation is exercised by no other than the European Court of Human Rights, regardless of the fact that the Court, in the case of Thlimmenos, albeit between the lines, did offer a reasoning that the domestic court should have applied this method of interpreting the legal rule. Therefore, the application of evolutive method of interpretation might open the doors to legal uncertainty and judicial arbitrariness, where almost any rule and its application might, under certain circumstances, be questioned from the perspective of whatever might be considered just in the case under consideration. Also, and in spite of the fact that a judge might resort to evolutive interpretation for the sake of preventing indirect discrimination, his/her ethical duty would be to ensure equality of treatment to all appearing before the courts.²⁶ A question may be asked whether an exception from applying the law, due to its unjust character in an extreme case, would represent a violation of this principle in relation to all the other accused to whom this legal rule would otherwise be applied. On the one hand, a judge deviates from applying a legal norm exactly due to exceptional and extreme circumstances of the case to which it should be applied, unlike under the circumstances of other most common cases to which such a legal norm shall be applied. On the other hand, one of the definitions of justice is exactly the application of a certain legal rule in all such situations to which such a rule should apply, judging by its contents.²⁷ One might assess that, in this case, a judge is to choose between formal and substantive equality before the law.

²⁴ A. Cozzi and Others, *Comparative study on the implementation of the ECHR at the national level*, (2016) at 181-184

²⁵ UNODC, *Commentary on Bangalore Principles of Judicial Conduct*, *supra* note 10, § 101

²⁶ *Bangalore Principles of Judicial Conduct*, *supra* note 1, Value 5

²⁷ H. Kelsen, *General Theory of Law and State*, (1945) at 14

6. JUDICIAL SUBVERSION

One of the options that judges may resort to, when confronted with a profoundly unjust legal provision or a provision which, in a specific case, would generate unjust result is the so called 'judicial subversion'. This is a situation in which a legal norm is clear and does not leave any room for broad interpretations, and it is clear to a judge how it should be interpreted and applied to a specific case. However, the judge may realise that the particular outcome achieved in this way would be fundamentally unjust, and therefore opt to attach another meaning to the legal norm than the one he/she viscerally knows it carries.²⁸ Therefore, a judge may depart from a clear and commonly accepted application of the norm, which is widely used in practice, offering a reasoning which, the judge knows is incorrect from a strictly legal point of view, but is deeply convinced that it is in compliance with fundamental principles of justice and human rights.

This kind of "judicial subversion" should be distinguished from a creative interpretation of the law, which occurs when judges are confronted with ambiguous legal provisions or standards. In such situations, a judge is nevertheless expected to determine the proper meaning of insufficiently precise legal norm in each particular case. However, as already stated, 'judicial subversion' is about precise and strict norms of imperative nature which leave not much space for different interpretations.

A special form of 'judicial subversion' exists when there is a tendentious treatment of factual issues aimed at bypassing an unjust legal norm.²⁹ In this situation, the judge is aware that the facts of the case, determined by his conscientious assessment of presented evidence, will imply a legal norm which will result in manifestly unjust outcome. Consequently, the judge attaches more importance to certain facts than actually due while, on the other hand, minimises the importance of some other facts, and in this way the judge applies a more mitigating legal norm which, in judge's opinion, will bring the just result.

Although there is not much talk in public about this issue, this kind of 'judicial subversion' is quite common in judicial practice. Namely, this kind of conduct represents a *judicial lying* of its own kind, where a judge delivers a decision he/she knows is not right from a strictly legal point of view. Therefore, as a rule, judges will not admit to having resorted to this method. Hence, it is not always easy to identify court decisions where judges resort to 'judicial subversion'. In fact, it would be fair to say that judges are most successful in this activity when, in their reasoning they manage to hide as much as possible that, in a specific case, they were fully aware of resorting to a different treatment of factual and legal issues in relation to other cases to which the same legal norm is due to be applied. In such a case, it is more probable that the judicial subversion will pass unnoticed and it is less probable that they will attract unwanted attention of the public and critique on account of the judge who had knowingly broken the law, and

therefore exceeded the powers of his judicial office. For all of the above mentioned, Ronald Dworkin suggested that it would not be wise to make this method a part of the theory of law, although he himself thought it was a necessity in certain cases.³⁰

This begs a question of how a panel of judges could resolve our hypothetical case in the above stated manner. Judges might start from the fact that the subject criminal offence falls under the section of criminal offences against human health. Therefore, it is the human health which is the object of protection i.e. persons who produce narcotics are sanctioned exactly because they produce a substance which is harmful to human health. Conversely, in our hypothetical case, the defendant produced cannabis oil in order to improve his medical status. He did not do so in order to misuse a narcotic drug or to sell it to other people. Incidentally, his own manufacture of cannabis oil was an extorted solution, in view of the fact that the state did not provide this type of treatment to persons suffering from such grave illnesses. In terms of the subjective relationship of the defendant towards the criminal offence, judges might note that the defendant's intention was not to produce the narcotics as a detrimental substance which may be misused, but as a medication. Given such reasoning, the defendant would be freed of charges for committing this criminal offence. Although the stated reasons are more than relevant, they are still in contravention with the Criminal Code of the Republic of Serbia, which provisions stipulate that

the intention with which a perpetrator commits a criminal offence is not relevant for the act of producing narcotics.³¹

Finally, of course, there is a question of bringing into line the proceedings with the principles of judicial ethics. Formally speaking, by applying this method the judge remains within the law. He does not nullify the domestic law in a manner in which a judge who would opt for evolutive interpretation of human rights would do. Only the legal professionals will be able to identify 'judicial subversion' here, especially if the judge offered convincing arguments for his/her decision. On the other hand, it is more probable that such court's decision, in the eyes of the general public will be perceived as justice served. Therefore, one might assume that this is the kind of practice that judges relatively frequently opt for in order to resolve their ethical dilemmas.

However, as already stated, 'judicial subversion' represents a kind of judicial lying; since the judge knowingly makes a decision and offers corresponding reasoning, well aware that it is not in accordance with the commonly practised interpretation of a certain legal norm. In relation to this, it would be best to quote from the Commentary on the Bangalore principles, which stipulates that '*a judge should always, not only in the discharge of official duties, act honourably*' and '*be free from fraud, deceit and falsehood*', as well as that there are no degrees of integrity, and that it is absolute.³² Likewise, the Bangalore Principles underline that a judge is duty bound to exercise the

³⁰ R. Dworkin, *supra* note 21, at 327

³¹ The answers of the Criminal Department of the Supreme Court of Cassation to disputed legal issues from the session held on November 14th, 2014, available at: <https://www.vk.sud.rs/sites/default/files/attachments/10%20KO%2014.11.2014..pdf>

³² UNODC, *Commentary on Bangalore Principles of Judicial Conduct*, *supra* note 10, §101

²⁸ Butler, 'When Judges Lie (and When They Should)', 91 *Minnesota Law Review* (2007) 1785

²⁹ Smith, 'May Judges Ever Nullify the Law?', 74 *Notre Dame Law Review* (1999) 1657, at 1660

judicial function independently, and in accordance with a conscientious understanding of the law³³, which begs the question of whether in the case of 'judicial subversion' we are talking about conscientious understanding of the law, or not. Therefore, one might consider that such an approach, on the one hand, contributes to delivery of a just decision with minimum damage to the external reputation of the judiciary while, on the other hand, it contradicts the ethical prerequisites of honest conduct and conscientious application of the law by a judge.

7. RESIGNATION

One of the options that judges have at their disposal, and which is not that common in judicial practice, is to resign their post. The Commentary on the Bangalore Principles regarding conduct of judges who are confronted with the so called 'moral vs. formal' dilemma offers exactly such a recommendation to judges. If a judge is duty-bound to apply the law, and the law is unjust or immoral, then it follows that the moral thing for the judge to do is resign.³⁴ The case known worldwide is that of Mahatma Gandhi who said the following to the judge before whom he had been summoned: *'The only course open to you, the judge, is as I am just going to say in my statement, either to resign your post, or inflict on me the severest penalty, if you believe that the system and law you are assisting to*

*administer are good for the people.*³⁵ With these words, Gandhi showed that he had recognized the moral dilemma in which the judge who trialled his case found himself, and therefore he suggested two options to the judge – to apply the law, if the judge believed that the system and the law were good for the people, or to resign, hinting that the latter would be morally more appropriate in this specific case.

The above mentioned illustrates that the idea of resignation, when judges are confronted with ethical dilemmas is no novelty at all. Far back in 1840 in the USA, a part of the professional public demanded that judges opposing the institution of slavery should resign, and in this way rise against unjust slave owners' laws they were forced to apply.³⁶ Albeit rarely, it would happen from time to time in American judicial practice that a judge confronted with a profound ethical dilemma decided to resign. In relation to this, a well-known case is the one of the renowned Justice Robert F. Utter who became the youngest elected judge in the history of American judiciary, and who resigned from his judicial function on March 30, 1995, after 23 years on the Washington Supreme Court. He composed a formal letter that was sent to the governor, where he wrote: *'I have reached the point where I can no longer participate in a legal system that intentionally takes human life. (...) We are absolutely unable to make rational distinctions on who should live and who should die.'*³⁷ Confronted

with deeply unjust sanction of frequent practice of taking human life, Justice Utter eventually chose to resign. Throughout his career, Utter dissented in two dozen death penalty cases, while in public debates and discussions he persisted in his viewpoint that the law should be changed and the death penalty abolished. The resignation of Justice Utter had such a huge impact that a year after that, a symposium was organised in the USA on the role of morals in delivering judicial decisions. This panel posed some major questions like: what does constitute a violation of the judicial oath; what are the boundaries of civil disobedience; does disobeying the rules undermines judge's integrity, and all these questions, to some extent or even entirely, touch on the topic of the present paper. Other collocutors on the panel presented views that Justice Utter's resignation launched the issue of conscience *'in a dramatic and forceful way (...) and may very well have changed the terms of debate'* on capital punishment in America.³⁸ Such an observation proved to be correct, having in mind that after the Justice Utter's decision, death sentences in America have declined more than 60 percent. After the resignation, Justice Utter continued to work on the USA Government projects, on strengthening the integrity of judges throughout the world, teaching courses to judges in Asia and in Eastern Europe to emerging democracies. A sentence he used to explain his personal decision to resign still resonates: *'At certain times, the simple refusal to do the wrong thing is the closest one can come to the true rule of law.'*

However, there are opposing views on resignation as a way of resolving moral dilemmas. According to some authors, the practical issue with resignation is that it will remain 'an ineffective means of helping those victimized by unjust laws.' *'If the virtue of resignation is that it avoids both the violation of the judicial oath and the application of oppressive law, the vice is that it probably will be ineffective, because other judges will apply that law. Resignation is not morally pure, either.'*³⁹

It is correct to say that, by offering resignation, a person affected by unjust laws will not be spared of its application, because the resigning judge will be replaced by another one who will be required to apply the enacted law. Nevertheless, according to the opinion of the authors of this paper, the very act of resigning on account of moral grounds is definitely challenging exactly for the reason it represents an act of rebellion against injustice, and one does rebel against injustice publicly, but in a noble and dignified manner. At the same time, one rises against injustice by scarifying own well-being – his/her career, but safeguarding own judicial integrity, as well as integrity of the entire judiciary. In such a case, a judge leaves the judicial office, but his/her professional career remains unblemished, and the very act of resignation may serve as a driver of change regarding unjust legal provisions and its amendments and supplements, like in the case of Justice Utter.

³³ Bangalore Principles of Judicial Conduct, supra note 1, Value 1, § 1.1

³⁴ Pitts II, 'Judges in an Unjust Society: The Case of South Africa', 15 Denver Journal of International Law & Policy (1986) 49, at 87

³⁵ Available at: https://www.mkgandhi.org/law_lawyers/25great_trial.htm

³⁶ Ledewitz, 'An Essay Concerning Judicial Resignation and Non-Cooperation in the Presence of Evil', 27 Duquesne Law Review (1988) 1

³⁷ "Robert F. Utter", Research by John Hughes and Lori Larson, Transcript on by Lori Larson, Interviews by John Hughes, available at <https://www.sos.wa.gov/legacy/stories/robert-utter/pdf/complete.pdf>

³⁸ Ibid.

³⁹ Joe W. Pitts II, supra note 34, at 87

On the other hand, it is obvious that by the act of resignation, in this specific case, justice as such would not be served, but it would be left to another judge to resolve the same dilemma in his/her own way. Still, although the judge leaves his/her judicial function, as an ultimate measure, resignation as such leaves a deep impact on judicial practice, which will induce the moral dilemma in other judges with regard to unjust laws and it will raise the level of sensitivity and judicial integrity in the process of delivering decisions.

8. CONCLUSION

The full burden of ethical dilemma that judges are confronted with in delivering a decision in the given hypothetical case is reflected in elaborated *pros* and *cons* with regard to its impact on integrity of judges and the judiciary, respectively. The studies on this topic so far have mainly dealt with the position of a judge in totalitarian regimes i.e. situations when the judge is forced to make a choice between immoral law and moral lawlessness. However, our hypothetical case shows that judges in today's Europe are also confronted with this ethical dilemma, due to imperfections of the law and extreme circumstances of the case that might fall within its range of application.

Certainly, a judge should primarily be aware of his/her privileges, as well as duties and burden, to be subjected only to the Constitution and the law. By taking the judicial office, the judge demonstrated readiness to sacrifice personal opinion on a certain case for the sake of due application of the law, but also to disregard the opinion of the general public and refrain from taking alliance with the general public, simply because they represent the opinion of the majority. On the other hand, integrity of a judge calls for fairness, awareness of social circumstances and changes, but also of consequences of judge's own decisions. A judge must be brave, have broad views and in his work must endeavour to serve justice and protect individual rights and freedoms. The dilemma arises when the judge should decide which of these values shall prevail in delivering the decision. In fact, it would be fair to say that it is up to the judge to make a fine balance and reconcile all of the mentioned values. Since the very ethical dilemma is a difficult one, so will any decision a judge may deliver be, from the aspect of sacrificing one set of values so that some other may be achieved. The answer to the question which decision is right or appropriate in cases of this nature will never be easy. However, the acknowledgment of this ethical dilemma, and a balance achieved between the stated values represents a safe indicator that judges are aware of their position and duties, which is also a safe indicator of their integrity.

Nonetheless, it is the opinion of authors of this paper that boundaries of judicial ethics are broader than the boundaries of legality. In fact, the totality of individual and collective qualities that judges integrity implies indicate that it cannot be reduced solely to the duty of mere application of the law. Therefore, it is our opinion that a judge is obligated to search for a solution which would reconcile legality and justice. In search of a just solution, a judge should not be limited by the law's usual rigor in its application, particularly in cases which have not been appropriately recognised in the law itself. In such cases, the judge must act as a necessary corrective for imperfections of a specific law, sticking by the fundamental principles of justice – that persons in equal situations are treated with equality and/or to prevent equal treatment of persons under different situations.

The authors of this paper share the view that such treatment does not undermine judicial integrity; on the contrary, it reinforces it. If the foundations of judicial decisions are strong, judicial integrity can only be enhanced, and in this way it shall surpass all obstacles that it may encounter along the way. This is the strong duty of each judge individually, and of the entire judiciary to ensure.

MORGANE COUÉ
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JUSTINE PÉDRON



Team FRANCE

JUDGING THE JUDICIARY

RESPONDING TO JUDICIAL MISCONDUCT WITHOUT THREATENING INDEPENDENCE

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Contemporary events, especially those in Poland where the reform of the Disciplinary Chamber of the Judiciary has been addressed by the European Court of Justice, underline the difficulty of combining judicial discipline with the preservation of judicial independence. At the same time, the development of cooperation bodies, such as the European Public Prosecutor's Office, emphasizes the need to ensure that common guarantees are homogeneously implemented to protect judicial independence. As much as the building of fair answers to judicial misconduct is a democratic imperative to preserve public trust in justice, disciplinary systems should not be politically instrumentalized. Through the analysis of applicable international and regional standards and a comparative study of several judicial disciplinary systems - in France, Italy, Slovakia, Poland and Germany -, this paper demonstrates that although no perfect disciplinary mechanism exists, common guidelines and values should be implemented at European level. It provides proposals for practical procedural and institutional tools to ensure adequate disciplinary responses without threatening judicial independence. It also advocates for stronger cooperation in these matters within the European Union.

KEY WORDS

Judges' discipline
European Union
Judicial Misconduct
Judicial Independence
Judicial Ethics
Judicial Council

1. INTRODUCTION

Judicial accountability inevitably clashes with independence, a cornerstone of the rule of law. All democratic countries have to find the right equilibrium between these two principles. The concept of accountability lends itself to different meanings, going from the revision of judicial decisions through appeal to the global public liability of the judiciary.¹ This essay addresses disciplinary responsibility, one of the most controversial forms of accountability with regard to its relation to judicial independence. On the one hand, the responsibility of judges and prosecutors forms part of a complex relationship between the judiciary and other state powers. It may happen that in the event of a conflict with politicians, the judiciary is deliberately weakened. Judicial discipline may then be used as a disruptive political tool to diminish the impact of some judicial decisions by discrediting those who delivered them. On the other hand, there is nowadays a legitimate public demand to sanction judges or prosecutors who, through their behavior, decisions or fail-

ures, cause damage or disturbance. The current legitimacy of the judiciary and its authority no longer rest solely on the power conferred by law, but also on the way its members prosecute, judge² and behave – and appear to behave - in their private life.

The search for an appropriate disciplinary regime is the subject of many attempts at rationalization. Although the need for international standards has been stressed, national judicial systems, including discipline of the judiciary, differ significantly, which makes the definition of universal rules difficult to achieve. The European continent is a representative example of the gap between a commitment to common standards and a reality that presents disparate national regimes. In some countries, such as Poland and Slovakia, the judiciary does not include prosecutors. In France and Italy, to the contrary, the term 'magistrates' refers to both judges and prosecutors who belong to the same corps. In other countries, like Germany, prosecutors are also considered as members of the judiciary although they form a corps that is

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¹ Consultative Council of European Judges ('CCEJ'), Opinion No. 18 on the position of the judiciary and its relation with the other powers of state in a modern democracy, 16 October 2015, § 30. If a judge has engaged in improper actions, he or she must be held accountable through the application of disciplinary procedures and, if appropriate, the criminal law. Civil liability, which also works as a sanctioning mechanism insofar as it entails censure of judges' decision-making behavior and payment of damages, will not be studied in this essay.

² Canivet, Joly-Hurard, 'La responsabilité des juges, ici et ailleurs', 4 *Revue internationale de droit comparé* (2006) 1050, at 1050-1051.

distinct from that of the judges.³ Such differences among prosecutors are likely to raise specific questions regarding their discipline, in particular in view of the creation of the European Public Prosecutor's Office ('EPPO'). The implementation of this institution has furthered the necessity to build some kind of homogeneity within the European Union ('EU') regarding the liability of the judiciary as a whole. Thus, in addition to the disciplinary regime of judges, that of prosecutors is addressed in this essay when they are members of the judiciary.

This paper aims to highlight the diversity of national judicial disciplinary bodies in the EU in order to demonstrate that, beyond national specificities that shape disciplinary systems, common guidelines and good practices remain necessary. In the first part, the existing international standards on this matter are detailed (1). The second part provides a comparative analysis of several national judicial disciplinary regimes in the EU (2). The third presents concrete proposals aiming to strengthen the fairness of disciplinary procedures (3).

2. EXISTING STANDARDS AT INTERNATIONAL AND REGIONAL LEVELS

At international and European levels, the discourse on judicial independence has long overshadowed that of accountability, the relevance of which has only been acknowledged lately.⁴ Consequently, the guarantees defined to ensure balanced responses to judicial misconduct remain relatively broad. The case-law of the European Court of Human Rights ('ECtHR') and the Court of Justice of the European Union ('ECJ') nevertheless highlights significant aspects of disciplinary proceedings.

A. GENERIC STANDARDS BELATEDLY DEFINED

General international statements, rather than concrete guidelines on judges and prosecutors' duties have been produced. Alongside Article 11 of the United Nations Convention against Corruption,⁵ the 2006 Bangalore Principles of Judicial Conduct provided for six values aiming at the preservation of judicial ethics and introduced implementation mechanisms.⁶

Through the Commentary on the Bangalore Principles and the Measures for the Effective Implementation of the Bangalore Principles, the Judicial Integrity Group presented tangible recommendations for the concretization of these values. Non-binding charters have also been developed, such as the 1999 Universal Charter of the Judge.⁷ Regarding disciplinary proceedings, tangible recommendations have been made, notably in the 1985 Basic Principles on the Independence of the Judiciary, which advocate for fair procedures subjected to independent review, and based on legally determined offenses.⁸ These principles, which sketch the outlines of judicial discipline in democracies, still allow for major diversity in national practices.⁹

B. THE ECtHR AND ECJ: CASE-LAW FOCUSED ON INSTITUTIONAL AND PROCEDURAL ASPECTS

The ECtHR and the ECJ seek to guarantee procedural fairness and judges' rights in order to protect judicial independence as a safeguard of the rule of law. The ECtHR has considered disputes involving judges who contested the legality of

their dismissal or suspension from judicial office. It condemned States that infringed upon the freedom of expression of judges - guaranteed by Article 10(1) of the European Convention on Human Rights - by imposing unjustified disciplinary sanctions. The Court assessed whether the disciplinary proceedings initiated against judges who allegedly misused their freedom of expression were necessary and proportionate to the violation of their duty of loyalty, reserve and discretion.¹⁰ It sanctioned proceedings that provoked a chilling effect on judges in order to discourage them from participating in the public debate about the justice system.¹¹ The ECtHR also ensures that judicial disciplinary proceedings respect the fair trial guarantees protected by Article 6(1). In *Olujić v. Croatia*,¹² the Court appreciated the violation of fair trial standards in the light of four criteria: the lack of impartiality of the tribunal, the violation of the principle of equality of arms, secrecy and excessive length of proceedings. In addition, the Court found that when the same disciplinary body brought charges, conducted proceedings and ultimately imposed sanctions, its impartiality appeared open to

³ For this reason, this essay considers the terms 'judiciary' broadly, as applicable to judges and prosecutors, when the latter are institutionally integrated in the judicial branch.

⁴ For example, CCEJ, Opinion No. 18, *supra* note 1.

⁵ UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422.

⁶ ECOSOC Res. 2006/23.

⁷ International Association of Judges, Central Council, Universal Charter of the Judge, 1999.

⁸ United Nations Office on Drugs and Crime ('UNODC'), Basic Principles on the Independence of the Judiciary, 1985, Principles 17 to 20. At European level, several regional instruments contain provisions on the disciplinary responsibility of judges, namely the European Charter on the Statute for Judges (1998) and the Council of Europe ('CoE') recommendation on judicial independence, see Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities. Advisory bodies of the CoE also contributed to clarifying some aspects of judicial liability. The CCEJ adopted an opinion devoted to the principles and procedures governing the liability of judges (*supra* note 1), and referred to this issue as well in the Magna Carta of Judges (2010). With regard to prosecutors, see, for example, Consultative Council of European Prosecutors, Opinion No.9 on European Norms and Principles regarding Prosecutors (2014).

⁹ Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, A/75/172, 17 July 2020.

¹⁰ ECtHR, *Albayrak v. Turkey*, Appl. no. 38406/97, Judgment of 31 January 2008; ECtHR, *Kudeshkina v. Russia*, Appl. no. 29492/05, Judgment of 26 February 2009. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>

¹¹ ECtHR, *Baka v. Hungary*, Appl. no. 20261/12, Judgment of 23 June 2016

¹² ECtHR, *Olujić v. Croatia*, Appl. no. 22330/05, Judgment of 5 February 2009

doubt.¹³ Finally, the ECtHR considered in several cases that judicial councils were dependent and partial due to their composition and mode of designation.¹⁴ In this respect, there are pending applications regarding the legal reforms of the judiciary in Poland.¹⁵

The recent case-law of the ECJ sets out guarantees that disciplinary proceedings should include in order to respect the principle of independence: a procedure led before an independent body that respects defense rights and the right of appeal, as well as the formalization of rules defining disciplinary offenses and sanctions.¹⁶ Sanctions should be adequately motivated and fair trial safeguards respected, especially that of an impartial and independent tribunal.¹⁷

Despite these guarantees at international and regional levels, national disciplinary systems remain diverse in the EU and protect judicial independence with mixed results.

3. THE MAZE OF NATIONAL JUDICIAL DISCIPLINARY SYSTEMS IN THE EU

Judicial disciplinary regimes in Europe are varied. In particular, they include long-standing judicial council systems, like Italy and France, judicial council systems set up more recently in younger democracies, such as Slovakia and Poland, and federal states without a judicial council, like Germany.

A. THE “JUDICIAL COUNCIL SYSTEM”: THE EXAMPLES OF ITALY AND FRANCE

Judicial council systems embody common features: the constitutional affirmation of the judiciary’s autonomy and responsibility through judicial councils, and similar disciplinary prosecution methods and measures.¹⁸ As this scheme subtends an ongoing interconnection between politics and the judiciary, its ability to safeguard independence sometimes hangs by a thread. France and Italy are distinctive examples that present striking similarities.

Both countries saw their judiciary, composed of judges and prosecutors, re-defined after the Second World War. The 1947 Italian Constitution and the 1958 French Constitution established strong guarantees of judicial independence¹⁹ and envisaged a judicial council to which judges and prosecutors are accountable. The establishment of a single council is historically rooted, designed to create consistent values shared by both judges and prosecutors.²⁰ However, in France, differences between the disciplinary treatment of judges and prosecutors persist and are highly debated, as representatives of the *Cour de cassation* strongly advocate for their unification.²¹

1. The art of balance: the composition of judicial councils

One specific debate about the judicial council system pertains to the composition of judicial councils, and the potential corporatist bias they carry.²² In 2008, the composition of the French Judicial Council was renewed in order to lower the number of magistrates on the board.²³ The disciplinary sections (one responsible for judges and one for prosecutors) are now made up of a president, seven members of the judiciary elected by their peers, one administrative judge,

one lawyer and six lay members appointed by the executive and legislative powers.²⁴ In Italy, the judicial council has a mixed composition with a majority of magistrates. Only one-third of its members are elected by Parliament. Its single disciplinary section, responsible for both judges and prosecutors, includes four magistrates and two lay members.

The predominantly judicial make-up of councils has been criticized. Professor S. Benvenuti pointed out that the overrepresentation of the judiciary in the Italian Judicial Council has long prevented the opening up of judicial recruitment to alternative channels.²⁵ Articles 2 and 3 of the Universal Charter of the Judge state that disciplinary authorities shall include members from outside the judicial profession, but exclude members of the legislative or executive branches. The presence of lay people within the disciplinary authority does not always form a barrier against the drifts of corporatism. The example of the Italian Council is emblematic as lay members were themselves involved in the circuits of influence dominated by magistrates’ associations,²⁶ and favored the appointment of magistrates ideologically close to their parties of origin.²⁷

¹³ ECtHR, *Kamenos v. Cyprus*, Appl. no. 147/07, Judgment of 31 October 2017, at para 102-110
¹⁴ ECtHR, *Oleksandr Volkov v. Ukraine*, Appl. no. 21722/11, Judgment of 9 January 2013; ECtHR, *Kulykov and others v. Ukraine*, Appl. no. 5114/09, Judgment of 19 January 2017
¹⁵ ECtHR, *Tuleya v. Poland*, Appl. no. 21181/19; ECtHR, *Grzęda v. Poland* Appl. no. 43572/18. In *Broda and Bojara v. Poland*, the Court considered that since the premature termination of the applicants’ term of office had not been examined by a body exercising judicial duties, Poland infringed the right of access to a court. In this case, the applicants complained that they did not have any remedy allowing them to challenge the decisions of the Minister for Justice to put a premature end to their term of office as vice-presidents of the Kielce Regional Court, see ECtHR, *Broda and Bojara v. Poland*, Appl. no. 26691/18 and 27367/18, Judgment of 29 June 2021
¹⁶ Case C-216/18, *Minister for Justice and Equality* (EU:C:2018:586) at para 67
¹⁷ Case C-64/16, *Associação Sindical dos Juizes Portugueses* (EU:C:2018:117) at para 16
¹⁸ The Spanish Constitution consecrates the principle of judge’s responsibility in Article 117(1) as the democratic counterpart of judicial independence, CSM Conference, *L’effectivité de la responsabilité des magistrats en droit français et approche en droit comparé*, 6 May 2021 (Speech by C. Lesmès).

¹⁹ Constitution of 22 December 1947 (Italy); Constitution of 4 October 1958 (France).
²⁰ See M. Fabri, *Regulating Judges in Italy* (2014), available at <https://www.ippapublicpolicy.org>, at p. 3.
²¹ CSM Conference, *Indépendance et responsabilité des magistrats: les enjeux du débat*, 12 April 2021.
²² Martinel, Natali, ‘Le Conseil Supérieur de la Magistrature, protecteur des magistrats ou des justiciables ?’, 30 *Après-Demain* (2014).
²³ Constitutional Law of 23 December 2008.
²⁴ Article 65 of the French Constitution.
²⁵ Benvenuti, ‘The Politics of Judicial Accountability in Italy: Shifting the Balance’, 14 *European Constitutional Law Review* (2018) 369, at 383.
²⁶ In the 1960s, magistrates’ associations (*correnti*) were institutionalized in the Council. In the beginning, such a development allowed for mutual checks and balances. In the long-term, however, the influence of the judicial associations fossilized, and the politicization of the Council increased, *ibid.*, at 382-383.
²⁷ Interview with Prosecutor Airoma (Italy), 31 May 2021.

2. Defining moral duties and disciplinary offenses

Disciplinary offenses are not homogeneously defined in judicial council systems. Some countries implement non-binding ethical codes while others provide for strict legal definitions. Authors are divided over the influence of constraining rules on the prevention of judicial misconduct. The absence of clear definitions can be seen as a threat to independence, as it leaves the political branch with a gap in which to pursue unjustified disciplinary actions. In this sense, Article 5.1 of the European Charter of the Statute of Judges recommends the definition of ethical duties by legal statute. To others, the binding definition of ethical duties is a risk, as it limits judges' critical thinking.²⁸

While France has chosen a non-legally binding ethical guideline produced by its Judicial Council, notably because of the constantly evolving nature of judicial ethics,²⁹ Italy has ensured a clearer definition of disciplinary offenses. In 2001, the ECtHR issued a decision criticizing the lack of foreseeability of disciplinary offenses.³⁰ In reaction, the Italian Parliament formalized the definition of such offenses.³¹ Judges in Italy are divided

over the legalization of disciplinary offenses. For some, current legislation does not yet provide the precision required by European standards.³² For others, this precision may be a drawback, as it entraps the definition of misconduct, leading to the application of administrative (less protective) proceedings and disguised sanctions to non-legislated behavior.³³

3. Problematic political interference in proceedings and sanctions

Judicial council systems provide guarantees aiming to ensure a balance between the response to judicial misconduct and the preservation of independence. Disciplinary proceedings present a jurisdictional character in Italy³⁴ and in France,³⁵ which secures the fair trial rights of the defendant magistrates. Disciplinary sanctions, prescribed by law, go from admonition to complete dismissal.³⁶ In France, nonetheless, the Judicial Council determines the penalty imposed on a judge, whereas the Minister for Justice is the competent authority for prosecutors.³⁷

The framing of disciplinary proceedings according to fair trial rules does not prevent judicial council systems from being

subjected to political influence. In both Italy and France, the Minister for Justice can take the initiative of disciplinary proceedings, even after the General Prosecutor has closed a case (in Italy) or after the Judicial Services Inspectorate (in charge of conducting a preliminary administrative inquiry in France) has concluded that there has been no misconduct.³⁸ In a 2021 statement,³⁹ the French Judicial Council expressed its concern about a disciplinary procedure initiated by the executive against prosecutors based on fragile accusations and insufficient proof of judicial misconduct. In such cases, disciplinary procedures are the mirror of a crisis in the judiciary, as defendant magistrates are exposed to disciplinary initiatives intended for political interest.

Even if it is imperfect, the 'judicial council model' later served as a template promoted to increase judicial independence, particularly in Central and Eastern Europe. After 1989, countries of the former Eastern Bloc created their own judicial councils in order to enter the EU. Slovakia and Poland, an analysis of which shows the limits of such a system, may be cited as an example.

B. THE LIMITS OF THE 'JUDICIAL COUNCIL SYSTEM' IN SLOVAKIA AND POLAND

In the 1990s, Slovakia and Poland started a democratic transition eventually leading to their accession to the EU that included the development of a strong judiciary with the creation of judicial councils. The experiment, as will be demonstrated hereafter, resulted in a pitfall, as it did not prevent politicization of the judicial branch. In both countries, prosecutors are not part of the judiciary and have their own disciplinary regimes. This is the reason that they will not be addressed here.⁴⁰

1. The controversial implementation of judicial councils

The introduction of the Judicial Council of the Slovakian Republic (JCSR) in 2002⁴¹ significantly affected the disciplining of judges.⁴² The JCSR is competent to elect and recall members of the disciplinary panels that are attached to the Supreme Court. It also decides on the number of disciplinary panels and their schedules. The number of judges in the disciplinary panels has evolved, as a reorganization in 2003 changed their composition so that judges became a

²⁸ Y. Gaudemet, 'La déontologie : un pouvoir masqué', *Académie des Sciences Morales et Politiques, Institut de France*, 27 April 2021, available at <https://academiesciencesmoraletpolitiques.fr>.

²⁹ Conseil Supérieur de la Magistrature (France), *Compendium of the Judiciary's Ethical Obligations* (2019).

³⁰ ECtHR, *NF v Italy*, Appl. no. 37119/97, Judgment of 2 August 2001

³¹ Law No. 150/2005 of 25 July 2005 and Legislative Decree No. 109/2006 of 23 February 2006 introduced three categories of disciplinary offenses depending on whether they had been committed during or outside the exercise of judicial functions and whether they result from committing a crime.

³² G. Oberto, *The Italian Experience in the Fields of Judicial Ethics and Judicial Discipline*, available at <http://biblioteca.cejamerica.org>, at 11-18.

³³ Airoma, *supra* note 27.

³⁴ Italian Constitutional Court, Judgment of 2 February 1971, Case No. 12.

³⁵ Articles 49 to 58 (for judges) 58-1 to 66 and (for prosecutors) of Law of 22 December 1958 relating to the statute of the judiciary.

³⁶ *Ibid.*, article 45 (France); Articles 19, 20 and 21 of Royal Decree No. 511 of 1946 (Italy).

³⁷ Articles 59, 65 to 66 of Law of 22 December 1958. The Judicial Council gives only its opinion.

³⁸ *Ibid.*, articles 50-1 and 50-2; Article 107(2) of the Italian Constitution.

³⁹ CSM Public Communication (16 April 2021), available at <http://www.conseil-superieur-magistrature.fr>.

⁴⁰ See *supra*, at 2-3. In Slovakia, prosecutors come under their own institutions, particularly the Public Prosecution Office, which is composed of five disciplinary commissions and two appeal panels, including exclusively prosecutors. Law No. 154/2001 of 28 March 2001 set out the provisions for prosecutors' liability. In Poland, the disciplinary regime of prosecutors was reformed through the Law on the Public Prosecution Office of 28 January 2016. The structure of the proceedings is similar to that of judges, with the difference that disciplinary judges are appointed by the general assembly of prosecutors at regional level. The Themis association of judges criticized the reform as it enabled the demotion of almost one-third of public prosecutors (113 prosecutors) from the two highest levels of the Prosecution Office.

⁴¹ Article 141a of the Constitution of Slovakia of 1 October 1992; Law No. 185/2002 of 11 April 2002 on the Judicial Council of the Slovak Republic.

⁴² D. Kosar, *Perils of Judicial Self-Government in Transitional Societies* (2016), at 304-307.

minority.⁴³ In 2008, following a ruling by the ECtHR,⁴⁴ the law reestablished the requirement of a majority of judges on each panel.⁴⁵

The *Krajowa Rada Sądownictwa* ('KRS') is an institution vested by the 1989 Polish Constitution with the mission to protect judicial independence as well as to motion the executive power to appoint judges for an indefinite period.⁴⁶ Although not an adjudicating body, its activities are related to the professional activities of judges: appointment and admission, promotion, transfer, dismissal or early retirement.⁴⁷ Article 187 of the Constitution sets the number of members at 25, including 15 members chosen from the judiciary. Until the 2017 reforms,⁴⁸ they were elected by their peers. In 2017, the appointment procedure changed, and the term of office of the 15 judicial members was prematurely interrupted. The new KRS was only staffed in March 2018 as the elections were boycotted and only 18 candidates ran for these positions following a negative position taken by judges' associations on this new procedure.⁴⁹ Indeed, since then, the 15 judicial members are appointed

by Parliament. Consequently, the legislative branch now appoints 21 of the 25 members of the KRS.

While this reform was presented by the Government as an evolution towards greater democratic representativeness of the judiciary, the change has been denounced as lessening judicial independence and endangering the rule of law. According to Pawel Filipek, '*the new appointment mechanism introduces a domination of political powers over the judiciary and is inconsistent with the principle of the separation of powers (...). It violates not only the Polish constitutional standards but also the European rules.*'⁵⁰ The European Network on the Councils of the Judiciary suspended KRS membership in September 2018, considering its members no longer met the independence criteria.⁵¹

2. Disciplinary proceedings: theory versus reality

In 2003, Slovakia opted for a comprehensive list of disciplinary misconduct.⁵² On the contrary, Poland has no such detailed list. The law provides that judges are liable for professional misconduct,

including obvious and gross violations of the law and breach of the dignity of office.⁵³ Nevertheless, both countries have similar sanctions: reprimand, salary reduction, dismissal from function or office, and demotion to another court.⁵⁴

In Slovakia, the JCSR initiates disciplinary motions⁵⁵ together with the Minister for Justice, the Ombudsman, the President of the Supreme Court, presidents of district and regional courts, and since 2005, judicial boards.⁵⁶ The fair trial rights of the defendant judges are guaranteed by law.⁵⁷

In Poland, disciplinary proceedings have evolved profoundly since 2017.⁵⁸ At first instance, cases are heard by disciplinary courts at appellate courts or by the newly created Disciplinary Chamber of the Supreme Court.⁵⁹ At second instance, all cases are adjudicated by this Disciplinary Chamber. The Disciplinary Chamber members are judges selected by the KRS.⁶⁰ They do not report directly to the President of the Supreme Court. The Disciplinary Chamber has jurisdiction

over disciplinary proceedings involving Supreme Court judges. The Disciplinary Commissioner and the disciplinary officers carry out the investigation and decide upon the initiation of proceedings before the relevant disciplinary court. They are appointed by the Minister for Justice. Before the reform, the KRS was competent to appoint them. The Minister for Justice, as Prosecutor General, may also appoint the Disciplinary Commissioner for the purpose of conducting a specific case relating to a judge. He plays a predominant role in disciplinary proceedings, having the power to initiate proceedings, appeal decisions, and object to the discontinuation of proceedings.⁶¹

3. Critical analysis: the use of disciplinary proceedings for political purposes

The Slovakian disciplinary system complies with most international standards. Statistics even suggest that it has been a success, as the number of disciplinary motions increased significantly in 2003 and has remained high in the following

⁴³ Art. 119(6) of Law No. 385/2000 on Judges and Lay Judges, as amended by Law No. 185/2002. In practice, professional judges represented a majority in the judicial council as even other institutions appointed judges as members. See Bobek, Kosar, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', 15-7 German Law Journal (2014) 1257, at 1284.

⁴⁴ ECtHR, *Paluda v. Slovakia*, Appl. no. 33392/12, Judgment of 23 May 2017

⁴⁵ Kosar, *supra* note 42.

⁴⁶ Articles 178 and 186 of the Constitution of Poland of 2 April 1997.

⁴⁷ Filipek, 'New national council of the judiciary and its impact on the supreme court in the light of the principle of judicial independence', *Problems of Contemporary International, European and Comparative Law (PWPM)*, (2018) 177, at 178.

⁴⁸ Act of 8 December 2017 amending the Act of 12 May 2011 on the National Council of the Judiciary and certain other laws.

⁴⁹ See Gajda-Roszczyńska and Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland', *Hague Journal on the Rule of Law* (2020) 451, at 459.

⁵⁰ European standards require that at least half of the national judicial council consists of judges who are elected by their peers, see Filipek, *supra* note 47, at 180.

⁵¹ European Network on the Councils of the Judiciary ('ENCJ'), Position Paper on the membership of the KRS of Poland (2018), available at <https://www.encj.eu/node/495>.

⁵² Articles 116 and 117 of Law No. 385/2000 on Judges and Lay Judges, as amended by Law No. 426/2003, see Kosar, *supra* note 42, at 308.

⁵³ Article 107(1) of Act of 27 July 2001 on the Organization of Common Courts.

⁵⁴ Slovakia: Kosar, *supra* note 42, at 309; Poland: Helsinki Foundation for Human Rights, *Disciplinary proceedings against judges and prosecutors* (2019), available at <https://www.hfhr.pl>. Additionally, Poland has a sanction of admonition that does not exist in Slovakia.

⁵⁵ Kosar, *supra* note 42, at 307.

⁵⁶ Article 120(2) of Law No. 385/2000 on Judges and Lay Judges, as amended by Law No. 185/2002.

⁵⁷ See the Submission of Slovakia for the report of the United Nations Special Rapporteur on the Independence of Judges and Lawyers on the disciplinary, civil and criminal liability of judges (2021), available at <https://www.ohchr.org/EN/Issues/Judiciary/Pages/ResponsesDCCLJ.aspx>.

⁵⁸ Act of 8 December 2017 on the Supreme Court; Act of 8 December 2017 amending the Act on the National Council of the Judiciary and some other acts; Act of 20 December 2019 amending the Act on the Organization of the Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland.

⁵⁹ Helsinki Foundation for Human Rights, *supra* note 54.

⁶⁰ At first instance, the Disciplinary Chamber is composed of two judges of the Disciplinary Chamber and one lay judge of the Supreme Court. At second instance, it is composed of three judges of the Disciplinary Chamber and two lay judges of the Supreme Court.

⁶¹ Justice Defense Committee (KOS), *A country that punishes. Pressure and repression of Polish judges and prosecutors* (2019), available at <http://citizensobservatory.pl>.

years.⁶² However, the so-called ‘judicial council Euro-model’, as implemented in most Central and Eastern European countries, was severely criticized. As it did not fit the legal cultures and social conditions of post-communist societies, the system presented major shortcomings.⁶³ By bestowing overly extensive self-regulatory powers on judiciaries immediately after the fall of the totalitarian regime, the model produced isolated and largely unaccountable entities.⁶⁴ In Slovakia specifically, the judicial disciplinary mechanism was used by Štefan Harabin, former President of the Supreme Court (1998-2003 and 2009-2014) and former Minister for Justice (2006-2009),⁶⁵ to intimidate judges who disagreed with him.⁶⁶ In the wake of these shortfalls, reforms were introduced to balance the independence of the judiciary with appropriately strong accountability. In 2014, for example, the position of the President of the JCSR became separated from that of the President of the Supreme

Court, with the goal of diluting the previous concentration of the judicial management power in one individual.⁶⁷ Recently, however, following revelations in the media of criminal misconduct on the part of several judges, legislative changes have been made. The amendments, which fall within the context of a larger reform of the judiciary, allow for the suspension of judges and prosecutors from their functions at the suspicion stage.⁶⁸ In 2020, the CCEJ expressed an adverse opinion to this reform that it considered contrary to judicial independence.⁶⁹

In Poland, many argue that the reforms spurred by the Justice and Law Party concerning judges’ disciplinary regimes endanger the rule of law, as the judicial authority is being put under the tutelage of the Government and its majority in Parliament.⁷⁰ Authors indicate that politically motivated disciplinary and explanatory proceedings are currently pending against at least 81 judges. Nine judges

have been criminally charged publicly due to their judicial decisions.⁷¹

The European Commission filed a complaint before the ECJ in October 2019 to declare the new Polish disciplinary regime illegal.⁷² The Court issued its judgment on 15 July 2021, ruling that Poland did not fulfil its obligations under EU law.⁷³ Firstly, it considered that Poland failed to guarantee the independence of the Disciplinary Chamber as it is composed of judges appointed by the newly politicized KRS. As a result of this lack of safeguard, it found that defining disciplinary offenses by statute could not prevent using a disciplinary regime to put pressure on judges and act as a deterrent, which could influence their decisions. Secondly, the Court considered that fundamental procedural rights were not respected in the disciplinary proceedings. Lastly, it condemned the possibility of engaging disciplinary proceedings if a judge referred to the ECJ through Article 267 of the Treaty on the Functioning of the EU (‘TFEU’), resulting in a ‘chilling effect’ for judges. Indeed, since the adoption of ‘the muzzle law’ in 2019,⁷⁴ disciplinary proceedings may be initiated against judges applying ECJ rulings. In 2020, Judge Paweł Juszczyszyn was sanctioned after being the first judge to implement the ECJ verdict of 19 November 2019,⁷⁵ establishing the criteria for independent and impartial courts.

The cases of Poland and Slovakia demonstrate the interconnectedness between disciplinary regimes, the independence of the judiciary and the rule of law. Through the politicization of their judicial councils, a dangerous shift may be observed. In both countries, judicial discipline was used to set aside obtrusive judges. Unlike Poland, where politicization came from the outside, imposed by legislative reforms, instrumentalization in Slovakia came from within. Slovakian judges misused the system for personal ends. In addition to removing unwanted peers, they took advantage of the independence of the judiciary to remain untouchable.

The judicial council system fails to provide judicial disciplinary procedures with complete protection from political interference. In well-established democracies, such as Italy or France, these procedures, when instrumentalized, at worst destabilize the judges and prosecutors concerned. In countries such as Slovakia or Poland, where judicial independence is a more recent guarantee, they may have led to completely sidelining important judges. Federal systems without a judicial council, such as Germany, propose a different approach.⁷⁶

⁷¹ Gajda-Roszczyńska, *ibid.*, at 451; Pech, Wachowiec and Mazur, ‘Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)Action’, *Hague J Rule Law* 13, 1–43 (2021); Interview with Judge Mazur (Poland), 14 June 2021.

⁷² Case C-791/19, *Commission v. Poland*, 25 October 2019. On that basis, the ECJ granted the request for interim relief emanating from the Commission and ordered Poland to suspend the activity of the Disciplinary Chamber, Case C-791/19, *Commission v. Poland* (ECLI:EU:C:2020:277).

⁷³ Case C-791/19, *Commission v. Poland* (ECLI:EU:C:2021:596)

⁷⁴ Act of 20 December 2019, *supra* note 58.

⁷⁵ Case C-585/18, *A. K. v. Krajowa Rada Sądownictwa* (EU:C:2019:982)

⁷⁶ Germany has been criticized by the Council of Europe thereupon. See CoE, Parliamentary Assembly Res. 1685, 30 September 2009, § 5.4.1

⁶² 225 motions lodged in 2003-2010, and 222 in 2010-2020, see Kosar, *supra* note 42, at 317. However, the author pointed out that the overall success rate of disciplinary motions was low (only 29%). It noted that in 72% of the disciplinary motions, impugned judges did not face any sanction, *ibid.*, at 317-318.

⁶³ See Kosar, *supra* note 42; Moliterno, Curo, Berdisova, Mazur, ‘Independence Without Accountability: The Harmful Consequences of EU Policy Towards Central and Eastern European Entrants’, 42-2 *Fordham International Law Journal* (2018) 481; Preshova, Damjanovski, Nechev, ‘The Effectiveness of the “European Model” of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms’, 1 *Centre for the Law of EU External Relations Papers (CLEER)* (2017).

⁶⁴ See Moliterno, *ibid.*, at 534; Bobek, *supra* note 43, at 1281.

⁶⁵ Submission of Slovakia, *supra* note 57.

⁶⁶ As Štefan Harabin was President of the Supreme Court, he also chaired the JCSR, which decides on the composition of the disciplinary panels, Kosar, *supra* note 42, at 319.

⁶⁷ Constitutional Law No. 161/2014, amending Article 141a of the Slovakian Constitution.

⁶⁸ Articles 22a and 22b of Law No. 385/2000 on Judges and Lay Judges, as amended by Law No. 459/2019.

⁶⁹ See CCJE, Opinion of the CCJE Bureau following a request by the CCJE member in respect of Slovakia as regards the reform of the judiciary in Slovakia, CCJE-BU(2020)3, 9 December 2020. The CCJE pointed out the possibility of transferring judges to a lower court without consent when changing the court system and the introduction of a new crime of ‘bending the law’, which creates room for inadmissible interference by the executive with the independence of the judiciary, in the form of unjustified prosecution.

⁷⁰ Helsinki Foundation for Human Rights, *supra* note 54; Justice Defense Committee, *supra* note 61; Gajda-Roszczyńska, *supra* note 49, at 451–459.

C. SYSTEMS WITHOUT JUDICIAL COUNCILS: THE GERMAN EXAMPLE

Germany being a federal state, its judiciary is composed of federal and state judges.⁷⁷ Therefore, the disciplinary system at federal level coexists with the regimes of each federated state. In Germany, judicial independence is protected by Article 97 of the Federal Constitution,⁷⁸ and in the constitutions of the states.⁷⁹ Noticeably, pursuant to the Federal Judges Act, a judge shall be independent and subject only to the law.⁸⁰ Another distinctive feature of Germany is that judges and prosecutors, although the latter being part of the judicial branch, constitute distinct bodies subject to different disciplinary courts.

1. The discipline of judges

According to the Federal Judges Act, which specifies the legal status of German judges, the misconduct of a federal judge is adjudicated by a special panel of the Federal Court of Justice, the Federal Service Court, exclusively composed of judges.⁸¹ They are all appointed by the presidium of the Federal Court of

Justice.⁸² With regard to procedure in judicial disciplinary cases, the Federal Discipline Act, which regulates the sanctioning of misconduct of civil servants, applies *mutatis mutandis*.⁸³ With respect to the discipline of state judges, state legislature is free either to designate a specific disciplinary law or to declare the procedural law for civil servants applicable.⁸⁴ In Lower Saxony, for example, the Lower Saxony Judges Act applies. In Section 94, however, it refers to the Lower Saxony Disciplinary Act, valid for civil servants.

The rules applicable to state and federal judges are largely similar. Indeed, the provisions of the different state laws only differ in detail, as the Federal Judges Act sets out a basic common framework. Notably, it provides that states shall establish special service courts,⁸⁵ which each include a presiding judge and an equal number of permanent associate judges (who may be judges or lawyers admitted to the state bar) and non-permanent associate judges (who practice in the court to which the defendant judge belongs).⁸⁶ Proceedings in the service courts may be

brought before at least two instances, but state legislation can also envisage an appeal before the Federal Service Court.⁸⁷

2. Judicial supervision

In Germany, in order to ensure that judges act dutifully, they are subject to disciplinary supervision, provided there is no interference with their core judicial functions.⁸⁸ However, the dividing line between what falls within “core judicial functions” and what does not⁸⁹ may be elusive.⁹⁰ In principle, supervision is exercised by the president of the court to which the judge belongs. It includes the power to censure an improper mode of executing an official duty and to urge appropriate attention to official duties. As such, it includes monitoring and correction. Under the supervisory procedure, which is administrative and written, only a reprimand may be imposed. If the president of the court deems that a more severe sanction should be handed down (fine, salary reduction, demotion or resignation),⁹¹ he or she refers the matter to

the state service court, before which the procedure is jurisdictional and all fair trial guarantees apply. In addition, if a judge considers a supervision measure to be in conflict with his or her independence, he or she may refer to a state service court or the Federal Service Court,⁹² the latter being the legal jurisdiction for appeals against all supervisory sanctions.⁹³

3. The discipline of prosecutors

German public prosecutors are not granted independence.⁹⁴ They are appointed by the Federal or Regional Minister for Justice, who can also veto their actions.⁹⁵ Their disciplinary regime is set out in Section 122 of the Federal Judges Act, which provides that service courts for judges, at federal and state level, render decisions in disciplinary proceedings against prosecutors. In this case, the non-permanent associate judges of the service courts must be prosecutors. At the Federal Service Court, they are appointed by the Federal Minister for Justice. State laws regulate the appointment procedure of non-permanent as-

⁷⁷ Articles 95 and 96 of the German Constitution of 8 May 1949, the so-called ‘Basic Law’.

⁷⁸ However, there is still heavy executive and legislative influence in the appointment procedures of federal and state judges. See Sanders, von Danwitz, ‘Selecting Judges in Poland and Germany: Challenges to the Rule of law in Europe and Propositions for a New Approach to Judicial Legitimacy’, 19-4 *German Law Journal* (2019) 770, at 794-798.

⁷⁹ The state constitutions copy *verbatim* or analogously repeat Article 97 of the Basic Law. Judges are appointed for life to a specific position. Once appointed, a judge cannot be removed against his or her will.

⁸⁰ Section 25 of Federal Judges Act of 19 April 1972.

⁸¹ *Ibid.*, Sections 61 and 62. The Federal Service Court includes a presiding judge and two permanent associate judges, who are members of the Federal Court of Justice. It also encompasses two non-permanent associate judges who are members of the court to which the defendant judge is attached.

⁸² There is a ‘presidium’ in every German court. It consists of a group of judges, chosen by their peers exercising in the same court or tribunal, whose main function is to spread cases amongst the judges.

⁸³ Sections 39 and 63 of Federal Judges Act.

⁸⁴ Rechluppe, *Das Disziplinarverfahren gegen einen Richter – und seine Einleitung durch das Justizministerium* (2016), available at <https://www.rechtluppe.de>

⁸⁵ Sections 67, 77 and 78 of Federal Judges Act.

⁸⁶ All members are elected by the presidium of the court in which the service court is established on the basis of proposals made by the judges of the courts and tribunals of the state.

⁸⁷ Sections 62, 79, 81 and 82 of Federal Judges Act.

⁸⁸ *Ibid.*, at Section 26.

⁸⁹ Supervision includes measures to ensure the orderly course of proceedings, like the timeliness of the setting of a court hearing or scheduling, see Seibert-Fohr, ‘Constitutional Guarantees of the Independence of the German Judiciary’, *SSRN* (2020), available at <http://ssrn.com/abstract=1706565>

⁹⁰ In a recent decision, the Federal Service Court rejected the appeal of a state judge who was reprimanded by the President of the state court for expressing a political opinion in his judgment. The judge refused to convict the defendants of the case in question (who discussed burning down accommodation for refugees on Facebook) for sedition, stating in his decision that “in this context, according to the court, the Chancellor’s decision to let a previously unknown number of refugees into the country unchecked is much more likely to disturb the public peace than the defendants.” By rejecting the judge’s appeal, the Federal Service Court stated “the personal political opinion of a judge, which is irrelevant for the actual finding of the law, has no place in the grounds of a judgment.” See Dr. Markus Sehl, *Political opinion has no place in the judgment*, Legal Tribune Online (2020), available at <https://www.lto.de/>.

⁹¹ Sections 30 and 64 of Federal Judges Act.

⁹² *Ibid.*, at Sections 62 and 78.

⁹³ *Ibid.*, at Sections 26 and 79.

⁹⁴ Sections 146 and 147 of Courts Constitution Act of 12 September 1950.

⁹⁵ The ECJ held that the German public prosecutor’s offices do not provide a sufficient guarantee of independence from the executive for the purposes of issuing a European arrest warrant, as they are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, see Joined Cases C-508/18 and C-82/19 PPU (*Public Prosecutors’ Offices in Lübeck and Zwickau, Germany*) (ECLI:EU:C:2019:456), 27 May 2019.

sociate judges of the state service courts. As with judges, the disciplinary acts valid for civil servants at federal and state level apply to prosecutors.

Germany presents a complex judicial accountability system characterized by the coexistence of federal and state disciplinary regimes. However, a common framework is set out in federal laws, which ensures some uniformity.⁹⁶ Although most of the rules applicable to judges and prosecutors are identical to those of civil servants, their discipline remains a strictly judicial matter as the composition of the disciplinary bodies is always predominated by professional judges or prosecutors at federal level. At state level, despite some diversity, judges and prosecutors remain the majority. Grave encroachments upon judicial independence are isolated events in Germany.⁹⁷ In addition, disciplinary issues in the German judiciary are residual. Breaches of judicial ethics are mostly resolved internally and among peers, informally or through supervision, without disciplinary proceedings being initiated.

This study shows the diversity of existing disciplinary systems, and some of their fragilities, which emphasizes the necessity for common norms, but also raises the difficulty of building a unified system at European level. Despite their strong judicial councils, France and Italy still encounter serious issues, whether this concerns the status of prosecutors in France

- where the determination of the disciplinary sanction remains in the hands of the executive branch - or corporatism in Italy - which remains relevant, despite the renewed composition of the Judicial Council. The Polish and Slovakian experiences demonstrate that importing a foreign system, such as the 'judicial council model', without taking into account local specificities, can prove to be unsuitable. In the German system, judicial discipline is entirely dealt with by peers. To date, the model appears to work in Germany because of its history and culture: in addition to being protected by statute, judicial independence is respected by other state powers that avoid interfering in judicial activity.⁹⁸

4. THE STRENGTHENING OF COMMON GUARANTEES IN THE EU

While no system can be exported as such, none is immune to institutional and social evolutions, which would upset the balance between judicial accountability and independence. This reinforces the need to develop common guarantees and good practices for judicial ethics and disciplinary proceedings at European level. Recommendations already exist but mostly focus on guar-

antees.⁹⁹ This paper rather proposes the implementation of institutional and procedural tools to combine independence with the appropriate sanction for judicial misconduct.

Such an approach appears all the more relevant, given that since June 1st 2021, the EPPO has been operative. The creation of this body reinforces the need for common guarantees regarding disciplinary procedures. The organization is structured on two levels, one central, including the European Chief Prosecutor and 22 European Prosecutors, and one decentralized, composed of the European Delegated Prosecutors ('EDP'). The latter are located in the participating EU countries and remain active members of the prosecution service or judiciary in their states.¹⁰⁰

According to the EU Council Regulation, all EPPO Prosecutors are independent. Nevertheless, they may be dismissed if they are found guilty of serious misconduct. Unlike the European Chief Prosecutor and the European Prosecutors, accountable to the ECJ, the EDPs continue to be subject to local disciplinary authorities, even for their responsibilities within the EPPO.¹⁰¹ The situation of the EDP raises concerns. Firstly, by remaining under the authority of their national disciplinary bodies, they are subject to a different regime than the European Prosecutors. Secondly, distinct discipli-

nary proceedings will apply to the EDP, as there are discrepancies in the disciplinary systems of EU Member States. Therefore, the same misconduct may receive different legal classifications and give rise to dissimilar sanctions. In addition, considering the imperfect configuration of the national disciplinary regimes, the risk of pressure on EDPs cannot be excluded entirely, without forgetting the situation of national judges who will adjudicate on cases prosecuted by the EPPO. Thus, the issuing of disciplinary sanctions against EPPO members with insufficient protective mechanisms would affect their independence and might destabilize the organization.

The following provides several proposals which could be implemented at European level to strengthen the guarantees which frame disciplinary procedures.

A. PREVENTING JUDICIAL MISCONDUCT

Proposal No. 1 - Institutionalizing internal support and observation tools. Several methods already exist. For example, the French Judicial Council created a confidential hotline in 2016, which provides concrete assistance to magistrates facing ethical issues.¹⁰² Intervision, a kindly method of reciprocal observation and reflection on professional practices developed by the Dutch judiciary, takes place confidentially between a pair of magistrates, and away from any hierar-

⁹⁶ Similarly, in the United States, which is also a federal state with a mixed judiciary, the Judicial Conduct and Disability Act was promulgated in 1980. It established a common procedure for complaints of misconduct against federal judges. In addition, the 2008 Rules for Judicial Conduct and Judicial Disability Proceedings provide for mandatory and nationally uniform provisions governing misconduct proceedings. Despite these laws, the judicial disciplinary procedures of the various states remain diverse.

⁹⁷ There is less interference by the other branches of government than by the judiciary itself, as judicial independence is most often raised as a defense against supervisory measures, Seibert-Fohr, *supra* note 89.

⁹⁸ Interview with Judge Müller (Germany), 9 June 2021.

⁹⁹ For instance, rules on judicial liability, composition of disciplinary bodies, defendants' rights, legality principle, see *supra*, Part 1.

¹⁰⁰ Established by EU Council Regulation 2017/1939 of 12 October 2017, the EPPO has jurisdiction to investigate, prosecute and bring to judgment crimes against the EU budget.

¹⁰¹ However, if the European Chief Prosecutor does not consent to disciplinary action by a Member State, it may request the college of the European Prosecutors to review the matter.

¹⁰² This support service includes three individuals chosen by the Judicial Council amongst its former members, Conseil Supérieur de la Magistrature, Rapport d'activité 2019, La documentation française, at 71-72.

chical link.¹⁰³ In the type of supervision applied in Germany, judges with appropriate advanced training conduct meetings with fellow judges in which problems at work are discussed in groups.¹⁰⁴ By institutionalizing such methods and extending their implementation to other countries, opportunities for discussion on ethical difficulties between peers could be offered, which would defuse potential judicial misconduct.

B. PROTECTING JUDICIAL INDEPENDENCE

Proposal No. 2 - Establishing an independent European regulator to oversee the respect of fundamental guarantees and encourage the circulation of good practices.¹⁰⁵ The example of Poland shows that the EU does not yet have the tools to take rapid action against breaches of judicial independence. It is vital to improve the time-responsiveness of the Union,¹⁰⁶ hence the proposal for an independent regulator within the EU. EU law provides various legal options. This body could be envisioned as part of the policy of judicial cooperation, which requires unanimity (article 73 of the TFEU). Thus, the building of such an organization would probably occur on the initiative

of a few countries through the enhanced cooperation procedure (article 20 of the Treaty on European Union - TEU). Otherwise, the articulation of articles 2¹⁰⁷ and 19¹⁰⁸ of the TEU provides the basis for the creation of such a regulator and, contrary to the cooperative approach, would give such a body the power of supervision, inquiry and injunction. It would conduct inquiries in EU Member States with regard to the rules and guarantees of EU and international laws. These investigations would lead to evaluations that could include recommendations and injunctions in order to ensure the effectiveness of judicial independence and accountability in Europe. This body would act as a stepping stone for exchanges on good practices aiming at the progressive harmonization of judicial cultures and disciplinary regimes.

Proposal No. 3 - Implementing an appropriate individual remedy available to judges and prosecutors who consider their independence under threat. While in most democratic countries, the principle of the independence of the judiciary is constitutionally protected, only a few States provide for a specific remedy allowing members of the judiciary

to point out situations in which their independence is endangered. Aside from Germany,¹⁰⁹ Article 14 of the 1985 Spanish Constitutional Law on the Judiciary permits judges who encounter such difficulties to refer to the Judicial Council, which can initiate investigations and refer to the State Prosecutor. While such a remedy is not infallible,¹¹⁰ it does give judges a concrete way of protecting the exercise of their professional duties from undue influences.

The integration of such a tool in national disciplinary regimes would usefully fill a void and protect magistrates who, due to their obligation of reserve and loyalty, are not permitted to express themselves as freely as any other citizen and thereby easily and publicly denounce interference.

Additionally, it would provide a solution against disguised sanctions, such as relocation or reposting regardless of the irremovability of members of the judiciary.¹¹¹ Such sanctions often come in the form of administrative measures imposed with the intention of destabilizing the magistrate concerned. These measures bypass fair trial guarantees, as administrative proceedings are less protective than judicial ones, and have a direct

and detrimental impact on the judge or prosecutor's career path.¹¹² While these sanctions may be contested¹¹³ in some national legal systems, the Polish example demonstrates that they still threaten judicial independence in Europe.¹¹⁴ The creation of an individual remedy before the abovementioned independent European regulator could also be provided for national judges and prosecutors (including EPPA prosecutors) as an additional guarantee.

C. SANCTIONING JUDICIAL MISCONDUCT ADEQUATELY

Proposal No. 4 - Strengthening public monitoring tools for judicial misconduct. Judicial disciplinary systems are mostly unknown to citizens, with a major impact on their perception of the judiciary. While 80% of European countries have implemented public complaint procedures against judicial misconduct¹¹⁵ in accordance with international standards,¹¹⁶ their efficiency may be called into question. For instance, in France, where such a mechanism has existed since 2010, less than 3% of complaints lead to actual disciplinary actions.¹¹⁷ While these mixed results may partially be explained by applicants confusing the complaint procedure with an appeal, they also show that there is

¹⁰³ Intervision includes two phases. First, there is a period of observation of one member of the pair by his or her partner, and then a period of discussion about what has been observed. See Marshall, Etcheverry, 'L'intervision ou comment améliorer la pratique des magistrats', 2 *Les Cahiers de la Justice* (2010) 129, at 129-136; see also Charte d'intervision élaborée par l'École Nationale de la Magistrature (2008).

¹⁰⁴ Legal Tribune Online, *Supervision in der Justiz: Erzähl' doch mal*, 20 May 2017, available at www.lto.de

¹⁰⁵ This proposal is inspired by the ENCJ Sofia Declaration on Judicial Independence and Impartiality (2013) calling for 'an independent European rule of law mechanism, respecting the diversity of justice systems, which inter alia will assist in the protection of the independence of the judiciary and in ensuring the promotion of an effective justice system and growth for the benefit of all citizens.'

¹⁰⁶ Mazur, *supra* note 71.

¹⁰⁷ See the interpretation of article 2 of TEU in Case C-791/19, *Commission v. Poland* (ECLI:EU:C:2021:596): 'it follows from Article 2 TEU that the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails.'

¹⁰⁸ See *ibid.*: 'A Member State cannot, therefore, amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU.'

¹⁰⁹ See *supra*, at 15.

¹¹⁰ Notably when the independence of the judicial council is called into question. In a letter sent to the European Commission, 2,500 Spanish judges denounced the recent project for reform of the Judicial Council which aims at lowering the parliamentary majority necessary to renew the composition of the latter, in order to reduce the influence of professional judges. See Parliamentary Question E-001995/2021 to the European Parliament 14 April 2021.

¹¹¹ International Commission of Jurists, Practitioners' Guide No. 13: Judicial Accountability, June 2016, at 27.

¹¹² Report of the Special Rapporteur, *supra* note 9, at 21.

¹¹³ *Conseil d'État* (France), Arrêt no. 418061, 24 July 2019.

¹¹⁴ In Poland, judicial human resources choices are made more and more according to political loyalty, Mazur, *supra* note 71.

¹¹⁵ ENCJ, Report 2019-2020, Independence, Accountability and Quality of the Judiciary, at 14.

¹¹⁶ UNODC, Global Judicial Integrity Network, Measure for the effective implementation of the Bangalore Principles of Judicial Conduct Implementation Measures, para. 15.2.

¹¹⁷ CSM Conference, L'effectivité de la responsabilité... , *supra* note 18 (Speech by J.-P. Sudre).

room for improvement. Firstly, fair trial rules should apply to judicial complaints mechanisms. The complaints should also be treated within a reasonable time by an independent body, separate from the disciplinary authority.¹¹⁸ Secondly, even though deleterious complaints should be rejected to protect judicial prerogatives, admissibility criteria should not be too restrictive, in order to ensure efficiency. Thus, the time limit to file a complaint should be long enough, notably to allow people to seek legal advice. In addition, complaints against members of the judiciary still working on a plaintiff's case should be considered admissible in order to avoid loss of evidence.¹¹⁹ Thirdly, remedies allowing for reparation to victims, in addition to disciplinary proceedings, could be implemented. Finally, such complaints mechanisms should be more transparent, as international observers have underlined the lack of data thereupon.¹²⁰ For this purpose, surveys on the satisfaction of court users could be more widespread. Such procedures should also be assessed by international bodies like the European Commission for the Efficiency of Justice or the independent European regulator.

Proposal No. 5 - Improving transparency and communication in judicial disciplinary proceedings at European level. Transparency is a key tool to people's trust in justice. Public communication resources should therefore be mobilized to allow direct and concrete access to judicial disciplinary proceedings and decisions handed down in EU Member States. To this end, a European database on judicial discipline could be created and managed by the abovementioned European regulator.¹²¹ Transparency should be combined with the imperative to protect judges and prosecutors' private life and personal safety. Practical tools such as the anonymization of disciplinary decisions could be implemented. Institutional responses to disciplinary misconduct would thus be ensured, as impunity is unacceptable on this matter, while protecting the security of convicted professionals. In order to prevent the emergence of fake news regarding disciplinary procedures, the production of an institutional and unique source of information would provide a solution.

While the ECtHR¹²² and ECJ¹²³ have developed consistent case-law regarding judicial disciplinary proceedings, information about their own disciplinary re-

gime is relatively sparse. In both Courts, there is no record of initiated disciplinary proceedings. Their websites do not explicitly mention their disciplinary regime. Hence, in order to safeguard their image and to incentivize Member States to respect European case-law on disciplinary proceedings, these Courts should improve communication, for instance by creating a specific section related to their disciplinary proceedings on their websites.

CONCLUSION

In his opinion rendered in the Polish case pending before the ECJ, Advocate General Tanchev highlighted the importance of judicial discipline for the EU legal order: *'a disciplinary regime (...) embodies a set of rules that permits judges to be held accountable for serious forms of misconduct and thus contributes to enhancing public confidence in the courts. Yet, there should be sufficient safeguards in place so as not to undermine judicial independence (...). Such a regime, therefore, is linked to the rule of law and, in turn, the functioning and the future of the Union judicial system predicated on the Court of Justice and the national courts.'*¹²⁴ This quote illustrates the necessity to envision the future of disciplinary regimes (also) supra- nationally.

As demonstrated in this essay, despite the guarantees at international and regional levels, the disciplinary systems of the EU Member States are diverse, and do not always comply with these standards. This shows that there is still potential for improvement in order to secure the fragile equilibrium between the preservation of judicial independence and the sanction of judicial misconduct. In this regard, the ongoing construction of cooperation tools (like the EPPO) raises the question of our collective ability to find such a balance. Furthermore, the Polish case highlights that a strong and quick responsiveness at EU level is needed in order to counteract possible changes in disciplinary regimes that breach judicial independence.¹²⁵

It should be underlined that insofar as the EU currently faces a crossroads in its history, the concrete implementation of common safeguards and institutions mainly remains a matter of political will. Nevertheless, recognizing the existence of international safeguards, and the difficulty to impose a common model of judicial discipline, this essay has tried to propose innovative and practical solutions aimed at ensuring the effective enforcement and respect of these guarantees.

¹¹⁸ International Commission of Jurists, *supra* note 108, at 39.

¹¹⁹ This is not the case in France, see Article 50-3 of Constitutional Law of 22 December 1958.

¹²⁰ European Commission for the Efficiency of Justice (CEPEJ), Evaluation Report, 2020 Evaluation Cycle, at 91. It underlined that data on the outcome of such procedures are limited.

¹²¹ In the United States, where disciplinary proceedings and decisions are mostly private, the Reuters press agency created a database recording cases of judicial misconduct. It noted 1,509 cases between 2008 and 2019, allowing a quantitative comparison of the disciplines of the various states, see Reuters Investigates, *The Teflon Robe, Exploring the misdeeds of judges across America* (2020), available at <https://www.reuters.com/investigates/special-report/usa-judges-data/>

¹²² Judges' disciplinary obligations are defined in the European Convention, the Rules of the Court, and the 2008 Resolution on Judiciary Ethics. However, they remain broad and there is no sanction listed, except for dismissal from office. The proceedings are internal to the Court as only judges from the Court can initiate proceedings which are conducted by the Plenary Assembly.

¹²³ There must be a unanimous judgment from the Court, composed of all the judges and advocates general. The sanctions can be dismissal from office, limitation of the right of pension or other advantages. In 2017, the Code of Conduct of the ECJ introduced a consultative committee to oversee its application.

¹²⁴ Case C-719/19, *European Commission v. Poland* (ECLI:EU:C:2021:366), at para. 6

¹²⁵ Mazur, *supra* note 71.

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THE JUDICIARY IN TIMES OF PANDEMIC: JUDGES' POSITION ON COMPULSORY VACCINATION

This article studies the judicial problems that may arise facing the measures related to the COVID pandemic. Thus, it analyses the judicial pronouncement on compulsory vaccination from an ethical point of view, combined with the legal provisions. References are also made to the health passport.

Likewise, reference is made to comparative law, with an explanation of the different vaccination regulations in the Member States of the European Union, with emphasis on Spanish legislation that could be applicable in the case that the authorities decide to make vaccination compulsory.

It also reflects on the possible impact on the impartiality of judges, when they have made public statements on compulsory vaccination and, therefore, have expressed their personal convictions.

In line with the above, various solutions are put forward in hypotheses in which the judge considers that the imposition of compulsory vaccination affects his impartiality so seriously that he cannot make an objective decision, or when the judge believes that fundamental rights may be violated.

KEY WORDS

COVID-19
Mandatory vaccination
Human rights
Recusal of judges
Health Passport
Judicial impartiality

1. INTRODUCTION

In recent times, when judicial bodies have had to decide on issues of great political significance, such as the suspension of Parliament in the United Kingdom or the prosecution of pro-independence politicians in Spain, judges have sometimes exercised their jurisdictional function as a counterweight to the executive branch.¹ Other judges, meanwhile, such as Iftikhar Muhammad Chaudhry, Chief Justice of the Supreme Court of Pakistan,² have overtly helped to support the rule of law. Clearly, the functions of the judiciary continue to venture beyond being merely a mouthpiece for the law, as Montesquieu claimed.

The health emergency caused by the current COVID-19 pandemic entails a high degree of uncertainty and has given rise to the introduction of exceptional public policies.

In this situation, the judiciary can establish itself as a counterweight to an increasingly powerful executive branch that imposes measures on citizens which, while they may be based on the need to safeguard public health, may also lead to the erosion of individual rights or fundamental legal principles, at both national and European Union level.

This paper does not - indeed cannot - seek to address all the challenges facing the judiciary during times of pandemic. Rather, we will focus on how judges should act with respect to a measure that is under consideration in many Member States and by the European Commission: the possibility of compulsory vaccination against COVID-19, as well as the related question of the issuing of a 'health passport' for persons who have been vaccinated or who are otherwise immune to COVID-19.

¹ Another example is Judge Igor Tuleya, who has become well known throughout Europe for his opposition to the reforms in the Polish Judiciary, particularly with respect to the disciplinary system for judges. See, inter alia: *Swissinfo.ch*, *Juez polaco contrario a la reforma del Gobierno rechaza declarar ante Supremo* [Polish Judge refuses to testify before the Supreme Court] (2021), available at https://www.swissinfo.ch/spa/polonia-justicia_juez-polaco-contrario-a-la-reforma-del-gobierno-rechaza-declarar-ante-supremo/46557312.

² Christophe, Jaffrelot, '¿Un gobierno de jueces?', *Le Monde Diplomatique en español* (2013), available at <https://mondiplo.com/un-gobierno-de-los-jueces>.

To this end, we will analyse the current situation from an ethical standpoint, considering the relevant legislation in force, the proposals that are currently being drafted but which in the coming months might become reality, and some of the judicial decisions that have already been issued and some which may be issued in the future. This analysis will be approached from the perspective of how judges can or should act in such situations, as guarantors of legality and fundamental rights. Principles of judicial ethics will also be taken into consideration.

2. CONTROVERSIAL ISSUES WITH RESPECT TO COMPULSORY VACCINATION

The global health crisis caused by COVID-19 and the development of different vaccines to prevent its spread have rekindled debate on compulsory vaccination.

The international social and economic situation, in a pandemic unequalled in our time, has called for rapid development of vaccines to curb the disease. The proliferation of false news and misinformation, coupled with its precipitous arrival, have given rise to a mistrust of coronavirus vaccines among a section of the population.

As early as 2016, the Spanish Bioethics Committee analysed increasing vaccine refusal in neighbouring countries in a report entitled 'Ethical and legal issues in vaccine refusal and proposals for a necessary debate'.³ The report pointed out that this refusal usually occurred in states where vaccines have been most successful, where there is, as a result, little perception of the risk of infection. While a lack of infections might lead some to the conclusion that vaccines are unnecessary, they are, in fact, essential to ensuring that there are no infections.

Yet is this degree of mistrust really a significant percentage? Should it pave the way for the possible implementation of compulsory vaccination? Is compulsory vaccination permissible within Spain's current legal framework? Or within the legal framework of other Member states of the European Union? Would this enforcement be ethical? Should judges, therefore, issue decisions on this enforcement in specific cases brought before them? We will consider these questions below.

A. COMPARATIVE LAW

Firstly, we find that all EU Member States provide for a national immunisation⁴ programme that ensures compliance with Article 35 of the Charter of Fundamental Rights of the European Union, which enshrines the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national legislation.

At European level, there are various approaches to the issue of whether vaccination should be compulsory or voluntary. One approach shared by all states is that most vaccines are merely recommended. Nevertheless, some states provide for certain compulsory vaccines. This is the case in France, which introduced a regulation on 30 December 2017 with the aim of eradicating several of its remaining infectious diseases, including measles. Italy, meanwhile, stipulates that children under the age of 6 may not access childcare facilities if they do not meet the vaccination requirements, and has introduced financial penalties in this respect. Likewise, Poland provides for the existence of some compulsory vaccination, imposing fines for non-compliance.⁵

At the other end of the scale, states such as Portugal do not provide for the compulsory use of any vaccine. It should be noted, however, that Portugal did, in fact, establish mandatory vaccination for tetanus and diphtheria in the 1960s.⁶

One unusual case is that of Latvia, where, while vaccination is voluntary, parents sign a document whereby they take responsibility for any consequences of their decision not to vaccinate their children.

Outside the European Union, in Australia, financial incentives are provided, either directly or through tax deductions, to encourage parents to vaccinate their children. This is combined with a ban on children attending school if they are suffering from a disease for which there is a vaccine.

B. ENFORCEMENT OR VOLUNTARINESS AND THEIR LEGAL FRAMEWORKS

Despite the differences that can be seen between these distinct models, they all share a preference for voluntary vaccination, relegating compulsory usage to exceptional cases. Practice shows that compulsory vaccination can be counterproductive in some cases,⁷ since vaccine enforcement may lead to polarisation in social debate, shifting the focus away from health and the benefits of vaccination towards issues of a more political nature.

In the interests of public health, the authorities clearly cannot allow mistrust of the health system - and specifically in public immunisation strategies - to spread. Nonetheless, it has been shown that positive measures (such as awareness raising, text reminders or providing rewards to vaccinated people) can be more effective.^{8,9} Moreover, in the event that some of the population remains vaccine hesitant, this may not have an excessive impact if the vaccinated population exceeds the minimum immunisation rate.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Comité Asesor de Vacunas de la Asociación Española de Pediatría, *Vacunas obligatorias en Europa*, 20 August 2018, available at <https://vacunasae.org/profesionales/noticias/vacunas-obligatorias-europa>.

⁸ Nature, *Laws are not the only way to boost immunization* (2018), at 249-250.

⁹ The Lancet, *The imperative of vaccination* (2017).

³ Comité de Bioética de España [Spanish Bioethics Committee], *Cuestiones ético-legales del rechazo a las vacunas y propuestas para un debate necesario* (2016).

⁴ Nuño, C., *¿Obligatoria o voluntaria? Así está legislada la vacunación general en otros países de Europa*, 1 January 2021, available at: <https://www.newtral.es/vacuna-obligatoria-voluntaria-paises-europa-francia-italia/20210101/>.

At the same time, the potential effectiveness of measures promoting vaccine uptake should not be underestimated. In this respect, the organ donation policy which has made Spain the most successful country in this respect - more successful even than countries that provide financial rewards to donors - may offer inspiration.

Israeli economists Uri Gneezy and Aldo Rustichini carried out an experiment in which parents received fines for arriving late to school to collect their children.¹⁰ Instead of reducing the number of parents who arrived late, the number increased; rather than viewing the fine as a penalty, parents saw it as a fee whose payment allowed them to disregard the pick-up time. This offers a clear example of how penalties do not always produce the desired effects.

In contrast, the same economists also conducted an experiment in which they encouraged three groups of students to raise funds for a cause.¹¹ The first group was given an awareness-raising talk about the cause in question but was not offered any extra incentives. The second and third groups were offered 1% and 10% commission, respectively, on the total amount of money raised. While the third group raised more than the second group, which might lead to the conclusion that higher commission provided more motivation, the surprise lay in discovering that the first group of students obtained the best results of all. This is because, although economic incentives may be important, we often forget the existence of other incentives that drive people's behaviour.

It is important, therefore, to consider the sociological effects of penalties and not underestimate the positive impacts of a culture of solidarity, which will convey to the public that vaccination can be a moral rather than legal obligation, and a benefit for both individual and collective health.

As we have already indicated, while it might be advisable to avoid enforcing vaccination, there will be cases when it might be necessary, such as when the minimum immunisation rate is not reached. This rate - which ranges from 70% to 95%, depending on the situation - indicates the percentage of the population which needs to be vaccinated to prevent the spread of a disease and to protect people who cannot be vaccinated due to medical reasons, as can occur among immunocompromised patients.

If the percentage of the population willing to be vaccinated is below the immunisation rate, the question arises as to whether compulsory vaccination can fit into our legal framework.

With respect to the Spanish framework, Article 2 of Organic Law 3/1986 of 14 April, on special measures for the protection of public health, provides, albeit very broadly, for the possibility that health authorities may take measures for treatment 'when there are rational indications to suggest that there may be a risk to the health of a person or group of persons'.

Article 2 of Law 41/2002 of 14 November, on patient autonomy and on rights and obligations with respect to clinical

information and documentation, states that every patient or service user has the right to refuse treatment, with the exception of 'those cases determined by law'.

It appears, therefore, that there may be a basis for compulsory vaccination, provided that the need for the protection of public health can be justified. This would always entail a decision to be made on a case-by-case basis, in the form of a judicial authorisation which assesses the concurrence of the requirements of suitability, necessity and proportionality.

We can, then, refer to a number of more or less recent cases in which judicial bodies have chosen to enforce vaccination. One noteworthy case involves a judgement issued by a court in Granada in 2010, which enforced the vaccination of 35 children from the same school in order to curb a measles outbreak.¹²

In 2019, the courts upheld the action of a municipal child-care centre that blocked the enrolment of an unvaccinated child, considering that the right to health of the other children was paramount. Similar judgments on schools' refusals to admit pupils can be found in those issued by the Chamber of Administrative Disputes of the Superior Court of Justice of Catalonia on 28 March 2000 and by the Superior Court of Justice of La Rioja on 2 April 2002.¹³

More recently in Galicia, the vaccination of an elderly dependent was enforced, despite her daughter's refusal, when the judicial body determined that the daughter's decision was not in accordance with her mother's best interests. In Seville, meanwhile, the Public Prosecutor's Office has now made a form available to nursing homes which allows them to report conflicts over the vaccination campaign to the judge.^{14,15}

Nevertheless, some jurists advise that in the event of a decision to make the COVID-19 vaccine compulsory, it would be preferable to adopt specific legislation that is as explicit as possible,¹⁶ since the legislation referred to above uses general terms which do not mention vaccination but merely 'treatment'. The Spanish Bioethics Committee's 2016 report foresaw the desirability of ensuring that the legal system encompassed various legal possibilities for these cases, taking into account the principle of proportionality and allowing sufficient flexibility for consideration on a case-by-case basis. In the same report, the Committee determined that a pandemic was one case where the need for coercive measures would be more justifiable, given the clear risk to public health.

If such legislation were to be considered, it could establish different forms of enforcement:¹⁷ physical coercion, which is

¹² Sentencia [Ruling] 362/2010, 24 November, del Juzgado de lo Contencioso Administrativo [Court on Administrative Matters] number 5 of Granada.

¹³ Rius, M, *¿Nos pueden obligar a vacunarnos de la covid?*, 17 January 2021, available at <https://www.lavanguardia.com/vivo/lifestyle/20210117/6183238/obligar-vacunar-covid.html>.

¹⁴ *Ibid.*

¹⁵ Quizhpe, E., *¿Se puede obligar a una persona a vacunarse contra la covid-19?*, 14 January 2021, available at: <https://www.publico.es/sociedad/vacuna-covid-obligar-persona-vacunarse-covid-19.html>. 2021

¹⁶ García, Y., *¿Sería posible la vacunación obligatoria ante la COVID-19? La legislación y los precedentes*, 27 November 2020, available at <https://www.newtral.es/vacuna-obligatoriedad-covid-19-espana/20201127/>

¹⁷ *Ibid.*

¹⁰ Gneezy, U., & Rustichini, A. *A fine is a price* (2000).

¹¹ Gneezy, U., & Rustichini, A. *Pay Enough-Or Don't Pay At All* (1998).

legally difficult to justify; the imposition of financial penalties; or the denial of access by unvaccinated persons to certain benefits or services, a measure whose proportionality could be justified by the risk of infection.

Individual freedom must always be restricted as little as possible; however, in a social state such as ours, individual actions will in many cases be necessarily delimited by the common good.

The ethical basis for compulsory vaccination lies in this tension between individual and collective rights. The Spanish Bioethics Committee's report¹⁸ underlines the fact that, while the right to health is an individual right, it is also reflected collectively in the right to public health. It is the protection of this collective right that transforms the right to health into both a right and duty, which requires a certain degree of diligence in the protection of one's own health. The obligation to be vaccinated would therefore be incorporated into this duty to protect both one's own health and public health. The fact that mandatory vaccination would benefit public health makes it different from other decisions that individuals might take regarding their own health and body, which might only benefit or harm themselves, such as pregnancy termination or the refusal of a certain treatment.

The Spanish Bioethics Committee stresses that this issue is particularly relevant in cases, such as the current crisis, in which health resources are under strain, since it is then that individual decisions

can have the most direct impact on public health.

Yet while vaccination may be an ethical or legal duty, it does not necessarily entail the imposition of coercive measures to ensure compliance. The fact that vaccination may never become legally binding does not suppose ethical indifference to whether or not vaccination is carried out, just as it is not ethically neutral to observe or disregard the other health measures that prevent the spread of the virus.

All these debates are still somewhat premature, given that vaccine coverage will not yet reach all citizens, and we still do not know whether voluntary vaccination will achieve herd immunity. Nevertheless, we can consider the issues in order to anticipate and be prepared for potential problems.

If the decision were taken to impose compulsory vaccination, a number of additional problems could arise.

First of all, we must bear in mind that there are several vaccines and that they differ both in their effects and in their production, since some have been created from messenger RNA and others using the viral vector system.¹⁹ What happens if a person refuses to accept one of these vaccines, because they believe that it produces worse side effects, but agrees to be vaccinated with a different vaccine that is not appropriate for them? And if a person refuses to be vaccinated, which of the vaccines would they be given?

¹⁸ Comité de Bioética de España [Spanish Bioethics Committee], *Cuestiones ético-legales del rechazo a las vacunas y propuestas para un debate necesario* (2016)

¹⁹ Sénécat, A., *Vaccination obligatoire contre le Covid-19: pourquoi le débat est prématuré*, 17 November, 2020, available at https://www.lemonde.fr/les-decodeurs/article/2020/11/17/covid-19-pourquoi-le-debat-sur-la-vaccination-obligatoire-est-premature_6060073_4355770.html.

Another issue is the possibility that private entities may decide to impose vaccination requirements, even if it is not compulsory. Can a company force its employees to get vaccinated under the threat of a penalty? Can it choose to provide services only to vaccinated people? Does this issue have the same ethical significance from the standpoint of competitive advantage or the protection of public health? Could it become incorporated into a company's corporate social responsibility policy?²⁰ And which criteria must judges take into consideration when deciding on one case or another?

C. COMPULSORY VACCINATION FROM A LEGAL STANDPOINT: NATIONAL AND EUROPEAN UNION LAW

As a general rule, vaccinations are voluntary in Spain, although there are exceptional cases where legislation can be read as allowing compulsory vaccination. This possibility is provided for in laws enacted some years ago and for highly exceptional cases: a 1980 law²¹ amended the National Health Act of 1944, introducing the possibility of implementing compulsory vaccination in the case of infection where safe and effective means of vaccination exist.²²

Likewise, the 1986 Law on special measures for the protection of public health²³ states that for the purpose of controlling transmissible diseases, the health authority may take any measures deemed necessary in the event of a risk of a communicable nature. According to some authors, this law authorises the imposition of vaccination when the health authority considers it necessary.²⁴

Some Member States, such as Austria, Estonia, Greece and Denmark, implement a voluntary but recommended vaccination system, like Spain, while others, such as Italy, Germany, France and Poland, provide for enforcement of certain vaccines and recommendation of others.

With respect to European Union law, competence over public health lies with the Member States in the absence of delegated powers, without prejudice to the EU's capacity to pursue public health objectives through the integration of the internal market.²⁵ It may also complement the actions of the Member States in this respect pursuant to Article 168 of the Treaty on the Functioning of the European Union (TFEU), as happened for the negotiation of COVID vaccine procurement for the whole European Union, in which the Commission negotiated with vaccine providers, on behalf of all EU members, although the Commission was also able to do so because of the trade competence that the EU does hold.

²⁰ Sorkin, A. R., *Should Companies Require Employees to Take the Vaccine?*, 12 December, 2020, available at <https://www.nytimes.com/2020/12/12/business/dealbook/should-companies-require-employees-to-take-the-vaccine.html>.

²¹ Spanish Law 22/1980, of 24 April, amending Basis IV of the National Health Act of 25 November 1944.

²² Established by the sole article of Law 22/1980.

²³ Spanish Organic Law 3/1986, on special measures for the protection of public health.

²⁴ Tolosa, Cesar, 'Problemas legales de la vacunación en España' [Legal problems with vaccination in Spain], 827/2021 *Diario la Ley* (2021).

²⁵ European Parliament, *Public Health* (2021), available at <https://www.europarl.europa.eu/factsheets/en/sheet/49/public-health>

For this reason, the institutions of the EU lack competence in the area of compulsory vaccination (and over vaccination in general); it has been argued that one of the most significant health-related problems to have arisen during the COVID crisis is the difficulty of coordinating joint action at European level.²⁶

If compulsory vaccination were to be imposed, the issue could reach the European Court of Human Rights or the Court of Justice of the European Union if it was considered that any fundamental rights protected by the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union - such as the right to physical and moral integrity and the right to privacy - might be impinged on by this enforcement.

In recent months, health laws for the management of the pandemic have been adopted by the parliaments of the Spanish regions of Galicia and Aragon.²⁷ These laws provide for the possibility of imposing coercive measures and stricter penalties in the event of a health emergency - measures designed to ensure compliance with the restrictions imposed by COVID-19.

These laws have been fiercely criticised in certain sectors for the alleged mandatory confinement of citizens with COVID-19 or those required to self-isolate,²⁸ although the literal text of the law (Article 38.ter.2 of the Galicia Health

Act) refers only to the public financing of accommodation for persons without access to adequate accommodation in order to comply with the measures required for self-isolating (e.g., having a bathroom for their sole use).

However, in this paper we will only focus on the possible enforcement of vaccination and, consequently, the judicial decision pursuant to the principles of objectivity and impartiality - principles that also inform judicial ethics. The Galicia Health Act provides for vaccination or immunisation as a measure to be taken by the health authority (Article 38.2.5) and, in the case of persons who unjustifiably refuse the vaccine, the imposition of fines of different amounts depending on this action's impact or significance with respect to public health (Article 41.bis.d and Article 42.bis.c). These fines range from €3,000 in the case of minor infringements to €60,000 in the case of serious offences of the highest degree (Article 44.bis).

It should be noted that the imposition of these fines is not only provided for in the event that there is a risk to public health, but also in the event that the unjustified refusal to be vaccinated is of little or no direct significance to the health of the population (Article 41.bis.d), which appears to be motivated in the violation of a general duty of solidarity, although the law does not explicitly state it.

In both cases, the coercive imposition of these measures will require the consideration of the individual rights both of the person directly affected by the measure and of indeterminate third parties who may be affected by a generalised disregard for public health.²⁹

Under these circumstances, and with respect to the media commentary circulating about these laws, judges must ensure that their impartiality is not compromised in their application of the law, by examining the legislation objectively, putting aside any prejudices or biases that might have stemmed from news or media misrepresenting the facts. As a second example, we can also question whether judges should, likewise, put aside any preconceived opinions that they may have formed during conversations with medical professionals which encroach on judicial ethics.

A third hypothesis to be considered is that where a judge who has openly taken an open anti-lockdown position on social media is examining a case related to the application of pandemic regulations, such as a decision on the opening up of the restaurant sector; have they compromised their impartiality and will they, therefore, make a decision clouded by bias or prejudice which cannot be put aside?

3. JUDGES' POSITION ON THE AUTHORISATION OF ENFORCED VACCINATION AND OTHER ISSUES RELATED TO HEALTH PASSPORTS

After analysing the legislation allowing for the possibility of compulsory vaccination against COVID-19, it should be noted that this legislation would constitute a health policy measure corresponding to the health authorities of the various Member states. The jurisdictional function is responsible for judging (applying the law) and enforcing judgements, and, particularly with respect to administrative disputes, judicial review, i.e. the subsequent examination of the actions of the Administration, which may involve the imposition of specific measures on citizens in the application of general legislation.

From an ethical judicial standpoint, however, we can consider what would happen if a judge expressed their opinion on a controversial issue, even before we consider specific cases with relevance to this issue. In this regard, there was a recent instance where a senior judge made unequivocal statements concerning compulsory vaccination in a legal article and on other forums, in which he considered that compulsory vaccination was possible under the current Spanish legislation.

²⁹ As of the date of submission of this paper, this law has been suspended due to a challenge by the Government of the Spanish State in the Constitutional Court, an effect that occurs automatically when a law is sub judice before this Court and the challenge has been made by the Government of Spain. Nevertheless, the challenge is based on issues of competence rather than substance, and reflections on the law in terms of judicial ethics are also applicable to possible state legislation that includes the same provisions.

²⁶ Brehon, Nicolas-Jean, *The European Union and the Coronavirus* (2021), available at <https://www.robert-schuman.eu/en/european-issues/0553-the-european-union-and-the-coronavirus>.

²⁷ Aragon Health Act: Law 3/2020, of 3 December, establishing the legal framework for the health emergency to control the COVID-19 pandemic in Aragon (Permalink ELI: <https://www.boe.es/eli/es-ar/l/2020/12/03/3/con>). Galicia Health Act: Law 8/2021 of 25 February, amending Law 8/2008, of 10 July, on health in Galicia. Permalink ELI: <https://www.boe.es/eli/es-ga/l/2021/02/25/8>

²⁸ López, Pablo, *El Confidencial News* (2021), available at https://www.elconfidencial.com/espana/galicia/2021-02-06/fejoo-galicia-covid-19-antivacunadas_2939036/. *El diario.es* (2021) available at https://www.eldiario.es/sociedad/ley-gallega-salud-no-creara-campos-concentracion-contagiados_1_7208922.html.

In this type of situation, and from the point of view of judicial ethics, we should consider whether positioning oneself openly in favour of compulsory vaccination compromises the objectivity and impartiality of any subsequent legal procedure.

Indeed, it could be argued that by expressing their opinion in a journalistic forum, the judge might be prejudicing the content of a future ruling on a case brought before them, thus jeopardising their impartiality in future proceedings. Point 2.4 of the Bangalore Principles states that 'a judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding'. At the same time, the Spanish Principles of Judicial Ethics stipulate that 'judges should avoid reaching conclusions before the stage in the procedure appropriate for this purpose, which is immediately prior to the court's decision'. On the basis of these principles, it could be questioned whether the impartiality of a judge who is clearly in favour of a measure could be compromised, thus paving the way to potential disqualification or recusal,³⁰ a possibility which will be discussed below.

Furthermore, it might appear that a judge making such statements might intend to steer the actions of other public authorities, in particular the health authorities. Judges' opinions, therefore - especially senior judges in good standing serving in the higher courts that govern public action - might even give rise to a greater propensity to the adoption of such measures by health authorities, since the Spanish health authority might understand that its actions will not subsequently be censured.

The considerations above call into question the appropriateness of the public disclosure of judicial opinions on the determination of public policies, particularly when we take into account that this is an area reserved for the legislative and executive powers, the bodies representing the will of the people.

In short, we again find ourselves in the territory of judicial ethics and its border zones.

A. CONCERNING THE COVID PASSPORT

Now that immunisation against COVID-19 is a possibility, a new debate has arisen as to whether immunised people should be subject to the same restrictions as those who are not, mainly with respect to international mobility.

The European Union has already set forth its proposal to create a type of 'health passport' by the summer,^{31,32} and the President of the Commission³³ has stated that its purpose will be to indicate not only whether the holder has been vaccinated but also whether they have antibodies or have had a recent negative test.

Similar initiatives have been introduced previously,³⁴ as was the case with the World Health Organization's creation of the Yellow Card, a vaccination certificate required for entry to several African states, proving that the holder has been vaccinated against yellow fever.

In the present case, the European Commission has stated that its solution will lean toward a platform connecting the different national systems. Such a health passport, however, raises dilemmas on three levels.³⁵

Firstly, as this is a novel situation, it is still not possible to be certain of the effects of the vaccines. Specifically, it is not yet possible to be sure that immunisation completely prevents transmission of the virus, given its mutations. If it does not prevent infection, the rationale for enabling the mobility of vaccinated people by means of this passport will be undermined.

Secondly, it may impinge on the principle of equality. Not all people will have access to the vaccine, due to circumstances beyond their control.³⁶

Thirdly, it might inspire some people to seek out infection in order to gain immunity and thus access to the corresponding benefits.

³¹ Vega, G., El Gobierno anuncia que lanzará el pasaporte covid en mayo, 10 March 2021, available at <https://elpais.com/tecnologia/2021-03-10/el-gobierno-anuncia-que-lanzara-el-pasaporte-covid-en-mayo.html>.

³² Malingre, V., Covid-19 : la Commission européenne présentera un projet de passeport vaccinal en mars, 1 March 2021, available at https://www.lemonde.fr/planete/article/2021/03/01/covid-19-la-commission-europeenne-presentera-un-projet-de-passeport-vaccinal-en-mars_6071615_3244.html.

³³ European Commission. Statement by President von der Leyen at the joint press conference with President Michel, following the videoconference of the members of the European Council, 25 February 2021.

³⁴ Damgé, M., & Dagorn, G., Covid-19 : six questions sur le passeport sanitaire, 3 March 2021, available at https://www.lemonde.fr/les-decodeurs/article/2021/03/03/le-debat-sur-le-passeport-vaccinal-en-six-questions_6071847_4355770.html.

³⁵ Lorasque, Á. N., Entrevista a Federico de Montalvo. El pasaporte covid será ético cuando la vacuna sea universal, 1 April 2021, available at <https://www.larazon.es/sociedad/20210301/ohl7e3mhsnf4bfrc6yj5jvt3eq.html>.

³⁶ Jacquin, J.-B., Covid-19: la création d'une passeport vaccinal se heurterait à de nombreux obstacles juridiques, 4 March 2021, available at https://www.lemonde.fr/societe/article/2021/03/04/covid-19-la-creation-d-un-passeport-vaccinal-se-heurterait-a-de-nombreux-obstacles-juridiques_6071942_3224.html.

³⁰ Article 219 of the law governing the Spanish judiciary (Spanish Organic Law 6/1985 on the Judiciary) provides for recusal and disqualification on the grounds of 'direct or indirect interest in the case'.

An ethical dilemma also arises with respect to those who have not been infected with COVID-19 precisely because they have acted responsibly in following the health recommendations. These people will effectively be punished by not being able to travel until they are vaccinated, even though their lack of immunity stems directly from the responsibility of their actions. At the same time, with respect to those who have been infected, while in some cases this may stem from a lack of observance of health recommendations, it is likely that in most cases, it will simply have been due to bad luck. There is no justification for limiting the rights of a person who cannot transmit the virus, irrespective of the reason. Yet it could be considered paradoxical that compliance with the rules and good luck might lead to that person's rights being limited.

Finally, in the event that a health passport is established at European level or in a Member State of the European Union, questions could be raised about the legality of the measure. Firstly, it would entail a restriction on the right to freedom of movement, as provided for in Article 19 of the Spanish Constitution and Protocol No. 4, Article 2 of the European Convention on Human Rights. Secondly, it would conflict with the right to equality and non-discrimination established in Article 14 of the Spanish Constitution and Article 14 and Protocol No. 12 of the Convention, as it would establish clearly differential treatment for persons who have not been vaccinated. Spanish judges could also question the legality of the decision through the mechanisms that we will examine below with respect to enforced vaccination against COVID-19.

In the event either that compulsory vaccination against SARS-CoV-2 is established or that the so-called health passport is imposed, it is no great leap to consider that judges, as guarantors of fundamental rights, would be the ones to authorise the enforced vaccination of those unwilling to receive the vaccine voluntarily or to resolve any conflicts that such a passport might entail in relation to freedom of movement. Even without the imposition of compulsory vaccination against this virus, under the current legal system in Spain, an application can be made to a judge for authorisation to forcibly vaccinate a person with disabilities in a health centre due to the risk of COVID-19 infection. This is already the case where a person who is not able to look after themselves requires medical treatment which can be classed as aggressive and which requires judicial authorisation, for example, when their legal representative is not willing to authorise this treatment to be administered.

We should also bear in mind that companies and administrations may be keen to ensure that their workers or users get vaccinated, although they cannot, it seems, oblige them to do so. Nonetheless, they may apply to the courts to rule on their vaccination. In order to avoid the large influx of applications that might be expected to flood the courts, other possible options for companies and administrations can be anticipated. Firstly, vaccination uptake could be incentivised through positive reinforcement measures such as the payment of a certain amount of money or the relaxation of some of the imposed safety restrictions for employees who get vaccinated.

Secondly, vaccination could be promoted without establishing compulsory vaccination *per se*, but by establishing restrictions of a coercive nature aimed at penalising those who do not get vaccinated. The latter option might not, however, be desirable since it entails discrimination against people who are not willing to receive the vaccine. In either case, such measures would remove the question of whether or not the person should be vaccinated from judicial consideration.

B. JUDGES' PERSPECTIVE

Having analysed the possibility of compulsory vaccination from an ethical and legal standpoint, we will next discuss how judges might act when they have to examine an administrative decision which obliges someone to be vaccinated.

It must be assumed that, by virtue of the principle of *non liquet*, judges must issue a ruling and cannot therefore recuse themselves on the basis of a possible ethics-based conscientious objection. A different question might be whether a judge has recourse to recusal because their impartiality is compromised when the judge has legal grounds for recusal or, in the event that they do not recuse themselves, they are challenged on the grounds provided for in the legislation.

The fundamental right to freedom of conscience is recognised in Article 16 of the Spanish Constitution and Article 9 of the European Convention on Human Rights. The Spanish Constitutional Court, the highest-level interpreter of

the Constitution, has stipulated that this fundamental right includes the right to conscientious objection, which can be exercised within the limits established by law and irrespective of whether its exercise has been legally regulated (Constitutional Court Judgements 15/1982 and 53/1985, *inter alia*).

This right is expressly recognised in Article 30.2 of the Spanish Constitution, in respect of (the now defunct) compulsory military service. Given that it is only mentioned in this specific context, it is the Constitutional Court's case-law which has extended the exercise of this right to other specific contexts, such as pharmacists' dispensing of specific medicinal products (Constitutional Court Judgement 145/2015 of 25 June). Nevertheless, the Spanish Supreme Court has provided that, in order to avoid this right being extended to any duty or obligation, it should be limited to the cases expressly recognised by the Constitutional Court or by the law.

The European Court of Human Rights recognised the right to conscientious objection to military service in its judgement in the case of *Bayatyan v. Armenia* of 7 July 2011.³⁷ Nonetheless, this Court has rejected this possibility in the case of the practice of abortion as of the case of *Pichon and Sajous v. France* in 2001. Consequently, there is no general recognition of conscientious objection and it does not seem likely that this would be admitted in favour of a judge in relation to the exercise of their judicial function, especially if we take into account the principle of *non liquet*.

³⁷ ECtHR, *Bayatyan v. Armenia*, Appl. no. 23459/03, Judgment 7 July 2011. All ECtHR decisions are available at <http://hudoc.echr.coe.int/>

Article 219 of Spain's Organic Law on the Judiciary establishes the grounds for the recusal and disqualification of judges. These include circumstances that might adversely affect a judge's impartiality and objectivity, such as marital or familial relationships with the parties or with the representative of the Prosecution Service. Among the grounds listed in this article, the tenth point consists in 'having a direct or indirect interest in the lawsuit or case'. As the Spanish Supreme Court and Constitutional Court have established, this justification refers only to a personal rather than professional interest,³⁸ since its aim is to safeguard the subjective impartiality of the judge's relationship with the parties.³⁹ This means that a judge cannot be challenged on the above-mentioned grounds by invoking professional or objective reasons. The Constitutional Court considers that objective impartiality is intended to ensure that judges who are involved in deciding a case approach the case without bias or prejudice arising from a prior relationship or contact with the person subject to proceedings. Likewise, it indicates that in order to determine when doubts about judicial impartiality can be considered objectively justified, it is necessary to verify in each specific case whether previous action by the judicial body caused it to make a decision 'assessing issues identical in substance or very similar to those which must be subject to a ruling or decision in the consideration

of merits'. To this end, account must be taken of 'not only the preliminary enquiries, the adoption of previous decisions involving a prejudgement of guilt, or the prior involvement in an earlier instance of the same process, but, more generally, the ruling on facts argued in a previous case'.⁴⁰

Nonetheless, there are those who advocate further expanding 'direct or indirect interest in the lawsuit or case'. According to Antonio del Moral García,⁴¹ if a judge realises that it is contrary to their convictions or beliefs to apply a rule relevant to the merits of the process, they should recuse themselves from the case due to lack of impartiality. In such cases, it could happen that a judge might seek out special obstacles or difficulties in applying the rule, which would result in bias. The principle of the judge's impartiality, which is a pillar of judicial ethics and closely related to the rights guaranteed by Article 24 of the Constitution, would provide grounds for judges to recuse themselves in such cases.

Despite this, Moral points out, a judge's simple disagreement with the law would not in any case suppose a conflict of conscience; thus, it must be the judge himself or herself who decides whether this has occurred. This entails a judgement of discretion that is intrinsic to the act of recusal.

Offering another point of view, Abraham Barrero Ortega⁴² suggests that 'a judge (is) not a private individual; the judge is a public power. Conscientious objection is an individual's right before the State and the judge is the State'. Moreover, 'access to the jurisdictional function is voluntary. This function is not imposed on judges'. Judges are therefore obliged to exercise the jurisdictional function in accordance with the rules that apply to them, interpreting and implementing the legal order. It is understood that if judges do not wish to implement the legal order and, therefore, neglect their jurisdictional function, they should step down from their duties. Professor Barreiro argues that allowing a judge to object to the application of any law which goes against their conscience would pose a serious risk, given that 'the mandates of the legal order are countless and the demands of conscience can be almost infinite'.

It is also possible that judges might oppose the authorisation of forced vaccination against coronavirus by raising an issue of unconstitutionality before the Spanish Constitutional Court. This mechanism is regulated by Article 163 of the Constitution and entails the suspension of proceedings until the High Court has issued its decision. It could be argued that there is a violation of the fundamental right to physical integrity enshrined in Article 15 of the Spanish Constitution. Thus, it would fall to the Constitutional Court to weigh this right against those of the rest of society. This separate process

can only be promoted once the main process is over and the judge has to lay down a ruling. Then, the judge has to hear the parties and decide whether he or she raises the issue to the Constitutional Court. If the judge decides to raise it, the original process is suspended until the Constitutional Court decides about the constitutionality of the questioned law. The judge that raises the issue does not take part in such process. The only parties that can take part in the issue process are the ones that took part in the original process, as well as the Spanish Congress, the Spanish Senate, the General Prosecutor of the State, the Spanish Government and, if the process is about Autonomous legislation, the legislative and executive organs of the affected Autonomous Community.⁴³

In short, a judge who is asked for effective judicial protection with respect to whether or not a person should be vaccinated must put aside any prejudices or biases to focus on the impartial and objective application of the law, in order to ensure that the principles underpinning judicial ethics are not harmed and to safeguard rights, honouring the judicial function in the service of those seeking justice.

Finally, to conclude, mention should be made of the recent judgement of the European Court of Human Rights on compulsory vaccination, Judgment of the Grand Chamber of 8 April 2021 in the case of *Vavříčka and others v. the Czech Republic*.⁴⁴ In this case, several parents

³⁸ Order of the Spanish Supreme Court, Special Chamber on Article 61 of the Law on the Judiciary of 1/2015, 17 April, 2008 (Application 2/2007) and 25 February, 2015 (Appl. 1/2015)

³⁹ Judgement 164/2008 of the Constitutional Court, Second Chamber, of 15 December, 2008

⁴⁰ Judgements of the Spanish Constitutional Court: 133/2014 of 22 July, legal basis 3; 47/2011 of 12 April, legal basis 9; 36/2008 of 25 February, legal basis 2; 60/2008 of 26 May, legal basis 3; 26/2007 of 12 February, legal basis 4; 143/2006 of 8 May, legal basis 3; and 45/2006 of 13 February, legal basis 4.

⁴¹ Del Moral García, 'Jueces y objeción de conciencia' [Judges and Conscientious Objection] (2009)

⁴² Barrero Ortega, 'La objeción de conciencia judicial (o de cómo lo que no puede ser no puede ser y, además, es imposible)' [Judicial conscientious objection (or how what cannot be cannot be and is, moreover, impossible)], 22 *El cronista del Estado Social y Democrático de Derecho* (2011), at 28

⁴³ Spanish Organic Law 2/1979, of the 3rd of October, of the Constitutional Court, articles 35 to 37. Available at <https://www.boe.es/eli/es/lo/1979/10/03/2/con>

⁴⁴ ECtHR, *Vavříčka and others v. the Czech Republic*, Applications nos. 47621/13 and 5 others, Judgment of 8 April 1978

were either fined or their children were denied admission to nursery school for failure to comply with the compulsory vaccination schedule. The claims were based on the necessary protection of the right to respect for private life provided for in Article 8.2 of the European Convention on Human Rights.

The European Court of Human Rights determined that such penalties, as well as compulsory vaccination, cannot under these circumstances be considered contrary to the ECHR. This decision was based on the proportionality of the measure, concerning the vaccination of minors, who are subject to very few risks from the potential side effects of vaccines, and at a stage of schooling which is not compulsory.

This measure can be considered effective to prevent the spread of an illness, taking into account that nursery schools and schools in general are places where viruses can spread horizontally and thus cause new infections. Therefore, the benefits for public health would be high compared to the risks the measure involves.

4. CONCLUSION

The role of Judges goes beyond being merely a mouthpiece of the law, especially when it comes to situations of uncertainty such as the current COVID-19 crisis.

Some of the measures that can be necessary to prevent the virus to spread may affect fundamental rights in a negative way. The protection of fundamental rights is among the most important functions of the judiciary. Therefore, judges must assess the use of such measures to prevent an unlawful breach of fundamental rights.

Although compulsory vaccination may be counterproductive, it will be necessary if we do not reach a minimum immunisation rate. Compulsory vaccination implies an ethical conflict in the form of tensions between collective and individual rights to health. For this reason, even though compulsory vaccination has ways to fit in the Spanish legal framework, jurists recommend adopting a more specific legislation that determines the conditions in which compulsory vaccination could be applied.

As compulsory vaccination affects fundamental rights, it is necessary for judges to assess the measure abides by the requirements of sustainability, necessity and proportionality. This is why compulsory vaccination can bring about dilemmas related to judicial ethics.

Judges must always ensure their impartiality is not compromised and, therefore, put aside prejudices or biases that might stem from a misrepresentation of the facts in the news or on the media. Also, they should not openly show their opinions on social media, as it may seem they are prejudicing. These situations could lead to a potential disqualification or recusal, or they may be seen as intent to influence the actions of other public authorities.

Moreover, by virtue of the principle of *non liquet*, when judges do not agree with a law they must issue a ruling and cannot recuse themselves. The Spanish Supreme Court limits the use of conscientious objection to the cases recognised by the law and the Constitutional Court. The European Court of Human Rights does not provide a general recognition of it, either.

Also, Article 219 of the Spanish Organic Law for the Judiciary establishes the grounds for recusal and disqualification, and it refers to "having a direct or indirect interest in the lawsuit or case", which means a personal rather than a professional interest.

Taking all this into account, the question is whether a judge can recuse himself or herself on the grounds of conscientious objection. Some consider that a judge should have the possibility to recuse himself or herself if his or her convictions are contrary to applying a relevant rule, as that contradiction could result in bias incompatible with the right to an impartial judge, which is reflected by article 24 of Spanish Constitution. Despite that, the judge would be the only person who can know whether his or her impartiality is affected by such convictions. On the contrary, it is widely held that judges are not private individuals, but public powers. If conscientious objection is an individual right before the State, and judges are the State, they will not be able to exercise that right.

We believe these positions to be compatible, as judges should try by all means not to recuse themselves, but if in extreme cases they see their impartiality affected, they may have to do it to protect citizens' right to an impartial judge.



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