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In Memoriam

Law and Legal Mentality Between Italy and Germany *In memoriam* Carlo Luigi Ubertazzi

Christopher Heath*

I. Prof Ubertazzi as a Bridge Between Italy and Germany

Back in 1992 when I first came to the Max Planck Institute for Comparative and International Patent, Copyright and Competition Law in Munich, Professor Ubertazzi was a frequent guest. In fact, he sent most of his PhD students there and actively participated in seminars and discussions. Although most of us were a bit surprised by the way he treated his PhD students – too hierarchical for an Institute whose motto 'Do as you please' was invisibly written over its entrance door – no one doubted Prof Ubertazzi's excellent knowledge of German, his erudite knowledge of German law, culture and mentality.

This was by no means an easy feat, as the Alps are far more than a geographical boundary. Italians and Germans are a bit like men and women: They complement each other well, but understand each other badly. I will not go further into the anecdotal, but rather refer to an essay once written by Tullio Ascarelli – *nullum par elogium* –: *Antigone e Porzia*.[1] Ascarelli in this essay gives a character interpretation of Antigone's refusal to obey Kreon's laws, and of Portia's decision in Shakespeare's *Merchant of Venice*. Ascarelli's view for the latter is that the contract Shylock wants to enforce is valid:

> 'The contrast between the agreement and a moral need which condemns it, is not resolved through the revolutionary act of denying the agreement. The contrast is bypassed, as some would say, through interpretation'.

The subtlety of contractual interpretation is thereby contrasted with a moral requirement, and this tells us much about the difference in legal perception North and South of the Alps. Ascarelli himself is aware of this and lets us know where

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[1] T. Ascarelli, 'Antigone e Porzia' *Rivista internazionale di filosofia del diritto*, 756 (1955). An English translation has been provided by Camilla Crea: T. Ascarelli, 'Antigone and Portia' (1959), *The Italian Law Journal*, 167 (2015). The quotations of Ascarelli's essay have been taken from this translation.

his sympathies lie:

> 'Portia's intelligence, combined with a hint of probabilism and, morally speaking perhaps even ambiguity, is set against what could be defined as Antigone's Calvinist Puritanism.[2] The human triumph of interests, defended through a winning interpretation that presents itself as a remunerable professional activity, is set against the death of Antigone who only asserts the victory of her truth by sacrificing herself'.

Not only Ascarelli, but also Jhering and Kohler dealt with the contract litigated in The Merchant of Venice. There is now an interesting difference in perception between these two German scholars and Ascarelli: Rudolf von Jhering[3] reasons that Shylock 'in secure confidence of his generally recognised right' goes to court and everyone in court seems to agree that the contract is valid. This being so, according to Jhering, the judge was wrong to 'scornfully deny' the enforcement of the verdict, even if it were for the sake of humanity, because 'does an injustice committed in the interest of humanity no longer remain an injustice?'. For Jhering, Shylock, not Portia, is the hero of the play.[4]

Josef Kohler[5] first of all attests Jhering to have 'understood not a toss of Shakespeare's drama', yet also he is very upset about Portia's reasoning:

> 'It is a solid principle of law that whoever confers another the right to do something, must also confer the right to all what it takes to realise this right (…) who rents out a flat must also concede the tenant to use the door and staircase so as to reach the flat'.

According to Kohler, Portia's decision is a denial of justice, a hairsplitting quibble, an overly sophisticated argument. And yet Kohler approves the decision: according to him, it is the task of the judiciary to render a good decision, even with bad reasons. The more so where legal perception has strayed so far from moral perception that the former appears 'a ruin of ancient circumstances that no longer suits our time'. The victory in this case is 'the victory of a refined legal

[2] As we know, Luther was not minded to reform the catholic church 'through interpretation'. Whether this would have been better, is arguable: Germany lost two-thirds of its population in the thirty years war (1618-1648) that pitted Catholics against Protestants.

[3] R. von Jhering, *Der Kampf um's Recht* (Wien: Manz'sche Verlags- und Buchhandlung, 8th ed, 1886), XI-XII. In the seventh edition, he also vehemently citicises Kohler's approach (first published in 1883). For Jhering, Shylock is the hero of the play, because by insisting on his rights, he defends the legal order as such.

[4] The difference in legal perception between Jhering and any Italian is striking. According to Jhering, 'Law is the certainty of enjoyment'. Which Italian would ever endorse such a definition?

[5] J. Kohler, Shakespeare vor dem Forum der Jurisprudenz (Würzburg: Stahel, 1883), 3-9, 72-73, 88; Id, Nachwort zu Shakespeare vor dem Forum der Jurisprudenz (Würzburg: Stahel, 1884), 1-2.

conscience'. Kohler believes in the evolutionary forces of law driven by legal perception and put into effect by the judiciary. For Kohler, the Merchant of Venice is one of the turning points in legal history, for Jhering a squalor and for Ascarelli an example of a badly drafted contract.[6]

Even to an Italian scholar as great as Ascarelli, the resort to fundamentals was as bewildering as to the German scholar Josef Kohler the resort to the fifty shades of grey, the *sfumato*, the (mere) interpretation of a contractual clause, 'transforming it and thereby adapting it to an ever-changing equilibrium of conflicting forces and evaluations. An ongoing re-creation'.

For a people like the Italians that for centuries has been occupied by foreigners (Saracens, Normans, Byzantines, French, Spanish, Germans, Austrians, you name it), the art of solving problems by sidestepping them becomes a necessity of survival. The only constant is the unchangeable of change.[7]

II. The Importance of The Fundamental

For as much as I admire Tullio Ascarelli, there is room for the fundamentals in addition to the realm of skilful interpretation. The elegance of Ascarelli's *ars interpretatorum* is as much part of the law as Josef Kohler's recognition that legal interpretation must be based on fundamental principles that draw their justification from what is commonly accepted and acceptable: cutting the flesh of debtors in default no longer was.

Even further, the elegance of interpretation may at times even distract the view from issues of fundamental importance. When looking at interests that are of fundamental commercial importance to Italy, one area that comes to mind are geographical indications. Fundamental because the interest in their protectionis not limited to the national territory. No coincidence then that Italy is a member to the Madrid Arrangement for the Suppression of Misleading Indications,[8] hosted negotiations for the Stresa Agreement[9] and sent her most reputed legal scholar – Tullio Ascarelli – to head the negotiations for the

[6] With all due respect to Ascarelli, if he was correct, why would Shylock be punished and lose all his belongings? For bad drafting skills? Kohler appears the most modern scholar: his reasoning could equally apply to such turning points in legal history as the Nuremberg trials that crystallised the crime of genocide out of a moral imperative which provides law with its ultimate justification: 'My Lords, I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong': *Donoghue* v *Stevenson* (1932) UKHL 100 (per Lord Atkin).

[7] Which may be the same as G. Tomasi di Lampedusa's *Il Gattopardo*: 'If we want that everything remains as is, everything has to change'.

[8] Madrid Arrangement for the Repression of False or Deceptive Indications of Source on Goods (1891), to which Italy acceded in 1951.

[9] Stresa Agreement for the Indication of Cheeses 1 June 1951. The agreement entered into force on 8 July 1953.

conclusion of the Lisbon Arrangement for the Protection of Appellations of Origin.[10] In EU negotiations of bilateral and multilateral free trade agreements, proprietary protection of geographical indications has often featured prominently on Italy's insistence.[11]

Different from France, Italian denominations of origin lead an often precarious existence outside national borders. They easily get lost in translation (does 'Parmigiano Reggiano' translate as 'Parmesan'? Why is the indication not simply called 'Parmigiano'? And what about 'Grana Padano'? Also to be protected as 'Parmesan'?), appear contradictory (how can 'Montepulciano' be geographical if in Italy itself, there is an indication 'Montepulciano d'Abruzzo'?), or, *horribile dictu*, de-localised (Prosecco makers from Valdobbiadene are at pains to point out that their fizz is *not* from Prosecco[12] – and is there such place, anyway?). One could therefore think that it may be in the best interest of Italy to do her utmost to protect foreign denominations of origin at home so that Italian denominations be protected abroad. But not so:

- Contrary to the clear wording of Art 6 Lisbon Arrangement,[13] protection was denied for the Czech indication 'Pilsener Urquell' because Art 6 should be considered a mere presumption[14] (1996);

- Contrary to international and European law, beer (in this case 'Budweiser' from Budweis) was considered a product incapable of protection as a geographical indication (2002).[15]

[10] The 1959 Lisbon Arrangement for the Protection of Appellations of Origin remains the most important international agreement for the protection of geographical indications. Under the Agreement, Italy alone has protected one hundred and seventy five indications. The then president of the Fourth Commission, S. Takahashi, ceded presidency to the then vice-president T. Ascarelli, as Japan was not interested in negotiating an agreement for the protection of appellations of origin: *Actes de la Conférence Réunie a Lisbonne*, du 6 au 31 octobre 1958, (Geneva 1963), 830-849.

[11] A. Moerland, Why Jamaica wants to protect Champagne: Intellectual Property Protection in EU Bilateral Trade Agreements (Oisterwijk: Wolf Legal Publishers, 2013).

[12] 'The area of production of Valdobbiadene Prosecco Superiore D.O.C.G. Extra Dry extends over the hill country of the Treviso province, encompassing the cities of Conegliano and Valdobbiadene' available at https://tinyurl.com/yaucbr9r (last visited 31 December 2022).

[13] Art 6 Lisbon Arrangement reads: 'An appellation which has been granted protection in one of the countries of the Special Union pursuant to the procedure under Article 5 cannot, in that country, be deemed to have become generic, as long as it is protected as an appellation of origin in the country of origin'. The negotiating history of the Agreement show that this provision was of great importance to the delegations and should be put into terms as clear as possible: 'Consideratons of the Preparation Committee' *La Propriété Industrielle*, 239 (1956): 'Pour exclure toute transformation en dénomination générique d'une appellation d'origine protégée'. Protocol of the Conference itself: 'La Commission estime necessaire de régler d'une manière explicite ce cas. En effet, une exception à la règlre fondamentale qu'une appellation d'origine une fois enregistrée ne pourrait jamais être considérée comme générique dans les pays de l'Union particulière pourrait se presenter'. ('Actes' above n 10, 838).

[14] Corte di Cassazione 28 November 1996 no 10587, *Rivista di diritto industriale*, II, 144-145 (1997).

[15] Corte di Cassazione 21 May 2002 no 13168, 34 *International Review of Intellectual*

- Finally, the Italian Supreme Court denied the Bavarian Brewery Association protection against a third party registration of 'Bavaria' for beer originating in the Netherlands (2012)[16] without having regard to the fact that such registration most likely causes confusion amongst Italian consumers, millions of whom have been to the Oktoberfest that is overlooked by a very sizable statue of the Bavaria: after all, according to Art 14, para 1, lett *b) Codice della proprietà industriale* (IPC),signs that can mislead the public as to the geographical origin of goods (considered as a relevant aspect of consumer choice) cannot be registered or are prone to subsequent revocation.

The Bavarian Brewery Association in the above-mentioned case was represented by Prof Ubertazzi. He had understood that Bavaria for Bavarians carried the same importance as Chianti for the Tuscans. It concerned cultural identity. The fundamentals. Yet the fundamental was lost in the above cases, and, worse perhaps, this was not even noticed.

And while the fundamental, the *chiaroscuro*, was lost, at least for the indication Budweiser, the *sfumato* of skilful interpretation somehow changed the picture: While the Supreme Court in 2002 decided that the plaintiff (a US company) based on a handful of journals circulated in Italy in the 1930s had obtained an unregistered, well-known mark for the term 'Budweiser', the same court ten years later (2013) decided that this well-known, unregistered mark had been misleading all along in regard of its geographical provenance,[17] another five years later that this mark, even though misleading, still gave a right to use (2018),[18] and, in 2021 and without being in contradiction with the earlier verdict, that the right to use a misleading mark was limited to instances where it was not misleading.[19] Someone not initiated in the rites of the 'ever changing equilibrium of contrasting interests and evaluations' may be pardoned for the thought that the court has simply gone haywire.

III. Law Comparison as an Intercultural Dialogue

Law as a discursive science derives its legitimacy from dialogue. Since the ten commandments, no law has dropped from the sky as an absolute truth, although law students often get a different impression when listening to their professors. Understanding different laws, legal cultures and legal perceptions is

Property and Competition Law, 676 (2003) – *Budweiser III*. The case had other irregularities, too, see my comment: C. Heath, 'Il caso Budweiser' *Rivista di diritto industriale*, II, 77 (2004).

[16] Corte di Cassazione 20 September 2012 no 15958, 46 *International Review of Intellectual Property and Competition Law*, 881 (2015) – Bavaria.

[17] Corte di Cassazione 10 September 2013 no 21023, 46 *International Review of Intellectual Property and Competition Law*, 891 (2015) – Budweiser V.

[18] Corte di Cassazione 1 February 2018 no 2499, available at www.dejure.it.

[19] Corte di Cassazione, 30 November 2021 no 37661, 71 *Gewerblicher Rechtsschutz und Urheberrecht - Internationaler Teil* (2022), 1067 with comment by C.Heath and N. Rampazzo.

a first step of understanding one's own.

Professor Ubertazzi, who regularly sent his disciples to Germany for research and cultural understanding, was aware of the importance to bridge the linguistic and cultural gap between Italy and Germany. Those who follow him are hereby warmly encouraged.

Essays

The Role of Energy Communities in the Energy Transition

Annalisa Cocco*

Abstract

The paper aims to offer a legal framework for Energy Communities in the European and Italian contexts. Particular attention is given to the function of collective energy sharing introduced by lawmakers in the context of regulatory actions to implement the decarbonization goals set by the Paris Agreement. The modalities of State support to citizen initiatives operating as prosumers in the market for the beneficial impact of sharing energy and enhanced use of renewables are examined. In addition, the connection between energy and digital transition with the possible risks arising from this necessary interaction are considered.

I. Introduction

Global warming and climate change are now pressing threats to human, ecosystem, and biodiversity health. The threats have been known to society, but are now finding an ever more ready response in terms of legislative policy. Despite the gradual worsening of greenhouse gas emissions in recent years,[1] citizens and legislators have shown a common purpose to reverse course via a synergy that will produce concrete results within a reasonable timeframe. Serious commitments have in fact been taken, not just at the European level, to counter a global phenomenon that requires a coordinated effort by individuals and institutions. The Italian lawmakers even amended the Constitution in February 2022 to introduce environmental protection among the most prominent provisions in the national legal framework.[2]

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[1] For detailed information, see the official 'Sixth Assessment Report of the Intergovernmental Panel on Climate Change', available at https://tinyurl.com/2s3c9kdz (last visited 31 December 2022).

[2] Cf the current Arts 9 and 41 of the Italian Constitution, where the environment receives protection also in the interest of future generations and must be considered even in business activities. On this topic see P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, III, *Situazioni soggettive* (Napoli: Edizioni Scientifiche Italiane, 2020), 77; M. Pennasilico ed, *Manuale di diritto civile dell'ambiente* (Napoli: Edizioni Scientifiche Italiane, 2014), 15. Concerning the environmental impact of renewable energy consumption, A.A. Alola et al, 'The role of economic freedom and clean energy in environmental sustainability: Implication for the G-20 economies' *Environmental Science and Pollution Research*, 36612

However, the effort required for an effective ecological transition requires more than merely a technical effort. *Ad hoc* regulatory initiatives are insufficient; what is needed is, more generally, a change in people's values and morality leading to changes in daily lifestyles.[3] Thus the problem of environmental protection is close to the class of 'No Technical Solution Problems'[4] and it should be addressed accordingly. All tools – both informative and operational[5] - must be in place to increase social awareness of the harmful effects of individual behavior and take advantage of new instruments, including technological ones, to reduce its overall impact.

A global ecological transition entails above all an energy transition:[6] that is the transition from an energy production system based on fossil sources (coal, oil, natural gas) to a system mainly focused on renewable sources along with proper infrastructure (adequate grids and energy storage systems). The ultimate goal of the energy transition – and a fundamental step for the entire ecological one – is the so-called decarbonization or 'carbon neutrality': ie, the reduction of the carbon/hydrogen ratio in energy sources. Achieving this goal requires the rethinking of traditional energy production and consumption patterns and new behavior standards to be applied both in private life and business activities by citizens and economic operators. European lawmakers have prepared innovative

(2022). Cf F.V. Bekun et al, 'Toward a sustainable environment: Nexus between CO_2 emissions, resource rent, renewable and nonrenewable energy in 16-EU countries' 657 *Science of The Total Environment*, 1023 (2019). About the reform of Art 41 of the Italian Constitution, F. De Leonardis, 'La transizione ecologica come modello di sviluppo di sistema: spunti sul ruolo delle amministrazioni' *Diritto amministrativo*, 779 (2021). With reference to the link between european and Italian legal systems within the energy field see S. Quadri, 'Riflessioni sul rapporto tra diritto interno e ordinamento dell'Unione europea in tema di energia' *Rivista italiana di diritto pubblico comunitario*, 1031 (2012).

[3] 'Interestingly, people's value-based judgements of energy sources may affect their evaluations of various consequences of these energy sources, including consequences that should not be particularly important to them given their values': L. Steg et al, 'Understanding the human dimensions of a sustainable energy transition' 6 *Frontiers in Psychology* (2015), available at https://tinyurl.com/4f3832yw (last visited 31 December 2022).

[4] G. Hardin, 'The Tragedy of the Commons' 162 *Science New Series*, 1243 (1968). Cf also E. Ostrom, *Governing the Commons. The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990), 1-28. On the 'Commons' issue, see at least S. Rodotà, 'Beni comuni e categorie giuridiche. Una rivisitazione necessaria' *Questione giustizia*, 237 (2011); U. Mattei, *Beni comuni. Un manifesto* (Roma-Bari: La Terza, 2011); S. Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* (Bologna: il Mulino, 2013), 459-479.

[5] See L. Neij and K. Astrand, 'Outcome indicators for the evaluation of energy policy instruments and technical change' 34 *Energy Policy*, 2662–2676 (2016); cf also B.D. Solomon and K. Krishna, 'The coming sustainable energy transition: History, strategies, and outlook' 39 *Energy Policy*, 7428 (2011); M. Chang et al, 'Trends in tools and approaches for modelling the energy transition' 290 *Applied Energy*, 116731 (2021).

[6] See the SAPEA Science Advice for Policy by European Academies, *A Systemic Approach to the Energy Transition in Europe* (Berlin: SAPEA, 2021), available at https://tinyurl.com/2p93yw4m. With regard to renewable sources in the framework of property right, cf P. Laghi, 'Impianti fotovoltaici e distanze legali: osservazioni sulla "funzione sociale" della proprietà nell'era delle energie rinnovabili' *Rassegna di diritto civile*, 875 (2017).

social-cooperation instruments to encourage the spread of alternative ways of producing, consuming, and storing energy. Those instruments include the so-called Energy Communities. Such communities allow a peculiar method of energy fruition: energy sharing.[7]

In the following section, the historical background and the rationale behind the Energy Communities system are explained. In the third and fourth sections, the structures of collective 'Self-Consumers' and 'Renewable Energy Communities,' as well as the 'Citizen Energy Communities' are analyzed. Finally, the Italian Legal Framework of Renewable Energy Communities is described. In the conclusion, the inevitable conflict between the energy transition and the digital one are highlighted.

II. Historical Background: The Rationale Behind Energy Communities. Prosumption and Self-Consumption

The 'Green Revolution'[8] has been taking place remarkably for about a decade. In February 2015, the 'Energy Union Strategy' was outlined by the European Commission. In a communication addressed to the European Parliament and the Council, the Commission provided a plan for all EU member states enabling them to anticipate the Protocol which was to be negotiated in Paris at the end of that same year. That agreement would have involved all the world's major economies: Europe, China, and the United States of America. As an essential part of its Energy Union Strategy, the Commission proposed a fundamental transformation of the European energy system marked by maximum freedom of energy flow and diversification of resources employed for production. The main goals were: increasing renewable sources to reduce carbon dioxide (CO_2) emissions and

[7] Directive (EU) 2019/944 of the European Parliament and of the Council, 5 June 2019, on common rules for the internal market for electricity and amending Directive 2012/27/EU, Recital no 43: 'Distributed energy technologies and consumer empowerment have made community energy an effective and cost-efficient way to meet citizens' needs and expectations regarding energy sources, services and local participation. Community energy offers an inclusive option for all consumers to have a direct stake in producing, consuming or sharing energy'. On this topic see also Ferrero, 'Le comunità energetiche: ritorno a un futuro sostenibile' *Ambiente e sviluppo*, 677 (2020); A. Caramizaru and A. Uihlein, 'Energy communities: An overview of energy and social innovation' *JRC Science for Policy Report* (2020), available at https://tinyurl.com/4mwfvxyd (last visited 31 December 2022); J. Cuenca et al, 'Energy Communities and Sharing Economy. Concepts in the Electricity Sector: A Survey' *International Conference on Environment and Electrical Engineering* (2020), available at https://tinyurl.com/4baah5hn (last visited 31 December 2022); D. de São José et al, 'Smart energy community: A systematic review with metanalysis' 36 *Energy Strategy Reviews*, 100678 (2021).

[8] For an Italian perspective see the 'PNRR: rivoluzioneverde e transizioneecologica', available at https://tinyurl.com/y2wjjp5p (last visited 31 December 2022), and the 'Italy's National Energy Strategy 2017', available at https://tinyurl.com/473zujhf (last visited 31 December 2022).

enhancing citizen participation in energy production. In the Commission's view, citizens play a prominent role in the energy transition and can take advantage of new technologies to pay less and actively participate in the market.

The year 2015 saw effective international cooperation on the energy issue. In September of the same year, the '2030 Agenda for Sustainable Development' was signed by all one hundred and ninety-three member countries of the United Nations and approved by the UN General Assembly. That document consists of seventeen Sustainable Development Goals (SDGs),[9] among which are Affordable and Clean Energy (Goal no 7)[10] and Sustainable Cities and Communities (Goal no 11).[11] In December 2015, moreover, the Paris Agreement was signed by all member states of the United Nations. It was the world's first legally binding universal climate agreement that commits countries to build a 'climate-neutral' society by 2050. The agreement entered into force in October 2016. Between 2018 and 2019, the European Commission issued the 'Clean Energy Package' (CEP): a package of eight Directives to achieve the promised results.

In the field of Energy Communities, the 'RED Directive II' (Renewable Energy Directive II)[12] on promoting the use of energy from renewable sources and the 'IEM Directive' (Internal Electricity Market),[13] establishing common rules for the internal electricity market, are particularly important. Both of them were implemented in Italy only at the end of 2021, with decreto legislativo no 199 (Directive RED II) and decreto legislativo no 210 (Directive IEM). Pending the implementation of these European directives, however, the 'milleproroghe decree' of 2019 (decreto legge no 162 of 2019, converted into legge no 8 of 2020) intervened; its Art 42 bis deals precisely – in the field of technological innovation– with the so-called 'self-consumption from renewable sources'. It provided for the possibility, pending the transposition of the RED II Directive and in implementation of Arts 21 and 22 thereof, of 'collective self-consumption' from renewable sources or 'renewable energy communities'.

The self-consumption concept introduced by the rule is the one of prosumption[14] because the consumer can both consume and produce. To find a

[9] Cf R. Michaels et al eds, *The Private Side of Transforming our World. UN Sustainable Development Goals 2030 and the Role of Private International* (Cambridge: Intersentia, 2021), 3; R. Romàn-Collado and M. Economidou, 'The role of energy efficiency in assessing the progress towards the EU energy efficiency targets of 2020: Evidence from the European productive sectors' 156 *Energy Policy*, 112441 (2021).

[10] Goal and Targets all available at https://tinyurl.com/2p8a4sem.

[11] Goal and Targets all available at https://tinyurl.com/57vbd4cx.

[12] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the Promotion of the Use of Energy from Renewable Sources. Cf also the Directive known as 'RED I': Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources.

[13] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on Common Rules for the Internal Market for Electricity and amending Directive 2012/27/EU.

[14] On this topic, see G. Ritzer and J. Nathan, 'Production, Consumption, Prosumption. The Nature of Capitalism in the Age of the Digital 'Prosumer' *Journal of Consumer Culture*, 14

difference between the two terms, we can consider that prosumption implies a kind of 'social fusion' of roles between professional and consumer so that the latter also acts in the community as a potential supplier of goods or services; the self-consumption concept instead has a predominant individual perspective. Thus the self-consumer produces and primarily consumes the good or service for himself. It must be noticed that legal scholarship indiscriminately mentions 'prosumption' and 'self-consumption' while the European legislature never adopts the former term. In the RED II directive, it always refers to 'self-consumers'; in the IEM directive, it exclusively refers to 'self-generated electricity'. In the Italian context, back in 2012, the AEEGSI (Autorità per l'Energia Elettrica, il Gas e il Sistema Idrico) used the term 'prosumption' to indicate a person who is both producer and final consumer of electricity.[15] The preferred solution appears to be the one adopted by the legal scholarship: that is accepting the semantic unification of the two terms as both of them have their essential core in the reference to a double operational role of the consumer regardless whether this benefits only himself or the whole community by sharing goods.[16] Moreover, mere nominalistic distinctions are not necessary even with a view to protecting people involved since in the Italian and European legal framework everyone finds fundamental protection simply as a human being.[17]

As highlighted in a 2017 EESC opinion,[18] there are several economic benefits

(2010). Concerning the 'Energy Prosumption', cf S.B. Jacobs, 'The Energy Prosumer' 43 *Ecology Law Quarterly*, 519 (2016), available at https://tinyurl.com/ypsjnew9 (last visited 31 December 2022); A.J. Bokolo, 'Smart City Data Architecture for Energy Prosumption in Municipalities: Concepts, Requirements, and Future Directions' 17 *International Journal of Green Energy*, 827-845 (2020); S. Bellekom et al, 'Prosumption and the Distribution and Supply of Electricity' 6 *Energy,Sustainability and Society*, 22(2016); R. Zafar et al, 'Prosumer Based Energy Management and Sharing in Smart Grid' *Renewable and Sustainable Energy Reviews*, 1675 (2018); L. Ruggeri ed, *Needs and Barriers of Prosumerism in the Energy Transition Era* (Madrid: Dykinson, 2021).

[15] Resolution of 18 May 2012 188/2012/E/com, available at https://tinyurl.com/3j87bmsp (last visited 31 December 2022). See lett h for the 'Prosumer' definition. See also on this theme M. Maugeri, 'Elementi di criticità nell'equiparazione, da parte dell'Aeegsi, dei «prosumer» ai «consumatori» e ai «clienti finali» '*Nuova giurisprudenza civile commentata*, 406 (2015).

[16] See R. Garetto, 'Overcoming Energy Poverty through Becoming a Prosumer?', in L. Ruggeri ed, *Needs and Barriers of Prosumerism* n 12 above, 49, who categorizes prosumers into different types according to the European Parliamentary Research Service (EPRS). The EPRS divides prosumers into four categories: residential prosumers, communities and citizen-led renewable energy cooperatives ('Res Coops'), commercial prosumers, and public prosumers.

[17] P. Perlingieri, 'La tutela del consumatore tra liberismo e solidarismo', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 308, where it is emphasized that producers and consumers are exclusively economic qualifications and that the consumer is, first of all, a person and only sometimes also a consumer. Cf also P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1972), 7; P. Femia ed, *Drittwirkung: principi costituzionali e rapporti tra privati* (Napoli: Edizioni Scientifiche Italiane, 2018), 53.

[18] Opinion of the European Economic and Social Committee on 'Prosumer Energy and Prosumer Power Cooperatives: Opportunities and Challenges in the EU Countries', available at https://tinyurl.com/62wc4urb (last visited 31 December 2022).

of prosumption and self-consumption in the energy sector.[19] First of all, transmission costs are reduced since consumers produce in the same location where they consume. This allows savings in physiological grid losses. Moreover, the potential of local sources is enhanced by creating alternative sources based on the specific characteristics of a given location (eg, places highly exposed to sun or wind). Finally communities are directly involved; in fact, they are made more aware of the production and – especially – the consumption of energy. Moreover, prosumers are more efficient if they operate in groups. By sharing the expenses of a common plant and offering larger quantities of energy, groups can strengthen their market position and reduce production costs. For this very reason, the lawmakers have provided for several self-consumption collective arrangements: (a) Collective Renewable Energy Self-Consumption; (b) Renewable Energy Communities; and (c) Citizens' Energy Communities.

III. Structural Configuration of 'Self-Consumers' and 'Renewable Energy Communities'

Under European law, an energy self-consumer is an end-consumer operating in his own sites within defined boundaries in other places, as allowed by a member state. He produces renewable electricity for his consumption and may store or sell self-produced renewable electricity as long as these activities do not constitute his main commercial or professional activity.[20] Self-consumers are considered to act collectively when they establish a group of at least two self-consumers located in the same building or apartment building.[21] At an operational level, self-consumers are also permitted (both individually and through aggregators) to produce renewable energy for their own consumption, to store or to sell surplus renewable electricity using electricity suppliers, renewable electricity trading agreements, and peer-to-peer exchange ones. They may also install and manage electricity storage systems combined with renewable electricity generation facilities for self-consumption and receive remuneration also by

[19] J. Lowitzsch ed, *Energy Transition. Financing Consumer Co-Ownership in Renewables* (Switzerland: Palgrave Macmillan, 2019), 10. See also J. Lowitzsch, 'The Consumer at the Heart of the Energy Markets?', in Id ed, *Energy Transition* above, 59-74; B. Lennon at al, 'Citizen or consumer? Reconsidering energy citizenship' 22 *Journal of Environmental Policy & Planning*, 184 (2020); R. Fernandez, 'Community Renewable Energy Projects: The Future of the Sustainable Energy Transition?' *The International Spectator*, 87 (2021).

[20] Art 2, no 14, Directive (EU) 2018/2001. Cf M. Meli, 'Autoconsumo di energia rinnovabile e nuove forme di energy sharing' *Nuove leggi civili commentate*, 630-656 (2020); V. Raffa, *Generazione di energia distribuita e comunità energetiche* (Napoli: Edizioni Scientifiche Italiane, 2020), 11. See also M. Giobbi, *Il consumatore energetico nel prisma del nuovo quadro regolatorio italo-eurounitario* (Napoli: Edizioni Scientifiche Italiane, 2021), 64; S. Monticelli e L. Ruggeri eds, *La via italiana alle comunità energetiche* (Napoli: Edizioni Scientifiche Italiane, 2022), 9.

[21] Art 2, no 15, Directive (EU) 2018/2001.

means of access-support schemes[22] for self-generated renewable electricity fed into the grid.[23] In any case, they maintain their rights and duties as end consumers.

The same 2018 RED II Directive provides for the Renewable Energy Communities (REC) by defining them as legal entities based on open and voluntary participation and control by shareholders or members located near the renewable energy projects owned and developed by those legal entities (Art 2, no 16, lett a). Shareholders or members of renewable energy communities are natural persons, small and medium-sized enterprises (SMEs), or local authorities, including municipalities, whose main purpose is to provide environmental, economic, or social-community benefits to their shareholders or members or to the local areas, rather than financial profits.[24] The Italian legislative decree transposing the Directive specifies that participation in renewable energy communities is open to all consumers, including those from low-income or vulnerable households. Control is always in the hands of natural persons, small and medium-sized enterprises, local authorities, research and training institutes, religious organizations, third sector, and environmental-protection entities located in the same municipalities where the energy-sharing projects are.

As regards the methods of energy production and management, as established by the 2019 'milleproroghe decree,' in Italy the members of the renewable energy community must produce energy by powered renewable source plants with a total power of no more than two hundred kW. The plants must have come into operation after the law converting the decree (legge 28 February 2020 no 8) and within sixty days after the date of entry into force of the RED II Directive transposition measure.[25] Community members share the energy using the existing distribution network. Shared energy is equal to the difference, in each hourly period, between the electricity produced and fed into the grid by renewable energy plants and the electricity withdrawn from all associated end consumers. Consumers' withdrawal points and plants' feed-in points must be located on low-voltage electricity grids subtended on the date the community was created by the same medium/low-voltage transformer cabin.

Thus for the valid establishment of a renewable-energy community, several

[22] About the support schemes, see M. Romeo, 'Produzione di agroenergie, autoconsumo collettivo e comunità energetiche' *Diritto e giurisprudenza agraria alimentare e dell'ambiente*, 8-9 (2021).

[23] Art 21, Directive (EU) 2018/2001.

[24] Art 2, no 16, Directive (EU) 2018/2001. 'The well-being of the population is at the centre of the optimization of territorial planning. The community becomes the protagonist for the improvement of the environmental, economic, and social context of the district to which it belongs. The citizen is trained and informed in such a way as to be himself a promoter of territorial development': F. Ceglia et al, 'From smart energy community to smart energy municipalities: Literature review, agendas and pathways' 254 *Journal of Cleaner Production*, 12 (2020).

[25] The Directive (EU) 2018/2001 has been implemented by Decreto legislativo 8 November 2021 no 199. The sixty-day deadline implies that the plants have entered service by 8 January 2022.

elements must exist: a subjective one (the will to pursue a common goal other than financial profit), an objective one (the use of renewable sources), and a topographical one (the submission of the energy withdrawal and feed-in points to the same electrical voltage transformer cabin).

A clear function of CERs is to increase the flexibility of the electric grid, always maintaining a constant and perfect balance between energy demand and overall consumption. This goal is achieved through decentralization and peer interaction that allows a better functioning of the 'Demand-Response' (DR) mechanism by which the distribution of electricity in the grid works.[26] Indeed communities can respond to both immediate and future energy needs. They are equipped with facilities producing energy from renewable sources and also providing storage systems for later use. Self-produced energy is used primarily for instantaneous on-site self-consumption or for sharing with community members. Any excess can be stored and sold through renewable electricity-trading agreements. In any case, the REC can also produce other renewable-energy forms (different from electricity) to be used by members. It can also offer electric-vehicle charging services to its members and assume a retail company role as well as offer ancillary services to the national grid.

For all negotiations with third parties (including the Italian Gestore dei Servizi Energetici (GSE)) and for internal management by private contract, members can identify an entity responsible for both allocation of shared energy and payment and collection.

IV. The 'Citizen Energy Communities'

Renewable energy communities (RECs) are not the only ones existing at present. Shortly after the introduction of the institution in 2018, the European legislators had a real sense of the achievable advantages of energy sharing. In fact, in the introductory recitals of the 2019 IEM Directive, energy communities became

[26] A. Schneiders et al, 'Peer-to-Peer Electricity Trading and the Sharing Economy: Social, Markets and Regulatory Perspectives' *Energy Sources, Part B: Economics, Planning, and Policy*, 1-17 (2022). See also S. Karnouskos et al, 'Prosumer interactions for efficient energy management in smartgrid neighborhoods' (2011), available at https://tinyurl.com/3rzd3kd3 (last visited 31 December 2022); B.P. Koirala et al, 'Energetic communities for community energy: A review of key issues and trends shaping integrated community energy systems' 56 *Renewable and Sustainable Energy Reviews*, 722 (2016). Concerning 'Demand-Response' system, cf M.E. Honarmand et al, 'An Overview of Demand Response: From Its Origins to the Smart Energy Community' 9 *IEEE Power & Energy Society Section*, 96851-96870 (2021). On this topic see also N. O'Connell et al, 'Benefits and Challenges of Electrical Demand Response: A Critical Review' 39 *Renewable and Sustainable Energy Reviews*, 686-699 (2014); G. Gutiérrez-Alcaraz et al, 'Effects of Demand Response Programs on Distribution System Operation' 74 *International Journal of Electrical Power & Energy Systems*, 230-237, (2016); N.G. Paterakis et al, 'An Overview of Demand Response: Key-Elements and International Experience' 69 *Renewable and Sustainable Energy Reviews*, 871-891 (2017).

an effective and cost-efficient way to respond to citizens' needs and expectations regarding energy sources, services, and local participation.[27] Following in the wake of the initiative undertaken the previous year, it recognized a new form of cooperation between citizens or local actors: the 'Citizen Energy Community' (CEC).[28] However, the outlined cooperative schemes are not mandatory. The provisions introduced on energy communities do not preclude other worthy initiatives implemented through private law contracts.[29]

Citizens' energy communities can be established in the form of any legal entity (association, cooperative, partnership, nonprofit organization, small or medium-sized enterprise) as long as it can exercise rights and be subject to obligations in its name.[30] The Italian legislative decree implementing the European Directive for the Internal Electricity Market mentions as CEC members individuals, small businesses, local authorities and administrations, research and training entities, third sector and environmental protection, and religious entities. The main purpose of members – as with the REC – must always be to provide environmental, economic, or social community benefits rather than pursuing financial profits. The citizen community may participate in the generation, distribution, supply, consumption, aggregation, energy storage, energy efficiency services, electric vehicle charging services, or other energy services it may provide to its members or partners.

Energy communities can share any electricity by employing the existing distribution network, by leasing or purchasing portions of the network or newly constructed networks where there are specific technical reasons for so doing and a specific sub-concession agreement can be stipulated between the current distribution company and the community.[31] In cases of management of the

[27] Recital no 43, Directive (EU) 2019/944 of 5 June 2019.

[28] M.M. Sokołowski, 'Renewable and citizen energy communities in the European Union: how (not) to regulate community energy in national laws and policies' 38 *Journal of Energy & Natural Resources Law*, 289 (2020); A. Golla et al, 'Evaluating the impact of regulation on the path of electrification in Citizen Energy Communities with prosumer investment' 319 *Applied Energy*, 119241 (2022); A. Stroink et al, 'Benefits of cross-border citizen energy communities at distribution system level' 40 *Energy Strategy Reviews*, 100821 (2022).

[29] With regard to the freedom of contract and its limits cf P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, IV, *Attività e responsabilità* (Napoli: Edizioni Scientifiche Italiane, 2020), 19. With specific reference to the 'energy contracts' see C. Ferrari, 'Financial and Energy Contracts: New Demands for the Regulation and Categorization of Contracts' 3 *The Italian Law Journal*, 377 (2017); J. Rodriguez-Fernandez et al, 'Reputation Computational Model to Support Electricity Market Players Energy Contracts Negotiation', available at https://tinyurl.com/bddz2pyx (last visited 31 December 2022).

[30] According to E. Cusa, 'La cooperazione energetica tra tutela dei consumatori ed economia sociale di mercato' *Giurisprudenza Commerciale*, 663 (2015), in the energy sector, a regulation should be established which is truly proportional not only to the size of the regulated undertaking but also to the legal form of private enterprise, effectively promoting those forms (such as the cooperative) more consistent with Italian and European principles.

[31] Terna SpA has been a concessionaire for the transmission and dispatching of electricity throughout Italy since 2004, including the unified management of the national transmission

distribution networks by the latter, however, distribution networks by CECs are considered public ones with a third-party connection obligation. That ensures effective protection for end users. The community, as a sub-concessionaire of the deployed grid, is required to comply with the same obligations (eg, maintenance obligations) and conditions provided by law for the concessionaire entity. Citizen energy communities may participate, directly or through aggregators, in all markets for electricity and related services, in a non-discriminatory manner and subject to network security constraints. However, they are financially liable for any imbalances brought to the system (Art 14, para 10, lett a, decreto legislativo no 210 of 2021).

The conditions established by the Italian law for a valid creation of a citizen energy community are: (a) voluntary and open participation by all stakeholders; (b) all rights and obligations must be guaranteed to the community members according to their *status* as energy end-customers; (c) the shared electricity generation and storage facilities must result in the availability and control of the citizen energy community. Management, installation, operation, data processing, and maintenance may be delegated to a third party, but the powers of direction and control must remain with the community.

These therefore are the main identifiable differences between RECs and CECs: a first difference relates to the type of energy and sources involved. RECs involve power from renewable energy alone and its conversion into different energy carriers, such as electricity, thermal and cooling energy, while CECs can operate with any source (including non-renewable ones) but can produce only electricity. RECs also are restricted to the geographic perimeter of all energy withdrawal and input points to the same electrical voltage transformer cabin, while CECs are not subject to this constraint. Finally, another distinction concerns the possible activities performed and CECs' additional operational faculties in the electricity market. In fact, RECs are expected to make mandatory use of facilities coming into operation after the legislative change, while CECs are generally allowed to use the grid – both existing and newly built – to operate as a full-fledged energy distributor (possibly by leasing or purchasing portions of the grid). From the perspective of achieving European decarbonization goals, however, surely RECs seem to be the more useful energy communities because of the exclusive use of renewable sources. In fact, Italian and European lawmakers have outlined special support schemes for RECs to incentivize their deployment

network. For sub-concessions and contracts with third parties, see Art 12 of the Contract available at https://tinyurl.com/2t99wed7 (last visited 31 December 2022). A natural monopoly regime applies in the energy sector; as a rule, the construction of a new electricity network does not constitute an activity of a free enterprise. Cf F. Cemil Ozbugday and P.H. Nillesen, 'Efficiency and Prices of Regulation-Exempt Consumer-Owned Natural Monopolies: A First Look at Electricity Distributors in New Zealand' *Annals of Public and Cooperative Economics*, 361 (2013), according to whom consumer-owned natural monopolies might eliminate some of the inefficiencies associated with formal regulatory frameworks.

throughout the countries.

V. The Italian Legal Framework of Renewable Energy Communities: Enhancement and Incentive Service of Shared Electricity and Other Support Schemes

At present, the overall legal framework of energy communities is composed of several rules from distinct sources. First of all, reference must be made to the European sources giving rise to them: the Renewable Energy Directive (RED II) no 2001 of 2018 and the Internal Electricity Market (IEM) directive no 944 of 2019. Also indispensable are the 'milleproproghe decree' no 162 of 2019, converted into legge no 8 of 2020, and the decreti legislativi nos 199 and 210 of 8 November 2021, implementing the European Directives. Other measures are specifically dedicated to Renewable Energy Communities and the way in which they work in the Italian context. These are the Deliberation of the Autorità di Regolazione per Energia Reti e Ambiente (ARERA) no 318 of 4 August 2020;[32] the Decree of the Ministero dello Sviluppo Economico (MISE) of 16 September 2020,[33] and the Technical Rules of the Gestore dei Servizi Energetici (GSE) of 22 December 2020.[34]

The Resolution of the Autorità di Regolazione per Energia Reti e Ambiente (ARERA) no 318 of 4 August 2020 regulates the so-called shared electricity valorization and incentive service, establishing the procedures for regulating economic transactions related to electricity shared by a self-consumer group acting collectively or by members of a renewable energy community (REC). Art 3 of Annex A to the Resolution[35] establishes the criteria for access to the valorization and incentive service. As far as energy communities are concerned, it must be verified that: (a) the community is a legal entity (eg, an association, third-sector entity, cooperative, benefit cooperative, consortium, partnership, nonprofit organization) based on the established requirements;[36] (b) the members

[32] Available at https://tinyurl.com/ye39ej7b (last visited 31 December 2022).

[33] Available at https://tinyurl.com/2p9m4n9r (last visited 31 December 2022).

[34] Available at https://tinyurl.com/2s4zs2mw (last visited 31 December 2022).

[35] The text of the attachment to the resolution is available at https://tinyurl.com/4u8e47xy (last visited 31 December 2022).

[36] The community is based on open and voluntary participation, is autonomous, and is effectively controlled by shareholders or members who are located nearby the production facilities held by the renewable energy community. The members are natural persons, small and medium-sized enterprises, local authorities, or local authorities, including municipal administrations, provided that, for private enterprises, participation in the renewable energy community does not constitute the main commercial and/or industrial activity. The main objective is to provide environmental, economic, or social community-wide benefits to its shareholders or members, or to the local areas in which it operates rather than financial profits. These requirements are expressly stated in Art 1.1, lett c, of the Annex to the Resolution. Notice how – unlike what is established by the European legislature – the Italian authority seems to implicitly accept the possibility that for non-private enterprises participation in the renewable

are holders of connection points on low-voltage electric grids underlying the same medium/low-voltage transformer cabin; (c) the members have mandated the same contact person – coinciding with the renewable energy community – for the access application to the shared electricity valorization and incentive; (d) each shared electricity generation plant must have come into operation as a result of new construction from 1 March 2020, and within sixty days after the date of entry into force of the measure transposing Directive 2018/2001. It also must have a capacity of no more than two hundred kW and must be connected to low-voltage electricity grids underlying the same secondary cabin. The generation facilities must be owned by the renewable energy community and may be operated by the community itself or one of its members or by a third-party producer.

The shared electricity valorization and incentive service is provided by GSE (Gestore dei Servizi Energetici) through the mandated contact person. Parties who wish to benefit from the shared electricity valorization and incentive service apply to the GSE by a predetermined template approved by the Director of the Direzione Mercati Energia all'Ingrosso e Sostenibilità Ambientale of the authority. In the application, the contact person must attach the mandate received from the community members, make available the community's statute and any other documents useful for verifying the requirements for the valid establishment of the REC, communicate the list of individuals who are part of the configuration and certify that all the conditions for access to the service are met. The Gestore dei Servizi Energetici checks for compliance with all the eligibility requirements for the shared electricity valorization and incentive service and – if the requirements are satisfied – enters into a contract with the community contact person. Next, the GSE communicates to Terna (the energy transmission and dispatching concessionaire throughout Italy) the information about the communities for which the valorization service has been activated. It then calculates, for each community, the contribution for the hourly and monthly shared electricity amount,[37] and finally disburses the contribution – which is equal to the product between the shared electricity and the incentive tariff defined by the Ministero dello Sviluppo Economico – to the referent every month.

With the decree of 16 September 2020, the Italian Ministry identified the so-called incentive rate for the remuneration of renewable energy installations in energy communities and in collective self-consumption configurations. The incentive rate corresponds to a 'premium tariff' of one hundred and ten euros per Mwh of electricity produced in the case of energy communities (one hundred euros in the case of collective self-consumption). The community is entitled to the premium rate for twenty years from the contract date with the

energy community constitutes the leading commercial and/or industrial activity.

[37] The hourly and monthly shared electricity amount is equivalent to the sum of the hourly shared electricity amounts during the different hours of the month.

Gestore dei Servizi Energetici.

The Technical Rules drafted by the national operator in 2020 frame the regulatory context, identify the requirements for access to the shared electricity valorization and incentive service and specify how the service activation request must be submitted. In particular, a contract form for service recognition has been outlined. The contract for the economic match regulation shared by a renewable energy self-consumer group acting collectively or by a Renewable Energy Community contains several clauses that must be accepted by the Renewable Energy Community's contact person in order to obtain the incentive rate based on the electricity produced and shared. The contract consists of a general part concerning its subject matter coinciding with the service regulation of shared energy valorization and incentive, its commencement, and its duration. The incentive period duration is twenty years, but its effective date is stated in the individual order of acceptance by the GSE of the ERC's application. After the expiration of the incentive period, the contract may be tacitly renewed. The second part of the contract is devoted to the economic profiles: energy measurement, the fees recognized and disbursed by the operator, and the payment and billing method of the contribution. The third part is dedicated to the obligations of the parties; the national operator assumes the obligation of remuneration. No liability is provided for events relating to relations between the community and operators or third parties (eg, installers, suppliers, or technical referents). The community contact person is obliged to inform the GSE of any changes during the contract (possibly requesting an extension in writing at least six months before the expiration) and to submit any required documentation related to the plant, its operating characteristics, and the maintenance and verification operations that are carried out. The fourth and final part of the signed agreement deal with strictly contractual profiles. It is provided, among other things, that any assignment of receivables is effective against the GSE only upon its explicit acceptance and that the contract will be terminated for six pre-established reasons (eg, if the requirements for access to the incentive are no longer met or if controls by the operator are not allowed). The operator is allowed to terminate the contract at any time as long as he provides at least sixty days' notice.

The overall system enacted by Italy to regulate and foster relations with energy communities responds to the desire expressed by the European lawmakers to identify and apply in each state of the Union a 'Support Scheme' and appropriate 'Promotion Tools' for Renewable Energy Communities.[38] Art 4 of

[38] See Recital no 16 of Directive (EU) 2018/2001, which states, 'Support schemes for electricity from renewable sources or "renewable electricity" have been demonstrated to be an effective way of fostering deployment of renewable electricity. If and when the Member States decide to implement support schemes, such support should be provided in a form that is as non-distortive as possible for the functioning of electricity markets. To that end, an increasing number of Member States allocate support in a form by means of which support is granted in

the RED II Directive states in this regard that

> 'Support schemes for electricity from renewable sources shall provide incentives for the integration of electricity from renewable sources in the electricity market in a market-based and market-responsive way while avoiding unnecessary distortions of electricity markets as well as taking into account possible system integration costs and grid stability. Support schemes for electricity from renewable sources shall be designed to enhance the integration of electricity from renewable sources in the electricity market and to ensure that renewable energy producers are responding to market price signals and maximizing their market revenues. To that end, concerning direct price support schemes, support shall be granted in the form of a market premium, which could be, *inter alia*, sliding or fixed'.

Similar support schemes are not found in the IEM Directive for Citizen Energy Communities. This absence is probably justified because only the REC operates as a collective configuration based on renewable sources while the CEC can operate with any source of energy, including non-renewable ones. A REC, therefore – compared to a CEC – is a more effective means of achieving the decarbonization goals set by EU member states as it incentivizes the exclusive use of renewable energy sources.

Unlike a CEC, a REC can convert energy from renewable sources into different energy carriers. The Italian support scheme operates both for electricity and thermal energy production from renewable sources, biomethane, and technological and industrial development. The first source of support coincides with an incentive paid in the form of a tariff attributed only to energy share produced by the plant and shared within the configuration. Biomethane produced or fed into the natural gas grid, on the other hand, is incentivized through the disbursement of a specific tariff whose duration and value are defined by the decree of the Ministero della Transizione Ecologica. The biomethane producer is guaranteed the same level

addition to market revenues and introduce market-based systems to determine the necessary level of support. Together with steps by which to make the market fit for increasing shares of renewable energy, such support is a key element of increasing the market integration of renewable electricity, while taking into account the different capabilities of small and large producers to respond to market signals'. See also Art 2, no 5, which defines the 'support scheme' as 'any instrument, scheme or mechanism applied by a Member State, or a group of Member States, that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased, including but not restricted to, investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and sliding or fixed premium payments'. Please note that support schemes must be adopted in accordance with the European law in the field of State aid. Cf A. Canepa, 'Corte di giustizia e interventi nel settore energia: recenti pronunce in materia di rinnovabili, sostegno alla produzione termica di energia, tassazione e gas naturale (settembre 2014-marzo 2015)' *Rivista italiana di diritto pubblico comunitario*, 997 (2015).

of incentive for use in the transportation sector and other uses, including the ones for the electricity and heat production in industrial cogeneration plants, also in connection with district heating and heat networks, and with the exclusion of non-cogeneration thermoelectric uses. ARERA defines the incentive disbursement modalities by coordinating that scheme with the one already provided by the Ministero dello Sviluppo Economico: 'Promotion of the use of biomethane and other advanced biofuels in the transport sector'. The National Authority is aware that – outside the incentive schemes – the current electricity and gas market model has limitations for European decarbonization goals. Therefore, Italian markets must be integrated with those of other European countries according to organic reform processes.[39]

VI. Conclusions: The Connections and Conflicts Between Energy and Digital Transition

As shown above, both individual citizens and the local community would benefit from the creation and diffusion of energy communities that would ultimately bring about positive effects on the global environment.[40] Therefore, in today's society, energy communities – and in particular Renewable Energy Communities – seem to be an important instrument of energy transition implementation. Their proliferation throughout Europe is undoubtedly desirable and they may one day constitute a device for energy decommodification.

However, the technological factor must also be considered. In fact, self-consumption and energy sharing can achieve their full potential by means of appropriate technological mechanisms that allow the transmission of information regarding the current consumption and the actual need for energy on the market. Any effective energy transition cannot actually take place without being accompanied by a contextual digital one. The use of new technologies is a parallel necessary tool to allow the operation of smart electricity grids. Blockchains, for example, would be a very effective means of facilitating peer-to-peer energy exchanges.[41] They operate as shared and distributed data structures that can

[39] See the new 'Testo Integrato del Dispacciamento Elettrico' (TIDE), developed by the Autorità di Regolazione per Energia Reti e Ambiente (ARERA) (available at https://tinyurl.com/2p9evubb (last visited 31 December 2022)) to lay the foundations for a new regulation, rational and solid, which allows the full participation in the electricity system of renewable sources, widespread generation, storage systems, aggregators and consumers, some of which are also producers (prosumers). Cf G. Le Treut et al, 'The multi-level economic impacts of deep decarbonization strategies for the energy system' 156 *Energy Policy*, 112423 (2021).

[40] Cf N. Li et al, 'Cost allocation in integrated community energy systems. A review' 144 *Renewable and Sustainable Energy Reviews*, 111001 (2021) who point out the 'long-term commitment of local community members' that affects the successful implementation and long-term development of the Integrated Community Energy Systems.

[41] C. Burger et al eds, *Blockchain in the energy transition. A survey among decision-makers in the German energy industry* (Berlin: German Energy Agency, 2016), 13; J. Hwang

securely store digital transactions without a central authority and also allow the automated execution of smart contracts in peer-to-peer (P2P) networks.[42] It would be useful to set up digital platforms, reachable through apps for smartphones, in order to share consumption data with members of configurations and to monitor energy needs.[43] In this way energy waste could be minimized and storage operations could be scheduled for later use on users' consumption habits. Indeed, similar platforms dedicated to managing energy sharing (so-called Energy Platforms) already exist today.

The interaction between new technologies and the energy market would not only bring beneficial effects but also risks to both people and society. Individual users would be exposed to profiling risks due to the data based on their needs and the analysis of their habits.[44] Such information, moreover, often concerns people's activities at their homes. Therefore, the question arises whether

et al, 'Energy Prosumer Business Model Using Blockchain System to Ensure Transparency and Safety' *Energy Procedia*, 194 (2017); M. Andoni et al, 'Blockchain technology in the energy sector: A systematic review of challenges and opportunities' 100 *Renewable and Sustainable Energy Reviews*, 143 (2019); S. Saraji and C. Khalaf, 'Blockchain Applications in the Energy Industry', in P.M. Tehrani, *Regulatory Aspects of Artificial Intelligence on Blockchain* (Pennsylvania: IGI Global, 2022), 159; Y. Wu et al, 'Towards collective energy Community: Potential roles of microgrid and blockchain to go beyond P2P energy trading' 314 *Applied Energy*, 119003 (2022).

[42] On this theme see A.M. Gambino and A. Stazi, 'Contract Automation from Telematic Agreements to Smart Contracts' 7 *Italian Law Journal*, 97 (2021). Concerning the use of smart contracts in the energy field cf M.R. Alam, 'Peer-to-peer energy trading among smart homes' 238 *Applied Energy*, 1434 (2019); L. Thomas et al, 'A general form of smart contract for decentralized energy systems management' 4 *Nature Energy*, 140 (2019); D. Han et al, 'Smart contract architecture for decentralized energy trading and management based on blockchains' 199 *Energy*, 117417 (2020). From an Italian perspective see M. Giaccaglia, 'Il contratto del futuro? Brevi riflessioni sullo smart contract e sulla perdurante vitalità delle categorie giuridiche attuali e delle norme vigenti del Codice civile italiano' *Tecnologie e diritto*, 113 (2021).

[43] See, for instance, the Italian Platform 'RealGrid' (available at https://tinyurl.com/4suvcks3) – open to users, entrepreneurs and Public Administration – that works through the digitalization of energy and technologies capable of communicating production, storage, and consumption assets of different users. About the current Italian energy community projects, see C. Candelise and G. Ruggieri, 'Status and Evolution of the Community Energy Sector in Italy' *Energies*, 1888 (2020). Concerning in general the so-called Energy Platforms, see S. Kloppenburg and M. Boekelo, 'Digital platforms and the future of energy provisioning: Promises and perils for the next phase of the energy transition' 49 *Energy Research & Social Science*, 68 (2019); M.M. Martìn Lopo et al, 'A literature review of IoT energy platforms aimed at end users' 171 *Computer Networks*, 107101 (2020). Cf also the official document (available at https://tinyurl.com/yc2h4ssf (last visited 31 December 2022)) of the National Agency for New Technologies, energy and sustainable economic development, for the design of a residential energy data collection platform. A.B. Gallo et al, 'Energy storage in the energy transition context: A technology review' 65 *Renewable and Sustainable Energy Reviews*, 802 (2016), describes the mechanical energy storage technologies.

[44] R. De Meo, 'Autodeterminazione e consenso nella profilazione dei dati personali' *Diritto dell'informazione e dell'informatica*, 587 (2013); C.M. Colombini et al, 'Digital scene of crime: Technique of profiling users' 3 *Journal of Wireless Mobile Networks, Ubiquitous Computing, and Dependable Applications*, 50 (2012); A. Vivarelli, 'The Crisis of the Right to Informational Self-Determination' 6 *Italian Law Journal*, 301 (2020) describing the phenomenon of 'hetero-construction' of identities achieved through user digital profiling.

these data on private and family life should be treated differently from other masses of data concerning the activities of companies or public administrations. As regards data processing, it should be noted that, according to the Technical Rules established by the Italian Gestore dei Servizi Energetici, the GSE qualifies as an 'Autonomous Controller' of data by virtue of the request for the valorization and incentive of self-consumption shared electricity. The GSE has no liability under the EU Regulation 679/2016 (GDPR) in case of events such as data misuse, illicit use, malicious or unauthorized events possibly suffered by third parties with whom the GSE interfaces for the requests management. Such a statute does not seem to guarantee effective protection for end users who may find great difficulty in identifying each third party with whom the operator has interacted. Data concerning the household and possibly minor subjects present in the place of the energy user should also be protected.

The need to use smart devices to benefit from economic reductions and share energy could also present additional drawbacks such as widening the digital divide and exacerbating any existing state of energy poverty.[45] Likewise, energy community participation in the market, as a seller of self-generated electricity, could distort competition among energy participants.[46] Therefore, it is necessary not to overlook the problematic aspects related to the spread of energy communities throughout Italy and Europe.

Undoubtedly, the enormous advantages they produce – in terms of stability and flexibility of the electricity grid, decentralization of energy production, increased use of renewable sources, and direct involvement of the citizen community – deserve a joint effort of society and institutions aimed at achieving a balance between the beneficial progress of innovation and the preservation of adequate standards of human protection. Only in this way will the energy transition truly be sustainable.

[45] S. Wang et al, 'The Impact of energy poverty on the digital divide: The mediating effect of depression and Internet perception' 68*Technology in Society*, 101884 (2022). Cf A. Reddy, 'Energy and social issues', in J. Goldemberg ed, *World Energy Assessment: Energy and the Challenge of Sustainability* (New York: United Nations Development Programme, 2000), 44 and M.M. Vanegas Cantarero, 'Of renewable energy, energy democracy, and sustainable development: A roadmap to accelerate the energy transition in developing countries' 70 *Energy Research & Social Science*, 101716 (2020). See also S. Carley and D.M. Konisky, 'The justice and equity implications of the clean energy transition' 5 *Nature Energy*, 569 (2020).

[46] On this theme, see M. Al-Gwaiz et al, 'Understanding How Generation Flexibility and Renewable Energy Affect Power Market Competition' 19*Manufacturing & Service Operations Management*, available at https://tinyurl.com/3cfwnfjy (last visited 31 December 2022). On the abuse of dominant position and the opening up of the market for the sale of electricity to competition, cf the important case C-377/20 *Servizio Elettrico Nazionale SpA, ENEL SpA, Enel Energia SpA* v *Autorità Garante della Concorrenza e del Mercato and Others*, Judgment of 12 May 2022, available at www.curia.europa.eu.

The Impact of Organisational Factor on Negligence Offences in Italy

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Abstract

In contemporary criminal law the negligent offense is frequently the poisoned fruit of improper planning of a complex activity and of a defective coordination of means and people. In short, crime is increasingly understood as a systemic error of an organizational nature. In recent years, Western regulators have started to understand this trend and have often contemplated the liability of the organization, basing it on the failure to prevent and correct dangerous behavior engaged in by its directors, officers, and employees. But how can we separate the misconduct of the individual from the negligence of the organization? The paper aims to identify the distinctive features of these two reproaches so as to understand their peculiar attributes.

I. Aim of the Study: An Attempt to Update Negligence Liability in Italian Criminal Law

For a long time in Italian criminal law, the definition of negligence was calibrated to the individual and defined by Art 43 of the Criminal Code.[1] Scholars have now adopted a shared interpretation of it from a normative rather than psychological perspective, whereby the term is to be understood as a violation regarding the rules of caution (formalised in rules or the result of collective experience), the compliance of which would have prevented precisely the kind of harmful event that occurred.

Therefore, the negligence of the individual does not have psychological connotations, except in the particular case of conscious negligence, where the agent acknowledges the existence of a risk underlying his or her action and the injurious event that may result from it, but nevertheless does not desire its realisation.

This interpretation may have been common until the end of last century, but today this is no longer the case.

Italian criminal law has not yet gained full awareness of the deep rupture occurred over time, since the entry came into force of the regulations regarding

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[1] Art 43 of the Italian Criminal Code: 'The offence...is negligent, or against intent, when the event, even if foreseen, is not intended by the agent and occurs due to negligence or carelessness or inexperience, or due to failure to comply with laws, regulations, orders or disciplines'.

the liability of entities with decreto legislativo 231/2001 within a negligence liability. In fact, the liability for offences of the legal person depends on the existence of organisational negligence upon the entity and consists of the failure or inadequacy of internal procedures aimed at preventing the commission of intentional and negligent offences perpetrated within the organization, in its interest or to its advantage, by employees or organs.

In particular, case law continues to employ the term negligence without making a distinction between whether the defendant is a natural or legal person, using it indifferently to qualify the failure to comply with rules of conduct directed at the individual and dangerous procedures existing within an organisation.

Thereby, terminologies, evidentiary schemes, and argumentative solutions that have been developed since 2001 with reference to organisational negligence in order to ground the punishment of the legal person, have been transited into the grounds of convictions of individuals, involved in trials for adverse events related to the performance of complex activities (particularly serious work accidents, environmental contamination, environmental disasters, railroad disasters, construction collapses and so on).

Often in the Italian context, negligence liability, especially in respect to macro-events such as those above mentioned, does not rest on an isolated person, but on a group of individuals who found themselves acting in the same context as the event which occurred and who should have better coordinated their actions in an effort to avoid it.

The regulatory mechanism used in case law to reprimand individuals involved in the chain of decisions or conduct that led to the harmful event, is the institution of negligent cooperation; governed by Art 113 of the Criminal Code.[2] This is a typically Italian instrument, which does not exist in Common Law countries or in German-speaking legal systems. Through it, the person who causally participated in the act by violating some rule of prudence or failed to prevent or correct the negligent conduct of the person who materially produced the damage is also punished as the perpetrator of the negligent act.

The application of negligent cooperation in Italy has issue: behind the use of the individual regarding a concept of negligence that should only be valid for entities where there has been hidden an underhand and irrefutable hypothesis of strict liability; the individual is blamed for failing to behave diligently (mostly for failing to prevent the damaging event), but in reality only the legal entity could have achieved this, being the only entity with the necessary means and capabilities.

Recently, the Italian Supreme Court has apparently begun to recognise the need to distinguish between the negligence of the individual and the negligence

[2] Art 113, para 1, of the Italian criminal code: 'In negligent offence, when the event was caused by the cooperation of more than one person, each of them shall be subject to the punishments established for the offence itself'.

of the organization,[3] but it is a barely consolidated interpretation that needs much more strengthening.

The current paper starts from this present situation and tries to give a definition of the two types of negligence, and then focuses on how the liability *of the individual within the organisation* works, finally attempting to provide the conceptual tools aimed at preventing the reproach *of the complex structure* from being assimilated and superimposed on that aimed *at the individual*.

In order to reach such a result, although ambitious, the correct method requires distinguishing semantically and systematically the overlapping notions of negligence in practice, then analysing scholars and case law expended on the subject in recent years.

II. The *Individual* vs *Collective* Dichotomy as a Key to Interpreting Contemporary Criminal Negligence

Criminal law has come to terms with the organisational variable as a decisive factor in the causation of negligent offences:[4] increasingly however the aforementioned, especially those economically connoted, involves coordination of people and resources. The adverse event most often derives from defective planning of a complex activity, in particular in the form of an inadequate (or perhaps even missing) division of tasks and liabilities, sometimes at the moment when planning the intervention with other persons, other times at the moment of its material implementation.[5]

The imagination of criminal lawyers is certainly not so unbridled and so the reflection on the collective dominant in negligent offence has started within the label of *organisational negligence*.

However, we are discussing an ambiguous concept that requires a plurality of clarifications and a preliminary field selection. It is indeed necessary to decide from the very outset whether one intends to refer to the concept of liability regarding solely the entities or to the attribution of the event to the natural person.

[3] For a clear conceptual distinction between the two semantic areas Corte di Cassazione-Sezione penale IV 10 May 2022 no 18413, *Giurisprudenza penale web*, 11 May 2022, which on the subject of criminal liability related to occupational accidents states verbatim: '…the requirement that the mentioned negligence of organisation be strictly proven and not confused or overlapped with the negligence of the (employee or director of the entity) responsible for the offence'.

[4] With specific regard to intentional offences, but with reasoning that can also be extended to negligent ones, it notes that on an empirical level there is 'an impulse of the general organisation, also implemented through conclusive behaviour, an act of encouragement to others illicit activity' N. Selvaggi, *La tolleranza del vertice d'impresa tra 'inerzia' e 'induzione al reato'* (Napoli: Edizioni Scientifiche Italiane, 2012), 24.

[5] On the fundamental principles of the organisation see the recent study by G. Morgan, *Images. Le metafore dell'organizzazione* (Milano: Franco Angeli, 2020), 44.

In the first case we are faced with the general criterion for ascribing the liability of the organization, while in the second case the term becomes more confused, by referring to a morphology of non-compliance related to particular agents, who tend to be in a hierarchical or functional position of super-ordination, who are the physical perpetrators of a negligent offence. In the latter case, we are dealing with a concept that is instrumental in deciphering contributory negligence. Therefore, the lemma is used with respect to a multi-personal phenomenon, but while for entities it rests on the attribution of the fact to a single subject (collective but legally unitary), for individuals it becomes a mechanism for ascribing the offence to a plurality of individuals within a contributory perimeter.

The terminology, therefore, must not lead to a confusion of levels.

III. *Organizer* Negligence vs *Organisational* Negligence: Terminological Clarifications

With regard to the issue of negligence in complex activities, one is induced, almost unconsciously, to qualify the imprudence of those who negligently plan the structural set-up of a company or an articulated behavioural procedure as *organisational negligence*.[6] It is a dangerous summons, which depends on the suggestive, but inaccurate, semantic meaning of the term. This word, on the other hand, must be defined with precision, in order not to import in the field of

[6] Regarding which, by way of example, only in the immense doctrinal production, it is important the reference to the works of prof Paliero, essential pages about that in C.E. Paliero, 'Colpa di organizzazione e persone giuridiche', in M. Donini ed, *Reato colposo* (Milano: Giuffrè, 2021), 64; Id, 'La colpa di organizzazione tra responsabilità collettiva e responsabilità individuale' *Rivista trimestrale di diritto penale dell'economia*, 175, (2018); Id, 'La personalità dell'illecito tra 'individuale' e 'collettivo", in G. De Francesco and A. Gargani eds, *Evoluzione e involuzioni delle categorie penalistiche: atti del Convegno di Pisa (8-9 maggio 2015)* (Milano: Giuffrè, 2017), 101; Id, 'La società punita: del come, del perché, e del per cosa' *Rivista italiana di diritto e procedura penale*, 1516, (2008); Id, 'Das Organisationsverschulden', in U. Sieber et al eds, *Strafrecht und Wirtschaftsstrafrecht. Dogmatik, Rechtsvergleich, Rechtstatsachen. Festschrift für Klaus Tiedemann zum 70. Geburtstag* (Köln-München: Heymann, 2008), 503; C.E. Paliero and C. Piergallini, 'La colpa di organizzazione' *La Responsabilità amministrativa delle società e degli enti*, 167 (2006). In addition see the writings of C. Piergallini, 'La colpa di organizzazione e di impresa', in M. Donini and R. Orlandi eds, *Reato colposo e modelli di responsabilità. Le forme attuali di un paradigma* classico (Bologna: Bononia University Press, 2013), 161; Id, 'Paradigmatica dell'autocontrollo penale', in M. Bertolino et al eds, *Studi in onore di M. Romano* (Napoli: Jovene, 2011), 2049; A. Fiorella, 'La colpa dell'ente per la difettosa organizzazione generale', in F. Compagna ed, *Responsabilità individuale e responsabilità degli enti negli infortuni sul lavoro* (Napoli: Jovene, 2012), 267; G. De Simone, '*Societates* e responsabilità da reato. Note dogmatiche e comparatistiche', in M. Bertolino et al eds, *Studi in onore di M. Romano* (Napoli: Jovene, 2011), 1883; G. De Vero, 'La responsabilità penale delle persone giuridiche. Parte generale', in C.F. Grosso et al eds, *Trattato di diritto penale* (Milano: Giuffrè, 2008), 63; V. Mongillo, *La responsabilità penale tra individuo ed ente collettivo* (Torino: Giappichelli, 2018), 435; A.F. Tripodi, ' "Situazione organizzativa" e "colpa in organizzazione": alcune riflessioni sulle nuove specificità del diritto penale dell'economia' *Rivista trimestrale di diritto penale dell'economia*, 482 (2004).

individual criminal law, in particular in the context of a contributory negligence pursuant to Art 113 of the Italian criminal code, incriminating mechanisms that are certainly valid for the entity, but improper (if not unconstitutional *tout court*) for the natural individual, as inconsistent with the principle of culpability based on the fact.

Nomina sunt consequentia rerum, *sed etiam in iure res sunt consequentia nominum*: a clear distinction is therefore required when it comes to the breach ofprecautions by individuals invested with organisational power within a structure.

The organisational negligence is a concept that has long been developed by scholars, first German then Italian, in close functional connection with the criminal liability of legal persons.[7] It has a well-defined perimeter of reference valid, as regards the Italian scenario, within the framework of decreto legislativo 231/2001.

The conspiracy of persons and the liability of the entity are different and independent teleological perspectives, although both possess the characteristic of binding a plurality of actions united by non-compliance with a rule of conduct.

i. The *negligence* of the individual who organises the activities of others (what we can trivially call the *organiser negligence*) reproaches the omitted elimination or reduction of *factual risks*, relating to adverse events criminally relevant pursuant to a specific incriminating case (accidents, damage to environment, offences to public safety and so on); the precautions aim at coordinating, managing, prudently directing third parties and the interaction between their sphere of action and field of action of the person who has the power of coordination;

ii. the *organisational negligence* has a preparatory nature and no immediate precautionary purpose;[8] it censures the omitted neutralisation of *regulatory risks* relating to the commission of a class of offences by bodies and employees of a collective entity.[9] It consists in the violation of the very general rule which requires the entity to organise itself in order to prevent the commission of offences by bodies or employees. Scholars[10]believe that it does not have a strictly precautionary nature, rather a projectual or planning one. In fact, the broken rule is not functional to the prediction of a specific type of event, as in the case of the precautionary rules that give rise to the negligence of the individual. Here we are in a planning phase of defining roles, organisation charts, general relationships, divided by types and regulated by procedures,

[7] On the birth of the concept of *Organisationsverschulden* in relation to § 30 of the *Ordnungswidrigkeitengesetz*, the German law on administrative violations, dedicated to the liability of legal persons and associations, the reference goes to K. Tiedemann, *Die Bebußung von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftkriminalität*, in *NJW*, 1988, 1169. In Italy, it is essential the reference to C.E. Paliero and C. Piergallini, *La colpa di organizzazione* n 6 above, 167.

[8] ibid 178.

[9] Similarly D. Castronuovo, 'Fenomenologie della colpa in ambito lavorativo. Un catalogo ragionato' *Diritto Penale Contemporaneo*, III, 216, 235 (2016).

[10] C.E. Paliero and C. Piergallini, *La colpa di organizzazione* n 6 above, 176.

designed to make the activity of bodies and employees controllable and set up obstacles and disincentives to the commission of illegal acts.

The duty to properly organize the legal person provided by decreto legislativo 231/2001 acts as a condition of pre-existence of the precautionary rules and its transgression places the entity in the position of not being able to run in the prevention of the risk of committing offences. It is therefore a concept that has no point of tangency with negligence as a systematic category of the criminal law referred to natural persons, because it cannot be correlated with specific events; it therefore does not respect the fundamental criminal law axiological constraint in the matter of negligence, which requires reference to a single event, in order to verify whether an alternative behaviour would have prevented it.[11]

The conduct of the entity that does not adequately address the risk of offence is therefore completely different from individual negligence due to the nature of the model agent (the organisation), the type of risk (identifiable by classes and not by individual cases),[12] as well as the type of event, which in the case of Italian decreto legislativo 231/2001 is the predicate offence legally prequalified; in the case of the individual it is a naturalistic and harmful fact not yet pigeonholed into legal references. The diversity of the two reprimand models is a direct consequence of the type of rule by which the non-compliance is based and subsequently the risk to be countered.

The *organiser's* negligence is therefore quite distinct from *organisational negligence*. In fact, the organiser is a natural person placed at the top of a complex structure (not necessarily the administrator of a company, but also the general manager or the head of human resources in a multinational company) or acting as the planner of a multi-stakeholder activity consisting of several procedural steps (such as the coordinator of a team dedicated to organ transplants). This is a rather problematic decision relating to project and programmatic carelessness. In this aspect it can be assimilated with organisational negligence, but in the case of the natural person the specific correlation with the adverse event is required, in order to reconstruct a precautionary rule which, even if indirectly, concretely has a connection of risk with the specific unwanted fact.

Within a complex structure, in which the activities of several people are coordinated, the duty of supervision, control and coordination of top management gradually becomes impossible as a task to be carried out personally. It assumes the forms of the obligation with regard to the correct organisation of work, but

[11] On the subject see the reflections of A. Gargani, 'Posizioni di garanzia nelle organizzazioni complesse: problemi e prospettive' *Rivista trimestrale diritto penale dell'economia*, 508, 510 (2017). Possibility on the useful application of the negligence of the organisation scheme with respect to individual negligence A. Massaro, 'Omissione e colpa', in M. Donini ed, *Reato colposo* (Milano: Giuffrè, 2021), 875.

[12] On the point, see C.E. Paliero and C. Piergallini, *La colpa di organizzazione* n 6 above, 182; C. Piergallini, 'Colpa (diritto penale)' *Enciclopedia del diritto* (Milano: Giuffrè, 2017), Ann. X, 262.

even when it distances itself greatly from the adverse event, it never becomes abstract and general: it always has a connection to a specific event due to insuperable constitutional constraints concerning criminal responsibility.[13] It would be illegitimate, facing non-small structures, to punish top management for the immediate failure to fulfil the tasks in preventing adverse events: this is an evolution imposed by compliance with the principle of guilt, by the prohibition of liability for the acts of others and by the effectiveness of the protection of the legal asset.

It is true that the one who possesses such power is usually a guarantor, but the criminal liability that can affect this individual is in reality rarely omissive: adverse events result from the incorrect planning of the conduct of others in connection with one's own or others' conduct, ie, from choices, decisions and directives.

The underestimation profiles of organisational and relational risks regarding organisational negligence most often manifest themselves before the adverse event and they need to be updated and implemented by subordinate subjects, placed to the next level in the procedural chain. This scenario generates a particular phenomenon of occurrence of the negligence in a markedly anticipated form with respect to the causation of the adverse event by the material author of the fact. This is a mismatch that only negligent cooperation can rationalize.[14] In fact, a mono-subjective (individual) view of negligence would not be able to coherently formalise the risk connection activated by the organiser, that is clouded by the temporal latency and the interference of self-responsible conduct of various subjects. In complex contexts it actually tends to mitigate the relevance of the representation of the risk for the various subjects involved in the procedural chain and blurs, at least with respect to most of them, *Anlass*, ie, the possibility of grasping the non-observant nature of one's conduct and the precautionary link with the final event.

If from a *chronological* point of view it is quite possible that the precautionary violation of the manager takes place and ends before the realisation of the unlawful act from the material perpetrator of the negligent offences, it is different from the *logical* point of view: although the conduct may also be prior to the harmful fact, it is closely and immediately correlated to it in a significant and perceptible risk connection.[15]

[13] For a reflection in this sense, see also L. Cornacchia, 'Responsabilità penale da attività sanitaria in *équipe*' *Rivista italiana di medicina legale e del diritto in campo sanitario*, III, 1219, 1234 (2013).

[14] For a recent reflection on negligence in employment and the *Koinzidenzprinzip* D. Piva, 'Spunti per una riscoperta della colpa per assunzione' *Discrimen*, 9 September 2020.

[15] On the relationship between pre-culpability and the risk connection of verification of the subsequent offense, V. Militello, 'Modelli di responsabilità penale per incapacità procurata e principio di colpevolezza', in A.M. Stile ed, *Responsabilità oggettiva e giudizio di colpevolezza* (Napoli: Jovene, 1989), 495. For Donini, the 'risk link' should not be identified either with causality or with willful misconduct or negligence, since it would integrate a further and distinct link between the conduct and the result, in short, it would be a real constitutive element of the typical fact

The organisational negligence is a *culpa in causa*, that is to say a 'stem' negligence that directs the management of a complex activity on a wrong track and that determines the preconditions for the realisation of the adverse event, also misleading the activities of those who will have to enter the procedure or execute the directives in the capacity of subordinates and executors.

It constitutes a form of authentic negligence, whose peculiarity consists in being a prerequisite for non-compliance by others, since there is a conduct that induces errors in third parties. From a structural point of view, it is based on the violation of a precautionary 'meta-regulation' (a regulation of the regulation activity), that is a precautionary claim aimed at producing additional precautionary regulations referring to third parties.[16]

In turn, the organiser negligence is distinguished from the mono-subjective negligence for the content. It reproaches the causation of the adverse event *by means of others*, therefore the omitted coordination between one's own action and the conduct of whoever present in the context and subordinated to a power of direction; individual negligence (which may be the one of the material author himself, who in fact is already punishable) is based on the violation of the prohibition to independently cause the unwanted event.

The organiser negligence is clearly not the only form of negligence mediated by the non-observant behaviour of others; such is for example the negligence of the instigator of negligent conduct or even of the participant who cooperates in a dangerous activity without taking decisive action with respect to the fact (who supplies a restaurant with expired food that the cook then chooses to give to customers anyway, trusting that cooking will eliminate any parasites) or of the one who generates a dangerous situation then actualised by a third party: this is the case of those who leave to their friend, a well-known pyromaniac, the task of keeping highly flammable material for an afternoon, if he uses it promptly to set fire to abandoned cars for fun, thus starting (perhaps due to drought summer) to a forest fire.

All cases of indirect negligence, of course, but rare and scattered in a casuistry that cannot be reduced to predefined subjective figures of participants; it is only when we come across the organiser that we can find a model of agent (not a model agent) that embodies the paradigm of the unobservant participant. Therefore, the agent perfectly fulfils the function of 'test subject' to be subjected to an in-depth study in order to understand the meaning and limits of the

(see M. Donini, 'Imputazione oggettiva dell'evento' *Enciclopedia del diritto* (Milano: Giuffrè, 2010), Ann. III, 636); the Author himself considers the requirement of the avoidability of the event through legitimate alternative behavior an exclusive requirement of the negligent offense (Id, *Imputazione oggettiva dell'evento. "Nesso di rischio" e responsabilità per fatto proprio* (Torino: Giappichelli, 2006), 109.

[16] In the area of criminal labor law, it highlights the particular security duty imposed on the employer, a real meta-duty, as it is aimed at producing additional safety standards D. Castronuovo, n 9 above, 228.

negligent multi-subject matter.

1. The Blame on the Organisation

The difference between organiser negligence and organisational negligence can be clearly grasped if we look at the US regulatory scenario that has been dealing with it for the longest time. US experience inaugurated the concept of *corporate negligence*. In the US version, the organisational reproach was initially understood as *corporate mens rea*, concept immediately used as a transversal tool for criminal and civil liability,[17] although its application was not without criticism.[18]

We can perceive how this notion is alternative to any other category valid for individuals such as *mens rea*, *culpability* etc: on the contrary, the *corporate mens rea* is functional to ensure the application of the law when it is not possible to identify a natural person as the perpetrator of the offence or at least to prove his or her individual liability.[19]

But the gradual development, even overseas, of negligent criminal liability and the complex articulation of *public enforcement* on companies (with the use of extra-criminal sanctions) led to a progressive decline of the *corporate mens rea* as a general instrument of imputation,[20] with a correlative increase in *negligence* claims. Negligence, in fact, is considered a *species* of the *mens rea* itself, the

[17] V.S. Khanna notes it, 'Is the Notion of Corporate Fault a Faulty Notion?: the Case of Corporate Mens Rea'79 *Boston University Law Review*, 355 (1999), to which reference is also made for an excursus on the birth and historical development of the concept (360). Also from a historical perspective, see also the now dating work of K.F. Brickey, 'Corporate Criminal Accountability: a Brief History and an Observation'60 *Washington University Law Quarterly*, 393, 415 (1982). The bibliography on the concept of *corporate mens rea* is enormous and we only mention, by way of example, the first works that started the debate on the subject, such as the contribution of P.A. French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984), 31-47, according to which the concept can establish a liability of the organisation for the deficient governance of internal processes; R.S. Gruner, *Corporate Crime and Sentencing* (Charlottesville: Michie, 1994), 198-203, 263-284, with regard to the imputation of the agent to the top management; as well as the famous document entitled 'Developments in the Law - Corporate Crime: Regulating Corporate Behaviour Through Criminal Sanctions' 92 *Harvard Law Review*, 1227 (1979), in particular, 1243, where various hypotheses for configuring the liability of the entity are addressed in the event of defects in the procedures and business practices that have led to the failure of the prevention of offences within the structure; also, B. Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' 56 *Southern California Law Review* 1141, 1197-1201 (1983), which argues that the requirement of the *corporate mens rea* could be satisfied by identifying a deficiency in the strategy to tackle offences by the entity; with particular reference to the plan for detecting the negligence of the entity W.S. Laufer, 'Corporate Bodies and Guilty Minds'43 *Emory Law Journal,* 647 (1994).

[18] V.S. Khanna, n 17 above, 359, which proposes to replace it either with a model of *strict liability* or, at most, of *negligence*.

[19] K.F. Brickey, n 17 above, 422; in the same sense, noting the correlation with the *identifiability problem*, J.R. Elkins, 'Corporations and the Criminal Law: An Uneasy Alliance' 65 *Kentucky Law Journal,* 73, 82-84 (1976), as well as on the issue of the relevance of the difficulty of proof as an element connected to the liability of the entity A.O. Sykes, 'The Economics of Vicarious Liability'93 *Yale Law Journal,* 1231, 1246-1252, 1254-1255 (1984).

[20] V.S. Khanna, n 17 above, 365.

extreme offshoot of a *continuum* that certainly has its peak in *intent* and then flows into the mere non-fulfilment of the duty of attention and prudence.[21]

For these reasons, new *standards* of reprimand of the entity have sprouted in the US debate:

i. scholars and jurisprudence spoke about the so-called *collective mens rea*, which combines awareness and actions of the individual agents that move within it, referable to a single supra-individual subject.[22] This allows the facing of situations in Court in which no director or employee has integrated the subjective element required but held isolated fragments of relevant information.[23] For instance, the instructions to the jury given in *Bank of New England* v *United States*: 'If employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all';[24]

ii. the *liability for negligent procedures and Policies*, outlined by scholars, considers accountable the *corporation* whose internal procedures and policies present elements of carelessness and superficiality. Each commentator provides its own version. For example, someone considers the liability integrated on the basis of a functional link between company policy and violation of the law by an employee or body acting in the interest of the entity,[25] or, similarly, in the event that the offence produced was the reasonably foreseeable result of company policies[26] or, again, in the event that there has been a negligent collection or management of relevant information connected to the production of a criminally significant damage.[27]

What emerges from a fleeting juxtaposition of the US experience is that the organisational reproach arises on a level that has nothing to do with the negligenceof natural persons, indeed it was created to replace it through a sort of arithmetic of precautionary non-compliance: the organisational negligence of the entity is a sum of many individual failures which in themselves would not assume legal significance.

[21] See in this regard W.S. Laufer, n 17 above, 722-724 according to which an entity acts negligently when it involuntarily creates a substantial risk that it should have avoided; S. Shavell, 'Strict Liability Versus Negligence' 9 *Journal of Legal Studies,* 1, 2 (1980), according to which liability for negligence requires agent to act with due care in his business.

[22] On this point R.S. Gruner, n 17 above, 263.

[23] See for example the cases *Kern Oil & Refining Co.* v *Tenneco Oil Co.,* 792 F.2d1380, 1387 (9th Cir.1986) and *United States* v *LBS Bank New York, Inc.,* 757 F. Supp.496, 501 n. 7 (E.D. Pa.1990). See also, on the subject of violations of the *Interstate Commerce Act, United States v. T.I.M.E.-D.C.,* 381 F. Supp. 730, 739 (W.D. Va.1974).

[24] *Bank of New England* v *United States*, 821 F.2d844, 855 (1st Cir. 1987).

[25] W.S. Laufer, n 17 above, 668. On the same line P.H. Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability'75 *Minnesota Law Review,* 1095, 1121 (1991) which considers the liability of the entity to be configurable in the event that the corporate ethos has somehow encouraged the criminal conduct of its employees.

[26] In this sense A. Foerschler, 'Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct' 78 *California Law Review,* 1287, 1308 (1990).

[27] R.S. Gruner, n 17 above, 284.

Collective negligence of organisational and individual negligence of the organiser are therefore parallel tracks that never meet.

IV. The Value of the Organisation as a Decisive Factor in the Genesis of the Negligent Offence

After clarifying the scope of the reasoning and renouncing of any reference to organisational negligence, we now want to link our reflection to the subjective role of the one who violates the due caution within a multi-subjective context: the *organiser's negligence*, where the organiser is a 'strategic' subject in the framework of coordinating the activities of others in a complex procedure or structure.

The study of the precautionary non-observance of this individual is essential; the cases relating to damage due to product, safety at work, safety and public health or the environment, just to stay in the main fields, are all understandable only with the lens of systemic organisational error.[28]

Depersonalisation and reiteration of production processes trigger addiction and distraction mechanisms, as well as excesses of confidence that can become a source of risks. Adverse outsources are added to the harmful potential that arises from the activity itself, well known by *legal* and so-called *permitted* risk.[29] When the organisational or executive error increases the tolerated risk beyond the permissible limit provided for by law, it makes the previously permissible activity unlawful *tout court*.

The conduct of the individual, once placed in the overall organisational context, deserves an autonomous code of interpretation by criminal law, which produces an effective but guaranteed way to charge with the offence. In fact, it is common, not only in criminal law, that the operations carried out within a complex structure can take on a particular meaning (and evaluation) within the institution; different from the one given by the rest of the community.[30] It cannot be hidden that culpable cooperation within an organization is often

[28] On which sociology, in particular sociology of organisation, has been carrying out very in-depth studies for some time, see for example M. Catino, *Da Chernobyl a Linate. Incidenti tecnologici o errori organizzativi* (Milano: Bruno Mondadori, 2006) 251.

[29] On which is permitted the reference to F. Consulich, 'Rischio consentito', in M. Donini ed, *Reato colposo* (Milano: Giuffrè, 2021), 1102.

[30] This is a sociological acquisition dating back, just think of M. Weber, *Economia e società* (Milano: Edizioni di Comunità, 1961) 212; and M. Crozier and E. Friedberg, *Attore sociale e sistema. Sociologia dell'azione organizzata* (Milano: Etas, 1978), 42; and, in Italy, M. Magatti ed, *Azione economica come azione sociale. Nuovi approcci in sociologia economica* (Milano: Franco Angeli, 1991), 56. In the criminal law literature, by way of example, see B. Schünemann, *Unternehmenskriminalität und Strafrecht* (Köln: Heymann, 1979), 9, 30 and G. Forti, 'Il crimine dei colletti bianchi come dislocazione dei confini normativi. «Doppio standard» e «doppio vincolo» nella decisione di delinquere o di *blow the whistle*', in Centro nazionale di prevenzione e difesa sociale ed, *Impresa e giustizia penale. Tra passato e futuro. Atti del Convegno (Milano, 14-15 marzo 2008)* (Milano: Giuffrè, 2009), 173.

facilitated by a push to maximise productivity even at the expense of possible damage or even non-compliance within the sector regulation.

Constitutional guarantees prevent the use of any type of collective imputation; the causal contribution to the fact cannot become conspiracy simply by belonging to a group regardless of the degree of personal and subjective adhesion to the complex procedure;[31] the axiological, cultural and environmental conditioning that membership determines on individual behaviours must be considered, especially when they are devoid of an antagonistic will to the legal system and produce the offence not autonomously, but by combining with one another.[32]

From a morphological point of view, the negligence of the members of an organisation looks like a chain of anomalies, which remain hidden for a long time both because they are not immediately able to determine the event without several errors and the complexity of the decision-making and operational systems of a multi-member structure, makes the shortcomings unclear until they explode into adverse events. Behind this lack of transparency there may be no mystifying intent from management; it is within certain limits inherent to the plurality of subjects involved and this condition may persist even beyond the fact until the trial, where it becomes difficult to identify individual liabilities.[33]

Faced with this kind of scenario, consequences on criminal law are immediate. The complexity of the organisational and procedural phenomena encourages us to consider negligent offences not as real conducts, but as breaches of duties and failures to achieve targets. In a nutshell, negligence is a non-compliance with a role rather than empirically graspable action, so the classic distinction

[31] It is a question of retracing, *mutatis mutandis*, the path traced in international criminal law, which required the reorganisation of the assignment of liability according to a collective logic, but always within the constraint of proportion while avoiding forms of position liability. On this point, see, among others, the reflections of G. Werle, *Diritto dei crimini internazionali* (Bologna: Bononia University Press, 2009), 133; S. Manacorda, *Imputazione collettiva e responsabilità personale. Uno studio sui paradigmi ascrittivi nel diritto penale internazionale* (Torino: Giappichelli, 2008), 113.

[32] V. Torre, 'Organizzazioni complesse e reati colposi', in M. Donini ed, *Reato colposo* (Milano: Giuffrè, 2021), 894 notes how the culture of the organisation affects individual choices, if not eroding spaces of self-determination, influencing individual choices, and decreasing their personal profile.

[33] On this point, the research conducted by D. Vaughan remains essential, *Controlling Unlawful Organisational Behaviour. Social Structure and Corporate Misconduct* (Chicago: University of Chicago Press, 1983), 73; Id, 'Rational Choice, Situated Action, and Social Control of Organisations' 32 *Law & Society Review*, 23 (1998), indicating a fall in the general-preventive capacity of the law with respect to organisations; J. Reason, 'Understanding Adverse Events: Human Factors' 4 *Quality in Health Care,* 80 (1995); Id, *Managing the Risks of Organisational Accidents* (London: Ashgate, 1997), 11; and in Italy by M. Catino, *Miopia organizzativa. Problemi di razionalità e previsione nelle organizzazioni* (Bologna: il Mulino, 2009); Id, *Capire le organizzazioni* (Bologna: il Mulino, 2012); A. Bianco Dolino and M. Catino, 'Teoria sull'eziologia degli incidenti nelle organizzazioni' 130 *Sociologia del lavoro,* 33 (2013); Id, 'Organizational accidents theories', in R. Dahlberg et al eds, *Disaster Research. Multidisciplinary and International Perspectives* (London: Routledge, 2015) 195.

between acting and omitting is out of date.[34] Following this approach, behaviours that would appear *prima facie,* simple inertias without meaning, are read again as violations of the duties of the role covered within the multi-member structure and then qualified as essential contributions in the dynamics of the offence.[35]

The method can be agreed upon in large parts. It is evident that the mere omission should not be considered as a moment detached from the context in the framework of a fragmentation of the fact. In the manner of the Divisionists of the late nineteenth century, the social meaning of the conduct can be correctly understood only if it is inserted into the complex of activities previously carried out by the same corporate body[36]or into the rules of the organisation. If within a board of directors or a medical team the rule that dissent must be expressly manifested is valid and shared by everybody, silence must be understood, unambiguously, as a positive adhesion to the resolution.[37] The civil law doctrine of the last century had already admitted the possibility that a conduct could assume a different meaning due to its repetition over time; for example, a simple inaction (or maybe even the decision not to give rise to sanctions, or even continue the promotion procedure as if nothing had occurred) in relation to the conduct of a subordinate can become an explicit authorisation, or a way of activating a psychic impulse to commit offences in case of the repetition of the illicit behavior.[38]

In conclusion, the organisation attributes a new meaning, essential for the criminal lawyer, to facts that would otherwise lack them or would have a one

[34] On the so-called omissive moment of negligence, for everyone, Arm. Kaufmann, *Die Dogmatik der Unterlassungsdelikcte* (Göttingen: Schwartz, 1958), 167; in Italy, much more recently, F. Giunta, *Illiceità e colpevolezza nella responsabilità colposa* (Padova: CEDAM, 1993), 92; F. Angioni, 'Note sull'imputazione dell'evento colposo con particolare riferimento all'attività medica', in E. Dolcini and C.E. Paliero eds, *Studi in onore di Giorgio Marinucci* (Milano: Giuffrè, 2006), II, 1287.

[35] K. Volk, 'La delimitazione tra agire e omettere. Aspetti dommatici e problemi di politica criminale', in K. Volk ed, *Sistema penale e criminalità economica* (Napoli: Edizioni Scientifiche Italiane, 1998), 67; C.E. Paliero, 'La fabbrica del *Golem*. Progettualità e metodologia per la «Parte Generale» di un Codice penale dell'Unione Europea' *Rivista italiana di diritto e procedura penale*, 466, 483 (2000). On the impossibility of making a distinction between action and omission, which would instead be closely related from an axiological and empirical point of view, at the beginning of the 1980s, G. Arzt, '*Zur* Garantenstellung beim unechten Unterlassungsdelikt' *Juristische Arbeitsblätter*, 553 (1980). Also, from the point of view of the criminal liability related to the role and the disappointment of expectations regarding the proper management of one's own sphere of competence, the conduct can manifest itself indifferently as an action or omission, as noted by G. Jakobs, *Die strafrechtliche Zurechnung von Tun und Unterlassen* (Opladen: Westdeutscher, 1996), 36.

[36] For example, on the subject, see C. Piergallini, *Danno da prodotto e responsabilità penale* (Milano: Giuffrè, 2004) 241.

[37] In relation to the jurisprudential experience gained with respect to decisions in the context of criminal associations (for example of the so-called excellent murders), N. Selvaggi, n 4 above, 90.

[38] E. Betti, Teoria generale del negozio giuridico, in F. Vassalli, Trattato di diritto civile (Torino: UTET, 1960), XV-2, 77.

somewhat different, completely misleading with respect to comprehension the events.

V. The Negligence of the Individual Operating in a Complex Organisation: The Failure or Deficiency in Coordinating the Activities of Others as a Reason for Criminal Prosecution

The organiser, heading a structure or leading a procedure, plays a decision-making role, which is practiced sometimes in full autonomy, other times in common with others. Sometimes it is a power originally held, on other occasions it derives from a total or partial proxy received from others.[39]

The reprimand of such an individual mainly relates to the breach of duty to acquire knowledge concerning the risks of the organisation and, consequently, to gain information regarding the best techniques for removing or reducing them.[40] The individual in question must then follow up on the assumption of knowledge in relation to safety hazards and techniques within his or her own organisation by taking appropriate preventive measures (ie, Art 28 of Decreto legislativo 81 of 2008).

One might be led to believe that the organiser and guarantor might match up and therefore that there is no need to build a specific rule book for the organiser, since it is possible to resort to the guarantor.

However, assimilation between the two notions would be hasty, as the coincidence is limited and even random at times. It may represent a mistake to identify those responsible using a static perspective of the structure:[41] the planned areas of expertise do not correspond to the actual divisions, since they are blurred by the dynamics of practices, complicities and conflicts of interest that outline quite a different reality from the record.

First of all, the criminal liability of the organiser is mostly active: the reproach, in fact, does not concern the failure to provide for this or that supervision or coordination procedure, but the construction of an organisation that causes damage. Therefore, we are dealing with an active paradigm.

Secondly, it is possible to identify the one who organises the activity of

[39] For a critical reflection on the evolution of the discipline of delegation of functions, recently, G. Morgante, 'La ripartizione volontaria dei doveri di sicurezza tra garanti 'innominati': la delega di funzioni', in M. Catenacci et al eds, *Studi in onore di Fiorella* (Roma: Roma Tre-Press, 2021), II, 1715.

[40] It is known, in fact, that the majority doctrine, followed by case law, has assumed a connotation of informed negligence upon the adoption of the maximum technologically available security, with consequent reduction to a minimum of risks, in the wake of what is claimed by G. Marinucci, 'Innovazioni tecnologiche e scoperte scientifiche: costi e tempi di adeguamento delle regole di diligenza' *Rivista italiana di diritto e procedura penale,* 29, 40 (2005); in the same sense also D. Pulitanò, *Diritto penale* (Torino: Giappichelli, 2021), 322.

[41] V. Torre, n 32 above, 900.

others only on a factual level and not for a legal quality recognised on the basis of formal procedures. The organiser may also have no impeding power but simply have factual possibilities to interfere in the legal sphere of others. The *ratio* of his punishment lies in the misrule of this practical prerogative.

There can certainly be a connection between organiser and guarantor. In fact, the guarantor is often the one who holds the organisational power[42]but not always.

He or she may not even exercise this power, since the individual is just a *straw man* behind other individuals. Those persons concerned may have preferred to delegate the power to others (it opens the scenario of the delegation of functions, that adds further guarantors to the original one; this hypothesis is not particularly relevant for our purposes). Finally, he or she may have exercised the power by defining general lines of action that are not self-applicable and therefore must be implemented through other subjects. In fact, the choices of top management become concrete only through more specific organisational decisions and detailed operations taken by employees, assistants, and other workers. In this case, in particular, the delegate does not even receive a derivative position of guarantee, but the individual still holds a portion of organisational power: his negligence could well imply his liability in case of adverse events.

Briefly, 'the organiser' is a factual role, while the 'guarantor' is a legal qualification. In addition, organisational power is not identified with a top position within an organisation chart, since it has a more complex and transversal connotation:

a) it has a variable scope, from the definition of the most general and important operational choices of a company to those that are merely occasional and refer to elementary level interventions of an artisan enterprise, although it should involve coordination of the activities for at least one other person;

b) it can be placed at any level of an organisational structure of any type,[43]

[42] The notion of employer is a completely independent notion from that of the entrepreneur pursuant to Art 2082 of the Italian Civil Code: 'employer', pursuant to Art 2, lett. b) of decreto legislativo 9 April 2008 no 81, is not only the 'subject holding the employment relationship with the worker', but the 'subject who, according to the type and structure of the organisation in which the worker carries out his activities, has the liability of organisation itself or of the production unit as it exercises decision-making and spending powers'. See E. Scaroina, 'Le posizioni di garanzia nelle organizzazioni complesse', in M. Catenacci et al eds, *Studi in onore di Fiorella* (Roma: Roma TrE-Press, 2021), II, 1844.

[43] The negligence of the organiser, for example, was used to formulate the criminal reproach of the medical director of a private nursing home, analysing the management powers of the facility and the duties of supervision and technical coordination associated with this role. For the Corte di Cassazione, the liability of the top takes on an organisational consistency: 'può affermarsi che al direttore sanitario di una casa di cura privata spettano poteri di gestione della struttura e doveri di vigilanza e organizzazione tecnico-sanitaria, compresi quelli di predisposizione di precisi protocolli inerenti al ricovero dei pazienti, all'accettazione dei medesimi, all'informativa interna di tutte le situazioni di rischio, alla gestione delle emergenze, alle modalità di contatto di altre strutture ospedaliere cui avviare i degenti in caso di necessità e all'adozione di scorte di

but also outside it. It is possible to organise the activities of other people even extemporaneously, without particular form constraints: think of a charity event (a bike ride) by an amateur association in which a volunteer works to coordinate the security service along the route in order to prevent motorists from create a danger to participating amateur cyclists.

Once this factual condition is found in the hands of one or more of the subjects involved in a multi-personal context, the duties of diligence are modulated in very diversified forms, more or less intense depending on the greater or lesser organisational power expressed concretely in the situation given by the subjects involved. The duties of prudent organisation of a complex activity can therefore be multiple: alongside the 'primary' ones, that is to say general and pertaining to the overall structure and coordination of all the participants, there are 'secondary' ones, depending on the divisions of internal skills as defined by the organiser of the first type.[44]

VI. Case Law: The Risk Management as a Key to Interpreting the Individual Negligence in Complex Organisations

Leading on from the unwanted event, the chain of decisions that preceded it gradually passes from *individuals* who have materially acted to *roles* that have contributed to a decision or have not exercised their skills correctly. At the same time, the risk connection between the violation of caution and event seems to be rarefied,[45] since the prudential program is increasingly general and indeterminate, merely instrumental and preparatory to other rules of conduct. Currently, case law gives a more factual reinterpretation of the position of guarantor, by orienting it along areas of competence according to the *cliché* of the risk manager: the person responsible for the adverse outcome in an organisational situation is identified by imputing to him or her a mismanagement of powers to

sangue e/o di medicine in caso di necessità (…). Il conferimento dei suindicati poteri comporta l'attribuzione al direttore sanitario di una posizione di garanzia giuridicamente rilevante, tale da consentire di configurare una responsabilità colposa per fatto omissivo per mancata o inadeguata organizzazione della casa di cura privata, qualora il reato non sia ascrivibile esclusivamente al medico e/o ad altri operatori della struttura'. Corte di Cassazione-Sezione penale IV 19 February 2019, no 32477, *Guida al Diritto*, 44, 95 (2019). See also G. Vetrugno et al, 'Il *risk management* e la «colpa di organizzazione» tra diritto penale e medicina legale', in M. Caputo and A. Oliva eds, *Itinerari di medicina legale e delle responsabilità in campo sanitario* (Torino: Giappichelli, 2021), 293.

[44] On the different levels between the in Italian so called 'guarantee positions' (duty to avoid damages to one or more definite interests) within the company, D. Pulitanò, n 40 above, 389.

[45] In reality, the open nature of negligent offences in general has been denounced for decades, in Italy as in Germany, see F. Giunta, *Illiceità e colpevolezza* n 10 above, 16; Id, 'La normatività della colpa penale: lineamenti di una teorica' *Rivista italiana di diritto e procedura penale*, 86, 90 (1999); G. Forti, *Colpa ed evento nel diritto penale* (Milano: Giuffrè, 1990), 136; C. Roxin, *Offene Tatbestände und Rechtsplichtmerkmale* (Hamburg: Cram, de Gruyter & Co., 1959), 53.

control the sources of the danger.[46]

Nevertheless, these are not violations of lesser value than those of the person who personally commits the negligent act. Greater power corresponds to greater liability and from this point of view the law follows the most stringent social expectations connected to the peculiar socially disengaged role.[47]

Obviously, the combination between imputation and role refers back to the *Jakobsian* universe, where liability is based on the lack of organisation and framed in the perspective of an action by the impersonal structure rather than by the single individual: the key to understanding the fact is institutional, enough to overcome even the value of the distinction of the individual between doing and omitting.[48]

This observation captures an undeniable feature of any complex activity; the fragmentary naturalistic qualification of the single action is not singularly important in order to establish the real distinction between criminally relevant or irrelevant participation. Rather, to recognise a negligent participant, it is essential to compare the set of actions concretely performed by the agent in a given period of time within the structure and the normative standards of safe and cautious execution of the specific tasks that the aforementioned individual had.

Thus, the notion of role, is an important part in the context of negligence: indeed, it allows to reduce the complexity of the relationship between agent and caution and to prevent the predictable defence argument concerning the impossibility of consciously accessing cautionary precepts that are often highly technical and specific. Faced with technical rules that appear *prima facie,* ungovernable and shapeless, the judge has a simpler task, by referring to peculiar positions of individuals with prominent roles in a structure or procedure. These tools greatly simplify not only the selection of possible perpetrators, but

[46] On the notion of risk manager, see the jurisprudential overview offered by S. Dovere, 'Giurisprudenza della Corte suprema sulla colpa', in M. Donini ed, *Reato colposo* (Milano: Giuffrè, 2021), 586. Naturally, the most significant precedent on this notion is represented by Corte di Cassazione-Sezioni unite penali 24 April 2014, no 38343, *Rivista italiana di diritto e procedura penale*, 1925 (2014). Whether or not it was a sought-after result, the acceptance of the guarantor as a risk manager also alleviates the problems of ascertaining omissive causality, as noted by V. Torre, n 32 above, 896. Criticism of the notion of competence as a key to interpreting the contributory negligence L. Risicato, *Cooperazione colposa,* in M. Donini ed, *Reato colposo* (Milano: Giuffrè, 2021), 332, since one of the two: either the competitor is not a guarantor and therefore precautions aimed at preventing the offence of others against him are not conceivable, or the 'guarantee position' (duty to avoid damages to one or more definite interests) exists and it will therefore be the latter to interact with Art 113 of the Italian Criminal Code.

[47] Here the reference to G. Jakobs is essential, *Der strafrechtliche Handlungsbegriff* (München: Beck, 1992), 31.

[48] G. De Francesco, 'Brevi riflessioni sulle posizioni di garanzia e sulla cooperazione colposa nel contesto delle organizzazioni complesse' *Legislazione Penale*, 3 February 2020, 5 notes that in the context of culpable cooperation it is not easy to draw a boundary between action and omission and the distinction, if it can still be useful, must be sought on a functional and teleological level. On the liability for organisation failure G. Jakobs, *Die strafrechtliche Zurechnung von Tun und Unterlassen* n 35 above, 21, where the founding role of the concept of risk is used also to distinguish the competence of the agent, the victim or third parties.

also the proof of *mens rea*.

In fact, the judge can presume the accessibility and compliance of the precautionary precepts, because there is a connection between the specific role in the organisation and the technical norms and standards: this is the so-called *negligence by assumption*. The performance, even as a mere matter of fact, of a complex activity presupposes the relevant awareness among the agent and, where this is not the case, negligence consisting of tackling a technically connoted task in the absence of the necessary training is considered *ex se* integrated.

It is a common experience that negligent offences are certainly not all proper offences (*reati propri*), but, in any case, the perpetrator is identified even when within a narrow range of subjects. There is nothing innovative in such an observation, not only because scholars, including the Italian scholars,[49] clarified this some time ago, but above all because everyone, consciously or not, has always reasoned 'by roles'. After all, the use of the model agent is nothing more than the result of a functionalist pre-understanding, which links the criminal reprimand to the position contingently assumed by the person in the reference context.[50]

However, the concept of role can also be abused by using it when it is found to be misleading with respect to the understanding of reality and observance of principles: this occurs when, from a mere exegetical support, it becomes an exclusive mechanism for ascribing negligence.

First of all, the systematic use of the aforementioned weakens its selective scope. For each situation, new roles can always be constructed, even after the fact, and for good measure, by which the concrete case can be reinterpreted in order to direct the criminal charge; in particular, this is possible because there is almost never a legal definition of the criminally relevant roles, except in the particular case of the 'guarantee positions' (in Italian: *posizione di garanzia*, ie duties to avoid damages to one or more definite interests).

In short, the role cannot ensure the conclusions of the interpreter but only serve as a mere prerequisite in the application of criminal law. The recognition

[49] In Germany, G. Jakobs, 'Das Strafrecht zwischen Funktionalismus und alteuropäischem Prinzipiendenken' *Zeitschrift für die gesamte Strafrechtswissenschaft*, 843 (1995); Id, *Norm, Person, Gesellschaft* (Berlin: Duncker&Humblot, 1999); as well as, Id, *Die strafrechtliche Zurechnung* n 35 above, 30; in Italy, for all, L. Cornacchia, *Concorso di colpe e principio di responsabilità per fatto proprio* (Torino: Giappichelli, 2004), *passim* and above all, 565.

[50] On the connection between entering a circle of relationships and the consequent evaluation of subsequent behaviors according to the standard already connected to it, decades ago, G. Marinucci, *La colpa per inosservanza di leggi* (Milano: Giuffrè, 1965), 194. *Homo eiusdem* is the most sociological of penal concepts and in fact represents a shadow that detaches itself from the physical person operating in a given context, becoming the externalised representation of the criminally relevant role, a projection that ends up tyrannising the agent, based on the social expectations of reference. On the theory of 'reference groups', first R.K. Merton and A.S. Kitt, 'Contributions to the Theory of Reference Group Behavior', in R.K. Merton and P.F. Lazarsfeld eds, *Continuities in Social Research: Studies in the Scope and Method of the American Soldier* (Glencoe: The Free Press, 1950) then Id, *Social Theory and Social Structure* (New York: The Free Press, 1968), 279.

of a particular position with respect to the facts, the event and the other co-agents does not allow any presumption of liability,[51] but rather requires stringent checks on the type of precautionary rules that had to be respected.

Thus, it may be the case that in the organisation a dissociation arises between the negligence of the individual member of the structure and the collaborators who are supposed to assist him or her, even though they may be placed in a position of hierarchical subordination. Certainly, we can run into gross negligence of the subject qualified by a position of primacy, compensated by the virtuousness of the employees who make up for his superficiality, but also in the opposite case, finding a perfect precautionary fulfilment of the organiser, which, however, is thwarted by the failures of the employees who do not comply with his or her directives. In short, the occurrence of the adverse event must never be inexorably indicative of negligence on the behalf of the individual who would also have an abstract 'competence' to oversee the risk; later translated into harm against an interest in accordance with the 'role' held.

Liability of position, disconnected from the fact. These are the risks underlying the nouvelle vague of competence for risk and prompting a preference for the not-yet-exhausted tradition of the risk nexus between specific rule of prudence and type of event in assessing whether there has been and when the moment of crisis in a precautionary system has been realised.

VII. Negligent Organisational Conduct as the Basis of Blame for Individual

The practice brings out how liability can rest on the one who did not materially cause the adverse event, but rather did insufficient efforts to preestablish the safe conditions in which others should have acted. The form of contribution to the negligent act of others assumes the consistency of the *organisational conduct*.

[51] As noted by N. Pisani, *La "colpa per assunzione" nel diritto penale del lavoro* (Napoli: Jovene, 2012), 3, 6. On the subject, see also the considerations of A.F. Tripodi, n 6 above,483. Previously, on the difficulties of reconciling the model agent with complex structures, so much so that perhaps we have to configure a collective notion of them, V. Attili, 'L"agente modello' nell"era della complessità': tramonto, eclissi o trasfigurazione' *Rivista italiana di diritto e procedura penale*, 1240, 1258 (2006). The regulatory parameter underlying the notion is however inevitably also present in the legal systems of other countries, with the German *Maßfigur*, on which H. Welzel, *Fahrlässigkeit und Verkehrsdelikte* (Karlsruhe: Müller, 1961) 15; la *persona sensata y prudente* in Spagna, su cui M.A. Rueda Martìn, 'La concreciòn del deber objetivo de cuidado en el desarollo de la actividad médico-quirùgica curatìva' *InDret*, IV, 48 (2009); the literature on the *reasonable person* in *common law* is endless, also because it is not strictly related to *criminal law*; an overview in M. Chamallas, 'Who Is the Reasonable Person? Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases' 14 *Lewis &Clark Law Review,* 1351 (2010); however, it should be noted that even overseas there is a certain disenchantment towards this concept. See the epigrammatic notation of K.W. Simons, 'Dimensions of Negligence in Criminal and Tort Law' 3 *Theoretical Inquiries in Law*, 283 (2002), 311: 'The "reasonable person" formulation then adds nothing of substance to the content of negligence test'.

The contribution is therefore a poor or completely absent coordination conduct with the activities of other subjects, which obviously includes the person who commits the fact described by the law, if the offence has a constrained form (*forma vincolata*), or the immediate causal conduct of the adverse event, if the offence has a free form (*forma libera*).

Organisational conduct can take a double form, also concomitant with the practical act:

i. the *decision* of one or more subjects who hold the power, in fact or by law, to direct the activities of others, by coordinating them in a manner that does not generate illicit risks;

ii. the *realization* of the decision *sub* i) into more analytical patterns of action wherein, in a second step, will be located the individual executive actions that lead to the adverse event in a specific case.

It is certainly in the complex structures that the multiform phenomenology of the organisational fact finds its elective concretisation as a hypothesis of participation in contributory negligence. However, as repeated many times, the non-observing organisational conduct, ie the phenomenal substrate of negligent cooperation, is not necessarily a fact that occurs in a hierarchical context, for example in the framework of a business activity, in a health facility or in a public administration, since it can occur in any collective activity that is carried out with a rudimentary coordinated interaction between several people and that generates an unauthorised risk (from hunting conducted without the necessary safety measures, to clandestine car races, to hiking in the mountains without the necessary equipment and so on).

Organisational conduct certainly includes the old features of *culpa in eligendo* and *in vigilando* (ontologically that implies a plurality of concepts[52]) and their modern transfiguration of omitted or incorrect risk assessment and failure to supervise compliance with internal procedures; To these ancient formulas must also be juxtaposed that series of active conduct designed to coordinate the activities of others and the risks involved.[53] In short, the *culpa in vigilando atque eligendo* is the progenitor of an organisational reproach that today draws on those who inefficiently exercise a power to shape the behaviour of others.[54]

[52] As pointed out by M. Romano, 'La responsabilità amministrativa degli enti, società o associazioni: profili generali' *Rivista delle Società*, 393 (2002).

[53] Also noted by D. Piva, *La responsabilità del "vertice" per organizzazione difettosa nel diritto penale del lavoro* (Napoli: Jovene, 2011) 38, according to which there is a substantial correspondence between the traditional paradigms of the *culpa in vigilando* and *in eligendo* and the organizational negligence (282).

[54] On organizational negligence such as the negligence of the top or the sub-top manager (in the field of criminal labor law), D. Castronuovo, n 9 above, 234; D. Piva, *La responsabilità del "vertice"* n 53 above, 100. The enhancement of the organisation as a task of those in a superordinate position allows at the same time to refine these two dating patterns of negligence caused by others, preventing them from conveying position liability. The correct organisation, in particular, can act as a tool for defining, subject to adaptation to the specific case, the diligent

These are certainly not original notations. In fact, a general distinction has now been established between a liability deriving from structural deficiencies due to choices and omissions on the company organisation, for which the top management is responsible,[55] and individual, episodic and occasional deficiencies that concern a sector or a branch of the business, in which – given certain conditions – the liability lies with the persons in charge or even with individual employees.[56]

For the criminal lawyer, this implies that the obligations of the primary level organisation lie with those who have the power to carry out the necessary extraordinary spending actions and have the possibility to define basic choices regarding company policy that exceed power possibly delegated to others, who as subordinates to the top management are not merely operational subjects but still have margins of decision-making autonomy and therefore may be burdened with secondary organisational duties.[57]

VIII. Negligent Offences in Organisations as Offences Based on Positive Conducts

The organiser is often a guarantor, but the guarantor is not always an organiser and, above all, not always, indeed almost never, the liability of the organiser is omissive and this makes it useless to think in terms of the obligation in preventing the adverse event, in the face of an actively procured causation.

The presence of a factual power to coordinate the actions of others does not require a 'guarantee position', which cannot arise as a matter of practice.

This is particularly significant in a cultural *milieu* in which case law often

behaviour that should have been followed within the specific structure. The reflection of A. Massaro moves in this direction, *La responsabilità colposa per omesso impedimento di un fatto illecito altrui* (Napoli: Jovene, 2013), 354. On the distorting use of the two Latin brocards in the context of organized structures, G. De Francesco, 'Il "modello analitico" fra dottrina e giurisprudenza: dommatica e garantismo nella collocazione sistematica dell'elemento psicologico del reato' *Rivista italiana di diritto e procedura penale,* 107, 116 (1991).

[55] Among the top management risks there is also that of interference with the activities of other organisations, since it is clear that coordination between structures can only be achieved through cooperation between those who hold the management levers. The obligation for the top management to establish a transparent organisation of competences is also thematised by German case law, see H. Achenbach and A. Ransiek, *Handbuch Wirtschaftsstrafrecht* (Heidelberg-München-Landsberg-Berlin: Müller, 2008), 51.

[56] This was already noted by D. Piva, *La responsabilità del "vertice"* n 53 above.

[57] It is therefore a question of 'non portable' task that entails mandatory criminal liability. The model in this sense is provided by the occupational health and safety sector, which demonstrates, through the formalisation of the risk assessment obligation, pursuant to the combined provisions of Arts 17 and 28 of decreto legislativo 9 April 2008 no 81, as the transparency of the organisation is a very personal duty of the top management. See Corte di Cassazione-Sezione penale IV 4 November 2020, *Guida al diritto,* 77 (2010); Corte di Cassazione-Sezione penale IV 28 January 2009 no 4123, *Cassazione penale* 3550 (2009), with note by A. Strata, 'Sugli obblighi del datore di lavoro in materia di prevenzione degli infortuni'.

neglects the principle of typicality of omissive liability, recognizing the presence of an anomalous (already conceptually) factual obligation to prevent the negligent offence of others:[58] the concrete management of the source of risk is enough to establish social contact, giving rise to the guarantee position.[59]

In the face of such a drift, organisational conduct must instead be understood as a form of commissive participation in the non-compliance of others, independent of a provision of law that establishes the criminally relevant obligation pursuant to Art 40, para 2, of Italian criminal code.[60]

In this context, the 'social contact' to which case law sometimes refers, more or less implicitly to recognise omissive criminal liability, can have a function in the

[58] See Corte di Cassazione-Sezione III penale 17 July 2019 no 50427, *Guida al diritto*, VIII, 112 (2020). On social contact as a mechanism for activating a guarantee position, Corte di Cassazione-Sezione IV penale 22 May 2007 no 2557, *Diritto penale processo* 748 (2008), with note by C. Piemontese, 'Fonti dell'obbligo di garanzia: un caso enigmatico, tra contatto e fatto'; on the unilateral assumption of the role of guarantor based on a social contact obligation, Corte di Cassazione-Sezione IV penale 29 January 2013 no 18569, *Diritto e Giustizia,* 29 April 2013; also, Corte di Cassazione-Sezione IV penale 16 December 2013 no 50606, *Giurisprudenza italiana*, 2026 (2014). More recently, A. Gargani, 'Lo strano caso dell'"azione colposa seguita da omissione dolosa". Uno sguardo critico alla sentenza "Vannini" ' *Discrimen*, 2, 18 November 2020, has ascertained the overcoming of the dogma of the legality of the source of the guarantee obligations with the recognition of positions assumed by way of mere fact. Indeed, it can be read in the ruling of the Court of legitimacy (Corte di Cassazione-Sezione I penale 6 March 2020 no 9049, *Giurisprudenza Penale Web*, 25, 6 March 2020) that the accused and his family members voluntarily assumed a duty of protection and therefore an obligation to prevent harmful consequences for his property, above all his life. On the same sentence, we also read the notations, regarding the factual foundation of the guarantee position, by R. Coppola, 'La posizione di garanzia nel rapporto di ospitalità: il caso Vannini' *Archivio penale* 11 October 2021; and the observations on the argumentative weaknesses of S. De Blasis, 'Precisa enucleazione della posizione di garanzia come criterio selettivo nel reato omissivo improprio' *Diritto penale e processo* 460 (2021); and S. Prandi, 'Alla ricerca del fondamento: posizioni di garanzia fattuali tra vecchie e nuove perplessità' *Diritto penale e processo*, 654 (2021) and F. Piergallini, 'Il "caso Ciontoli/Vannini": un enigma ermeneutico *'multichoice' Criminalia*, 609 (2019).

[59] In this regard, see the observations of D. Notaro, 'Le insidie della colpa nella gestione di attività pericolose lecite. La predisposizione delle pratiche ludico-sportive' *Criminalia*, 587, 593 (2019). This is a phenomenon that has been going on for some years and consists of a progressive ethic drift of the impediment duty, probably the result of the attenuation of the typological boundaries between the position of guarantee and the duty of prudence. Sometimes it seems that the case law understands the impeding duty as a simple variant of a generic duty to behave with the diligence and prudence suggested by common sense and common experience (basically this happens with regard to the failure to prevent the death of a temporarily cohabiting family member, accused by way of murder to those who had not promptly called medical assistance). In these terms the Corte di Cassazione 22 February 2005 no 9386, *Foro italiano,* II, 417 (2007). Even more recently we read in the motivation of the Corte di Cassazione-Sezione IV penale 8 April 2015 no 14145, Rv. 263143 – 01 that 'it can be said that the road user is responsible for traffic safety and therefore assumes a position of guarantee also towards third parties who come into contact with him, whenever his conduct leads to dangerous situations exceeding the normal risk connected to the road traffic'.

[60] On the guarantee function of the legality of the guarantee position F. Giunta, 'La posizione di garanzia nel contesto della fattispecie omissiva impropria' *Diritto penale e processo,* 620 (1999); in manuals see G. De Francesco, *Diritto penale* (Torino: Giappichelli, 2018), 224.

place that it is more appropriate, that is the construction of rules of diligence, and not in the construction *ex facto* in regard to duty of care. Rules of diligence, in fact, have always originated in the context of relationships between subjects who operate in the same context and who therefore must behave according to the prudence of the case and are precisely those that 'social contact' requires.

Moreover, caution is often not a legal rule, at least in all cases in which it is not acknowledged in a law or other formal source, so it can well arise from the fact without any attack on legality. In short, an obligation of behaviour without performance arises from social contact, as theorised by scholars of civil law,[61] who highlight the role the principle of good faith and mutual trust in the onset of a mandatory relationship.[62] The contact between two subjects generates duties and purely precautionary, therefore irrelevant pursuant to Art 40, para 2, of Italian criminal code: these duties concern the preservation, through negative conduct, of the reciprocal legal sphere of abstention from aggression to the interests of others, without being able to claim positive ones (as a phenomenon very different from the *de facto* contract).[63]

In fact, it should be remembered that from a precautionary point of view there are two distinct categories of hypotheses, which are relevant in terms of supervision regarding the actions of others:

i. on the one hand, there are precautionary charges placed within duty of care, which give content to the latter, indicating what the guarantor must do to prevent the adverse event;

ii. on the other hand, we recognise precautionary charges where the duty to take action to prevent or correct the error of others arises residually, when a risk arising from interaction with others is discernible. These are coordination duties that involve a bundle of prudent conduct, part of which also consists of taking action to neutralise the misbehaviour of others, without signifying obligations to prevent any offence.

Cooperating with others in the same context generates a change in the rules of prudent conduct and an increase in the level of caution, which passes from the general prohibition of *alterum non laedere* to the command which thereby implements the overall safety connected to the intervention, avoiding that collective action generates greater risks specifically due to the increased injurious capacities related to acting as a group.

The Italian Supreme Court (*Corte di Cassazione*), instead of grasping the mutation of duties of care, addresses these cases enucleating 'social contact'

[61] See the important study by C. Castronovo, 'Tra contratto e torto. L'obbligazione senza prestazione', in Id, *La nuova responsabilità civile* (Milano: Giuffrè, 2006), 443.

[62] Social contact is related to the assignment by C. Castronovo, 'Ritorno all'obbligazione senza prestazione' *Europa e diritto privato*, 679, 698 (2009).

[63] On the distinction between obligations deriving from a *de facto* contract and social contact liability F. Galgano, 'I fatti illeciti e gli altri fatti fonte di obbligazioni', in Id, *Trattato di diritto civile* (Padova: CEDAM, 2010), III, 301.

regarding the aforementioned by caring to analyse the distribution among agents of organisational power. Consider someone who encounters a group of hikers and offers to guide them through the valley using the snowmobile he or she is traveling upon and that subsequently certain members of the party are involved in an accident. According to the Italian Supreme Court, the person who offers to lead the descent becomes a guarantor, who assumes this quality in fact, because of the reliance aroused in others but also in an unclear nexus between social behaviour and law within the context of a contractual and gratuitous relationship.[64]

In cases such as these, however, it seems more correct to believe that there are no guarantors and the liability is not omissive, but negligent active-conduct, in function of a relationship that bases relational precautionary duties. They are ones that arise due to the reliance actively generated on hikers by those who offer to guide their return to the valley by flaunting their greater expertise and experience. With regard to these duties, criminally significant noncompliance is measured if there is careless conduct of the descent (excessive speed, poor lighting etc).[65]

This involves the construction of the conducts held by a subject who has a position of supremacy in the concrete event in an active key and not in an omissive one, with the related inescapable problems of atypicality and indeterminacy that the non-compliant conduct brings with it:[66] individual or group prompts, even for conclusive facts, other co-agents to assume an unauthorised risk that otherwise they would not have faced.

The theories of social contact and the consensual creation of the position of guarantee such as the earlier one that spoke of previous dangerous actions as a source of duty to avoidance, appear to be the result of an error of perspective which excessively fragments the complexity of reality. In fact, it is sufficient to broaden the gaze to understand that the supposed guarantor is just a subject who created or raised a situation of danger by generating improper reliance on

[64] Corte di Cassazione-Sezione IV penale 22 May 2007 no 25527, *Diritto penale processo,* 748 (2008), with note by C. Piemontese, n 58 above.

[65] The reasoning was conducted by the Corte di Cassazione in a similar way also in a subsequent case, with respect to the legal obligation to cooperate in the safety of a swimming pool by the owner of a catering company for the death by drowning of a boy in a hotel during a night party: in the motivation of the sentence we read the reference to multiple examples brought back by the Court to the issue of the occurrence of the guarantee position by consensus, mentioning 'the mountain guide, the members of a volunteer association of first aid, the neighbours who offer themselves without pay to accompany the inexperienced hiker, to transport the sick person to the hospital or to look after the child in the absence of the parents, with acceptance of the service by the beneficiaries'. According to the Court, 'situations can be placed in this context in which the assumption of the role of guarantor is based on a consensual basis'. See the Corte di Cassazione-Sezione IV penale 24 April 2013 no 18569, Rv. 255229 – 01.

[66] Detected by C. Piemontese regarding the construction of the guarantee position as a purely factual, n 58 above, 759.

the owner or in the real guarantor of the offended asset.[67]

The same occurs in complex settings, where the guarantor is sometimes blamed for failing to prevent an event when he or she positively created the preconditions for it by establishing a defective system for controlling an enterprise risk even though he or she may have remained inactive in practice on the occasion of the adverse event. Organisational conduct is active in itself.

IX. Synthesis. The Distinction Between Individual and Collective Negligence as a Barrier to the Uncontrolled Expansion of Criminal Liability for People Acting on Behalf of a Legal Entity

In conclusion, we can therefore state that there are two models of negligence in risk contexts in which multiple individuals act in cooperation with each other. The reference to organisation allows for a better understanding and focus of reprimand boundaries in the context of a possible multi-subjective offence, identifying a factual data that is easy to understand and judicially demonstrable.

On the one hand, *organisational negligence* applies only to legal entities and allows them to be blamed for failing to set up internal procedures able to prevent (or even make it more difficult) misconduct by individual employees or bodies that could represent an offence. Evidence that proper organisation would have prevented the offence of the individual is not required, but it is sufficient for the Public Prosecutor to prove that the internal disorganisation of the facility provided the occasion or facilitated the occurrence of the incident (in the case of negligent offences) or the wilful offence (in the case, not of interest hereto, in which the individual committed a wilful offence).

On the other hand, there is *the organisational negligence of the individual* who has to control and direct the activities of other subordinates to him or her. He is punished if he contributes, through failure or poor coordination of cooperators, to the negligent causation of the harmful event, although another subordinate person materially causes it.

These are the only conditions that allow the organiser, in regard to the activity of someone else, to be prosecuted as well, together with the person who materially caused the criminally relevant harm directly and immediately.

Systematically, these are limits referable to the nature of the concurrent negligent type, placed in two distinct areas.

First of all, there must be a common risk that is *not permitted (or no longer permitted),* which calls for the prudent action of several subjects, involved in the same context. It is not such a scenario in which someone or some people

[67] On the compatibility between ownership of coordination functions of a work organisation and the possibility of spending the principle of reliance on subordinate subjects, M. Mantovani, 'Il caso Senna fra contestazione della colpa e principio di affidamento' *Rivista trimestrale diritto penale economia*, 153, 176 (1999).

interrupt the risk connection: the causality started by the first agents, but a person who subsequently intervened in the same situation triggered a new etiological link that starts precisely in that moment. It is the so-called hypothesis of surpassing causality, wherein the first link is severed, in a way that the ones upstream of the breach are exonerated from any reproach: typically, this is what happens in the medical field, where the negligence of the second health care provider is likely to generate an autonomous causal process developing into the event. A risk *new* and *different* from that generated by the previous conduct is determined and not a *combined one* resulting from the conduct of all involved.[68]

Secondly, if we consider, as case law correctly does,[69] that negligent cooperation implies some form of *organisation*, even extemporaneous and poorly governed, then it is necessary to identify the *organiser*, ie, the one who holds the reins of such a multi-personal structure. Alongside the conduct of the negligent offender, there is a peculiar participant figure, the organiser, who must be placed alongside the 'classic' figures of the material or moral participant. However, in order to be able to charge this individual with the offence, it is necessary to identify an subject endowed with a factual power to determine and coordinate the activities of others, precisely of the one or those who later committed the causal precautionary violation, and based on a substantive hierarchy that may differ from the formal one, focusing on charismatic aspects, interactions between 'micro-powers' within the group, negotiating and transactional practices to maintain a balance in the relations between the components, and so on.[70]

Therefore, it is not enough to refer to an *a priori* role, an abstract competence, or a generic position of guarantee for liability to arise for negligent risk management.

It is the actual performance of coordinating conduct, before and regardless of the existence of an obligation to prevent the event, that gives the organiser an essential importance in the context of negligent cooperation, if possible even preeminent over the figure of the material author of the conduct immediately producing the adverse event. The organiser who badly coordinates the conduct of others without understanding the precarious scenario in which one operates is the real focus of negligent conspiracy today. The individual does not have to prevent anything; he or she is prohibited from causing harm by directing the activities of others.

[68] On the point, see V. Militello, *Rischio e responsabilità penale* (Milano: Giuffré, 1988), 246.

[69] Reference is made to the well-known arrest in which the Supreme Court correlated negligent cooperation with the pretence of prudent integration, when this is imposed by organisational needs related to risk management or by objectively defined contingencies, see the Corte di Cassazione, Sezione penale IV 2 December 2008, *Diritto penale e processo*, V, 571 (2009), with note by L. Risicato, 'Cooperazione in eccesso colposo: concorso "improprio" o compartecipazione in colpa "impropria" '.

[70] On the need to consider these elements in order to proceed with a realistic imputation in multi-subjective realities V. Torre, n 32 above, 897.

The Grand Game.
Social Networks and 'Contract-Based' Good Morals

Manolita Francesca*

Abstract

The paper analyzes the place and role of 'contract-based' good morals (*boni mores, bonnes moeurs, buon costume 'stipulativo'*) in the context of sharing platforms built on a network of contracts with end-users. As a matter of fact, virtual communities have outgrown reality. Virtual and real systems contaminate each other, just like contract-based rules of conduct governing the life of virtual communities contaminate those outside of them. Most standards of conduct in force in the social networks are drafted in such a way as to reflect the well-known doctrines of public policy (*ordre public*) and good morals (*boni mores, bonnes moeurs, buon costume*) with regard to any line of conduct generally qualifying as 'objectionable'. What remains to be assessed are the terms and requisites necessary to define 'objectionable' – a task by and large entrusted to the control of an algorithm and/or a moderator – and the effects thereof on extant contracts.

I. Preliminary Remarks on Good Morals (*Boni Mores, Bonnes Moeurs, Buon Costume*), Social Communities and the Conformism of Algorithms: The Grand Game

The doctrine of good morals (*bonnes moeurs*) has had mixed fortunes.[1] Its permeability to societal changes has made its border line with the neighboring

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[1] On the good morals doctrine, see G. Giorgi, *Teoria delle obbligazioni nel diritto moderno italiano* (Firenze: Cammelli Editori, 1876), II, 519; F. Ferrara, *Teoria del negozio illecito nel diritto civile italiano* (Milano: Società Editrice Libraria, 1914); A. Trabucchi, 'Buon costume' *Enciclopedia del diritto* (Milano: Giuffrè, 1959), V, 700; E. Betti, *Teoria generale del negozio giuridico*, (Torino: UTET, 2nd ed, 1960), 106; G.B. Ferri, *Ordine pubblico, buon costume e la teoria del contratto* (Milano: Giuffrè, 1970), 184; S. Rodotà, 'Ordine pubblico o buon costume?' *Giurisprudenza di merito*, 106 (1970); G. Panza, *Buon costume e buona fede* (Napoli: Jovene, 1973); Id, 'L'antinomia tra gli artt. 2033 e 2035 c.c. nel concorso tra illegalità e immoralità del negozio' *Rivista trimestrale di diritto e procedura civile*,1174 (1971); L. Lonardo, *Ordine pubblico e illiceità del contratto* (Napoli: Edizioni Scientifiche Italiane, 1993); R. Sacco, 'Il contratto', in F. Vassalli ed, *Trattato di diritto civile* (Torino: UTET, 1975), 516. On the relationship with the over-arching doctrine of *ordre public*: M. Barcellona, 'Ordine pubblico e diritto privato' *Europa diritto privato*, 925 (2020); G. Perlingieri, 'In tema di ordine pubblico' *Rassegna di diritto civile*, 1382 (2021), Id, 'La via alternativa alle teorie del «diritto naturale» e del «positivismo giuridico inclusivo» ed «esclusivo». Leggendo Wil J. Waluchow' *Annali SISDiC*, 69 (2020); S. Pagliantini, '*Lex perfecta*, trionfo dell'ordine pubblico e morte presunta del buon costume: appunti per una ristampa della Teoria del negozio illecito nel diritto civile italiano' *Persona e mercato*, 670 (2021).

doctrine of public policy (*ordre public*) quite uncertain. In France, for example, the recent reform of the *Code civil* has led to a complete hybridization of the *bonnes moeurs* into the *ordre public* principle.[2]

While courts in Italy redefine the boundaries of Art 2035 of the Civil Code[3] and the Constitutional Court reopens the debate on the Merlin law,[4] in the parallel world of the Internet, the doctrine of good morals is being revitalized in the shaping and implementation of 'community' standards,[5] and its effectiveness is entrusted to algorithms, user feedbacks and moderation guidelines.

The cases are growing in number, the best known being the images of nudes contained in works of art, such as 'The Descent from the Cross' by Pieter Paul Rubens, the female nudity by photographer Gerhard Richter, '*L'origine du mond*e' by Gustave Courbet and Canova's 'The Three Graces'.[6] These works, recast on digital platforms, were considered contrary to the 'community' policy forbidding the display of reproductive organs.

This same reasoning is also behind the censorship and removal of photos of babies being breast fed. In 2021, the Facebook account of the International Exhibition of Contemporary Art and Design, which included the exhibition of

[2] In recent literature, see G. Passagnoli,'Note sull'*ordre public* dopo la riforma del *code civil*' *Persona e mercato*, 37 (2018); N. Rizzo, 'La positivizzazione del diritto naturale ed il superamento dei «buoni costumi»' *Persona e mercato*, 116 (2018); G. Terlizzi, 'Erosione e scomparsa della clausola dei «buoni costumi» come limite all'autonomia contrattuale' *Persona e mercato*, 135 (2018); C.Crea, 'La «resilienza» del buon costume: l'itinerario francese e italiano, tra «*fraternité et diversité*»'*Rassegna di diritto civile*, 872 (2019).

[3] Among the latest contributions, see A. Palmieri, 'In tema di irripetibilità per contrasto al buon costume. Nota a ord. Cass. sez. VI civ. 3 aprile 2018, n. 8169' *Foro italiano*,3240 (2018); A. Barale, 'Il problema della «soluti retentio» in caso di contemporanea violazione dell'ordine pubblico e del buon costume' *Foro napoletano*, 674 (2020); F.P. Patti, 'Buon costume e scopo della norma violata: sull'àmbito di applicazione dell'art. 2035 c.c.' *Rivista di diritto civile*, 517 (2021).

[4] The Constitutional Court, with judgments no 141 and no 278 of 2019, re-examined the so-called Merlin Law (legge 20 February 1958 no 75, repealing the former regulation on prostitution) adapting it to new forms of voluntary prostitution. See R. Bin 'La libertà sessuale e prostituzione (in margine alla sent. 141/2019)' *forumcostituzionale.it*, 26 November 2019; L. Del Corona, 'La Corte costituzionale torna a pronunciarsi sulla legge Merlin, ma alcuni problemi interpretativi permangono' *Rivista italiana di diritto e procedura penale*, 315 (2020); L. Violini 'La dignità umana al centro: oggettività e soggettività di un principio in una sentenza della Corte Costituzionale (sent. 141 del 2019). Nota a sent. C. Cost. 7 giugno 2019 n. 141' *dirittifondamentali.it*, 444 (2021).

[5] See P. Femia, 'Tre livelli di (in)distinzione tra princípi e clausole generali', inG. Perlingieri and M. D'Ambrosio eds, *Fonti, metodo e interpretazione, Primo incontro di studi dell'ADP* (Napoli: Edizioni Scientifiche Italiane, 2017), 209, 224.

[6] R. Borrello, 'Arte e rete digitale: i *social networks* e le *policies* sulla «nudità»' *Nomos,* 28 (2020); M. Ferraioli, 'Ennesimo pasticcio di Facebook: censura come "pornografiche" alcune opere di Rubens' *Artribune.com*, 30 July 2018. On Gerhard Richter's artwork, see 'Gerhard Richter Painting Pulled From Pompidou Center Facebook Page' *artlyst.com*, 1 August 2012, at https://tinyurl.com/7se8d27x (last visited 31 December 2022). On the *Origine du monde,* see *finestresullarte.info.it*, 19 March 2018, at https://tinyurl.com/y4w7292a (last visited 31 December 2022). Moreover, see 'Canova censurato, Sgarbi fa causa a Facebook e Instagram'*vvox.it*, 23 September 2019.

the works of Italian artist, Teresa Letizia Bontà and Spanish artist, Gloria Marco Munuera, was suspended for alleged violation of the social network's standards, although they simply represented scenes of maternity.[7] The story went viral, so much so that some bloggers from 'Theories of the Deep Understanding of Things' tested Facebook's algorithm by posting on their page the image of a pretty girl, completely wrapped in foam, in a bathtub, and with an innocent elbow as the only naked point of her body. Within a few weeks, the innocent photograph was removed due to an alleged violation of the social network's policy.[8]

The recent corporate shift – from Facebook to Meta – has led to an amendment to the community standards. The famous Internet Social Provider (hereinafter ISP) was advised to publish an accompanying statement for each of the 'objectionable contents' put forward in the platform's new community standards: hate speech, violent and graphic content, adult nudity and sexual activity/solicitation.

Under section 3 of the Terms of Use (referring to the user's commitments to Facebook and its community) is a paragraph relating to individual conduct ('2. What you can share and do on Meta Products'). With specific regard to nudity and adult sexual activities, the Facebook Community Standards specify:

> 'Our nudity policies have become more nuanced over time. We understand that nudity can be shared for a variety of reasons, including as a form of protest, to raise awareness about a cause, or for educational or medical reasons. Where such intent is clear, we make allowances for the content. (...) We also allow photographs of paintings, sculptures, and other art that depicts nude figures'.[9]

What makes the whole system rather peculiar is that the detection of (contractual) breaches is entrusted to the judgment by other users, or left with algorithmic decision-making. Thus, the users' subjective ethical standards and/or the parameters behind an algorithm become central in sanctioning the infringer, temporarily or permanently disconnecting him or her from the community.[10]

[7] See 'Biennale di Firenze, Facebook oscura la pagina della manifestazione per aver esposto opere che ritraggono seni nudi' *artemagazine*, 13 September 2021 (available at https://tinyurl.com/y36k4mw8 (last visited 31 December 2022)).

[8] See SkyTg 24 Tecnologia, 'Statue, quadri, fotografie: le discutibili censure di Facebook', 3 January 2017, athttps://tinyurl.com/2fws5b5j (last visited 31 December 2022).

[9] Access to the regulations is free at https://tinyurl.com/yf5n3k3v (last visited 31 December 2022).

[10] In part 3 ('Your commitments to Facebook and our community') of the Terms of Use, Facebook (Meta), at point 2 ('What you can share and do on Meta Products') we find: 'We can remove or block content that is in breach of these provisions. If we remove content that you haveshared for violation of our Community Standards we'll let you know and explain any options youhave to request another review, unless you seriously or repeatedly violate these Terms or if doing so may expose us or others to legal liability; harm our community of users; compromise or interferewith the integrity or operation of any of our services, systems or Products; where we are

The goal pursued by the social network is clear; to guarantee the safety of virtual exchanges/relationships through the construction of a self-standing concept of 'social etiquette' barely inclined to measure up to multiculturalism and the incessant modifications of common morality. Although necessary for the evaluation of social behavior, such contents can hardly be translated into pre-defined norms.

Since the relationship between the users and the platform provider is essentially of a contractual nature, the whole issue deserves to be studied according to the tenets of contract law. The act of private autonomy, whereby a user accepts the requirement to share a set of personal data in order to get access to the service,[11] is the source of several rules of conduct, including a binding notion of etiquette. Such a notion does not reflect a conventionally accepted code of morality based on

> 'a process of repetition of a certain way of acting, authoritatively promoted by one or more persons, and sometimes by anonymous initiatives, which meets with public approval and acceptance, and to which the public submits itself in such a universal way that it seems inappropriate and unusual to turn away from it'.[12]

Rather, it is a kind of 'regulated' etiquette, embodied in the rules of conduct laid down in the platform's general conditions.

Here, at first sight, what the contracting parties seem to be agreeing upon is the provision of a general clause, namely, a 'good morals' clause. However, unlike the doctrine which we, as civil lawyers, are accustomed to – characterized by

restricted due to technical limitations; or where we are prohibited from doing so for legal reasons.

To help support our community, we encourage you to report content or conduct that you believe breaches your rights (including intellectual property rights) or our terms and policies.

We also can remove or restrict access to your content, services or information if we determine that doing so is reasonably necessary to avoid or mitigate adverse legal or regulatory impacts to Facebook'.

In part 4 ('Additional provisions'), at point 2 ('Account suspension or termination'), is specified: 'We want Facebook to be a place where people feel welcome and safe to express themselves and share their thoughts and ideas.

If we determine that you have clearly, seriously or repeatedly breached our Terms or Policies, including in particular our Community Standards, we may suspend or permanently disable access to your account. We may also suspend or disable your account if you repeatedly infringe other people's intellectual property rights or where we are required to do so for legal reasons.

Where we take such action we'll let you know and explain any options you have to request a review, unless doing so may expose us or others to legal liability; harm our community of users; compromise or interfere with the integrity or operation of any of our services, systems or Products; where we are restricted due to technical limitations; or where we are prohibited from doing so for legal reasons'.

[11] In this regard, among the most effective reconstructions, see C. Perlingieri, *Profili civilistici deisocial networks* (Napoli: Edizioni Scientifiche Italiane, 2014), 88.

[12] F. Ferrara, *Trattato di diritto civile italiano* (Roma: Athenaeum Edizioni Universitarie, 1921), I, 29.

an unavoidable degree of vagueness –, in this context the good morals clause loses its typical vagueness, ending up turning into a provision dominated by the service provider's terms of use and driven by an inflexible algorithm. Failure to comply with the said standards triggers a sanction, temporary or indefinite exclusion from the platform (*rectius*: termination for breach).[13]

As is known, a social network crashing down for some hours may have an enormous social and economic impact, as it causes the disconnection of an indefinite number of users. Hence, the forced exclusion of one or more users from a social platform constitutes a truly punitive measure, as it limits personal or economic communication. This is what former President Trump complained about in the Capitol Hill affair and regarding the containment measures adopted against him by the major social networks.

The Capital Hill case is well known. On 6 January 2021, hundreds of supporters of former President Trump stormed the US Congress, incited by messages about Trump's allegations of election fraud, following Joe Biden's victory in the November 4 election. The major social networks (Facebook, YouTube and Twitter) suspended the former president from their sites (for an indefinite period).

The allegations of 'censorship', by the press and by many institutions, were also reported into an Interrogation by the EU Parliament to the Commission,[14] which led to Facebook referring the findings to the Oversight Board, an independent panel of 'wise persons' set up to evaluate/review the platform's decisions.[15] The Board essentially upheld the original decision, although it considered it procedurally incorrect and too hasty, and referred the ISP to the definition of a proportionate penalty, similar to that applied to other users in similar cases.

Finally, the sanction was confirmed, and given the seriousness of the former President's behavior, he will not be allowed access to the social platform until January 2023. However, access remains conditional. This is based on a prior assessment by experts on the potential risks which Donald Trump's return to

[13] See n 10 above.

[14] Question for written answer E-000406/2021 to the Commission, 'Censorship by Facebook and Twitter and blocking of Trump's and the Libero newspaper's accounts', available at https://tinyurl.com/96m2sbw (last visited 31 December 2022). The Commission's response refers to the Digital Service Act, which represents the most recent strategy prepared by the European Commission to combat illegal content disseminated online. The 2020 proposal for a regulation by the EU Commission has the ambitious aim, the first legislative experiment in the world, to establish common rules on a continental basis for digital platforms. The proposal has been definitively approved: European Parliament legislative resolution of 5 July 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020)0825 – C9-0418/2020 – 2020/0361(COD)).

[15] Oversight Board, case decision 2021-001-FB-FBR of 5 May 2021, available at https://tinyurl.com/yc4c6rjs (last visited 31 December 2022). See A. Gerosa, 'La tutela della libertà di manifestazione del pensiero nella rete tra *Independent Oversight Board* e ruolo dei pubblici poteri. Commenti a margine della decisione n. 2021-001-FB-FBR' *Forum di Quaderni costituzionali*, 427 (2021).

the platforms might pose to public safety.

II. Algorithms of the First Millennium: The Great Deception. Two Examples from History

Social platforms handle an uncontrollable amount of information. Recent studies have shown that the algorithmic logic of preferences reproduces, in terms of general information, the same results as those sought after on a commercial level. Algorithms are designed to record a user's preferences and to customize subsequent commercial communication.[16] Such an inductive method, when applied to a subject's informational inclinations, produces a multiplier effect of the information and its variables. Its major effect can be described as a bubble in which individuals withdraw into themselves, together with information that is a repetition of the initial content, thus, feeding the monothematic information on the subject in question.[17] The ability of a multiplicity of contracts of exchange to produce a similar effect on a global scale misleads these very political decision-makers. Yet, the pervasiveness of instruments of communication and the power of algorithms to influence individual choices is certainly not new. A few examples can be quite revealing.

For the first example, it is enough to look to one of the first anecdotes on the science of media deception and the first driving force behind communication studies on the social impact of media.[18] At 8.30 pm on 30 October 1938, the evening before Halloween, at the dawn of radio communication, a very young Orson Welles opened a radio broadcast on CBS with a false news report, announcing an alien invasion of America. The program was 'War of the Worlds', inspired by the science fiction novel of the same name, written by H.G. Wells.

It was said the style was so realistic, that, despite the warnings before and after the program, many listeners did not realize that it was fiction and fell into a state of panic that soon turned into mass hysteria. Some of the listeners abandoned their homes, believing that this would save them from the alien

[16] On micro-targeting, see D. Bennato, 'L'emergere della disinformazione come processo socio-computazionale. Il caso Blue Whale' *Problemi dell'informazione*, 393 (2018).

[17] On confirmation bias, see R.S. Nickerson, 'Confirmation Bias: a ubiquitous phenomenon in many guises' 2 *Review of General Psychology*, 175 (1998); on the same issue already J.T. Klapper, 'Mass Communication Research: An Old Road Resurveyed' 27 *Public Opinion Quarterly*, 515 (1963). More recently, G. Marchetti, 'Le *fake news* e il ruolo degli algoritmi' *Rivista diritto dei media*, 29, 31 (2020)

[18] S. Natale, 'E se l'inganno è banale? Per una nuova teoria dei media nell'epoca della disinformazione' *Studi culturali*,437, 439 (2021); Id, 'Unveiling the Biographies of Media: On the Role of Narratives, Anecdotes and Storytelling in the Construction of New Media's Histories' 26 *Communication Theory*, 431 (2016). It is also necessary to refer to J. Pooley and M. Socolow, 'Checking up on the Invasion from Mars: Hadley Cantril, Paul Lazarsfeld, and the Making of a Misremembered Classic' 7 *International Journal of Communication*, 1920 (2013).

invasion which was now at the gates of New York.[19]

As for the algorithms, in the 1980s the music broadcaster, MTV, used a statistical model to identify the music videos to broadcast. The target of the analysis was composed of young white people with a clear preference for rock music.[20] This led producers systematically to exclude 'black music' from their broadcasts, with the effect of fueling the expansion of a single musical model and leading to commercial discrimination against African American artists. It took artists of the caliber of David Bowie and a large-scale musical operation to bring about change.

In short, explosive reactions of the masses are not new, nor is the guide to the creation of preferences based on algorithms.[21] However, the impact of current social networks is exacerbated by both the numerosity and transnationality of users and by the private nature of the relationships between users and ISPs.

III. The European Union and the Role of ISPs in Combatting Hate Speech

ISPs have gained institutional momentum, in particular with regard to the phenomenon of 'hate speech'.[22] The history of the twentieth century has provided remedial antibodies, at least in the ability to read the signs of terminological decline and the effects of hate propaganda.[23] This will occur even more frequently if the latter is subject to the multiplier effect that is typical of social media and is facilitated by the obscurity of the relationships among people who are only

[19] At the end of the 1930s, Welles collaborated with CBS radio, creating the program named 'The War of the Worlds', an adaptation of the 1897 novel by the British writer H.G. Wells. On this point, see the admirable analysis by D. Bennato, n 16 above, 397-398. The newspapers of the time reported that some citizens of New York claimed to have seen the Martians or the Nazis, both in Europe and in Latin America. The effects of the radio program on the population were the subject of the study by H. Cantril, *The Invasion from Mars: A study in the psychology of panic* (Princeton: Princeton University Press, 1940), 55.

[20] The use of targets is a known phenomenon. In Italian literature, see P. Aroldi and F. Colombo eds, *Le età della tv. Indagine su quattro generazioni di spettatori italiani* (Milano: Vita e Pensiero, 2003). On MTV's ability to influence consumer tastes, see G. Bertoli and N. Ghezzi 'Globalizzazione dei mercati e comunicazione televisiva: il caso Mtv' 7 *MICRO & MACRO Marketing*, 449 (1998); P. Russo, 'Sentieri della globalizzazione' *Il Mulino*, 60 (1999); C. Johnson, *Branding television* (London: Routledge Chapman & Hall, 2011).

[21] P. Femia, 'Essere norma. Tesi sulla giuridicità del pensiero macchinico', in P. Perlingieri et al eds, *Il trattamento algoritmico dei dati tra etica, diritto ed economia* (Napoli: Edizioni Scientifiche Italiane, 2020), 65.

[22] See G. Alpa, 'Autonomia privata, diritti fondamentali e «linguaggio dell'odio»' *Contratto e impresa*, 45 (2018); F. Abbondante, 'Il ruolo dei *social network* nella lotta all'*hate speech*: un'analisi comparata fra l'esperienza statunitense e quella europea' *Informatica e diritto*, 65 (2017); A. Spatuzzi, '*Hate speech* e tutela della persona. tra incertezza del paradigma e declinabilità dei rimedi' *Diritto della famiglia e delle persone*, 888 (2021); P. Falletta, 'Controlli e responsabilità dei *social network* sui discorsi d'odio *online*' *Rivista diritto dei media*, 146 (2020).

[23] M. Francesca, 'Razza e diritto, Note introduttive sugli epigoni della discriminazione razziale', in S. Donadei et al eds, *Razza, Identità, Culture. Un approccio interdisciplinare* (Napoli: Edizioni Scientifiche Italiane, 2019), 3.

virtually in contact.

In 2016, the European Union adopted the European Parliament Resolution on EU strategic communication 'to counter propaganda against it by third parties'.[24] This followed a long line of previous acts, starting with the 2009 Resolution 'On European Conscience and Totalitarianism'.[25] Para 21 refers to 'the importance for the EU and Member States to cooperate with social media service providers to counter ISIS/Daesh propaganda spread through social media', and para 47, which expresses 'concern about the use of social media and online platforms for criminal hate speech'. It calls on Member States to adopt and update their legislation to deal with ongoing developments, or fully to implement and enforce existing legislation on hate speech, both online and offline, affirming the need for increased co-operation in this regard, with online platforms and leading internet and media companies.

The subsequent agreement between the EU Commission and the largest Internet Providers, reached in 2016, facilitated the implementation of coordinated measures to combat hate speech.[26] The parties committed to 'strengthen ongoing partnerships with civil society organizations' and pursue the adoption of a code of conduct aimed at countering hate speech. In 2017, the European Commission also approved a Communication on

> 'the implementation of good practices to prevent, detect, remove and disable access to illegal content in order to ensure the effective removal of illegal content, greater transparency and the protection of fundamental rights online'.[27]

The same Communication provided clarification regarding the responsibility of ISPs 'in taking proactive measures to detect, remove or disable access to illegal content (the so-called "good Samaritan" actions)'. The Commission looked at the improvements achieved through direct intervention to control and remove illegal content and concluded in favor of a non-regulatory approach, accompanied by measures to facilitate cooperation among all interested parties.

The Communication goes much further, and after an additional call for platforms to work more closely with the competent authorities, asks for the necessary resources to understand the legal frameworks for local and transnational operations and for the activation of the so-called 'trustworthy flaggers'; it concludes

[24] European Parliament resolution of 23 November 2016 on EU strategic communication to counteract propaganda against it by third parties (2016/2030(INI)).

[25] European Parliament resolution of 2 April 2009 on European conscience and totalitarianism (P6_TA(2009)0213).

[26] The Code of Conduct can be found at https://tinyurl.com/ykee9vjz (last visited 31 December 2022). See P. Falletta, n 22 above, 154.

[27] European Commission, 28 September 2017, 'Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms' COM(2017) 555.

by offering a reinterpretation of Art 14 of the Directive on E-Commerce.[28] On this last matter, on the basis of the interpretation given by the Court of Justice in the case of *L'Oréal* v *eBay*,[29] with regard to the liability of platforms, the Commission noted:

> 'Proactive measures taken by online platforms falling within the scope of Article 14 of the E-Commerce Directive in order to detect and remove any illegal content on their platform – including the use of automatic removal tools and other tools to ensure that previously removed content is not reloaded – do not in themselves result in a loss of the liability waiver.
>
> The adoption of such measures does not necessarily imply that the online platform concerned plays an active role which would no longer allow it to benefit from the waiver. Where the adoption of such measures results in the online platform being informed or becoming aware of unlawful activities or information, the online platform should take immediate action to either remove or disable access to the unlawful content in order to continue to benefit from the waiver.
>
> Online platforms should do their best to proactively identify, detect and remove illegal content online. The Commission strongly encourages online platforms to take these proactive voluntary measures and to step up cooperation and investment in automatic detection technologies along with their application'.

Because of such requirements, social networks may be induced to adopt a rather cautionary approach; ISPs may lean towards the early removal of the doubtful content.[30]

Nevertheless, such indications have influenced national and European courts in re-interpreting the Directive on E-Commerce, in particular Art 14.[31] This led to a shift in the liability regime for ISPs, from a merely 'passive' role

[28] Directive 2000/31/CE of 8 June 2000on electronic commerce [2000] OJ L178/1.

[29] Case C-324/09 *L'Oréal SA.* v *eBay International AG*, Judgment of 12 July 2011, available at www.eur-lex.europa.eu. See M.L. Montagnani, *Internet, contenuti illeciti e responsabilità degli intermediari* (Milano: Egea, 2018), 102.

[30] See A. Fachechi, Net neutrality *e discriminazioni arbitrarie* (Napoli: Edizioni Scientifiche Italiane, 2017), 27.

[31] The notion of an 'active host provider' has been embraced by Corte di Cassazione 21 February 2019 no 7708, *Rivista di diritto industriale*, 201 (2019). *Contra* M. Bassini, 'La Cassazione e il simulacro del *provider* attivo: *mala tempora currunt*' *Rivista diritto dei media*, 248 (2019). See also Tribunale di Roma 12 July 2019 no 14757, *Guida al diritto*, 49 (2019); R. Bocchini, 'La responsabilità civile plurisoggettiva, successiva ed eventuale dell'ISP' *Giurisprudenza italiana*, 2607 (2019); S. Braschi, '*Social media* e responsabilità penale dell'*Internet* Service Provider' *Rivista diritto dei media*, 157 (2020). The European Court of Justice applied stricter measures on the ISPs (Case C-18/18 *Eva Glawischnig*-Piesczekv *Facebook Ireland Limited*, Judgment of 3 October 2019, available at www.eur-lex.europa.eu). See, *ex multis*, P. Falletta, n 22 above, 153.

(entailing no liability) to an actual obligation to monitor specific cases.

IV. Guidelines for Content Moderation on Social Media: *The Guardian* v *Facebook*. System Security Requirements Between Formalistic Algorithms, Stressed Moderators, and the Oversight Board

Hence, the ISPs were induced to change their approach, although such a change was not driven by the so-called 'EU soft law' nor by the stricter positions taken on by national and European courts.

It is well known that the greatest results are achieved when the game between the parties is played by the same rules and on a neutral playing field. Eventually, even the European Union started to reconsider the effectiveness of its soft law recommendations. This capitulation is witnesses by the European Parliament's adoption of the Digital Service Act,[32] the first legislative experiment on a global scale to establish common rules for digital platforms, witnessing a clear transition to hard law.

However, the greatest pressure has probably come from The Guardian's investigations in 2017, which raised several reputational (let alone financial) issues. The well-known British newspaper, well before unveiling the Cambridge-Analytica[33] scandal, published the contents of a hundred internal Facebook documents detailing the rules and policies for moderating contents on social networks.[34]The method followed two paths: 1) the detection, through algorithms or user reports, of content that breaches the social network's policies, and 2) the intervention by moderators to resolve the most controversial issues, usually subsequent to a request for re-evaluation. The Guardian explained that the instructions given to moderators were often contradictory and did very little to help the thousands of staff in charge of reviewing reported contents every day. The most controversial posts were those with blurred sexual content, which required a subjective assessment prior to the issuance of a final decisions (biased by the mediator's training and/or speculative attitudes).

As is known, moderators work under the pressure of very tight deadlines; a Facebook employee has about ten seconds to decide on a report before moving

[32] See n14 above. See F.G. Murone, 'Il Digital Service Act e il contrasto ai contenuti illeciti online' *iusinitinere.it* (2021); S. Orlando, 'Regole di immissione sul mercato e «pratiche di intelligenza artificiale» vietate nella proposta di Artificial Intelligence Act' *Persona e mercato*, 365 (2022). A warning about the ineffectiveness of soft law is already found in G. Alpa, n 22 above, 45.

[33] See D. Bennato, n 16 above, 395.

[34] See https://tinyurl.com/5edmvx6s, 21 May 2017 (last visited 31 December 2022), revealing Facebook's secret rules and guidelines. The Guardian reviewed more than 100 internal training manuals, spreadsheets and flowcharts revealing how Facebook used to moderate issues such as violence, hate speech, terrorism, pornography, racism, and self-harm. The Facebook files give a first glimpse of the codes and rules formulated by the site, which is subjected to enormous political pressure both in Europe and in the United States.

on to the next one.[35]All these variables often lead to inconsistency and different solutions for similar cases.

In an 'assembly line', mistakes are just around the corner. This was evident in the case of the famous photograph by Út, depicting a naked Vietnamese girl running away from a village that had just been bombed during the Vietnam War.[36]

Bans on nudity are frequent, regardless of function and context. So much so that, as the information has been revealed in internal policy documents, moderators are not required to remove videos showing an abortion, provided there are no scenes of nudity.[37] This line of conduct stems from a formalistic attitude toward nudity, instead of basing the assessment on the concrete effect which certain images evoke among highly sensitive people, ISPs prefer to de-contextualize their decisions.

The world of moderation seems to operate according to clauses of 'good morals' which are utilized also in the drafting of algorithms. These operate with the same rigidity as in the work instructions provided to human moderators.

The ISPs' decision-making processes have been criticized because of a dysfunctional use of corrective methods, often unapt to recognize forms of expression of personal identity or of native customs. Such criticism led Facebook in 2020 (and then Twitter) to set up an 'Oversight Board'.[38] The 'Supreme Court of Digital Freedom of Speech' – already mentioned in relation to the Capitol Hill affair – is composed of forty members chosen among experts (academics, judges) or public leaders (former politicians, human rights activists), through an articulated mechanism aimed at guaranteeing geographical, cultural and political pluralism, and full independence from the platform. The Board has the task of selecting a few cases with high symbolic value and of particular complexity, destined to become 'law' within the social network, also by confirming (or revoking) previous decisions taken automatically.

The Supervisory Committee, as intended by the creator of Facebook, has the function of striking a balance between the protection of fundamental rights and 'Terms of Use' – social standards –, through the inclusion of additional

[35] ibid

[36] The image of Phúc running naked is one of the most famous images of the Vietnam War Photographer Nick Út won the Pulitzer Prize for that photograph, which was later also chosen as the 1972 World Press Photo of the Year. Again, Facebook was accused of 'discriminatory and racist' behavior after deleting photosof Papua New Guinean men and women (https://tinyurl.com/b35m787b, (last visited 31 December 2022)).

[37] In the cited article from The Guardian, the guidelines given to moderators are reported; among these, we read that all 'handmade' art showing nudity and sexual activity is allowed, but not digitally realized art showing sexual activity. Videos of abortions are allowed, as long as there is no display of nudity. The question is even more relevant if compared with the decision by the Corte di Cassazione 15 February 2022 no 4927, *Dejure online*, which found the excessiveness of the fine (500 euros) put forward by the Municipality of Brescia to punish someone who stops their car to allow a prostitute on board, justified by the alleged obstruction of traffic.

[38] At https://oversightboard.com.

contextual factors in the decision process, such as the political, social and cultural context of the country in which the content being evaluated is published. In short, it is a kind of supranational law,[39] which should protect social networks from political, legal and social responsibilities triggered by the dynamics of mass communication.

V. Average Contextual Etiquette v Good Morals in the Social Networks

Individual users, when they first sign up to a social network, adhere to the community's general terms, which entail a highly standardized 'social etiquette'. The aim is clear and falls in line with the fundamental need for security in the functioning of the virtual community.[40] However, that push towards security seems to be developed on two levels, which are not at all antithetical: behavioral/contextual standardization and expression of personal identity.

Much has changed since Orson Welles's radio test and the consumer model produced by MTV's statistical algorithm.

The so-called 'community standards' preside over specific contractual positions of both parties, economic and otherwise. Since the dawn of the first social networks, the perception of the average user has been that of having a free service, that is, without committing to give anything in return (the Facebook homepage once stated reassuringly, 'It's free and always will be'). However, this perception is contradicted by the legal reality. It is true that by declaring their adherence to the General Terms of Use, the users grant the other party a non-exclusive, transferable and subsequently negotiable intellectual property license for the use of any content (data, comments, images, etc.) published on or in connection with the platform. Also, in exchange for the right to access the platform, the user authorizes the social network to use his/her name, profile image and all information related to their activities on the social networks, for the purpose of commercial profiling. The pioneers of this market were certainly aware of this, otherwise they would not have been able to explain how Facebook could distribute dividends to its shareholders at such an 'agreeable' rate. This has now also been noticed by legislators, who seem to have definitively recognized the contractual and onerous nature of these 'authorizations',[41] as

[39] In short, the evaluation is entrusted to a group of experts. See the significant contribution by D. Caselli, *Esperti. Come studiarli e perché?* (Bologna: il Mulino, 2020).

[40] M. Francesca, '«Uno studio in rosso». Sicurezza, sistemi e alterità artificiali' *Actualidad Jurídica Iberoamericana*, 54 (2021).

[41] On this point, see the decision by the Italian Competition Authority 29 November 2018 no 27432, available at www.agcm.it, sanctioning Facebook for unfair commercial practices with reference to the famous banner 'it's free and always will be'. In particular, the Authority found that the reported announcement 'integrates a case of unfair commercial practice in violation of Arts 21 and 22 of the Consumer Code'. The finding was challenged several times, before the Tribunale Amministrativo Regionale Lazio-Roma (decision 10 January 2020 no 260)

part of a wider process of capitalization involving personal data, images and ultimately the digital identity of the 'people on the net'.[42]

It is in such a highly contractualized framework that the dream of a supposedly all-encompassing freedom of expression seems to be ultimately fading away.

The platform owner has an interest in keeping a firm grip on the permissible behavior, not simply in order to adapt to a given set of liability rules, but above all, because this serves to produce a double security effect: a) the configuration of a transversally livable virtual place, even at the cost of cutting out 'extreme' social interactions, b) the configuration of a place in which everyone can freely, so it may seem, develop and express their own identity, without having to deal with the normalizing forces embedded in the various societal institutions and clichés; a comfortable place for everyone, a place that rejects no-one, and as such, is able to attract new subscribers and increase the quantity of interactions onto the platform.[43] The number of 'thoughts' posted,[44] images shared, reactions (likes, dislikes) given to facts, news, places, and people are, in short, 'fresh' data from 'active' users to be used as goods to be monetized by the platform owner.

What has been described up to now is part of the behavioral/contextual standardization level. It is the first level of security that covers the major area of a contractually conformed notion of 'good morals', or, if not 'good', in any case 'universally' accepted.

This part is predictable and generally associated with the external representation on oneself. After all, the culture of sobriety in clothing recurs in many working and social settings, without constituting a restriction of personal freedom. A well-known example of this is the nudist, who is free to be naked

and the Consiglio di Stato on appeal (decision 29 March 2021 no 2631). The administrative courts exhaustively addressed the issue of 'commodification' of personal data. See M. D'Ambrosio, 'Confidentiality and the (Un)Sustainable Development of the Internet' *The Italian Law Journal*, 253 (2016); G. Resta e V. Zeno Zencovich, 'Volontà e consenso nella fruizione dei servizi in rete' *Rivista trimestrale di diritto e procedura civile*, 411 (2018); V. Ricciuto, 'La patrimonializzazionedei dati personali. Contratto e mercato nella ricostruzione del fenomeno' *Diritto dell'informazione e dell'informatica*, 689-726 (2018); A. De Franceschi, 'Il "pagamento" mediante dati personali', in V. Cuffaro et al eds, *I dati personali nel diritto europeo* (Torino: Giappichelli Editore, 2019), 1381; G. Finocchiaro, 'Intelligenza Artificiale e protezione dei dati personali' *Giurisprudenza italiana*, 1670 (2019); G. Scorza, 'Facebook non è gratis?' *Nuova giurisprudenza civile e commerciale*, 1079 (2021); C. Solinas, 'Trattamento dei dati personali e pratiche commerciali scorrette' *Giurisprudenza italiana*, 320 (2021); D.M. Matera, 'Patrimonializzazione dei dati personali e pratiche commerciali scorrette' *Tecnologie e diritto*, 155 (2022). Anticipatory is the work of C. Perlingieri, n 11 above,80.

[42] See G. Resta, 'Identità personale e identità digitale' *Diritto dell'informazione e dell'informatica*, 516-517 (2007); C. Mignone, *Identità della persona e potere di disposizione* (Napoli: Edizioni Scientifiche Italiane, 2014), 227. On the treatment of personal data as 'price' see F. Viterbo, *Protezione dei dati personali e autonomia negoziale* (Napoli: Edizioni Scientifiche Italiane, 2008) 223.

[43] See C. Perlingieri, n 11 above,92.

[44] F. Astone, 'Il rapporto tra gestore e utente: questioni generali' *AIDA*, 113 (2011).

within the limits of the locations where nudism is permitted but agrees to reduce his/her freedom of aesthetic expression when in social or work environments.

The second of the two levels is more complex. The values in question, in this case, belong to the macro-category of cultural conflicts,[45] and are related to one's ethical, religious or artistic identity.[46]

VI. Case Studies from the Oversight Board. Scope of Good Morals: In Search of the Right Remedy

On the first level, a pre-established 'netiquette' is ancillary to the proper functioning of the virtual organization. The next level represents, instead, a non-disposable/hard-to-objectivize dimension, reflecting the dynamics of oneself in relation with other individuals. Such a concept of good morals goes far beyond what is generally viewed as 'dominant morality' and opens up to personal identities, to 'what is common [...] to the plurality of ethical concepts which co-exist in contemporary society, to be interpreted as respect for all human beings',[47] always required in the execution of a contractual relationship.

This notion of good morals cannot be constrained within the boundaries of the community standards; rather, it recalls the wording of Art 21 of the Italian Constitution regarding freedom of speech.[48]

The two different regulatory levels herein described – regarding behavioral/contextual standardization, on the one hand, and expression of personal identity on the other – entail different remedies; in the former case, the mere prohibition of a singular content; in the latter, if an objectionable action is reiterated, the final sanction may amount to the removal of the account.

The complexity of the clause in question is witnessed by the relationship between the need to protect personal identity and the absence of spatial delimitations. In the absence of territorial boundaries, new frontiers are erected; the protection of religious or ethnic beliefs, in a phenomenon ontologically

[45] Considerations on multiculturalism and the balance between individual equality and autonomy of groups can be found in R. Di Raimo, *Le associazioni non riconosciute. Funzione, disciplina, attività* (Napoli: Edizioni Scientifiche Italiane, 1995), 35.

[46] See G. Boggero, 'Satira, disabilità e dignità umana: una significativa sentenza della Corte suprema canadese' *Quaderni costituzionali*, 162 (2022), analyzing the Canadian Supreme Court's decision of 29 October 2021, *Ward* v *Commission des droits de la personne et des droits de la jeunesse*, 2021 SCC 43.

[47] Corte costituzionale 17 July 2000 no 293, *DeJure online*.

[48] R. Perrone, 'Buon costume (diritto costituzionale)' *Digesto discipline pubblicistiche* online, Agg 2021; Id, 'Public Morals and the European Convention on Human Rights' 47 *Israel Law Review*, 361 (2014), and M. Cuniberti, 'Il limite del buon costume', in M. Cuniberti et al eds, *Percorsi del diritto dell'informazione* (Torino: Giappichelli, 3rd ed, 2011), 33, 36. See, also, M. Imbrenda, 'Buoni costumi. Diritti positivi odierni' *Enciclopedia bioetica e scienza giuridica* (Napoli: Edizioni Scientifiche Italiane, 2009), II, 453.

devoid of outer limits, is enriched by new multicultural perspectives.[49] There is no longer a single context of reference for the doctrine of good morals, intended as a means by which to protect individual identities, but a plurality of contexts, in which individual choices hardly follow pre-established paths, hence enlarging the scope of application of the good morals doctrine.[50]

Two examples from the Oversight board may be useful.

The first one[51] is the case regarding the publication of a video on Facebook that portrayed a folkloristic character from the Netherlands, Zwarte Piet, who appeared on the night between 5 and 6 December in the role of a Moorish servant, an assistant to St Nicholas. The video featured a child and three adults, one dressed as *Sinterklaas* (St Nicholas) and two dressed as Zwarte Piet, also known as 'Peter the Moor'. The latter two had their faces painted black and wore afro wigs under Renaissance hats and clothes. All the characters in the video were obviously white actors. The Board decided to remove the post permanently, believing that the representation, although expressing a tradition, contributed to the creation of a discriminatory and offensive environment for people of color.

In another case,[52] the Board revoked the removal of a post that contained an image of a Turkish TV series depicting a fighter, with the caption, 'If the Kafir's tongue starts moving against the prophet, then the sword should be taken out of the sheath', accompanied by depictions of French President Emmanuel Macron as the Devil.

This was posted during the boycott of French products, following some measures aimed at controlling the financing of mosques. This time, the Board believed that, although the character of the TV series wields a sword, the post was merely a criticism of Macron's actions against religiously motivated violence. This was not, therefore, a form of incitement to violence.

While tradition is considered offensive because it contains characteristics which belong to a particular community, freedom of speech, even if its content is intrinsically violent, is protected as a form of expression associated with a particular culture.

These are two significant examples of the evolution of the principles underlying decision-making in the virtual world, carried out by *ad hoc* delegated bodies, to express themselves in a context which is devoid of space and, by its

[49] See C. Mignone, n 42 above, 135. See however G. Passagnoli, 'Dignità, buon costume, ordine pubblico non economico' *Persona e mercato*, 392 (2022).

[50] A. Sen, *Identity and Violence: The Illusion of Destiny* (London: Penguin Books, 2007), 9; C. Mignone, n 42 above, 140; C. Crea, 'Argomento morale, pluralismo 'culturale' e semantica dei marchi' *Persona e mercato*, 350 (2020).

[51] Oversight Board, case decision April 2021 no 2021-002-FB-UA, available at https://tinyurl.com/2en25tt6 (last visited 31 December 2022).

[52] Oversight Board, case decision February 2021 no 2020-007-FB-FBR, available at https://tinyurl.com/mrxxk83p (last visited 31 December 2022).

nature, is culturally complex. Once the controls by algorithms and moderators are completed, the subsequent checks and balances are delegated to common courts of justice or entrusted to independent bodies, as is the case with Alternative Dispute Resolution (ADR) in the consumer field.[53]

In this infra-spatial context, the strictly territorial perspective adopted by the Tribunal of Rome[54] in the case of the shutdown of the Facebook and Instagram profiles of the neo-fascist association, Casa Pound, is also significant. The court qualified the social provider as a public service provider and thus, guarantor of the plurality of political opinions safeguarded by the Constitution. In justification of its action, the ISP referred to the repeated representation of the Celtic cross on the pages of Casa Pound, against which, however, the Court believed that the mere removal of the post was sufficient, rather than the complete removal of the user from the platform. It is clear that algorithms seek to detect hate speech by tracking historically defined symbols for their precautionary removal,[55] given the provider's priority to escape direct liability. However, the matter remains controversial, given the peculiar sentiments of that political association and, therefore, the atmosphere of intolerance in which that symbolism was commonly used.

Although the language found on those pages could only indirectly be tracked back to one of the cases identified in the list of prohibited expressions,[56] the ISP found it to be offensive to the religious, ethnic and cultural identity of the human person and, as such, justified the termination of the contract for non-compliance with community standards, as integrated by the principles of EU soft law on hate speech.[57]

[53] See M. Francesca, 'Dalle ADR *offline* alle procedure di *Online Dispute Resolution*: statuti normativi e suggestioni di sistema' *Corti Salernitane*, 7 (2015).

[54] Tribunale di Roma 12 December 2019, *Dejure online*. *Contra*, Tribunale di Siena 19 January 2020, *Dejure online*; Tribunale di Trieste 27 November 2020, *Giurisprudenza italiana*, 2089 (2021), with a comment by S. Martinelli, 'Facebook – Associazione – La chiusura dell'account Facebook di un'associazione: quale tutela?'. Also, see R. Bin 'Casa Pound vs. Facebook: un'ordinanza che farà discutere' *lacostituzione.info* (2019); G. Cassano, 'Gira la ruota per CasaPound, a Siena prevale il regime privatistico del rapporto, ed il profilo rimane disattivato (Tribunale di Siena 19 gennaio 2020)' *Diritto di internet* (2020); R. de Caria, 'Ritorno al futuro: le ragioni del costituzionalismo 1.0 nella regolamentazione della società algoritmica e della nuova economia a trazione tecnologica' *Rivista diritto dei media*, 84 (2020); G. Grasso, '*Social network*, partiti politici e lotta per il potere' *Rivista diritto dei media*, 211 (2020); P. Falletta, n 22 above, 149; F. Zorzi Giustiniani, 'I limiti alla libertà di espressione nell'agorà politica virtuale e la cyberviolenza come nuova forma di violenza domestica' *Nomos*, 1 (2020); G. Passarelli, 'La metamorfosi dei *social media*. La rilevanza sociale nell'attuale agorà digitale di un servizio «privatistico»' *Nuova giurisprudenza civile commentata*, 1195 (2021).

[55] Corte d'Appello L'Aquila 9 November 2021 no 1659, *Dejure online*.

[56] P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 530, 544. Also, see G. Chiodi, 'Clausole generali e abuso della libertà contrattuale: esperienze del primo Novecento' *Diritto & Questioni pubbliche*, 87 (2018).

[57] G. Perlingieri, *La via alternativa* n 1 above, 5.

On virtual social networks, grounded in the exchange of messages with third parties, the doctrine of good morals is always governed by the free speech clause (Art 21 of the Italian Constitution) just like any other manifestation of thought. Here, what is under scrutiny through the lenses of good morals is not the source (ie, the contract), but the ensuing relationship (ie, the execution of that contract).[58]

This also includes the unsaid. The abuse of (freedom of) speech, information or images, is usually connected to disrespect for customs, traditions or identity. The conflict (*rectius*: competition) between values is first and foremost a conflict (*rectius*: comparison) between cultures and their respective customs, which form the basis of individual personality.

Even the sanction, when applied in cases of non-compliance with the social network's rules of conduct, is affected by this renewed concept of good morals, no longer applying to the contract, but to the relationship.

The open-ended clause of good morals, thus re-interpreted so as to absorb multi-culturalism and the regulatory landscape against hate speech, becomes a rule by which to measure the fullness of the parties' performance.[59] In this perspective, the pathology related to non-observance of good morals shifts from the nullity/voidness of the contract to liability for non-performance (eg Art 1453 of the Italian Civil Code on termination/avoidance).[60]

The winds of war are blowing both on the social media and the real worlds. Wars are not only fought for the mere protection of territories, but also to gain respect for individual and mass identities. When anonymous media organizations stand up for the rights of people are trumped by the real economy, they voice a sense of community justice far from what is decided in courtrooms. Simply consider the Anonymous legion, a group of hackers who interact with political and economic choices in the real world. Among the most famous actions are boycotts of institutional and commercial websites, which, in the opinion of this group of hackers, were found guilty of discriminatory actions.

Conclusively, advocating the elimination of the good morals doctrine (or its watering down into *ordre public*) appears to be an anachronistic choice,[61] defeated by recent history.[62] The principles guiding the 'liquidity' of a constantly interconnected world prevail over normativism, even more so when customs, understood as co-essential in the formation of individual personality, stand out

[58] C. Mignone, n 42 above, 101. Cf Tribunale di Trieste 27 November 2020, n 54 above.

[59] See S. Polidori, 'Situazioni esistenziali, beni e diritti: dal negozio a contenuto non patrimoniale al mercato dei segni distintivi della personalità' *Annali SISDiC*, 227, 246 (2020).

[60] P. Perlingieri, Forma dei negozi e formalismo degli interpreti (Napoli: Edizioni Scientifiche Italiane, 1987), 84; R. Lener, Forma contrattuale e tutela del contraente "non qualificato" nel mercato finanziario (Milano: Giuffrè, 1996), 32. See also A. Tartaglia Polcini, 'Termini e funzioni degli atti di autonomia negoziale' Rassegna di diritto civile,473, 490 (2019).

[61] G. Perlingieri, *In tema di ordine pubblico* n 1 above, 1428.

[62] M. Grondona, 'Il diritto privato oggi e il ruolo del giurista' *Revista Ibérica do Direito*, 29, 33 (2020).

on a daily basis as the reasons for territorial and virtual conflicts. Like it or not, the great virtual game has pervaded reality and is now the fifth dimension with which the law must deal, by establishing a truly bi-directional dialogue.

Essays

Fast and Furious: Is German Regulation on Automated Vehicles Forging Ahead?

Federico Gasparinetti*

Abstract

This article deals with the legal implications of the automation revolution in the transportation sector, with specific regard to the German regulation on driverless vehicles. The invention of vehicles completely changed the possibility to move and the concept of mobility itself and now we are facing a new great industrial revolution: the introduction of autonomous vehicles. Such change will have great effects on the worldwide social, economic and legal scenarios. The German legal framework concerning automated vehicles is one of the most developed among the Western legal systems and this article has the goal to briefly examine its regulation, with particular regard to the reforms of the *Straßenverkehrsgesetz* made through the *AchtesGesetz zur Änderung des Straßenverkehrsgesetzes* and the *Gesetz zur Änderung des Straßenverkehrsgesetzes und des Pflichtversicherungsgesetzes – Gesetz zum autonomen Fahren*. After that, a comparison will be proposed between German and Italian law provisions in order to better grasp their respective strengths and weaknesses and to try to understand possible next steps that may be taken by national and European legislators.

I. Introduction. The Relation Between Law and Vehicles: A Centuries-Old Relationship

This article deals with the legal implications of the automation revolution in the transportation sector. Since the beginning of car use in the first half of the XX century, it has been clear that the relevant regulation would have been absolutely peculiar.

Vehicles and their use represent a great innovation in human history. Their importance is impressive not only from a social or an economic perspective, but also law development has been strongly influenced by the advent of cars.

The invention of vehicles gave the possibility to substitute an external animal source of power with an internal motor[1] and this completely changed the possibility to move and the concept of mobility itself. Furthermore, car and traffic regulation have probably been the very first legal field where very detailed norms with a highly elevated technical content have been introduced.

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[1] M.G. Losano, 'Il progetto di legge tedesco sull'auto a guida automatizzata' *Il diritto dell'informazione e dell'informatica*, 1 (2017).

Nowadays various scientific, technical and technological subjects are ruled by law provisions: not only vehicle production (eg minimum safety standards) and use (eg speed limit), but also pharmaceutical and chemical products, foodstuffs, goods to be sold to consumers, etc.

Modern law provisions and technical and scientific rules are now strongly interconnected and jurists and experts from various fields cooperate in drafting new laws, which today often have a great technical content. Car production and use regulations probably represent the first case of this kind of legal creation, in the different legal orders, of norms with a similar technical nature and content.

Now we are facing a new great scientific revolution: the introduction of autonomous vehicles. Such change cannot be considered, from a juridical point of view, as a physiological development of the existing technology with no effects on the relevant regulation. Indeed, whereas in the past it was possible to clearly distinguish between the vehicle and the driver, with the increasingly sophisticated vehicle functions, the boundary between them is becoming increasingly blurred.[2]

The entire transportation sector is undergoing a quick development that will also affect the conditions of production and energy supply of the same vehicles, the characteristics of people and goods mobility, the interaction of vehicles with cities and rural areas, the infrastructures and connection systems.[3]

More in general, the unique amount of innovation related to the increasing use of Artificial Intelligence and the consequent new juridical issues to be solved represent one of the hardest challenges for the actual legal scholarship and for legislators all over the world.

Moreover, such questions and problems need to be solved not at a national level but by the international community as a whole. As a matter of fact, it is clear that Artificial Intelligence and Internet of Things[4] research and development and the effects of its admission and use cannot be limited to the area of a single country but are naturally transnational and global.[5] This applies even more with regard to automated vehicles if we consider how road traffic and the circulation of vehicles among different states is and always will be increasing.

Driverless vehicles are the symbol of a multiplicity of technological innovations which, taken together, have initiated a process of transformation of mobility characterised by the driving automation and the connection between vehicles and infrastructures.[6]

[2] B. Wolfers, 'Autonomes Fahren ist möglich: Deutschland als regulatorischer Tempomacher' *Recht Automobil Wirtschaft*, 24 (2022).

[3] D. Cerini, 'Dal decreto Smart Roads in avanti: ridisegnare responsabilità e soluzioni assicurative' *Danno e responsabilità*, 401, 402 (2018).

[4] For an overview of the Internet of Things main characteristics, see *inter alia* M.C. Gaeta, 'La protezione dei dati personali nell'internet of things: l'esempio dei veicoli autonomi' *Il diritto dell'informazione e dell'informatica*, 147 (2018).

[5] S. Vöneky, 'Key Elements of Responsible Artificial Intelligence – Disruptive Technologies, Dynamic Law' *Ordnung der Wissenschaft*, 9, 9-10 (2020).

[6] G. Calabresi and E. Al Mureden, *Driverless cars* (Bologna: il Mulino, 2021), 95.

Experimentation of driverless cars began several years ago[7] and many scholars have already started to analyse their social and juridical impact, as well as to study the most complicated legal and ethical questions connected with their use.

At the same time, some legislators have already promulgated some norms having as object driverless car production, experimentation and use. Such provisions – in the same way as all norms having as object Artificial Intelligence – represent a significant change, considering the fact that until today 'the law is – and always has been – made by humans and for humans'.[8]

Automated and autonomous vehicles regulation will in fact have to – similarly to the rest of the future 'robot law'[9] – necessarily be different from the existing norms, even from those that already rule the use of vehicles or other products. This is due to technological reasons more than to juridical ones: the role of the technologies will always be more active and they will take actions and make decisions on their own (even if on the basis of previous general human orders) and not only perform tasks that have been ordered by a human being.

With regard to such norms, it should be noted, however, that the existing international and European regulatory framework for the approval of automated and autonomous driving functions has not progressed very far in recent years, in contrast to the current scientific and technological state of the art in this field. Particularly the existing regulatory regimes still show a large regulatory gap for SAE Level 3, 4, and 5 driving functions.[10] On the other hand, non-harmonized regulatory areas could represent an important space to be filled by modern national legislation. So was for the German legislator, who seems to have recognized this non-harmonized legal area as an opportunity for its own innovative legislation. As we will see, for two times, in 2017 and in 2021, Germany has used a gap in the multi-level system to drive forward technical and legal developments in the field of automated and autonomous driving.[11]

This article has the goal to examine German law on autonomous vehicles, with particular regard to the reforms of the *Straßenverkehrsgesetz* made through

[7] See also W. J. Kohler and A. Colbert-Taylor, 'Current Law and Potential Legal Issues Pertaining to Automated, Autonomous and Connected Vehicles' 31 *Santa Clara High Technology Law Journal*, 99, 100-101 (2014), see particularly n 3. According to M. G. Losano, n 1 above, 1, the first experiments concerning automated vehicles started already in the 1980s.

[8] H. Eidenmüller, 'The Rise of Robots and the Law of Humans' *Zeitschrift für Europäisches Privatrecht*, 765, 766 (2017).

[9] There are several studies concerning the so called 'robot law', but also, more in general the relation between law and technology. Among the latter see the analyses conducted by G. Pascuzzi, *Il diritto dell'era digitale* (Bologna: il Mulino, 5th ed, 2020), 249-250, where he underlines the effects of digital technologies on juridical norms, noting that technology and its development can change the content of law provisions and make it necessary to amend parts of them or to introduce new ones, on the other hand law can use new technologies to better pursue its goals and protect more effectively society's interests. See also M.G. Losano, 'Verso l'auto a guida autonoma in Italia' *Il diritto dell'informazione e dell'informatica*, 423-441 (2019).

[10] See below for their description.

[11] B. Wolfers, n 2 above, 24 and 28.

the *AchtesGesetz zur Änderung des Straßenverkehrsgesetzes* and the *Gesetz zur Änderung des Straßenverkehrsgesetzes und des Pflichtversicherungsgesetzes – Gesetz zum autonomen Fahren*. After that, a comparison will be proposed between German and Italian law provisions in order to find out their respective strengths and weaknesses.

The German legal framework concerning automated vehicles is one of the most developed among the Western legal systems and the German legislator has already from 2017 been extremely keen on being at the vanguard in terms of legalising and regulating the use of automated vehicles.[12] Therefore the German regulation in this field can represent a great opportunity of comparison for other legal systems. The analysis of the virtues and flaws of the current German regulation on automated vehicles may help the legislators of those countries who still have to develop a regulation in this field or where, like in Italy, such regulation is at an early stage. Comparative law teaches us that legal transplants are never easy. The question here is what kind of transfers the German legislation could put in motion.

This article is structured as follows. In addition to this short introduction and to the final remarks, there are five chapters.

Subject of the next one is the international and European legal scenario with regard to driverless vehicles. Special attention is paid to the 1968 Vienna Convention on Road Traffic and specifically to the amendments proposed in 2021. After that there is a summary of the most relevant regulations and acts of the European Union. The following three chapters deal with the main theme of this study: the German regulation on driverless vehicles. Particularly in the third chapter there is brief summary of the most relevant sources of law in this field as well as an in-depth analysis of the role that could be played by the German Constitution. Chapter four and five have as an object the two great reforms concerning autonomous and automated vehicles regulation. In the first one the 2017 *AchtesGesetz zur Änderung des Straßenverkehrsgesetzes*and the introduction of the new §§ 1a – 1c of the *Straßenverkehrsgesetz*are treated. In the second one I try to examinate the subsequent reform which took place in 2021, the so called *Gesetz zum autonomen Fahren*.Finally in the sixth chapter, there is a comparison with the Italian regulation on automated vehicles as well as a reflection on the possibility to transplant German provisions in Italy. The article is concluded by some final considerations on the analysed law provisions as well as on the possible next steps national and European legislators may take.

II. German Traffic Regulation: The International and European Sources of Law

[12] M.N. Schubert, 'Regulating the Use of Automated Vehicles (SAE Levels 3 to 5) in Germany and the UK'*Recht Automobil Wirtschaft*, 18 (2019).

If we want to try to identify the German law provisions ruling autonomous vehicles it is necessary – in the same way as for other social and economic sectors – to consider not only national laws, but also sources of law at an international and European level.

Because of road traffic's intrinsic characteristics, international treaties and European regulation have always played a relevant role in this particular field. As a matter of fact, already in the second half of the last century it was clear to most of the legislators that different state's road traffic rules need to be harmonised in order to give road users the possibility to drive in and through different nations having to always respect the same (or similar) rules. This will to harmonise is justified not only for economic reasons but also by the intention of increasing road safety.

It is clear that a harmonised international legal framework would support mobility so much more than a fragmented one.

This not only applies also to autonomous vehicles, but it is even more important if we reflect on the constantly increasing importance of cross-border mobility and on the fact that their use will be necessarily based on a constant connection with other vehicles and infrastructures.

In light of the above, it seems appropriate to start this brief analysis of the German autonomous vehicles' legal framework from the international treaties concerning road traffic which finds application in Germany. After that, we turn to European regulations and directives. Finally, we will focus on German national norms.

1. The Vienna Convention on Road Traffic of 1968

The Vienna Convention on Road Traffic of 8 November 1968[13] is one of the most important law provisions concerning national and international road traffic. As of today, more than eighty states have signed it. Among those nations there are Germany, Italy, France, the United Kingdom, but not the USA.

The same convention came then into force in Germany in 1977[14] and sets the international law framework conditions of national law provisions concerning road traffic. Thanks to the 1968 Convention and to the signatory states' task to adapt their national norms to the Convention content it is therefore possible to have more similar regulations and consequently a higher security on roads.[15]

As any international treaty, the 1968 Convention is not directly applicable in the signatory states but nevertheless plays a central role for this analysis

[13] The Convention is available on the United Nation Treaty Collection website at https://tinyurl.com/msjwec32 (last visited31 December 2022).

[14] German Federal Law Gazette (*Bundesgesetzblatt*) 1977, part II, no 39, 809-1111.

[15] See Convention's preamble. J. Ensthaler and M. Gollrad, *Rechtsgrundlagen des automatisierten Fahrens* (Frankfurt am Main: Fachmedien Recht und Wirtschaft, 2019), 57.

considering that German law provisions have to respect it.[16] Indeed the national legislator can enact laws on autonomous vehicles only and within the limits provided by the 1968 Convention.

More in detail, the possibility for national sources of law to admit and to rule upon the use of autonomous vehicles belonging to the third, fourth and fifth level of driving automation is possible only if at the international level the relevant conditions have been previously created.[17]

The further development of the Vienna Convention and the drafting of technical regulations is under the responsibility of the UNECE (United Nations Economic Commission for Europe) working groups.[18] These working groups draw up technical regulations (so called ECE regulations) that are based on the current state of the art of science and technological development and contain detailed specifications and requirements for certain components or vehicle functions. The harmonised technical requirements for motor vehicles drafted by the UNECE working groups are referred to as 'Regulations'. The adoption of a new regulation by the World Forum is followed by a procedure within the UNECE and a ratification process within the UNECE Member States, including the European Union. The European Union either adopts the UNECE regulations in their entirety or adopts its own legal acts that are strongly based on the UNECE regulations.[19]

The WP.1 (Working Party: Global Forum on Road Traffic Safety) and the WP.29 (World Forum for Harmonisation of Vehicle Regulations) are competent for the development of regulations on automated driving and the sub-working group on automated and connected driving (GRVA - *Groupe Responsive Voiture Automatique* -Working Party on Automated/Autonomous and Connected Vehicles) is responsible particularly for automated and connected driving.[20]

During the last decades the Vienna Convention has been the subject of several modifications. With specific regard to autonomous vehicles, two specific

[16] As for any international treaty, the States that have signed the Vienna Convention have to respect its content in accordance with the principle '*pacta sunt servanda*' as *per* Art 26 of the Vienna Convention on the Law of Treaties and with what is stated by Art 27 of the same convention: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. The Convention on the Law of Treaties of 1969 is available on the United Nation Treaty Collection website athttps://tinyurl.com/5n7rr5wr (last visited31 December 2022). A. Von Arnauld, *Völkerrecht* (Heidelberg: C.F. Müller, 2nd ed, 2014), 83.

[17] M. Wagner, *Das neue Mobilitätsrecht* (Baden-Baden: Nomos, 2021), 34.

[18] More information on the UNECE working groups and their work on autonomous vehicles can be found on the UNECE website at https://unece.org/automated-driving. The role played by the UNECE Regulation in this field is absolutely important. This is confirmed by almostall the legal scholarship. See, among others, J. Klink-Straub and T. Keber, 'Aktuelle Gesetzeslage zum automatisierten Fahren – eine Rechtsvergleichung' *Neue Zeitschrift für Verkehrsrecht*, 113-114 (2020) and F. Geber, 'Rechtliche Anforderungen an Software-Updates von vernetzten und automatisierten Pkw' *Neue Zeitschrift für Verkehrsrecht*, 15 (2021).

[19] ibid 15.

[20] M. Wagner, n 17 above, 35.

amendments to the Vienna Convention have to be taken into account.

The first one took place in 2016[21] and had as object the modification of Arts 8 and 39 of the Convention. For the purposes of this analysis, the most important change was the introduction into Art 8 of para 5-*bis*, according to which:

> 'Vehicle systems which influence the way vehicles are driven shall be deemed to be in conformity with paragraph 5 of this Article and with paragraph 1 of Article 13, when they are in conformity with the conditions of construction, fitting and utilization according to international legal instruments concerning wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles'.

Para 5-*bis* is of great importance, if we consider that before this amendment there was no possibility to use any kind of autonomous vehicles.

As a matter of fact, pursuant to Art 8, para 5 'Every driver shall at all times be able to control his vehicle or to guide his animals.' and to Art 13

> 'Every driver of a vehicle shall in all circumstances have his vehicle under control so as to be able to exercise due and proper care and to be at all times in a position to perform all manoeuvres required of him. (…)'.

It was therefore not allowable to 'delegate' the driving activity to the vehicle or to another technological system.

Pursuant to such fundamental provisions it was always necessary that driving activities were conducted in accordance with two requirements: the necessary presence of a driver and his capacity to constantly control the vehicle.[22] Consequently, all the existing driving technologies – like the cruise control or the lane departure warning system – always carried out only an assistance function and the person driving the car always had to keep an ongoing control on the same.

The new Art 8, para 5-*bis*, of the Vienna Convention represents a fundamental basis for the introduction of automated driving systems. For the first time, it put signatory states in the condition to enact law provisions concerning the use of highly automated vehicles (Level 3 and 4 of the SAE International classification),[23] ie, vehicles where the automated system controls the vehicle if the latter is in a defined driving mode (eg, in highways) and the system is also activated. At both Levels 3 and 4, the driver naturally has to carry out the driving task when the vehicle is operated outside the defined driving mode. At Level 3, the driver hands over control to the system only in predefined scenarios (eg in a traffic

[21] The proposal was submitted on 23 September 2014 and then relevant amendments entered into force on 23 March 2016.

[22] J. Ensthaler and M. Gollrad, n 15 above, 58.

[23] M. Wagner, n 17 above, 36. See also the opinion of C. Artz and S. Ruth-Schumacher, 'Zulassungsrechtliche Rahmenbedingungen der Fahrzeugautomatisierung' *Neue Zeitschrift für Verkehrsrecht*, 57, 61-62 (2017).

jam)[24] and must be able to resume the driving task (fallback performance), which is not the case at Level 4.[25]

The amended version of the Convention entered into force in Germany in 2016.[26]

Even if this opinion is not shared by all scholars, it should be deemed that the above-mentioned provision cannot be referred also to so called autonomous vehicles (Level 5 of the SAE International classification), iea vehicle that, by completely deviating from the current idea of a vehicle, is equipped with an automated driving feature that 'can drive the vehicle under all conditions'.[27] A vehicle where human intervention can be completely excluded and that consequently can be without any of the tools (steering, pedals) through which this typically takes place.[28]

This is due to the fact that Arts 8 and 13 of the Convention still require that the driver keeps the control of the vehicle and consequently driving systems that cannot be oversteered are not compliant with the same Convention.[29]

More in detail, automated driving systems can be deemed as compliant with Arts 8, para 5-*bis*, and 13 of the Vienna Convention if they meet the conditions of an international agreement such as the Geneva Convention of 1958[30] or the Agreement on UN Global Technical Regulations of 1998[31] or, if

[24] V. Lüdemann et al, 'Neue Pflichten für Fahrzeugführer beim automatisierten Fahren – eine Analyse aus rechtlicher und verkehrspsychologischer Sicht' *Neue Zeitschrift für Verkehrsrecht*, 411, 412 (2018).

[25] M.N. Schubert, 'Der Automated and Electric Vehicles Act 2018'*Straßenverkehrsrecht*, 124, 126 (2019).

[26] *Gesetz zur Änderung der Artikel 8 und 39 des Übereinkommens vom 8. November 1968 über den Straßenverkehr* (Law to amend Articles 8 and 39 of the traffic road Convention of 8 November 1968) of 7 December 2016, German Federal Law Gazette (*Bundesgesetzblatt*) 2016, part II, no 34, 1306-1808. J. Ensthaler and M. Gollrad, n 15 above, 59.

[27] A description of the SAE Levels of driving automation is available at https://tinyurl.com/wmh7ffnb (last visited 31 December 2022). In any case please note that – according to the information currently available – it is quite hard to always distinguish the difference Level 4 technology from Level 5 one. In fact on both levels, the car carries out autonomously the driving activities, but in Level 4 – unlike Level 5 – this is only possible under specific conditions (*eg*in a certain geographic area).

[28] G. Calabresi and E. Al Mureden, n 6 above, 98. The description of the SAE Automation Levels of A. Kriebitz et al, in 'The German Act on Autonomous Driving: Why Ethics Still Matters' *Philosophy & Technology*, 1, 4 (2022), is particularly effective: 'the various levels of autonomous driving correspond not so much to the level of technical sophistication but rather to the degree of driver involvement and autonomy'.

[29] M. Wagner, n 17 above, 37-38, see specifically fns 77 and 78.

[30] Agreement concerning the adoption of uniform conditions of approval and reciprocal recognition of approval for motor vehicle equipment and parts, which is available on the United Nation Treaty Collection website at https://tinyurl.com/2jt3y7sb (last visited 31 December 2022).

[31] Agreement concerning the establish of global technical regulations for wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles, which is available on the UNECE website at https://tinyurl.com/5cb9banc (last visited 31 December 2022).

this is not the case, the driving system can be overridden or switched off.[32]

2. The Latest Amendment to the Vienna Convention: A Real Chance for Autonomous Vehicles?

The abovementioned WP.1 (Working Party: Global Forum on Road Traffic Safety) underlined in the past years the possible problems related to a future use (and admission) of automated vehicles of Level 4 and 5. Consequently some signatory States, and especially the United Kingdom and France, proposed different amendments to the Convention.[33]

On 14 January 2021 a proposal of amendment to the Convention transmitted by the Sustainable Transport Division of the United Nations Economic Commission for Europe was officially communicated by the Secretary-General of the United Nations.[34]

Such amendments have great importance with regard to this article's topic as they affect Art 1 and a new Art 34-*bis*.

More in detail, the subject of the proposed amendment is the introduction at Art 1 ('Definitions') of two new definitions (letters 'ab' and 'ac'). The former has as object specifically the automated driving systems, which have been defined as 'vehicle system that uses both hardware and software to exercise dynamic control of a vehicle on a sustained basis'. The latter states that according to the same Convention the concept of dynamic control

> 'refers to carrying out all the real-time operational and tactical functions required to move the vehicle. This includes controlling the vehicle's lateral and longitudinal motion, monitoring the road, responding to events in the road traffic, and planning and signalling for manoeuvres'.[35]

Even more important is the provision contained in the new Art 34-*bis*, which is expressly dedicated to the automated driving and establishes that

> 'The requirement that every moving vehicle or combination of vehicles shall have a driver is deemed to be satisfied while the vehicle is using an

[32] J. Ensthaler and M. Gollrad, n 15 above, 59-60. The same Authors also point out that according to Art 39, para 1, of the 1968 Convention driving systems that comply with the aforementioned agreements now also meet the requirements of Annex 5 of the Vienna Convention, which imposes basic technical requirements on vehicles. Moreover, they underline that pursuant to Art 8, para 5-*bis*, an oversteer or deactivation capability is now only required if the corresponding technical requirements of international agreements are not met. However, the ECE regulations based on the Geneva Convention of 1958 mentioned there continue to require that the systems can be permanently deactivated and overridden.

[33] M. Wagner, n 17 above, 42-43.

[34] The proposal of amendment to the Convention transmitted communicated by the Secretary-General of the United Nations on 14 January 2021 is available at https://tinyurl.com/5dx9w4z2 (last visited 31 December 2022).

[35] https://tinyurl.com/4899hs2n (last visited 31 December 2022).

> automated driving system which complies with: (a) domestic technical regulations, and any applicable international legal instrument, concerning wheeled vehicles, equipment and parts which can be fitted and/or be used on wheeled vehicles, and (b) domestic legislation governing operation. The effect of this Article is limited to the territory of the Contracting Party where the relevant domestic technical regulations and legislation governing operation apply'.[36]

On 21 January 2022 the Secretary-General of the United Nations stated that by 14 January 2022, on the expiry of a period of twelve months following the date on which the was by depositary notification, none of the Vienna Convention's contracting parties informed the Secretary-General that it had rejected the proposed amendments. Therefore, in accordance with Art 49 of the Convention, the amendments to Art 1 and the introduction of Art 34-*bis* have to be considered approved and will enter into force for all parties six months after the expiry of the period of twelve months, ie, on 14 July 2022.[37]

The aim of the proposal is to provide a significant legal certainty for the signatory States without imposing a uniform interpretation of the Convention with regard to possible disputed points. The amendment is intended to allow signatory States to facilitate the responsible use of automated vehicles, even in the absence of a human driver, under conditions that are acceptable to them and consistent with the more general safety principles of the Convention. This solution is intended to be read both as an exception to the driver requirement and as a clarification that automated vehicles satisfy the driver requirement, depending on which reading the contracting State follows.[38]

3. The European Union Legal Framework

According to Art 4 of the Treaty on the Functioning of the European Union, 'transport' is one of the areas where there is a shared competence between the Union and the Member States (Art 4, para 2, lett g, TFUE). Arts 90 and following of the same Treaty are specifically referred to the regulation of the transport sector. Based on such norms, the European legislator has approved many regulations and directives in this sector, with the aim of creating increasingly harmonised legislation and ensuring as much safety as possible on European Union roads.

To offer some examples, among such provisions the following pieces of legislation are present: (*i*) the Regulation (EC) No 661/2009 concerning type-

[36] https://tinyurl.com/hz5hwcvn (last visited 31 December 2022).

[37] The official communication concerning the acceptance of the amendment to Art 1 and the new Art 34-*bis* of the Convention is available at https://tinyurl.com/24r8jpyb (last visited 31 December 2022).

[38] M. Wagner, n 17 above, 42-43.

approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor and (*ii*) the Directive 2010/40/EU on the framework for the deployment of Intelligent Transport Systems (ITS) in the field of road transport and for interfaces with other modes of transport.

Simultaneously we are starting to see a regulation on Artificial intelligence. The White Paper on Artificial Intelligence in particular should be remembered,[39] as also the Commission report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics[40] and the proposal of 21 April 2021 of the Commission for a Regulation laying out harmonised rules on artificial intelligence (Artificial Intelligence Act).[41]

As of today there is no law provision (neither regulation nor directive) enacted by the European Union having as its subject a complete regulation of driverless cars, their possible market entry conditions and their use.[42] Nevertheless there are some acts that should be considered at this stage.[43] In 2018, the European Commission itself adopted an official communication directed to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions concerning 'the road to automated mobility: An EU strategy for mobility of the future'.[44]

Through such document, the Commission presented a comprehensive EU concept for connected and automated mobility as well as its vision for supporting measures, in particular with regard to the legal and policy framework for the development and adoption of key technologies, services and infrastructures.[45]

Primarily based on such communication of the European Commission, on 15 January 2019 the European Parliament adopted a resolution on 'Autonomous driving in European transport'.[46]

In this document the European Parliament briefly summarised the 'state of the art' with regard to automated driving functions and pointed out the relevant needs to be met as soon as practically possible by the competent public and private bodies. The Parliament, *inter alia*, 'Affirms the important role of cooperative

[39] COM (2020) 65.

[40] COM (2020) 64.

[41] COM (2021) 206.

[42] B. Wolfers, n 2 above, 27.

[43] Please note that this is not the placefor an in-depth analysis of the European regulation on driverless vehicles. Only a brief overviewon the current legal scenario with regard to the topic of this article will be carried out.

[44] COM (2018) 283. The text of the resolution is available at https://tinyurl.com/2p8djsn9 (last visited 31 December 2022).

[45] M. Wagner, n 17 above, 47; F.P. Patti, 'The European Road to Autonomous Vehicles' 43 *Fordham International Law Journal*, 125, 127 (2019).

[46] 2018/2089 (INI). The text of the resolution is available at https://tinyurl.com/3vanhw4m (last visited 31 December 2022). See also C. Antweiler and P. Liebschwager, 'Die Entwicklung des öffentlichen Verkehrsrechts in den Jahren 2019/2020'*Neue Zeitschrift für Verwaltungsrecht*, 849, 859 (2021).

intelligent transport systems (C-ITS) in providing connectivity for Society of Automotive Engineers (SAE) level 2, 3 and possibly 4 automated/autonomous vehicles; encourages the Member States and industry to further implement C-ITS, and calls on the Commission to support the Member States and industry in deploying C-ITS services, notably through the Connecting Europe Facility, the European Structural and Investment Funds and the InvestEU programme' (Point 3),

> 'Acknowledges the significant potential of automated mobility for many sectors, offering new business opportunities for start-ups, small and medium-sized enterprises (SMEs), and the industry and enterprises as a whole, in particular in terms of the creation of new mobility services and employment possibilities'

and

> 'Underlines the need for the development of autonomous vehicles that are accessible for persons with disabilities and reduced mobility (PRMS)' (Point 5 and 6).

Consequently it

> 'Underlines that fully autonomous or highly automated vehicles will be commercially available in the coming years and that appropriate regulatory frameworks, ensuring their safe operation and providing for a clear regime governing liability, need to be in place as soon as possible in order to address the resulting changes, including interaction between autonomous vehicles and infrastructure and other users' (Point 19).[47]

Later, in 2021, the European Commission presented the Sustainable and Smart Mobility Strategy, by means of which the foundations of the future development of European transport have been laid out.[48] In this Plan special attention has been put on not only on the transport sector's environmental sustainability but also on its digital transformation. Particularly, the Commission points out the social importance of the transport sector's technological progress; it in fact underlines that it has to take place within a proper framework guaranteeing all European citizens enjoy its advantages and, on the contrary, avoiding inequalities or conflicts caused by such development.[49]

[47] 2018/2089 (INI).

[48] The Sustainable and Smart Mobility Strategy and the related information and documentation is available on the website of the European Commission at https://tinyurl.com/k4ub9zdt (last visited 31 December 2022).

[49] The first two paragraphs (no 54 and 55) of the third section ('Smart Mobility – Achieving Seamless, Safe And Efficient Connectivity') of the Plan are very clear: 'People should enjoy a seamless multimodal experience throughout their journey, through a set of sustainable

The European Commission seems to be fully aware of automated vehicles' possible social impact, but also of the related risks as well as of the strong relation between driving and cultural and ethical values, which results in the necessity of particular attention on the side of the legislator.

Based on the above stated, the Commission underlines in the Plan that

> '(t)he Commission will explore options to further support safe, smart and sustainable road transport operations under an existing agency or another body. This body could support the deployment and management of ITS and sustainable connected and automated mobility across Europe. It could facilitate the preparation of relevant technical rules, including as regards the use of automated vehicles cross-border and on the deployment of recharging and refuelling infrastructure, provided for in Union legislation and to be adopted by the Commission. Such rules would in turn create synergies across Member States. It could for example prepare drafts of roadworthiness inspection methods and carry out other specific road safety tasks, as well as collect relevant data. It could also accomplish specific tasks in the area of road transport in the face of major disruptions like the COVID-19 pandemic, where emergency measures and solutions such as Green Lanes42 have been necessary' (para no 58).[50]

Furthermore, it states:

> 'Proactively shaping our future mobility by developing and validating new technologies and services is key to staying ahead of the curve. The EU will therefore put in place favourable conditions for the development of new technologies and services, and all necessary legislative tools for their validation. We can expect the emergence and wider use of drones (unmanned aircraft) for commercial applications, autonomous vehicles, hyperloop, hydrogen aircraft, electric personal air vehicles, electric waterborne transport and clean urban logistics in the near future. An enabling environment for such game-changing mobility technologies is key, so that the EU can become a prime deployment destination for innovators. Start-ups and technology developers need an agile regulatory framework to pilot and deploy their products. The Commission will work towards facilitating testing and trials, and towards making the regulatory environment fit for innovation, so as to

mobility choices, increasingly driven by digitalization and automation. As innovation will shape the mobility of passengers and freight of the future, the right framework and enablers should be in place to facilitate this transition that can make the transport system much more efficient and sustainable. Public and social acceptance is key for a successful transition, which is why European values, ethical standards, equality, data protection and privacy rules, among others, will be fully respected and at the heart of these efforts, and cybersecurity will be treated with high priority'.

[50] Sustainable and Smart Mobility Strategy, 12.

support the deployment of solutions on the market' (para no 64).[51]

One of the milestones indicated in the Plan is the development of large-scale automated mobility by 2030.[52]

Concluding this paragraph the following should be kept in mind, that there are also other sources of law of the European Union that should be taken into account, even if they do not expressly rule automated driving technologies.

Among those there is the EU Regulation 2018/858 and particularly Art 39 ('Exemptions for new technologies or new concepts'), according to which the 'manufacturer may apply for an EU type-approval in respect of a type of vehicle, system, component or separate technical unit that incorporates new technologies or new concepts that are incompatible with one or more regulatory acts listed in Annex II'[53] (where the requirements for the purpose of EU type-approval of vehicles, systems, components or separate technical units are indicated).

On 6 June 2022 the EU Regulation 2019/2144 will enter into force on type-approval requirements for motor vehicles and their trailers, and systems, components and separate technical units intended for such vehicles, in relation to their general safety and the protection of vehicle occupants and vulnerable road users.[54] This law provision is (further) proof of the constantly increasing importance of driverless vehicles also for the European legislator: at Art 3 ('Definitions') there is also the definition of 'automated vehicle' and 'fully automated vehicle'. The former is defined as a

> 'a motor vehicle designed and constructed to move autonomously for certain periods of time without continuous driver supervision but in respect of which driver intervention is still expected or required';

the latter as 'a motor vehicle that has been designed and constructed to move autonomously without any driver supervision'.[55]

The same Regulation states at the following Art 11 the 'Specific requirements

[51] ibid 13.

[52] ibid 14.

[53] Art 39, para 1, EU Regulation 2018/858.

[54] Regulation (EU) 2019/2144 of The European Parliament and of the Council of 27 November 2019 on type-approval requirements for motor vehicles and their trailers, and systems, components and separate technical units intended for such vehicles, as regards their general safety and the protection of vehicle occupants and vulnerable road users, amending Regulation (EU) 2018/858 of the European Parliament and of the Council and repealing Regulations (EC) No 78/2009, (EC) No 79/2009 and (EC) No 661/2009 of the European Parliament and of the Council and Commission Regulations (EC) No 631/2009, (EU) No 406/2010, (EU) No 672/2010, (EU) No 1003/2010, (EU) No 1005/2010, (EU) No 1008/2010, (EU) No 1009/2010, (EU) No 19/2011, (EU) No 109/2011, (EU) No 458/2011, (EU) No 65/2012, (EU) No 130/2012, (EU) No 347/2012, (EU) No 351/2012, (EU) No 1230/2012 and (EU) 2015/166, Official Journal of the European Union, 16.12.2019, L 325/1.

[55] As we will see below, such definitions do not completely match with those provided by the German regulation.

relating to automated vehicles and fully automated vehicles'. Such provision is particularly important because it seems to continue to require the presence of a physical driver, who is able to take control of the vehicle if necessary.[56]

III. German Road Traffic Norms: The Current National Juridical Scenario

Law provisions concerning driverless cars (as well as those having as object 'classic' vehicles) have to face various kinds of problems and rule different aspects of their assembly and construction, sale and use. In general, the legal framework concerning road traffic can be divided into legal issues concerning the registration of vehicles in order to be used on public roads, the use and the behaviour in the public road space, the requirements for the transportation of passengers and goods.[57]

Such regulation has to be particularly detailed because of the complexity which naturally characterises road traffic and this complexity will probably even increase with the introduction of driverless cars and the relevant infrastructures.

Moreover, road traffic regulation has the particular task of having to rule an activity which is today considered ineliminable and irreplaceable, but also a source of equally significant risks (so called 'negative externalities') that must be contained as much as possible.[58] Furthermore, vehicle use is inevitably connected with rights protected by constitutional law. In particular, §§ 2 (Personal freedom) and 3 (Equality before the law), but also 14 (Property – Inheritance – Expropriation) of the *Grundgesetz* (German constitution) come into play.

1. The Driverless Cars from the Perspective of the German *Grundgesetz*

The German legal scholarship has already started to analyse the possibility of using automated vehicles taking into consideration the principles and the provisions of the German constitution, the *Grundgesetz* (hereinafter also the 'GG').

In particular, such scholarship has noted that the constitutional framework should be examined and its importance should not be undermined in the case of automated and autonomous driving systems. Also, whilst drafting the law provisions and the technical regulations concerning such technologies should the constitutional framework be kept in due consideration. The focus should be specifically on fundamental rights, which have a very central meaning in the

[56] B. Wolfers, n 2 above, 30-31.

[57] M. Wagner, n 17 above, 52.

[58] F. Jourdan and H. Matschi, 'Automatisiertes Fahren – Wie weit kann die Technik den Fahrer ersetzen? Entwickler oder Gesetzgeber, wer gibt die Richtung vor?' *Neue Zeitschrift für Verkehrsrecht*, 26-29 (2015), make an interesting analysis on the relations between safe driving and technology.

field of autonomous driving.[59]

Because of their complexity and variety, all the constitutional issues that may arise with regard to driverless technologies cannot be analysed properly here. Nevertheless, I will present a preliminary analysis on these themes of great importance.

A first point to be discussed is the care itself that the German legislator should put in drafting the necessary law provisions in time with respect to the quick development of the automated driving systems. Why? Because according to almost all the studies conducted on such technologies the number of car crashes will drastically decrease thanks to them and one of the most important duties of the State is to protect citizens' lives and health also through concrete acts (*staatliche Schutzpflichten*). This is obviously based on the assumption that the more vehicles equipped with the appropriate technology can participate in road traffic, the more the number of accidents could be reduced. The prerequisite for this, of course, would be that the technology used in the vehicles actually works flawlessly and that accidents with autonomously driving cars on the roads will be virtually impossible. The final result could be that when the technological systems will be sufficiently developed, the State will be committed to admit and support the use of automated vehicles.[60]

This idea represents *mutatis mutandis* a development of the so-called crashworthiness doctrine which has been developed in the United States in the second part of the last century and according to which there is a duty to grant the vehicles that guarantee the highest protection level entrance into the market.[61] From another point of view, driving automatization should represent a tool aimed to compensate for human flaws.[62]

Moreover, the necessity to reduce the negative external impacts of road traffic has been felt by the national and European legislators for many decades and has inspired almost all the road traffic regulation amendments of the last few years. Automated and autonomous vehicles now seem to represent the instrument through which achieving a real qualitative leap in policies that aim to balance

[59] M. Brenner, 'Verfassungsrechtliche Vorgaben für die rechtliche Ausgestaltung des autonomenFahrens', in M. Hermann and M. Knauff eds, *Autonomes Fahren* (Baden-Baden: Nomos, 2021), 46-47.

[60] ibid, 47-48. The Author - see n 10 - also points out that according to the *Staatisches Bundesamt* the eighty eight per cent of accidents in 2017 were caused by a human error and only the 1% by a technical defect of the vehicle. See also P. Ringlage, *Haftungskonzepte für autonomes Fahren – „ePerson" und „RmbH"?* (Baden-Baden: Nomos, 2021) 53-54; F. Jourdan and H. Matschi, n 58 above, pp. 26-27; H. Eidenmüller, n 8 above, 770. Such circumstance is also confirmed in the Bill for amendment of the Road Traffic Act and the Compulsory Insurance Act – Act on Autonomous Driving, available at https://tinyurl.com/2cw6are6 (last visited 31 December 2022), 18. On this topic see also the analysis of A. Hevelke and J. Nida-Rümelin, 'Responsibility for Crashes of Autonomous Vehicles: An Ethical Analysis' *Science and Engineering Ethics*, 619-630 (2015).

[61] G. Calabresi and E. Al Mureden, n 6 above, 42.

[62] F. Jourdan and H. Matschi, n 58 above, 27.

efficiency and safety in the field of vehicular circulation could be possible.

Another topic that has been analysed in the German literature is if the right to use not-automated cars will always exist when this technology will be completely developed and will be accessible to all citizens. This now seems to be a very theoretical and not current problem, but it is in any case necessary to start dealing with it, especially in a country like Germany where the car and driving culture is strongly rooted in the population. The question is if it will still be possible to forbid driving a 'classic' not-automated vehicle or if the loss of the possibility to drive a vehicle by the state would cause a disproportionate interference with the general freedom of action.[63] To answer this question – the Author thinks this will be effectively possible only when the automated technologies will be concretely available – it will be necessary to balance the protection of life and physical integrity with other rights also protected by the *Grundgesetz*.[64]

But the most discussed and problematic issue with regard to automated vehicles use and its regulation is represented by the so-called dilemma situations (*Dilemmasituationen*). Many scholars have started to deal with this issue, not only from a juridical and constitutional point of view, but also from an ethical one. Also the German Government took the importance of the ethical issues related to the use of driverless cars into account and the Federal Minister of Transport and Digital Infrastructure appointed an *Ethik-Kommission Automatisiertes und Vernetztes Fahren* (Ethic Commission on automated and connected driving), which presented a code of ethics published in 2017 consisting in twenty ethical guidelines indicating how the use of automated vehicles should take place.[65]

The problem arises with reference to the fact that (clearly) automated and even more autonomous vehicles will be equipped with collision avoidance systems that are ideally capable of independently preventing an accident or at least mitigating its consequences. Nevertheless, there will be situations in which an accident cannot completely be prevented and in those cases the vehicle shall make a decision (on behalf of the driver) with potential consequences for the life and health of the driver, of the other vehicle's occupants or of third parties. The

[63] See the analysis of M. Brenner, n 59 above, 49-50.

[64] See particularly §§ 1, 12, and 14.

[65] The guidelines are available at https://tinyurl.com/ycy4twcu (last visited 31 December 2022). See the comments regarding them made by C. Lütge, 'The German Ethics Code for Automated and Connected Driving' *Philosophy &Technolology*, 547-558 (2017).

Among the scholars who have started to deal with the ethical problems related to automated driving activities, see, eg N. Knoepffler, 'Ethische Fragen autonomer Mobilität', M. Hermann and M. Knauff eds, *Autonomes Fahren* (Baden-Baden: Nomos, 2021), 9-26; F. Kröger, 'Automated Driving in Its Social, Historical and Cultural Contexts', in M. Maurer et al eds, *Autonomous Driving* (Berlin-Heidelberg: Springer, 2015), 41-68; P. Lin, 'Why Ethics Matters for Autonomous Cars', in M. Maurer et al eds, *Autonomous Driving* (Berlin-Heidelberg: Springer, 2015), 69-85; J.C. Gerdes and S.M. Thornton, *Implementable Ethics for Autonomous Vehicles*, in M. Maurer et al eds, *Autonomous Driving* (Berlin-Heidelberg: Springer, 2015), 87-102.

vehicle will not make this decision spontaneously, but in the way it was programmed in advance by the manufacturer, who has therefore programmed in advance using specific algorithms[66] how the vehicle should behave in a specific situation. It has been underlined how this kind of problem exactly proves the unique importance of constitutional law in the context of autonomous driving as the programming of vehicles shall be carried out respecting the conditions of constitutional law and the constitutionally protected legal interests.[67]

It is clear that this could lead to profound differences in the regulation and systems programming rules among the various countries in light of the fact that the 'hierarchy' of constitutionally protected interests can also vary considerably across legal systems.

Concluding this quick recap, it should be observed that in the *Grundgesetz* there is no explicit reference to technology and technological development among the fundamental rights. On the other hand, it has been pointed out that the same Constitution is deemed open for progress in technology, considering that science and research fall within the scope of application of Art 5, para 3, GG.[68]

In Germany also § 14 GG which guarantees property[69] and § 2 GG concerning the protection of life and physical integrity come into play.[70] The challenge for the programming of autonomous vehicles will be to anticipate possible conflicts of fundamental rights and to resolve them as carefully as possible by means of practical concordance in a constitutionally compliant balance.[71] It is hard to predict how this will practically take place, in any case the future regulation, the legal scholarship and the constitutional case law will play a central role.

2. German Law Provisions Concerning Road Traffic

German road traffic regulation ('*Straßenverkehrsrecht*') is particularly detailed and consists of various law provisions. The most relevant ones are the following:

- Road traffic law ('*Straßenverkehrsgesetz*' – StVG);
- Road traffic regulation ('*Straßenverkehrs-Ordnung*' – StVO);
- Road traffic admission regulation ('*Straßenverkehrs-Zulassungs-Ordnung*' – StVZO);

[66] With regard to the functioning of such algorithms see, *inter alia*, G. Pascuzzi, n 9 above, 291.

[67] M. Brenner, n 59 above, 50-51.

[68] E. Böning and H. Canny, 'Easing the Brakes on Autonomous Driving - International Law, European Law and German Law in Perspective' *Freiburger Informationspapiere zum Völkerrecht und Öffentlichen Recht*, 15 (2021).

[69] The first sentence of § 14, para 1, GG states clearly that property shall be guaranteed ('*Das Eigentum und das Erbrecht werden gewährleistet*').

[70] § 2, para 2, GG foresees that every person shall have the right to life and physical integrity ('Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person ist unverletzlich. In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden').

[71] M. Brenner, n 59 above, 51.

- Vehicle approval regulation ('*EG-Fahrzeuggenehmigungsverordnung*' – EG-FGV), which converted into national law the European directive no 2007/46/EC;
- Vehicle admission regulation ('*Fahrzeug-Zulassungsverordnung*' – FZV);
- Regulation on the admission of people to road traffic ('*Verordnung über die Zulassung von Personen zum Straßenverkehr*' – FeV).

With specific regard to automated vehicles, as of today, the most important law provision is the *Straßenverkehrsgesetz* and particularly §§ 1a – 1l.

The *Straßenverkehrsgesetz* rules, more in general, the behaviour of drivers in the context of road traffic and the use of traffic signs. In 2017 and then in 2021 it was modified in order to provide a regulation also to the most recent (and even not yet completed) technological developments in the field of autonomous driving.

IV. The Reform of the *Straßenverkehrsgesetz* of 2017 and the New §§ 1a – 1c

In 2017 automated vehicles made their debut in the German legal scenario.[72] By means of the *AchtesGesetz zur Änderung des Straßenverkehrsgesetzes* of 16 June 2017[73] the *Bundestag* introduced the new §§ 1a, 1b and 1c. The changes made to the *Straßenverkehrsgesetz* concerned three main areas: (*i*) the characteristics and the registration of driverless vehicles, (*ii*) the driver's liability by using them and (*iii*) data storage.[74] More specifically with this reform the use of highly and fully automated vehicles that fulfil certain requirements has been explicitly legalised.[75]

On this occasion the German legislator proved to be aware of the new challenges that driverless cars oblige it to address or at least to take into due consideration.[76] In particular, it was clear that in the near future technical developments in automotive engineering will lead to scenarios in which it is technically possible for the technological system to take over vehicle control in certain situations. At the same time, it was not possible (in 2017) to consider those systems as perfectly and constantly working. It was therefore necessary to keep in mind their limits and leave to the driver the possibility to retake over

[72] M.G. Losano, n 1 above, 3-4, points out that already in 2015 the German Government decided to digitise a stretch of highway intended for testing automated vehicles, so that it has experimental data on which to base legal rules to be applied to this developing field. It was only a closed-to-the-public road area, albeit simulating a public highway.

[73] German Federal Law Gazette (*Bundesgesetzblatt*) 2017, Part I, no 38, 1648-1650.

[74] E. Böning and H. Canny, n 68 above, 18; M.G. Losano, n 1 above, 4-7. The regulation concerning automated driving systems data and their use will not be a subject of this article. Because of their complexity and extent such topics require indeed to be analysed specifically.

[75] K.A.P.C. van Wees, 'Technology in the Driver's Seat: Legal Obstacles and Regulatory Gaps in Road Traffic Law', in S. Van Uytsel S. and D. Vasconcellos Vargas eds, *Autonomous Vehicles* (Singapore: Springer, 2021) 21, 30.

[76] J. Klink-Straub and T. Keber, n 18 above, 114.

driving control. In any case such technical developments required regulations by the legislator on the interaction between the vehicle driver and the motor vehicle with automated driving functions.[77]

Thanks to this reform, for the first time Germany saw a regulation aiming to rule the coexistence of 'classic' vehicles with cars of Level 3 and 4 of the SAE Classification.[78]

To be more precise, it is necessary to note that the terminology used by the German legislator is a bit misleading. Particularly § 1a ff. StVG uses the expression '*Kraftfahrzeuge mit hoch- oder vollautomatisierter Fahrfunktion*' (Vehicles with high or complete automated driving function) but in a different sense from the one used in the SAE Classification. In this latter rating system highly and fully automated driving technologies correspond to those of Level 4 and 5. Probably it would have been more appropriate to use the terminology 'conditional' (Level 3) and 'high' (Level 4) automation,[79] or, even better, to make an explicit reference to the SAE Classification or in any case to support the use of a unique international rating system.

However, it has been pointed out that despite the fact that the StVG does not expressly refer to the SAE Classification, the reference to it is in any case clear from the parliamentary documentation.[80] In the same way it is clear from the parliamentary proceedings that Level 5 was not a subject of the *AchtesGesetz*.[81]

The exclusion of autonomous vehicles (Level 5, ie, cars with a driverless technology that is completely autonomous in every possible situation and where the 'tools' that allow the 'physical' driver to control the vehicle are not even necessarily present) is also expressly stated by § 1b StVG, according to which the driver has to be able to take back vehicle the control. Therefore, the modification made through the *AchtesGesetz* did not change the need to have a physical driver always present in the car and able to drive.[82]

Starting to analyse the provisions instructed by the abovementioned reform, § 1a StVG (expressly entitled '*Vehicles with high or complete automated driving function*') states the admissibility of automated vehicles if they are handled for their intended purpose ('*bestimmungsgemäß*').[83] Furthermore, § 1b StVG ('*Rights*

[77] Deutscher Bundestag, Drucksache 18/11300, 20 February 2017, 1. The most relevant documentation concerning the *AchtesGesetzzurÄnderung des Straßenverkehrsgesetzes*is available at https://tinyurl.com/45sf2fff (last visited 31 December 2022).

[78] M. Brenner, n 59 above, 45. This is confirmed by other several scholars, among which see K.A.P.C. van Wees, n 75 above, 30, fn 36, according to which: 'Although these new rules do not refer to the automation levels as defined by the SAE, in essence, the term "high automation" in the German law is akin to SAE Level 3 ("conditional automation"), while the term "full automation" equals SAE Level 4 ("high automation")'.

[79] Among others, M.N. Schubert, n 25 above, 126, also points out that the German '*hochautomatisiert*' driving system corresponds to the 'conditional automation' (Level 3).

[80] Deutscher Bundestag, Drucksache 69/17, 27 January 2017, 6.

[81] M.N. Schubert, n 12 above, 20-21.

[82] J. Klink-Straub and T. Keber, n 18 above, 114. V. Lüdemann et al, n 24 above, 412.

[83] M.N. Schubert, n 12 above, 20, translates the first paragraph of § 1a StVG (Der Betrieb

and obligations of the vehicle driver when using highly or fully automated driving functions') states that driving functions are permissible only to the extent that drivers may temporarily turn away from traffic and driving and are always capable of overriding the automated system.

In the second paragraph, § 1a StVG defines *Kraftfahrzeuge mit hoch- oder vollautomatisierter Fahrfunktion*, as those with a technical equipment that:

1. can control the motor vehicle after activation in order to perform the driving task, including longitudinal and lateral guidance;
2. during highly or fully automated vehicle control is capable of complying with the traffic regulations directed at the vehicle control;
3. can be manually overridden or deactivated by the vehicle driver at any time;
4. is capable of recognizing the need for the driver to control the vehicle manually;
5. can indicate visually, acoustically, tactilely or otherwise perceptibly to the driver the need for manual control of the vehicle with a sufficient time buffer before the driver is given control of it, and
6. indicates if the use is contrary to the system description.

The manufacturer of such a motor vehicle shall make a binding declaration in the system description that the vehicle complies with the requirements described above and clarify prerequisites and limits of the automated system. Drivers are required to inform themselves of these limits and keep them in mind when driving.[84]

This provision – set by § 1a, para 2, StVG – has been criticised by some scholars, as there is the risk that too many tasks are placed on the manufacturer. Tasks that as of today have always been performed by the State, especially if we consider that the responsibilities in this sector are particularly high and sensible because there are constitutional and human rights of the individuals (including health and life of the driver, of passengers and of the other users of the road) that may be involved.[85]

Going back to § 1a StVG, it should be noted that according to the following para 3, the vehicles must comply with international regulations (UNECE-Regulations)[86] or have type approval under EU law. In this regard it should be noted that since European Union law provisions (Directive 2007/46/EC and Regulation 2018/858/EU) also refers to the ECE regulations in many cases,

eines Kraftfahrzeugs mittels hoch- oder vollautomatisierter Fahrfunktion ist zulässig, wenn die Funktion bestimmungsgemäß verwendet wird.) as follows: 'The operation of motor vehicles by means of a highly or fully automated driving function shall be permissible if this function is used for its intended purpose'. In my view, 'bestimmungsgemäß' could also be translated into 'according to the regulations'.

[84] E. Böning and H. Canny, n 68 above, 19.

[85] ibid 19-20.

[86] J. Klink-Straub and T. Keber, n 18 above, 114.

these will be decisive for automated vehicle eligibility.[87]

Such requirements have a central importance: in order for a driver to be allowed to turn his or her attention away from driving (§ 1b StVG), the same requisites set forth by the § 1a StVG have to be met.[88]

Even if he or she can carry out other actions while the car is moving, based on the definition of § 1a StVG, the importance that the driver's role continues to have has been made absolutely clear. This is furthermore stressed by the subsequent para 4, according to which the driver of the vehicle[89] is also the person who activates a highly or fully automated driving function within the meaning of the above summarised definition and uses it to control the vehicle, even if he or she does not directly control the vehicle during the use of this function.

As a matter of fact, the 'physical' driver has to always be able to override the automated system which is therefore still considered as an assistance technology, not as a driver-replacement one. For this reason, Level 5 driving systems cannot be considered as admitted according to §§ 1a-1c StVG.

The 'revolutionary' aspect of this law provision is given by the fact that § 1a StVG states clearly the admissibility of high and fully automated vehicles on public roads.

Such admission is granted upon application if the vehicle corresponds to an approved type (*Typengenehmigung*) or an individual approval has been granted and a motor vehicle liability insurance policy complying with the compulsory insurance law has been subscribed to. In the case of type approval (*Betriebserlaubnis*), a distinction is made between type approval for series-produced vehicles of the same type on the basis of a sample vehicle and individual approval for individual vehicles.[90]

Some scholars have questioned the exact meaning of the term '*bestimmungsgemäß*' (for its intended purpose), which is indicated as a requirement in order to handle automated vehicles by the abovementioned § 1a, para 1, StVG. More in general, this term represents a central parameter for driverless vehicles' use admissibility as well as for the driver's liability.[91]

According to the official documentation related to the *AchtesGesetz zur Änderung des Straßenverkehrsgesetzes*, such a requirement is addressed first of all to the cars' producers. More in detail, the manufacturer has to clearly explain to the user of the vehicle that it is a vehicle with highly or fully automated driving functions as described in this law and which are the limits of such use.[92]

[87] M. Wagner, n 17 above, 54.

[88] E. Böning and H. Canny, n 68 above, 19.

[89] ie the person who has all the related rights, duties and obligations.

[90] M. Wagner, n 17 above, 53-54, see specifically fn 149; C. Artz and S. Ruth-Schumacher, n 23 above, 58.

[91] § 1a, para 1, and § 1b, para 1, no 2, StVG.

[92] Deutscher Bundestag, Drucksache 18/11776, 29.03.2017, 10: 'Beim Tatbestandsmerkmal „bestimmungsgemäß" kommt der Systembeschreibung durch den Hersteller Bedeutung zu.

Similar to other fields, the use of a certain product or object for its intended purpose represents a parameter, which is necessary to limit the manufacturer's responsibility.[93] Here it is particular that § 1a, para 1, StVG links the *bestimmungsgemäß* use of the automated vehicles with their admissibility. The authorised handling of the vehicle by means of automated driving functions is to be restricted: not every technically possible use of the functions has to necessarily be deemed as admissible for the user.[94]

Consequently, it has to be pointed out the great importance of the role played by the manufacturer. According to the abovementioned *AchtesGesetz*, the manufacturer defines the requirements for the *bestimmungsgemäß* use of the vehicle in its functional description.[95] *Eg* the use of an automated driving function would only be *bestimmungsgemäß* on highways or traffic routes similar to freeways if the automated system is only intended for this use according to the vehicle manufacturer.[96]

In this way § 1a, para 1, StVG seems to make a dynamic reference to the private standard-setting by a corporation. Such reference could be source of uncertainty and in contrast with the rule of law and the principle of '*Rechtsklarheit*'.[97]

On the other hand, it should also be noted that the margin left to the manufacturer is strongly limited by the fact that the requirements foreseen by § 1a, paras 2-3, StVG, including the technical standards referred to therein, shall be understood as a determination of the content of the permissibility of automated driving functions. The *bestimmungsgemäß* use will be therefore first of all specified by the technical requirements (such as the ECE regulations) for individual driving functions within the meaning of § 1a Para 3 StVG. These technical requirements shall already contain specific information about the intended use of the driving function and its prerequisites and the manufacturer's system description must be assessed in accordance with these technical

Mit dieser Regelung wird der Hersteller verpflichtet, dem Nutzer des Fahrzeugs eindeutig zu *erklären, dass es sich hier um ein Fahrzeug mit hoch- oder vollautomatisierten Fahrfunktionen* gemäß der Beschreibung in diesem Gesetz handelt'. (The description of the system by the manufacturer is important with regard to the criterion of 'its intended purpose'. This regulation obliges the manufacturer to clearly explain to the user of the vehicle that this is a vehicle with highly or fully automated driving functions according to the description in this law.).

93 For a first analysis of the characteristics of the producer's liability according to German law, see O. Palandt, *Bürgerliches Gesetzbuch*, *Kurz Kommentar* (Munich, C.H. Beck, 79th ed, 2020), § 823, para 169-185.

94 J. Ensthaler and M. Gollrad, n 15 above, 68.

95 In the documentation related to the *AchtesGesetz* (particularly Deutscher Bundestag, Drucksache 18/11300, 20.02.2017, 20) it is stated that the system description of the vehicle has to provide unambiguous information about the type of automated driving function equipment as well as about the degree of automation in order to inform the driver about the framework of the intended use ('*Rahmen der bestimmungsgemäßen Verwendung*').V. Lüdemann et al, n 24 above, 412.

96 J. Klink-Straub and T. Keber, n 18 above, 114. J. Ensthaler and M. Gollrad, n 15 above, 68.

97 S. Vöneky, n 5 above, 14. See also V. Lüdemann et al, n 24 above, 412.

requirements.[98]

To conclude, what does 'use for its intended purpose' mean in practice? It is not possible to give an unique answer, considering that the possible use of the vehicles will depend first of all on the degree of automation of the driving function (Level 3 or 4), the operating domains in which an automated function or system is designed to properly operate (operational design domain - 'ODD'), the requirements of the vehicle, the interaction with the vehicle by using the driving function (human-machine interaction), and specific instructions for using the driving function in the vehicle.[99]

1. The Sharing of Liabilities in Case of an Accident Caused by a Driverless Vehicle

One of the most discussed issues with regard to automated vehicles use is the sharing of liabilities and of the consequent damages' compensation obligations. The basic question is if the physical person in the car or its owner[100] shall or not bear the cost[101] of an accident caused by the vehicle – as it is for cars without an automated driving system or with a SAE Level 1 or 2 technology – if in that moment the car is driven by the driving system.

The questions that arise in relation to the applicability of the actual liability regime to automated vehicles represent a challenge for all legislators. Particularly it is necessary to state if the current liability provisions remain effective also with regard to such new technologies or if they need to be amended or substituted.[102]

[98] J. Ensthaler and M. Gollrad, n 15 above, 69.

[99] ibid 69.

[100] According to § 7, para 1, StVG: 'If, during the operation of a motor vehicle, a person suffers death, the body or health of a person is injured or an item of property is damaged, the vehicle holder is liable to make compensation to the injured person for the resulting damage'.

[101] § 12 StVG foresees a monetary cap. Such provision states the following: '(1) The party liable to pay damages shall be liable: 1. only up to a maximum total amount of five million euro in the case of the death or injury of one or several persons as a result of the same event; only up to a maximum total amount of ten million euro in the case of the damage being caused on account of the use of a highly or fully automated driving function in accordance with section 1a or during operation of an autonomous driving function in accordance with section 1e; in the case of the commercial transportation of passengers for payment, the liability of the holder of the transporting motor vehicle to pay damages shall increase when more than eight passengers were killed or injured by six hundred thousand euro for each additional passenger who was killed or injured; 2. only up to a maximum total amount of one million euro in the case of damage to property, even when several items of property were damaged by the same event; in the case of the damage being caused on account of the use of a highly or fully automated driving function in accordance with section 1a, or during operation of an autonomous driving function in accordance with section 1e, only up to a maximum total amount of two million euro. The maximum amounts specified in sentence 1 no 1 shall also apply to the capital value of an annuity to be paid as damages. (2) Should the combined indemnification to be paid to several injured parties on account of the same event exceed the maximum amounts specified in subsection (1), then the individual compensation shall be reduced pro-rata to the maximum total given'.

[102] See also B.A. Koch, 'Produkthaftung für autonome Fahrzeuge', in S. Laimer and C. Perathoner eds, *Mobilitäts- und Transportrecht in Europa* (Berlin: Springer, 2022), 113-128.

The German liability regime has always been characterised by a strict liability imposed on the owner (ie, the person or legal entity in whose name the vehicle is registered).[103] Particularly § 7 StVG states that if, during the operation of a motor vehicle, a person suffers death, the body or health of a person is injured or an item of property is damaged, the vehicle holder is liable to make compensation to the injured person for the resulting damage. Moreover § 18 StVG regulates the vehicle driver's liability to pay damages compensation if he or she caused it. But does such liability regime change if the vehicle is driven by an automated technological system?

The *AchtesGesetz zur Änderung des Straßenverkehrsgesetzes* of 2017 started to deal with this problem. As a matter of fact, by means of such law provision the German legislator not only made automated driving available for the first time, but also defined the areas of responsibility for the use of automated driving functions.[104]

The subjects here involved are the manufacturer, the competent approval authority, the vehicle's owner and the driver.

The manufacturer bears a comprehensive safety-related product responsibility ('*sicherheitsbezogene Produktverantwortung*'). Before the launch of an automated driving system on the market, the manufacturer must comply with the regulatory requirements, implement them in the automated driving system and prove that they have been met in the approval procedure. Particularly, the manufacturer has the responsibility to ensure that the automated driving function complies with the requirements foreseen by the law.[105] This is checked by the approval authority (or the technical service commissioned by it). The approval authority has a guarantee responsibility ('*Gewährleistungsverantwortung*'), as it certifies with the approval of the automated driving function that its intended use does not impair road safety. The task of the public authority itself is therefore very important, as the latter decides whether or not a highly or fully automated vehicle can be purchased and then used on public roads. Therefore, the competent authority has to test and then, eventually, approve the vehicle.[106] Such activities play a central role and are a source of responsibility on the authority, considering that the testing and approval of the highly or fully automated driving function is part of the authorization process. Only by performing such activities correctly can the approval authority fulfil its responsibility to

[103] M.N. Schubert, n 12 above, 18; M. Channon et al, *The Law of Autonomous Vehicles* (Abingdon-New York: Informa Law from Routledge, 2019), 68.

[104] B. Wolfers, 'Regulierung und Haftung bei automatisiertem Fahren: zwei Seiten einer Medaille?' *Recht Automobil Wirtschaft*, 94 (2018).

[105] B. Wolfers, n 104 above, 95. See also the analysis on the provisions of the European Union on the product responsibility (also in relation to the automated vehicles) made by B.A. Koch, n 102 above, 118-128.

[106] With regard to the approval procedure, see B. Wolfers, n 104 above, 94 and 97.

guarantee the approval of safe vehicles with automated driving functions.[107]

Furthermore – as already mentioned above – pursuant to § 1a, para 1, sentence 2, StVG the manufacturer has to make a binding declaration in the system description that the vehicle complies with the requirements by the aforementioned sentence of the same norm. Such declaration duties have effects *vis-à-vis* both the driver and the approval authority.[108] At the same time, the manufacturer's liability has to follow the law provisions concerning the liability for products' defects[109] as well as the regime of the producer's liability.

The owner liability is stated by § 7 StVG and it does not change if the vehicle is equipped with a highly or fully automated driving technology (Level 3 and Level 4).

With regard to § 7 StVG, it should be remembered that the liability regulated by the same provision is a '*verschuldensunabhängige Gefährdungshaftung*' (no-fault liability). This also applies if a vehicle with an automated driving function is used. Therefore, such liability covers all potential damage, regardless of whether it is caused by a use for the intended purpose or not or by an error of the automated driving function. Malfunctions of driving systems are not an event of force majeure (*höhere Gewalt*), as they are not something 'external' from the vehicle, and therefore the exception pursuant to § 7, para 2, StVG does not apply.[110] In this case, the owner of the vehicle will therefore still be considered liable, but she or he may be then able to take recourse against the manufacturer.[111]

Finally, the driver is liable pursuant to § 18 StVG and has a responsibility to gather information, monitor and take over the driving system ('*Informations-, Überwachungs- und Übernahmeverantwortung*'): He or she must inform him- or herself about the requirements and limits of the automated driving function, monitor compliance with them and, if necessary, take over the driving task again.[112] In other words, his or her duty to be informed has to be respected in order to enable the driver to respect the obligations foreseen by § 1b StVG. At the same time, he or she always has to use the driverless technology *bestimmungsgemäß*, otherwise the same use is inadmissible, and the driver will be liable in case of damage to third parties.[113] In fact the circumstance that

[107] C. Artz and S. Ruth-Schumacher, n 23 above, 57-62.

[108] B. Wolfers, n 104 above, 96.

[109] And particularly the provisions of the *Gesetz über die Haftung für fehlerhafte Produkte* (Act on Liability for Defective Products – ProdHaftG).

[110] P. Ringlage, n 60 above, 43; B. Wolfers, n 104 above, 99. See also V.M. Jänich et al, 'Rechtsprobleme des autonomen Fahrens' *Neue Zeitschrift für Verkehrsrecht* (2015), 313-318, cited by the latter Author at fn 31.

[111] M. Channon et al, n 103 above, 69-70.

[112] P. Buck-Heeb and A. Dieckmann, 'Die Fahrerhaftung nach § 18 I StVG bei (teil-)automatisiertem Fahren' *Neue Zeitschrift für Verkehrsrecht*, 113, 115 (2019).

[113] B. Wolfers, n 104 above, 94 and 96. The Author correctly points out the strict connection between the duties of the manufacturer and the driver: As a matter of fact, the manufacturer's information and transparency responsibility corresponds to the driver's responsibility to be informed.

the '*bestimmungsgemäße Verwendung*' is determined by the manufacturer's system description implicates the driver's duty to know this before activating the driving function and using it to control the vehicle. If he or she does not do this, he or she is acting in breach of his or her duty of care and it will not be possible for him or her to exonerate himself or herself from the presumption of fault pursuant to § 18, para 1, StVG.[114]

Moreover, even if the automated driving systems are considered as a safer alternative to traditional cars, the damage compensation monetary cap foreseen by § 12 StVG has been increased from a liability coverage of five million to ten million (§ 12, para 1, no 1 StVG) in case of damage (death or injury of one or several persons) caused on account of the use of a highly or fully automated driving function in accordance with § 1a StVGor during the operation of an autonomous driving function in accordance with § 1e StVG.[115]

Such increase of the monetary cap has been foreseen also in case of damage to a property: the cap of one million euro has been doubled to two million euro if the damage has been caused on account of the use of a highly or fully automated driving function in accordance with § 1a StVG or during operation of an autonomous driving function in accordance with § 1e StVG.

It has been pointed out that the above-described monetary cap increases pursuant to § 12 StVG seem to reflect a degree of uncertainty in relation to whether these cars that are allowed to be used according §§ 1a ff StVG will actually increase road safety. At the same time, it should be considered that there is no empirical data related to the use of automated driving systems, only estimations are available so far.[116]

With regard to the sharing of liabilities, what the German Government explicitly pointed out in the official motivation of the law proposal sent to the German Parliament is interesting. In particular it stated that at this stage of the technological development it should be clear that highly and fully automated systems should be programmed and structured so that they are able to recognize their limits and request the vehicle driver to take over vehicle control. The vehicle's driver is obliged to comply with this request without delay. In addition, the vehicle driver must take over vehicle control if the prerequisites for using a highly or fully automated driving function no longer apply. Consequently, even in the case of vehicle control by means of an automated driving function, the driver of the motor vehicle in question remains the 'physical' driver, *i.e.,* during the automated driving phase the vehicle driver is not replaced by the highly or fully automated system. This would only be the case with autonomous driving, in which there is no driver, only passengers.[117]

[114] P. Buck-Heeb and A. Dieckmann, n 112 above, 116.

[115] Moreover, see the section dedicated to autonomous driving function in accordance with §§ 1e and followimg StVG.

[116] E. Böning and H. Canny, n 68 above, 20.

[117] Deutscher Bundestag, Drucksache 18/11300, 20 February 2017, 14.

According to §§ 1a ff StVG when a highly or fully automated driving system is used, the 'physical' driver remains legally in control of the vehicle, even if he or she is not manually controlling the vehicle in this mode.[118] This is clearly stated by § 1a, para 4, StVG according to which the driver is the person who activates a highly or fully automated driving function and uses it to control the vehicle, and this does not change if he or she does not directly control the vehicle while using the driverless technology.

Therefore, this is no great change in the liability regime, especially with regard to the rights and duties of the vehicle's owner pursuant to § 7 StVG. Even apart from the reasons described above, this is due to the fact that the regulation (which is prior to these driving technologies) according to which the vehicle owner shall be considered liable, regardless of whether or not he or she was driving the vehicle, is not affected and does not depend on whether a human or machine driver is controlling the car at the moment of the accident. Therefore, the opinion according to which after the *AchtesGesetz* the liability regulation, especially with regard to the vehicle's owner, is not substantially changed could be shared.[119]

The only aspect that could be considered new, however, is the subject of the owner's liability: The owner no longer has to be liable only for the behaviour of human drivers who use the vehicle under his or her authority, but also for the automated driving software.[120]

In other words, §§ 1a and 1b StVG did not created an independent liability regime: the previous liability regimes, in particular those of the StVG, the *Bürgerliches Gesetzbuch* (German Civil Code – BGB) and the *Gesetz über die Haftung für fehlerhafte Produkte* (Act on Liability for Defective Products – ProdHaftG) have remained essentially unchanged. At the same time, it cannot go unmentioned that according to part of the scholarship the new regulations have an – at least indirect – impact on the existing liability regimes. Particularly, they affected the concept of fault and the determination of a product defect. As a result, it has been stated that the liability regimes have not been changed, but they have been readjusted in line with the new allocation of responsibility for automated driving functions.[121]

This applies especially for the driver's liability pursuant to § 18 StVG, which – differently from § 7 StVG – is based on negligence, which the law initially presumes, but that can also be refuted (§ 18, para 1, StVG).[122] This is typically the case if the accident is due to a technical fault (*eg* burst tire, failing brakes). In this case the driver must prove that his or her loss of control was due to this

[118] M.N. Schubert, n 12 above, 21.

[119] ibid 19; P. Buck-Heeb and A. Dieckmann, n 112 above, 113; M. Channon et al, n 103 above, 69.

[120] P. Ringlage, n 60 above, 48.

[121] B. Wolfers, n 104 above, 98.

[122] P. Ringlage, n 60 above, 52; M. Channon et al, n 103 above, 68.

technical fault and that she or he acted without fault.[123]

Which is the relation between this general liability norm and the provisions of §§ 1a and 1b StVG? How should § 18 StVG be interpreted if an automated driving system is used and the driver is not technically driving?

The abovementioned scholarship supports the opinion according to which the standard of negligence has been shifted by provisions introduced by the *AchtesGesetz* and that the result of the combined application §§ 1a, 1b and 18 StVG is that the driver can reduce the standard of care while driving within the limits of the intended use of the automated driving technology, but within this framework the assumption and monitoring responsibility remain with the driver. Consequently, the liability exception pursuant to § 18, para 1, StVG is applicable if the accident is caused by an error of the driverless technology (which was used for its intended purpose) that could not be recognized in time, but not if the same accident is caused by the circumstance that the driver did not use the technology for its intended purpose or did not take back the control of the vehicle when he or she should have done so.[124]

Considering the continuous and quick development of driverless technology it has been pointed out that probably the higher the degree of automation of the vehicles, the less the fault liability according to § 18 StVG will play a role in the future.[125]

At the end of this section, it should be noted that the owner and the driver are also subject to general tort liability pursuant to § 823 BGB. Particularly the owner has a duty to instruct the driver as part of the general duty to ensure road safety, consequently he or she has to inform the driver about the automated driving functions, their purpose, requirements and limits. On the other hand, the driver has to fulfil the information responsibility by properly informing himself or herself.[126] In this case, differently from the provisions of road traffic law, neither a presumption of fault on the part of the driver nor a cap in favour of the driver apply.[127]

2. Non-Driving Activities

The main consequence of the use of driverless technologies is the possibility for the driver – even if he or she has to be always able to take back the control of the vehicle – to do other activities (also called 'side activities') while the car is proceeding.

This right of the driver to 'be distracted', to turn away from the driving activities ('*Abwendungsrecht*') represents a great innovation as it is an exception

[123] B. Wolfers, n 104 above, 99; P. Buck-Heeb and A. Dieckmann, n 112 above, 114.
[124] V. Lüdemann et al, n 24 above, 412; B. Wolfers, n 104 above, 99-100.
[125] J. Klink-Straub and T. Keber, n 18 above, 114-115.
[126] V. Lüdemann et al, n 24 above, 412.
[127] B. Wolfers, n 104 above, 100.

expressly provided by law from the obligation foreseen by § 1, para 1, StVO, according to which being involved in road traffic requires constant caution and mutual consideration ('*ständige Vorsicht und gegenseitige Rücksicht*').[128]

Such possibility is not only a logical consequence of the admission of the driverless systems (and one of their main advantages) but also is openly stated by the law. Pursuant to § 1b, para 1, StVG the driver is allowed to turn away from the traffic environment and vehicle control, but must remain sufficiently perceptive so that he or she can resume control in every moment if necessary.[129] In the second paragraph the same law provision indicates when the driver has the duty to immediately take back the control: When the automated system prompts him or her to do so (no 1), or when she or he realises, or, because of clear circumstances, must realise that the conditions for using the automated driving functions are no longer being met (no 2).[130] This means that the driver cannot rely entirely on the automated driving technology.[131]

But what this concept of '*Wahrnehmungsbereitschaft*' (perception readiness) means could represent a problem. In fact, it is not clear which level of attention is required from the driver. The legislator has refrained from rendering the above-mentioned term more concrete.[132] In any case, considering that § 1b, para 1, StVG allows the driver to turn away from the traffic situation and the control of the vehicle, it can be deduced that a permanent monitoring is not required, instead it is necessary to have only a minimum level of attention in order to be able to take control again.[133]

Part of the legal scholarship has also pointed out that as of today it is not clear which are in practice those circumstances from which the driver has to

[128] B. Wolfers, n 104 above, 95; M. N. Schubert, n 25 above, 126. See also M. Wagner, n 17 above, 66-69, who points out with regard to the *Straßenverkehrs-Ordnung* (StVO) that its provisions are mainly directed at the vehicle driver and that consequently there could be some difficulties related to the interpretation and application of those norms when a highly or fully automated driving system is used. She also reflects on the fact that in the absence of a clarification of the StVO with regard to the use of driverless cars, questions arise in relation of the extent to which the principle of constant vehicle control remains in effect even with highly and fully automated driving, or to what extent the driver may turn away from the traffic situation when automated driving functions are activated.

[129] *Der Fahrzeugführer darf sich während der Fahrzeugführung mittels hoch- oder vollautomatisierter Fahrfunktionen gemäß § 1a vom Verkehrsgeschehen und der Fahrzeugsteuerung abwenden; dabei muss er derart wahrnehmungsbereit bleiben, dass er seiner Pflicht nach Absatz 2 jederzeit nachkommen kann*. (During vehicle manoeuvres using the highly or fully automated driving functions pursuant to § 1a, the driver may turn away from the traffic situation and vehicle manoeuvring; in doing so, he must remain perceptive in such a way that he can fulfil his duty in accordance with paragraph 2 at any time.).

[130] A. Albanese, 'La responsabilità civile per i danni da circolazione di veicoli ad elevata automazione' *Europa e diritto privato*, 995, 997-998 (2019). With regard to the concept of '*offensichtliche Umstände*' (evident circumstances) see P. Buck-Heeb and A. Dieckmann, n 112 above, 118-119.

[131] M. Channon et al, n 103 above, 69.

[132] P. Buck-Heeb and A. Dieckmann, n 112 above, 114.

[133] V. Lüdemann et al, n 24 above, 414.

infer that he has to take back control of the vehicle.[134] This problem will probably be solved by case law, but at this stage this gap could cause uncertainty and hinder the spread of driverless technologies.

Theoretically the driver may therefore carry out any non-driving activity, provided that in the specific driving situation he or she is still able to resume control of the vehicle '*unverzüglich*' (without delay) as soon as the system prompts him to do so.[135]

In order to respect such an obligation, the driver has to be able to interrupt the non-driving behaviour from time to time in order to monitor the driving system and observe the traffic situation. The period of time during which he has to comply with this reduced monitoring duty depends on the respective traffic, visibility, road and weather conditions characterising the concrete driving situation. As long as the non-driving activity does not cause the driver to lose his or her capacity to perceive external circumstances, he or she can do theoretically anything, provided he or she does not leave the driver's seat to do so and that he or she is – as said above – always able to stop the non-driving activity immediately.[136]

In any case, according to § 1b StVG there are three requirements to be met in order to let the driver do non-driving activities: (*i*) a '*hoch- oder vollautomatisierte Fahrfunktion*' pursuant § 1a, para 2, StVG has to be used to drive the vehicle, (*ii*) said driving system has to be used for its intended purpose pursuant § 1a, para 1, StVG and (*iii*) the driver must remain '*wahrnehmungsbereit*' during the automated driving functions use in accordance with § 1b, para 2, StVG.[137]

The legislator did not also provide a list of allowed non-driving activities[138] or examples of them and this contributes to a certain degree of uncertainty that – as said *supra* – can only be overcome by case law.

V. The Reform of 2021: The *Gesetz zum autonomen Fahren*

Until 2021, the use of autonomous vehicles on public roads has so far only been legally permitted in parts of the USA.[139] Such a scenario could now change in Germany.

More specifically, thanks to the *Gesetz zur Änderung des Straßenverkehrsgesetzes und des Pflichtversicherungsgesetzes - Gesetz zum autonomen Fahren vom 12.07.2021*[140] the German legislator opened the door

[134] M.N. Schubert, n 12 above, 21; J. Klink-Straub and T. Keber, n 18 above, 114; V. Lüdemann et al, n 24 above, 413.

[135] P. Buck-Heeb and A. Dieckmann, n 112 above, 117.

[136] ibid 119.

[137] B. Wolfers, n 104 above, 95.

[138] V. Lüdemann et al, n 24 above, 414.

[139] J. Klink-Straub and T. Keber, n 18 above, 118.

[140] German Federal Law Gazette (*Bundesgesetzblatt*) 2021, part I, no 48, 3108-3115.

also to the '*Kraftfahrzeuge mit autonomer Fahrfunktion*', *ie* pursuant to the new § 1d StVG, motor vehicles that can perform the driving task independently, within a defined operating area and without a person driving them and that have the technical equipment required by the law.[141] Such innovative law was adopted as a transitional regulation currently applicable in the national legal framework in preparation for later expected international legal harmonisation.[142]

Thanks to this reform, in Germany autonomous driving (in defined operating ranges) is already a regulatory reality and the technical application can now travel the path paved by regulation.[143]

Before dealing with a short analysis of the *Gesetz zum autonomen Fahren*, it is necessary to observe what the German legislator means when it uses the expression '*Kraftfahrzeuge mit autonomer Fahrfunktion*'. Such wording is indeed partially misleading, as it does not refer to the Level 5 vehicles of the SAE Classification, but to Level 4.

This is not explained in the law provisions themselves, but in the relevant documentation, as well as in the relevant German Federal Ministry for Digital and Transport communication of 27 July 2021.[144] More in detail it is possible to read in the 'Bill for amendment of the Road Traffic Act and the Compulsory Insurance Act – Act on Autonomous Driving' that these vehicles are not those 'fully automated' of Level 5 according to the international classification (SAE), because

> 'Level 5 SAE means fully autonomous driving, in which the dynamic driving task is performed without a human driver under any road and environmental condition that is conventionally also controlled by a human

[141] The German text of § 1d, para 1, StVG is the following 'Ein Kraftfahrzeug mit *autonomer Fahrfunktion im Sinne dieses Gesetzes ist ein Kraftfahrzeug, das 1. die Fahraufgabe* ohne eine fahrzeugführende Person selbstständig in einem festgelegten Betriebsbereich erfüllen kann und 2. über eine technische Ausrüstung gemäß § 1e Absatz 2 verfügt.'. (A motor vehicle with an autonomous driving function within the meaning of this law is a motor vehicle that 1. Can perform the driving task independently within a specific operating area without a person driving the vehicle and 2. features technical equipment pursuant to § 1e paragraph 2.).

The Gesetz zur Änderung des Straßenverkehrsgesetzes und des Pflichtversicherungsgesetzes - Gesetz zum autonomen Fahren vom 12.07.2021 entered into force last July and therefore there is not lot of literature on it yet. Consequently this part of the article cannot be particularly exhaustive and will consist only in a short summary of the most evident amendments made by the same law provision.

[142] S. Gstöttner et al, 'Dürfen automatisierte Fahrzeuge Recht brechen?' *Neue Zeitschrift für Verkehrsrecht*, 593, 595 (2021).

[143] B. Wolfers, n 2 above, 28. As A. Kriebitz et al, n 28 above, 2, point out: 'The act, which was finally passed in July 2021, marks an important step in autonomous driving legislation, as it depicts the first comprehensive national law on autonomous driving'.

[144] On the website of the Ministry, on the page 'Germany will be the world leader in autonomous driving', available at https://tinyurl.com/5ycp58wx (last visited 31 December 2022), it is stated that 'With the new Act on Autonomous Driving, we have established the regulatory framework for autonomous motor vehicles (level 4) to be allowed to operate in regular public road transport in determined operational areas – all across Germany'.

driver. Regulations concerning autonomous driving in suitable operating areas correspond to SAE Level 4'.[145]

Using the words 'autonomous driving vehicles' to refer to SAE Level 4 may be – in the opinion of the writer – source of confusion, also because it is now not clear to which level the '*Kraftfahrzeuge mit hoch- oder vollautomatisierter Fahrfunktion*' of § 1a StVG should be referred to. This confusion can be even more significant if we consider that according to the SAE Classification (that now is mentioned expressly also by the German official documentation) fully automated driving technology is considered referred to Level 5.[146]

This is confirmed by the circumstance pointed out by the scholarship that in terms of handling the driving task, the driving technology must be equally capable of handling the entire driving task, so the key difference between the German *Kraftfahrzeuge mit autonomer Fahrfunktion* and the SAE Level 5 is only the restriction of operation to a specific operating area (the *festgelegter Betriebsbereich*).[147]

More in general we can see that the spread of law provisions concerning automated vehicles makes it urgent or in any case increases the need of a worldwide uniform classification and use of the same nomenclature.

On the other hand, it should be noted that the German legislation provides the indications for a vehicle to be considered autonomous and going back to the analysis of the *Gesetz zum autonomen Fahren*, it can be stated on a first approximation that by means of this amendment to the *Straßenverkehrsgesetz* autonomous motor vehicles – as defined below – can now beused in public traffic, provided that these vehicles and their respective operating areas have been approved by the relevant authorities and that the driving systems can be deactivated at any time by the *technische Aufsicht* (technical supervisor).[148]

In particular, through the above-mentioned *Gesetz zum autonomen Fahren* the legislator introduced eight new law provisions (from § 1d to § 1k) and changed § 1 of the *Pflichtversicherungsgesetz* (*ie,* the statutory insurance for motor vehicle owners) by adding one sentence to the first article. Starting

[145] In theEntwurf eines Gesetzes zur Änderung des Straßenverkehrsgesetzes und des Pflichtver- sicherungsgesetzes – Gesetz zum autonomen Fahrenof 8thFebruary 2021, available at https://tinyurl.com/2cw6are6 (last visited 31 December 2022), 19-20, itiswrittenthat 'Es handelt es sich hier nicht um vollau-tonome Kraftfahrzeuge der Stufe 5 gemäß den internationalen Einstufungen' (...) 'Stufe 5 SAE bedeutet voll-ständig autonomes Fahren, bei dem die dynamische Fahraufgabe unter jeder Fahrbahn- und Umgebungsbedingung, welche herkömmlich auch von einem menschlichen Fahrzeugführer beherrscht wird, ohne einen solchen durchgeführt wird. Regelungen, welche das autonome Fahren in geeigneten Betriebsbereichen betreffen, entsprechen der SAE Stufe 4'.

[146] See, *eg*, among the German literature, M. Wagner, n 17 above, 17 and 21.

[147] B. Wolfers, n 2 above, 28, see particularly fn 34.

[148] M. Brenner, n 59 above, 46. As confirmed also by A. Kriebitz et al, n 28 above, 6, with thereform of 2021 the reform of 2021 introduced the category of 'technical oversight' (or supervision).

from this last amendment the addition consists in a provision specifically referred to the autonomous vehicles pursuant § 1d StVG that foresees an obligation for the relevant owner to have liability insurance also for a person part of the technical supervision.

Notably, the above-mentioned law provision regulates, *inter alia*, the technical requirements for the construction, properties and equipment of a *Kraftfahrzeuge mit autonomer Fahrfunktion* as well as the obligations of the persons involved in the operation of the vehicle, but also the requirements for data processing (§ 1g StVG).[149]

Moreover, if we read the new articles of the *Straßenverkehrsgesetz*, it is immediately clear how their regulation is deeply different from the one foreseen by §§ 1a-1c. While the latter provisions regulate the use of highly and fully automated vehicles in a quite general way, §§ 1d ff. StVG regulate the use of autonomous vehicles with very specific norms and state in a very detailed way various aspects connected with such driving technology.

As mentioned above, § 1d StVG provides a first definition of autonomous vehicles. After that it states what a *festgelegter Betriebsbereich* (defined operating area),[150] the *technische Aufischt* (technical supervisor)[151] and the *risikominimaler Zustand* (risk-minimised state) are.[152]

The technical supervisor is a natural person (§ 1d, para 3, StVG), who, even if he or she does not have to constantly monitor the operations, has to be ready to intervene at any time in legally defined situations. In particular, the supervisor must be able to disable the vehicle at any time in dangerous situations or to perform certain driving manoeuvres. The necessary presence of the technical supervision results also from international provisions and is aimed at fulfilling the requirements contained in Art 8, para 5-*bis*, of the Vienna Convention. Moreover, it has to be noted that in this way the legislator creates confidence in the safety of new autonomous driving functions, which increases the acceptance of novel technologies on the market.[153]

After having provided the definition of the most important new concepts, the StVG regulates the use of autonomous vehicles through § 1e. Said norm is

[149] S. Gstöttner et al, n 142 above, 595.

[150] The locally and spatially determined public road space in which a motor vehicle with an autonomous driving function may be used if the requirements pursuant to § 1e, para 1, StVG are met (§ 1d, para 2, StVG).

[151] The natural person who can deactivate the motor vehicle during operation in accordance with § 1e, para 2, no 8 StVG and who can perform driving manoeuvres for this motor vehicle in accordance with § 1e, para 2, no 4 and para 3 StVG (§ 1d, para 3, StVG).

[152] A state in which the motor vehicle with autonomous driving function, at its own instigation or at the instigation of the technical supervisor, comes to a standstill in the safest possible place and activates the hazard warning lights in order to ensure the greatest possible safety for the vehicle occupants, other road users and third parties, taking due account of the traffic situation (§ 1d, para 4, StVG).

[153] B. Wolfers, n 2 above, 28.

quite complex and in the following paragraphs I will try to summarise it and provide a brief explanation in relation to it.

The first two paragraphs of § 1e StVG are strongly connected to each other. More specifically the first one states when the use of an autonomous vehicle is allowed and as a first requirement it is requested that vehicles respect the technical characteristics described in the second paragraph.

After that § 1e, para 1, StVG requires that an operating approval has been issued for the motor vehicle in accordance with the subsequent paragraph 4, that the same vehicle is used in a *festgelegter Betriebsbereich* approved by the competent authority and that it is licensed to participate in public road traffic pursuant to § 1, para 1, StVG. According to this, the use of the autonomous vehicle within Germany is not spatially unlimited. Rather, the *festgelegter Betriebsbereich* defines the area – approved by the competent authority – in which the operation of the autonomous driving function is permitted (§ 1e, para 1, no 3, StVG).[154]

Particularly interesting is the above-mentioned second paragraph where the requirements of the autonomous vehicles' technical equipment are listed. Such norm has very technical content and represent a great example of the increasingly frequent coexistence of juridical and technological provisions.

This 'cooperation' between different fields of social and technical sciences has to be appreciated as it should help create clear norms and avoid interpretative uncertainty.

But how should the equipment of an autonomous vehicle be structured pursuant to § 1e, para 2, StVG? The norm lists ten 'major' requirements.

First of all, such a driving system should be capable of performing the driving task independently in the *festgelegter Betriebsbereich* without a person driving the vehicle intervening in the control system or the driving of the motor vehicle being permanently monitored by the technical supervisor.

This first requirement is absolutely important as it states clearly the independence of the driving system and the fact that the supervisor has to stay only in the 'background'.

Such a statement is confirmed by § 1e, para 2, no 2, StVG according to which the same driving system has to independently comply with the traffic regulations and to have a system of accident prevention that (*a*) is designed to prevent and reduce damage; (*b*) in the event of unavoidable alternative harm to different legal interests, takes into account the importance of the legal interests, with the protection of human life having the highest priority; (*c*) in the case of unavoidable harm to human life, does not provide for further weighing based on personal characteristics.

How such a driving system will work in the practice – and specifically the respect of the last two requirements – is as of now not predictable.

According to the author, this latter point could cause particular difficulties,

[154] ibid

also from a social point of view, as the result of its application could be that the driving system decides in a different way than a human driver would. In other words: Pursuant to such provision in case of an unavoidable accident the driving system could theoretically 'decide' to sacrifice its passenger instead of third parties (*eg* a group of pedestrians), while, in the same situation, the human driver would maybe have decided to save his or her own life. Consequently, my question is: Will citizens accept to use a vehicle that could decide to harm them (or their relatives) without the possibility to intervene and stop this decision?

The subsequent § 1e, para 2, nos 3 and 4, StVG require that the driving system is able to put the vehicle in a minimal risk condition independently, if the continuation of the journey were possible only by violating road traffic regulations, and that in this case it has to independently suggest to the technical supervision possible driving manoeuvres to continue the journey, and provide data to assess the situation so that the technical supervisor can decide whether to approve the proposed manoeuvre. Moreover, the system has to check the driving manoeuvres ordered by the technical supervisor and not execute them, but rather put the motor vehicle independently in a minimal risk condition, if the driving manoeuvre were to endanger people participating in the traffic or uninvolved people, as well as immediately report any impairment of its functionality to the technical supervisor (§ 1e, para 2, no 5 and 6, StVG).

The relation between the driving system and the technical supervisor is particularly interesting as the law expressly states that a non-human technological system has to ignore a human order if it recognizes that it could cause risks to the traffic on the road or to other people. Such regulated 'superiority' of the machine may never not have particular effects in the practice, but, at least from a theoretical point of view, looks quite revolutionary.

The seventh requirement of the technical equipment consists in the capacity of recognizing its own limits and, when a limit is reached or when a technical malfunction occurs that impairs the exercise of the autonomous driving function, independently placing the motor vehicle in a risk-minimised state.

§ 1e, para 2, no 8, StVG counterbalances the power of the driving system described above and clearly states the permanent possibility for the technical supervisor and for the vehicle occupants to deactivate at any time the driving system, which in that case has to set the motor vehicle independently to the minimum-risk state.

Finally, the last two requirements consist in the capacity to indicate visually, acoustically or otherwise perceptibly to the technical supervisor its functional status and the need for activation of an alternative driving manoeuvre or deactivation of the system (§ 1e, para 2, no 9, StVG) and to ensure sufficiently stable radio connections protected against unauthorised interference, in particular to the technical supervisor, and to set the motor vehicle independently to a minimised risk state if this radio connection is interrupted or accessed without authorization.

The *fil rouge* of the ten technical characteristics requested by § 1e, para 2, StVG is represented by the necessity of ensuring safety to all the possible parties who could be present when an autonomous vehicle is used.

The concept of road safety therefore has a great importance for the German legislator which has considered it as the 'pillar' around which to build the whole autonomous vehicles regulation.

Furthermore, in accordance with § 1e StVG it can be deemed that under German law, an autonomous vehicle will not break any traffic rules independently in the future. Rather, a human decision-maker (the 'technical supervisor') will approve a proposed manoeuvre or, if necessary, order an alternative one.[155]

The same provision states at its para 4 that upon application by the manufacturer, the *Kraftfahrt-Bundesamt* issues an operating permit if the driverless vehicle meets the above summarised requirements (§ 1e, para 4, sentence 1, StVG). The approval, which is valid throughout Germany, 'makes sense' because the technical equipment should basically be usable everywhere in Germany.[156]

The other provision that will be quickly analysed here is § 1f StVG, which has as object the obligations of the parties involved in the use of motor vehicles equipped with an autonomous driving function.

The provision is divided in three paragraphs, one per each 'main character' involved in the use of the *Kraftfahrzeuge mit autonomer Fahrfunktion*.

Starting with the owner (*Halter*), the norm states that he or she has to maintain the road safety and environmental compatibility of the motor vehicle and must take the necessary precautions for this purpose. Moreover, he or she has to (*a*) ensure the regular maintenance of the systems required for the autonomous driving function, (*b*) take precautions to ensure compliance with other traffic regulations not directed at the driving of the vehicle and (*c*) ensure that the tasks of technical supervision are fulfilled.

Here it is evident that no particular driving tasks are required to the owner who therefore does not have to be necessarily able to take back control of the vehicle in case of emergency.

The latter is in fact a task of the technical supervisor. Pursuant § 1f, para 2, StVG the technical supervisor has to evaluate alternative driving manoeuvres in accordance with the abovementioned § 1e, para 3, no 4 and with para 3 StVG and enable the motor vehicle in relation to this purpose as soon as (*i*) he or she is visually, acoustically or otherwise perceptibly notified of such a manoeuvre by the vehicle system, (*ii*) the data provided by the vehicle system enables him or her to assess the situation and (*iii*) the execution of the alternative driving manoeuvre does not endanger road safety. Furthermore the technical supervisor has the duty to deactivate the autonomous driving function immediately as

[155] Gstöttner et al, n 142 above, 596.
[156] B. Wolfers, n 2 above, 28.

soon as this is indicated visually, acoustically or otherwise perceptibly by the vehicle system, evaluate signals from the technical equipment regarding its own functional status and, if necessary, initiate required measures for road safety, and immediately establish contact with the occupants of the motor vehicle and initiate the measures necessary for road safety when the motor vehicle is placed in the minimum risk state.

By summarising such a provision, we can say that it always foresees someone who can and has to control the technological driving system, but such a person does not have to be in the vehicle, on the contrary it seems that he has to be outside it. Moreover, it looks like there is no obligation to have a proportion of one technical supervisor for one autonomous vehicle and therefore it could be deemed that one technical supervisor can control a multitude of vehicles, within the limit that such control remains effective.

Based on what is stated above, it can be deduced that the autonomous vehicles regulated by the amended *Straßenverkehrsgesetz* does not necessarily have to be equipped with an internal tool that allow its occupant (we cannot call him or her 'driver') to take back control of the vehicle. Moreover, the person in the vehicle can no longer be considered liable in case of an accident and it is not necessary that he or she has driving skills.

Allowing such technology – that at the moment is only in an experimental phase – could represent a juridical revolution. At the same time, this represents the greatest difference with the highly and fully automated driving technologies pursuant to §§ 1a-1c StVG, as in this last case according to § 1a, para 4, StVG, users of highly and fully automated driving functions remain '*Fahrzeugführer*' (vehicle drivers) during the entire driving time and consequently they are basically subject to the same obligations of 'classic' vehicle drivers.[157]

Finally, the § 1f StVG regulates the duties of the autonomous vehicle manufacturer. Such obligations are divided into six subparagraphs.

More in detail the manufacturer shall prove to the competent authorities that the vehicle is compliant with the relevant provisions and that its equipment, including a radio link, respects the requested technological requirements as well as to provide the same authority with an adequate risk assessment. The manufacturer has furthermore to draft a system description for each motor vehicle, to prepare an operating manual and to make a binding declaration to the *Kraftfahrt-Bundesamt* (Federal Motor Transport Authority) and in the operating manual that the motor vehicle meets the requirements of §1e, para 2, also combined with para 3, StVG. Finally, the manufacturer has to offer specific training for the persons involved in the operation of the motor vehicle and if it detects any manipulation in the vehicle or its equipment it has to promptly notify the *Kraftfahrt-Bundesamt* and the other competent authorities and initiate any necessary measures.

[157] V. Lüdemann et al, n 24 above, 412.

The previous summary and explanation of part of the norms introduced by the *Gesetz zum autonomen Fahren* cannot be in any case complete but the author hopes that it can help to have a first overview on this innovative law provision.

VI. Germany v Italy: A Comparison of the German Regulation with the Italian 'Smart Roads' Decree

The Italian legislator's approach to automated vehicles is significantly different from the German one summarised in the previous pages. As of today, the only law provision concerning such technology is the decree of 28 February 2018 (complete name '*Modalità attuative e strumenti operativi della sperimentazione su strada delle soluzioni di Smart Road e di guida connessa e automatica*',[158] also called '*decretoSmart Roads*') of the Ministry of Infrastructures and Transport ('*Ministero delle Infrastrutture e dei Trasporti*')[159] and published in the Italian Official Journal no 90 on 18 April 2018.

Such decree is the result of a decision taken by the Italian Government in the previous budget law ('*legge di bilancio*', law no 205 of 27 December 2017) whereby pursuant Art 1, para 73 (only!) two million euro (one for 2018 and one for the subsequent year) were allocated to the research and experimentation of smart roads and automated vehicles. Particularly, in the same budget law, the legislator underlined the importance of supporting the process of digital transformation of the national road network and the development of the connected technologies and consequently expressly authorised the road testing of the smart roads and of connected and automated driving technologies.

Even if the allocated budget is not very significant, the above stated provision is nevertheless important, considering that it led the way to the subsequent Smart Roads decree.[160]

As we will see in the next paragraphs, the Italian regulation pursuant the ministerial decree of 28 February 2018 has huge differences if compared to the German one.

More in details, the Smart Roads decree is structured as follows. The first two articles provide the definition of the most important concepts, such as '*veicolo a guida automatica*' (Art 1, letter f), '*tecnologie di guida automatica*' (Art 1, letter g), '*operatività in modo automatico*' (Art 1, letter h), '*operatività in modo manuale*' (Art 1, letter i), '*supervisore*' (Art 1, letter j), '*smart road*' (Art 2, para 1).

[158] Such title could be translated into 'Implementation methods and operational tools of road testing of smart road and connected and automated driving solutions'.

[159] Pursuant to Art 5 of the Law-Decree no 22 of 1 March 2021 the Ministry changed its name, which is now 'Ministry of sustainable infrastructure and mobility' ('*Ministero delle infrastrutture e della mobilità sostenibili*').

[160] M.G. Losano, n 9 above, 430; S. Scagliarini, 'La sperimentazione su strada pubblica dei veicoli autonomi: il "decreto smart road" ', in Id ed, *Smart roads e driverless cars: tra diritto, tecnologie, etica pubblica* (Torino: Giappichelli, 2019), 15, 16.

The definition of self-driving vehicle is quite detailed and it states that such vehicle should be equipped with technologies capable of adopting and implementing driving behaviours without the active intervention of the driver, in predetermined types of roads and external conditions. After that the same provision states clearly that the current cars equipped with some driver assistance systems cannot be considered as automated vehicles. Three other definitions are also very important here, because thanks to them we are able to understand the characteristics that according to the Italian legislator an automated vehicle should have. More specifically letters h), i) and j) of article 1 state respectively that the automated driving functioning requires that the driving system has the full control of the vehicle, that there should be the possibility to switch off the driving systems and for the driver to take the control of the vehicle and that the 'supervisor' is the occupant of the vehicle, who should always be able to assume control of the vehicle regardless of its degree of automation, at any time the need arises, acting on the controls of the vehicle in absolute precedence over the automated systems. This person is also considered liable for possible damage caused during the use of the vehicle.

The person in the vehicle therefore plays a role 'oscillating' between a driver and a mere supervisor.[161]

Based on the definitions offered above, it is clear that the Italian *veicolo a guida automatica* can be compared to the German *Kraftfahrzeuge mit hoch- oder vollautomatisierter Fahrfunktion*, but not to the *Kraftfahrzeuge mit autonomer Fahrfunktion*.

In other words, as of today, in Italy it is not possible to use or even to test on a public road a vehicle equipped with a driving technology that does not allow a person inside it to take back control and disconnect the driving system.

Moreover, it should be pointed out that according to the Smart Roads decree it is in any case not possible to use or commercialise an automated vehicle, but only to test it after receiving a specific authorization by the same Ministry pursuant to Art 9.

Therefore, while in Germany it is – theoretically – possible to use automated vehicles, in Italy it is only allowed to test them in accordance with the provisions of the above-mentioned decree.

The regulation of the same testing and of the relevant procedures is very detailed and is regulated by Arts 9 to 18. The subsequent Art 19 foresees and regulates the content of a specific insurance coverage with the goal to guarantee the risks resulting from this special segment of road traffic. With regard to such norm, it should be noted that – similarly to the German regulation – the ceiling is particularly high (at least four times the amount provided for the vehicle used for the trial in its model without the self-driving technologies according to the current regulation) and the insurance contract has to identify exactly the risk

[161] D. Cerini, n 3 above, 405.

associated with the experimental circulation. The presence of this kind of norm has been approved by the literature, which has pointed out that the new mobility and the relevant insurance coverage cannot be separated considering that the entire transport sector is densely regulated by compulsory insurance obligations at national and international level in order to guarantee people safety, economic protection and freedom of movement.[162]

It is not the intention of the author to determine whether the Italian legislator has been safer considering that the automated driving technology still has to be developed, nor that the German one has been more capable of understanding social and economic needs in advance, but, as said at the beginning of this section, it should be clear that the two legislators have followed, as of today, two completely different tracks with regard to the regulation of automated vehicles.

1. May German Regulations Be 'Transplanted' into the Italian Legal System?

Considering the completely different current 'state of the art' of the German and Italian regulations on autonomous and automated vehicles, the transplant of the above summarized German law provisions in Italy could – theoretically – take place.

Legal transplants are '*the moving of a rule or a system of law from one country to another, or from one people to another*'[163] or, in other words, '*a situation where the legislator of one country enacts a new rule that largely follows the rule of another country*'[164] and they have always represented an important tool for the juridical development.[165] By means of a legal transplant, a country borrows or takes inspiration from a foreign law provision that seems efficient in order to introduce a similar one in its legal order or to change existing regulations improving it.

[162] D. Cerini, n 3 above, 402-405.

[163] A. Watson, *Legal Transplants* (Athens-London: The University of Georgia Press, 2nd ed, 1993), 21.

[164] M. Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2nd ed, 2018), 232. Another definition – *ex multiis* – is the one created by J.M. Miller, in 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process' 51 *The American Journal of Comparative Law* (2003), 839: 'the movement of laws and legal institutions between states'. Instead, according to U. Kischel, *Comparative Law* (Oxford: Oxford University Press, 2019), 59: 'A legal transplant occurs when the use of comparative preparatory materials leads legislatures to adopt specific legal norms or institutions from foreign law into their own'.

[165] According to A. Watson, n 163 above, 95: 'transplanting is, in fact, the most fertile source of development'. See also J. Husa, 'Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law' 6 *The Chinese Journal of Comparative Law* (2018), 129-130 and V.P. Hans, '*Trial by Jury: Story of a Legal Transplant*' 51 *Law & Society Review* (2017), 471-472. A very detailed analysis on the history and development of legal transplants research is done by J.W. Cairns, 'Watson, Walton, and the History of Legal Transplants' 41 *Georgia Journal of International and Comparative Law* (2013), 637, 638-696.

Scholarship has found cases of transplants already in the ancient Near East[166] as well as in the following centuries, particularly with regard to Roman law. Today such a phenomenon is absolutely remarkable and evident considering that '*economic development, democratization and globalization have today so sharply increased the number of legal transplants that at least in developing countries, most major legislation now has a foreign component*'.[167]

Moreover, technological progress can be one of the most frequent causes of a legal transplant[168] as it urges the necessity of efficient provisions for new kinds of rights and duties to be regulated.

With specific regard to the subject of this article, it can be noted that there are not many examples of an advanced and detailed regulation like the German one. At the same time, we have just seen that the Italian regulation is at an early stage.

Consequently, we could consider it possible for the Italian legislator to 'copy' German law provisions concerning autonomous and automated vehicles, instead of creating completely new legal provisions. *Prima facie*, such an approach would have some benefits for the Italian legal system: copying (or borrowing) German regulations would save time and costly experimentation (so called 'Cost-Saving Transplant').[169] This way Italy would have the possibility to introduce law provisions which are the result of a great study by German competent authorities and which are – albeit improvable – one of the most complete legal structure on autonomous driving in Western countries.

Also (and especially) for Germany the legal transplant of its rules in a foreign country would bring several advantages. The possibility for Germany to export its regulation in Italy or other countries would be convenient for it. In fact, it has been observed that also the origin country of a legal transplant may benefit from the latter: *eg* the country of origin gains in international prestige in this sector and in this way increases its chances to influence future developments of such regulation. Moreover its companies and firms will more easily have opportunities to create business relationships with commercial partners from the receiving country.[170]

[166] A. Watson, n 163 above, 22-24 and 95.

[167] J.M. Miller, n 164 above, 839-840. See also U. Mattei, 'Efficiency in Legal Transplant: An Essay in Comparative Law and Economics' 14 *International Review of Law and Economics* (1994) 3-4. M. Siems, n 164 above, 242-243, points out that: 'The general picture that emerges is that legal transplants between continental European countries have been fairly common. They did not only concern the positive law, but also the deeper structural levels of the 'legal ocean', such as the relevant legal methods and the use of law in society, often mixing various models. It also helped that European countries share a common history and culture'.

[168] M. Graziadei, 'Comparative Law, Transplants, and Receptions', in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2nd ed, 2019), 442, 457-458.

[169] J.M. Miller, n 164 above, 845-846 and 867-868.

[170] M. Siems, n 164 above, 235; J.M. Miller, n 164 above, 875, underlines the risk that the 'active foreign involvement may limit the recipient's autonomy in future interpretation of the

Furthermore, it should be considered that such transplant may take place not only from Germany to Italy, but also to other countries. In this way Germany would become the European leader in the field of automated driving regulation.

Considering the importance of the automotive industry in Germany, this could have a very significant economic and social impact.

On the other hand, considering now the Italian – or, more in general, the receiving country's – point of view, the legal transplant of the German automated driving regulation may have side effects that have to be taken into account.

In fact, the introduction of a new regulation from another country has to be carried out considering the social and legal environment of the recipient country, in the same way as an organ transplant into a new body has to be performed taking into account the characteristics of the latter.

Simultaneously, we have to reflect on the causes of the current differences between the German and the Italian regulation on automated cars and to consider that they are probably due not only to a greater or lesser sensibility of each legislator for this field, but rather to a different approach to this very peculiar area of human activities and to the will, or the lack thereof, to admit and legitimate certain risks.[171]

Therefore, if we consider the strong historical, social and cultural relation between a certain legal regime and its own country, a 'pure' transplant may also involve some disadvantages for the receiving country. It has to be remembered that

> 'reformers are never writing on a *tabula rasa* but, rather, operate within a complex set of context-dependent particularities – economic, political, social – that have shaped the historical evolution of existing institutions. These particularities affect the nature and scope of feasible institutional reforms'.[172]

Each legal transplant depends much on the relevant legal history[173] and has its own characteristics that can make each one very different from any other.[174] In the same way, the efficiency of a certain legal institution or reform depends on local characteristics.[175] Consequently, legal transplants have not always been successful: While in some cases ('receptive transplants') the foreign laws are

model and even shift interpretation in unforeseen ways'.

[171] As A. Watson points out in 'From Legal Transplants to Legal Formants' 43 *The American Journal of Comparative Law* (1995), 469, 474, it is important to remember 'the importance of comparative law for an understanding of law and society'.

[172] M. Prado and M. Trebilcock, 'Path Dependence, Development, and the Dynamics of Institutional Reform' 59 *University of Toronto Law Journal* (2009), 341, 349-350; J. Husa, n 165 above, 130.

[173] ibid 149.

[174] A. Watson, n 163 above, 17; U. Mattei, n 167 above, 7.

[175] J.M. Miller, n 164 above, 855.

adapted to local conditions and the transplants enable a progress of the receiving legal system, in others ('unreceptive transplants') the provisions have not been able to adapt to the conditions of the receiving country and the transplant attempt failed. This has often been due to a wrong transplant process (like in cases of colonization or other forms foreign norm impositions), which is therefore absolutely important and has to be performed with great care.[176]

A legal transplant or any other reform of existing regulations that ignores the importance of the legal, cultural and social background, the historical development and the institutional interdependencies will probably fail or anyway have a less efficient result.[177]

Moreover, it will not be possible to immediately see the transplant's positive or negative effects, but only when it will be effective in the legal reality, *ie* when the provisions will be applied in practise, together with the pre-existent norms, and interpreted by the competent judges.[178]

In every case the social outcome of a legal transplant is hard to predict,[179] but this is particularly true in the case of an absolutely innovative reform in the field of driving technology which is – as seen at the beginning of this study – particularly bound to the social environment and has a unique interdependency with the culture and the values of a country.

This is absolutely clear if we think about the very complex questions raised by themes like negative externalities mitigation and dilemma situations. That means that the regulation of driving activities is necessarily linked to the ethical and social principles and morals of the relevant country.

Dilemma situations probably represent the most evident example: the setting up of the algorithm that will decide who will suffer the biggest damage may be structured differently from a country to another depending on the different values of each. In fact, no ethical theory or decision is based on an undisputable argument and, above all, ethical value systems change from era to era or from one area to another.[180] As an example, in one country the algorithm

[176] T. Ma, 'Legal Transplant, Legal Origin, and Antitrust Effectiveness' 9 *Journal of Competition Law & Economics* (2013), 65, 67. See also K. Tran et al, 'Negotiating Legal Reform through Reception of Law: The Missing Role of Mixed Legal Transplants' 14 *Asian Journal of Comparative Law* (2019), 175, 208, who point out that 'the first and most important thing that needs to be done is to develop an appropriate legal doctrine in accordance with the legal transplant process'.

[177] The importance of the so called 'legal culture' is extremely relevant, as underlined by J. Husa, in *A New Introduction to Comparative Law* (Oxford-Portland: Hart, 2015), 4: 'Legal culture refers to the special system-specific way in which values and practices and legal concepts are integrated in the actual operation of the legal system. Law is no longer considered autonomous buy intimately connected to its human environment'.

[178] U. Kischel, n 164 above, 61.

[179] J. Husa, n 165 above, 139.

[180] V. Colomba, 'Driverless cars e intelligenza artificiale. Una questione di ordine pubblico: la liceità del brevetto', in S. Scagliarini eds, *Smart roads e driverless cars: tra diritto, tecnologie, etica pubblica* (Torino: Giappichelli, 2019), 87, 89.

could be set with the goal of always saving the youngest possible victims, in others the oldest, in others always the occupants of the vehicle.[181]

That means that – in any case – the introduction of a regulation on driverless cars will represent a legal and social revolution in Italy and therefore it should be carefully carried out.[182]

Moreover in Italy – like in Germany – the driving world has a great importance for its citizens: vehicles are not only used as a tools, but they are also a hobby, a passion and a status symbol.[183] In the same way driving activities are performed by many citizens not only when it is necessary to go from a place to another, but also as a form of a social activity. Buying, having and using cars are characterized by non-negligible psychological and social aspects that cannot be undervalued by introducing a new regulation that will change driving activities as never before.

In light of the above, a 'copy-and-paste' cost-saving transplant of the German regulation on driverless vehicles in Italy may not be the best solution for the Italian legal system and community.

In addition to what is observed above, also the importance of the automotive industry in both Germany and Italy should not be forgotten. It follows that the transplant would probably have effects also on the political and economic scenario, aspects which seem to be absolutely relevant. Also because, as the scholarship has pointed out, once 'a transplant is adopted, political dialogue and legal debate about the transplant will also be influenced by the transplant's origins'.

It is therefore necessary to deepen the questions related to the effective convenience of the transplant of such German regulation in Italy and to find out if it can be considered as more efficient and consequently able to improve the economic performance of the receiving legal system.[184]

Concluding this brief reflection, it is thus my opinion that considering that the German provisions on driverless vehicles have reached a great degree of progress and are the result of an indisputable detailed analysis and research, their transplant would have for sure a positive impact on the Italian regulation, taking into account its embryonic stage. At the same time, there is the risk that such advantages would be limited to a short-term period of time, because it is necessary to consider also the ethical, moral and social values and elements related to the driving activities as well as the possible economic and political

[181] See the very interesting study exploring the moral dilemmas that could be faced by autonomous vehicles conducted by E. Awad et al 'The Moral Machine experiment' 563 *Nature* (2018), 59–75. With regard to the importance of the ethical issues in Germany, see the twenty guidelines proposed by the *Ethik-Kommission Automatisiertes und Vernetztes Fahren*, n 65 above, as well as the literature indicated in the same note.

[182] M. Prado and M. Trebilcock, n 172 above, 366.

[183] G. Calabresi and E. Al Mureden, n 6 above, 21-23.

[184] M. Graziadei, n 168 above, 461.

consequences.

In my view, a better solution would be the creation of a complete regulation at the European Union level, which would probably start taking inspiration from the German provisions but which would also then develop into having as primary consideration the legal, ethical and social issues of all the Member States.

This way, the legal process would be for sure much longer and complicated but at the end it would be possible to have a regulation which would be more complete and competitive than the transplant from one country to another. This is due to the fact that this possible European regulation would consider the difficulties and needs related to each legal system in advance.

Moreover, this kind of regulation could be better coordinated with other EU provisions that necessarily would come into play in connection with the production and use of automated cars, like the ones concerning data protection or product liability. To this it should be added that a single European regulation would ease cross-border legal transactions[185] and simultaneously cause less problems related to the definition of the content and to the description of technical concepts as well as to interpretation of legal issues and especially to their translation, which could represent an important obstacle in a legal transplant.[186]

Furthermore, the chance to have a single regulation on driverless vehicles in the entire European Union would probably have very important effects on the position of the European market and of its companies in the automated driving field in comparison with the other two big players that seem to want to be the relevant future leaders: the United States of America and China. It looks like EU countries have a great opportunity at the moment, especially if we consider the current lack of a single regulation in the United States of America. Consequently, the introduction of EU provisions regulating in a unified manner driverless vehicles and all related issues in the 27 Member States could have a large importance under legal, economic and social points of view.

VII. Conclusions

The above-described reforms carried out by the German legislator intervened in an area that is innovative and rapidly evolving. As a result, the German 'regulatory predictions' cannot be based on the analysis of concrete experience (since automated self-driving cars do not yet circulate on public roads) nor on established technology, because innovation in this sector is quick and constant. Despite these difficulties, the German Government decided to set an initial regulation of the sector to prevent the risk that the technology will find an

[185] U. Kischel, n 164 above, 64.

[186] M. Graziadei, n 168 above, 456-457. With regard to the difficulties related to legal translations see also U. Kischel, n 164 above, 10-12.

obstacle to market deployment in the law.[187] This way, Germany has started to rule higher levels of autonomous driving while international initiatives have as of today proceeded slowly.[188]

The German legislation is far from complete, with regard not only to autonomous vehicles but also to highly and fully automated vehicles and above-summarised law provisions have received several critics.[189] At the same time, automated driving technologies have been recognised for five years in Germany as a legitimate form of automation and non-driving activities during their use are expressly authorised.[190] The aim is to create the conditions for the legally compliant use of highly and fully automated driving systems in road traffic and to help make Germany the world's leading market for this technology.[191]

Such a goal has been furthermore pursued through last year's *Gesetz zum autonomen Fahren*.[192]

It should be clear that the path chosen by the German legislator is as of now limited to Germany. However, it offers greater legal certainty and planning reliability than in other European States and it should create a much more cost-efficient and innovation-friendly legal framework from the manufacturers' point of view. The German scholarship seems to particularly appreciate this innovative approach of the legislator and underlines how Germany with the reform of 2021 has created the world's first comprehensive legal framework regulating SAE Level 4. This legal framework in Germany will continue to exist for the time being and we hope that it will also have an accelerating and stimulating effect on the development of a regulatory framework for autonomous driving functions under EU law.[193]

Indeed, it has been pointed out that the German law provisions – especially because there are still no regulations on autonomous driving at European Union level – could one day serve as a model for a European set of norms regulating driverless vehicles,[194] also taking into account its weaknesses.[195]

At the moment, neither international nor European law currently provides

[187] M.G. Losano, n 1 above, 5.

[188] A. Kriebitz et al, n 28 above, p. 11.

[189] *eg* with regard to the *Gesetz zum autonomen Fahren*, S. Gstöttner et al, n 142 above, 595, see especially fn 24.

[190] M.N. Schubert, n 12 above, 18 and 22.

[191] V. Lüdemann et al, n 24 above, p. 411.

[192] This is clearly stated also in the official website of the Federal Ministry for Digital and Transport at https://tinyurl.com/5ycp58wx (last visited 31 December 2022), where there is a page titled 'Germany will be the world leader in autonomous driving' and where it is written that 'Germany is to play a leading role in autonomous driving. To make optimum use of the great potential inherent in autonomous and connected driving, the Federal Government intends to advance research and development, thereby making the mobility of the future more diverse, safer, more environmentally friendly and more user-focused'.

[193] B. Wolfers, n 2 above, 27 and 31.

[194] M. Brenner, n 59 above, 46.

[195] See *eg* the critical analysis made by V. Lüdemann et al, n 24 above, 411-417.

requirements for the admission and use of driving functions of SAE Levels 4 or 5. The regulation of autonomous driving functions is thus subject to a non-harmonized legal framework that is open to national legislation.[196]

On the other hand, there are gaps and applicative difficulties in the same German regulation. Furthermore, the wording used by the German legislator seems to be partially confused and not perfectly in line with the internationally widespread rating systems.

In other words, it should be noted on one side that German legislator has been and still is the pioneer of the automated vehicles regulation in Europe, on the other one that although the regulations introduced in the StVG with the reforms of 2017 and 2021 can be considered very progressive from a technical perspective, they could be improved and particularly the obligations imposed on the different subjects foreseen by the new law provisions are not always satisfactorily regulated.[197]

From this European perspective, it can be agreed that the German legislative project should not be deemed as an obstacle to European or international harmonisation. On the contrary, it could represent a technical and legal accelerator for a harmonisation at the European and international levels, because probably without the German law on autonomous driving, the absolutely necessary legal harmonisation would have dragged on longer.[198]

A great challenge for the future will in any case be the harmonisation of the automated driving norms of different States and it is still not clear which role will be played by the European Union. This harmonisation task has to be performed already at this initial phase, in order to avoid legal uncertainty and the anti-economical circumstance that a driver has to inform himself or herself first about the regulation of the driverless systems in the destination country and change his or her usage behaviour of the automated vehicle before each border crossing.[199]

Moreover, it should be taken into account that with the deployment of automated and autonomous vehicles also the entire model of liability allocation and insurance coverages will change radically with an increase in product damage coverages and an internal reshaping of risks related to the operation of the automobile. That means that the above-mentioned need of harmonisation will be particularly significant also with regard to insurance regulation. Indeed, as of today the liability insurance regulation is probably the most harmonised one at the European level among insurance norms and the results achieved represent a model for other contexts of supranational integration. Therefore, the European legislator's goal should be to maintain an equally efficient and

[196] B. Wolfers, n 2 above, 27-28.
[197] J. Klink-Straub and T. Keber, n 18 above, 118-119.
[198] B. Wolfers, n 2 above, 32.
[199] J. Klink-Straub and T. Keber, n 18 above, 119.

integrated system with regard also to automated vehicles in order to allow their effective spread and a growing circulation in Europe with a consequent better protection of people's right to move.[200]

Another important issue to be considered is that the use and deployment of automated vehicles will most probably require to change or to adapt the current tort regulation considering that the roles of the owner, user and manufacturer of the vehicle will be significantly different from the ones they have played as of today with 'classic' cars.[201] If this tort law evolution happens at a harmonised Europeanlevel and not at national ones, the possibility of effective success of automated vehicles will drastically increase.

The spread of automated and autonomous vehicles can represent an innovation having a unique social impact. Thanks to them it is likely to have an absolutely significant decrease in road deaths and injuries. Moreover, their commercialisation and use could facilitate mobility of old people and persons with disabilities, reduce pollution and driving costs.[202] In addition to this, also the possibility to carry out the above-mentioned non-driving activities while the automated system is driving and the consequent positive impact on working and social life must be added.

All these great advantages will not be practically 'useful' in the absence of an appropriate international, or at least European, legal framework. The German regulation is probably not perfect, but it is a good place to start.

[200] D. Cerini, n 3 above, 405 and 409.

[201] F.P. Patti, n 45 above, 149-150.

[202] H. Eidenmüller, n 8 above, 770. This is also the intention of the German legislator, see the Bill for amendment of the Road Traffic Act and the Compulsory Insurance Act – Act on Autonomous Driving, available at https://tinyurl.com/2cw6are6 (last visited 31 December 2022), 18.

Essays

Post-Separation Parenting: Contemporary Trends and Challenges

Katarzyna Kamińska*

Abstract

The main aim of the paper is to identify the European legal framework for shared parenting after separation or divorce. The author examines emerging trends in legislation and legal doctrine in Europe with a special focus on non-legally binding instruments relevant to exercising parental responsibility in non-intact families. Then, the author presents the definition and terms of joint physical custody, but also its application in national jurisdictions. Different approaches to shared parenting following separation on the example of Swedish, Italian, Polish, as well as Swiss experiences are presented. This article attempts to answer the question of whether this kind of child arrangement is the prevailing trend in contemporary legal practice. It is also considered whether it would be warranted to make joint physical custody a legal presumption, ie the benchmark for the courts that have dealt with children's matters in divorce and relationship breakdown.

I. Introduction

The social behaviour and attitudes of people, lifestyles, values, and stereotypes, as well as politics and science are changing. This inevitably requires legal evaluation at national and international levels in various fields. One area of law that perfectly reflects social, cultural, and political changes in family law. It is true that at present, in many countries in Europe marriage rates are declining, whereas divorce rates are increasing. Also, many countries experience significant changes in family structure and approach to family relationships. This applies to both intact and non-intact families. Intact family means a family in which both parents reside in the same household. Non-intact family in turn mostly concerns families in which parents are separated or divorcing. In a non-intact family, both parents are not present in the home. The major assumption underlying the legal response to social changes is widely understood equality.[1]It is a current

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[1] G. Douglas, 'The changing concept of 'family' and challenges for family law in England and Wales', in J.M. Scherpe ed, *European Family Law*, II, *The Changing Concept of 'Family' and Challenges for Domestic Family Law* (Cheltenham, UK, Northampton, MA, USA: Edward Elgar, 2016), 22.

challenge for lawmakers to create, develop, and implement reforms promoting gender equality. In recent years, the equal rights and duties of the mother and father have been underlined in the legislation.[2] There is a growing consensus that parents exercise parental responsibility (still commonly called parental authority) jointly. The content of parental responsibility includes personal care of the child, administration of the child's property, and representation.[3] Importantly, parents equally share childcare responsibilities during marriage, and this is continued after divorce or separation. Joint parental responsibility, therefore means that both parents have full parental rights and duties concerning their child.

If joint parental responsibility does not cause much debate in doctrine and judicial decisions, there are some doubts about joint physical custody. Joint physical custody means that both parents have the right and obligation to take care of the child on the daily basis. In the scientific literature, it has also been referred to as joint residence, shared residence or dual residence, because it applies to a practice where the child spends equal or substantial amounts of time in each parent's home after they separate. It is now believed that both parents are equally entitled to take care of the child, which is also reflected in a growing acceptance of joint physical custody in rulings of family courts. It is also a modern trend in recent legislation. Bearing this in mind, it is reasonable to look at joint physical custody from legal and practical points of view. The main aim of the paper is to identify the European legal framework for shared parenting in non-intact families. To fulfil this goal, first specific legal instruments are examined. The starting point is joint parental responsibility because this concept is wider than the concept of joint physical custody. If parents are entitled to exercise joint physical custody, it always means that they both keep parental responsibility, but not the other way around. Then, the regulations for joint physical custody in different European countries are discussed. The legal systems of Sweden, Italy, Poland and Switzerland are investigated. The question is if this kind of childcare arrangement is the prevailing trend in contemporary legal practice.

II. Emerging Trends in Legislation and Legal Doctrine[4] in Europe with Special Emphasis on Non-Legally Binding Instruments

[2] In the paper it is assumed that parents are, in principle, mother and father (woman and man) for simplification purposes. However, in some legal systems parents could be same-sex, eg Sweden and Switzerland.

[3] See, eg Art 95 (1) of the Polish Family and Guardianship Code 1964 (*Kodeks rodzinny i opiekuńczy*, Act of 25 February 1964, initially promulgated in Journal of Statutes 1964, No 9, item 59).

[4] Legal doctrine includes, among others, judicial opinions and views of researchers from the legal academy and from political science departments who conduct research on the law. 'Legal doctrine is the currency of the law', see E.H. Tiller and F.B. Cross, 'What is legal doctrine' 41 *Northwestern University School of Law*, 517 (2006).

No authority at the European level has the mandate to legislate definitely in the sphere of family law. However, some institutions contribute to the evolution of European family law. These institutions can be divided into two groups. The first one consists of the ones that have a direct impact on family law matters, including the European Union (EU), the European Court of Human Rights, and the Court of Justice of the European Union. They establish minimum standards for the respective issues of the law. The second group includes institutions that indirectly affect family regulations, such as the Council of Europe (not to be confused with the European Council, the EU institution), the Hague Conference, and the Commission on European Family Law (CEFL). National lawmakers are realising that they operate in the European context, and are making the rules accordingly. And national courts are making decisions with European legal instruments in mind.[5] In this paper, three non-legally binding instruments were selected for the analysis which seems to be undervalued in the studies. However, it is to be noted that the role in the national legislation of international documents of non-legally binding character has been growing.[6] They are an important attempt to adapt the law to the changes in society, including changing roles and family relationships, and therefore they should not be overlooked in scientific discussions.

Firstly, the impact of the Council of Europe's work on family law should be taken into account. An example is a Recommendation on parental responsibilities which was adopted by the Committee of Ministers in 1984.[7] It was the first international instrument to embrace the concept of parental responsibility.[8] The Recommendation stipulates that parental responsibility is

> 'a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular by taking care of the person of the child, by maintaining personal relationships with him and by providing for his education, his maintenance, his legal representation and the

[5] J.M. Scherpe, 'Introduction to European family law', in J.M. Scherpe ed, *European Family Law*, I, *The Impact of Institutions* n 1 above, 1-3.

[6] The concept of soft law means quasi-legal instruments, such as non-binding resolutions, declarations, recommendations or guidelines created by governments and private organizations, which have no legal force, see B.H. Druzin, 'Why does soft law have any power anyway?' 7 *Asian Journal of International Law*, 361 (2017); A.T. Guzman and T.L. Meyer, 'International soft law' 2(1) *Journal of Legal Analysis*, 172 (2010).

[7] Recommendation No R (84) 4 of the Committee of Ministers to Members States on parental responsibilities (adopted by the Committee of Ministers on 28 February 1984 at the 367th meeting of the Ministers' Deputies).

[8] The first international legally binding document to mention parental responsibility as opposed to parental authority, was the Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.

administration of his property'.[9]

It has been an inspiration for national legislators, in particular concerning the possibility of replacing the legal term 'parental authority' with the term 'parental responsibility'.[10] For example, the Polish legislator has currently the dilemma concerning the accuracy of the term 'parental authority' used under Polish law. It is assumed by the legal doctrine that the need to amend terminology is justified by the need to put greater emphasis on the child's qualities as a subject in its relationships with parents. The term 'parental responsibility' underlines the essence of parental authority, while the currently used expression emphasises what is secondary, namely parental rights.[11]

In addition, it is worth paying attention to principle 2 of the said Recommendation, according to which equality between parents should be respected in any decision that concerns the attribution of parental responsibility or how that responsibility is exercised. In the case of dissolution of marriage or separation of the parents, the competent authority, usually, a court, should rule on the exercise of parental responsibility, eg by dividing the exercise of this responsibility between the two parents or, where they consent, by providing that parental responsibility will be exercised jointly. The Council of Europe Recommendation promotes the adoption of joint parental responsibility as a rule, but not necessarily in the form of joint physical custody.

Another non-legally binding instrument is the Draft recommendation on the rights and legal status of children and parental responsibilities, adopted in 2011, which contains a detailed definition of 'parental responsibility'.[12] According to principle 20, the notion of parental responsibility means 'a collection of duties, rights and powers, which aim to promote and safeguard the rights and welfare of the child following the child's evolving capacities, including health and development; care and protection; enjoyment and maintenance of personal relationships; provision of education; legal representation; administration of property'. Parental responsibility should belong to each parent and the dissolution of parents' marriage, or their separation, should not of itself constitute a reason for terminating this responsibility *ex lege*. Each parent has an equal right and duty to exercise parental responsibility and should be encouraged to do so jointly. Principle 31 of the Draft recommendation stipulates that in cases where parents are living apart, they should agree upon with whom the child resides.

[9] N. Lowe, 'The Impact of the Council of Europe on European family law', in J.M. Scherpe ed, *European Family Law*, I, n 1 above, 99.

[10] See, eg Section 3 (1) of the English Children Act 1989.

[11] J. Słyk, 'The Legal Content of Parental Authority in Polish Family Law' 32 *Prawo w Działaniu*, 94-95 (2017).

[12] Draft recommendation on the rights and legal status of children and parental responsibilities (Meeting Report of the 86th Plenary meeting of the European Committee on Legal Co-Operation, Strasbourg, 12-14 October 2011, CDCJ 2011 15).

Nevertheless, this requirement does not mean that the child's place of residence has to be in one location (either with the mother or father). It is permissible for parents to agree upon a shared care arrangement under which the child lives with each parent for a certain period.

It must be noted that, unlike the previous legal acts or legislative proposals, the Draft recommendation explicitly enshrines joint physical custody as an option for divorced or separated parents. The said Recommendation does not provide details concerning joint physical custody and leaves it to the Member States to choose the most appropriate form and methods for giving effect to such kind of childcare arrangement. This is an important piece of legislation which falls within the context of modern legal developments.

Besides these two soft law instruments originating from the Council of Europe, it is worth discussing the other, but equally valuable, legal instruments. In 2007, the CEFL published the Principles of European family law regarding parental responsibilities as a contribution towards the establishment of European family law. This comprehensive set of rules is based on respect for the rights of the child, and the equality of rights and duties of the parents. In its Principles, the CEFL uses the concept of parental responsibility as 'a collection of rights and duties aimed at promoting and safeguarding the welfare of the child'. They may, in particular, include care, protection and education; maintenance of personal relationships; determination of residence; administration of property, and legal representation. Principle 3:11 provides that parents should have an equal right and duty to exercise parental responsibility and, whenever possible, they should exercise it jointly.

As in the Draft recommendation, the Principles indicate that parents who exercise parental responsibility jointly and who are living apart should agree upon with whom the child resides. More significantly, the child may reside alternately with the parents upon an agreement approved by a court, or a decision issued by a court. Principle 3:20 encompasses practical guidance on how the court should decide on joint physical custody. One should take into consideration, *inter alia*, the age and opinion of the child; the ability and willingness of the parents to cooperate in matters concerning the child, as well as their situation; the distance between the residences of the parents and to the child's school. The CEFL has devoted a relatively large amount of attention to the topic of joint physical custody. However, it is not clear whether joint physical custody should be the rule or the exception to the rule of single physical custody. The starting point in this respect must be joint parental responsibility, which is reflected especially in sharing the decision-making ability (education, medical treatment, religion, and other major life decisions that concern the child), and it should only be the next stage to consider whether to rule in favour of joint physical custody, bearing in mind the specific circumstances of the cases and respecting the principle of child welfare.

The CEFL has analysed and compared the family law approaches of the European countries, resulting in the drafting of non-binding Principles of European family law regarding parental responsibilities. It has proposed several changes which aim to harmonise family law in Europe, but also modernise national regulations regarding family.[13] It is worth emphasising that national policymakers have been inspired by the model legal rules proposed by the CEFL. One example is Norway, where a legislative reform was carried out in 2010 to modernise family law through the introduction of joint physical custody. The Norwegian Child Law Commission was largely guided by the Principles, implementing entirely Principle 3:20.[14]

For the sake of completeness, it appears that non-legally binding instruments should not be underestimated in legal analyses in the field of European family law. Legally binding measures are rather aimed at formulating general rules and broad notions, like parent-child relationship protection, whilst non-binding ones contain detailed regulations on specific legal issues. They govern practical problems, such as joint physical custody. Soft law instruments seem to be more progressive, introducing new legal terminology and notions. Those discussed in this paper have been drafted by nationally renowned experts in family law and developed based on long-term research. Joint physical custody would be very helpful for national courts in their decisions and national legislators when drawing up legislative initiatives.

III. Cross-National Analysis of Joint Physical Custody in Europe

First of all, it is necessary to clarify what joint physical custody is. It requires parents to share decision-making responsibility as in joint legal custody and also requires the child to share his time with parents more or less equally. Joint physical custody may involve alternate large blocks of time (eg half a year with each parent), alternate short blocks of time (eg a week with each parent), or a bird's nest custody, in which the child lives in only one house, but the parents move in and out for various periods.[15] It must be stressed that an alternate child custody arrangement is not always tantamount to each parent obtaining physical custody for the same amount of time.[16] One can ask about custody time limits.

[13] K. Boele-Woelki, 'The Impact of the Commission on European Family Law (CEFL) on European family law', in J.M. Scherpe ed, *European Family Law*, I, n 1 above, 210; K. Boele-Woelki, 'The principles of European family law: its aims and prospects' 1(2) *Utrecht Law Review*,161 (2005).

[14] K. Boele-Woelki, F. Ferrand, C. González-Beilfuss et al, *Principles of European Family Law Regarding Parental Responsibilities* (Antwerpen-Oxford: Intersentia, 2007), 132-133.

[15] The parents take turns living in that house with the child, never at the same time. In other words, mother leaves when father comes home, and father leaves when mother comes home, see C. Cox, 'Joint Custody: Dividing the Indivisible' 3 *Utah Law Review*, 578 (1986).

[16] C. Farris, 'Child Custody: An Overview of Child Custody Laws, Custody Laws in Alabama,

In the doctrine, taking into account the results of empirical research, it is most often assumed that joint physical custody is when the child lives with each parent at least thirty five percent of the time.[17] It is justifiable to put a time limit, and it is derived from the essence of joint physical custody, namely staying with both parents in post-separation child-rearing and maintaining strong relationships, including frequent and continuous contact with children. It cannot involve the child spending only the weekends with one of the parents, as it boils down to spoiling children by entertaining them in expensive places and buying them toys and gifts.[18]

The current trend of many courts is to recognise the importance that each parent plays in the child's life, irrespective of their status *vis-à-vis* each other. Lawmakers are now considering changes to the law that would encourage joint physical custody or make it a default solution even when parents disagree. This applies mostly to countries such as Belgium, France, the Netherlands, and Sweden. There is currently a trend towards shared parenting and continued involvement of both parents in the life of their children after divorce or separation. These countries conduct effective family policies which encourage to division of parental responsibilities fairly and equally, regardless of whether the parents are married or living together. In other jurisdictions, a shared residence order is theoretically possible but is relatively rarely used in practice, eg in the Czech Republic, Germany, Italy and Poland. This may result from the fact joint physical custody is the subject of much judicial scepticism and criticism from some academics.[19] Many still believe that it is the mother that is more necessary or plays a role that is more important than the role of the father in their infants' or toddlers' lives, and children can grow up without a father. This refers to the 19th-century American common law principle that mothers should automatically have custody of their children in the event of divorce. The tender years' doctrine has implied a presumption of maternal custody for children aged

and a National Trend towards Shared Parenting' 41(1) *Journal of the Legal Profession*, 162 (2016).

[17] L. Nielsen, 'Shared Physical Custody: Summary of 40 Studies on Outcomes for Children' 55(8) *Journal of Divorce & Remarriage*, 614-636 (2014).

[18] M.A. Kipp, 'Maximizing Custody Options: Abolishing the Presumption against Joint Physical Custody' 79(1) *North Dakota Law Review*, 70 (2003).

[19] See, eg NálezÚstavníhosoudu ze dne 15.03.2016, Právoobourodičůpečovat o dítě a podílet se najehovýchově v zásaděstejnouměrou (III. ÚS 2298/15-1); K. Holásková, 'Experiment střídavá péče: rodiče dělají základní chyby, ženou dítě do záhuby', available at https://tinyurl.com/2tsc7yc5 (last visited 31 December 2022); Corte di Cassazione 29 March 2012 no 5108, *CED Cassazione*; F. Giardini, 'Joint Custody of Children on Separation and Divorce: The Current Law in Italy: An Overview of the Law and How It is Applied' *International Survey of Family Law*,237 (2014); H. Sünderhauf-Kravets, *Wechselmodell: Psychologie - Recht - Praxis: Abwechselnde Kinderbetreuung durch Eltern nach Trennung und Scheidung* (Wiesbaden: VS Springer Fachmedien, 2013), 61; wyrokSąduNajwyższego z dnia 21.11.1952 (C 1814/52, OSNCK 1953/3/92); W. Stojanowska, 'Porozumienierodzicówjakoprzesłankapozostawieniaimobojguwładzyrodzicielskiej po rozwodzie' [The agreement between parents as a condition to exercising parental authority over a child after divorce] 6(821) *Acta IurisStetinensis*, 306 (2014).

four and younger.[20] This leads to the conclusion that fathers are still considered second-class parents and are very often excluded from the daily life of the child.

It is worth comparing different approaches to shared parenting after divorce on the example of Swedish, Italian and Polish experiences. For the sake of completeness, the Swiss legal solutions for joint physical custody will be discussed also. First, Sweden adopted joint parental responsibility preference after divorce as early as 1976. The Children and Parents Code[21] clearly states that even if the child's parents divorce, the main rule is that the child will remain under custody (*vårdnad*) of both parents.[22] So far, there has been no legal presumption in favour of joint physical custody. The welfare of the child is the decisive factor in all decisions concerning custody, residence and contacts.[23] In Sweden, the rise in joint physical custody has been significant, rising from one per cent of children with separated parents in the 1980s to forty per cent in recent years.[24] The Swedish experience of shared parenting in the post-divorce context demonstrates that it is important to promote equal shared parenting even before the parents' relationship breaks down. There is a perception that children benefit most when parents are actively engaged in their lives through a wide range of daily activities. Both parents feel responsible for providing the day-to-day childcare, including measurable tasks, like feeding, clothing, arranging for medical and dental care, education, recreation, etc.[25] The fact that childcare responsibilities are, as far as practicable, equally shared between the father and the mother in an intact family is considered acceptable in society. It is therefore not surprising that equality between parents must be guaranteed in the case of divorce as well. Swedish parents are more likely than parents in other countries to exercise joint physical custody of their children. In the case of divorce, they also tend to live in nearby neighbourhoods so the distance between their residences is relatively small.[26]

In 2006, the Italian legislature replaced the preference for sole parental custody with the preference for joint parental custody.[27] The current rules guarantee the preservation of the exercise of parental responsibility by both

[20] S. McCall, 'Bringing Specificity to Child Custody Provisions in California' 49 *Golden Gate University Law Review*, 153 (2019).

[21] Act on the Children and Parents Code (*Lagen om Föräldrabalk*, SFS 1949:381).

[22] J. Stoll, 'Legal Relationships Between Adults and Children in Sweden', in J. Sosson, G. Willems and G. Motte eds, *Adults and Children in Postmodern Societies. A Comparative Law and Multidisciplinary Handbook* (Cambridge-Antwerp-Chicago: Intersentia, 2019), 518-519.

[23] See sec 6:2 a of the Swedish Children and Parents Code.

[24] M. Bergström, B. Modin, E. Fransson et al, 'Living in two homes - a Swedish national survey of wellbeing in 12 and 15 year olds with joint physical custody' 13 (868) *BMC Public Health*, 1 (2015).

[25] K.T. Bartlett, 'Prioritizing Past Caretaking in Child-Custody Decisionmaking' 77(1) La*w and Contemporary Problems*, 49 (2014).

[26] E. Fransson, A. Hjern and M. Bergström, 'What Can We Say Regarding Shared Parenting Arrangements for Swedish Children?' 59(5) *Journal of Divorce & Remarriage*, 349-350 (2018).

[27] F. Giardini, n 19 above, 230.

parents, even when their relationship breaks down.[28] This also follows from Art 30 of the Italian Constitution, since 'it is the duty and right of parents to support, raise and educate their children, even if born out of wedlock'.[29] Under Italian law, the value of the right of the child to maintain a relationship not only with both parents but also with closer or more distant relatives (eg grandparents, cousins) is emphasised.[30] Joint physical custody is legally accepted and consists in spending part of the time with each parent, through the child's alternate residence in each parent's home, or the alternate residence of both parents in their former common home. Nonetheless, this kind of childcare arrangement is not viewed as a starting point in children's matters. It is not applied, and the available data shows that most children of divorced parents continue to live with the mother and visit the father at weekends or during holidays.[31]

It is worth noting that the Polish regulations governing parental responsibility resemble the solutions adopted by the Italian legislature. For several years, family law has evolved towards increasing the involvement of both parents in parenting after divorce.[32] The Family and Guardianship Code provides for the possibility of retaining full parental responsibility of both divorced (also factually or legally separated) parents, including the possibility for the court to rule that parents have physical custody periodically.[33] When deciding on child custody, the court should take into account the child's right to be raised by both parents but, most of all, the best interests of the child. The starting point is a joint parental responsibility, which in practice means that both divorced parents have the legal authority to make major decisions for the child. However, there is no presumption of joint physical custody that would provide for equal or almost equal time for the child to spend with both parents. The rule of being raised by both parents is fairly general so it can take many forms, and each childcare arrangement must be following the principle of child welfare, even if it leads to a traditional sole physical custody order.[34] Joint physical custody is very rarely

[28] See Art 315-*bis* ff of the Italian Civil Code.

[29] F. Giardini, 'Unification of Child Status and Parental Responsibility: The Reform of Filiation Remodels the Family in the Legal Sense in the Italian Legal System' 1 *Interdisciplinary Journal of Family Studies*, 4 (2017).

[30] G. Tamanza, S. Molgora and S. Ranieri, 'Separation and Divorce in Italy: Parenthood, Children's Custody, and Family Mediation' 51 (4) *Family Court Review*, 558 (2013).

[31] S. Stefanelli, 'Legal Relationships Between Adults and Children in Italy', in J. Sosson, G. Willems and G. Motte eds, n 22 above, 358-359.

[32] A. Grabowska, 'Zmiany w zasadach orzekania o władzy rodzicielskiej przy rozwodzie wprowadzone ustawą z dnia 25 czerwca 2015 r. o zmianie ustawy - Kodeks rodzinny i opiekuńczyoraz ustawy - Kodeks postępowania cywilnego' (Changes in the rules for adjudicating on parental responsibility after divorce, introduced by the Act of June 25, 2015 amending the Family and Guardianship Code and the Code of Civil Procedure), in M. Andryszczak, R. Badowiec and D. Gęsicka eds, *Prawo - rodzina - praca (Law - family - labour)*, (Toruń: Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, 2017), 103.

[33] See Art 58 (1) and 107 (1) of the Polish Family and Guardianship Code 1964.

[34] M. Habdas, 'The Evolution of Joint Parenting in Poland: The Legal Perspective on

used in Poland. Even if both parents have full parental responsibility, only one parent is the child's primary carer, ie the parent with whom the child lives. Studies show that around ninety per cent of primary caregivers are mothers, and only 10 per cent are fathers.[35] It appears that knowledge about the essence of joint physical custody and the experiences of other jurisdictions in this respect is still insufficient in Poland. Polish courts lack empirical studies showing how to use shared residence in practice. Above all, there is a need to change the stereotypical views on such an alternate child custody arrangement. It does not necessarily have to be symmetric custody, because just thirty-five per cent of the time with each parent is enough to take care of the proper development of the child.[36]

Also, it is necessary to pay attention to Switzerland and its extensive jurisprudence in the field of shared parenting, which can provide practical guidance to other jurisdictions. In Swiss family law, both parents exercise, as a rule, parental responsibility (*Gemeinsame elterliche Sorge*). A joint parental responsibility order does not necessarily mean that they are entitled to exercise physical custody jointly. According to Art 298, Section 2-*ter*,[37] the court should consider,

> 'concerning the child's best interests, (…) the possibility of the child residing with both parents on an alternating basis, if this is requested by one of the parents or by the child'.

The primary prerequisite for joint physical custody is always the child's well-being.[38] Moreover, the Swiss Federal Supreme Court established criteria that should be examined before the court's ruling on the shared residence is issued. These criteria include parenting skills; distance between the parents' homes; ability and desire to cooperate; model of childcare before the relationship breakdown; the possibility of a parent to care for the child personally; the age of the child; the child's relationship to siblings; general embeddedness in the social environment; the child's opinion.[39]

There are a few aspects that need to be highlighted in assessing joint physical custody. First of all, according to the latest research, most children in joint physical custody reported better outcomes than children in predominantly single-parent custody, including physical health and stress-related illnesses, as

Lessons Learned and Still to Be Learned' 33 *International Journal of Law, Policy and the Family*, 346-347, 351-352 (2019).

[35] M. Fuszara, 'Divorce in Poland' 2(12) *Societas/Communitas*, 221 (2011).

[36] L. Nielsen, 'Shared Physical Custody: Does It Benefit Most Children?' 28(1) *Journal of the American Academy of Matrimonial Lawyers*, 198 (2015).

[37] Swiss Civil Code of 10 December 1907 (*Schweizerisches Zivilgesetzbuch*).

[38] A. Jungo and L. Rutishauser, 'Legal Relationships Between Adults and Children in Switzerland', in J. Sosson, G. Willems and G. Motte, n 22 above, 558-559.

[39] Bundesgericht, 142 III 612 vom 29, September 2016.

well as psychological, emotional, and social well-being.[40] One argument frequently used by opponents of shared residence is that it results in instability in children's lives. Nevertheless, according to the researchers, it is exactly the opposite. Shared residence leads to stability because it usually resembles the model of living enjoyed before the relationship breakdown.[41] Moreover, an alternate child custody arrangement is beneficial as it provides the child with ongoing contact with his parents. It may lead to an increase in the quantity, but also quality, of the time, spent together. It could result in better communication with both parents by mitigating the stress factors related to divorce, like the economic hardship and time constraints arising from single parenthood. The cost of child maintenance is likely more equally divided between parents in shared residence than when the non-residential parent pays alimony and child support to the residential parent.[42] Joint physical custody fits into the ideology of gender equality and shared parenting, moving away from the concept of the 'winner takes all' that has been rooted in custody disputes. Sole custody often creates an adversarial forum which forces parents to fight for full custody of their child. Whether she or he believes it or not, a parent is forced to point out every single imperfection and flaw in the other parent's character, in hopes of increasing their chances of winning the case.[43] Child custody is a zero-sum game, there is no 'winner' or 'loser'. Parents must be and, in the event of divorce or separation, remain partners, not adversaries, in issues about the child.

On the other hand, joint physical custody is not a panacea for all post-divorce parenting cases and the court should not automatically make such a determination, because the individual needs and circumstances of each family are different. The court is required to issue a ruling that takes into account the welfare of a particular child to the greatest extent possible. Some European legislators are now considering whether to change their family norms and adopt a statutory presumption in favour of shared residence. However, it is questionable whether this arrangement always protects the welfare of the child. Applying for shared residence by default might entail risks associated with a long-lasting parental conflict, domestic violence, the physical distance between each parent's home and the difficulty in transporting the child between homes, the child's special needs, etc.

Practice and research show that not all parents are candidates for joint

[40] L. Nielsen, 'Shared Physical Custody: Does It Benefit Most Children?' 28(1) *Journal of the American Academy of Matrimonial Lawyers*, 113 (2015).

[41] N.M. Schave, 'Best Interests of Minnesota: Adopting a Presumption of Joint Physical Custody' 33(1) *Hamline Journal of Public Law and Policy*, 186 (2011).

[42] T. Bjarnason and A. Arnarsson, 'Joint Physical Custody and Communication with Parents: A Cross-National Study of Children in 36 Western Countries' 42(6) *Journal of comparative family studies*, 20-21 (2011).

[43] N. Lapsatis, 'In the Best Interests of No One: How New York's Best Interests of the Child Violates Parents' Fundamental Right to the Care, Custody, and Control of Their Children' 86(2-3) *St. John's Law Review*, 709 (2012).

custody. The parents who demonstrate serious impairment of adult functioning over time, ie marital relationships characterised by ongoing conflict and violence, are probably poor risks for managing joint custody.[44] A shared residence is most beneficial for children when the level of parental conflict is low, and when both parents can communicate and cooperate.[45] D.J. Miller presents a sample of the distances that presently separate parents engaging in joint physical custody with a rotation cycle of fewer than two weeks:

> 'across the street, on the same block, within walking distance, twelve blocks apart, in the same school district but a different neighbourhood, in adjacent suburbs, a 30-minute car ride away, and a 90-minute car ride away'.[46]

The geographic proximity of parents after divorce or separation is the practical aspect of joint physical custody. Hence, it would seem advisable to treat joint physical custody as an option, and its application is to remain, in fact, at the discretion of the court.

IV. Conclusions

Until recently, there was no doubt that when parents divorce or separate, the child would reside with one parent that has full parental responsibility. At present times, parents share responsibility, irrespective of whether they live together and irrespective of whether they ever lived together. In several national jurisdictions, this approach obliges the court to consider joint physical custody as an option in cases of divorce. The child has the right to maintain a loving, meaningful relationship with each parent. Both divorcing or divorced parents should remain responsible for raising and caring for the child, and shared residence could be the best possible way to achieve this.[47] However, national rules on the parent-child relationship should be structured both to promote co-parenting from the time of the child's birth and to reinforce the parents' overall relationship. If the regulations are so structured, like in Sweden, then shared parenting becomes a reality for more parents even without a legal mandate.[48] While currently there is a discussion in the doctrine and jurisprudence about the primacy of the mother and, on the other hand, gender equality in post-

[44] B.W. Ferreiro, 'Presumption of Joint Custody: A Family Policy Dilemma' 39(4) *Family relations*, 424 (1990).

[45] Corte di Cassazione 19 June 2008 no 16593, *CED Cassazione*; Corte di Cassazione 17 December 2009 no 26587, ibid.

[46] D.J. Miller, 'Joint Custody' 13(3) *Family Law Quarterly*, 389 (1979).

[47] K. Boele-Woelki, n 13 above, 222.

[48] M.H. Weiner, 'Thinking outside the Custody Box: Moving beyond Custody Law to Achieve Shared Parenting and Shared Custody' 4 *University of Illinois Law Review*, 1537 (2016).

divorce parenting, the issue of sharing parenting duties between mothers and fathers (and work-family balance) within the intact family is often overlooked. Therefore the advocates of adopting joint physical custody as the preferred normative model for post-separation family life should consider how it was working in the intact family in the first place.[49]

The institutions, such as the Council of Europe, and the academic initiative of the CEFL, appear to have a considerable and growing impact on European family law. The national legislature is inspired by the work of these institutions. Therefore, the conclusion is that the Council of Europe recommendations and the CEFL Principles are not only black letter law but also well-functioning practice (law in action). The Recommendation on parental responsibilities, the Draft recommendation and the Principles support the joint exercise of parental responsibility. It is certainly a positive trend. If both parents agree to joint responsibility, there is no winner or loser in a custody battle. Both the mother and father keep parental rights and do not have to prove that the other person is an unfit parent. All of these legal instruments also mention, directly or indirectly, shared residence. However, none of them decides whether such an arrangement should be the rule or the exception. They provide only that joint physical custody is one of the child arrangements that national legislation should at least allow.

[49] S. Harris-Short, 'Building a house upon sand: post-separation parenting, shared residence and equality - lessons from Sweden' 23(3) *Child and Family Law Quarterly*, 362, 369 (2011).

Essays

On Fundamental Rights and Common Goals: At Home and Abroad

Gianluigi Palombella*

Abstract

The article addresses the understanding of 'fundamental' rights and their relations to public goals. Do fundamental rights need to stand in stark contrast against the public goals normativized within a legal order? The question is relevant in different ways in the State and in the inter- and supra- national setting. By referring to a notion of 'fundamental' rights, the first part deals with the institutional (dis-) embeddedness of rights in the domestic legal orders, an issue which features in winding interpretive paths *vis à vis* public goals. A second part asks how the relation between rights and goods can fare beyond the State domain, taking into account the main legal transformations of the international contemporary legal fabric and some of its 'community'- related commitments.

I. Introduction

In times of human rights talk, a further candidate worthy of legal protection has rapidly taken the scene, that is, global public goods. For many aspects, environmental concerns are well witnessing the relentless emergence of the notion of the 'good' which spans interests and values deemed common to all peoples.

It is useful to reconsider how our more familiar and domestic view of the relation between fundamental rights and common goals has been intended in the evolving institutional narrative of our legal orders. The pre-understanding of their opposition or disconnection is mainstream in the Western constitutional history, starting at least from the thrust of the American Constitution and *mutatis mutandis* up to the present time neo-liberal view of rights.

Although common goods, public goods, global concerns are notions with distinct meanings and scope, they all seem to require a further assessment of such 'received' lines of thought. There is much to be clarified concerning the relations between human or fundamental rights and the legal understanding of some global good(s). First, it is crucial to see what it really means to assume that a right is fundamental in a legal order, and whether or not that connects to the very idea of pursuing common goals. Second, how the answer to the latter question works beyond the familiar domain of domestic orders, in the wider extra-states arena? Not least, for instance, is the question whether the present

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need to oppose and reduce climate change, to preserve or enhance environmental integrity, to respect future generations and prevent disastrous consequence, would best be served by resorting to rights or to the idea of the global public goods as efficient legal notions. Indeed, one intuition would find it obvious that the environment is a common good of some kind as well as a right (we (should) hold a right to a healthy environment), either at home or abroad.

However, in some sense, the two things should be seen as pointing to different conceptual domains. Of course, the narratives and the grounds are different:[1] one thing is to protect a good on the ground that it enjoys a collective priority, a different thing is to protect it on the ground that someone, or many, have a right to it.

For example, to future generations, the preservation of the environment looks a matter of justice, implied by the very rights of future generations, including what we owe to their survival regardless of whichever notion of the common good we think to presently choose. Needless to say, it would be difficult to convey a common good universalized conception, say, univocally shared between the Global North and South. That notwithstanding, on the global side, beyond human rights claiming, there are global public goods, known as non rival and not excludable, that we are to protect, due to some grounding assumptions, be they the ethics of the universal humanity needs, or the ethics of responsibility towards poorer peoples, or even more basically, the mutual interests that all happen to share, for example *vis à vis* some factual threats to human life, such as climate change, or pandemic and disease, the two most recently acknowledged ones. Therefore, working conceptions fit to states' driven scenario are to confront different hurdles onto the global dimension.

I will first deal with a general question concerning legal rights in the State traditional dimension. Do fundamental rights stand in stark contrast against the goals normativized within a legal order? What happens if we ask the same question in the legal international dimension? Global public ends surface as much as human rights as covered by legal instruments. In the state setting, that is, within the domestic domain, rights and public goals have been often put in a conflictual relation, while in truth they might be conceived of in a converging path. The way toward the latter can be made to rest upon an institutional idea of rights, and in particular of those rights that are, as a matter of fact, deemed to be 'fundamental' in a legal order. I will follow the winding road of institutional (dis-) embeddedness of rights. In a further section I will take into consideration whether global public goods and rights beyond the State can benefit from such recognition.

[1] Cf S. Cogolati, 'Human Rights or Global Public Goods: Which Lens for Development Cooperation' (13) *Manchester Journal of International Economic Law*, 334-356 (2016).

II. Rights and Public Goods' Understanding

Spanning older and new emerging rights, the tussle between public interest and individual liberal and neo-liberal advocates, often forgets some conceptional drifts that have been and still are at stake, beneath the assessment that interpretive accounts within a legal order provide. I will trace and recall some pivotal questions referring to the returning opposition between common goals and individual liberties and safeguards, questions that rest on a divide of which constitutional reasoning should better be fully aware.

At the level which corresponds to primary public goals, as I submit, the relevant rights are 'fundamental' rights. As I will surmise, for a right to be fundamental in a legal system it has to play a special role as a validating criterion, working as a rule of recognition for the legality and constitutionality of any positive norms. At the same time, this quality and status of 'being fundamental' in a legal order would imply a full-fledged institutional account of rights, one that is often at odds with some liberal understanding of them as somehow unfettered by the sovereign jurisgenerative power, and indeed just curbing and limiting its exercise. The concept of fundamental rights requires of us to come to terms with such views and to restate the understanding of their reconciliation.

The legal systems can protect rights and even qualify rights as 'fundamental' by providing for their guarantees, and by allowing some of them to have a special place or define their functional role in the institutional organization of law.[2] This was not fully true in the legal logics of the pre-constitutional European State, also called the 'legal State' of the time (*Estado de derecho*, *Rechtsstaat*, *Etat de droit*): the legal system, historically, was institutionally organized in ways that were not focused upon awarding rights a true recognition as bearing 'intrinsic value' worth of legal protection *per se*.[3]

Even from a legal point of view, having a value of one's own means primarily not being derived from other values; receiving consideration not just as the tool of an ulterior, pre-eminent objective, but through being vested with

[2] See this conception of fundamental rights in G. Palombella, 'Arguments in Favour of a Functional Theory of Fundamental Rights' 3(14) *International Journal for the Semiotics of Law*, 299-326(2001), also confronting (and diverging from) different theories like that of G. Peces Barba, *Curso de Derechos Fondamentales. Teoria general* (Madrid: Ediciones de la Universidad Complutense, 1991) and the ('extensional' or universality dependent) notion of 'fundamental' originally exposed by L. Ferrajoli, 'Diritti fondamentali'*Teoria politica*,1998/2, Engl. transl., 'Fundamental Rights'1(14) *International Journal for the Semiotics of Law*, 1-33.

[3] On the definitional features of the Rule of law as distinct and different from the European continental conception of the *Stato di diritto*, *Estado de Derecho*, etc, cf G. Palombella, 'The Rule of law as an institutional ideal' 1(9), available at https://tinyurl.com/bdh6kf54, 4–39 (2010). For an 'application' of the rule of law conception see G. Palombella, 'Illiberal, Democratic and Non-Arbitrary? Epicentre and Circumstances of a Rule of Law Crisis' 1(10) *Hague Journal on the Rule of Law*,5–19 (2017).And also G. Palombella, 'Two Threats to the Rule of Law: Legal and Epistemic (Between Technocracy and Populism)' 11(2-3) *Hague Journal on the Rule of Law*, 383-388 (2019).

'weight' and 'merit' of its own. If the intrinsic value of rights indicates on the axiological plane that they cannot just depend on the importance of something else, then on the institutional plane it should have implied at least that they should exist legally in some standing that would shield them *vis à vis* the contingent whim and purview of a legislative *fiat*: that is, the everchanging, discretionary will of the majoritarian legislator (the sovereign). Yet, such institutional protection coupled with no dependency upon the legislative will was not the case in continental Europe (in the 'legal State' of continental Europe major countries before the II WW). As long as the very 'recognition' of rights depended on legislation, as a matter of fact, the legal existence of rights remained strictly decided by the will of the sovereign, so that individual rights were lacking an independent, self-standing normative source and scope.

The relative independence of rights *vis à vis* legislation is instead a concept that can certainly be traced back, at least in principle, to the Anglo-Saxon tradition: despite the supremacy of Parliament as the ultimate normative source, a competition flourished among the established power, the Courts, the common law, since the medieval England to the modern history of the Bill of Rights, and on a line bringing us to the ideas of public law propounded by the A.V. Dicey: A consistent legal representation of the intrinsic value of (some) rights was achieved due to the assumption of rights' 'independence', ascribing to them a *raison d'être* external to the state and certainly autonomous, of the deliberations of the Parliaments (and today, of the people, or democratic 'majorities'). What A.V. Dicey wrote of the rule of law in the English setting aptly phrases the state of the art:

> '(W)ith us...the rules that in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of the individuals, as defined and enforced by the Courts.'[4]

Although that should be taken as a necessary premise for an independent (of the sovereign will) recognition of rights, however, a further question arises. Such form of recognition has fostered an anti-institutional conception. Paradoxically, that paves the way to disentangling individual rights from political institutions, leading to the dichotomy, often stressed in the last decades by liberal authors (as we will see later, like Ronald Dworkin), between individual rights as a matter of individual justice on one side and on the other the jurisgenerative sources in the domain of political majorities pursuing collective goals and the common weal.

Legislative institutions bear the task of deciding collective ends, and in short, the pivotal policy orientation of the legal order, thereby defining what is deemed normatively worthwhile in their jurisdiction. Whereas the issue of what possesses an ultimate value for a determined legal system, ie proves legally

[4] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan and Indianapolis: Liberty Classics, 8th ed, 1915, Reprinted 1982), 21.

'fundamental' for it, depends on the choices actually made by institutional actors (in turn depending on their ethical and political convictions), the separation between the goals of a polity and the right of the individuals puts rights defense purposively outside the political realm. In the basic background of the American Constitution, checks and balances are to constrain the public powers. A paradoxical anti-institutional nature of rights is not out of sight, if for example we think of rights just as separate and independent limits to the normative exercise of sovereign authority.

Such a dichotomy can be explained. In general, having an intrinsic value for fundamental rights has been intended to mean that such rights should be placed outside the purview of the sovereign. Hopefully, they cannot be overridden by the State and its public institutions. The ultimate property of rights of this kind is seen to oppose the expansive force of public decision making: such a property is mainly due to the fact that they are somehow pre-positive and pre-political, or in a second version, they should not be simply depending on ordinary legislation. Of course, and especially in that second version, the assumption may certainly be accepted – and put in practice – in constitutional systems. However, the question arises whether fundamental rights are necessarily incompatible with the goals of public institutions.

Contrasting institutions vs rights, entails a 'defensive' view of rights, treating them as clearly distinct, following Carl Schmitt, from 'legal goods' (and goals).[5] As it seems, this correspondence between rights that have intrinsic value and the 'defence' of individuals against power, dominates the evolution of the conceptions of rights, as coined in a sustained strand of the western legal and political theory.

Public goods, with Carl Schmitt, are a more 'earthy' category to which allegedly fundamental rights cannot immediately belong. One can define such a situation as the institutional dis-embedded-ness of fundamental rights. This became, ironically, their safe harbor.

As it is known, Ronald Dworkin interpreted such circumstances as the basis for the priority of rights. Rights are seen as the task of the judiciary, while public goals belong to politics and legislation. Therefore, the distinction strictly matches the separation of powers. The goals, the purposes relative to the 'common weal' are the competence of the political process (of policies), which should have no bearing on rights to be adjudicated by the judiciary. Arguments of principle sustain rights while they exclude the application of arguments that

[5] In his *Verfassungslehre*, even Carl Schmitt wrote that the 'scientific utility' of a concept such as that of fundamental rights holds, in a bourgeois state governed by the rule of law, if it is established that 'fundamental rights are only those rights that may apply as pre- and supra-state rights and that the state does not concede by virtue of its laws, but recognizes and protects as pre-existing (…) (I)n their substance, therefore, they are not legal goods, but spheres of freedom, whence rights and precisely rights of defense derive' (C. Schmitt, *Verfassungslehre*, Sechste, unveränderte auflage (Berlin: Duncker & Humblot, 1983), 163).

establish a collective goal.[6] One collective purpose encourages 'trade-offs of benefits and burdens within a community in order to produce some overall benefit for the community as a whole';[7] while on the other hand 'It follows from the definition of a right that it cannot be outweighed by all social goals'.[8] After all, as United States constitutionalism includes a Bill of Rights, it 'is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest'.[9] The fact that rights must be guaranteed even *vis à vis* the democratic process is taken for granted, because 'decisions about rights against the majority are not issues that in fairness ought to be left to the majority'.[10]

Although the safeguard of rights' intrinsic value is necessarily starting from their normative independence from the whim of the political majority and given for granted that the judiciary is actually a countervailing power capable of protecting rights against the assaults from the legislator, nevertheless rights are still legal norms, and their protection belongs to the responsibility of the judiciary as well as of the legislator. The protection of rights is not so much a responsibility of the judges but seems to depend on the development of a functioning polity and is in any case woven intimately into the same fabric.

If rights must have an intrinsic value, also institutionally, they must be conceived for what they are, as part of a 'positive' project for affirming goods (pertaining to individuals or groups) and the values they include. This conclusion appears to be the most suitable for applying tools dealing with the more complex contemporary situation. For in the contemporary framework civil and liberty rights and political rights are flanked firmly not only by social rights, but also by rights of the fourth and fifth generation, which include peace, solidarity, safeguarding the ecosystem, the rights of the planet's future inhabitants, the rights arising in relation to the use of biotechnologies and so forth; but this is not all, for even the 'oldest' civil and political rights are now acquiring quite unprecedented (and anything but negative) profiles, by virtue of the changing circumstances in which they attain to a new meaning and in which they have to be guaranteed. This has consequence also on the 'external' legal relations. In many inter-orders confrontations, a vision of human rights propounded through internationalist ideals in defense of peace since 1948, is seen to be balanced and re-interpreted in the light of domestic and 'national' elaboration in their own terms of rights as the outcome of a cultural or 'constitutional' prerogative. Recent events can be read in the same line: for example, the famous and recurrent statements of the German Constitutional Court *vis à vis* the European Union,

[6] R. Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth & Co Ltd., 1978), 90.
[7] ibid 91
[8] ibid 92
[9] ibid 133
[10] ibid 142

from the Maastricht to the Lisbon Treaty, to the criticism against the European Central Bank and the European Court of Justice (the PPSP judgement)[11] are part of the trajectory. The same, *mutatis mutandis*, holds with the European Convention of Human Rights, that has finally resolved to make the doctrines of the Member States' margin of appreciation and that of subsidiarity a legally binding method of assessing the Convention's rights.[12] New dimensions of legal arguments develop generating a dialogue if not a contestation to be arbitrated between abstract or pre-political rights and fundamental rights as rooted in one's system fabric. The same issue of rights' defense might emerge from one legal order vs another eg, in the even wider arena of the United Nation security system.[13]

What we have here is a qualitative leap: a necessary emancipation from that slightly deforming and outdated perspective which holds that rights on the one hand and on the other the common weal belong to different vessels, each of whose levels can only rise if that in the other falls: in other words, it is not a game between contradictory opponents, each of whose sole purpose is to deny the other.

III. More on Being 'Fundamental'

If the foregoing stands as a reminder of the necessity for rights to be embedded in the institutional goals of a polity, the reverse holds true as well: It has actually been observed that the importance of certain 'collective goods' can also be protected from a liberal perspective, that is, one concerned mainly with the individual freedoms and welfare:

> 'Liberals should be concerned with the fate of cultural structures, not because they have some moral status of their own, but because it's only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value'.[14]

The questions of the priority of Right (meant as fairness and non-interference *vis à vis* individuals' sphere) over the Good (meant as the ideas of well-being that can be collectively supported) as well as that of individual rights over collective goals tend to resemble each other. In the evolution of liberal

[11] BverfG, 2 BvR 859/15, 05 May 2020 (PSPP), BverfG Cases 2 BvR 2134/92, BverfG 2 BvR 2159/92 (Maastricht), 2 BvE 2/08 (Lissabon).

[12] See the Protocol 15 of the European Convention on Human Rights.

[13] One good example, among many though, is the appeal to constitutional rights with which the Italian Constitutional Court (2014) dismissed a decision of the International Court of Justice (*Germany* v *Italy*, 2012). Cf G. Palombella, 'German war crimes and the rule of international law' 3(14) *Journal of International Criminal Justice*, 607–613 (2016). And a similar discussion in G. Palombella, 'Senza identità: Dal dirittointernazionalealla corte costituzionale tra consuetudine, *jus cogens* e principisupremi' *Quaderni Costituzionali*, 815-830 (2015).

[14] W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989), 165.

rights, their normative status thought of as eluding any political substance, is possibly more legendary than real.

Admittedly, different traditions have shown variable paths. As an example from early 20th century American constitutional doctrine, rights proved to be successfully defined by the courts regardless of the ethical and political goals advanced by legislation: think of how the doctrine had a clear and famous test with the *US Supreme Court Lochner* v *New York* case in 1905, when the fundamental right of contractual freedom was held to prevail over a statute limiting the number of weekly working hours. The constitutional rights held in the Lochner era were contractual freedom and property. It was an idiosyncratic way to assert the priority of the Right over the Good, in the sense that 'certain individual rights prevailed against legislative policies enacted in the name of the public good'.[15]

In the subsequent decades, the question of the priority of Right over the Good took alternate interpretations, or at least the Constitution was not compelled to stand only as the bulwark of a conception based on the free-market rights and the absolute priority of property.

The element that determined the contrast between liberals and communitarians, famously started in the 1980s-1990s of last century, resided in the fact that for one group it is individuals and the rights of freedom that have ultimate value, while for the other it is the community, its conceptions of goodness and its collective goals. When constitutional seasons, after the II WW, spread throughout continental Europe, the features of such constitutionalism were tailored on a different standpoint compared to that of, say, the liberal American constitutionalism. The point of limiting power was of course central, but in a different setting. Much of the continental Europe's constitutional ideologies were built upon the primacy of the 'common weal', along with a connected effect of re-balancing individual rights *vis à vis* the public interest. The recurrent wordings of rights' protection are flanked by an anti-individualistic tone, one that includes associative and solidarity obligations for the pivotal sacred right to property, and that promotes an idea of democracy through social rights and substantive equality. More recently, the European access to the problematique of rights vs public goals is partly reflected in the work of Robert Alexy, insofar as his *Theory of Constitutional Rights*, meant as 'optimization principles', refers to their construction within the German Constitution: the very possibility of 'balancing' in the pool of rights and goals, depends on their principle-structure, which prevents them from being viewed as belonging to radically separate and self-contained realms.[16]

[15] M. Sandel, *Democracy's Discontent. America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1998), 42.

[16] Cf R. Alexy, *A Theory of Constitutional Rights*, tr. J. Rivers (Oxford: Oxford University Press, 2002); Id, 'On Balancing and Subsumption. A Structural Comparison' 4(16) *Ratio Juris*, 433-449 (2003).

However, whatever is left of the tussle between public goals and individual rights should be downplayed- since it bears minor relevance when in question are those rights that are considered to be fundamental from the positive side of a legal system. Their being fundamental for the law is, in fact, due to their functional role in the validity judgements of a legal system: they work as criteria of recognition of other norms (as consistently capable of belonging) in a system where those fundamental rights' choices have been elected as ultimate parameters.

From that point of view, then, should a legal system adopt some rights as fundamental, and thus, as pivotal for assessing the validity, legality and legitimacy of other norms (legislation included) it is indeed their categorization as 'fundamental' that places them among the priorities and goals embedded in the legal system. Accordingly, rights deemed to be legally fundamental are necessarily part of the ethical-political choices of that polity inasmuch it is ordered through law. In such a conjunction, even those rights become part of the ideas of the Good, as it features through a legal order.

Of course, all that should not conceal the further question concerning what substance we attribute to them, which rights (for example, in an individualistic and neo-liberal culture) and which balance *vis à vis* other legal principles defending wider collective interests. Moreover, it is a matter of fact whether primary goals are established pursuing, say, a market driven idea of individual autonomy or otherwise.

Our concern here is only to combine the idea that some rights constitute values in themselves (ie not merely instrumental to purposes of the common weal) with the possibility to bind them as public ends, not necessarily depriving them of their well-deserved deontological *status*.[17]

Of course, this task transcends the very concept of fundamental rights as a sheer guarantee of individuals against public laws and policies.

Ironically, and due to its previous history and culture, continental Europe, as hinted above, seems to be traditionally better disposed towards perceiving the status of rights as norms and their institutional, collective significance. In the rationale of the post II World War constitutionalism, as mentioned above, public values and the public weal, as well as correlative obligations of rights-holders, seem to be the original epistemic standpoint also for the assessment and somehow socially harmonized protection of individual rights.

It is perfectly possible, of course, that some downsides would be noted: overcoming rights as mere freedoms, conceiving them as *objektive Grundsatznormen*, forces fundamental rights to be measured, if not defined, on the basis of the political and social variables that prevail from time to time; and it is also possible that rights will have to pay for

[17] For the defense of the deontological status of rights contrary to the balancing exercise elaborated by Alexy, J. Habermas, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy*, tr. William Rehg (Cambridge, Ma: MIT Press, 1996), 256-259.

> 'their claim to extend further than the liberal tradition with an unquestionable loss of weight and of normative force; in a word, they would try to normativize the political dimension and are remorselessly relativized by it'.[18]

Another risk, often voiced in long standing debates, concerns the assimilation of rights to public utility, or better their surrender to utilitarianism. On this one can recall the thoughts of Amartya Sen. He argues that goal-based theories (enhancing the point of the common weal) are not necessarily opposed to those that attribute priority to rights, but are in contrast only to utilitarian theories. One can think to reconcile the priority of rights and theories of collective goals, for example, of the (public) goal of equality: for Amartya Sen it coincides with the moral idea that the underprivileged have *rights* to a better treatment.[19]

And other hypotheses of re-conciliation might be invoked, although on radically different basis.[20]

If some rights are to be vested with ultimate intrinsic value (and these are the candidates to feature as fundamental rights in a legal system) their *raison d'être* cannot thus be reduced only to creating a free zone that the majoritarian ethics cannot override. The common weal partakes in explaining the significance attributed to fundamental rights. Thus the idea that rights are an individual question that keeps public matters out 'is based on a profound misunderstanding of the nature of rights generally and of civil and political rights in particular'.[21] Considering rights as goals, then, opposes the false assumption that rights are simple limits to public decision making and social action. They must be conceived as social objectives deserving of maximum attention.[22] Rights can be placed at the foundation of a system only if they can be selected to number among the objectives of public policies and the goals of normative production. In turn, should exist no rights (norms protecting rights) to which the legal order attributes the role of 'criteria of recognition', there would be no fundamental rights: and none would feature among that social and political system's collective goals. Sen expresses a concept that is relevant when he writes that

> 'if rights are fundamental, then they are also valuable, and if they are valuable intrinsically and not just instrumentally, then they should figure

[18] M. Fioravanti, 'Quale futuro per la "costituzione"' *Quaderni Fiorentini*, 632 (1992).

[19] A. Sen, 'Rights as Goals' (Austin Lecture), in S. Guest and A. Milne eds, *Equality and Discrimination: Essays in Freedom and Justice* (Stuttgart: F. Steiner Verlag, 1985), 21, 12.

[20] John Finnis, for example, made the question of (natural) rights to converge into an objective order of goods (through a neo-aristotelian and neo-tomist philosophy), and the common weal: J. Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980).

[21] A. Sen, n 19 above, 56

[22] ibid 15

among the goals'.[23]

In a liberal democratic culture, where sovereignty is vested in the people, if rights are legally enshrined, they are a good that affects the way of being of the public power itself.

In a further sense, it is possible to recount the same problem by considering that when we admit of fundamental rights as institutionally belonging to the criteria of recognition and conceived as goods for individuals and groups that are worth protecting according to the ultimate choices within a legal order, we also hint at some objectivity in law's institutes that refers to their being legal norms. Therefore, we are at least sympathetic with the idea that places rights somewhere in the very fabric of objective law. In a recent talk, as well as in a previous chapter, the French scholar Kervégan,[24] challenging the 'conservative' risk of that position, attempts a reconstruction of institutionalist view of law, ranging from Hegel to Savigny and Hauriou, in order to escape the deadlock between natural law and positive law theories: in his view, and to some extent as in the view of Neil MacCormick,[25]for rights to be guaranteed *vis à vis* sovereign whim (that is, the positivist fiat) we do not need a faith in natural law, but the strength of a networked normative order within which particular rights are placed. Rights are part of a formalized set of legal institutions. And institutions are not immune from reforms, revolutions, changes, but at the same time they have some resisting capacity, or objective normativity encompassing rights as part of a context, one that resembles for him the foundational theory of Hegel's 'objective spirit'. In a sense, one can accept, through such a reconstruction, that fundamental rights do not come from heaven, but at the same time: while they can legally matter only if they reach to their objective status (and function, as in the previous sections), they vehicle our ethical, moral and political expectations to law.

IV. Human Rights and Global Public Goods

1. Human rights as a legal construct have a 'concrete' existence in legal norms, and as far as they hold through the last seventy years or so, from the founding document, the Charter of the United Nations (1945) and the Universal Declaration adopted by the General Assembly in 1948,followed by The International Covenants (on Civil and Political Rights and on Economic Social and Cultural Rights) as well as several multilateral human rights treaties and Covenants in the International Community, up to Regional Conventions (European,

[23] A. Sen, n 19 above, 15.

[24] J.F. Kervégan, 'Towards an Institutional Theory of Rights', in I. Testa and L. Ruggiu eds, *'I that is We, We that is I.' Perspectives on Contemporary Hegel* (Leiden: Brill, 2016), 68–85. The talk was online at Oxford Jurisprudence Group 2022.

[25] N. MacCormick, *Institutions of Law* (Oxford: Oxford University Press, 2007), 163.

American and African) and so forth, that constitute a body of law endowed with normative force, albeit at different levels of juridical scope.

In the state domain, I meant that rights, if they are fundamental, they should be part of the goals, in so far as they have to work as criteria of recognition of the validity of norms in a legal order. I also submitted that this view of rights, as fundamental, has an explanation based on the function of recognition/validation it plays.

One can think that the same would apply in the extra state domain with regard to rights that are capable of calling upon States' responsibility for their violations, although not all infringements are violating fundamental rights. The point then is to be made in factual sense, inasmuch as some rights at least are fundamental for the international community and in the international order, if they work as rules of recognition discriminating which norms or decisions are validly admissible in it. As Hart reminds us, all that is not just written down in some legal text but can only be known looking at those norms that are practiced as recognition rules by officials.[26] Admittedly, applying to rights the case for Hartian rules of recognition, and to assess what rights are 'fundamental' in this very sense within (the) extra-state order(s) remains still uncertain or debatable.

Aspirational thoughts would put some kind of human rights- certainly not all of those which feature in the human rights' mentioned body of law- at least at the forefront as fundaments of validity of norms in an international legal order. But much and main attention has been devoted to a very different issue, that is, which rights are actually human rights, among those enshrined in international legal instruments[27] or what criteria should better count for 'deciding' that a right is a human right or not. However, one can agree that a supporting moral value is to be conceived at the basis of Human Rights Legally enshrined, since they 'also serve urgent-universal-concern-meriting moral rights'.[28]

The question of the role played by a right as fundamental in a legal order is possibly analyzed through empirical ascertainment, but is far from being easily solvable. One could wish that some human rights become criteria for the recognition of the validity of other norms.[29]

[26] Hart confirms that this 'rule of recognition', unlike other rules and norms (which are 'valid' from the moment they are enacted and even 'before any occasion for their practice has arisen'), is a 'form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts'. (H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2nd ed, 1997), 256.

[27] The main theses are divided into two sides, the moral (orthodox) and the political view (here John Rawls and Joseph Raz are placed at the center). See the chapters in A. Etinson ed, *Human Rights: Moral or Political?* (Oxford: Oxford University Press, 2018).

[28] A. Sangiovanni, 'Are moral rights necessary for the justification of international legal human rights' 4(30) *Ethics and International Affairs*, 471-481 (2016). See also for the debate between moral and political conceptions of human rights, Id, 'Beyond the Political-Orthodox Divide: The Broad View', in A. Etinson ed, *Human Rights: Moral or Political?* (Oxford: Oxford University Press), 174-198.

[29] Otherwise, International law possesses such criteria of recognition, of course: cf S.

On the other hand, the standard narrative of IL based on bilateralism is slowly declining, since IL needs to provide a credible foundation for the emergence of its 'community' layer, human rights protection against states, environmental and biodiversity duties, jus cogens norms,[30] as well as obligations *erga omnes*.[31] All these transforming notions are to be taken seriously. Indeed, they make it possible, among other things, to pave the way through which the connections between fundamental rights and community goals develop. Still, it cannot be denied that for some structural features the extra state realm would work differently.

As in the foregoing section, in the state domain if a right protects a good, an interest of the individuals, that good or interest is given a validity-recognition function and accordingly it is considered fundamental in the political choices of a legal order. As we know, there is poor sense here to distinguish between negative and positive rights: policies and expenditures include negative or positive rights, liberty, property as much as freedom of speech, education, health, housing and so forth.

Although (and admittedly) doubts and principles' conflicts and disagreements are common even in the domestic arena, the international setting is hardly clear as to its disparate goals, and which goals are primary is itself uncertain. We have difficult time in coming to clarify which rights are fundamental because the legal order works in fragmented and let's say less-than-constitutional ways. We cannot speak of rights that are beyond the purview of a legislator because a legislator proper is said to be absent; conversely, we cannot either assume that there is a pre-eminent sovereign to which the political choices concerning the common goods are assigned. Even making a right the goal of a set of international norms and actions is only possible within the remit of the cluster of human rights regimes, but hardly outside them. It is well known and also exemplary how the World Bank interpretation, which sets the scope of its Environmental and Social Framework (2016), includes no human rights obligations and in general the question of human rights is not a condition for the WB aid, since rights are meant as importing a political question which is beyond its powers,[32] that are 'limited' within the objective of poverty reduction through investment programs. On the other hand, thinking in terms of providing global public

Besson, 'Theorizing the Sources of International Law', in S. Besson and J. Tasioulas eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 163-185.

[30] Peremptory norms such as *jus cogens* are those that, according to Vienna Conventions on the Law of Treaties, May 23, 1969, Art 53, render void a treaty conflicting with them. According to Antonio Cassese (*International Law*, 2nd ed, Oxford: Oxford University Press, 2005), 217, rules banning slavery, genocide, and racial discrimination and the rule banning torture have become customary.

[31] On obligations due to the international community as a whole, see M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Oxford University Press, 2010).

[32] See G. Palombella, 'On the potential and limits of global justice through law' *Rivista di filosofia del diritto*, 15-16 (2017).

goods, endowed with a transboundary scope, rests on the common interest of all states and peoples, since climate change or the fight against COVID pandemic are intrinsically belonging to the self interest of all.

Therefore, the question remains whether it is possible to see human rights as public goals or identify a connecting logic between human rights and public goods in international setting. According to Neil Walker each will sound as one hand clapping.[33] He examines whether Human Rights can supply 'in the register of global political morality' a complementary support to the pursuit of the 'good' and the need to sustain it with political authority.[34]The discourse of Global Public Goods 'presupposes rather than provides grounds for the relevant 'public' and so suffers from a general deficit of political authority'; the same deficit holds for Human Rights which lose their authoritative roots when projected beyond their state-centered sources, in the global setting.[35] The nature of Global public goods speaks to a problem of collective action which is furthermore loaded with controversial issues regarding their scope, contents, distributive balances, and so forth. While those are possibly solved in State institutions there is no equivalent to the latter at the supra-states level, and that undermines even their political morality background.[36] The urgent need and the apparent evidence of providing/ protecting global public goods (again, think of the pandemic disease, or climate change), which amounts to a strong support from the side of political morality (basing on concurrent interest of actors in the global arena), is not itself able to substitute for the lack of political authority. For Walker

> 'the two hand need to meet. If they do not do so on account of a deficit of political authority, the claims of substance at the level of political morality may either over-reach and fail to be implemented, or be prey to unilateral implementation by a non-globally representative yet hegemonic political power; or, as is more likely for most global public goods, it may under-reach in compensation for a lack of political authority'.[37]

Now, Human Rights do not afford the missing authority supplier, because they do not really rest on a background political community, and they do not signal the emergence of a global political community, which remains limited in

[33] N. Walker, 'Human Rights and Global Public Goods: The Sound of One Hand Clapping?' 1(23) *Indiana Journal of Global Legal Studies*, 249-265 (2016).

[34] ibid 263.

[35] ibid 251.

[36] The reference here is to 'instrumental goods': contrasting and mitigating climate change or controlling disease spreading. Admittedly, and despite a range of possible controversial choices, an 'enlightened self-interest' can become credible ground of common commitment. I skip here the further and for Walker even more serious difficulty concerning the need of a global public community with reference to those goods, like a tolerant society or a society treasuring cultural heritages (that is, communal goods) which presuppose a much stronger societal and communitarian sharing at the global level. See N. Walker, n 33 above, 252.

[37] ibid 258.

the borders of the State. That amounts to a 'structural bias' also due to the concurrent doctrines of sovereign autonomy. Walker's observations are well based on a widespread common sense. However, they might end up foreclosing the projection of the concept of fundamental rights, that I described in the first part above, onto the global arena. Notably the 'structural bias' of rights themselves resurfaces as highly relevant here, because it hints at the dependence of rights upon the construction of public power (that rights are intended to limit), not vice-versa. It seems to imply too much, though. Neither global public goods nor rights in the global arena would have a positive normative strength, since positive commitments could only be based on a universalized political authority capable of exposing prescriptive tenor and teleological significance.

I will return on this last point in my conclusive remarks, since different conclusions would depend on recasting the problem in terms of legal justice and legal institutions. But some considerations as to how human rights contribute to common goals and vice-versa in the legal setting, are in order.

2. The thrust of the relation between fundamental rights and common goals (interest-concern)[38] as I depicted it in the 'domestic' side, should not be excluded a priori in the global arena, since, as a matter of fact, legal norms are available that explicitly raise some rights themselves to fundamental goals, to be pursued as common goods by the international community. One can recall for example that the protection of the community interest to peace and security was interpreted by the Security Council in order to protect fundamental rights against the action of their own government, in case concerning Lybia: to protect civilians means at the same time avoiding a menace against world peace and security (UNSC February 2011, resolutions 1970 and 1973).

The connection between some rights and the communitarian interest is recurrent: the ICJ famously noted in its Advisory Opinion on Reservations to the Convention on Prevention and Punishment of the Crime of Genocide (ICJ Reports 1951, 15) that the *raison d'étre* of the Convention is not the pursuit of states' interests, since States 'merely have, one and all, a common interest, namely the accomplishment of those high purposes' of the Convention, which in turn are to protect huma rights of individuals and groups. As in other cases of States' obligations to protect human rights-some still Treaty based, some other become customary law- the 'common interest implies that the obligations in questions are owed by any state party to all the other states', they are obligations 'erga omnes' (parties or tout court), toward the international community as a whole. That is precisely reinforced by the Study Group of the International Law Commission on Fragmentation of International Law:

[38] Among several portraits of common interest and common concerns, cf. S. Thin, 'In search of Community. Towards a definition of common interest', in G. Zyberi ed, *Protecting Community Interests Through International Law* (Cambridge: Intersentia, 2021), 11-30.

> 'If a State is responsible for torturing its own citizens, no single State suffers a direct harm (…) such action violates values or interests of all (…) the international community as a whole' (para 393).

Recently, ICJ case law[39] confirms for example that

> '(T)he common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*'.

In principle, then, the fact that some rights are taken in such highest consideration through institutional means, supported by legal norms and jurisprudential interpretation and implementation, shows how IL itself is not simply sticking to the logic of protecting rights *vis à vis* states' power, the negative part of the issue, but is meant to positive duties, and states are entrusted to cooperate collectively in order to protect promote and realize rights that need the commitment of all toward an established interest shared by the sovereigns themselves. In other words, the *mediation* of a common interest or better of the common concern includes some rights, making them a goal in the 'communitarian' side of international law. Again, one can discuss that international law does not have any community or polity of which one can identify the proper goals: but as things stand that is clearly counterfactual, from a legal point of view. And even more so, when some rights and obligations belong in jus cogens,[40] peremptory norms: that which endows those norms with hierarchical superiority as well.[41] Of course, such examples are still evoking the common interest by way of limitation of States' abuse. It is not irrelevant, then, that a more, say, positive or goal-based significance emerges in areas

[39] 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide' (*Gambia* v *Myanmar*), judgment on jurisdiction, 22 July 2022, esp paras 107-108.

[40] M. Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' 6 *Nordic Journal of International Law*,211-239 (1997).

[41] See recently the Draft Conclusions *on Jus Cogens* adopted in 2022 by the UN International Law Commission (UN Doc A/77/10), Conclusion 2 holding that 'Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law'. Another pillar is in the pronouncement of the ICTY, in *Prosecutor* v *Furundzjia*, case no IT 95-7/1, Trial Chamber II, at 260, para 153 (10 december 1998). On whether one can understand jus cogens as the appearance of a common good, cf M. Retter, '*Jus Cogens*: Towards an International Common Good?' 2(4) *Transnational Legal Theory*, 537–571 (2011). J. Vidmar correctly adds that, however, the hierarchical superiority is debated, as in some cases the dependence on the will of States resurfaces, insofar as the legal system might not provide for remedies in case of breach of jus cogens norms (here the reference is made to the ICJ, 2012 case, *Germany* v *Italy*). See the chapter: 'Protecting Community Interests in a State centric Legal System: The UN Charter and Certain Norms of 'Special Standing'', in W. Benedek et al eds, *The Common Interest in International Law* (Cambridge: Intersentia, 2014), 109-125.

where the issues are radically connected to a structural question of cooperation, as with regard to environmental concerns and their relation to rights: based on the United Nations Framework Convention on Climate Change (1992) defined as a 'common concern of humankind'. Here it is a global public good based at least on *interdependence* to spur a chain of legal acts and obligations which are meant toward a shared objective.

The protection of human rights infringed by the consequences of climate change is a core issue. It has been noted as well that the very idea of the common concern of humankind 'provides a point of departure for the development of the extraterritorial dimension of human rights obligations in relation to climate change'.[42]

All in all, the idea propounded by authoritative scholars like Cancado Trindade, or Theodor Meron, and Antonio Cassese about the progress toward 'humanization' of international law has put human rights not just as a common interest of States but of the international community beyond States themselves.

Perhaps the most comprehensive case in point is found in the principles of sustainable development: In the understanding of sustainable development on a global scale, approaches based on human rights and those based on Global Public Goods are said to mutually compensate each other. Development policies and programs include protection of human rights while the Global Public goods approach values, for example, at the same time prevention or mitigation of climate change, protection of biodiversity, fight against pandemic disease, and so forth.[43] The strength of a human rights-based approach to development lies in its relying on legal obligations, fixed by supranational and treaty international law, obligations that have an objective normative basis. Global public goods, which are to be traced back to an economic or utilitarian basis, enjoy legal positivization but leave open further questions of production, distribution and choice. The theoretical approach does not take into account preferences, individuals, minorities, and does not of itself empower people to demand something as a matter of 'justice' that is, as a 'right'[44]and in the aggregate pursuit of global goods there is a systemic objective which might well be not mindful of equitable distribution issues.[45] One can recall that often the appeal to issues of common interest remains too vague: the reference to interests that are 'common' bears indeterminacy which 'does not allow for distinguishing oppressive interests from those of the oppressed'.[46]

[42] W. Scholtz, 'Human Rights and Climate Change', in W. Benedek et al eds, *The Common Interest in International Law* n 41 above, 134.

[43] See S. Cogolati, n 1 above.

[44] S. Cogolati, n 1 above, 350.

[45] D. Augustein, 'To whom it may concern: International human rights law and global public goods', WZB Discussion Paper, No SP IV 2015-809, Wissenschaftszentrum Berlin für Sozialforschung (WZB), 5.

[46] C. Heri, 'Pushing the boundaries of human rights discourse: Peasants rights and Peasants

However, the logic of rights could well work as remedying the blind spot of a global public goods approach, providing for and legitimating the access to the production of a global public good insofar as it can be claimed as a right of individuals or groups. On the other hand, it is equally true that human rights are loaded with the constraints of western, liberal, individualistic, universalistic and state-oriented bias. Therefore,

> 'human rights law in its current iteration fails to adequately contest and remedy elements of social, global and environmental justice, business responsibility for human rights, and the effects of neoliberalism'.[47]

Global public goods, in turn, suffer the unresolved state of affairs, in the extra-state sphere, where it is possible to consider each subfield of law as a common interest of some collective value, that is, human rights, environment, trade, natural resources protection, cultural heritage, security, peace and so forth, leaving their relations and the priorities, as much as the interpretation of their sting, open and negotiable.

These circumstances do complicate the picture, but they ultimately do not detract from the point that making some rights *fundamental*, as I submitted, would mean to make them a goal of common concern, or should allow for interpreting them in conjunction with an idea of a common objective, even beyond the individualistic bias that might have been marked the lamented 'liberal' and western coin. Corina Heri maintains, for example in the case of the movement vindicating peasants rights, that rights can be freed from the neoliberal box. The peasants movement, related to the United Nations Declaration for the Rights of Peasants and other People working in Rural Areas (2019), focusing on rights to land, water, seeds, the environment, is said to bear a 'subversive' potential. In this vein, it

> 'seems to be going beyond simply protecting [that] environment for the benefit of human individuals, and may be seen as advocating for a closer connection between humans and the natural world, and even a protection of nature in its own right. This indicates a possible transcendence of definitionally anthropocentric human rights'.[48]

In other words, the connection between common interest and human rights is to be understood as relatively open as regards the direction it takes, and the ethical and political choices underneath are decisive and determinative, while the mutual reference between rights and the goals pursued proves however mutually

interests', in G. Zyberi ed, *Protecting Community Interests Through International Law* (Cambridge: Intersentia, 2021), 304.

[47] ibid 286. Should be added here: S. Moyn, *Not Enough: Human Rights In An Unequal World* (Cambridge, Massachusetts: Belknap Press of Harvard University, 2019).

[48] ibid 295

reinforcing and demonstrates some implication of consistency and coherence.

A different question instead concerns whether the inter and extra state setting host some understandable and credible one single global common good. Of course, the idea of IL's humanization hints at shared basic considerations of commonweal. But the understanding of such grand objective is substantially contestable and is resolved into the protection of single common goods. The rather metaphysic idea of the general good for the peoples on the globe might have resurfaced in the context of very fundamental threats for the survival of humanity on earth, first of all, nuclear war or the irreversible degradation of the environment and natural resources. But even here, the urgency is *morally* prevailing over the disposition to share an ethical convergence toward a full-fledged idea of the further good for humanity as a whole. Loaded with choices of huge complexity the global good remains somehow unreachable and perhaps even undesirable, if one wishes to preserve pluralism and contestability, at least. What remains is more a matter of *goods* and *discrete* goals. And here, the fundamental quality of choices concerning which common interests and which rights is not decided in a pre-fixed hierarchy nor in a unitary and once for all manner.

In a fragmented universe of specialized international regimes, global goods are coming up in varied guises.[49] Those regimes are fixing statutory goals, principled basis for pursuing norms, policies and regulations. Among them hierarchy is hard to define, if any. Legally speaking the convergence among the fundamental, undeletable legal strength of such regimes, and the individual/ collective rights and those single common goods proves a substantial vantage point. And as hinted above, cooperation is becoming a chance not to be neglected.[50] The appearance of sustainable Development Goals is even considered as the common interest in international law[51], and therefore it looks as a kind of coordinative imperative:

> 'This principle is incorporated in various agreements in environmental and economic fields and in agreements related to certain commons. The adoption of the 2014 Sustainable Development Goals (SDGs) has cemented the relationship of sustainable development to human rights. With the

[49] Cf 'Global Public Goods amidst a Plurality of Legal Orders: A Symposium' 3(23) *The European Journal of International Law*, 643-791 (2012). See also J. Verschuuren, 'The Role of sustainable Development and the Associated Principles of Environmental Law and Governance in the Anthropocene', in L. Kotzé ed, *Environmental Law and Governance for the Anthropocene* (Oxford: Hart Publishing, 2019), 3-30.

[50] P.T. Stoll, 'A 'New' Law of Cooperation: Collective Action across Regimes for the Promotion of Public Goods and Values versus Fragmentation', in M. Iovane et al eds, *The Protection of General Interests in Contemporary International Law* (Oxford: Oxford University Press, 2021), 321-343.

[51] Ch. Voigt, 'Delineating the Common Interest in International Law', in W. Benedek et al eds, *The Common Interest in International Law* (Cambridge: Intersentia, 2014), 9-28.

> adoption of the SDGs in 2015 the relationship of sustainable development to human rights has been firmly established. The principle of sustainable development most importantly contains three elements: environmental protection and economic as well as social development, and therefore encompasses various aspects related to public goods, commons, and fundamental values. It can substantially inform the proper implementation of agreements'.[52]

In truth, climate litigation[53] has been exemplary to this regard[54]. Despite many and persisting (procedural and substantive) limitations and complexities,[55] the recognition of the standing before a judge in order to vindicate a country's inertia in putting in place sufficient environmental measures for preventing further global warming or for mitigating the present consequences of climate change, contributes to the preservation of a discrete global public good. In a sense the dynamic is two-way: viewing the healthy and safe environment as a right[56] activates the legal protection and asks for States' duties to be respected. At the same time, the general recognition of the urgency of the climate change problem has elicited a revision of more traditional obstacles concerning the standing before a court,[57] that is, the enhancement of access to justice, if not also the progress beyond affirming wider or novel rights matching goods that bear as well a collective and in principle recognizable common value.

Arguing in terms of legal rights often ends up bypassing underlying indeterminacy in the scope or content of a common good, bearing a determinative strength in concrete circumstances; at the same time, it depends on the assumption, found in multilateral legal instruments, that, say, climate change represents a primary goal for the international community. On the other hand, nothing detracting from the above, a caveat is due: climate litigation based on rights alone[58] might not necessarily prove to be always the only path to contrast climate change. On the contrary, procedural and substantive aspects of relying on

[52] P.T. Stoll, n 50 above, 331.

[53] There is a flourishing literature on the increasing amount of climate litigation in several continents, cf A. Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages', in S. Duyck et al eds, *Routledge Handbook of Human Rights and Climate Governance* (London: Routledge, 2018), 31-43.

[54] For the hugely expanding number of climate cases see the databases at Sabin Center of LSE.

[55] D. Shelton, 'Complexities and Uncertainties in Matters of Human Rights and the Environment: Identifying the Judicial Role', in J. Knox and R. Pejan eds, *The Human Right to a Healthy Environment* (Cambridge: Cambridge University Press, 2018), 97-121.

[56] S. Varvastian, 'The Human Right to a Clean and Healthy Environment in Climate Change Litigation', MPIL Research Paper Series no 09, 1-14 (2019).

[57] Cf G. Palombella, 'Access to justice: dynamic, foundational and generative' 2(34) *Ratio Juris*, 121-138 (2021).

[58] Interesting account of the recent use of tort law procedures and their limitations, D. Bertram, 'Environmental Justice 'Light'? Transnational Tort Litigation in the Corporate Anthropocene' 5(22) *German Law Journal*, 738-755 (2022).

individual or collective rights bring about a narrowing of the perspective, thereof preventing it from evolving toward disentangling the idea of environmental integrity from the angle and the vantage point of Anthropo(cene-)centric rights.

V. Questions and Remarks

In the global arena, the connection between rights and goals is said to lack the political authority that it enjoys in the domestic setting. Indeed, when some rights are fundamental in a legal system, they are pivotal in the validity recognition practice of officials, judges, legislators and public administrators. Such a core function belongs to the structure of a legal order. However, making sense of it implies the recognition that all this involves the commitments that a legal order intends to respect, that is, the goals that are taken as of primary importance, or ultimate, within the same order.

I have submitted that also the international legal order, as its normative fabric shows, weaves common goals and human rights, accordingly, transcending the opposition-divide along the lines of a contrast between individual rights and common interests. Such a mutual reinforcement compensates for the one-sided understanding of the nature of rights and common goals respectively.

In truth, both the question of rights and that of global public goods come to be framed by legal means through a chain of choices, and out of ethical political selective process that involves States, peoples, private actors, NGOs, as well as corporations and in the supranational sphere an array of players active in the global governance scenario.

As a matter of fact, the normative strength of legal international commitments and rules might avail of varied or disputable legitimation sources, something recurrently debated, and relatively far from the consolidated *acquis* of the kind that, for instance, domestic systems possess, and Juergen Habermas described as embedding the *co-originality* between sovereignty and the system of rights in constitutional democracies. In the foregoing sections I have not dealt with problems of legitimacy, but I focused on the dynamic interplay between rights and public goals, in the domestic and international arenas as a matter of the functioning and institutional organization of a legal system.

Focusing on legality and the normative strength of positive law has its own theoretical premises, though, that deserve of some further explanation. Justice is often seen as depending upon the birth of some coercive power: this thesis, famously well represented by Thomas Nagel,[59] is only in part acceptable, and even as regards the extra-state sphere epistemically insufficient. It entails that the lack of coercive political authority would make laws of international and

[59] Th. Nagel, 'The Problem of Global Justice' 3(33) *Philosophy & Global Affairs*, 113-147 (2005).

global justice untenable.

In such a view, the possibility of some conditions of justice would end up being erroneously made to depend *directly* on *power*. This narrative can be contrasted with the modern legal narrative that from Kant or Bentham explains how those conditions – for developing the *possibility* of justice – are due to the birth of *law*, instead:[60] Kantian view of law[61] sees it as a generator of publicness in which the creation of legal parameters puts the basis for conceiving the problem of justice. In Kant's reasoning, law is resorted to conceptually in order to avoid the (state of nature) condition in which the abuse of personal liberty encounters no objection and no contrary reason. Even if the state of nature need not be unjust, it is devoid of justice, so that men 'do one another no wrong when they feud among themselves'.[62] For Bentham, it is again the law to provide for generally accessible criteria of behavior, it aims at ensuring social coordination and fairness precisely because it makes possible the solution of the tussle between collective goals and individuals' interests as well as among different conceptions of the common well-being.[63]

In other words, the epistemic premise of (the possibility of) justice, is law, not power. The question of coercive background power can point to a different problem, one that is potentially affecting or undermining *not justice*, but the *actual existence and effectiveness of a legal order*. That holds true as well for the international legal order of which legal scholars have for long time doubted the nature and quality of a juridical system, and for several reasons.[64] But as a matter of fact that must not be an issue, here, unless one would revoke again, after some centuries of controversies, the nature of international law as an 'existing' legal order.[65] Here the problem concerning how the foundational pillars

[60] I draw, to this regard, on a more extensive treatment of the matter in G. Palombella, 'On the potential and limits of global justice through law' *Rivista di filosofia del diritto*, 11-26 (2017).

[61] In Kant's view unless man '(W)ants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by law' (I. Kant, 'Metaphysical First Principles of the Doctrine of Right', in *The Metaphysics of Morals* (1797) (Cambridge: Cambridge University Press, 1996, repr 2003), paras 33, 44, 90.

[62] I. Kant, n 61 above, paras 42, 86.

[63] J. Bentham, 'Of Laws in General', in J.H. Burns and H.L.A. Hart eds, *The Collected Works of Jeremy Bentham* (London: The Athlone Press, 1970), 192. As Bentham argued, a civil society public sphere would be impossible to imagine outside the service afforded by law.

[64] Famously, the reasons provided by Herbert Hart (n 26 above) for international law being just a set of rules (not a mature legal order) are given in his chapter X. For criticisms establishing the contrary for example Besson (supra at note 29) and J. Waldron, 'International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?' *New York University Public Law and Legal Theory Working Papers*, 2013.

[65] In a huge literature, I would suggest a 'classic' work gathering the array of questions & answers about authority and international legality: N.G. Onuf, 'International Legal Order as an

of international law are capable of standing, even in the absence of a global sovereign and of a global 'polity' cannot be taken into further account. Suffice to say, that legality beyond the state is a notion of clear and dense reality, of which international law is the oldest appearance. On this premise, the idea of justice that the legality- beyond- the- State actually conveys (whichever it contingently is) shall bear the same level of bindingness, validity and effectiveness as that which such a legal order in fact demonstrates. Given this premise, this article has just focused on how in the logic of legal ordering, rights and goals are interwoven in a joint enterprise. The collective nature of law as public,[66] in truth, should mitigate the ambiguity and relativize the dogmas according to which human rights are not a matter of common weal, are opposed to it, and fare on a self-standing path unrelated to the fundamental goals.

Idea' 2(73) *The American Journal of International Law*, 244-266 (1979).

[66] More on this in G. Palombella, 'The (Re) Constitution of the Public in a Global Arena', in C. Mac Amhlaigh et al eds, *After Public Law?* (Oxford: Oxford University Press, 2013), 286-309.

Essays

Preventing and Fighting Organized Crime and Mafia-Type Infiltration: The Italian Anti-Mafia Information Model Compared with US Civil RICO

Felice Piemontese*

Abstract

The article critically analyses legislative instruments of both the Italian anti-Mafia legislation and the US Code, notably the Italian 'anti-Mafia information' (informazione interdittiva anti-Mafia) and the US civil remedies under the Racketeer Influenced and Corrupt Organization Act (RICO). By comparing these specific tools, which share investigative activities in the fight against organized crime, the purpose of this article is to find similarities between the two models. The article also highlights the main differences between the Italian and American remedies and provides indications to be able to fight organized crime in a more coordinated and efficient way.

I. Introduction

In 2022, Italy celebrated the memory of Judges Giovanni Falcone and Paolo Borsellino thirty years after their murders, which took place, respectively, on 23 May1992 and on 19 July of the same year. Together with them, theirs escort agents: Agostino Catalano, Walter Eddie Cosina, Rocco Dicillo, Vincenzo Li Muli, Emanuela Loi, Antonino Montinaro, Vito Schifani, Claudio Traina, and Francesca Morvillo, Giovanni Falcone's wife, were murdered as a result of Mafia attacks.

Judges Falcone and Borsellino played an important role in the implementation of Italy's legislative system and in cultivating important investigative collaborations between Italy and United States of America. Some of these collaborations are still ongoing.

The FBI's relationship with Judge Falcone was forged in the case known as 'Pizza Connection' (1984), in which the FBI, the New York Police Department,

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and federal prosecutors teamed up with Judge Falcone and Italian authorities to bust an international heroin smuggling ring that laundered drug money through pizzerias and extortion. The legacy of Judge Falcone still leaves on today through the bronze monument at the FBI Academy in Quantico, Virginia, that welcomes thousands of visitors from all over the world and celebrates the so called 'Falcone method' of investigation as a useful model for untangling criminal affairs.

In 2022, Italy also celebrated the 40th anniversary of the enactment of the legge13 September 1982 no 646, also known as the Rognoni-La Torre Law, which followed the murder of the Member of Parliament Pio La Torre – shortly before the murder of the General Carlo Alberto Dalla Chiesa – while Virginio Rognoni was the Minister of the Interior. Such law introduced Article 416-*bis* into the Italian Penal Code (1930) to punish Mafia-type association, individuated as an organisation of three or more persons whose members use the power of intimidation deriving from the bonds of membership, the state of subjugation and conspiracy of silence that it engenders to commit offences, to acquire direct or indirect control of economic activities, licences, authorisations, public procurement contracts and services or to obtain unjust profits or advantages for themselves or others, or to prevent or obstruct the free exercise of vote, or to procure votes for themselves or others at elections.

In these years, the Italian fight against Mafias has witnessed the intensification of State action through the activities of Italian law enforcement agencies and the role played by the judiciary in arresting, indicting, and convicting many bosses, underbosses or white-collar criminals belonging to Italian organized crime families, including members of the most famous and dangerous groups like *Cosa Nostra* in Sicily, the *Camorra* in Campania, the *'Ndrangheta* in Calabria, and the *Sacra Corona Unita* and the *Società Foggiana* in Puglia.

The results achieved by Italy are impressive, amounting not only at fighting but also at preventing what today represents an evolution of the 'criminal Mafia' into an 'economic Mafia'.

In particular they are important the results against the powerful of the organized crime spreading through Italy and especially in the North – the richest part of the nation – where there are many occasions to take control, through the infiltration into corporates and public administration, of public aid and public procurement contracts.

For many years, the fight against organized crime has also seen a greater awareness on the part of some citizens, who prefer freedom and trust in the State to the abuse and oppression of the Mafia and have accordingly denounced mobster by cooperating with the judiciary. Also was implemented the Italian education system (from the schools up to the universities) through specific dissemination activities (like telling the stories of people killed by the Mafia or

explaining and commenting – even using practical cases – the laws adopted by the Parliament) with the main aim to spread the values of legality and civic education.

Within this preliminary information, this article analyses two legislative instruments of these nations, which share investigative activities in the fight against organized crime: the Italian anti-Mafia information and the US civil remedies under the Racketeer Influenced and Corrupt Organization Act (RICO).

Section II describes the administrative model adopted by Italy within the broader anti-Mafia legislation,[1] focusing on specific reliefs aimed at preventing the dangerous infiltration of organized crime inside Italy's administrative authorities *(*ie, *pubblica amministrazione)*, and within companies that have direct relations with these authorities, following the general need to protect the community's ability to use public funds and resources according to Art 97 of the Italian Constitution.[2] More specifically, this section describes the specific instrument of the 'anti-Mafia information' as provided by the Anti-Mafia Code enacted in 2011 following a precedent Act of 1994.[3]

Section III focuses on the specific civil remedies available under the US Code and related to the Racketeer Influenced and Corrupt Organization Act (RICO).[4] These remedies are part of the Organized Crime Control Act adopted in 1970 and are based on the important works of several investigative

[1] References are to the decretolegislativo 6 September 2011 no 159 that introduced in the Italian legislation the 'Code of anti-Mafia laws, relevant preventive measures and new anti-Mafia provisions' (hereafter Anti-Mafia Code). The Anti-Mafia Code is still now the main source of law for Italian anti-Mafia measures combined into a unique normative corpus the laws adopted since in the early 1960s. For a better understanding of the system of sources of law of the Italian system it is important to clarify right now the difference in the use of words like law (*legge*), legislative decree(*decretolegislativo*) and law-decree (*decreto legge*). The legislative power to adopt *laws* is assigned by the Italian Constitution (1946) to the Italian Parliament and to the Regional legislative assemblies (Arts 55, 117 of the Italian Constitution) and judicial opinions are not a source of law in Italy, like for all civil law legal systems. However, there are cases in which the Government (the executive power, ie,the Council of Ministers) can also issue acts having force of law: while the (a) legislative decreeis an act adopted by the executive power after the approval of a law by the Parliament that delegates the Government to regulate a matter within principles and criteria established by the enabling law and only for a limited time and for specified purposes (Art 76 Italian Constitution), (b) a law-decree is an act adopted by the executive power in case of necessity and urgency, under its own responsibility. Such a measure shall lose effect from the beginning if it is not converted into law by the Parliament within sixty days of its publication (Art 77 Italian Constitution).

[2] Art 97 para 1 of the Italian Constitution sets off: 'Public offices are organised according to the provisions of law, so as to ensure the efficiency and impartiality of administration'.

[3] Decretolegislativo 8 August 1994 no 490 introduced for the first time the systems of the anti-Mafia communications and certifications (*comunicazioni*and*certificazioni anti-Mafia)* which required that each enterprise or individual that would have applied for public aid or bidding on public procurement contracts, had to show an anti-Mafia certificate attesting that there was no involvement in Mafia-type associations/organized crime. These dispositions then became part of the subsequent Anti-Mafia Code (n 2 above).

[4] 18 USC § 1964.

commissions established by the US government like the Kefauver Committee (1951), the McClellan Committee (1963), and the Presidential Task Force on Organized Crime (1967).[5]

It is central to our analysis the important definition of enterprise and how its meaning it's wider than the Italian one. Specifically, this section also analyses the application of RICO to tackle organized crime with respect to regulating labour unions.

The article also generally examines other tools of the Italian civil and criminal legislation that are the same way useful to prevent and fight organized crime[6] and that, in some way, share similarities with the US RICO model. By relating the analysed instruments to the notion of *matière pénale* as defined by the European Court of Human Rights (ECHR), the article ends by recommending a more purpose-oriented use of such tools.

The main reflection is to fight organized crime avoiding an abuse of lawsuit between corporates that little or nothing have to share with criminal affairs. Furthermore, the generalization that sees the involvement of people that even if linked by the bloodshed do not necessarily represent a continuation of the criminal organization, should be avoided and further elements should be need to prove the risk of a concrete, Mafia infiltration.

II. Anti-Mafia Information and its Consequences

According to Art 91 of the Anti-Mafia Code, before entering into a contract or before undertaking any administrative acts,[7] the Italian administrative

[5] B. Scotti, 'Rico vs. 416-bis: A Comparison of U.S. and Italian Anti-Organized Crime Legislation'25 *Loyola of Los Angeles International and Comparative Law Review*, 143, 146-147 (2002).

[6] Note that in this article, especially into a comparative approach, the definition of organized crime (ie, organized criminal group) is the one provided by the United Nations Convention Against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000 and signed in Palermo, Italy, on 12-15 December 2000 and that means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit, as provided for in Art 2, letter a) of the Convention available at https://tinyurl.com/mkackuc9 (last visited 31 December 2022).

[7] Administrative acts are described into Art 67 of the Anti-Mafia Code. They refer to: a) police and commercial licences or authorisations; b) concessions of public waters and rights attaching thereto, as well as concessions of state property when required for the exercise of entrepreneurial activities; c) concessions for the construction and operation of works relating to the public administration and public service concessions; d) entries in the lists of contractors or suppliers of works, goods and services relating to the public administration, in the registers of the Chamber of Commerce for the exercise of wholesale trade and in the registers of commission auctioneers at wholesale annual markets; e) certificates of qualification to carry out public works; f) other registrations or measures with an authorizing, granting, or enabling content for the performance of business activities, however called; g) contributions, loans or

agencies (ie, the Public Administration or contracting authorities) must request the 'anti-Mafia information' to the Prefecture.[8] This document mainly consists of the attestation of the existence or absence of one of the causes of forfeiture, suspension or prohibition,[9] or in any attempts at Mafia infiltration tending to influence the policies of the enterprise. The contracting authority must request the anti-Mafia information, indicating the name of the company, the object and the value of the contract/administrative act, and the personal details of all the people involved in the enterprise[10] mainly for: I) concessions for public works and public procurement contracts with a value above the EU threshold;[11] II) authorizations of subcontracts or assignations to build public works or to supply public services valued more than one hundred and fifty thousand euros (one hundred and seventy thousand dollars approximately); III) investments that benefit public fund from the European Union for more that twenty-five thousand euros (twenty-eight dollars approximately); IV) specific sectors, regardless of the contract value (eg, services for garbage disposal)[12] and in all the other cases provided for by the anti-Mafia code. It is unlawful both for administrative agencies and for enterprises, under penalty of nullifying their acts, the execution of contracts, concessions and disbursements in order to violate the application of the Art 91.[13]

After the receiving of the request from the contracting authority, the

subsidized loans and other disbursements of the same type, however denominated, granted or disbursed by the State, other public bodies or the European Union, for the performance of business activities; h) licences for the possession and carrying of weapons, the manufacture, storage, sale and transport of explosive materials.

[8] The Prefecture-Territorial Government Office (*Prefettura-Ufficio Territoriale del Governo*) is the local administrative office presents in each Province and representing the Italian Government. It directly depends from the Italian Ministry of the Interior that, differently from the US Department of the Interior, is the executive office of the Government responsible for the management of public order, national public security, immigration, asylum, citizenship, elections and other civil rights. The Prefect (*Prefetto*) is the head of the administrative office in every Prefecture.

[9] See Art 67 of the Anti-Mafia Code with regard to the causes of forfeiture, suspension or prohibition identified as circumstances for which a person has been subjected to the application of a definitive measure of prevention provided by the Italian Penal Code.

[10] Art 83 paras 1 and 2 and Art 91 para 4 of the Anti-Mafia Code. Note that according to Art 83 para 3, the anti-Mafia information is not required in some specific cases (eg, when contracts are stipulated between public authorities, for contracts between public authorities and other private subjects that have specific requirement of good conduct) also, it is not required for contracts with a value below one hundred and fifty thousand euros (one hundred and seventy thousand dollars approximately) (Art 91 para 1 letter a) and c)).

[11] For these aspects see decretolegislativo 18 April 2016 no 150 (Code for Public Contracts) and the European Parliament and Council Directives 2014/23/UE, 2014/24/UE and 2014/25/UE.

[12] These sectors involve sensitive activities to Mafia and organized crime infiltration and they are indicated by the Art 4-*bis* of the decretolegge 8 April 2020 no 23, as converted into legge 5 June 2020 no 40. Sensitive activities were initially provided by the legge 6 November 2012 no 190 (a law for preventing and repressing corruption and illegality within the public administration).

[13] Art 91 para 2 of the Anti-Mafia Code.

competent Prefect must consult the national anti-Mafia database and extend the investigation to the subjects – internal or external to the corporate entities engaged in negotiation – which appear to be able to determine the policies of the company. In doing so, the Prefect is supported by a special anti-Mafia law enforcement group, which represents all the law enforcement agencies that operate in the province where the Prefecture has its jurisdiction: the investigative anti-Mafia group (*gruppo investigativo anti-Mafia* or *GIA*).

The Prefect can have evidence of the Mafia infiltration from specific elements indicated by the Anti-Mafia Code.[14] Alternatively, the Prefect may obtain that evidence as a result of general investigations ordered by the Prefect making use of the *access powers* delegated by the Minister of the Interior: in fact, the Prefect can undertake investigations similar to criminal ones.

At the end of the procedure, there are two possibilities: (1) the Prefect can issue a 'positive anti-Mafia information' (*informazione anti-Mafia liberatoria*) if there are no elements to attest that there are causes of forfeiture, suspension, prohibition and/or attempts at Mafia infiltration,[15] (2) the Prefect can evidence the presence of elements to issue a 'negative anti-Mafia information' or 'anti-Mafia interdiction' (*informazione anti-Mafia interdittiva*). Prior to November 2021, the Prefect could directly adopt the negative anti-Mafia information; however, as of 6 November 2021, the Government has adopted[16] the decreto legge no 152/2021 relating to 'Urgent provisions for the implementation of the National Recovery and Resilience Plan (NRRP)[17] and for the prevention of Mafia infiltration'". Arts from 47 to 49 of the decreto legge, which amend the Anti-Mafia Code, aim at solve some critical issues through the development of some judicial opinions in two main ways: (1) by introducing the concept of *due process* into the administrative procedures, and (2) by developing a third

[14] According to Art 84 para 4 and Art 91 para 6, the following elements are considered evidence of Mafia infiltration: a) convictions for offences related to organized crime eventually with the presence also of concrete elements from which it appears that the business activity can, even indirectly, facilitate criminal activities or be in some way conditioned by them (note that it's not required a final conviction); b) repeated violations (within a five-year period) of the obligation to conduct traceable financial transactions; c) the imposition of pre-trial measures or convictions for some specific offences indicated by the Italian Criminal Code and by the Italian Criminal Procedure Code (eg, extortion, fraud, money laundering etc.); d) proposal or imposition of personal or patrimonial preventive measures; e) replacement of the relevant subjects in an enterprise with family members of person subject to preventive measures or prior convictions; f) failure to report specific serious offences (eg, bribery and extortion in favour of Mafia association), by subjects indicated by the Italian Code of Public Contracts (n 12 above).

[15] Art 92 para 1 of the Anti-Mafia Code.

[16] The decreto leggewas converted into law by the Italian Parliament with the *legge* 29 December 2021 no 233. About the distinction between legge and decreto legge, n 2above.

[17] The National Recovery and Resilience Plan (*Piano Nazionale di Ripresa e Resilienza*, PNRR) is part of the Next Generation EU (NGEU) programme, namely the seven hundred and fifty billion package that the European Union negotiated in response to the *Covid-19* pandemic crisis. More information about the European Union programme are available at https://europa.eu/next-generation-eu/index_en (last visited 31 December 2022).

'pathway' between a positive and a negative anti-Mafia information.

Before the decreto legge no 152/2021, the Anti-Mafia Code only contained the possibility for the CEO of the enterprise to participate in the anti-Mafia procedure,[18] while now, according to Art 48 of the law-decree, the Prefect, must give timely communication to the enterprise indicating the symptomatic elements about the infiltration every time the Prefect believes the presence of elements to issuing a negative anti-Mafia information.[19] To the enterprise it is then given a period of twenty days to produce written observations or to request a hearing. At the end of the procedure, the Prefect can (1) release the positive anti-Mafia information if the Prefect considers that the critical issues have been overcome by the documents or during the hearing, (2) release the negative anti-Mafia information, (3) arrange the application of the new 'collaborative prevention' (*prevenzione collaborativa*) which is the new pathway introduced by the law-decree no 152/2021.

If a negative anti-Mafia information is released, according to Article 94 of the Anti-Mafia Code, contracting authorities cannot stipulate, approve or authorize contracts or subcontracts or authorize, issue or otherwise allow concessions and disbursements with the recipient company to which the information is addressed. In fact, the company is excluded from the possibility of having contractual relations with Italian administrative agencies due to the legal incapacity determined by the negative anti-Mafia information.

Otherwise, as alternatives introduced by the decreto legge no 152/2021, the Prefect can arrange the application of the collaborative prevention if the attempt

[18] Personal hearings of the subject interested were provided only if the Prefect had deemed them useful. Even if for years administrative judges reiterated that the preventive purpose underlying the release of the negative anti-Mafia information 'may lead to a mitigation - if not an elimination - of the procedural contradictory' (ie, *procedural due process*) (Consiglio di Stato 31 January 2020 no 820, www.giustiziamministrativa.it; Consiglio di Stato 6 May 2020 no 2854, www.giustiziamministrativa.it), lately, the Consiglio di Stato itself has called, for a partial recovery of the procedural guarantees and in a *de jure condendo* perspective, in the participation of the private individual in the procedure leading to the adoption of the measure in question (Consiglio di Stato 10 August 2020 no 4979, www.giustiziamministrativa.it). See also, on this last aspect, the annual report on the activity of administrative justice of the President of the Council of State, (2 February 2021), available at https://tinyurl.com/bdcst9s2 (last visited 31 December 2022). This *turning point* of the administrative judge also incorporates what was highlighted by the Italian Constitutional Court with a view to enhancing the centrality of participation in the procedure understood as an instrumental principle to the knowability and transparency of administrative action (Corte Costituzionale 19 May 2020 no 116). The explained roots of the new collaborative prevention are highlighted in the Parliamentary report about the *decreto-legge* 6 November 2021 no 152, available at https://tinyurl.com/yr23ytdj (last visited 31 December 2022), at 273-275.

[19] According to Art 48 para 1 of the decretolegge 6November 2021 no 152 that amends Art 92 of the Anti-Mafia Code, the Prefect can override the *due process* in the procedure only (1) if there are particular requirements of speed of the procedure, or (2) if there are information elements whose disclosure is capable of prejudicing administrative proceedings or ongoing procedural activities, or the outcome of other investigations aimed at preventing Mafia infiltration.

at Mafia infiltration is attributable to situations of occasional facilitation.[20] In this case, the Prefect can adopt one or more of the following measures: the Prefect can require the enterprise to adopt organizational measures that can remove or prevent the causes of Mafia-type infiltration;[21] the company can report obligation to the Prefecture's law enforcement group all the transactions with a value above seven thousand euros (eight thousand dollars approximately) or above other value, as determined by the Prefect and communicate every form of financing to the company from its members or from third parties and every contract of association in participation; or the Prefect can require the company to use for all the payments a bank account dedicated only to these financial operations, as provided by the rules for traceability of financial transactions.[22] During the period of the collaborative prevention, which can last from six to twelve months, the Prefect can also appoint up to three experts to carry out support functions aimed at implementing the collaborative prevention measures adopted. At the end of the period, if the Prefect agrees that the danger of Mafia infiltration has disappeared, the Prefect can release a positive anti-Mafia information. Otherwise, the Prefect will issue a negative anti-Mafia information, as described above.

1. Judicial Control: A Test for the Enterprise

If a company receives a negative anti-Mafia information, it can sue the Prefecture before a court and start an administrative trial.[23] Such an

[20] The 'occasionality' of the infiltration – which is different from a 'permanent' one – indicates episodic conduct, left without follow-up, which cannot integrate the concept of participation and that therefore would not render vain the measure of collaborative prevention of the Prefect or, as will be said later (below section II.1), of judicial control by the court competent for prevention measures. SeeCorte di Cassazione-Sezioni Unite 26 June 2019 no 46898, available at www.dejure.it. For further information in the Italian literature see B. Frattasi and S. Gambacurta, *Il rilascio dell'informazione antimafia e La documentazione antimafia: tipologia e contenuto, Commento al codice antimafia* (Rimini: Maggioli editore, 2011); P. Marotta and P. Marotta, *Natura e limiti del potere amministrativo di prevenzione antimafia* (Milano: Giuffré, 2021); F. Mazzacuva, 'La natura giuridica delle misure interdittive antimafia', in G. Amarelli and S. Damiani eds, *Le interdittive antimafia e le altre misure di contrasto alle infiltrazione mafiosa negli appalti pubblici* (Torino: Giappichelli, 2019); M. Mazzamuto, 'Profili di documentazione amministrativa antimafia' 3 *giustamm.it*, (2016).

[21] Art 49 of the decretolegge6 November 2021 no 152 refers to the decretolegislativo 8 June 2001 no 231 relating to corporate liability and to the organizational model there provided. This latter law represents in some way in Italy the corresponding model of the vicarious liability for the US common law system.

[22] See Art 3 of the legge 13 August 2010, no 136 as amended by Art 6 of the legge 17 December 2010 no 271 concerning the traceability of financial flows imposing specific obligations for financial transactions and money movements.

[23] Italian Administrative trial begins before the Regional Administrative Trial (*Tribunali Amministrativi Regionali* or *TAR*) set in every Region and their sentences may be appealed before the Council of State (*Consiglio di Stato*): the judge of last resort for administrative trials in Italy which is set in Rome. As it is codified in Art 100 para 1 of the Italian Constitution 'The Council of State is a legal-administrative consultative body and it oversees the administration

administrative trial is the judicial instrument provided to the enterprise to demonstrate the absence of any kind of Mafia infiltration.

According to Art 34-*bis* para 6[24]of the anti-Mafia Code, companies that have appealed to the measures issued by the Prefect, can request the application of the 'judicial control' (*controllo giudiziario*) to the court competent for prevention measures.[25] After hearing the competent district prosecutor, the Prefect who adopted the negative anti-Mafia information and the representatives of the company, the court may accept the request if the Mafia infiltration is attributable to situations of occasional facilitation.[26] In this case, the court appoints a delegated judge and a judicial administrator, the latter with the task to support the administration of the company for a period between one to three years and to refer periodically, at least every month, the results of the control activity to the delegate judge, submitting also a final relation at the end of the judicial control.[27]

If a court establishes the judicial control in this manner, it also establishes the tasks of the judicial administrator and may impose a series of obligations to the company including, for example, particular obligations to not change the headquarters, company name, corporate purpose and the composition of the administrative, management and supervisory bodies; or to constantly inform the judicial administrator about the activities of the company; or to take any other initiative aimed at specifically preventing the risk of attempts at

of justice' and according to Art 103 para 1 of the Italian Constitution 'The Council of State and the other bodies of judicial administration have jurisdiction over the protection of legitimate rights before the public administration…'. Note that this administrative jurisdiction is different from the US administrative law judges that usually are internal bodies of the agencies and authorities with para-judicial functions in the context of the related proceedings. The Italian administrative code has been adopted with the decretolegislativo 2 July 2010 no 104.

[24] This Article is an amendment following the approval of the legge 17 October 2017 no 161that modified the Anti-Mafia Code and other criminal and procedural criminal rules. Note that Italian legislation use latin terms such as '*bis*', '*ter*', '*quater*' (ie, 'second', 'third', 'fourth' and so on), when there is an amendment within an existing law. In this way, Art 34-*bis* means that it is an amendment within Art 34 and Art 35 of the Italian anti-Mafia code.

[25] References in this case are to criminal courts different from the administrative ones. Generally, the civil and criminal process in Italy have a three-tiered system of justice: courts of first level and court of appeal in every Regions (where there is one or more Judiciary District) and the Court of Cassation (*Corte di Cassazione*), which is the judge of last resort, in Rome. Note also that according to Art 111 para 8 of the Italian Constitution 'Appeals to the Court of Cassation against decisions of the Council of State and the Court of Accounts are permitted only for reasons of jurisdiction'. The Court of Accounts has jurisdiction in matters of public accounts and in other matters laid out by law (Art 103 para 2 Italian Constitution).

[26] Note that the lawsuit before the trial court is an interdependent procedure with respect to the administrative one arising from the appeal to the Regional Administrative Trial for the negative anti-Mafia information (in this sense has stated Corte di Cassazione 22 March 2019 no 27856, available at www.dejure.it). For the concept of 'occasionality' of the Mafia infiltration see n 21 above.

[27] For an in-depth analysis on judicial control see A. G. Diana, *Il controllo giudiziario delle aziende* (Pisa: Pacini Giuridica, 2019).

infiltration or conditioning of the Mafia.[28]

The most important effect of the judicial control is that, during that period, the administrative trial will be suspended. In addition, the granting of the judicial control suspends all the effects of the negative anti-Mafia information,[29] thus allowing the company to contract with Italian administrative agencies (ie, public administration).

At the end of the period of judicial control, the administrative trial will restart and the company shall demonstrate, also using the final relation of the judicial administrator, that at the time when the negative anti-Mafia information was issued, there were no elements proving the Mafia infiltration obtaining, in this way, a sentence to repeal the negative anti-Mafia information.

As evidenced by the Italian courts, it is important to note that at the end of the period of judicial control, the non-existence of elements that can lead to the attestation of a current infiltrative risk as deducted by the judge, does not allow at the same time the judge to deduce the illegitimacy of the negative anti-Mafia information previously provided.[30]

Furthermore, both during the administrative process and during the judicial control or after its end, the Prefect, himself or on the documented request of the interested party, has to update the outcome of the information to confirm the disappearance of the circumstances relevant for the adoption of the negative anti-Mafia information. Such as affirmed by Italian administrative judges, the updating of a negative anti-Mafia information is possible only in the event of the presence of different and additional facts that confirm the disappearance of the dangerous Mafia-type situation. In practice, the disappearance of the relevant circumstances that had led to the adoption of the measure does not simply depend on the passage of time, in itself, but on the arrival of different or contrary objective elements that make unnecessary its adoption.[31]

[28] All these measures are provided by Art 34-*bis* paras 2 and 3 of the Anti-Mafia Code.

[29] Art 34-*bis* para 7 of the Anti-Mafia Code.

[30] *Ex multis* Consiglio di Stato 11 January 2021 no 319, www.giustizia-amministrativa.it. About what seems a *probatio diabolica* in the updating of a negative anti-Mafia information by the Prefect and about its hidden economic life imprisonment effect, seeG. Amarelli, 'Le interdittive anti-Mafia 'generiche'tra interpretazione tassativizzante e dubbi di incostituzionalità', in G. Amarelli and S. Damiani eds, *Le interdittive antimafia e le altre misure di contrasto alle infiltrazioni mafiosa negli appalti pubblici* (Torino: Giappichelli, 2019), 207. See also M.D. Florio, 'Brevi considerazioni sui rapporti nel diritto vivente tra interdittiva prefettizia e controllo giudiziario volontario nell'impresa in odor di Mafia' *lalegislazionepenale.eu*, 15 March 2021; A. Manna, *Misure di prevenzione e diritto penale: una relazione difficile* (Pisa: Pisa University Press, 2019); C. Visconti, 'Il controllo giudiziario "volontario": una moderna 'messa alla prova' aziendale per una tutela recuperatoria contro le infiltrazioni mafiose' *archiviodpc.dirittopenaleuomo.org* (2019); Id, 'Proposte per recidere il nodo mafie-imprese' *archiviodpc.dirittopenaleuomo.org* (2013).

[31] Art 91 para 5 of the Anti-Mafia Code is about the updating process of a negative anti-Mafia information. See also Consiglio di Stato 30 October 2018 no 4620, Consiglio di Stato 9 April 2019 no 2324, available at www.giustizia-amministrativa.it. In this way even if according to Art 86 para 2 of the Anti-Mafia Code and anti-Mafia information is it valid for one year, in

2. Burden of Proof & Preponderance of Evidence *vs* Reasonable Doubt

After this overview about these two important instruments that can strongly affect the life of a company, it is now important to reflect upon the burden of proof and how it concretely operates comparing the administrative trial issued by a negative anti-Mafia information and the criminal trial issued by a petition to obtain the judicial control of the corporate.

The measure adopted by the Prefect, which consists of attesting whether any attempts at Mafia infiltration tending to condition the policies of the enterprise, is not based on certain data, but on a probabilistic assessment based on serious, precise and concordant indications. The scope of the measure is not of on an afflictive nature, but aims at preventing the Mafia or in general organized crime from penetrating and infiltrating the legal economy.[32] The Prefect's powers to access and discretion must in fact lead to confirm the infiltration of organized crime, since they do not have to provide either proof that Mafia infiltration is taking place, or to what extent infiltration conditions the company's choices. In sum, the predicate acts of the Prefect need not to be established beyond a reasonable doubt and the consequences of a finding of liability are not identical to consequences of a criminal conviction. Thus, the Prefect must only show that the predicate acts are more likely to be true than not true, and that the *preponderance of the evidence* standard of proof (ie, balance of probabilities) is essentially met if there is a greater than fifty percent chance that the Prefect's findings are true.[33]

the case of issuing of a negative anti-Mafia information the expiry of the annual period should not be attributed the effect of automatically determining the loss of effectiveness of the interdiction, but that of legitimizing the person prohibited to submit an application aimed at requesting the review of the measure itself, in the light of elements such as to justify the re-evaluation by the Prefecture of the relative conditions Consiglio di Stato 13 December 2021 no 8309, available at www.giustizia-amministrativa.it, Consiglio di Stato 21 January 2019 no 515, available at www.giustizia-amministrativa.it).

[32] Consiglio di Stato 18 April 2018 no 2343, available at www.giustizia-amministrativa.it.

[33] About the discretion attribuiting to the the Prefect see F. G. Scoca, 'Le interdittive anti-Mafia e la razionalità, la ragionevolezza e la costituzionalità della lotta 'anticipata'alla criminalità organizzata' 6 *giustamm.it*, (2018). For the author of the contribution, the anti-Mafia information consists of an attestation that is an act of knowledge (or judgment), concerning any attempts at Mafia infiltration in the governance of the company. In this perspective, the preponderance of the evidence standard formulated and supported by established case-law, recalls concepts of evidence, of demonstration, more or less full, of truth that excludes genuinely discretionary assessments that is, of expediency with this implying that the evaluation of the Prefect, although certainly questionable and subjective would not be discretionary as it pertains to the knowledge of the facts, to the determination of their circumstantial value, and to the proof (even if not full and not constituting the rank of criminal evidence) of the possibility that an imprint may be exposed to infiltration by organized crime. Therefore, it is the exercise of a constrained and non-discretionary power. Differently see Consiglio di Stato 31 January 2020 no 820, available at www.giustizia-amministrativa.it, which qualifies anti-Mafia information as a 'measure never bound but by its very nature discretionary' (citing also Consiglio di Stato 29

As stated by the Italian Council of State (*Consiglio di Stato*), requiring such a demonstration, analogous to the evidentiary standard required for criminal prosecution, would imply a series of investigations and reasoning clearly incompatible with the effective and immediate operation of the instrument in question. The main scope is to anticipate the threshold of social defence, ensuring in this way advanced protection in the field of combating criminal activities. Any attempts at Mafia infiltration and the tendency of these to influence the management of the company are all notions that outline a case of danger, proper to the Italian law of prevention, aimed, in fact, at preventing an event that, by the same choice of the legislator, is not necessarily current, but also only potential. In this way, the Italian administrative law of anti-Mafia prevention does not sanction facts, criminally relevant, nor represses illicit conduct, but aims at avoiding a threat to public security, Mafia infiltration in business activity, and the probability that such an event will occur.[34]

In fact, the discretion accorded to the Prefect allows him to assess the risk that the business activity may be subject to Mafia infiltration, in a concrete and current way, even on the basis of judgments of acquittal if there are any relevant information about the conduct of the people involved in the company. Also, the Prefect can take into account family relationships, anomalous events in the formal structure of the enterprise or anomalous events in the concrete management of the enterprise. Or they can be relevant corporate co-interests and/or frequentations with criminal subjects that – in their overall assessment and not singularly – are such as to establish a judgment of probability that the business activity is able, even indirectly, to facilitate the commercial activities of crime or to be in some way conditioned by it.[35]

The only limits provided by the Italian State Council are within a balancing operation that the Prefect shall follow between opposing constitutional values. The freedom of enterprise, on the one hand, and the equally indispensable, vital, interest of the State in countering the danger of the Mafia on the other hand.[36]

On the contrary, the proceedings to obtain the judicial control before a trial court are subjected to the general rules of criminal law. The prosecutor must

February 2016 no 868, available at www.giustizia-amministrativa.it) and Consiglio di Stato 26 September 2017 no 4483, also available at www.giustizia-amministrativa.it. About the discretion of the power of the Prefect seeJ. Colmaedici, 'Le interdittive anti-Mafia: tra discrezione e arbitrio' *Rassegna dell'Arma dei Carabinieri*, II, 111, 114-115 (2019).

[34] Consiglio di Stato 30 January 2019 no 758 citingConsiglio di Stato 3 May 2016 no 1743, available at www.giustizia-amministrativa.it.

[35] Consiglio di Stato 13 August 2018 no 4938 and Consiglio di Stato 9 October 2018 no 5784, available at www.giustizia-amministrativa.it.

[36] About the action of the Prefect that must operate a concrete balance between opposing constitutionally protected values: the freedom of enterprise on the one hand and the indispensable, vital, interest of the State in countering the pitfall of the Mafia on the other, see Consiglio di Stato 5 September 2019 no 6105, available at www.giustizia-amministrativa.it.

produce evidence to prove beyond any reasonable doubt (ie, BARD) that the enterprise does not qualify to apply for a judicial control, and thus cannot obtain the law's benefit because the Mafia infiltration does not qualify as occasional but that it is stable.[37]

In sum, although for a negative anti-Mafia information, the Prefect shall prove that the Mafia infiltration is more likely to be true than not true and the burden of proof before the administrative trial is on the company, in the criminal trial, the prosecutor will have the burden of proof to prove, using the BARD standard, that the company request is unfounded.

III. US Civil Rico

Civil RICO should also be examined in comparison with the remedies provided by the Italian law. The main purpose of the RICO is to eradicate organized crime in the United States by strengthening the legal tools in the evidence-gathering process, establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.[38]

More specifically, RICO seeks to punish (1) a person who commits repeated 'predicate acts' constituting a 'pattern of racketeering activity'[39] when (2) those acts involve an entity known as an enterprise in the manner specified by the statute and how it will be best analysed below sectionIII.2.[40] A conviction under criminal liability may lead to up to twenty years' imprisonment, fines and

[37] Art 533 para 1 of the Italian Criminal Procedure Code provides that the criminal judge pronounces a sentence of conviction if the accused party is proved to be guilty beyond any reasonable doubt. Seealso Corte di Cassazione 21 April 2010 no 19933, available at www.dejure.it.

[38] Congressional statement of finding and purpose. Pub. L. 91-452, §1, Oct. 15, 1970, 84 Stat. 922, available athttps://tinyurl.com/5n9bydbx.

[39] In sum, the racketeering activity is constituted by some predicate acts that involve both federal and state law. 18 USC § 1961 (1) includes both felonies under state law and federal felonies with a list of federal crimes such as mail and wire fraud, obstruction of justice, forgery or false use of passport, extortion and money laundering and 'any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter… which is chargeable under the State law and punishable by imprisonment for more than one year'.

[40] According to 18 USC § 1962, to state a claim under RICO the government shall prove that (1) the RICO enterprise existed and that (2) the defendant committed two or more predicate acts (18 USC § 1961 (1)). The attorney general must also prove that (3) the commission of the predicate acts constituted a pattern of racketeering activity whose pattern (4) affected interstate commerce, or the enterprise engaged into interstate or foreign commerce and that (5) the defendant committed one of the substantive crimes provided: (i) invested in or operated an enterprise with money obtained through a pattern of racketeering activity (18 USC § 1962 (a)); (ii) acquired an interest or maintained control over an enterprise through the pattern of racketeering activity (18 USC § 1962 (b)); (iii) conducted the affairs of an enterprise through the pattern of racketeering activity (18 USC § 1962 (c)); or (iiii) conspired to violate any of the provisions of (i)–(iii) (18 USC § 1962 (d)).

forfeiture.[41]

The main purpose of this section is to focus on RICO's civil liability under 18 USC §1964, which gives to the Attorney General the general power to institute proceedings before the district courts of the United States in order to prevent and restrain violations of section 1962.[42] Even if the list of the restraining orders or prohibitions that courts may adopt is non-exhaustive, there are some similarities with the dispositions provided into the Italian Anti-Mafia Code.

For example, RICO order of imposing reasonable restrictions on the future activities or investment of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavour as the enterprise engaged in, the activities of which affect interstate or foreign commerce is something comparable with the obligations of the enterprise admitted to the judicial control, as described above section II.1 after the adoption of a negative anti-Mafia information. The order provided by RICO is also similar to the general measures that the Prefect can adopt within the collaborative prevention introduced by the *decreto legge* no 152/2021.

Furthermore, the power attributed by the US legislation to the judge to appoint one or more trustee, is similar to the figure of the judicial administrator according the judicial control to the enterprise or to the experts appointed within the collaborative prevention by the Italian law.

Otherwise, there are more penetrating powers that are able to determine 'the life and the death' of the enterprise when section 1964 provides the possibility to issue decisions to order any person to divest himself of any interest, direct or indirect, in any enterprise and to ordering dissolution or reorganization of any enterprise.[43]

[41] Chapter 96 of the title 18 of the United States Code (paras 1961-1969) is popularly known as the Racketeer Influenced and Corrupt Organizations Act (RICO). Civil remedies are provided within18 USC para 1964.

[42] According to 18 USC §1964 (a): 'The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavour as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons'. Also, according to 18 USC §1964 (b): 'The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper'.

[43] On the contrary, one of the orders that Italian courts can establish with the admission to the judicial control is not to change the headquarters, company name, the corporate purpose and the composition of the administrative, management and supervisory bodies (Art 34-*bis* para 3 (a) of the Anti-Mafia Code). However, if the Mafia infiltration is not attributable to situations of occasional facilitation but to a stable infiltration where the business and the criminal interests are more stable to converge, the aims of judicial control would be frustrated

The most powerful instrument provided by the American legislation is, however, the RICO treble-damage provision, according to which 'any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee'.[44] According to US case law, a cause of action does not accrue under civil RICO until the amount of damages, that the plaintiff has sustained in business or property caused by the RICO violation becomes clear and definite.[45] Furthermore, a civil plaintiff must show that the RICO offense was both a 'but for' cause and a 'proximate cause' of injury: although even if the first requirement is met, proving that the damage would not have occurred without the necessary cause as a negligent act, the proximate cause requires some direct relation between the injury asserted and the injurious conduct alleged, and cannot rest on a link that is too remote, purely contingent, or indirect.[46]

As required by the Italian anti-Mafia information model – yet different from the RICO criminal penalties[47] – predicate acts under civil RICO need not be established beyond a reasonable doubt. The fact that offending conduct is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of finding liability in a private civil action are identical to the consequences of a criminal conviction.[48] Thus, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be convicted.[49]

Although the Italian Anti-Mafia Code does not have this particular relief

(see Tribunale di Catanzaro, no 14/2018, available at www.dejure.it) and the court, according to Art 34 of the Anti-Mafia Code shall adopt the different measure of the Judicial Administration characterised by a *manager dispossession* with all the corporate governance substituted (and not simply supported as sets for the judicial control) by the judicial administrator. About the concept of occasional facilitation see n 21 above.

[44] 18 USC §1964 (c).

[45] See City of NY v Fedex Ground Package System, Inc., 175 F.Supp.3d 351, 369 (SDNY 2016) [citing *Sky Med. Supply Inc.* v *SCS Support Claims Servs., Inc.* 17 F.Supp.3d 207, 231 (EDNY 2014) and DLJ Mortgage Capital, Inc. v Kontogiannis, 726 F.Supp.2d 225, 236 (EDNY 2010)].

[46] Ibid 370 citing *Hemi Grp., LLC* v *City of New York,* 559 US 1, 9, 130 S.Ct. 983, 175 L.Ed.2d 943 (2010). About proximate-causation standards test see *Holmes* v *Securities Investor Protection Corp.,* 503 US 258, 268 (1992) where the Court defined the test to require 'some direct relation between the injury asserted and the injurious conduct alleged'.

[47] 18 USC §1963.

[48] *Sedima, SPRL* v *Imrex Co., Inc.,* 473 US 479, 105 S.Ct. 3275, 3281-3282 (1985) citing *United States* v. *Ward,* 448 US, at 248-251, 100 S.Ct., at 2641-2642 . In *Sedima* the Supreme Court stated that there is 'no support in the statute's history, its language, or considerations of policy for a requirement that a private treble-damages action under § 1964 (c) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indications [of the statute] is that no such requirement exists'.

[49] About RICO preponderance of the evidence standard of proof seealso H.S. Simonoff and T.M. Lieverman, 'The RICO-ization of Federal Labor Law: An Argument for Broad Preemption', 8 *The Labor Lawyer*, 335, 340 (1992).

within its measures, similar provisions – even if not exactly like a treble-damage – may be found in Article 2043 of the Italian Civil Code. Synthetically: this rule introduces the so called non-contractual liability (or *aquilana*)[50] that arises when a subject suffers damage from the conduct of others and when there is no mandatory relationship between them (ie, contract). According to the Italian law this, (1) any intentional or negligent act (2) which causes an unjust damage to others (3) obliges the person who committed the act to correct the damage caused.

1. Rico and Labour Unions

An area that best shows some similarities between the RICO civil remedies and the Italian judicial control (above sectionII.1) is the labour law and, in particular, the attempt of organized crime to infiltrate business through labour unions. A starting point for this took place in 1986[51] when the Provenzano group, within the broader Genovese Cosa Nostra Family,[52] sought to take control and making use of the Local 560 for both legal and illegal profit. The Provenzano group, whose leader was Anthony Provenzano, is the textbook example of the 'creation and the use of a climate of fear and intimation to extort union members' rights'.[53] According to federal reports, in June 1961, Teamsters Local 560 Secretary-Treasurer Anthony Castellito, then one of the most popular members of Local 560 and considered by Anthony Provenzano to be a serious threat to his control over Local 560,[54] was murdered.

Next, in May 1963, Walter Glockner, who had spoken out at a Local 560 membership meeting in opposition to a Provenzano Group proposal,[55] was murdered the day after his speech. Even if the record did not support the conclusion that the Provenzano group had these union members killed, it was

[50] Non-contractual liability is also called *aquiliana* from the name of the Roman law - *Lex Aquilia de damno* - that first regulated the ex delicto responsibility (286 BC, possibly).

[51] *United States* v *Local 560, Int'l Bhd. of Teamsters,* 581 F. Supp. 279, 282 (DNJ 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985), *cert. denied,* 476 US 1140 (1986).

[52] The Genovese crime family is one of the 'Five families' that with Bonanno, Colombo, Gambino and Lucchese crime families represents the Italian-American Mafia who controls organized crime activities in New York City after the so called 'Castellamarese War' (1930-1931) that saw the mobster Salvatore Maranzano declaring himself as the 'boss of all bosses'. The Genovese crime family in particular is the organization who directs criminal affairs in New York City and New Jersey. More about the mob organized crime in US is available athttps://tinyurl.com/4rf9jp4f (last visited 31 December 2022). In *Local 560*, at 285 had been ascertained that Provenzano group had association with the Genovese crime family.

[53] S.T. Ieronimo, 'RICO: Is it a Panacea or a Bitter Pill for Labor Unions, Union Democracy and Colletive Bargaining?' 11 *Hofstra Labor and Employment Law Journal*, 499, 516 (1994) quoting R. M. Mastro, et al, 'Private Plaintiffs' Use of Equitable Remedies Under the RICO Statute: A Means to Reform Corrupted Labor Unions', 24 *University of Michigan Journal of Law Reform*, 571, 601 (1983).

[54] n 53 above.

[55] ibid 312.

found that the Provenzano group had utilized the perception that they had killed Castellito and Glockner to instil fear and to stifle opposition.[56] The government also alleged that Local 560 was an enterprise within the meaning of section 1961(4) and that individual defendants were associated under the leadership of Anthony Provenzano, that they were aided and abetted by past and present members of the Executive Board of Local 560, and that they conspired in violation of section 1962(d)[57] to violate section1962(b)-(c).[58]

Judge Harold Ackerman ruled that the evidence supported a conclusion that Local 560 would remain a captive labour organization as long as the status quo would remain unchanged and that in order to prevent future racketeering violations by the Provenzano Group and its aiders and abettors, it was necessary to remove the current Executive Board members from their positions, appointing one or more trustees to administer the Local during a curative period of appropriate length in their place.[59]

Thus, under section 1964(a),[60] the government secured the removal of the Executive Board in favour of the appointment of Joel R. Jacobson as RICO trustee of Local 560 to administer the union during a curative period of eighteen months so that no adherent of the Provenzano Group would have been in a position to potentially undermine the efforts of the trustee.

Jacobson served to effectively dispel the atmosphere of intimidation within Local 560, to restore union democracy, and to ensure that racketeers did not obtain positions of trust within the Local 560. He also supervised the general elections of new officers for Local 560 in order to permit the members to express themselves without fear or apprehension.[61] With many difficulties in controlling the Local's organization and after that many shop stewards continued to show their loyalty to the Provenzano group, Jacobson was replaced by Edwin H. Stier, a cop and former Assistant United States Attorney and Director of the New Jersey State Division of Criminal Justice, with the main purpose of avoid for further participation people near the Provenzano group and leaving Local 560 conditions better than before the RICO trusteeship.[62]

[56] ibid 312.

[57] n 43 above.

[58] S.T. Ieronimo, 'RICO' n 54 above, 517.

[59] n 53 above 321.

[60] In Local 560 the relief is considered 'equitable and remedial in nature, not punitive', n 52 above, 328.

[61] ibid 326.

[62] For a more in-dept analysis about the under-estimation of the problem resulted in the 'Teamster for Liberty' campaign lead by Michael Sciarra and Joseph Sheridan (the latter a former vice-president of Local 560 before the enforcement of the RICO to the Local 560) see S.T. Ieronimo, 'RICO' n 54 above, 519, and M. J. Goldberg, 'Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement' 824 *Duke Law Journal*, 902, 969-970, 974 (1989). Note also that on June 1988 the government filed a civil RICO suit against the Teamsters (*United States* v *International Bhd. of Teamsters,* 708 F. Supp. 1388 (SDNY 1989). This case still represents 'the boldest step taken under RICO in the labor arena, and perhaps the boldest

2. The Broader US Concept of Enterprise

It is also important to conduct a separate comparative analysis of the Italian AntiMafia Code and RICO Act concerning the subjective areas of application of the standard regarding the nature of the *enterprise*, which has a broader meaning in the United States statute.

The Italian AntiMafia Code provisions about the anti-Mafia information only applies to legal entities legally recognized as companies under Italian law. The definition of the Italian entrepreneur (*imprenditore*) is set by Art 2082 of Civil Code as 'one who undertakes professionally an economic activity, organized to produce or to exchange goods or services': the entrepreneur can undertake this activity individually (*libero professionista* or *ditta invididuale*), or within a company, pursuant to Art 2247, which states that a company is formed by an agreement (*contratto di società*) by which 'two or more persons confer goods or services for the mutual performance of an economic activity with the purpose of sharing the profits'. Italian companies must also register into one of the Italian Chamber of Commerce, Industry, Craft and Agriculture registers utilized in every Italian Province.[63] It is relevant to note that what it is provided by the Italian AntiMafia Code can only apply to private entities and in some cases to public or private entities participating by the public administration within the private rules of the Italian Commercial Law.[64]

In contrast, under section 1961(4), an enterprise includes 'any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity'. This definition covers two categories of associations. Although the first category is about organizations such as corporations and partnerships, and other 'legal entities', the latter category is referred to as an 'association-in-fact' enterprise that is not recognized as a legal entity and that is simply a continuing unit that

step taken under RICO in any context' (the quote is from K.R. Wallentine, 'A Leash Upon Labor: RICO Trusteeships on Labor Unions' 7 *HofstraLabor Law Journal*, 341, 345 (1990). This time – in a way very similar to the Italian judicial control – the court allowed defendants to remain in office until the next election and in return the Teamsters, according to §1964(b), agreed to be supported by three court officers to reorganize the International Brotherhood of Teamsters (IBT) governing structure and election process: an administrator who shared power equally with Teamsters' president governing the union, an investigative officer to investigate possible corruptive phenomena and an election officer with the full authority to oversee the election process (S.T. Ieronimo, 'RICO' n 54 above, 523). In fact, RICO trusteeship would have had the merit to transform the corrupted IBT in one of the most democratic unions all over the country (S.T. Ieronimo, 'RICO' n 54 above, citing F. Swoboda, 'The Teamsters' New Face: Judge Leads Army of Federal Monitors to Union Convention to Keep Reforms on Track' *The Washington Post*, 23 June 1991, H1).

[63] The Province is an Italian administrative division (it is something similar to the American division into counties.). They are 107 (such as the Province of Rome, the Province of Florence etc…) and in every Province there is a Prefecture (n 9 above).

[64] The Italian Civil Code of 1942 is the principal source of legislation on companies and partnership. Companies are regulated by Title V of Book V of the Civil Code (Arts 2247-2641).

functions with a common purpose and must to have at least three structural features: (1) a purpose, (2) a relationships among those associated with the enterprise, and (3) longevity sufficient to permit these associates to pursue the enterprise's purpose.[65] Therefore, as held by the Supreme Court, the term enterprise includes both legitimate and illegitimate enterprises.[66] In addition, according to the requirements to state a claim under civil RICO, the enterprise must be an entity separated and apart from the pattern of activity in which it engages and the existence of an enterprise must at all times remain a separate element, both of which must be proven by the Government.[67]

As evidenced by the present considerations there is no place in the Italian anti-Mafia Code for what it is a *de facto* association within the anti-Mafia information measures. Moreover, the meaning of enterprise can be traced back when Congress passed the RICO act, providing that the purpose of the association-in-fact was probably intended to apply directly to the Mafia due to its illegal organization as family members and group of individuals.[68] So, from a point of view related to tackle crime, the only similar instrument that it is provided by the Italian legislation consistent with an association-in-fact and with the main purpose of fighting Mafia is Art 416-*bis* of the Italian Penal Code, which punishes any person participating in, promoting, directing or organizing a Mafia-type unlawful association including three or more people;[69] however, as discussed above section II.2, the application of a criminal law rule clashes with the greater requirement of the standard of proof and the prosecutor must

[65] About the 'association-in-fact' see *Boyle* v *United States,* 556 US 938, 129 S.Ct. 2237, 2244-2246 (2019). Thus, an association-in-fact enterprise may be a group of individuals, or a group of corporations, or a group that includes both individuals and legal entities (*United States* v *Philip Morris USA, Inc.,* 566 F.3d 1095, 1111).

[66] In *Turkette*the US Supreme Court has held that 'there is no inconsistency or anomaly in recognizing that § 1962 applies to both legitimate and illegitimate enterprises' (*United States* v *Turkette*, 452 US 576, 584-585 (1981)). See also *RICO Guideline*, prepared by the Office of General Counsel, U.S. Sentencing Commission 6-7 (2018) available at https://tinyurl.com/2s4cvaar (last visited 31 December 2022).

[67] ibid 582-583. Seealso *Cedric Kushner Promotions* v *King* 533 US 158 (2001) citing *River City Markets, Inc.* v *Fleming Foods West, Inc.* 960 F.2d 1458, 1461 (9th Cir. 1992) for a more in-dept analysis about the relationship between the enterprise and the 'person' who conducts the enterprise even according to the common-law maxim that a person cannot conspire with himself. Note that to state a civil RICO claim the defendant must have participated 'in the operation or management of the enterprise' *Reves* v *Ernst & Young* 507, US 170, 185 (1993).

[68] J.E. Grell, *Enterprise*, available athttps://tinyurl.com/4r6k9yzm (last visited 31 December 2022).

[69] According to Art 416-*bis*, para 3 of the Italian Penal Code, as amended in 1982, Mafia-type unlawful association is said to exist when the participants take advantage of the intimidating power of the association and of the resulting conditions of submission and silence to commit criminal offences, to manage or at all events control, either directly or indirectly, economic activities, concessions, authorizations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for others, or with a view to prevent or limit the freedom to vote, or to get votes for themselves or for others on the occasion of an election. For the use of latin term like *bis*, see n 25 above.

produce evidence to prove criminal liability *beyond any reasonable doubt* (ie, BARD).

Also, the broader concept of enterprise under the RICO Act, without distinguishing between private and public entities has led to the involvement of state and local governmental agencies.[70]

IV. Conclusion

As shown by this analysis, the same purpose of undermining organized crime at its roots is very strong both in the Italian administrative model of anti-Mafia information and in the US civil RICO. Accordingly, both legal systems provide several tools to protect the legal economy from illicit influences. While the Italian model exists on an administrative level and the US one is based on civil level RICO, both systems' tools can be broadly entered within the concept of *matière penale* as defined by the European Court of Human Rights (ECHR) for all those sanctioning reactions, variously named, endowed with an intrinsically punitive content.[71]

Three are the *Engel Criteria*[72] elaborated by the European Court of Human Rights, useful for qualifying an offence as a 'criminal charge': (1) the formal qualification that a State attributes to the violation of a rule, (2) the 'nature of the infringement', understood from the viewpoint of the consequences of the measures, and (3) the 'severity of the sanction that the accused is likely to suffer' to be understood as the severity of the sanction abstractly envisaged and not of the one actually inflicted.

In this way, it turns out to be hard not to put in discussion both what is provided by the Italian law for the anti-Mafia information, and what is provided in the context of civil remedies under the US RICO, in order to include them within the conceptual perimeter outlined by the ECHR jurisprudence.

In the past, the pre-RICO legislation, represented chiefly by the Hobbs Act (1946) that only applied against the person who committed crimes, not offering tools against bosses who commanded their performance, failed.[73]

Now it is undisputed that RICO is 'the most important substantive and

[70] The 5th Circuit held that the Macon Georgia Police Department was an enterprise for the purposes of the RICO (*United States* v *Brown* 555 F.2d 407 (1977)). Into a similar conclusion see also the qualification as an enterprise by the 3rd Circuitfor Pennsylvania Bureau of Cigarette and Beverage Taxes (*United States* v *Frumento* 563 F.2d 1083 (1977).

[71] C.E. Paliero, ' "Materia penale" e illecito amministrativo secondo la Corte Europea dei Diritti dell'Uomo: una questione "classica" a una svolta radicale' *Rivista italiana di diritto e procedura penale*,908 (1985), and Eur. Court H.R., *A e B* v *Norvegia*, Judgment of 15 November 2016 available at www.hudoc.echr.coe.int.

[72] Eur. Court H.R., *Engel and Others* v *The Netherlands,* Judgment of 8 June 1976 available at www.hudoc.echr.coe.int.

[73] B. Scotti, 'Rico vs. 416-bis' n 6 above, 147-149.

procedural tool in the history of organized crime control'[74] intending to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.[75]

Likewise, it is also undisputed that, above all with the treble-damage provision,[76] now the mainly civil remedy used within section 1964, it has started to be abused and overused by plaintiffs and their attorneys.[77] This provision, instead of being used against mobsters and organized criminals, has led civil RICO to become a tool for every day fraud cases.[78]

The construction of the predicate acts both with federal and state felonies causes a 'truly Herculean'[79] effort in its interpretation. In *Sedima*, the Supreme Court acknowledged that private civil actions under the statute were applied under circumstances non-specifically imagined by the Congress rather than against the archetypical, intimating mobster. The Supreme Court stated that 'this defect – if defect is – is inherent in the statute as written and its correction must lie with Congress'.[80] In this way, through the important broadest concept of enterprise that allows, also through the association-in-fact, to hit even the most evolved phenomena of organized crime, it would be desirable to use RICO civil actions in order to precisely target organised crime.[81] Nevertheless, the association-in-fact provided by US civil RICO could be a useful concept to incorporate within the Italian Anti-Mafia Code. Using the preponderance of the evidence standard of proof in this way and not by the BARD rule provided for the application of the criminal statutes of the Art 416-*bis* of the Italian Penal Code,[82] it could be a way to punish the most advanced forms of Mafia

[74] J.B. Jacobs et al, *Busting The Mob: United States v. Cosa Nostra* (New York: New York University Press, 1994), 4-5.

[75] *Russello* v *United States*,464 US 16, 27 (1983).

[76] 18 USC §1964 (c).

[77] S.T. Ieronimo, 'RICO' n 54 above, 538.

[78] n 49 above, 3275.

[79] This is how the problem involving RICO interpretation has been called in S.J. Buffone and T.G. Reed, 'Defending a CIVIL Rico Case: Motions, Defenses, Strategies & Tactics' 155 *Practising Law Institute*, 323 (1990), available athttps://tinyurl.com/8v8uzxvz (last visited 31 December 2022). In *Sedima*the court held that 'RICO should be liberally construed to effectuate its remedial purposes' (n 49 above, 3286). Also the New York Court of Appeals stated 'there is little difference between State Judges interpreting Federal criminal law if the predicate act alleged is Federal law violation and the Federal Judges interpreting State criminal law if the predicate act alleged is a State law violation' (*Simpson Elec. Corp*.v *Leucadia, Inc.,* 530 N.E.2d 860, 865 (NY 1988).

[80] n 49 above, 3286-3287. The Supreme Court cited also the ABA record demonstrating that of at the time 270 known civil RICO cases at the trial court level only the 9% involved allegations of criminal activity of a type generally associated with professional criminals.

[81] Even not sharing the idea that 'private civil RICO actions in the field of labour relations should be proscribed' (S.T. Ieronimo, 'RICO' n 54 above, 544), dissenting opinion of Justice Powell in *Sedima* certainly should represents an important starting point through which the language of the statute should not be read broadly in every way and that 'it is the duty of this Court to implement the unequivocal intention of Congress'.

[82] n 70 above.

infiltration within the legal economy.

On the other hand, the anti-Mafia information system of the Italian Anti-Mafia Code poses problems of coordination with similar measures provided for by Legislative Decree no 231/2000. Within the administrative liability for crime of entities there are also interdiction sanctions provided after being sentenced to certain serious crimes (ie, for the crime provided by the Art 416-*bis* of the Italian Penal Code) and similar tools to judicial control represented by the judicial commissioner of the company.[83]

For example, the application of an interdiction for the enterprise is envisaged, lasting from a minimum of three months to a maximum of two years, represented, in order of severity, by the prohibition from exercising the activity, by the suspension or revocation of authorizations, by the ban on contracting with the Italian administrative agencies or by the exclusion from concessions, loans, contributions or subsidies in addition to the revocation of those already granted. Also in this case, an enterprise can obtain a 'judicial commissioner' *(commissariamento giudiziale)* but in this case, the trustee by the judge does not work alongside the company but completely replaces the management bodies. Even in these measures, which are however adopted in criminal proceedings, the application of a criminal law rule clashes with the greater requirement of the standard of proof of the anti-Mafia information and the prosecutor must produce evidence to prove criminal liability beyond any reasonable doubt (ie, BARD).[84]

Moreover, analysing the great discretion granted to the Prefect under Italian law, it would be desirable to provide for more concrete elements, necessary to ascertain the effective permeability of the business system to the illicit interference of organized crime. This could be possible also in the light of recent Italian jurisprudential rulings that have seen the revocation of the measures adopted due to the insufficiency of the evidentiary framework[85] often linked even only, if not exclusively, to the blood relations of corporates administrators or entrepreneurs and on their frequentations that, even if linked by the bloodshed with people involved in the past into criminal affairs, are not univocally probing the criminal Mafia conditioning.[86]

[83] About the interaction between the Anti-Mafia Code (decretolegislativo 6 September 2011 no 159) and the administrative liability of entities dependent on crime (decretolegislativo 8 June 2001 no 231) see L. D. Favero and C. Corsaro, 'L'estensione delle misure di prevenzione patrimoniale ai reati comuni. Amministrazione giudiziaria e controllo giudiziario quali occasione per la predisposizione degli strumenti di organizzazione, gestione e controllo aziendale' 1-*bis* www.*giurisprudenzapenale.com*, 31 January 2021.

[84] See F. Viganò, 'Artt. 13 e 14', in A. Bernasconi, C. Fiorio and A. Presutti eds, *La responsabilità degli enti. Commento articolo per articolo al D.Legisl. 8 giugno 2001, n. 231* (Padova: CEDAM, 2008).

[85] Consiglio di Stato 2 November 2020 no 6754, available at www.giustizia-amministrativa.it.

[86] Differently, according to the last judicial opinions, it is legitimate the negative anti-Mafia information that is based on a single figure if a series of elements are concentrated

In this sense, the measure envisaged by the anti-Mafia Code should be adopted by the Prefect in compliance with the principle of proportionality that is a 'condition of civilization of the administrative action' [87] and that is composed by the three criteria of the suitability, necessity and adequacy of the measure only in cases where any other instrument offered by the law to combat organized crime cannot be adopted.[88]

Finally, it should be noted that these legal tools act exclusively on one of the symptomatic manifestations of the disease, but do not cure the upstream disease represented by the rooting of organized crime in the socio-economic environment. For this treatment, there will continue to be a need for awareness of the important role played by the individual citizen who, in the imaginary football match between State and Anti-State, the latter represented by Mafia and organized crime associations, daily must decide for whom to cheer.

around it, such as the proximity with contraindicated subjects as well as, through these and through the figure of the cohabiting companion, the world of drug dealing, as well as the proximity to a local Mafia association (Consiglio di Stato 3 August 2021 no 5723 citingConsiglio di Stato 2 May 2019 no 2855).

[87] Consiglio di Stato 5 September 2019 no 6105, available at www.giustizia-amministrativa.it.

[88] The principle of proportionality, which as is well known has assumed importance in the European law and jurisprudence, has certainly acquired greater centrality in national Italian law, above all by virtue of the express reference to the principles of the European Union as disposed by Art 1 para 1 of the legge 7 August 1990 no 241 (Italian Administrative Procedure Act), as amended in 2005.

From a Siloed Regulation to a Holistic Approach? Labour and Environmental Sustainability Under EU Law

Paolo Tomassetti* and Alexis Bugada**

Abstract

Drawing on a progressive interpretation of the principle of sustainable development, this article reviews, compares and analyses the channels for interaction and integration between labour and environmental sustainability in two EU normative domains: social policy and environment policy. While a siloed approach is still evident in both domains, with few exceptions, recent EU legislation on the economic pillar of sustainability has promoted horizontal policies on labour and environment. Social and environmental clauses have been enacted in EU financial law and public procurement law. The same goes for corporate law when the proposal for a directive on due diligence of multinational companies is adopted. The analysed examples of horizontal policies to advance labour and environmental sustainability present risks and opportunities. Arguably, the main risk is that such policies end up in accentuating rather than overcoming the competition between labour and the environment as 'fictitious commodities'.

I. Introduction

Over the last decade, sustainable development has rapidly become a broadly shared goal in policy setting and legislation, for which a degree of consensus among international institutions, states and stakeholders is visible. Yet, in spite of its apparent clarity, sustainable development conceals many pitfalls and legal hurdles. Firstly, the concept has been mainstreamed and lost its specificity: while nobody argues in favour of 'unsustainable development', different stakeholders advocate it with conflicting interests and goals in mind.[1]

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[1] M. Kullmann, 'Promoting social and environmental sustainability: what role for public procurement?' 40 *Comparative Labor Law & Policy Journal*, 109, 111-112 (2018).

Although sustainable development has been championed in recent legislation and orthodox scholarship, critical scholars from different disciplines highlight the perils that such 'oxymoron' brings about, claiming that it risks reproducing the traditional rationality of capitalism, and the multiple contradictions attached to it.[2] Secondly, there is consensus that a progressive interpretation of sustainable development should question conventional policy and regulatory techniques in which normative goals are pursued separately, within different areas of regulations. The potential of sustainable development to advance social and environmental justice, within and beyond the legal foundations of capitalism, lies in its capacity to break silos. And to create channels for integration and solidarity among different (and apparently contrasting) goals, in a such way as to construe sustainability as an element that conditions development, and not vice versa.[3] This is the main concern of this article.

Consider for example labour law and environmental law, two critical domains for sustainable development. A progressive interpretation of sustainable development would not just imply juxtaposing labour and environmental sustainability. Nor such would it involve a simplistic choice on whether priority be given to labour or environmental justice. Although labour standards have 'distinctive merit as a facet of social sustainability', in real-life they interact 'dynamically with the realization of environmental and economic objectives'.[4] Linking social rights with environmental objectives appears as a way forward for both international and domestic regulations, while such an approach must not lead to a dissolution of the specific features of labour law and environmental law.[5] Taking sustainable development seriously,[6] therefore, would involve long-term, complex choices on how to shift from a linear to a systemic type of regulation in which labour and environmental values are balanced and pursued simultaneously. A regulation that

> 'can achieve a fair and sustainable balance between the opposing

[2] For discussion on this aspect, see the classical essay of M. Redclift, 'Sustainable Development (1987-2005): An Oxymoron Comes of Age' 13 *Sustainable Development*, 212 (2005).

[3] E.K. Rakhyun and K. Bosselmann, 'Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law' 24 *Review of European, Comparative & International Environmental Law*, 194, 197-198 (2015). For broader discussion of this argument, see K. Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (London: Routledge, 2016), 79, where the author argues that in terms of goals, the principle of sustainability 'aims to protect ecological systems and their integrity. Its subject matter is ecological processes. However, social processes determine to what extent and how ecological systems should be sustained. This way sustainability becomes a social issue'.

[4] T. Novitz, 'Engagement with sustainability at the International Labour Organization and wider implications for collective worker voice' 159 *International Labour Review*, 463, 465 (2020).

[5] E. Pataut and S. Robin-Olivier, *White paper on the future of labour law* (Paris: ILA, 2022), 61.

[6] B. Sjåfjell, 'The Legal Significance of Article 11 TFEU for EU Institutions and Member States', in B. Sjåfjell and A. Wiesbrock eds, *The Greening of European Business under EU Law. Taking Article 11 TFEU Seriously* (London: Routledge, 2015), 51-72.

> interests of the world of work and business in the mutually shared context of the ecological protection of the planet'.[7]

Such regulatory shift is far from happening. An illuminating report of the European Political Strategy Centre notes that, despite the European Union (EU) has taken pioneering action to promote social and environmental sustainability,

> 'it has also often been the case that its policies remained overly constrained within silos, or rooted in traditional economic premises based on linear development approaches and a prevalence of short-term concerns'[8]

– thereby failing to address the root causes of labour and environmental injustice. Arguably, a similar claim could be made for national legislations and policies. Not only domestic labour laws and environmental laws exist in silos, but lack of coordination between these two normative domains often comes with negative externalities for labour and the environment as 'fictitious commodities',[9] thus undermining sustainable development as a normative principle and in real-life.

This article addresses such dilemmas by analysing how the principle of sustainable development is construed and operates in EU policy setting and legislation. After reviewing the antecedents of sustainable development in a multi-level perspective (section two), it looks at how far EU law and policy making have embraced a holistic approach to the regulation of labour and environmental sustainability. By focusing on the evolution of EU social and environment policy, section three highlights the parallel development of these policy areas, which have historically been subject to a siloed approach to regulation. While such approach is still evident in contemporary EU social policies, section four shows how a new generation of environmental policies have addressed labour concerns by embracing the principle of 'just transition'. However, it will be argued that EU reference to the normative goal of justice in the transition away from fossil fuels is made in a reductionist manner – one that is based on procedural aspects only, without substantial consideration of the role of social partners in shaping the outcomes of the transition and the resulting idea of justice. Section five and the following subparas analyse how labour and environmental sustainability (fails to) interact in EU horizontal

[7] B. Caruso, R. Del Punta and T. Treu, *"Manifesto" for a sustainable labour law* (Catania: Centre for the Study of European Labour Law 'Massimo D'Antona', 2022), 6.

[8] Europlanet Science Congress (EPSC), *Europe's Sustainability Puzzle. Broadening the Debate* (Brussels: EPSC, 2019), 2.

[9] K. Polanyi, *The great transformation: the political and economic origins of our time* (New York: Farrar & Rinehart, 1944). For discussion of labour and the environment as fictitious commodities, in the perspective of sustainability, see T. Novitz, 'Past and Future Work at the International Labour Organization: Labour as a Fictitious Commodity, Countermovement and Sustainability' 17 *International Organizations Law Review*, 10 (2020).

policies, focussing on financial law, public procurement law and corporate law. The last section draws conclusions.

II. Contextualising Sustainable Development

Despite the social implications of sustainable development being already acknowledged since the Brundtland Report of 1987 and the Rio Declaration of 1992, sustainability has barely been construed as a normative principle beyond environmental law. For decades, sustainable development has been a core guiding principle for policy making and legislation in environmental law, without much direct consideration in other legal domains.

One can argue that, indirectly, any regulation of the market economy is attuned with sustainable development.[10] This is acceptable for many reasons. Labour law, for example, plays a market constitutive role: instead of limiting economic development and growth as such, labour standards justify the market economy by making the labour market sustainable, while guaranteeing the fundamental principle that 'labour is not a commodity'.[11] Furthermore, sustainable development in labour relations resonates with the notions of balancing and proportionality among the different interests underpinning the employment contract. This implies that workers' and firms' interests are to be in equilibrium.[12]

On closer inspection, however, orthodox labour law justifications[13] do not entirely fit sustainable development.[14] Firstly, except for social security law and the regulation of pension systems,[15] labour law tends to underestimate the

[10] S. Deakin et al, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' 45 *Journal of Comparative Economics*, 188 (2017).

[11] S. Deakin, 'The Contribution of Labour Law to Economic and Human Development', in G. Davidov and B. Langille eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011), 156.

[12] This is how labour lawyers tend to construe the concepts of sustainable development and sustainability: see for example the debate on labour law and sustainability that took place at the XX national congress of the Italian Association of Labour Law and Social Security (AIDLaSS), '*Il Diritto del lavoro per una ripresa sostenibile*', held at the University of Bari, 'Jonico' Department, in Taranto, on 28-30 October 2021. The keynote speeches of M. Marinelli, L. Fiorillo, M. Marazza and S. Renga, and the related comments by the audience are published in D. Garofalo et al, *Il diritto del lavoro per una ripresa sostenibile. XX Congresso Nazionale AIDLaSS. Taranto, 28-30 ottobre 2021* (Piacenza: La Tribuna, 2022).

[13] For systemic analysis of different labour law justifications, see G. Davidov, *A purposive approach to labour law* (Oxford: Oxford University Press, 2016).

[14] Overall, there is consensus that labour law should be reconsidered in the light of sustainable development, despite the positions of labour law scholars tend to diverge when it comes to establish the goals and the means of such normative and epistemological adjustment. Contrast, for example, B. Caruso, R. Del Punta and T. Treu, n 7 above, 111-118. For a broader conceptualization of labour law in the light of sustainable development, see V. Cagnin, Labour law and sustainable development (Alphen aan den Rijn: Wolters Kluwer, 2020).

[15] For discussion of this topic, see the special issue published in the issue no 1 *Diritto delle relazioni industriali* (2019) on 'La solidarietà intergenerazionale nella tutela pensionistica

interests of future generations – a core normative value for sustainable development.[16] The popular definition of the Brundtland report points exactly in that direction: '(s)ustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future'.[17] Although this is a major difference with sustainable development, this article will focus on a second set of reasons: the lack of environmental consideration in the classical labour law normative domain.[18] This holds true the other way around: traditionally, the fundamental goal of environmental law was to render development compatible with the preservation of the environment, without any consideration for workers' material interests. This reductionist idea of sustainable development reproduced the binary conception of regulating labour and the environment as fictitious commodities, whose 'double-movement'[19] was articulated in silos, underestimating the potential externalities that siloed regulation brings about in terms, for example, of cost-based competition between the two normative domains.

Although the problem of cost-based competition in the regulation of labour and the environment as fictitious commodities is underestimated in labour law discourses, Italian scholarship is not unfamiliar with it. Antonio Vallebona, for example, argues that since legislation on labour and the environment affects production costs, labour law should consider the environmental effects of labour regulation and *vice versa*.[20] He maintains that in a globalised economy, environmental and labour standards in Western jurisdictions might have the effect to incentivize the outsourcing of the most polluting production activities where labour and environmental costs are lower. Riccardo Del Punta made a similar claim in a pioneering article of 1999.[21] He observed that the two values – labour and the environment – in capitalist economies and societies tend to be considered as costs, therefore they are put in competition. Legislators and trade

pubblica e privata', with essays of G. Arconzo, G. Ludovico, G. Canavesi and M. Squeglia.

[16] Cf T. Novitz, 'The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?' 31 *International Journal of Comparative Labour Law and Industrial Relations*, 243 (2015).

[17] World Commission on Environment and Development, *Our Common Future* (Brundtland Report) (1987).

[18] For exceptions, see the special issue published in the 40(1) *Comparative Labor Law & Policy Journal* (2018), with essays of A. Zbyszewska, S. Routh, P. Tomassetti, C. Chacartegui and M. Kullmann) and the special issue published in the issue no 1 *Lavoro e diritto* (2022), with essays of A. Lassandari, S. Laforgia, W. Chiaromonte, G. Natullo, V. Brino, R. Bin and G. Centamore, as well as in the issue no 2 *Lavoro e diritto* (2022), with essays of A. Baylos, S. Buoso, F. Martelloni, C. Carta, P. Pascucci, P. Tullini, D. Castronuovo, V. Pinto, F. Grazzini, L. Corazza and C. Faleri. Cf also P. Tomassetti, *Diritto del lavoro e ambiente* (Bergamo: Adapt University Press, 2018).

[19] K. Polanyi, n 1 above.

[20] A. Vallebona, *Lavoro e spirito* (Torino: Giappichelli, 2011), 16.

[21] R. Del Punta, 'Tutela della sicurezza sul lavoro e questione ambientale'*Diritto delle relazioni industriali*, 151, 160 (1999).

unions have historically embraced productivism as a goal for regulation, underestimating the implications that raising labour standards and growth might have on environmental sustainability. The author made the case for rethinking the value of labour and its regulation in the light of other social values and interests, among which environmental sustainability should be given primacy.

The year 2015 was a turning point to rethink the idea of sustainable development. The United Nations (UN) 2030 sustainable development agenda set the policy framework to promote social, environmental, and economic sustainability at regional and state level. Goal no 8 of the UN agenda seeks to 'promote inclusive and sustainable economic growth, employment and decent work for all', by improving 'progressively, through 2030, global resource efficiency in consumption and production and endeavour to decouple economic growth from environmental degradation'. The UN Framework Convention on Climate Change (UNFCCC), the so-called Paris Agreement, emphasises 'the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty'. The same year, the International Labour Organization (ILO) adopted the Guidelines for a just transition towards environmentally sustainable economies and societies for all, putting the four pillars of the Decent Work Agenda – social dialogue, social protection, rights at work and employment – at the core of sustainable development.[22] The ILO intended to raise awareness of the intimate nexus between economic, social, and environmental pillars. The centenary declaration outlines the horizon of the ILO's action, with a focus on protection of work as inseparable from the economic, social, and environmental dimensions of development.[23] As clearly put in the 'White paper on the future of labour law', therefore, 'the future of work is tightly connected with the notion of 'sustainable development'.[24]

The antecedents of a systemic approach to sustainable development were already visible at European level, despite the set of norms set forth in the fundamental acts of the EU not having found appropriate implementation at a both policy and regulatory level. Art 11 of the Treaty on the Functioning of the EU is instructive in this respect. It provides that 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development'. A similar provision is laid down by Art 37 Charter of fundamental rights of the EU, according to which 'A high level of environmental protection and the improvement of the quality of the environment must be

[22] ILO, Guidelines for a just transition towards environmentally sustainable economies and societies for all (Geneva: International Labour Office, 2015).

[23] See para II, A, 1 of the ILO Centenary Declaration for the Future of Work, 21 June 2019.

[24] E. Pataut and S. Robin-Olivier, n 5 above, 61.

integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'. While a reasonable interpretation of such provisions would imply that environmental concerns should inform all the EU policies and activities, including social policy and legislation, a reductionist idea of sustainable development has prevailed, leaving the three dimensions of sustainability often addressed in silos.[25]

In parallel to the promotion of environmental sustainability at international level, the principle of sustainable development has been constitutionalised in core EU member States. France and Italy are notable examples in this regard. Adopted in 2004, and incorporated in the Constitution in 2005,[26] the French 'Charter of the Environment' completed the *long durée* list of constitutional rights that began with the 1789 Declaration.[27] Art 6 of the Charter provides that 'Public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress'. Despite sustainable development not being explicitly mentioned in the 2022 amendment of the Italian Constitution, indirect reference to such principle stands out in the revised versions of Arts 9 and 41.[28] While Art 9 provides that the Republic 'protects environment, biodiversity and ecosystems, also in the interest of future generations', Art 41 makes it clear that private economic initiative cannot take place when damaging health and the environment. Moreover, Art 41 mandates that the law shall provide

> 'appropriate programs and controls, so that public and private economic activities can be directed and coordinated for social and environmental purposes'.

These provisions have elevated environmental sustainability and sustainable development from the status of having simple protection through legislation, to constitutional rights. In both jurisdictions, case law had already recognized the protection of the environment as a core and primary value. On this basis, both the French and Italian Constitutions provide standards for legislators and policy makers to make substantial contents of legislation attuned with environmental sustainability. If those standards are not respected, in terms of balance with

[25] EPSC, n 8 above.

[26] Loi constitutionnelle 2005-205, 1 March 2005 (Loi constitutionnelle relative à la Charte de l'environnement (1)), JORF 2 March 2005, esp 3697.

[27] D. Marrani and S.J. Turner, 'The French Charter of the Environment and Standards of Environmental Protection', in S.J. Turner et al eds, *Environmental Rights. The Development of Standards* (Cambridge: Cambridge University Press, 2019), 309-322, and D. Bourg and K.H. Whiteside, 'France's Charter for the Environment: Of Presidents, Principles and Environmental Protection' 15(2) *Modern & Contemporary France*, 117 (2007).

[28] V.M. Cecchetti, 'Virtù e limiti della modifica degli articoli 9 e 41 della Costituzione' *Corti supreme e salute*, 127 (2022); E. Mostacci, 'Proficuo, inutile o dannoso? Alcune riflessioni a partire dal nuovo testo dell'art. 41' 52(2) *DPCE Online*, 1123 (2022); C. Sartoretti, 'La riforma costituzionale "dell'ambiente": un profilo critico' *Rivista giuridica dell'edilizia*, 119 (2022).

economic and other social rights, the constitutional courts may declare that statutory regulation fails to comply with the Constitution. Yet, how to pursue sustainable development in practice, balancing the three pillars of sustainability and making them convergent, is much more controversial, as recent 'hard cases' in France, Italy and elsewhere demonstrate.[29] Many challenges arise when it comes to turn the normative proposition of sustainable development into regulation and policies, even considering that the great majority of national legislation in the fields of labour law and environmental law derives from EU law.

III. Siloed Regulations and Policies

Instead of a convergent pattern, the evolution of EU environmental and social policies followed a *parallel* development, while remaining compartmentalised.[30] In both domains, the old-time Commission played the 'legal basis game' in order to advance its own proactive goals before a proper legal competence had been entrusted to her. It was with the Single Act and later the Maastricht Treaty (1993) that the EU obtained a legislative power to start exerting some actual influence upon recalcitrant Member States. While the Treaty of Maastricht made the environment an official EU policy area, introducing the co-decision procedure and making qualified majority voting in the Council the general rule, the Treaty of Amsterdam (1999) established the duty to integrate environmental protection into all EU sectoral policies with a view to promoting sustainable development. The Nice Treaty (2001) was a disappointment for activists and supporters of a more interventionist Europe in both social and environmental areas as the promise of enlarged competences were denied and key areas continued to be subject to the unanimity rule, which meant in fact that no Directives could be passed if a single Member State exercises its power of veto (for instance, taxation policies in the environmental domain or individual dismissals in the labour domain).

The most dynamic period for common regulation was the nineties and early years of the new century. Since the 2004 enlargement, there has been a growing trend to halt new legislation and to replace hard law by softer means of persuasion also in view of the difficulty to enforce current legislation. The costs for business and the drive for competitiveness have been branded in an inflated manner as arguments against new legislation or strict enforcement of existing legislation in both domains, not only by individual Member States but also

[29] The reference is to Cons. Const. déc. DC n° 2022-843, 12 August 2022 (France) and to Corte Costituzionale 9 May 2013 no 85, available al www.cortecostituzionale.it: see section IV(2) below, for discussion.

[30] J.P. Lhernould, 'Une Europe sociale durable en 2030 ? Petit exercice de futurologie' *Semaine juridique éd. Sociale*, 1315 (2021).

internally to the Commission.[31]

Such a parallel development between the environmental and the social branches of EU law and policy were not sufficient to shape a more integrated approach between the two. There are several reasons for that. The functional separation and specialization of policy makers and advisory groups both internally to the Commission and in each country's administration is one such reason.[32] Different legal bases in the Treaty make policy objectives more difficult to embed in regulation as it increases the number of players and makes the procedural steps even more complex and cumbersome than they already are. Active opponents of a proactive environmental policy would welcome this opportunity to join forces with opponents of social regulation to block the legislative adoption procedure.[33]

There is one policy field where the interaction between social and environmental objectives is clearer. That is occupational health and safety. The 1989 framework directive[34]and the technical directives that complement it put the responsibility for the health and safety of workers on the employer and assigns to him the obligation of evaluating and preventing the risks through a formal risk assessment procedure. It also imposes on the employer the obligation of informing and discussing with workers or their representatives about any risk and providing them with specific training. While literal interpretation of the text clearly points to risks that are limited to environmental conditions affecting the health and safety of workers, a purposive approach to the analysis of the directive is perhaps less restrictive than it seems. For example, the directive requires prevention planning to take account of 'environmental factors' at work. This notion does not distinguish between internal and external factors, and it appears to be porous to broader environmental risks that can affect workers' health. On the other hand, it is difficult in many contexts to distinguish between employee's health, public health, and environmental concerns. For instance, when workers are not assigned to a specific or closed workplace, or in the case of work involving chemical agents. Surprisingly, though, the distinction between internal working environment and the natural environment did not exist before mid-eighties; this separation was the result of a political choice made during the intergovernmental conference of 1984-1985, when nuclear issues and those related to work environment were extrapolated from the general EU environmental policies.

Joint consideration of environmental and social aspects should have led to more compatible legislation on the protection of health and safety of workers

[31] P. Tomassetti, n 18 above, 159.

[32] M. Hartlapp, J. Metz and C. Rauh, *Which Policy for Europe? Power and Conflict Inside the European Commission* (Oxford: Oxford University Press, 2014).

[33] P. Tomassetti, n 18 above, 160.

[34] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183.

and environmental protection in the case of hazardous chemical substances. The Seveso directives,[35] the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regulation[36] and the Occupation Safety and Health (OSH) directives on chemical agents and carcinogens were developed separately with the result that now both impose requirements on the use of hazardous chemical substances in the workplace and employers find themselves faced with two sets of duties. Their requirements overlap to some extent, and this has the potential to give rise to inconsistencies in their application. Moreover, although the goal of the Seveso directives was not to hinder competitiveness and industrial innovation, in many cases they have prompted an increase in production costs. When the first Seveso directive was passed, some chemical companies were simply put out of the market, while other outsourced the most polluting production activities in non-EU countries, with negative effects on both vulnerable workers and communities.[37] This problem of effectiveness should not be underestimated by future EU legislation in this field, which has been announced within the European Green Deal (EGD),[38] in order to increase the level of protection and intensify substitution of chemicals by safer and more sustainable products.[39] Beyond such problems of effectiveness, both the Seveso directives and the REACH regulation have contributed to improve knowledge of chemical substances to achieve a higher level of protection for human health and the environment. In this connection, they

[35] Also known as the 'Seveso Directive', after the Seveso disaster, Council Directive 82/501/EEC of 24 June 1982 on the major-accident hazards of certain industrial activities [1982] OJ L 230, was aimed at improving the safety of sites containing large quantities of dangerous substances. It was superseded by the Seveso II Directive (Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances [1996] OJ L 10) and then by Seveso III directive (Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC Text with EEA relevance [2012] OJ L 197).

[36] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L 396.

[37] For discussion of this problem, see P. Tomassetti, 'Ambiente di lavoro e di vita: fonti regolative e standard di prevenzione' *Rivista giuridica del lavoro e della previdenza sociale*, 160, 165-166 (2021).

[38] European Commission, Chemical Strategy for Sustainability. Towards a Toxic-Free Environment, COM(2020) 667 final.

[39] The reform proposal aimed at changing the prevention mechanism by imposing a risk assessment carried out no longer on a case-by-case basis, but on the ground of categories of substances for greater intelligibility. A public consultation was launched. However, the energy crisis linked to the war in Ukraine and the resistance of the oppositions to the reform process have both conspired against the revision proposal. The recast of the text has been postponed at the end of 2023 or, more likely, after the next European elections.

have led to tighter control of products and better information, forcing employers to better assess chemical substances and prevent the risks attached to them for the environment, workers, and communities.[40]

Another area of normative intersection between the two fields is the so-called 'Whistleblowing Directive',[41] which lays down common minimum standards for the protection of persons reporting breaches of Union law, including directives and regulations concerned with the protection of the environment and nuclear safety. According to Art 4, the directive should apply to reporting persons working in the private or public sector who have obtained information in a professional context about the violation of EU environmental, or public health legislation including radiation protection (nuclear safety) and product safety and compliance among others. The Directive requires states to protect workers who have reported such violations from reprisals by also providing them with support measures in the form of active and passive protection.

However, out of these specific normative domains, EU social policy is muted when it comes to deal with environmental sustainability. Except for the 2004 European social partners framework agreement on telework, all the directive's preambles in the field of employment fail to consider even indirectly any reference to environmental concerns that would justify an interpretation of the EU social policy in the light of the principle of sustainable development as governed in Art 11 of the Treaty on the Functioning of the EU. The European Commission has recently lost an opportunity to do so when drafting the EU Pillar of Social Rights (EPSR), as this document does not mention environmental sustainability among its objectives or policy goals. Besides a vague reference to the sustainability of the growth model in recital 11, the socio-ecological nexus was largely missing in the principles of the EPSR, a partial exception being the recognition of the right to access good quality essential services, including water, sanitation, and energy (Principle 20).

This is unfortunate since, conversely, in the majority of communications and working documents falling within the EU environmental policy, the Commission compulsively accounts for the positive impact of the transition to a law carbon economy on the labour market.[42] In this connection, the EPSR has

[40] C. Vanuls, *Travail et environnement. Regards sur une dynamique préventive et normative à la lumière de l'interdépendance des risques professionnels et environnementaux* (Paris: PUAM, 2014), spec para no 437.

[41] Directive (EU) 2019/1937 of the European parliament and of the Council of 23 October 2019, on the protection of persons who report breaches of Union law [2019] OJ L 305.

[42] See, for example, European Commission, *A Roadmap for moving to a competitive low carbon economy in 2050*, COM (2011) 112 def, 13; European Commission, *Roadmap to a Resource Efficient Europe*, COM (2011) 571 def; European Commission, *Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness*, COM (2012) 95 def, 3; European Commission, *A 2030 framework for climate and energy policies*, COM(2013) 169 def; European Commission, *A policy framework for climate and energy in the period from 2020 to 2030*, COM(2014) 15 def; European Commission,

gradually became the normative framework and benchmark for the EU 'just transition' to climate neutrality, while active labour market policies, education, training and skills-development policies are considered as key enablers of this major shift of the EU economy. An example of this is a Communication from the Commission stating that:

> 'the European Pillar of Social Rights is the European answer to these fundamental ambitions. It is our social strategy to make sure that the transitions of climate-neutrality, digitalisation and demographic change are socially fair and just'.[43]

IV. The EU 'Just Transition' Era

After the publication of the EGD, the link between the EPSR and the green transition was made more explicit. The Communication 'A Strong Social Europe for Just Transition' is clear in stating that the EPSR is the EU's 'social strategy to make sure that the transitions of climate neutrality, digitalisation and demographic change are socially fair and just'. Two areas of intervention relating to the governance of socio-ecological challenges are emphasized: a) equipping people with the skills needed for the green transition; and b) addressing energy poverty and the distributional consequences of the energy transition.

EU policy responses to the Covid-19 crisis have further enhanced the link between the EPSR and the transition to a green economy. While emphasizing the Covid-19 crisis as a 'unique opportunity to accelerate the green transition', the Commission invited Member States 'to factor in', across green policy areas, the need to ensure a just and socially fair transition and to adopt measures ensuring equal opportunities, inclusive education, fair working conditions and adequate social protection 'in the light of the European Pillar of Social Rights'.[44] Moreover, in order to assess the adequacy of the National Recovery and Resilience Plans to be adopted within the Next Generation EU recovery programme, a set of criteria have been established by Regulation (EU) 2021/241 of the European Parliament and of the Council, including their contribution to the implementation of the EPSR (recital 42).[45]

In this policy framework, labour market policies, education, training and skills development are strongly highlighted and explicitly linked to the green

Green Employment Initiative: Tapping into the job creation potential of the green economy, COM(2014) 446 def.

[43] European Commission, *A strong social Europe for Just Transitions*, COM(2020) 14 final.

[44] European Commission, *Annual Sustainable Growth Strategy 2021*, COM(2020) 575 final, 8.

[45] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57.

transition. The emphasis on labour market policies is also emphasized in EU policy documents that specifically address the social and economic implications of the green transition, including the establishment of a Just Transition Mechanism and of a Just Transition Fund.[46]

Beyond the narrow coverage of the Just Transition Fund, whose focus is on the regions, industries and workers most affected by decarbonisation, other EU policy areas have established transitionary tools to anticipate and mitigate the employment effects of the transition to climate neutrality. On 21 December 2021, for example, the European Commission endorsed new Guidelines on State aid for climate, environmental protection and energy (the Guidelines).[47] The Guidelines are intended to bring state aid rules in line with the objectives of the EGD, which will require very significant investment, public as well as private.[48]

Despite state aid being prohibited by Art 107(1) of the Treaty on the Functioning of the EU, where it threatens to distort competition in the internal market by favouring certain undertakings or the production of certain goods, and affects trade between Member States, permitted state aids include costs linked to the closure of power plants using coal, peat or oil shale and of related mining operations (see point 4.12 of the Guidelines). In line with the principle of just transition, state support to mitigate the social (and environmental) implications of such closure is exceptionally allowed to cover, among the others, labour-related costs (see Annex II of the Guidelines), including the payment of social welfare benefits resulting from the pensioning-off of workers, as well as residual costs to cover former workers' health insurance. Other exceptional expenditure is allowed to support workers who lose their jobs, along with the costs covered by the undertakings for the re-qualification of workers in order to help them find new jobs, especially for training purposes.

1. From Justice to Fairness?

A major shift in EU policy language is visible in policy documents dealing with the employment implications of the energy transition. While this transition was originally meant to be just, reflecting the trade unions demand for climate justice and the ILO guidelines on a just transition,[49] the European

[46] Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund [2021] OJ L 231.

[47] European Commission, *Guidelines on State aid for climate, environmental protection and energy 2022*, 2022/C 80/01. These guidelines were formally adopted in January 2022.

[48] See K. Arabadjieva and P. Tomassetti, 'Commission guidelines on environmental state aids: A 'Just Transition' perspective' 11 *Etui.greennewdeal Newsletter*, 1-3 (2022).

[49] For discussion on the origins of the principle of 'just transition', see D.J. Doorey and A. Eisenberg, 'The Contested Boundaries of Just Transitions', in C. Chacartegui eds, *Labour Law and Ecology* (Cizur Menor: Thomson Reuters-Aranzadi, 2022), A.R. Harrington, *Just Transitions and the Future of Law and Regulation* (London: Palgrave Macmillan, 2022) and D.J. Doorey, 'Just Transitions Law: Putting Labour Law to Work on Climate Change' 30 *Journal of Environmental Law and Practice*, 201 (2017).

Commission has now switched to the concept of fairness, by proposing a Council recommendation on ensuring a fair transition towards climate neutrality.[50] The recommendation was adopted on 16 June 2022 without substantial changes from the Commission's proposal.[51]

The word 'just' and the concept of justice almost entirely disappeared from this recommendation, except for reference purposes when previous policies are recalled. Now the emphasis is all on fairness, to the point of misciting the content of existing policy documents. In several sentences, indeed, the (proposed) Council recommendation recalls that the EGD 'stresses that the transition must be fair and inclusive'.[52] It states that 'the need for a fair transition is an integral part of the Green Deal'.[53] But this is inaccurate.

The EGD clearly affirms that the transition 'must be just and inclusive'.[54] In this framework, a Just Transition Mechanism was launched – and the Just Transition Fund was established –with the aim 'to leave no one behind'. Further EU policy documents have reproduced the concept of justice in the transition to EU climate neutrality. For example, on 17 December 2020 the European Parliament adopted a Resolution on 'A strong social Europe for just transitions'.[55] The emphasis on justice is also evidenced in the 'European Pillar of Social Rights Action Plan',[56] while the measures presented in the Communication on 'Tackling rising energy prices: a toolbox for action and support'[57] are expected 'to contribute to achieving a socially just and sustainable energy transition'.

It is true that this conceptual shift may only be a nominal one, as fairness and justice are interchangeable. But looking at the conceptual difference between the two words, it is at least reasonable to argue that this change is far from being unintentional. The issue at stake with the energy transition is whether the idea of justice regarding the outcomes of this process is to be socialised or imposed.[58] Depending on this, the debate on fairness can be accepted or challenged. Point 8(c) of the recommendation, which refers to social dialogue and collective bargaining as cross-cutting elements for policy actions, is ambivalent in this respect. Member States are invited to 'Involve social

[50] European Commission, Proposal for a Council recommendation on ensuring a fair transition towards climate neutrality, COM(2021) 801 final.

[51] Council of the European Union, Recommendation on ensuring a fair transition towards climate neutrality, 16 June 2022.

[52] ibid 16.

[53] ibid 14.

[54] European Commission, *The European Green Deal*, COM(2019) 640 final, 2.

[55] European Parliament, A strong social Europe for Just Transitions, 2021/C 445/11.

[56] European Commission, The European Pillar of Social Rights Action Plan, 2021.

[57] European Commission, Tackling rising energy prices: a toolbox for action and support, COM(2021) 660 final.

[58] C. Chacartegui, 'Workers' Participation and Green Governance' 40 *Comparative Labor Law & Policy Journal*, 89 (2018).

partners at national, regional and local levels in all stages of policy-making foreseen under this recommendation, including through social dialogue and collective bargaining where adequate'. Apparently, this provision entitles social partners to be involved in a wide range of policy making areas, at different levels. On closer inspection, however, this Council recommendation is restricted to measures aimed at addressing the employment and social implications of industrial policies that, ultimately, have already been decided elsewhere by someone else and, usually, without any democratic participation.

2. Justice, Fairness, and Equity Under the EU 'Climate Law'

In this connection, the idea of participation underpinning the EU 'climate law'[59] might also be questioned. EU Regulation 2021/1119 emphasises the need to ensure that the transition to climate neutrality is fair and socially equitable for all.[60] While fairness and equity remain vague concepts, this regulation endorses the principle of participation in environmental law. Art 9 expressly refers to public participation, which means a dialogue with all components of civil society aimed at empowering stakeholders, citizens, and communities. The need for an inclusive process on the part of civil society resonates with Principle 10 of the 1992 Rio Declaration,[61] as well as with Art 6, para 4, of the 1998 Aarhus Convention.[62] Both provisions echo the idea that stakeholders should have a voice in environmental decisions, which in turn implies access to information, public awareness and, most importantly, involvement in the decision-making process when all policy options are still viable.

The implementation of such inclusive participatory process, though, cannot be taken for granted. As recent social conflicts over the energy transition and climate litigation demonstrates, a minimalistic idea of participation has prevailed. Based on the wrong idea that there is a dichotomy between fossil fuels and renewable energy,[63] EU policies continue to focus on the process rather than on

[59] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] OJ L 243.

[60] Art 4.

[61] Principle 10 of 'The Rio Declaration on Environment and Development' of 1992 provides that 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided'.

[62] Art 6, para 4, of the 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters', provides that 'Each Party shall provide for early public participation, when all options are open and effective public participation can take place'.

[63] A. Dunlap, 'Spreading "green" infrastructural harm: mapping conflicts and socio-ecological

the outcomes of the transition towards carbon neutrality. This is unfortunate since the outcomes of the energy transition are not neutral in terms of labour power and social sustainability. While decarbonization policies are welcome and much needed to meet the goals of the Paris agreement, the transition to renewables will not necessarily lead to social-ecological justice. Regardless of critical problems of distributive justice and inequality, in fact, renewables risk reproducing the hierarchical and undemocratic architecture of the fossil-fuel political economy.

In short, democratic participation in the transition away from fossil fuels should not be idealized. Lack of substantial participation is the rule rather than the exception when it comes to take core environmental decisions. This is also evidenced by climate litigation. In most climate litigation suits against governments that failed to take adequate actions to meet climate targets, plaintiffs include Non-governmental organizations (NGOs) and civil society, with no trade unions involved. Although the suits focus on violation of human rights, including the right to a stable and safe climate, no reference to the social implications of greenhouse gas emissions cut is visible, except for some cases in which the job opportunities of the green economy are mentioned. This approach to climate litigation risks bringing governmental defences to manipulate the 'just transition' principle so to justify delays in the implementation of climate policies, just like employers tend to do when they advocate the idea of justice in the transition away from fossil fuels.

The Ilva case in Italy is instructive in this respect.[64] Despite evidence on the environmental disaster produced by the giant steel corporation, legal arguments behind the Italian Constitutional court decision to maintain Ilva's operations in line with the then Governmental decision, were based on a construct through which the safeguard of health and the environment as fundamental rights[65] was (put in competition and) balanced with the right to work upon which the constitutional order is founded,[66] instead of balancing the right to health with the economic freedom.[67] Business interests and the right to work were therefore considered as a hendiadys, and occupation served as a shield to counterbalance health and environmental protection, thus justifying the continuation of Ilva's activities.[68]

Similarly, a recent decision of the French Constitutional Council ruled on

disruptions within the European Union's transnational energy grid' *Globalizations* (2022).

[64] M. Meli, 'The Environment, Health, Employment. Ilva's Never Ending Story' 6(2) *The Italian Law Journal*, 477 (2020).

[65] Art 32 Costituzione.

[66] Arts 1 and Art 4 Costituzione.

[67] Art 41 Costituzione.

[68] See P. Tomassetti, 'From Treadmill of Production to Just Transition and Beyond' 26 *European Journal of Industrial Relations*, 439 (2020) and P. Tomassetti, 'Labor law and environmental sustainability' 40 *Comparative Labor Law & Policy Journal*, 61, 82-83 (2018).

the constitutionality of a law allowing for the acceleration of the installation of a floating LNG tanker in a major French harbour (Le Havre), implying derogations to certain standards laid down by the environmental code.[69] In addition, the law provided for an increase in the greenhouse gas emission ceiling for certain fossil-fuel based facilities for electricity generation. The judges made extensive use of the 'Charter of the Environment', indicating that the Council will fully implement it in its future decisions. The decision is remarkable since it recalls several fundamental rights: the right to live in an environment that respects health, the right to information and citizen participation, and respect for the ability of future generations and other peoples to meet their needs. It begins with the very strong assumption that humanity is inseparable from its natural environment. It then mandates that the promotion of sustainable development shall lead to the balancing of environmental protection, economic development, and social progress. Finally, the Constitutional Council carries out a control of finality and proportionality by specifying that the preservation of the environment must be construed in the same way as the other fundamental interests of the nation. Despite this, though, the decision ultimately legitimised the derogations of the environmental code for energy security reasons linked to the current energy crisis.

V. Labour and Environmental Sustainability in EU Horizontal Policies

Beyond the EU sectoral competences on social and environment policies, labour and environmental sustainability have been promoted in different policy domains falling within the economic pillar of sustainable development, including finance, public procurement, and corporate governance. Labour and environmental standards have come to acquire relevance in the EU internal market regulation through incentive norms and conditionality rules aimed at enhancing sustainable development. The next three sections provide examples of such regulatory techniques, analysing horizontal policies in the fields of 'Socially Responsible Investments' and pension funds, public procurement and concession contracts, as well as corporate sustainability due diligence.

1. EU Regulations on Sustainability-Related Disclosures and Taxonomies

In the wake of the Paris Agreement and the UN 2030 Agenda, the EU is rapidly building a legal framework to reorient capital flows towards sustainable investments. EU law introduced transparency-related obligations in two EU

[69] Cons. Const. déc. DC n° 2022-843, 12 August 2022, https://www.conseil-constitutionnel.fr/decision/2022/2022843DC.htm.

Regulations applicable to financial services. Regulation 2019/2088[70] establishes the rules on sustainability-related disclosures in the financial services sector (referred to as the 'Disclosure' regulation). Regulation 2020/852, instead, establishes a framework to facilitate sustainable investment (known as the 'Taxonomy' regulation).[71]

The Disclosure regulation seeks to achieve more transparency regarding how financial market participants – including pension funds –[72] integrate sustainability risks into their investment decisions along with investment or insurance advice.[73] The Taxonomy regulation is intended to shape the criteria for determining whether an economic activity qualifies as environmentally sustainable for the purposes of establishing the degree to which an investment is environmentally sustainable.[74]

Based on a shared language across the EU, this regulation can certainly help to steer private funding towards responsible finance. The Taxonomy regulation does not prohibit investments. It exposes them to transparency on societal and environmental risks by reinforcing existing rules on extra-financial information, which also makes it possible to offer a benchmark to fight against greenwashing.

Art 6 of the Disclosure regulation states that financial market participants shall include descriptions of the manner in which sustainability risks are integrated into their investment decisions along with the results of the assessment of the likely impacts of sustainability risks on the returns of the financial products they make available. According to Art 8 and Art 9 of the Regulation, the sustainability risk assessments and relative pre-contractual disclosures by financial market participants should feed into pre-contractual disclosures by financial advisers. In turn, financial advisers should disclose how they take sustainability risks into account in the process of selecting the

[70] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L 317.

[71] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L 198.

[72] See Art 2, para 1, letters c), d), f).

[73] The guiding principle of this regulation is clarified in para 15 of the preamble: 'Where the sustainability risk assessment leads to the conclusion that there are no sustainability risks deemed to be relevant to the financial product, the reasons therefore should be explained. Where the assessment leads to the conclusion that those risks are relevant, the extent to which those sustainability risks might impact the performance of the financial product should be disclosed either in qualitative or quantitative terms'.

[74] The proposition behind this regulation is expressed in para 11 of its preamble: 'Making available financial products which pursue environmentally-sustainable objectives is an effective way of channelling private investments into sustainable activities'. Para 12 of the same preamble, instead, sets the overall rational of the regulation: harmonisation at Union level, 'in order to remove barriers to the functioning of the internal market with regard to raising funds for sustainability projects, and to prevent the future emergence of barriers to such projects'.

financial product presented to end investors before providing their advice, regardless of the preferences for sustainability. In particular, para 3 of Art 9 sets out that 'where a financial product has a reduction in carbon emissions as its objective, the information to be disclosed pursuant to Arts 6(1) and (3) shall include the objective of low carbon emission exposure in view of achieving the long-term global warming objectives of the Paris Agreement'.

While the social and governance aspects of sustainability have not yet been defined in the Taxonomy regulation,[75] economic activity is understood as being environmentally sustainable where it contributes substantially to one or more of the environmental objectives set out in the regulation: that is to say, it does not significantly harm any of the environmental objectives set out in the regulation; it is carried out in compliance with the minimum safeguards laid down in the regulation; and, it complies with the technical screening criteria that the Commission establishes in accordance with the regulation.[76] Art 9 of the Taxonomy regulation identifies the following environmental objectives: (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems. Each of these objectives is further specified in the subsequent articles of the regulation, which provide extensive details on how sustainability goals and taxonomies should be articulated.[77]

Despite the lack of a definition of social sustainability, para 35 of the Taxonomy regulation's preamble embeds a clear principle of integration between social and environmental sustainability, clarifying that compliance with minimum labour standards and safeguards – including those established by the European Pillar of Social Rights – 'should be a condition for economic activities to qualify as environmentally sustainable'. For this reason, the regulation states that economic activities should only qualify as environmentally sustainable to the extent that:

> 'they are carried out in alignment with the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights, including the declaration on Fundamental Principles and Rights at Work of the International Labour Organisation (ILO), the eight fundamental conventions of the ILO and the International Bill of Human Rights. The fundamental conventions of the ILO define human and labour rights that undertakings should respect. Several of those international standards are enshrined the Charter of Fundamental Rights of the European

[75] For discussion about the reasons behind such exclusion, see C.H.A. Oostrum, 'Sustainability Through Transparency and Definitions: A Few Thoughts on Regulation (EU) 2019/2088 and Regulation (EU) 2020/852' 18 *European Company Law Journal*, 15, 15-18 (2021).

[76] See Art 3.

[77] See Arts 10-17.

> Union, in particular the prohibition of slavery and forced labour and the principle of non-discrimination. Those minimum safeguards are without prejudice to the application of more stringent requirements related to the environment, health, safety and social sustainability set out in Union law, where applicable'.

Despite the integration between social and environmental sustainability being formally declared, the substantive part of the Regulation only partially reflects the general principles set forth in the preamble. Reference to the European Pillar of Social Rights and to the Charter of Fundamental Rights of the EU, for example, has not been reproduced in the mandatory part of the Taxonomy regulation. Indeed, Art 18 declares that the minimum safeguards are to be intended as procedures implemented by an undertaking that is carrying out an economic activity to ensure alignment with the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, including the principles and rights set out in the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights.

Although the social and governance aspects of sustainability remain undefined and thus references to these dimensions are incomplete in the substantive part of the regulation, such shortcomings may potentially be addressed in the future. On the one hand, market entities and governments could develop their own framework for the definition of social and governance aspects of sustainability, although this might lead to fragmentation and even undermine transparency and comparability of financial products.[78] On the other hand, the Taxonomy regulation includes mechanisms to further define sustainability criteria at EU level. This could happen in two contexts. Firstly, when complying with the minimum social and governance safeguards laid down in the Taxonomy regulation, undertakings should adhere to the principle of 'Do No Significant Harm' referred to in Regulation (EU) 2019/2088 and take into account the regulatory technical standards adopted pursuant to that Regulation in further specifying this principle. To this aim, para 36 of the Taxonomy regulation's preamble states that Regulation (EU) 2019/2088 should be amended to mandate the European Supervisory Authorities[79] (ESAs):

[78] C.H.A. Oostrum, n 75 above, 21.

[79] Established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L 331; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC [2010] OJ L 331; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European

> 'to jointly develop regulatory technical standards to further specify the details of the content and presentation of the information in relation to the principle of 'Do No Significant Harm'. Those regulatory technical standards should be consistent with the content, methodologies, and presentation of the sustainability indicators in relation to adverse impacts as referred to in Regulation (EU) 2019/2088. They should also be consistent with the principles enshrined in the European Pillar of Social Rights, the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights, including the ILO Declaration on Fundamental Principles and Rights at Work, the eight fundamental conventions of the ILO and the International Bill of Human Rights'.

Secondly, in addition to establishing a set of minimum standards that should be respected,[80] the Taxonomy regulation expects the European Commission to establish a Platform on Sustainable Finance (the 'Platform'), composed in a balanced manner of various groups, including representatives of EU agencies (such as the European Environment Agency) together with experts representing private stakeholders, civil society and academia.[81] The Platform has advisory, technical assistance and monitoring functions to support the Commission in further establishing and updating the technical screening criteria.

2. Rules on Institutions for Occupational Retirement Provision

In December 2016, the EU adopted a recast version of the so-called IORP (Institutions for Occupational Retirement Provision) directive[82] to encourage long-term investment through occupational pension funds.[83] Among other goals, the recast Directive aims to encourage occupational pension funds to invest in long-term economic activities that enhance growth, environmental sustainability and employment. IORPs are encouraged to consider environmental, social and governance risks in their investment decisions and to document such risks in their three-yearly Statement of Investment Policy Principles. More specifically, Art 19 of the recast Directive stipulates that Member States shall require IORPs registered or authorised in their jurisdictions to invest in line with the 'prudent person' rule, according to which the assets shall be invested in the best long-term interests of members and beneficiaries as a whole. Within

Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L 331.

[80] Art 19.

[81] Art 20.

[82] Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision [2003] OJ L 235.

[83] Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (recast) [2016] OJ L 354.

the 'prudent person' standard of fiduciary conduct, Member States shall allow IORPs to take into account the potential long-term impact of investment decisions on environmental, social and governance factors. Although the question of what precisely lies in the interests of beneficiaries remains unclear and should be assessed on a case-by-case basis, this provision is significant, given the fact that the 'prudent person' rule should now be interpreted in the sense that, in principle, taking into account non-financial criteria (such as environmental, social, and governance factors) in investment decisions does not constitute an infringement of the fiduciary duty. Shareholder activism for social and environmental purposes thus has greater and clearer legitimation when it comes to deciding on the financial investments of pension funds in the EU.

As part of their risk management system, IORPs are also expected to produce a risk assessment for their activities relating to pensions. This risk assessment should also be made available to the competent authorities and should, where relevant, include, risks related to climate change, the use of resources, and the environment, as well as social risks and risks concerning the depreciation of assets due to regulatory changes ('stranded assets'). Within the IORPs, however, Socially Responsible Investments are not mandatory – they become relevant in potential terms, provided that they have an impact on members' and beneficiaries' interests. In other words, social and environmental concerns are relevant as long as they make sense financially, meaning that the returns on investment are reasonable for future retirees to maintain an adequate retirement income and a good standard of living.

So long as environmental, social and governance factors are considered in investment decisions, Art 28 provides that Member States shall ensure that the risk assessment includes new or emerging risks related to climate change, the use of resources and the environment. IORPs' own-risk assessment would allow them to be more aware of their commitments to their members and beneficiaries and thus make better-informed decisions about investments in long-term, sustainable assets. According to Art 41, in fact, Member States shall require IORPs to ensure that prospective members are informed about whether and how environmental, climate, social and corporate governance factors are considered in the investment approach (paras 1 (c) and 3 (c)).

This provision is noteworthy since transparency about sustainability is an essential condition in enabling workers to assess the long-term value creation of pension funds and the management of sustainability risks. More transparency is also needed because, as non-professional investors workers are currently often investing contrary to their own beliefs and values. Since this attitude-behaviour gap is largely due to a lack of communication and information by financial service providers,[84] designing effective obligations regarding transparency is necessary, as is forming a common understanding of language on sustainability, given that

[84] C.H.A. Oostrum, n 75 above, 15-16.

meanings are often disputed and subject to manipulation. Although the recast IORP directive remains muted about the criteria on assessing and disclosing environmental, social and governance risks, pension fund investment policies are subjected to rules applicable to financial services as a whole.

3. Public Procurement and Concession Contracts

Consistent with the developments observed in financial law, EU public procurement and concessions law has been subjected to significant revisions 'to enable procurers to make better use of public procurement in support of common societal goals',[85] including labour and environmental sustainability objectives. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 provides general principles for the integration of environmental, social and labour requirements into public procurement. This makes procurement no longer an instrument for equal treatment of tenderers and transparency in the procurement process but also a channel to deliver social and environmental objectives.[86]

This approach is evidenced by Art 18(2) of the Directive, according to which:

> 'Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X'.[87]

Observance of the obligations referred to in Art 18(2) is made relevant also for subcontractors. According to Art 71(1), compliance with obligations in the fields of environmental, social and labour law is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit (eg, labour inspectors).

Contract award criteria are regulated too. Directive 2014/24/EU provides that contracting authorities shall award public contracts on the basis of the 'most economically advantageous tender'. This includes evaluating the price or cost, using a cost-effectiveness approach, and may also comprise the best price-quality ratio, which

> 'shall be assessed on the basis of criteria, including qualitative,

[85] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94, preamble (2).

[86] C. Barnard, 'To Boldly Go: Social Clauses in Public Procurement' 46 *Industrial Law Journal*, 208, 211 (2017).

[87] An identical provision is provided by Art 30(3) of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94.

environmental and/or social aspects, linked to the subject-matter of the public contract in question' (Art 67(2), Directive 2014/24/EU).

Reference to the best price-quality ratio is not mandatory, and so are the assessment criteria based on environmental and/or social consideration. Moreover, the 'and/or' drafting technique is rather ambiguous, leaving the possibility to assess social or environmental criteria alternatively. The same technique is used by Directive 2014/23/EU: Art 41(2) provides that the award criteria of concessions 'may include, inter alia, environmental, social or innovation-related criteria'.

Most importantly, despite the emphasis on social and environmental concerns, both directives fail to address the issue of integration and balance between these two dimensions. Art 18(2) and Art 67(2) of Directive 2014/24/EU are certainly positive developments for the enforcement of labour law and environmental law. And so are Art 30(3) and Art 41(2) of Directive 2014/23/EU. It is, nonetheless, unfortunate that both directives hardly consider the potential conflicting relationship between labour and environmental sustainability. The critical issue with procurement and concessions, in fact, is the competition between labour and environmental costs of the bid.

As correctly noted by Miriam Kullmann, 'in order to participate in a tender, it may occur that budget for labour conditions and environmental conditions may shift to one side or the other, that is increased labour protection may reduce environmental protection and vice versa'.[88] Environmental costs might include energy and raw material prices, for example. Rising prices for greener technologies risk putting pressures on the labour side of the bid, both in terms of occupation and wage levels. The opposite is also true: compliance with more protective labour law standards risks being offset with poor investments in environmental sustainability. The directive does not provide any rule to foresee and possibly prevent this risk. While such a hurdle might be addressed in the call for tender, this would still be based on the voluntary decision of the contracting authority.

4. Corporate Sustainability Due Diligence

The EU aspiration to promote responsible capitalism has recently been relaunched in the draft directive on due diligence that the European Commission announced at the beginning of 2022.[89] The general sources of inspiration behind such proposals are the 2011 UN Guiding Principles on Business and Human Rights, the OECD's work on due diligence, and the ILO's

[88] M. Kullmann, n 1 above, 116.

[89] European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022, COM(2022) 71 final.

Declaration on Multinational Enterprises.[90] Like the proposal for a directive on sustainability reporting of 21 April 2021,[91] the EC normative action on due diligence is not only horizontal, but cross-sectoral. It seeks to complement, indeed, the two existing sectoral regulations in the same normative area: the regulation that fights illegal harvesting and aims to ensure the traceability of timber;[92] the regulation concerning imports of tin, tantalum and tungsten, their ores and gold from conflict or high-risk areas.[93] A third proposal is under consideration concerning sustainable electric batteries, an issue that is known to have a high energy and environmental impact, especially in exporting countries where minerals and raw materials are extracted to fuel the parallel energy and digital transitions.

The legal bases of the directive proposal are freedom of establishment (Art 50 TFEU) and the functioning of the internal market (Art 114 TFEU). Such legal bases highlight the horizontal nature of this political project for the EU, under which social and environmental are considered as critical elements of a broader development policy. The aim of the directive proposal is to establish a legal requirement for companies to identify, prevent, mitigate and manage potentially adverse social and environmental effects that may arise from business operations. It creates a policy of vigilance, prevention and mitigation of the negative impacts of company activity, the establishment of complaints procedures and the periodic evaluation of monitoring measures in order to guarantee the effectiveness of the human, social and environmental rights referred to in the annex to the proposed directive.

The rationale of the project is also evident in the annex of the directive proposal, which targets three categories of fundamental international standards: those relating to environmental law, those specific to human rights and those concerning fundamental social rights. Twelve strictly environmental conventions are in fact linked to other international texts relating to human rights in the broad sense. The major social rights range from the Universal Declaration of Human Rights to the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights. This covers fair

[90] J.G. Ruggie and J.F. Sherman, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' 28 *European Journal of International Law*, 921 (2017).

[91] European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, 21 April 2021, COM(2021) 189 final.

[92] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market [2010] OJ L 295.

[93] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L 130.

remuneration, decent work, child labour prohibitions and freedom of association. The ILO's core-labour standards are also covered. These include the eight fundamental conventions, but also the declaration on fundamental social rights and the one on principles applicable to multinationals.

Despite the broader reference to international standards, the proposed directive lacks any consideration of EU law or domestic legislation. In this perspective, the proposal for a directive is not conceived as a lever to advance EU social and environmental laws. The EU is rather mobilising towards the enforcement of international human rights and environmental standards. While this is reasonable in view of the broader scope of the directive proposal and the need to reach sufficient political consensus to adopt it, the due diligence obligations risk creating social and environmental dumping due to uneven levels of protection across the global value chains.

The duty of care that the directive proposal establishes, indeed, is applicable to certain companies registered in the EU, depending on their size and turnover. Precisely, the Directive targets the following economic operators: EU limited liability companies with 500 employees and a worldwide net turnover of more than EUR 150 million; Other limited companies operating in high-impact sectors that employ more than 250 people and have a turnover of EUR 40 million; Third country companies that meet the above thresholds as long as their turnover is achieved in the EU. While these thresholds are relatively high, and many EU companies fall outside the scope of the directive, small and medium-sized enterprises will indirectly be affected as long as due diligence obligations are correctly implemented. Targeted companies, indeed, should be concerned with their 'established commercial relations' (power of influence). In addition, certain small and medium-sized enterprises remain targeted if they are listed on the stock exchange or if they operate in high-risk sectors (eg, textile manufacturing, mineral resources, aquaculture, fisheries and forestry).

Due diligence must be integrated into the strategy of companies, requiring a proactive attitude in providing and implementing planning and correction mechanisms. This means that the evolving nature of risk requires permanent monitoring and internal self-assessment. It is a question of imposing a strategy of due diligence on the companies concerned as a highly structured obligation of means. Drawing up a code of conduct or a due diligence plan will not be enough. A pragmatic way of ensuring the effectiveness of such an internal process has also been to involve directors directly. These are expressly targeted by the text, which uses the lever of their remuneration, which is supposed to include a variable component based on the due diligence criterion.

Surprisingly, the 2015 Paris Agreement does not appear in the annex listing the basic texts that make it possible to qualify, in the event of a violation, the actual or potential harm as deserving protection. However, the text refers to it in the following way for the largest companies subject to the most onerous

obligations (Art 15): they must establish a plan to ensure that 'the company's business model and strategy are compatible with the transition to a sustainable economy and with limiting global warming to 1.5°C in accordance with the Paris Agreement'.[94] Based on the reasonably available information to the company, this plan shall determine the extent to which climate change represents a risk for the company's activities or an impact on them. If such a risk is identified, then Member States must ensure that the company includes emission reduction targets in its plan.

There is no doubt that the proposed directive meets a need for harmonization. Some European countries have led the way, particularly in response to the exemplary and dramatic case of the Rana Plaza (2013).[95] Firstly, the French law of 27 March 2017 on the duty of care of parent companies and contractors.[96] This is a general law on vigilance oriented towards human rights and environmental protection. Others have followed in Europe, such as the Dutch law (2019) or the Swiss law (2020), but these are more focused on child labour. Some countries have adopted more general legislation such as Germany (2021) and Norway (2021).

Compared to the French law that preceded it, the EU approach to due diligence appears even more ambitious. First, the scope of the directive proposal is broader than the French one because the thresholds are lower in terms of number of employees. Moreover, it does not only cover companies registered in a Member State but also companies from third countries. Vigilance involves the entire value chain (companies, subsidiaries and their established commercial relations), although this notion of value chain is still vague, and will require further clarification. The proposal also provides for more extensive obligations since the European text retains the notion of actual or 'potential' negative impacts of the activities subject to monitoring by reference to the corpus of international texts in the annex.

Furthermore, stakeholders should be involved in risk assessment, monitoring, and mitigation. The directive proposal defines stakeholders as: 'employees of the company, employees of its subsidiaries and other individuals, groups, communities or entities whose rights or interests are or could be

[94] An important French independent authority, the National Consultative Commission on Human Rights, issued an opinion on the subject, regretting 'the weakness of climate obligations, disconnected from vigilance obligations', CNCDH, *Declaration for an ambitious European Union directive on the duty of care of companies with regard to human rights and the environment in global value chains*, JORF, 3 April 2022.

[95] D.J. Doorey, 'Lost in Translation: Rana Plaza, Loblaw, and the Disconnect Between Legal Formality and Corporate Social Responsibility' (2018), available at https://tinyurl.com/3j5hrcuw (last visited 31 December 2022).

[96] V. Monteillet, 'Devoir de vigilance des sociétés mères et entreprises donneuses d'ordre' 256 *Droit de l'environnement*,195 (2017). For discussion about the implementation of this law, see E. Savourey and S. Brabant, 'The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption' 6(1) *Business and Human Rights Journal*, 141 (2021).

affected by the products, services and activities of this company, its subsidiaries and its business relationships'.[97] Accordingly, workers' unions should be involved in the construction of these vigilance processes (as it is, in principle, in France). The proposed directive details the responsibility of individuals to hold companies accountable through whistleblowing and claims for remedies.[98]

Finally, the directive proposal does not limit itself to envisaging jurisdictional avenues for triggering the civil liability of the company in the event of a lack of vigilance. Upstream, it calls for the creation of an independent administrative authority in the States, which are expected to cooperate within a European network. Their role would be to supervise and accompany companies, and even to sanction them in a dissuasive but proportionate manner. Downstream, in a very original way, a complaint procedure should be established, similar to a form of mediation. The aim would be to hear complaints and process compensation for victims who have suffered damage as a result of a lack of vigilance (Art 9). Claims could be made by any person concerned, including by NGOs or even workers' unions or any other person representing workers in the related value chain.

VI. Discussion and Conclusions

This article has explored channels for interaction and integration between labour and environmental sustainability in two EU normative domains: social policy and environment policy. Within the first domain, the principle of sustainable development is underdeveloped. Except for the so-called whistleblowing directive, there are no social policies nor directives that explicitly address the environmental implications of work organization. The focus remains on the protection of the workers and of the work environment, without any consideration for the effects of work organization on the 'natural' environment. Hence the principle of sustainable development, as laid down by Art 11 of the Treaty on the Functioning of the EU, is largely ignored within EU social policy.

While EU social policies are not informed by the principle of sustainable development, they contribute to shape sustainability within other policy domains. Although the focus on environment policy was restricted to new generation policies enhancing the major shift of the EU away from fossil-fuels, considerations of social and employment aspects become visible as the EU institutions embrace the idea of a just transition as a guiding principle in such policy setting and regulation field. However, the idea of a just transition is adopted in a reductionist manner, with the emphasis being placed on procedural aspects and the reactive role of social partners in addressing the employment

[97] Art 3(n).
[98] See Arts 19 and 23.

effects of the transition away from fossil fuels. Labour market policies are championed as the main policy space to ensure a just transition towards climate neutrality.

In this context, the EU policy language has recently shifted from the concept of justice to the one of fairness, which risks conflicting with the ILO guidelines on a just transition.[99] These guidelines, indeed, outline a wider agenda for social partners in the definition of the outcomes of the energy transition and, more broadly, in the policy pathways to promote sustainable development. This is something that, despite the rhetoric on the role of social partners in promoting a just transition, is actually missing in EU policies to contrast global warming and climate change. In EU law, fairness and justice are general clauses lacking specific indicators to assess their normative propositions. In turn, social justice would require a substantive definition including environmental inequalities, distributional aspects, human well-being, and their relation to development construed as progress.[100] But as long as the scope of workers' voice is restricted to the employment implications of decarbonization policies, unions are powerless in shaping the definition of justice in the transition away from fossil fuels. They are destined to play the role that for centuries the market economy has assigned to them: to relieve or suppress symptoms rather than to cure the underlying disease.[101]

This article's analysis stretched beyond the boundaries of EU policy on labour and the environment. Although secondary EU law has maintained a 'disciplinary compartmentalisation',[102] recent EU legislation on the economic pillar of sustainability has promoted horizontal policies on labour and the environment through several normative channels. Social and environmental clauses have been enacted in EU financial law, public procurement law and corporate law. The analysed examples of horizontal policies to promote labour and environmental sustainability present risks and opportunities. Arguably, the main risk is that such policies end up accentuating rather than alleviating the competition between the two values. This is a competition based on costs, that might arise when labour and environmental sustainability are pursued separately, in a linear relationship with the economic pillar of sustainable development.

EU regulations on sustainability related disclosures and taxonomies are a progressive example of good integration between labour and environmental concerns in a critical policy sector for sustainable development: finance. As opposed to other EU legislation and policies, these regulations define what environmental sustainability is, and social aspects are incorporated in this

[99] n 22 above.

[100] L. Éloi, 'Le *Green Deal* européen : juste une stratégie de croissance ou une vraie transition juste ?', in OFCE Observatoire français des conjonctures économique éd, *L'économie européenne 2021* (Paris: La Découverte, 2021), 94-104.

[101] R. Hyman, Industrial relations. A Marxist introduction (London: Macmillan, 1975), 98.

[102] J.P. Lhernould, n 30 above, 1315.

definition. Coherently, the same development should be reflected in future EU regulation that will address the definition of social sustainability for financial purposes. While the risk of competition between labour and environmental sustainability cannot be excluded, this normative technique creates the basis for an alliance and integration between the two values. An alliance and integration that can be better enhanced through shareholder activism, as positive experiences of sustainable investments of pension funds demonstrate.[103] Sustainable investment policies of pension funds are now legitimated thanks to the new EU rules allowing IORPs to consider environmental, social and governance risks in their investment decisions. This is a positive development since the argument on fiduciary duty has long been used as an expedient to exclude social and environmental objectives from investment policies of pension funds.

The EU effort to steer finance towards sustainability remains a controversial one. The discussion on 'green finance' is currently taking place on a more technical level as the EU taxonomy is supplemented by delegated acts. The first set out the technical examination criteria and excluded natural gas and nuclear energy. After intense debate, natural gas and nuclear energy were eventually included in the taxonomy as participating in the actions to contrast and mitigate global warming, by gradually driving the energy mix away from fossil-fuels. While opposition to such development is comprehensible, it is also true that the objective of a less carbon-intensive union cannot be detached from that of energy independence, which is one of the historical reasons behind the foundation of the European community. In a new shape, the debate on the taxonomy echoes the original concerns of the European Coal and Steel Community (ECSC) Treaty (now expired) and the Treaty establishing the European Atomic Energy Community (Euratom), which is still in force. It should be reminded that the latter was intended, from the outset, to establish uniform safety standards for the population and workers exposed to nuclear risk. The continuation of the nuclear industry should therefore logically lead to the development of labour law based on the sectoral achievements in this sector, especially regarding occupational health and safety and its link to environmental sustainability.

Unfortunately, a positive evaluation of EU financial law can hardly be extended to normative developments in the field of EU public procurement and concessions law. While horizontal procurement policies are welcome, the current formulation of EU directives in this policy area is inadequate and can even be counterproductive since legal mechanisms are not in place to anticipate and possibly eliminate the risk that social and environmental interests are treated as separate dimensions that can easily be traded off against one other. Simply juxtaposing labour and environmental concerns is not sustainable development.

[103] See P. Tomassetti, 'Between Stakeholders and Shareholders. Pension Funds and Labour Solidarity in the Age of Sustainability' forthcoming in *European Labour Law Journal* (2022).

The proposed directive on due diligence is a valuable effort to advance corporate sustainability over the global value chains, by making companies accountable for their actions or inactions to mitigate adverse social and environmental effects of economic activities. Despite explicit integration between labour and environmental sustainability not being visible, the idea of forcing companies and their managers to develop mandatory control, monitoring and correction mechanisms by involving relevant stakeholders is welcome. Through the system of governance that the directive proposal sets around the due diligence obligations, workers and their representative might have a voice, along with other relevant stakeholders, in monitoring the enforcement of both labour *and* environmental standards. This process of stakeholder engagement could lead to a cultural change that will certainly take time to be achieved. Also, political and economic resistance to the adoption of this directive is likely to be strong. But a concrete step towards the construction of an institutional edifice where social and environmental sustainability might converge has now been taken.

While this is a significant step towards an integrated and no longer siloed approach to labour and environmental justice, though, due diligence obligations should not be idealised. Even the more progressive discourses about corporate sustainability come with ambivalent effects on the contested boundaries of labour law and other relevant legal domains, notably of environmental law.[104] Although these disciplines have internalised considerations of the increasing unsustainability of nomad capitalism, they have at the same time legitimised the status quo,[105] marginalising the possibility for more critical scrutiny of how modern corporations, and the globalised division of labour they carry, endanger humans and ecosystems at their invisible roots.

[104] For critical analysis of existing regulatory frameworks for Global Value Chains, see C. Omari Lichuma, '(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains' 81 *Heidelberg Journal of International Law*, 497 (2021); P. Okowa, 'The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation' 69 *International and Comparative Law Quartely*, 685 (2020); G.A. Sarfaty, 'Shining Light on Global Supply Chains' 56 *Harvard International Law Journal*, 419 (2015).

[105] For some, the 'imperialistic programme' of Western countries: S. Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?' 46 *Osgoode Hall Law Journal*, 565, 582 (2008).

Corporate and Financial Markets Law

Why Diversity? Gender Balance in Corporate Bodies
Notes on the Recent Amendments to the Equal Opportunities Code and the Final Approval of the Women on Boards Directive

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Abstract

The work analyzes the rules stated by the Law no 120/2011 (so-called Golfo-Mosca Law) and its subsequent and even recent amendments developed both in relation to the details of the discipline and to the principles of corporate governance and gender diversity in listed companies, State-owned companies, bank and insurance companies.

The work takes into account also the EU Directive on Gender Balance on corporate boards (published on 7 December 2022 and entered into force on 27 December 2022) and the recent legge no 162 of 2021, amending the Italian Equal Opportunities Code (decreto legislativo 11 April 2006 no 198) and introducing the new rules about the certification of gender equality, or 'gender diversity rating', envisaged also by Mission 5 of the National Reform Programme (PNRR).

I. The Italian Regulatory Framework on Gender Balance: Recent Evolution and Fragmentation of the Discipline

Italian legislation on gender balance in the management and control bodies of listed and publicly controlled companies has been at the forefront in Europe, since the first legislative intervention dates back to 2011 and consists of the commonly known '*Golfo-Mosca* Law' (legge 12 July 2011 no 120). This law was enacted at the same time as the *Loi Copé-Zimmerman* (loi du 27 janvier 2011 no 2011-103) in neighbouring France. As a result of the application of the *Golfo-Mosca* Law and subsequent measures, numbers relating to the presence of the under-represented gender in the administrative bodies of Italian listed companies recorded a significant increase, rising from approximately seven point four percent in 2011 to almost forty-one point two percent in 2021.[1] There has also been a

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[1] CONSOB (Commissione nazionale per le società e la Borsa, ie Securities and Exchange Commission) 2021 Report on the *Corporate Governance* of Listed Companies, available at http://www.consob.it, shows that the presence of women on the boards of directors and boards of statutory auditors of listed companies, at the end of 2020, recorded thresholds that

decisive increase in the number of women sitting on the administrative and control bodies of publicly controlled companies, as shown by the latest Report of the Department of Equal Opportunities of the Presidency of the Council of Ministers of 28 January 2020.[2] Italy is therefore among the first countries to have introduced binding rules that have proven effective.[3] There is now a great deal of evidence in this regard,[4] which confirms that the path taken by the

exceeded forty-one percent and forty percent of positions, respectively. In turn, the 2019 *Report*, referring to 2018 (available at http://www.consob.it), highlighted how, following the entry into force of the legge 12 July 2011 no 120, 'other characteristics of the *boards* have also changed, such as the average level of education and the diversification of the professional profiles of directors, both of which have increased, and the presence of members linked to the controlling shareholder by familyrelationships, which have steadily decreased over the years'. The data contained in the Report *Women at the Top of Companies, 2020*, produced by Cerved-Fondazione Bellisario in collaboration with the INPS (Istituto Nazionale per la Previdenza Sociale, ie National Social Insurance Agency), is also of considerable interest. The report shows an extremely positive balance of the application of the *Golfo-Mosca* Law, with an increase in the number of women on the Boards of Directors of companies listed on the Milan stock exchange from one hundred and seventy in 2008, equal to five point nine percent, to eight hundred and eleven today, an amount that represents a thirty-six point three percent share, while on the boards of statutory auditors there has been an increase from thirteen point four percent in 2012 to forty-one point six percent in 2019, with four hundred seventy-five women auditors. For companies controlled by public administrations, the data show an increase in the presence of women on the Boards of Directors from eleven point two percent (figure referring to the period before the 2011 legislation was passed) to twenty-eight point four percent in 2019, and as far as standing and alternate auditors are concerned, the percentages show an increase from fifteen point five percent to thirty-three point three percent and from twenty point six percent to forty-one point seven percent respectively, with a total increase in the presence of women in the administration and control bodies from fourteen point three percent to thirty-two point five percent in 2019. Moreover, the bibliography on the subject of company performance is increasingly rich. For the most recent studies, see M. Noland and T. Moran, 'Study: Firms with More Women in the C-Suite Are More Profitable'*Harvard Business Review*, 8 February 2016; J. Chen at al, 'Research: When Women Are on Boards, Male CEOs Are Less Overconfident' *Harvard Business Review*, 12 September 2019; R. Cassels and A. Duncan, 'Gender Equity Insights 2020: Delivering the Business Outcomes', 5 *BCEC|WGEA Gender Equity Series* (2020).

[2] 'Report on the status of application of the legislation concerning equal access to administrative and control bodies in public administration subsidiaries not listed on regulated markets (period from 12 February 2016 to 12 February 2019)', communicated to the Presidency of the Council by the Minister for Equal Opportunities Elena Bonetti on 28 January 2020.

[3] Italy, in fact, is one of the countries that adopted *ad hoc* legislation some time ago, and today, with the provision of forty percent representation imposed in listed companies, as we will say in a moment, it even anticipates the European programme. In addition, as regards the presence of women on Boards of Directors, Italy ranks fifth in the world, as shown by both the Credit Suisse Report *The CS Gender 3000 in 2019* (available at https://tinyurl.com/34sds3jp, last visited 31 December 2022) and the World Economic Forum, *Global Gender Gap Report 2020* (available at https://tinyurl.com/368699c6, last visited 31 December 2022).

[4] Aware of the possible limitations of empirical surveys, the European Commission's clarifications on the positive value of gender quotas on boards of directors, as set out in the European Commission Green Paper 'The EU corporate governance framework', COM(2011) 164final, available at http://www.eur-lex.europa.eu and in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Strategy for equality between women and men 2010-15',

Italian legislature should not be abandoned, but should be further persued, with the aim of implementing the rules and refining the regulatory framework. This goal seems even more desirable in the perspective of a new strategy, not only European but also global, which attaches great importance to the theme of 'rebalancing', recognizing that gender equality is objective no 5 of the 2030 Agenda for Sustainable Development drawn up by the United Nations.[5]

Accordingly, it is necessary to focus on some aspects that involve both Italian domestic law in this area and the long approval process for the Directive for a uniform gender quota in management positions across Europe, which dates back to 14 November 2012[6] and was finally enacted on 7 December 2022.[7]

To begin, as is well known, the first step on the path towards gender rebalancing in Italy is represented by the *Golfo-Mosca* Law, which imposed on listed and publicly controlled companies 'time-based' regulations (originally lasting three terms) aimed at ensuring that the underrepresented gender holds one third of the seats on the management and control bodies of such companies.[8]For listed companies, the *Golfo-Mosca* Law was implemented in 2011, amending Arts 147-*ter*, para 1-*ter*, 147-*quater* para 1-*bis* and 148, para 1-*bis* and para 4-*bis* of TUF (*Testo Unico della* Finanza, ie Consolidated Law on Financial Intermediation, D.lgs. 24 February 1998 no 58).

The beneficial effects brought about by this law combined with the awareness that at the end of its period of applicability there would be steps backwards in

COM(2010) 491 final, available at http://www.eur-lex.europa.eu, are extremely significant.

[5] Goal 5 is 'Achieve gender equality and empower all women and girls'. Among the targets the UN sets with reference to this goal is to 'Ensure full and effective participation of women and equal opportunities for leadership at every level of decision-making in politics, economics andpublic life' (Target 5.5). Gender equality is not only a fundamental human right, but a necessary condition for a prosperous, sustainable and peaceful world. Ensuring women and girls (...) adequate representation in decision-making, political and economic processes will promote sustainable economies that benefit societies and humanity as a whole. See ASviS, 2020 Report, *Italy and the Sustainable Development Goals*, 2019, 1, available at https://tinyurl.com/mwxrcaye.

[6] 'Proposal for a Directive of the European Parliament and of the Council, on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures', COM(2012) 614 final, available at http://www.eur-lex.europa.eu.

[7] EU Directive 2022/2381.

[8] In recent years there has been an impressive bibliography on the various issues raised by the *Golfo-Mosca* Law, the questions that preceded its enactment and those that have arisen since the debate both in terms of constitutional principles and the practical application of the law. Here it seems interesting only to mention the dualism of perspectives and therefore the different conclusions reached in the analysis of the reference legislation; perspectives that sometimes place at the centre of the interpretation the principle of ethical and egalitarian character of constitutional rank, at other times instead, in a perspective even of exclusionary opposition, they look at the efficiency of the company and its corollaries as the determining motor and ultimate justification of the regulatory interventions of rebalancing. In order to include both interpretative 'languages', see, among others, L. Calvosa and S. Rossi, 'Gli equilibri di genere negli organi di amministrazione e controllo delle imprese' *Osservatorio del diritto civile e commerciale*, 3 (2013); M. Sarale et al, 'La L. Golfo-Mosca n.120/2011 e la parità di genere. Profili sociologici e giuridici' *Giurisprudenza Italiana*, 2245 (2015); F. Massa Felsani, *La gestione delle s.p.a. a partecipazione pubblica. Nuovi profili di* governance (Napoli: Edizioni Scientifiche Italiane, 2019), 64.

the diversification of boards, led the legislature to intervene again, introducing in the 2020 Budget Law (legge 27 December 2019 no 160), some provisions dedicated solely to listed companies, which modified, once again, the text of the cited articles of the TUF.

The new rules resulting from the latest intervention require listed companies to introduce clauses in their bylaws which reserve 'at least two-fifths' of the seats in their relative management and control bodies to the lesser represented gender, and no longer only one-third, as provided for under the 2011 legislation. The time span for the application of this gender balance criterion has also been extended to a further six consecutive terms of office, starting from the renewal of the bodies after 1 January 2020.[9] In general, therefore, the gender balance provisions, initially envisaged for only three terms by the *Golfo-Mosca* Law have been extended for up to eighteen years for listed companies; during this period, it is hoped that corporate culture will have made the necessary cultural changes that have been fostered by positive legislation.

As has already been pointed out on another occasion,[10] the enactment of this most recent legislation, which was certainly expected and opportune, has, however, generated an obvious misalignment with the rules on gender balance in publicly controlled companies. Such companies, until a few months ago, were regulated by the provisions contained in the legge no 120/2011 allong with its implementation regulations (contained in decree of the President of Italian Republic 30 November 2012 no 251). These provisions were supplemented by Art 11, para 4 of the Italian TUSPP (*Testo Unico delle società a Partecipazione Pubblica*, ie the Consolidated Law on Italian publicly held companies, decreto legislativo19 August 2016 no 175), which is related to administrative bodies.

[9] For listed companies, the rules outlined by the *Golfo-Mosca* Law had already been amended, shortly before the approval of the 2020 Budget Law (legge 27 December 2019 no 160), by legge 19 December 2019 no 157, converting decreto legge 26 October 2019 no 124 containing urgent provisions on tax matters and for unavoidable needs, so-called 'Tax Law', which came into force on 25 December 2019. By virtue of this legislative intervention, Arts 147-*ter*, para 1-*ter*, 147-*quater* para 1-*bis* and 148, paras 1-*bis* and 4-*bis,* 147-*ter*, para 1-*ter*, and 148, para 1-*bis* of the TUF (*Testo Unico della* Finanza, ie Consolidated Law on Financial Intermediation, decreto legislativo 24 February 1998 no 58), already amended by the *Golfo-Mosca* Law in 2011, while maintaining the one-third quota reserved for the lesser represented gender in the corporate bodies (administrative and control) had extended the period of application of the gender distribution criterion from three consecutive terms to six consecutive terms, thus generating not insignificant interpretativedoubts. Following this addition to the body of the TUF, it was not clear whether the six mandates were to be understood as including the three mandates provided for under the previous rules, or whether they were to run from the first renewal after 1 January 2020 (misunderstandings fuelled by the Report on the 2020 Budget Law). These doubts have been expressly eliminated by the most recent amendments contained in the 2020 Budget Law, in which the legislature, in addition to raising the quota reserved for the least represented gender to two-fifths, confirmed that the six-mandate requirement starts from the first renewal of the body after 1 January 2020.

[10] E.R. Desana and F. Massa Felsani, 'Democrazia paritaria e governo delle imprese. Nuovi equilibri e disallineamenti della disciplina', available at www.federalismi.it, 1, 24 (2020).

This provision, however, had not intervened on the extent of the quota reserved for the under-represented gender, but had referred to the 'criteria' of the *Golfo-Mosca* Law for collective administrative bodies, thus maintaining the reference to the quota of one third of the posts in the administrative bodies. This quota – and this is undoubtedly the most important novelty of Art 11, para 4 of the TUSPP – has been appropriately extended by Art 11 to the appointments of single-member bodies made in a year by each public administration in order to promote gender balance also in companies governed by a sole director.

It was only with the enactment of the legge 5 November 2021 no 162 that the rules of gender balance for both types of companies were realigned, by raising the quota reserved for the under-represented gender to two-fifths. However, the restoring of the symmetry between the two categories of companies, which characterised the original rules, was only partially achieved, due to the fact of a legislative oversight: Art 6 of legge no 162/2021 referred only to the new rules laid down by the TUF for the composition of the board of directors for publicly controlled companies, forgetting the board of statutory auditors (and the administrative and control bodies of the other two governance systems of joint-stock companies).

Therefore, the current regulatory framework, compared to the one originally outlined by the *Golfo-Mosca* Law, is fragmented and not homogeneous. It is impossible not to note the considerable discrepancies between the rules on gender balance in publicly controlled companies and those regarding listed companies, as will be shown in section 2.

Interesting innovations are found in the sectors of banking and insurance firms, where the issue of gender balance is becoming increasingly important. For the former, moving from the perspective of the greater efficiency of bodies characterised by adequate gender diversity, the Bank of Italy in its Regulatory Impact Analysis concerning the introduction of gender quotas in the provisions on the corporate governance of banks and banking groups of December 2020, suggested that in all banks, the under-represented gender should be allocated thirty-three percent of positions, to be

> 'considered optimal as it is believed that it can give a greater internal dialectic by creating a 'critical mass' of female presence that is able to really influence all decision-making processes (from strategy development to risk management policies) (...)'.

A few months later, with Update no 35 of 30 June 2021 to Notice no 285 of 2013, the same Supervisory Authority then required all banks to ensure that in the

> 'bodies with strategic supervision and control functions, the number of members of the least represented gender (is) at least 33% of the body's

members'.[11]

For the insurance companies the Research Paper of 22 January 2022[12] addressed the topic, coming to the conclusion that 'increasing the diversity of leadership in insurance companies promotes more effective corporate governance mechanisms, can improve companies' financial performance and help reduce the protection gap of Italian companies and households' and therefore invites regulators and supervisors to take

> 'a proactive role, adopting concrete measures – within their respective competences and prerogatives – to support diversity and inclusion of women for insurance companies, thus putting them on an equal footing with other regulated companies in the financial sector'.

As a result, Art 11 of the decree of Ministry of Economic Development 2 May 2022, no 88 required all insurance companies to ensure that

> 'the number of members of the less represented gender shall be at least 33 per cent of the members of the governing and supervisory bodies. For the two-tier model, reference is also made to the management board. In the one-tier model, the quota applies separately to the board of directors, net of the members for the management control, and to the management control committee'.

This decree specifies in fact that

> 'the composition of the administration and control bodies must be suitably diversified so as to: foster debate and dialectic within the bodies; encourage the emergence of a plurality of approaches and perspectives in the analysis of issues and decision-making; effectively support the corporate processes of strategy formulation, management of activities and risks, and control over the work of top management; take into account the multiple interests that contribute to the sound and prudent management of the company'.

[11] Note 1 on page 21 of the Update Notice states that 'An adequate degree of diversification, including in terms of age, gender and geographic origin, promotes, among other things, a plurality of approaches and perspectives in the analysis of problems and decision-making, avoiding the risk of mere alignment with prevailing positions, whether internal or external to the bank. Diversification may lead to a greater degree of involvement of each member in matters or decisions that are more akin to his or her own characteristics. However, this should not undermine the principle of active participation of all members in the work and decisions of the Board; each member must therefore be able to analyse and formulate assessments on all the matters dealt with and decisions taken by the Board'.

[12] D. Capone et al, *Donne,* board *e imprese di assicurazione* (Roma: Quaderno no 22 IVASS, 2022), 1.

In the same context, at an international level, albeit with the effectiveness of a source of soft law, the International Association of Insurance Supervisors (IAIS) indicates as a best practice in the sector to pay attention

> 'to respective duties allocated to individual members to ensure appropriate diversity of qualities and to the effective functioning of the Board as a whole'.

This is based on the assumption that diversity 'can help move us away from groupthink, poor risk assessment and insufficient challenge'. In November 2021, the IAIS itself published the Statement on the importance of Diversity, Equity and Inclusion (DE&I) – considerations in insurance supervision, on the importance of the principles of diversity, equity and inclusion for supervision objectives along three dimensions: a) improvement of corporate governance and risk management; b) greater innovativeness and products which are more responsive to consumer needs; and c) achievement of better results in terms of ESG (Environmental, Social and Governance) objectives through greater inclusiveness of the insurance offer.

II. Gender Balance in Publicly Controlled Companies. Recent Amendments to the Equal Opportunities Code and Persisting Critical Points. The Prospects of Women's Empowerment in the Name of Sustainable Development

The amendments introduced by the 2020 Budget Law to the rules on gender balance have therefore concerned, as already mentioned, only companies listed on regulated markets, whereas publicly controlled companies, until the enactment of the legge no 162/2021, remained subject to the provisions of the *Golfo-Mosca* Law and the relevant implementing decree of the President of the Italian Republic no 251/2012, combined with the provisions of Art 11, para 4, of the TUSPP.

As a result of the amendments introduced by the Budget Law 2020, a significant and unjustified misalignment of the rules on gender balance in listed companies and in publicly controlled companies had been created, so that for the latter there was a clear need for a regulatory intervention aimed *primarily at* realigning the rules, but also at clarifying previous interpretative doubts that had already arisen with the launch of the TUSPP due to the poor coordination of the provisions contained in Art 11, para 4, of the TUSPP with those of the *Golfo-Mosca* Law and its implementing decree.

The recent legge no 162/2021, amending Codice delle pari opportunità (ie Equal Opportunities Code, decreto legislativo 11 April 2006 no 198), therefore aligns, at least in fundamental respects, the two laws and yet, as we shall see, does not eliminate some previous doubts of interpretation but, on the contrary,

in some ways strengthens them.

More precisely, Art 6 of the legge no 162/2021 provides that companies controlled by public administrations within the meaning of Art 2359, paras 1 and 2, of the Italian Civil Code (R.D. 16 March 1942 no 262), are subject to the rules on gender balance in the board of directors set forth in Art 147-*ter*, para 1-*ter,* of the TUF. The criterion – already established for listed companies – according to which the less represented gender must obtain at least two-fifths of elected directors is therefore also applicable to companies, incorporated in Italy, controlled by public administrations, and not listed on regulated markets, and also applies to them for six consecutive terms.

Art 6, para 2, of the legge no 162/2021 also provides that the necessary amendments for coordination must be made to the regulation referred to decree of President of the Italian Republic no 251/2012 by means of a regulation to be adopted within two months of its entry into force.

There is no doubt that this regulatory intervention therefore represents an important step forward, which, moreover, was strongly and repeatedly hoped for,[13] since it is quite clear that the most marked difference created by the amendments made by the 2020 Budget Law between the rules governing listed companies and those governing publicly controlled companies was the percentage reserved for the under-represented gender in the management and control bodies (which in publicly controlled companies remained fixed at one third, as provided for by the *Golfo-Mosca* Law) and the duration of the application of the distribution criterion.

As regards the first aspect, as already noted, the requirement that the size of the quota must be aligned with the two-fifths quota already provided for listed companies is in line with the *ratio* of the *Golfo-Mosca* Law to which the TUSPP refers, but also consistent with the Women on Boards Directive,[14] which provides, albeit only for listed companies, for the minimum threshold of forty percent to be calculated in relation to non-executive directors.[15]

[13] E.R. Desana and F. Massa Felsani, 'Democrazia' n 10 above; Id, 'Corporate governance and gender diversity in listed and publicly controlled companies', in A. Mirone et al eds, *Studi in onore di Vincenzo Di Cataldo* (Torino: Giappichelli, 2021), II, 309; M. Callegari, E.R. Desana and F. Massa Felsani, 'Riequilibrio di genere negli organi societari. Appunti a margine della nuova disciplina e presentazione delle Osservazioni di Noi Rete Donne alla Proposta di Direttiva europea COM (2012) 614 final', available at www.astrid-online.it (2021), 1.

[14] See n 6 above. On the Directive's path, see M. Callegari, 'Nota metodologica', in M. Callegari, E.R. Desana et al eds, *Speriamo che sia femmina: l'equilibrio fra genere nelle società quotate e a controllo pubblico nell'esperienza italiana e comparata* (Torino: Quaderni del Dipartimento di Giurisprudenza dell'Università di Torino no 21, 2021), 161 et seq; Id, 'Riflessioni conclusive in tema di gender equality alla luce degli interventi dell'Unione Europea e dei modelli adottati dai diversi ordinamenti', ibidem, 289 et seq; M. Callegari and E.R. Desana, 'Riequilibrio' n 13 above.

[15] The Directive also takes care to identify the possible widespread causes of gender under-representation on the boards of directors of listed companies and indicates the negative consequences that can be ascribed to it in order to reiterate that 'clear conditions are therefore

On the other hand, the issue of the time limit of the provision contained in the TUSPP was no less important, given that the reference made in Art 11, para 4, to the legislation contained in the *Golfo-Mosca* Law concerned only the criteria to be followed by the articles of association in choosing the directors to be elected in the case of a collegiate body, but did not clarify the number of terms of office for which the gender balance rule was to be considered in force. Although the idea that had become popular among scholars was that the rule could be considered *sine die*[16] also in the light of what happens in other legal systems (see, for example, the case of Norway, France and Spain),[17] many doubts remained due to the fact that the provision of a limit of terms of office in the *Golfo-Mosca* Law met the need, of which the 2011 legislature was well aware, not to force the constitutional principle of Art 51 of the Italian Constitution (*Costituzione della Repubblica Italiana* 27 December 1947), which seeks to establish equality in the starting points but not in the results.[18] In any case, the

needed to regulate the thresholds that companies must reach regarding the gender representation of non-executive directors, the transparency of recruitment procedures (qualification criteria) and the obligations to report on the situation regarding gender diversity on boards'. See E.R. Desana, 'La legge n. 120 del 2011: luci, ombre e spunti di riflessione' *Rivista di diritto societario internazionale comunitario e comparato*, 539 (2017).

[16] This interpretative solution was adopted by the Department for Equal Opportunities in the Report n 2 above, where the provisions dictated by Art 11, para 4, are acknowledged to be permanently effective. However, it is clear that the reference to Art 147-*ter*, para 1 of the TUF made by Art 6 of the Law 5 November 2021 no 162, amending Codice delle pari opportunità (ie Equal Opportunities Code, D.lgs. 11 April 2006 no 198), which expressly refers to six terms of office, is also bound to affect the interpretation given by the Equal Opportunities Department to the duration of the provisions. In doctrine E.R. Desana, 'L'equilibrio di genere nelle società a controllo pubblico: figlie di un dio minore?', in M. Callegari and E.R. Desana, *Speriamo* n 14 above, 111 et seq; M. Cossu, 'Delle società con partecipazioni dello Stato o di enti pubblici. *Companies of national interest*. Artt. 2449-2451', in F.D. Busnelli ed, *Il Codice civile. Commentario* (Milano: Giuffrè, 2018), 255, fn 156; F. Cuccu, *Partecipazioni pubbliche e governo societario* (Torino: Giappichelli, 2019), 154.

[17] See J. Redenius et al, 'La représentation des femmes dans les conseils d'administration et de surveillance en France et en Allemagne'*Revue des sociétés Dalloz,* 203 (2011) ; A. Mairot, 'La féminisation des conseils d'administration et de surveillance légalement imposée' *Droit des sociétés*, 1 (2011) ; H.B. Reiersen andB. Sjåfjell, 'Report from Norway: Gender equality in the board room' 5 *European Company Law*, 191 (2008); B. Sjåfjell, 'Gender Diversity in the Board Room & Its Impacts: Is the Example of Norway a Way Forward?'20(1) *Deakin Law Review*, 25 (2015); M.T. Carballeira Rivera, 'The Spanish law for effective equal opportunities between women and men', available at http://www.forumcostituzionale.it. See also the articles by M.C. Rosso, 'A happy island for gender equality: the Norwegian model', in M. Callegari, E.R. Desana et al eds, *Speriamo* n 14 above; R. Russo, 'Organi sociali e parità di genere in Spagna: nuove risposte (e un silenzio di vecchia data)', ibidem; M. Arena, 'Il modello francese: un approccio gradualistico verso la parità di genere', ibidem.

[18] On this subject, see, among others, M. D'Amico, *Una parità ambigua*, *Costituzione e diritti delle donne* (Milano: Raffaello Cortina, 2020), 124 et seq; L. Calvosa and S. Rossi, 'Gli equilibri' n 8 above, 16 et seq; C. Garilli, 'Le azioni positive nel diritto societario: le quote di genere nella composizione degli organi delle società per azioni' *Europa e diritto privato*, 885 (2012) also in the light of the fundamental considerations surrounding the meaning of the 'temporariness' of the rules in relation to their exceptional nature.

need for a regulatory intervention to clarify and at least realign the limit on the number of mandates for publicly controlled companies with the different limit of six terms of office for listed companies was clear.[19]

The innovations introduced by the legge no 162/2021 are therefore certainly welcome but, as anticipated, do not eliminate other doubts which had arisen in the coordination of the provision set forth in Art 11, para 4, of the TUSPP with the *Golfo-Mosca* Law and its implementing decree of the President of the Italian Republic no 251/2012. It was already clear with regard to the provisions contained in the TUSPP that the legislator had committed an unfortunate 'oversight' by omitting any reference to gender representation in the supervisory bodies, and this was a significant omission in view of the fact that the legislation dedicated to gender balance in publicly controlled companies was all contained in Art 11 of the TUSPP, which (as announced in the heading of the same article) regulates both the administrative body and the supervisory body.[20] The lack of reference to the supervisory body was also relevant from the point of view of compliance with the *Golfo-Mosca* Law – to which the TUSPP refers –which provided for identical rules on gender balance in the administrative and supervisory bodies of listed and publicly controlled companies, with an intentional parallelism that was lost in subsequent legislative interventions. As will be seen in paragraph 4, this aspect is also unclear in the 2012 Draft European Directive, which does not deal specifically with the composition of the control body, but only with that of 'any administrative, management or supervisory body of a company'.

On the other hand, it could be noted that the lack of provision for gender balance in the control body could perhaps have even justified the failure in practice to comply with the rebalancing rule by companies in which the three-terms limit set by the *Golfo-Mosca* Law was expiring. However, this solution must be decidedly ruled out, not only from the perspective of the analogy with the provisions governing listed companies, but also and above all from the perspective of the *ratio legis of* the *Golfo-Mosca* Law which, although referred to in Art 11 of the TUSPP only with reference to the appointment criteria, has certainly continued to inspire the regulatory system of rebalancing in publicly controlled companies.[21]

Similar considerations naturally now apply to the new provisions of Art 6 of the legge no 162/2021*,* although this provision no longer refers to the *Golfo-Mosca* Law, but only provides that the provisions of Art 147-*ter*, para 1-*ter*, of the TUF

[19] E.R. Desana and F. Massa Felsani, 'Corporate' n 13 above, 335.

[20] On this gap see in part. L. Furgiuele, 'I controlli interni nella società per azioni a partecipazione pubblica', in G. Guizzi ed, *La* governance *delle società pubbliche nel d.lgs. 175/2016* (Milano: Giuffrè, 2017), 221, also in R. Garofoli and A. Zoppini eds, *Manuale delle società a partecipazione pubblica* (Molfetta: Nel Diritto Editore, 2018), 452.

[21] E.R. Desana and F. Massa Felsani, 'Corporate' n 13 above, 335.

> 'shall also apply to companies, incorporated in Italy, controlled by public administrations within the meaning of Art 2359, paras 1 and 2, of the Italian Civil Code, which are not listed on regulated markets'.

Therefore, there is no reference to Art 148, para 1-*bis* of the TUF, which regulates the composition of control bodies in listed companies, but there is no reference either to Arts 147-*quater,* para 1-*bis* and 148, para *4-ter* of the TUF, which extend the same rules, respectively, to management boards composed of a number of members not less than three and to supervisory boards.

In short, not only did the legislature once again fail to provide for gender balance in the supervisory bodies of publicly controlled companies, but it did so by severing the link between the new legislation and that contained in the legge no 120/2011. Moreover, the most recent legislation also lacks any form of link with the provision contained in Art 11, para 4 of the TUSPP, a circumstance which forces the interpreter to undertake a difficult task of reconstruction, as we shall see in a moment, at least until the implementing regulation referred to in Art 6, para 2, of the Law no 162/2021 and within the limits in which such regulation, as a second level regulation, may intervene.

The persistent absence of any reference to the application of the gender balance legislation to the supervisory bodies seems to confirm, as already stated with reference to the wording of Art 11, para 4, of TUSPP, that the criteria and time limits provided for by the *Golfo-Mosca* Law still apply to the supervisory bodies. This solution appears not only unsatisfactory in itself, since it contradicts the very *rationale of* the legge no 120/2011, but also dangerous in view of the fact that the three-terms limit for most publicly controlled companies has already expired.[22] In addition, it seems clear that the legislature has once again missed the opportunity to organically regulate the gender balance in publicly controlled companies, introducing a further and unjustified element of interpretative uncertainty.

The framework of uncertainty continues to be fuelled by the continuing absence of clarifications on the sanction's regime. These clarifications are necessary, or at least timely, as already noted with reference to the rules for the reorganisation of public companies introduced in 2016, given that the TUSPP has already made no provision for sanctions. The advisability of rethinking the system of sanctions emerges if one looks at the regulations set forth in decree of the President of the Italian Republic no 251/2012 implementing the *Golfo-Mosca*

[22] See F. Cossu, 'L'organo di controllo interno delle società pubbliche', in F. Fimmanò and A. Catricalà eds, *Le società pubbliche* (Napoli: Edizioni Scientifiche Napoli, 2016), I, 494, considers that, despite the silence of the legislator, the rule on gender balance is applicable 'also to the public companies referred to in Art 3 of the Consolidated Law'. In the sense that the interpretation should move in compliance with the criteria established by Law no 120 of 12 July 2011, see instead L. Furgiuele, 'I controlli' n 20 above.

Law[23] in the light of the provision set forth in Art 11, para 4 of the TUSPP, which establishes that in the choice of directors of publicly controlled companies, it is the administrations – and therefore no longer the companies, as provided for in the 2011 law – that must ensure compliance with the principle of gender balance to be calculated on the total number of nominations or appointments made during the year.[24] The amendment of the Equal Opportunities Code does not affect this aspect.

In this regard, it can be observed that the novelty concerning the person, the public administration, who is in charge of the appointment is to be appreciated in consideration of the general criterion identified by the TUSPP whereby, as a general rule, the administrative body of publicly controlled companies is made up of a sole director, except in cases where, for specific reasons of organisational adequacy, the shareholders' meeting of the company, by means of a motivated resolution, provides that it be administered by a board of directors composed of three or five members. The possibility that a significant number of companies may opt for management by a sole director could obviously nullify any regulatory provision on gender balance if the choices were to be left, as in the past, to the companies themselves (which, moreover, it is never superfluous to recall, have always preferred and continue to prefer sole male directors).[25]

On the other hand, however, it seems equally necessary to point out that the lack of provision in the TUSPP as well as in the recent legge no 162/2021[26] for sanctions in the event of non-compliance with the rules on gender balance creates many problems in terms of application, even before interpreting them, given the concrete difficulties in referring to the application of the provisions contained in decree of the President of the Italian Republic no 251/2012.[27] These provisions have entrusted the supervision of compliance with the rules on gender balance in public subsidiaries to the President of the Council of Ministers or to the delegated Minister, and have set up a sanctioning mechanism that consists of two successive warnings addressed to the non-compliant company, warnings whose unsuccessful outcome leads to the disqualification of the members elected in violation of the rules; a negative consequence that therefore directly affects the governance of the company.[28] This is a system that

[23] M. Callegari and E.R. Desana et al, 'Riequilibrio' n 13 above.

[24] E.R. Desana and F. Massa Felsani, 'Corporate governance and gender diversity. Equilibri in divenire' Rivista del diritto commerciale e delle obbligazioni, 1 (2022).

[25] As reported by the Report n 2 above, the proportion of women among sole directors, although increasing, stood at 12.3 of the total as of March 2019.

[26] With reference to which, however, amendments to the sanctions system may be made, if necessary, by the implementing regulation referred to in Art 6, para 2 of Law no 162/2021.

[27] On the subject of sanctions, see V. Donativi, *Le società a partecipazione pubblica* (Milano: Giuffrè, 2016), 687 et seq; R. Ranucci, 'Gli amministratori delle società a partecipazione pubblica', in F. Fimmanò and A. Catricalà eds, *Le società* n 22 above.

[28] For an interesting ruling on the revocation of directors of a publicly controlled company appointed in violation of the rules on gender balance, see Tribunale di Milano 15 April 2021,

proved effective before the adoption of the TUSPP, since until then the obligation to ensure gender balance in management and control bodies was incumbent on the companies themselves, but which appears weaker now that the obligation is incumbent on the administrations.[29] Ultimately, it is still the companies that are the recipients of the double warning and of the final sanction, which provides for the disqualification of the members elected in violation of the appointment criteria, where it is a matter of choices that the latter did not have the opportunity to make because they are in the responsibility of the appointing administration.[30] In this regard, however, one must take into account a 'mediating' interpretation provided by the *Report on the state of application of the legislation* drawn up by the Department for Equal Opportunities. This *Report*, while

> 'considering that, with respect to the provisions of the Law no 120/2011, Art 11, para 4, first sentence of the TUSPP, has introduced a further and different obligation specifically charged to the 'controlling' Public Administrations',

it specifies that

> 'vice versa, the obligation sanctioned by Art 11, para 4, second sentence, of the TUSPP, like those provided by the decree of the President of the Italian Republic no 251/2012, falls directly on the subsidiaries, which, in accordance with this provision, in the case of collegiate administrative bodies, are required to adapt their articles of association, in order to ensure that the appointment of directors takes place in compliance with the 'criteria' established by the Law no 120/2011'.

Clearly, this is an entirely acceptable evaluation, but it does not seem possible to deduce why the sanctioning consequences should fall on companies even when

available at http://www.deiure.it,which found that the revocation of directors based on warnings sent to the company by the Equal Opportunities Department was justified.

[29] See E.R. Desana and F. Massa Felsani, *Corporate* n 24 above, 42; T.S. Musumeci, 'L'equilibrio di genere negli organi sociali delle società a controllo pubblico', in M. Callegari and E.R. Desana et al eds, *Comitato scientifico Università degli Studi di Torino*, 121.

[30] All the more so since, pursuant to Art 9, para 7, of the TUF, even the appointment of directors now takes effect on the date of receipt by the company of the notice of appointment or revocation. On the meaning of this provision, in the sense that such anticipation of the - effectiveness of the act of appointment is part of the public logic that governs the whole matter see G.M. Caruso, *Il socio pubblico* (Napoli: Edizioni Scientifiche Napoli, 2016), 335; on the qualification of the same as an act or administrative measure P. Tullio, 'Art 9. Gestione delle partecipazioni pubbliche', in G. Meo and A. Nuzzo eds, *Il testo unico sulle società pubbliche. Commento al d.lgs. 19 agosto 2016, n. 175* (Bari: Cacucci Editore, 2016), 135; R. Ranucci, 'Gli amministratori' n 27 above, 451. For a reconstruction instead still in a privatist key M. Rossi, 'Nomina, revoca e prorogatio degli amministratori di società a partecipazione pubblica', in G. Guizzi ed, *La* governance n 20 above, 113, also in R. Garofoli and A. Zoppini, *Manuale* n 20 above 388.

they have adapted their articles of association.

Finally, it is not clear – and the legislator should have made this clear – whether the person in charge of controlling compliance with the legislation is always and exclusively the Presidency of the Council of Ministers or the Equal Opportunities Department, or whether the competent body could be (also?) the Structure of the Ministry of Economy and Finance, given that the latter, *according to* Art 15 of the TUSPP, is in charge of guiding, monitoring and controlling the implementation of the TUSPP.

It therefore seems necessary to stress that, even and all the more so following the most recent legislative changes, the regulatory framework dedicated to gender balance in management and control bodies still appears in many respects to be incomplete as well as confused to the extent that a new regulatory intervention would be desirable. In any event, the provisions of the forthcoming decree implementing Law no 162/2021 will be important, at least as regards the sanctions system, which could also be reconsidered on that occasion. This is an important step to ensure that gender balance legislation does not remain nothing more than a mere manifesto in publicly controlled companies. Otherwise, the fragility of a regulatory framework that has been fragmented by the most recent legislation and thus made more uncertain would be exacerbated.

In any case, it is necessary once again to point out that the data relating to the application of the *Golfo-Mosca* Law and subsequent amendments are, to date, undoubtedly positive and that, nevertheless, the introduction of quotas in the top bodies of publicly controlled companies, as well as in listed companies, has not been followed by a growth in the careers of women within corporate organisations, as had been imagined to happen by virtue of a hoped-for knock-on effect. Moreover, as will be explained in section 3, while the figures for women in the role of chairman of the board of directors seem to have risen slightly, those for managing directors are decidedly more discouraging. The latter reflects the modest growth that women have had, and continue to have, in management roles.

Therefore, with reference to what appears to be a fundamental aspect of equality, ie career progression within companies – also called for, as we know, by *Codice di Autodisciplina delle Società Quotate* (ie Code of Conduct for Listed Companies) of 2020[31] (but already in the 2018 text), drawn up by the Corporate Governance Committee (see Recommendation no 8, where it also calls for the monitoring of the concrete implementation of measures to promote equal treatment and opportunities between genders) – it must be noted that the data available are not exhaustive and almost never manage to focus on the real path of internal careers. This reflects gaps in the legislation on non-financial information in decreto legislativo 30 December 2016 no 254 and its matrix, the Non-Financial

[31] The Code was drawn up in 2020 by the Committee on *Corporate Governance* set up at Borsa Italiana S.p.A. and is available at https://www.borsaitaliana.it.

Reporting Directive (NFRD, Directive 2014/95/UE)[32] aimed at introducing and reinforcing virtuous behaviours of large public interest companies with more than five hundred employees with the pursuit of transparency objectives in the communication of information of a non-financial nature.[33]

However, in addition to the important prospects for improvement that now affect this disclosure as outlined by the *Corporate Sustainability Reporting Directive (CSRD*; proposal for a directive),[34] it seems that we can also see an increased commitment on the part of the Italian legislator aimed at extending the focus on gender balance in companies beyond top management roles as part of a broader project of sustainable development. Reference is made, in particular, to the commitment outlined in Italy's 'National Recovery and Resilience Plan' (PNRR, which the Government sent to the European Commission on 30 April 2021), within which the objective of gender equality, which is part of that of social inclusion, represents one of the strategic axes and transversal priorities. In particular, in the context of the Fifth Mission dedicated to Inclusion and Cohesion, the Plan has provided for a number of measures aimed at implementing the objectives of equal opportunities, generational equality and gender equality within the framework of a design whose main axis is represented by the sustainability of economic development.

As will be seen in the next section, these are provisions of considerable importance in that they are capable of bringing about a change that is also cultural, as can be deduced from the regulations introduced, in application of the principles indicated by the PNRR, by decreto legge 31 May 2021 no 77, and in particular by its Art 4, under which companies will have to 'take care' of gender equality objectives and answer a series of questions that these regulations require in terms of conditionality and/or rewards in order to be able to participate in the tenders of the PNRR and the complementary National Plan. Therefore, the positive effects in this case could be immediate, as inevitably follows from award mechanisms.

The development to which the PNRR (Piano Nazionale di Ripresa e Resilienza-National Recovery and Resilience Plan) refers has, moreover, strong

[32] European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330/1.

[33] See F. Cuccu, 'La (in)sostenibilità del nuovo codice di *corporate governance*' *Rivista del diritto commerciale e delle obbligazioni*, 243 (2021); D. Monciardini et al, 'Rethinking Non-Financial Reporting: A Blueprint for Structural Regulatory Changes' 10(2) *Accounting, Economics and Law: A Convivium*, 36 (2020); M. Abela, 'Paradise Lost: Accounting Narratives Without Numbers' ibid, 1.

[34] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting, COM(2021) 189 final, available at http://www.eur-lex.europa.eu. See F. Massa Felsani, 'ESG e Bilanci di genere', in E.R. Desana and G. Presti eds, *L'equilibrio di genere dieci anni dopo la legge Golfo-Mosca: a long and winding road* (Milano: Giuffrè, 2022), 127.

roots in that the theme of gender equality is now firmly implanted in the broader theme of sustainable development,[35] as we were previously reminded by the objectives set by the 2030 Agenda,[36] reaffirmed and specified by numerous legislative interventions at European level.[37] One example is the guideline provided by the European Parliament Resolution on the European *Green Deal*,[38] adopted after the Comunication of the European Commission 'Il *Green Deal* europeo',[39] which sets the ambitious goal of achieving climate neutrality by 2050. The Resolution emphasises, among other things, the need for the *Green Deal to* be aimed at creating a prosperous, equitable, sustainable and competitive economy that serves all, in all regions of Europe; highlights the need for a gender perspective on the actions and objectives of the *Green Deal,* including gender mainstreaming and gender-sensitive actions; reiterates that the transition to a climate-neutral economy and sustainable society must take place in conjunction with the implementation of the European Pillar of Social Rights and insists that all initiatives undertaken as part of the European *Green Deal must* be fully compatible with it. The strategic relevance of the European Pillar of Social Rights must be underlined as indicative of a definitively acquired awareness that sustainability must necessarily also be inclusive,[40] as solemnly proclaimed in the European Pillar, which was adopted on 17 November 2017 in

[35] The literature on the subject is truly vast and full of authoritative contributions. In the context of the economics of this work, we would like to refer at least to the fundamental work by J.E. Stiglitz et al, 'Measuring What Counts for Economic and Social Performance' (Parigi: OECD Publishing, 2018) of which the Italian translation (unofficial) J.E. Stiglitz et al, *Misurare ciò che conta. Al di là del Pil* (Torino: Einaudi, 2021).

[36] Agenda 2030, signed on 25 September 2015 by 193 United Nations countries, including Italy, defines 17 *Sustainable Development Goals* (SDGs) to be achieved by 2030, divided into 169targets and periodically monitored (the text is available athttps://tinyurl.com/yckux3az).

[37] For a reconstruction of the origins of the concept of sustainability in relation to economic development and its evolution, see, most recently, F. Massa Felsani, 'Lo sviluppo economico tra sostenibilità e inclusione. Nota introduttiva', in A. Blandini ed, *Diritto dell'Innovazione* (Padova: CEDAM, 2022).

[38] European Parliament resolution of 15 January 2020 on the European Green Deal (2019/2956(RSP) available at http://www.europarl.europa.eu.

[39] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions The European Green Deal, COM(2019) 640 final, available at http://www.eur-lex.europa.eu.

[40] Awareness acquired in all fields and more and more also in the financial one. Very interesting in this regard are the data reported by the most recent Bank of Italy study, *Questioni di Economia e Finanza (Occasional Papers*), *La diversità di genere nelle dichiarazioni non finanziarie delle banche italiane*, no 671, February 2022, available at http://www.bancaditalia.it, where, among other things, it is noted that 'in recent years, investments made through strategies that incorporate gender analysis into the more traditional financial analysis have also grown: in 2018 the amount of these investments, called Gender Lens Investments (GLI), amounted to two point four billion dollars, compared to one hundred million dollars in 2009 (Veris et al, 2019). This resulted in a demand for data and indices to measure companies' performance in supporting gender balance. A sectoral comparison shows that the financial sector does not always perform adequately in terms of level of transparency, while it ranks high for inclusive culture (Bloomberg, 2021)'.

Gothenburg by the European Parliament, the Council and the Commission in order to support fair and well-functioning labour markets and social protection systems.[41]

On the other hand, if, as is now known, sustainability has become the real strategy for growth, a way of approaching the market that guarantees greater competitiveness and consequent increase in turnover,[42] it is precisely in this perspective of sustainable development that one can therefore trust or at least hope for further promotion of female empowerment as well as for the fight against gender discrimination.

III. The Possible Valorisation of the Results Linked to Gender Balance in Listed Companies, in Other Companies and in Public and Private Bodies

Looking further into the Italian legal system, other aspects call for thorough legislative intervention with the aim of enhancing and increasing the results achieved with the *Golfo-Mosca* Law and the subsequent measures which, albeit gradually, have come, as we have seen, to influence also banking companies as well as insurance companies.

Among the unresolved issues and critical points of the new rules, with reference to listed companies, the first aspect that deserves to be addressed is the singular disparity between the amount of the minimum penalties provided for the violation of the rules on the composition of the supervisory bodies of listed companies and those applicable in case of non-compliance with the rules on gender balance in the administrative bodies: while in the first case the penalties range from twenty thousand to two hundred thousand euros, in the second case they are much higher, with a range from one hundred thousand to one million euros. This difference is not justified, especially if one considers that in the two-tier system the management board is overseen by a supervisory board, which is assigned tasks of unquestionable importance, including those of senior management.[43] It would therefore be appropriate that future legislation aligns the minimum and maximum penalties provided for violations with regard to each type of body.

In any case, with regard to the system of sanctions, a further critical point is the lack of an agile mechanism for imposing sanctions in the event of violation of the rules on gender balance. In particular, we are referring to Art 144-*undecies*.1 contained in *Issuers' Regulation* CONSOB (*Commissione nazionale per le*

[41] The Pillar Text is available at http://www.ec.europa.eu.

[42] See, in part, G. Giannelli, 'L'impresa (in)sostenibile: responsabilità, tutele, rimedi', in D. Caterino and I. Ingravallo eds, *L'impresa sostenibile* (Lecce: EuriConv, 2020), 253; F. Massa Felsani, 'ESG' n 34 above, 130.

[43] Cf E.R. Desana, 'La legge' n 14 above.

società e la Borsa, ie Securities and Exchange Commission), no 11971/1999 and referring to the sanctioning procedure by Regulation CONSOB no 18750/2013. These rules of procedure establish long timelines and have safeguards to protect the defendant and appear obsolete in the case of blatant violations: failure to comply with the gender quota does not in fact require a complex investigation but can be detected through a mere calculation based on the verification of compliance with the legal percentages in the composition of the bodies. Not to mention the fact that reference is still made to Art 11 of the legge 24 November 1981, no 689, which in the meantime has been superseded by the provisions of Art 194-*bis* of the TUF, on the subject of criteria for determining in concrete terms the penalty to be imposed, to be identified between the minimum and the maximum laid down by law.[44] It should also be noted that the regulatory framework for publicly controlled companies is complicated by the overlapping of several non-harmonised measures.

However, the most obvious shortcoming is certainly the fact that current legislation does not cover investee companies which are not subject to public control, nor large companies and unlisted small and medium-sized enterprises, foundations or other private bodies, including those dealing with culture, as well as social security funds and the governing bodies of the liberal professions.[45] In view of the beneficial effects of the gender balance rules experienced in the last ten years, it is necessary to fill this gap: the studies of the Supervisory Authorities have shown that gender diversity contributes to the efficiency of companies, as well as ensuring the substantive equality enshrined in Art 3 of the Italian Constitution. Gender diversity is, therefore, a value to be pursued in every company, especially in those that exceed certain size limits or that are required to draw up consolidated financial statements and in Entities of particular importance for the economy.

On the other hand, it should not be forgotten that in France, Art L 225-17 of the Commercial Code as amended by loi no 103 of 2011 – at Art 1, expressly requires that in all *sociétés anonymes*, including non-listed companies, the board of directors (which must consist of at least three members) must be composed in such a way as to achieve a balanced representation of genders;[46] it being

[44] E.R. Desana and F. Massa Felsani, 'Democrazia' n 10 above.

[45] The relevance of this issue is demonstrated by the interesting decision, rendered by Consiglio di Stato 18 December 2020, no 7323, as a precautionary measure, which suspended the operations for the election of the Boards of Chartered Accountants and Accounting Experts and the Boards of Auditors in office from 1 January 2021 to 31 December 2024; the decision was taken on the assumption that the relevant electoral regulations did not comply with the constitutional provisions on gender equality (Arts 3 and 51 of the Italian Constitution), recognising their immediate application.

[46] The limited liability company is administered by a board of directors consisting of at least three members. The articles of association set the maximum number of members of the board, which may not exceed ten. The Board of Directors is composed of a balanced representation of women and men.

understood that the same loi no 103/2011 also requires that in listed companies (private or public) and in larger companies, the proportion of directors of each gender must be no less than forty percent.[47]

A general rule should therefore be introduced into the Italian Civil Code which, although not accompanied by specific sanctions, suggests that a gender balance should be sought at least in all joint stock companies, and then imposes specific rules, with specific remedies, for companies operating in certain sectors or exceeding certain size limits, as is already the case for listed companies, publicly controlled companies, banks and insurance companies.

There is also a gap to be filled regarding the composition of the executive committees within the administrative body and of the internal committees (such as Internal Control Committees, Appointments Committees, Remuneration Committees, Related Parties Committees, and so on) present in listed companies, with respect to which the legislation currently in force does not offer any indications;[48] it would be desirable to have an explicit provision aimed at ensuring a gender balance within these committees as well, which, however, is usually quite spontaneously ensured.

From a substantive point of view, it should also be noted that the good results that can be ascribed to the introduction of legislation on gender balance in administration and control bodies[49] have not been accompanied by an increase in women's careers within corporate organisations. This shortcoming is ultimately manifested in the fact that woman, although present on Boards of Directors in the roles of independent, non-executive directors, rarely hold the position of chief executive or executive director in Italy.[50] This shows that women have indeed broken the glass ceiling, but mostly as external professionals, academics and consultants, while there has been no real transition from inside

[47] The quota applies to *sociétés anonymes* that have employed at least 250 people for three financial years and have a turnover or balance sheet total of at least 50 million.

[48] In this sense, with reference to the executive committee, see A. Blandini and F. Massa Felsani, 'Dell'equilibrio tra i generi: principi di fondo e "adattamenti" del diritto societario' *Rivista del diritto commerciale e delle obbligazioni*, 443, 452 (2015).

[49] On this point, in addition to the CONSOB, 2021 *Report* n 1 above, see the debate in the business doctrine: a recent synthesis can be read in S. De Masi, 'Le donne nei consigli di amministrazione delle imprese: gli effetti di una maggiore valorizzazione dei talenti femminili', in M. Callegari and E.R. Desana et at eds, *Speriamo* n 14 above.

[50] In this regard, see the aforementioned CONSOB 2021 *Report* n 1 above, which shows 'at the end of 2021 the number of cases in which women hold the role of managing director (16 companies, representing slightly more than two percent of the total market value) or of chairman of the administrative body (thirty issuers representing twenty point seven percent of the total capitalization total capitalisation) compared to the prevalence of the role of independent director (three out of four cases). The presence of women appointed by minority shareholders in application of list voting has increased in the last year, reaching a maximum of ninety-one 91 women directors, appointed in seventy-one companies with high capitalisation companies'. See also the Cerved-Fondazione Bellisario Report, n 1 above, whose figures show that female CEOs represent just eight point four percent of the total.

the company organisation to the 'control room'.[51]The problem is of course central to a perspective that has to take into account the dynamics, resulting above all from cultural aspects, that mark the mechanisms of internal career advancement. These aspects are already taken into account by the Italian Code of Conduct for Listed Companies[52] with provisions and recommendations that should certainly be strengthened.

Therefore, while on the one hand the positive results derived from the application of the *Golfo-Mosca* Law and subsequent measures should rightly be emphasised, on the other hand it is important to highlight not only the need for a reorganisation of the rules for public companies, but also to reflect on the development of gender equality at a European level and on the relationship between European Union initiatives and domestic legislation. Welfare measures such as an increase in public childcare facilities, incentives for companies to open their own, internal child care facilities and innovative reforms in the area of parental leave, especially for fathers, where use by the second parent is encouraged by the recognition of appropriate benefits or at least by making it compulsory, cannot be postponed. Another measure to be studied is the *bonus* for women returning to work after compulsory maternity leave. These are complex measures, however, only partially introduced by Directive 2019/1158/UE on work-life balance (implemented in Italy by decreto legislativo 30 June 2022, no 105).[53]

For listed companies, disclosure was already required by some provisions implementing EU rules: Art 123-*bis* of the TUF requires all listed companies to draw up a report on *corporate governance*, which constitutes a specific section of the report on operations and which must contain, among other things, a description of the diversity policies applied in relation to the composition of the administration, management and control bodies with regard to aspects such as age, gender composition and educational and professional background, as well as a description of the objectives, implementation methods and results of such policies (Art 123-*bis,* para 1, letter d-*bis*) the TUF).

In addition, for listed companies (or banking and insurance companies) of more significant size,[54] decreto legislativo no 254/2016, implementing Non-

[51] Thus E.R. Desana, 'Le prospettive in Italia', in E.R. Desana and G. Presti eds, *L'equilibrio* n 34 above, 177.

[52] The Code (2020) incorporates and reinforces some recommendations already present in the 2018 Code and in Art 2, Recommendation 8, in fact provides that 'companies shall adopt measures to promote equal treatment and opportunities between genders within the entire corporate organisation, monitoring their concrete implementation'.

[53] European Parliament and Council Directive (EU) 2019/1158 of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L188/79.

[54] Public interest entities shall draw up a statement for each financial year in accordance with Art 3 if they have had, on average, more than five hundred employees during the financial year and have exceeded, at the balance sheet date, at least one of the two following size limits:

(a) balance sheet total: twenty million euros;

(b) total net revenues from sales and services: forty million euros;

Public interest entities which are parent companies of a large group shall draw up a

Financial Reporting Directive of 2014, requires the drafting of the Non-Financial Declaration, which must account for

> 'social and personnel management aspects, including actions taken to ensure gender equality, measures to implement conventions of international and supranational organisations on the subject, and the ways in which dialogue with social partners is carried out';

and which, among other things, may soon become more stringent and apply also to medium-large unlisted companies.[55]

For other companies, some interesting innovations have recently been introduced, as a result of the recent legge no 162/2021, which has modernised and revamped the Equal Opportunities Code (decreto legislativo no 198/2006). Among other things it is worth mentioning the strengthening of the provisions on the staff situation report, already imposed on some companies by Art 46 of the Equal Opportunities Code, but never observed. The report must be drawn up every two years by all companies with more than fifty employees and failure to do so will expose them to administrative sanctions imposed by the Ispettorato del Lavoro (ie Labour Inspectorate).[56] The report must also give an account of the number of female and male workers employed, the number of female workers who may be pregnant, the number of female and male workers who may have been recruited during the year, and the differences between the starting salaries of workers of each sex. It must also provide information and data on employee selection processes. Its content was specified by a government decree enacted by the Minister of Labour in agreement with the Minister for Equal Opportunities, the Decree 29 March 2022.

This law introduced also the certification of gender equality, or 'gender diversity *rating*', envisaged also by Mission 5 of the National Reform Programme (PNRR).

The aim was to set up a certification mechanism, starting in 2022, to certify the measures taken by employers to reduce the gender gap in relation to growth opportunities in the company, equal pay for equal work, gender diversity management policies and maternity protection. To this scope the Italian Prime

statement for each financial year in accordance with Art 4.

[55] See the new Directive (EU) 2022/2464 of 14 December 2022 of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) no 537/2014 as regards corporate sustainability reporting.

[56] With regard to sanctions, if non-compliance continues for more than 12 months beyond the 60-day deadline within which companies that have not complied with the report are required to do so, the sanction, which until now was only optional, of one year's suspension of any contribution benefits enjoyed by the company will be applied. The *Ispettorato del Lavoro* (ie National Labour Inspectorate) verifies the truthfulness of the aforementioned reports and in the event of a false or incomplete report, a pecuniary administrative sanction of one thousand to five thousand euros is applied.

Minister adopted the Decree of 29 April 2022 (on the proposal of the Minister for Equal Opportunities in agreement with the Minister of Labour and Social Policies and the Ministry of Economic Development); this decree defines: minimum parameters for the achievement of such certification by companies with more or less than fifty employees (the parameters refer to remuneration, career progression opportunities, work-life balance, and to the modalities of acquisition and monitoring of the data transmitted by employers and made available by the Ministry of Labour); (ii) the procedures for involving company trade union representatives and territorial and regional equality counselors in monitoring and verifying compliance with the above parameters; (iii) means of advertising the certification of gender equality.

Possession of the gender certification allows certain benefits: in particular, there will be an exemption from the payment of the total social security contributions to be paid by the employer, up to a limit of fifty million euros, for the year 2022, for private companies in possession of the certification of gender parity referred to above (the computation rate for pension benefits remains unchanged). This relief is determined annually as an amount not exceeding one percent and up to a maximum of fifty thousand euros per year for each company, prorated and applied monthly by interministerial decree (Art 5 of the legge 162/2021).

In addition, a bonus score should be established for the evaluation by national and regional European funding authorities of project proposals for the granting of state aid to co-finance investments in private enterprises that, on 31 December of the year preceding the reference year, are in possession of a gender equality certification.

Finally, the contracting authorities shall include in the calls for tenders, notices or invitations to procedures for the procurement of services, supplies and works, the indication of bonus criteria to be applied in the evaluation of the offer in relation to the possession by private companies of the gender equality certification. In any event, the provisions of Art 47 of decreto legge no 77/2021 shall remain in force for the procedures relating to public investments financed in whole or partly by the resources provided for by the Italian Recovery and Resilience Plan (PNRR) and National Complementary Investment Plan (PNC). This provision is included in the framework of the administrative law and, in particular, for public procurement, introducing a series of provisions aimed at protecting and promoting gender equality in the context of the contracts related to the PNRR and PNC (in this case, relating to public investments financed, in whole or in part, with the resources provided by: a) Regulation 2021/240/EU;[57] b) Regulation 2021/241/EU;[58] c) the National Complementary Investment Plan

[57] European Parliament and Council Regulation (EU) 2021/240 of 10 February 2021 establishing a Technical Support Instrument [2021] OJ L57/1.

[58] European Parliament and Council Regulation (EU) 2021/241 of 12 February 2021

according to Art 1 of decreto legislativo no 59/2021). More in detail, contracting stations, ie public contracting authorities or other legal entities, which award public contracts for works, supplies or services or concessions, are now obliged, pursuant to the article under review, to include in the notices and invitations specific clauses, classifying them as necessary requirements or as additional bonus requirements of the tender, aimed at promoting, among other things, gender equality and the employment of women, while always respecting the principles of free competition, proportionality and non-discrimination.

IV. The European Scenario and the Recent Approval of the Directive for the Improvement of Gender Balance

On 7 June 2022, the Council and European Parliament reached a political deal on a new EU law promoting more balanced gender representation on the boards of listed companies and the final text of the 'Women on Boards Directive' was adopted by the Council on 17 October 2022 and by the EU Parliament on 22 November 2022. After it was published in the Official Journal of the EU on 7 December 2022, the Directive (EU) 2022/2381 entered into force on 27 December 2022.

The fact that the Proposal for a Directive on improving gender balance (2012) seems to be finally approved leads us to consider all the aspects that, in the light of the Italian experience, are susceptible to improvement at a European level as well.[59] This is based on the preliminary observation of the assumptions, as well as the objectives, that unite the Italian legislation and the European proposal. The recital 16 of the Directive is emblematic in this respect, stating that

> 'it is widely recognised at a corporate level that the presence of women on boards improves corporate governance (...)' and that 'numerous studies have also shown that there is a positive correlation between gender diversity at senior management level and a company's financial performance and profitability'.

How does the *Golfo-Mosca* Law and its successors fit into the path towards

establishing the Recovery and Resilience Facility [2021] OJ L57/17.

[59] The Women on Boards Directive is available at https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32022L2381&from=EN. The Proposal for a Directive on improving the gender balance among non-executive directors of listed companies and related measures, although dating back to November 2012, was not approved until ten years later, so that the original timetable for Member States to comply with its principles (1 January 2020 for listed companies and 1 January 2020 for listed companies that are public undertakings) has inevitably passed and will have to be rescheduled. See *Bulletin Quotidien* n 13 above). In doctrine see M. Callegari, 'Spunti di riflessione in tema di gender equality: interventi dell'Unione Europea e azioni positive: prospettive di armonizzazione', in M. Callegari, E.R. Desana et al eds, *Speriamo* n 14 above.

harmonisation that has been undertaken at an EU level? In the comparative framework, the measures adopted regarding 'gender balance on corporate boards' can be traced back to two models: on the one hand, voluntary initiatives taken by market players themselves (so-called 'soft law'), which can vary from recommendations by regulatory authorities, to self-regulatory codes, the adoption of *best practices*, or the sharing of *welfare* policies or objectives among several companies; on the other hand, the adoption of regulatory measures (what is known as 'hard law'), which differ according to the nature and size of the companies to which they are addressed, the content of the objectives and the obligations provided for (and, in particular, the adoption or not of positive actions, which include the adoption of so-called 'gender quotas', with the inclusion of a reference timeframe), as well as the provision of a penalty or reward system and its characteristics.[60]

The European Union's aspiration to 'gender equality' is therefore making its way, sometimes with difficulty, but driven by unequivocal synergies, in an extremely varied landscape. In addition to European countries that have opted to impose gender quotas in the composition of corporate bodies, albeit through heterogeneous legislation in terms of regulated entities and implementation methods (such as Norway, France, Italy, Iceland, Belgium, Denmark, Greece, Slovenia, Austria, Spain and Germany), there are other EU members which use a 'voluntary implementation method' in order to ensure compliance with European legislation, this tends to be in the form of 'codes of conduct' (such as Sweden, Finland, Luxembourg, Poland, the United Kingdom and Latvia).[61]

Both methods respond to the aspiration of guaranteeing equal opportunities with a more or less broad spectrum of application (private and public companies; only listed companies…), but the so-called 'soft law' model has achieved less successful results, in line with the first *moral suasion* experiments launched by the European Commission as early as 2010.[62]

In this context, Italy is one of the countries that has adopted *ad hoc* legislation, along with Norway, France and Spain, which have recently been joined by Germany – with provisions that until now referred only to the

[60] European Commission, *Women in economic decision making in the EU: progress report, A Europe 2020 initiative*, 2012, available at http://www.ec.europa.eu. On the different measures put in place to increase the presence of women on boards, see C. Seierstad et al, 'Increasing the Number of Woman: The Role of Actors and Processes' 141 *Journal of Business Ethics*, 289-315 (2017).

[61] See C. Carletti, 'Gender Diversity Management and Corporate Governance International Hard and Soft Laws Within the Italian Perspective' *The Italian Law Journal*, 251 (2019); M. Sarale et al, 'Dai "soliti noti" alla "gender diversity": come cambiano gli organi di amministrazione e di controllo delle società' *Giurisprudenza Italiana*, 2245 (2015).

[62] For a reconstruction of the process of the Proposal see the numerous contributions on the different legal systems in M. Callegari, E.R. Desana et al eds, *Speriamo* n 14 above. Cf M. Marcucci and M.I. Vangelisti, *L'evoluzione della normativa di genere in Italia e in Europa* (Roma: Quaderni Banca d'Italia no 188, 2013); Centro Studi Camera dei Deputati, *Legislazione e politiche di genere*, no 62, 5 March 2020, available at http://www.documenti.camera.it.

composition of the *Aufsichtsrat*, but which would now be extended to the *Vorstand* and therefore to the management body – to pursue gender equality policies through positive actions.

Following the success of 'hard law' interventions, in 2012 the European Commission came up with a Proposal for a Directive on gender balance among non-executive directors of listed companies, which represents a temporary measure to achieve the common goal of forty percent of non-executive directors of the underrepresented sex for all listed companies (including public companies for which the Proposal originally envisaged bringing forward the entry into force date of the obligations by two years) and which should apply to every board, this is intended as 'every administrative, managerial or supervisory body of a corporation'. The deadlines originally envisaged now seem very narrow, but they were indicated at the time of presentation of the Proposal as 31 December 2022 for private listed companies and even 2021 for publicly owned ones.[63]

Given that this is an objective to be achieved gradually, the forty percent figure seems fairly realistic, but also ambitious compared to the European scene because it does not require exact mathematical parity, also in view of the numerical composition of *boards*, the non-simultaneous nature of appointments, the greater difficulty of making management bodies heterogeneous, especially in certain sectors, or, moreover, special rules on the formation of appointments.

The process of the Directive got off to the best possible start. In November 2013, Proposal 614 final of 2012 was approved by a very large majority in the European Parliament, however, in the Council it did not gather the necessary consensus, becoming the object of wavering attention. The year 2017 seemed to be the right year due to an updated draft of the text being discussed in the Council. However, consensus was not reached, and the entire dossier ended up as 'unfinished business' and was transferred to the current EU Commission (2020-24). Fortunately, the approval of the Directive was considered as one of the priorities of the 2020-25 EU strategy for gender equality.[64]

[63] On the process of the Proposal of Directive and the underlying motivations see, *ex multis,* M. Callegari, E.R. Desana et al eds, *Speriamo* n 14 above, 290; M. Callegari, E.R. Desana et al, 'Riequilibrio' n 13 above; C. Buzzacchi, 'Il rilancio delle quote di genere nella legge Golfo-Mosca: il vincolo giuridico per la promozione di un modello culturale' 35 *federalismi.it*, 1 (2020); F. Cuccu, 'The unequal right in gender quotas in companies' *La nuova giurisprudenza civile commentata*, 1155 (2019); C. Carletti, 'Gender' n 61 above; V. Morera, 'Sulle ragioni dell'equilibrio di genere negli organi delle società quotate e pubbliche' *Rivista del diritto commerciale e delle obbligazioni*, 155 (2015); F. Gennari, *L'uguaglianza di genere negli organi di* corporate governance (Roma: Franco Angeli, 2015); F. Spitaleri, *L'eguaglianza alla prova delle azioni positive* (Torino: Giappichelli, 2013); M. Marcucci and M.I. Vangelisti, *L'evoluzione della normativa di genere in Italia e in Europa* (The Evolution of Gender Legislation in Italy and Europe). *Bank of Italy Occasional Paper* 188 (2013); L. Calvosa and S. Rossi, 'Gli equilibri' n 8 above; D. Stazione, 'In tema di "equilibrio tra generi" negli organi di amministrazione e controllo di società quotate' *Giurisprudenza commerciale,* 190 (2013).

[64] European Parliament resolution of 21 January 2021 on the EU Strategy for Gender Equality [2021], OJ C456/208.

The introduction of binding measures such as quotas as a corrective to gender inequality (remark 78) links up with Art 23 of the Charter of Fundamental Rights of the European Union (CFR), which allows for the introduction of advantages in favour of the unrepresented gender, interpreting it as a necessary corrective to Art 21 of the CFR and also linking it to Art 157, para 3, TFEU (Treaty on the Functioning of the European Union), which empowers the European Parliament and the Council to

> 'adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'.[65]

Compliance is, of course, reinforced by the neutrality of the measure, which brings the choice of the EU Legislature in line with what was expressed first by the *Golfo-Mosca* Law and then by the Budget Law 2020, as mentioned earlier, also avoiding *reverse* discrimination.

According to Brussels' estimates, improving gender equality could lead to an increase in GDP of up to 3.15 trillion Euros by 2050. Besides the ethical value of pursuing gender equality, this economic data cannot be ignored. This data has been highlighted in the negotiations leading up to the Budget and *Recovery Fund* as well as in the 'Conference on the Future of Europe' to which the Plenary sessions of the European Parliament in June and October 2021 were dedicated.

Despite the broad consensus in favour of adopting measures to improve gender balance in company boards, not all Member States have supported such legislation at an EU level, believing that binding measures at such a level are not the best way to achieve the objective.

The debate was not pointless; in fact 2022 was finally the breakthrough year. The approach proposed by the Commission from the start, which involves aspirational targets rather than bindig quotas, remains appropriate; however, the Precidency has updated the text and made some improvements. The changes include: rewording to indicate that it is up to the member states to choose between the alternative objectives (forty percent for non-executive board members or 33% for all board members); rewording of the suspension clause and reporting requirements, to clarify the text and ensure flexibility; updates to

[65] See on this point G. Bruno et al, *Boardoroom gender diversity and a Performance of Listed Companies in Italy* (Roma: Quaderno della Finanza Consob no 87, 2018); S. Comi et al, *Where Women make the Difference. The Effects of Corporate Board Gender Quotas on Firms' Performance across Europe* (Milano: Management and Statistic Working Paper no 367 Università Milano Bicocca, 2017); C.P. Green and S. Homroy, 'Female directors, board committees and firm performance' 102 *European Economic Review*, 19 (2018); D. Green et al, 'Do board gender quotas affect firm value? Evidence from California Senate' 60 *Journal of Corporate Finance*, 101526 (2020); N. Alkabani et al, 'Gender diversity and say-on-pay: Evidence from UK remuneration committees' 27 *Corporate Governance: An International Review*, 378 (2019).

the target and reporting dates; references to the pillar of social rights, the Porto declaration and the Commission's gender equality strategy. On 7 June 2022, the Council and European Parliament reached a political deal and, after the ritual approvals by both Council and Parliament, the Women on Boards Directive was published on 7 December 2022 and entered into force on 27 December 2022.

The long-awaited approval of the Directive was as timely as ever because, despite progress and good intentions, the gender imbalance in the governance of European companies remains evident. According to the latest figures from October 2021, women make up 30.6% of the members of the boards of listed companies surveyed in the EU. This is an increase of just one percent compared to 2020. According to the Directive, by 2026, listed companies should aim to have at least forty percent of their non-executive director positions or thirty-three percent of their non-executive and executive director positions held by members of the under-represented sex. France remains the only state where large, listed companies have numbers that meet the threshold indicated in the Directive in the composition of *boards;* Italy, Sweden and Belgium reach thirty-eight percent, but women are less than a fifth on the boards of more than ten EU states and a mere tenth in Estonia, Malta and Hungary.

Overall, the Directive confirms the intention to give Member States sufficient freedom to decide how objectives can best be achieved, offering a fairly flexible framework and a sufficiently long period of adaptation. Moreover, the variety of the current landscape, with 7 countries having adopted the regulatory imposition of gender quotas (France, Belgium, Italy, Germany, Austria, Portugal and Greece – the latter was added in 2020), nine countries with a mitigated approach (Denmark, Ireland, Spain, Luxembourg, Netherlands, Poland, Slovenia, Finland and Sweden) and the remaining eleven (Bulgaria, Czechoslovakia, Estonia, Croatia, Cyprus, Latvia, Lithuania, Malta, Hungary, Romania and Slovakia) which have not yet taken action to correct the inequality, would seem to justify the option of a flexible model with a sufficiently long adoption period, although this will have to be balanced against the need to limit the time necessary to close the large gender gap that still exists.[66]

The Directive tackles the central issues of the phenomenon, in line with an approach that is in many respects the same as that adopted in the Italian experience, which is reaffirmed as one of the most innovative interventions in the EU sphere, sanctioning the growing commitment to *gender mainstreaming* and to remedying the imbalance between genders using binding provisions, which do not have such a stringent deadline. All this so as to trigger a series of positive dynamics in the formation of top-level management bodies.

When outlining the content of positive action, a lot of space is left to legal

[66] The *Strategy 2020-25* and the mentioned motions and resolutions are available at http://www.europarl.europa.eu.

systems, without prejudice to the common goals. Of course, in addition to the objectives concerning directors, the Directive identifies a series of additional measures and information obligations for companies with the aim of ensuring that the conditions are as uniform as possible in the internal markets so that the objective of equality becomes a reality to improve corporate governance and company performance.

In this sense, candidate selection models (according to pre-established, clear, unambiguous and neutrally formulated methods and criteria), gender policies to overcome the persistent pay gap, training and education policies, as well as institutional communication on gender balance (Artt 6, 7) are key provisions that should be pursued more vigorously, as they are largely neglected by domestic legislation and their importance was strongly reiterated in the 2022 Report on gender equality in EU.[67]

In particular, a reading of the Text reveals, unlike the case in national legal systems, a strong focus on the development of incentives aimed at eliminating the persistent gender pay gap, which at European level currently stands at around fourtheen point one percent (and twenty-nine point five percent for the pension gap) in 2019, which is a very significant gap indeed.[68] On this aspect, there could be a significant change of course, given that on 4 March 2021 the EU Commission presented a specific Proposal for a Directive (no93 of 2021) on wage transparency and better implementation of equal pay,[69] in line, among other things, with the EU's commitment to the United Nations 2030 Agenda, whose approval was supported by the aforementioned Report on Gender Equality in the EU of 2021[70] and by a non-legislative Resolution of 500 MEPs on 15 December 2021.[71]

Finally, an absolutely central aspect in order to make the provisions effective is an adequate system of penalties (Art 8). The 'impunity' of non-compliance may in fact encourage a kind of self-regulation, which has traditionally proved less virtuous. Specifically, when comparing the experience of legal systems that introduced gender quotas, without sanctioning mechanisms, with that of

[67] Available at http://www.eige.europa.eu. See Opinion of the Committee on Legal Affairs on the legal basis dated 23 June 2013 and F. Cuccu, 'The unequal' n 63 above.

[68] This is a significant gap, with long-term repercussions on women's quality of life and increased risk of poverty, and perpetuating the pension pay gap. See The gender pay gap situation in the EU, available at https://tinyurl.com/mty6eyuz (last visited 31 December 2022).

[69] Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM (2021) 93 final, available at http://www.eur-lex.europa.eu.

[70] See 'Closing the gender gap in pay and pensions' (29), available at https://tinyurl.com/mr2zujj7 (last visited 31 December 2022). See also ASviS, 2020 Report n 5 above, 1.

[71] European Parliament resolution of 15 December 2021 on equality between women and men in the European Union in 2018-2020, 2021/2020(INI), available at http://www.europarl.europa.eu.

systems which introduced both, more significant results were obtained in the latter. This is demonstrated by the primacy of the French experience, which immediately introduced a stricter system of sanctions and obtained more positive results compared with softer experiences such as those of Spain and the Netherlands; in other words, the same difference in results Italy obtained between the listed and the public sector.[72]

Among the possible sanctions mentioned in the Directive are: considering void resolutions passed by bodies, the dissolution of companies, considering null and void appointments made in violation of legal obligations (as in the French model), the suspension of remuneration, as well as administrative sanctions, such as exclusion from the public procurement sector, from tax benefits or restructuring funds. Interesting and isolated, even compared to the Italian model, is the solution adopted by Norway, which applies the ordinary sanctioning mechanisms provided for companies whose boards of directors do not meet the legal requirements, ie the refusal of registration by the Commercial Register and the liquidation of those companies that do not promptly obey a compliance order. There are also those who suggest reward mechanisms instead of sanctions, for example in terms of tax benefits (in line with a recent Italian proposal to introduce tax benefits for female-founded *start-ups*).

In a broader sense, the problem of the 'effectiveness' of the rules reflects the level of affirmation of the issue in the system of values present at a social level; it is, in fact, evident that any intervention, regardless of its cogency, must in any case go hand in hand with and contribute to developing an adequate social, cultural and ethical sharing.

As many have pointed out, also following the socio-economic impact of the Covid-19 emergency, innovation and economic recovery pass through inclusion, an indispensable value to create the new narrative for the action of change in the labour market as stated in the European Parliament resolution of January 2021. From this perspective, the provision of gender quotas is not only a tool for bridging the gap, but also a key element in shaping a modern culture of inclusion and equality, preventing positive actions from being degraded to mere formal obligations through the adoption of so-called 'One & Done' practices.

In conclusion, while affirmative action is spreading, most recently with its introduction in Greece in October 2020 as well in the Netherlands and in Italy, thanks to recent legislation, the approval of the Women on Boards Directive is the long-awaited key step in the harmonisation process towards the achievement of gender equality in the labour market.

On 25 January 2022, the Commission for Women's Rights and Gender Equality elected its new President, Robert Biedron, who has identified the reduction of the pay gap and the unblocking of the Women on Boards Directive

[72] On this last point see E.R. Desana, 'L'equilibrio' n 16 above,111; F. Massa Felsani, *La gestione* n 8 above and M. Callegari, E.R. Desana et al, 'Riequilibrio' n 13 above, 10.

as priorities for his mandate. His inaugural words were emblematic:

> 'I would like to conclude by reminding what former US Secretary of State Madeleine Albright said: "There is a special place in hell for women who don't help other women". I would add this: there is also a special place in hell for men who don't support this fight'.

The hope is that the approval of the Women on Boards Directive will quickly result in a narrowing of the gender gap.

Corporate and Financial Markets Law

The *Tercas* Case, State Aid, and Antitrust: Are There Holes in the Warp?

Mariateresa Maggiolino*

Abstract

In order to guarantee the existence of competition in the internal market, the rules on State aid and the antitrust provisions are supposed to act in a complementary way, as if the latter were to cover the behaviours that the former do not capture and vice versa. Conversely, taking its cue from the recent *Tercas* case, the article shows that neither State aid nor competition law covers one case: that of solidarity-laden activities carried out by private agents with the intention of keeping failing firms in the internal market. The article discusses the reasons for this gap and its sustainability.

I. Introduction

At the end of October 2013, Banca Popolare di Bari S.C.p.A. (BPB) had a plan to save Banca Tercas S.p.A. (Tercas), head of a troubled Italian banking group that had been subject to special administration since mid-2012 and whose assets were circa 0.1% of total Italian banking assets. BPB wanted to make a capital injection of EUR 230 million on one condition: that one of the Italian Deposit Guarantee Schemes,[1] known as Fondo Interbancario di Tutela dei Depositi (FITD),[2] fully cover Tercas' negative equity for approximately EUR 300 million.[3]

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[1] Updated data on European Deposit Guarantee Schemes are available at https://tinyurl.com/33uvhe6n (last visited 31 December 2022).

[2] Established on a voluntary basis in 1987, FITD is a mutual consortium of banks aiming at pursuing the common interest of its members. Under Art 1 of its Statute (as modified in February 2021), FITD was created for the purpose of guaranteeing the depositors of member banks. In 1996, following the transposition into the Italian legal system of the European Parliament and Council Directive 94/19/EC of 30 May 1994 on deposit-guarantee schemes [1994] OJ L135/5, the Bank of Italy recognized FITD as one of the DGSs authorised to operate in Italy and the only one of which non-cooperative credit associations could become members. At present, FITD is governed by private law, the Italian Banking Act and its own Statute and By-Laws and its financial resources are provided by its members through ex-post contributions. According to Art 32 of the Statues, FITD, operating as DGS, may intervene in: a) the reimbursement of depositors, in cases of compulsory administrative liquidation of member banks licensed in Italy and, for branches of EU banks, under certain circumstances, in cases of intervention by its home deposit guarantee scheme; b) transfers of assets and liabilities, in cases of compulsory

After a few months of negotiation, FITD agreed to support Tercas by granting: (*i*) a non-repayable contribution of EUR 265 million to cover the negative equity of Tercas; (*ii*) a guarantee of EUR 35 million for three years to cover the credit risk associated with certain exposures of Tercas to third parties; and (*iii*) a guarantee of EUR 30 million to cover part of the possible additional costs and losses of around EUR 60 million associated with the tax treatment of the non-repayable contribution of EUR 265 million. Thanks to such intervention, the BPB's plan was put in place in the summer of 2014.

However, in February 2015 the European Commission found that FITD's intervention was unlawful. The Commission qualified it as a form of State aid granted in breach of the notification and stand-still obligations established in Art 108, para 3, of the Treaty on the Functioning of the European Union (TFEU) and, accordingly, ordered its recovery.[4] This gave rise to a legal battle that ended in March 2021 with the decision of the Court of Justice.[5] Confirming what had been established by the General Court on March 2019,[6] the Court of Justice ruled out the possibility that FITD's intervention could be considered a form of State aid within the meaning of Art 107 TFEU. It concurred with the General Court in affirming that FITD's intervention was neither imputable to the Italian State nor financed through its public resources.

This article, after briefly analysing the legal issues lying at the core of the *Tercas* case, moves on to consider whether Deposit Guarantee Schemes (DGSs), grouping together private commercial banks and performing activities similar to those of FITD in *Tercas*, could ever be subject to antitrust law. Indeed, given that antitrust and State aid rules act in a complementary way to ensure the existence of competition within the Internal Market, there is room to question whether DGSs' actions escaping the application of State aid can nevertheless fall within the scope of competition law. To answer this question, the article cannot

administrative liquidation of member banks licensed in Italy; c) preventative interventions, to overcome failing or likely to fail member banks licensed in Italy; d) financing of resolution, in cases of resolution of member banks licensed in Italy. Moreover, according to Arts 43-44 of its Statues, the Voluntary Intervention Scheme – established inside FITD, in the form of an unincorporated association – intervenes in support of its participating banks for the purpose of recovery and in the pursuit of the financial stability of the overall banking sector.

[3] It is worth noting that, from late 2019 to mid-October 2020, BPB itself has been subject to special administration and – following a procedure similar to that which had been previously carried out for the purpose of Tercas' rescue by BPB – in early July 2020 was bought out by Banca del Mezzogiorno – Mediocredito Centrale S.p.A. (a State-owned Italian bank), following a non-refundable equity injection by FITD of around 1.2 billion euros.

[4] Commission Decision (EU) 2016/1208 of 23 December 2015 on SA.39451 (2015/C) (ex 2015/NN) on State aid granted by Italy to the Bank Tercas, OJ L 203, 2016, 28.7.2016, (hereinafter, *Tercas* decision).

[5] Case C-425/19 P *Commission* v *Italy and Others*, Judgement of 2 March 2021, available at https://tinyurl.com/ye2azdwt.

[6] Joined Cases T-98, 196 and 198/16 *Italy* v *Commission* (General Court, Judgement of 19 March 2019). See also General Court of the European Union, Press release no 34/19 of 19 March 2019, available at https://tinyurl.com/ye2azdwt.

help but examine a preliminary and fundamental issue: whether and when DGSs are undertakings within the meaning of European Union (EU) competition law. Interestingly, it is in the development of this analysis that the article remarks a point that has gone unnoticed until now: that neither state aid law nor competition law covers the case of solidarity-laden activities carried out by private agents with the intention of keeping distressed firms in the market.

The article is set out follows. Section 2 opens with a brief description of the role that DGSs are supposed to play within the EU legal framework for the management of banking crisis and Section 3 then concisely recalls the rationale underpinning State aid law and the conditions for the application of Art 107 TFEU. Section 4 discusses the legal issues at the core of *Tercas* and the reasons why FITD's intervention did not qualify as State aid, then considers whether the same intervention could be subject to antitrust scrutiny. Section 5 introduces the antitrust notion of undertaking, while Section 6 discusses whether non-refundable investments of the kind that FITD made in *Tercas* might amount to an economic activity. Section 7 tests the theoretical viability of the idea that non-refundable payments and guarantees cannot come under antitrust scrutiny. Section 8 concludes by indicating that solidarity-laden activities aimed at saving failing firms that should otherwise exit the market are not subject to any competitive assessment when undertaken by private agents.

II. Deposit Guarantee Schemes and Their Intervention in Banking Crises

While the bankruptcy of an ordinary firm tends to favour its own competitors and potentially strengthens the economy as a whole by eliminating an inefficient economic agent, the default of a bank may weaken both its competitors and the market itself. It may put other banks in difficulty, jeopardize the stability of the overall financial system, determine a credit crunch that, in turn, slows down economic growth and even threatens the sustainability of sovereign debts.

This contagion mechanism (also named 'domino' or 'snowball effect') is rooted in the special nature of the banking activity as well as in the complex structure of present-day banks.[7] The essence of banking activity is borrowing capital in order to provide liquidity, lend money on the inter-bank market, and secure payment systems.[8] Therefore, banks bear a severe asset-liability mismatch

[7] E. Fama, 'What's different about banks?' 15 *Journal of Monetary Economics*, 29 (1985); C. Goodhart et al, *Financial Regulation: Why, How and Where Now?* (Abingdon: Routledge, 1998), 10-12.

[8] J. de Haan et al, *Financial Markets and Institutions. A European Perspective* (Cambridge: Cambridge University Press, 3rd ed, 2015);E. Hüpkes, 'Form Follows Function. A New Architecture for Regulating and Resolving Global Financial Institutions' *European Business Organization Law Review*, III, 369, 371 (2009); E. Carletti et al, 'Bank Mergers, Competition, and Liquidity' 39 *Journal of Money, Credit and Banking*, 1067 (2003).

that has no equivalent in the balance sheets of ordinary firms: irrespective of the specific business model or corporate governance system adopted, each bank has a low capital-to-assets ratio, a low cash-to-assets ratio, and a high short-term-debt-to-total-debt ratio.[9] Furthermore, present-day banks are large and interconnected.[10] Not only can the volume of their business shoot up to values that far exceed the higher turnover of large industrial firms but they also engage in a range of regulated and unregulated activities,[11] trade in global markets, stand at the heart of the monetary policy transmission chain,[12] and control the access to credit for ordinary firms and households.[13] Therefore, depending on the circumstances, a crisis in just one bank may undermine the stability of the overall financial system.

To restore the long-term viability of banks, confidence in the financial sector, and the ability of ordinary firms to access credit, Governments may use taxpayers' money to help troubled banks via non-structural and structural interventions, such as liquidity injections and loan guarantees[14] or recapitalizations and asset relief measures.[15] However, as the events of the past financial crisis have shown,

[9] G. Kaufman, 'Bank Failures, Systemic Risk, and Bank Regulation' 16 *Cato Journal*, 17 (1996).

[10] G. Sciascia, 'Recovery and resolution in the EU: Devising a European Framework', in E. Chiti and G. Vesperini eds, *The Administrative Architecture of Financial Integration. Institutional Design, Legal Issues, Perspectives* (Bologna: il Mulino, 2015), 93.

[11] R. Lastra and C. Proctor, 'The Actors in the Process: of Supervisors, Regulators, Administrators, and Courts of Justice', in R. Lastra ed, *Cross-Border Bank Insolvency*(Oxford: Oxford University Press, 2011), 74.

[12] P. Davies, 'Liquidity Safety Nets for Banks' 3 *Journal of Commercial Law Studies*, 287 (2013).

[13] M. Knight, 'Mitigating Moral Hazard in Dealing with Problem Financial Institutions: Too Big to Fail? Too Complex to Fail? Too Interconnected to Fail?', in J. LaBrosse et al eds, *Financial Crisis Management and Bank Resolution* (Abingdon: Routledge, 2009), 257; G. Psaroudakis, 'State Aid, Central Banks and the Financial Crisis' *European Company and Financial Law Review*, II, 194 (2012).

[14] Non-structural interventions aim to improve, on a temporary basis, the access that beneficiary banks have to finance, in order to prevent bank runs and the interruption of credit flows to the real economy. States can act directly, lending public funds to troubled banks or opening a line of credit to them, thereby exposing themselves to the risk of net losses should banks not repay the loan. This is the case of Emergency Liquidity Assistance (ELA) aimed at providing central bank monetary resources to (solvent) credit institutions that are facing temporary liquidity problems, Or, States can act indirectly by guaranteeing newly issued debt instruments, which beneficiary banks will use to raise funds from the market, or by lending government bonds, which beneficiary banks will use as collateral to borrow liquidity from the central bank. In both cases, therefore, States undertake to assume the liabilities of distressed banks, should they prove to be defaulting.

[15] Structural interventions are instead meant to produce lasting effects, by addressing capital shortfalls and improving balance sheets. Namely, pursuant to recapitalization plans, States inject new funds into distressed banks, by purchasing their capital and debt instruments at a price above the market price. In a complementary way, by means of asset relief measures, States free the banks in distress from the assets that could lead to losses: public asset relief measures free the beneficiary bank from the need to register either a loss, or a reserve for a possible loss, on its impaired assets and, thus, free a share of the regulatory capital for other

even public actions may be counterproductive; they may trigger a vicious circle (also named 'diabolic' or 'deadly embrace') at the expense of the very same troubled banks that they were supposed to help. By increasing the sovereign distress and reducing the solvency of States – especially of those whose public finances have already deteriorated and been further weakened by decreasing GDPs and tax revenues – governmental interventions funded with taxpayers' money may suppress the value of State debt bonds and, thus, the credit risk of those national banks that have received State bonds precisely to ensure their solvency.[16]

Therefore, in recent years, EU institutions have designed a new legal framework to manage banking crises, with the intention of limiting the use of taxpayers' money by increasing the use of private resources from banks, their shareholders and stakeholders, and other market investors. For what is most relevant here, this new setup mandates that each Member State create at least one private fund within its national boundaries, called a Deposit Guarantee Scheme (DGS), which must be financed each year by the commercial banks operating in that State and must have sufficient resources to intervene in the management of one or more banks in crisis.[17]

uses. To this end, they either purchase those assets via a vehicle owned, funded, or guaranteed by the State – the so-called 'Bad Bank' or 'Asset Management Company' – at a transfer price above the market value of the assets, or they leave the impaired assets under the ownership and the balance sheet of the bank, while committing to indemnify it, if the cumulative credit losses on a well-identified set of assets exceed a certain amount. Therefore, the State partially bears the downside risk linked to the asset but has no upside other than the fee revenue.

[16] E. Farhi and J. Tirole, 'Deadly Embrace: Sovereign and Financial Balance Sheets Doom Loops' 85 *The Review of Economic Studies*, 1781 (2018).

[17] First regulated by Directive 94/19/EC, at present DGSs are subject to the European Parliament and Council Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes (recast) [2014] OJ L 173/149 (Deposit Guarantee Schemes Directive or 'DGS Directive'), which has amended the European Parliament and Council Directive 2009/14/EC of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay [2009] OJ L68/3. The banks' mandatory membership of a DGS was introduced by Directive 94/19/EC which considers it as a precondition for obtaining a banking licence. According to Art 4 of the DGS Directive, each Member State must ensure that within its territory at least one DGS is introduced and officially recognized. DGSs set up and officially recognised in one EU country must cover the depositors at branches of their members in other EU countries. Among some of the main changes introduced by the amended DGS Directive is the duty to provide *ex-ante* financing arrangements (the level of these funds should amount to 0.8% of covered deposits in each Member State by 2025), as well as to ensure that the funds of the guarantee schemes are financed by the banking sector (as opposed to the public intervention funded by taxpayers' money); see Art 10 of the DGS Directive. The amount of the banks' payment is partly determined by the single bank's risk profile: the higher the risks a bank takes, the larger the contribution it has to pay into the fund; see Art 13 of the DGS Directive. DGSs' funding capability is essential for their reliability in the system; see M. Bodellini, 'The Optional Measures of Deposit Guarantee Schemes: Towards a New Bank Crisis Management Paradigm?' *European Journal of Legal Studies*, I, 341, 348 (2021). On the importance of DGSs in the managing of banking crises see also I. Mecatti, 'The Role of Deposit Guarantee Schemes in Preventing and Managing Banking Crises: Governance and Least Cost Principle' *European Company and Financial Law Review*, VI, 657, 661 (2020).

In particular, thanks to their private funds, under Art 108 of the Bank Recovery and Resolution Directive (BRRD),[18] DGSs have to serve the so called 'pay-box' function:[19] they must ensure that covered depositors of failing (or likely to fail) banks will be reimbursed up to a defined limit.[20] Secondly, in accordance with the conditions set out in Art 109 of BRRD, DGSs are required to finance banking resolutions. Finally, DGSscan perform optional functions: they can implement alternative measures aimed at preventing a bank's failure and they can provide financial means in the context of liquidation aimed at preserving access by depositors to covered deposits.[21]

For example, FITD – the Italian DGS involved in *Tercas* – has the discretionary power to take preventive measures to support one of its members when it is placed – as Tercas was – under special administration. In particular, according to its statute, FITD may decide to undertake such a voluntary action when it meets the so-called 'least cost principle', that is, when the cost of the preventive intervention is lower than all possible alternatives (including the cost that the very same FITD would bear to keep the the troubled bank's depositors guaranteed, had the bank failed) and provided that there are concrete prospects

[18] European Parliament and Council Directive 2014/59/EU of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L173/190.

[19] M. Bodellini, n 17 above, 343-344. After paying out the covered deposits, the DGS is entitled to subrogate to the covered depositors' rights in the assets' liquidation process, benefiting from the same preference given to covered depositors by Art 108.

[20] All depositors, whether individuals or companies, have their deposits protected up to an amount of EUR 100.000 per bank by the DGS of which their bank is a member. Other protected deposits include i) pension schemes of small and medium-sized businesses; ii) deposits by public authorities with budgets of less than EUR 500.000 and iii) deposits of over EUR 100.000 for certain housing and social purposes. See Arts 5 and 6 of the DGS Directive. From mid-2015 depositors are to be reimbursed within a maximum of 20 working days. However, the DGS Directive gradually shortened the time limit for pay-outs to seven days by 2024. See Art 8 of the Directive. At a depositor's request, an emergency amount may made be available earlier if a deposit guarantee scheme is unable to reimburse depositors within the seven day time-limit during the transitional period which ends on 31 December 2023. In addition, according to the new DGS Directive banks must provide more, simpler and clearer information from their bank about the level of their deposit protection before they sign up to a new deposit contract. See Art 16 of the Directive.

[21] See Art 11, paras 3 and 6 of the DGS Directive. According to paragraph 3, 'Member States may allow a DGS to use the available financial means for alternative measures in order to prevent the failure of a credit institution provided that the following conditions are met [...]', while paragraph 6 states that 'Member States may decide that the available financial means may also be used to finance measures to preserve the access of depositors to covered deposits, including transfer of assets and liabilities and deposit book transfer, in the context of national insolvency proceedings, provided that the costs borne by the DGS do not exceed the net amount of compensating covered depositors at the credit institution concerned.' See M. Bodellini, n 17 above, 344-345, 352-358. According to the Author such optional functions might end up being even more effective, from a system-wide perspective, in maintaining financial stability and reducing the destruction of value potentially resulting from an atomistic (or piecemeal) liquidation.

that the bank can be restored to health.[22]

As anticipated in the Introduction, the facts of *Tercas* fit into this scenario, because FITD was available to cover its negative equity via a non-repayable contribution and two guarantees. However, the Commission qualified FITD's intervention as State aid and a legal battle began.

III. State Aid Law in a Nutshell

There ain't no such a thing as a free aid: national measures designed to support one or more troubled firms have several drawbacks.[23]

First, they are not fully consistent with the model of market economies that conceives the market as a selection mechanism, which awards firms capable of meeting consumer needs while excluding firms that are not efficient and innovative enough to withstand competition from their rivals.[24]

By the same token, State intervention increases the moral hazard of companies. The awareness that the State will intervene to save firms in difficulty[25] – banks included, especially when they are deemed to be too big, too interconnected, or too complicated to fail[26]– may incentivize risk-taking and imprudent behaviour that puts banks themselves at risk, as well as diminish the importance of due diligence on the part of depositors who should assess the safety and soundness of their banks.[27]

[22] See Art 47 of the FITD Statute. The so called 'least cost principle' regulates the DGSs' optional functions according to the DGS Directive (see Art 11, para 3, letter c) of the DGS Directive).

[23] K. Bacon, *European Union Law of State Aid* (Oxford: Oxford University Press, 3rd ed, 2017); N. Pesaresi et al, *EU Competition Law.State Aid*, (Cheltenham: Claeys and Casteels, 2nd ed, 2016), IV; and C. Quigley, *European State Aid Law and Policy* (London: Bloomsbury, 3rd ed, 2015).

[24] N. Pesaresi, 'Diritto della concorrenza e crisi di impresa', in G.Colombini and M. Passalacqua eds, *Mercati e banche nella crisi: regole di concorrenza e aiuti di Stato* (Napoli: Editoriale Scientifica, 2012), 156.

[25] F. Carbonetti, 'La gestione delle crisi bancarie in Italia: prospettive e problemi di una riforma', in F. Belli et al eds, *Banche in Crisi (1960-1985)* (Bari: Laterza, 1987), 176 (arguing that the risk of bank run incentivizes banks to operate in a prudent and careful way); I. Atanasiu, 'State Aid in Central and Eastern Europe' 24 *World Competition*, 257 (2001); J. Kornai et al, 'Understanding the Soft Budget Constraint' 41 *Journal of economic literature*, 1095 (2003).

[26] M. Knight, n 13 above, 257. The doctrine is indeed understood to mean that, if a bank is big, complex, or interconnected enough, it will receive financial assistance to the extent necessary to keep it from failing, although this last may induce banks to disregard inefficiencies and undertake overly risky behaviours. This is why maintaining a vague policy in relation to large banks that will be rescued ensures sufficient incentive for risk-averse behaviour of economic agents – see P. Molyneux, 'Banking Crises and the Macro-Economic Context', in R. Lastra and H. Schiffman eds, *Bank Failures and Bank Insolvency Law in Economies in Transition* (Alphen aan Den Rijn: Kluwer Law International, 1999), 5.

[27] K. Dowd, 'Moral Hazard and The Financial Crisis' 29 *Cato Journal*, 141 (2009); A. Antzoulatos and C. Tsoumas, 'Institutions, Moral Hazard, and Expected Government Support of Banks' 15 *Journal of Financial Stability*, 161 (2014). More generally, as to the many sources

In addition, the model of market economies takes as a benchmark the scenario in which rivals compete against each other on equal footing or – better – a scenario in which no firm takes advantage of any support other than its own resources, business acumen, and good luck. If only a few firms could benefit from 'exogenous' help, as happens in cases of selective State measures, not only would the market mechanism not be revealing their different levels of efficiency and innovation, but even non-aided firms would lose the incentive to compete fiercely.

Finally, and irrespective of any conceptualization of the functioning of the market, any State measure produces a direct or indirect impact on the coffers of the State. In other words, State measures do not neutralize losses and debts, they collectivize them, transferring them from the balance sheets of private firms, banks included, to the balance sheets of the State.[28] Accordingly, any decision to support private firms in difficulty has a twofold cost in terms of public financing: it involves not only the use of taxpayers' money, but also the increase in public debt or its removal from the pursuit of other public interest objectives.

Besides, if one considers national public support in the framework of the formation of the European single market and the Eurozone, State intervention produces further distortive effects. It jeopardizes the integrity of the internal market, by inducing subsidy races and by favoring Member States whose margin of action in the use of taxpayers' money is broad. Furthermore, given the fiscal rules underlying the Euro zone, if a Member State seriously deteriorates its public debt to support its banks, the sustainability of the whole monetary union can be jeopardized due to the degree of interdependence and integration among markets using this same currency.[29]

At the same time, however, State measures can produce positive effects, not only in single Member States, but also at EU level.[30] As it was clear especially from mid-1990s onwards,[31]public support can serve a fully-fledged economic

of moral hazard in the banking sector, see R. Grossman, 'Deposit Insurance, Regulation, and Moral Hazard in the Thrift Industry: Evidence from the 1930s' 82*American Economic Review*, 800 (1992); T. Hellmann et al, 'Liberalization, Moral Hazard in Banking, and Prudential Regulation: are Capital Requirements Enough?' 90 *American Economic Review*, 147 (2000); and A. Haldane and J. Scheibe, 'IMF Lending and Creditor Moral Hazard'*Bank of England Working Paper No. 216*, (2004), available at SSRN.

[28]*Mutatis mutandis*, this idea recalls that of 'socialization of losses' that informed the law and mechanisms on banking resolution before the BRRD and the SRM came into force. See, on this point, F. Capriglione, 'La nuova gestione delle crisi bancarie tra complessità normativa e logiche di mercato', in V. Troiano and G. Uda eds, *La gestione delle crisi bancarie. Strumenti, processi, implicazioni nei rapporti con la clientela* (Padova: CEDAM, 2018), 7.

[29] M. Merola, 'La politica degli aiuti di Stato nel contesto della crisi economico finanziaria: ruolo e prospettive di riforma', in G. Colombini and M. Passalacqua eds, n 24 above, 219.

[30] L. Tosato, 'L'evoluzione della disciplina sugli aiuti di Stato', in C. Schepisi ed, *La "modernizzazione" della disciplina sugli aiuti di Stato* (Torino: Giappichelli, 2011), 3.

[31] European Commission, Community guidelines on state aid for small and medium-sized enterprises (SMEs), OJ C 213/4, 23.07.1996; Community framework for state aid for Research and Development, OJ C 45, 17.2.1996; Guidelines on aid to employment, OJ C 334, 12.12.1995; Framework on training aid, OJ C 343/10, 11.11.1998.

policy intended to pursue objectives of common EU interest,[32] ranging from social cohesion to environmental protection;[33] from job creation to financial sustainability.[34]

Luckily enough, the structure of Art 107 TFEU serves well this trade-off between the negative and positive effects of State measures. While the second and third paragraphs of Art 107 set forth two kinds of derogation,[35] its first paragraph includes the prohibition, which applies if and only if: an undertaking[36] within the meaning of EU law receives, on a selective basis,[37] an economic advantage,[38]

[32] A. Biondi and E. Righini, 'An Evolutionary Theory of EU State Aid Control', in D. Chalmers and A. Arnull eds, *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015), 671-673; J. Jorge Piernas López, *The Concept of State Aid under EU Law: From Internal Market to Competition and Beyond* (Oxford: Oxford University Press, 2015), 45; D. Diverio, 'Le misure nazionali di sostegno al mercato bancario: un'applicazione à la carte della disciplina europea degli aiuti di stato alle imprese?'*Diritto del commercio internazionale*, 630 (2017).

[33] M.L. Tufano, 'La disciplina degli aiuti di Stato nell'Unione Europea: dal controllo all'enforcement' *Il diritto dell'Unione Europea*, II, 381 (2010); C. Schepisi, 'La modernizzazione della disciplina sugli aiuti di Stato secondo l'Action Plan della Commissione europea: un primo bilancio', in C. Schepisi ed, n 30 above, 17.

[34] Indeed, during the financial crisis of 2008-2013, financial stability – and therefore the intent to prevent the failure of a single bank from threatening the financial system as a whole, the real economy, and public debt – has become one of the objectives of the European Union. – See Communication from the Commission on the application, from 1 August 2013, of State Aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'), OJ C 216, 30.7.2013, para 7.

[35] To be sure, the Treaty provides for other exceptions as well: Art 106, para 2, which deals with undertakings delivering services of general interest, and Arts 107(3)(e) and 108(2), which grant the Council the power to create lawful categories of State Aid.

[36] In other words, the beneficiary of any aid must be an undertaking: any aid must be conceptualized as a *vertical* measure affecting *horizontal* business relations, as it comes come from a Member State, but it impacts on the rivalry among undertakings. Thus, it is true that Art 107 addresses Member States and their use of their taxpayers' money. However, one of the reasons why Art 107 exists is to prevent Member States from preventing firms from competing on an equal footing.

[37] In order to be characterized as a State Aid, a State measure must favour certain undertakings or the production of certain goods. True, this requirement may seem trivial. Indeed, where the aid at stake is granted to an individual undertaking, it is presumed. However, in case of interventions that apply broadly, to more than one undertaking, the selectivity requirement is what serves to distinguish general measures of fiscal or economic policy, which do not fall within the scope of Art 107, para 1, from aid schemes, which instead are subject to State Aid law.

[38] To be deemed as State Aid, the measure in question must constitute an 'un-market-like' advantage for the beneficiary undertaking. In other words, the measure must lead to an improvement in the economic and/or financial position of the beneficiary, which the undertaking would not have received under normal market conditions. See, eg, Case C-206/06 *Essent Netwerk Noord and Others*, [2008] ECR I-5497, para 79; Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht*, [2003] ECR I-7747, para 84; Joined Cases C-34/01 to C-38/01 *Enirisorse SpA* v *Ministero delle Finanze*, [2003] ECR I-14243, para 30; and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti Srl* v *Giuseppe Calafiori*, [2006] I-02941, para 59; Case C-533/12 P, *SNCM and France* v *Corsica Ferries France*, 4.9.2014,

which is imputable to the State *and* is financed, directly or indirectly, through State-resources,[39] and which is likely to distort competition and affect trade between Member States.[40]

IV. The Requirements of Imputability and State Resources in *Tercas*

In *Tercas*, the only legal question at issue was whether the intervention of FITD, meant to guarantee financial sustainability, was actually imputable to[41] the Italian Republic and was financed, directly or indirectly, through the money of Italian taxpayers. This was the case because the party granting the alleged aid – FITD – was not a direct emanation of the State, but a consortium of private banks, and the funds transferred to the beneficiary bank – Tercas – did not came from the coffers of the Italian Republic, but from the budgets of those private agents. After all, the imputability requirement is automatically verified only when the aid results from a piece of national legislation[42] or consists in the action of a public administration.[43] In all the other cases, even when the measure is adopted by a public undertaking, imputability must be assessed by looking at the circumstances and the context of the case.[44] Likewise, any time

ECLI:EU:C:2014:2142, para 30 and Case C-39/94; *Syndicat Français de l'Express International (SFEI) and others* v *La Poste and others*, 11.7.1996, ECLI:EU:C:1996:285, para 60.

[39] See Section 4 below.

[40] The measure at issue must be capable of distorting competition and affecting trade among Member States. These conditions, although often analysed together, address two different issues – Joined Cases T-298, 312/97 and others *Alzetta Mauro and Others* v *Commission*, [2000] ECR II-2319, para 81; Case C-372/97 *Italian Republic* v *Commission*, [2004] ECR I-3679,para 44; and Case C-148/04 *Unicredito Italiano SpA* v *Agenzia delle Entrate*, [2005] ECR I-11137, para 55. As for the distortion of competition, the case law of the Court of Justice does not require any sophisticated market analysis: it is enough that the State measure puts the rivals of the beneficiary at a competitive disadvantage. Instead, as for the interstate commercial clause, case law does not require a threshold or a percentage below which the State measure is assumed not to affect trade between Member States – a fact, that, for example has justified the application of Art 107, para 1, to even minor domestic banks. Differently, to better administer its resources, the Commission has identified a *de minimis* threshold below which the State measure is supposed to have a negligible impact on trade and competition and, accordingly, does not require any notification. See, Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Arts 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24/12/2013, 1.

[41] Case C-482/99 *French Republic* v *Commission*, [2002] ECR I-4397, para 24 and Joined Cases C-182 and 217/03, *Belgium and Forum 187 ASBL* v *Commission*, [2006] ECR I-5479, para 127.

[42] Differently, if the measure directly derives from a piece of EU legislation and leaves a Member State without any choice or leeway, the measure in question cannot be deemed State Aid. See Case C-460/07 *Sandra Puffer* v *Unabhängiger Finanzsenat*, [2009] ECR I-03251, para 70.

[43] Joined Cases C-182 and 217/03 n 41 above, para 128.

[44] See, in this regard, Commission Notice on the notion of State Aid as referred to in Art 107, para 1, of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, paras 39-40 and 42-43.

the employed resources do not directly come from the public sector or from intra-State entities, such as decentralised, federated, or regional bodies, the Commission must proceed with a case-by-case analysis to understand whether the State financed the aid.[45]

In their judgments, the General Court and the Court of Justice explain that, to show imputability, demonstrating that the State is potentially able to exercise a decisive influence on the operations of the undertaking granting the aid is not enough. On the other hand, proving that the State has urged the undertaking to adopt the measure in question by giving it detailed instructions about such measure would be too cumbersome. Therefore, what the Commission must prove is that the State *actually* exercised *substantial control* over the entity granting the aid and the specific measure adopted.[46] In practical terms, this means that the Commission must look at a set of indicia *both* resulting from the circumstances of the case and the context in which the measure at issue was taken, *and* suggesting that, in the specific case, the State was involved with respect to the entity granting the aid and the very same measure.

In relation to the facts of *Tercas*, the General Court and the Court of Justice found that the Commission had not proven to the requisite legal standard that any Italian public authorities were involved in FITD's intervention.[47] In particular, according to the Courts, such a failure did not depend on the existence of a standard of proof different from that which always applies whenever an entity distinct from the State grants the alleged aid,[48] but on the specific pieces of evidence that the Commission decided to use.

Indeed, according to the Commission, FITD operated in execution of the public mandate included in Art 96-*bis*, para 1, TUB, the Italian consolidated text of the laws on banking and credit,[49] with the intent to protect a clear public interest, that is, the savings and banking system's reputation. In addition, for the entire duration of the procedure, FIDT was always subject to Bank of Italy's directives because: (*i*) the Italian central bank appointed the commissioner of Tercas who requested FITD's intervention and interacted with FITD for the whole duration of the procedure; (ii) during informal meetings, Bank of Italy invited FITD and Tercas to reach a balanced agreement and coordinate their actions; (iii) through its officials, Bank of Italy participated in FITD meetings; and (iv) the Italian central bank authorized FITD's intervention, at a time when

[45] ibid para 48.

[46] See paras 65-67 and 83 of the judgment of the Court of Justice and paras 132 of the judgment of the General Court.

[47] See paras 114 to 131 and 132 of the judgment of the General Court and paras 27 and 72-73 of the judgment of the Court of Justice. See paras 68, 69 and 89 to 91 of the judgment of the General Court and para 26 of the judgment of the Court of Justice.

[48] See paras 38-40 of the judgment of the Court of Justice.

[49] Under Art 96-*bis*, para 1, of the TUB, the FIDT may undertake support interventions in favour of members that are subject to special administration under certain conditions.

the very same FITD would still have been free to change its mind.

In contrast, according to the General Court and the Court of Justice, pursuant to Art 96-*bis*, para 1, TUB, FIDT had no organic link with the Bank of Italy and was not subject to any legal obligation, but acted freely, according to independently-defined purposes and modalities. In particular, the Courts recognized that FITD intervened for the sake of their members interested in protecting financial stability, but they also acknowledged that the convergence between private and public interests does not, in itself, give any indication as to the possible involvement of the State in the adoption of a specific measure. Finally, the General Court and the Court of Justice affirmed that the Bank of Italy did not exercise any actual and substantial control over FITD and its intervention because: (*i*) the appointment of Tercas' special administrator was not linked to the possible intervention of FITD, which BPB requested afterwards to subscribe the capital increase; (*ii*) the informal invitations of the Bank of Italy consisted of mere wishes, without any binding character; (*iii*) representatives from the Bank of Italy participated in FITD's meetings as observers, with no voting rights, and did not even act in an advisory capacity; (*iv*) the Bank of Italy authorized the intervention measures adopted by FITD as part of its monitoring and supervision tasks in order to ensure the sound and prudent management of banks which is entrusted to it by law.

That said, it has long been established that, notwithstanding the text of Art 107, para 1, the nature of a measure cannot be evaluated separately from the way in which it is financed.[50] In other words, the inquiry as to the imputability requirement does not exhaust the analysis, which has to establish whether the intervention was made 'through State resources'.

To qualify some funds as State resources, it is not necessary to show that the resources in question belong permanently to the State's assets, but – at the same time – it is necessary to prove that they remain permanently under public control and, therefore, are permanently available to the competent national authorities. In the Commission's view, since FITD's intervention was to be imputed to the State, the use of FITD's resources was also to be conceptualized

[50] See Case C-379/98 *PreussenElektra AG* v *Schhleswag AG*, [2001] ECR I-2099, para 58; and C-345/02 *Pearle and Others* v *Hoofdbedrijfschap Ambachten*, [2004] ECR I-7139, para 35. Accordingly, a measure is not State Aid unless it is financed through public resources, that is, unless it entails a burden on the public finances – see Case C-379/98 *PreussenElektra AG* v *Schhleswag AG*, ibid, Opinion of AG Jacobs, paras 137-145. For example, an ad hoc liquidity measure that is taken at the central bank's initiative and is not backed up by any counter-guarantee of the State is not State Aid. In such a situation, indeed, the State's coffers are not charged, even indirectly, with the onus of the liquidity support. See Communication from the Commission - The application of State Aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, GU C 270, 25.10.2008, para 51, which lists the other conditions that a liquidity measure must meet in order not to be characterized as State Aid. In the same vein, see also the current 2013 Banking Communication, n 34 above, para 62.

as if the State ordered it. According to the General Court, instead, in *Tercas* the Commission failed to establish to the requisite legal standard that the resources at issue were at the disposal of the Italian State. In other words, the Commission was not entitled to conclude that the private funds of FITD actually were under the control of the Italian public authorities that decided to use them to finance Tercas.[51] The Court of Justice also confuted the finding of the Commission, but from a different perspective: it remarked that neither the Commission in its appeal nor the General Court in its judgment sought to draw a clear distinction between the requirement relating to the imputability of a measure to the State and that relating to State resources, failing to devote sufficient attention specifically to the latter. Therefore, according to the Court of Justice, the failure to prove imputability also resulted in the failure to prove the State origin of the measures.[52]

In short, in their judgments, the Court of First Instance and the Court of Justice have ruled out the possibility that the intervention of FITD could be qualified as State aid within the meaning of Art 107.[53]

However, this position does not preclude the application of antitrust law, ie, of the other branch of EU law aimed at ensuring competition within the Internal Market. Indeed, *prima facie*, it could be argued that FITD or any other DGS, which does not merely execute mandatory legal provisions, but instead operates on a voluntary basis, qualifies as consortium between competing undertakings, ie, as an agreement subject to Art 101 TFEU.[54] Furthermore, *prima facie*, it is also true that, in order to compare the different business scenarios justifying either their compulsory or voluntary interventions, DGSs' member banks need to undertake a potentially anticompetitive activity: they would need to exchange sensitive commercial information.[55] Thus, driving DGSs and their actions under antitrust scrutiny could be the correct and right thing to do to preserve competition within the banking industry.

However, *closer examination* shows that antitrust rules, such as Art 101, can never be applied to DGSs and their activities, such as the exchange of sensitive information, if banks operating within DGSs do not qualify as competing firms under EU competition law.

Therefore, the next few paragraphs focus on this preliminary, but

[51] See paras 139-161 of the judgment of the General Court and para 28 of the judgment of the Court of Justice.

[52] See paras 58 and 63-64 of the judgment of the Court of Justice.

[53] This outcome is of paramount importance in the national panorama, as FITD has since made significant capital injections similar to those involving Tercas (see, *inter alia*, the aforementioned BPB rescue transaction of 2019-2020).

[54] V. Minervini, 'La regolazione delle crisi bancarie dopo la sentenza Tercas' I *Mercato concorrenze regole*, 73 (2020).

[55] Guidelines on the applicability of Art 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (2011/C 11/01) ('Horizontal Guidelines'), see para 58.

fundamental, issue.

V. Antitrust Law Applies to Undertakings

When thinking about the system of European rules that guarantee competition in the single market, a distinction is usually made between the rules on State aid and the antitrust provisions. While the former are aimed at Member States to prevent them from employing their powers and resources to favour one or more undertakings in spite of market mechanisms, the latter are aimed directly at undertakings to prevent them from using their market power via agreements and abuses of dominance to alter the free interplay of supply and demand. This means that EU competition law only applies to physical and legal persons that can be qualified as undertakings.

Traditionally, the antitrust notion of undertaking is described as functional,[56] because its boundaries are defined in light of the goals that EU institutions pursue when they apply Arts 101 and 102 TFEU. More to the point, given that EU competition law sanctions unilateral or multilateral business practices that are capable of altering the functioning of the market, an undertaking is any natural or legal person capable of putting in place those business practices; that is, of behaving so as to limit the available output, increase the market price, reduce the quality and variety of the offer, and/or slow down the rate of innovation.

On the basis of existing case law, it can be argued that to qualify a person as an undertaking one should consider several issues.

For example, when faced with scenarios in which several persons are involved in a given practice, one must identify the minimum combination of natural and legal persons who are autonomously and independently engaged in that conduct.[57] In other words, in characterizing a person as an undertaking the 'criterion of the minimum efficient unit' must be respected,[58] because it would be ineffective – to say the least – to apply the prohibitions set out in Arts 101 and 102 TFEU to those who, because of the role that they play in the economic process, belong to the same centre of economic interests and are not bound

[56] F. Thepot, The Interaction Between Competition Law and Corporate Governance (Cambridge: Cambridge University Press, 2019), 33. See Joined Cases C-264, 306, 354 and 355/01 AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), and Others v Ichthyol-Gesellschaft Cordes and Others,[2003] ECR I-2493, Opinion of AG Jacobs, para 25; Case C-205/03 P FENIN v Commission, [2005] ECR I-6295, Opinion of AG Maduro, para 11.

[57] Case C-48/69 *ICI Ltd.* v *Commission*, Judgement of 14 July 1972, available at https://tinyurl.com/2sampsf8, para 140; and Case C-66/86 *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs e V*, [1989] ECR 803, para 35. A. Jones, 'The Boundaries of an Undertaking in EU Competition Law' 8*European Competition Journal*,301 (2012).

[58] O. Odudu and D. Bailey, 'The Single Economic Entity Doctrine in EU Competition Law' 51 *Common Market Law Review*, 1721 (2014).

together in a competitive relationship that they could limit or distort.[59] Under the existing case law, in fact, the notion of an undertaking within the meaning of Art 101 TFEU refers to a single economic unit which consists of a unitary organization of personal, material and immaterial elements which pursues on a stable basis a certain economic end and which may contribute to the infringement of competition law.[60] Thus, the EU institutions consider as belonging to the same single economic entity: (*i*) legal entities that, subject to the effective (legal and factual) control of another legal entity, pursue the latter's commercial and strategic interests;[61] (*ii*) an entrepreneur and their commercial agents when, in dealings with third parties, the agents do not bear any autonomous business risk and therefore have no financial–commercial interest distinct from that of their principal;[62] and (*iii*) the employer and its employees, as the relationship of subordination requires the latter to act as auxiliary instruments of the former in commercial relations with third parties.[63]

In addition, when faced with the same person carrying out several activities, one must categorize that person as an undertaking in relation to each of those activities. For EU competition law the concept of an undertaking is indeed a relative one, because the same person carrying out different activities may and may not, at the same time, be an undertaking, depending on the specific activity taken into consideration.[64]

But, first of all, qualifying a legal or natural person as an undertaking means establishing whether the specific activity it carries out is indeed an *economic activity*,[65] that is an activity that consists of offering goods or services in a given

[59] Case C-170/83 Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli and C. Sas,[1984] ECR 2999, para 11.

[60] Case T–112/05 *Akzo Nobel NV and Others* v *Commission*, [2007] ECR II-5049, paras 57–58; Case T–9/99 *HFB and Others* v *Commission*, [2002] ECR II-1487, para 54; and Case T-11/89 *Shell International Chemical Company Ltd* v *Commission*, [1992] ECR II-757, para 311.

[61] Case C-521/09 P Elf Aquitaine v Commission, [2011] ECR I-8947, paras 54-72; Case C-217/05 Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA, [2006] ECR I-11987,para 44; Case C-22/71, Beguelin Import Co. v S.A.G.L. Import Export, [1971] ECR 949, paras 5–9; and Joined Cases 40–48, 50, 54–56, 111, 113 and 114/73, Suiker Unie UA and Others v Commission, [1975] ECR 1663, para 173.

[62] Case C-266/93 Bundeskartellamt v Volkswagen AG and VAG Leasing GmbH, [1995] ECR I-3477, para 19.

[63] See also Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73 n 61 above, paras 539-542, clearly observing that 'if such an agent works for his principal he can in principle be regarded as an auxiliary instrument forming an integral part of the latter's undertaking bound to carry out the principal's instructions and thus, like a commercial employee, forms an economic unit withthis undertaking.' See also M. Maggiolino, 'Even employees are undertakings in the labour market, but granting social rights is not Antitrust's job' 10 *Journal of Antitrust Enforcement*, 365 (2022).

[64] Case C-82/01 P *Aéroports de Paris* v *Commission*, [2002] ECR I-9297, para 74, according to which 'the fact that, for the exercise of part of its activities, an entity is vested with official powers does not, in itself, prevent it from being characterized as an undertaking within the meaning of Article [102].' See also Case C-49/07 *Motosykletistiki Omospondia Ellados NPID(MOTOE)* v *Elliniko Dimosio*, [2008] ECR I-4863, para 25.

[65] An often-recurring sentence in the judgments of the CJEU is: 'in the context of

market.[66] To put it another way, if competition law must chase legal and natural persons capable of harming the proper functioning of the market, there is no point in applying competition law to those who act outside the market, ie, independently from any competitive rationale. By definition, those who do not obey the market mechanism are not in the position to undermine its functioning.

Therefore, in order to subject DGSs to antitrust scrutiny, one has to verify that DGSs actually qualify as undertakings within the meaning of Art 101 TFEU whilst carrying out their activities. More exactly, given that DGSs perform both statutory and optional functions, one should only answer this research question with respect to the activities that DGSs *voluntarily perform*.

Indeed, their compulsory activities are excluded from the scope of EU competition law *in any case*, ie, irrespective of any consideration as to the application of the notion of undertakings to DGSs, because compulsory activities result from express legal provisions. Namely, pursuant to Arts 108 and 109 BRRD, DGSs must both reimburse covered depositors of failing (or likely to fail) banks up to a defined limit and finance banking resolutions. However, DGSs do not choose to serve these functions: they are required to do so, with the ultimate intent of using private funds in lieu of taxpayers' money to save troubled banks. Thus, even if these activities were to be deemed economic, and DGSs performing them, undertakings, EU competition law would never be applied. EU competition law is concerned with privately initiated restraints of competition and without those restraints being compelled by, or effectively controlled by, the State and its branches, even when these activities consist in offering goods and services to the market. Under EU competition law, firms are liable not when their potential infringing practices strictly and expressly result from some legal provisions, but as long as they have scope to decide their own commercial conduct.[67]

competition law … the concept of an undertaking encompasses every entity engaged in an economic activity.' See Case C-41/90 *Klaus Höfner & Fritz Elser* v *Macrotron GmbH*, [1991] ECR I-1979, para 21; Joined Cases C-159 and 160/91 *Christian Poucet* v *Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon*,[1993] ECR I-637, para 17; Case C-244/94 *Fédération française des sociétés d'assurances and Others* v *Ministère de l'Agriculture et de la Pêche*,[1995] ECR I-4013, para 14; Case C-55/96 *Job Centre coop arl*, [1997] ECR I-7119, para 21; Joined Cases C-180to 184/98 *Pavel Pavlov and Others* v *Stichting Pensioenfonds Medische Specialisten*, [2000] ECR I-6451; Case C-309/99 *J. C. J. Wouters and Others* v *Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR I-1577, para 46; Joined Cases C-264, 306, 354 and 355/01, *AOK Bundesverband and Others* v *Ichthyol-Gesellschaft Cordes and Others*,[2004] ECR I-2493, para 46.

[66] In relation to this issue there is another recurring sentence in CJEU decisions: 'any activity consisting in offering goods and services on a given market is an economic activity.' See Case C-475/99 *Firma Ambulanz Glöckner* v *Landkreis Südwestpfalz*,[2001] ECR I-8089, para 19; Case C-118/85 *Commission* v *Italian* Republic,[1987] ECR 2599, para 7; Case C-35/96 *Commission* v *Italian Republic*, [1998] ECR I-3851, para 36; Joined Cases C-180 to 184/98 n 65 above, para 75; Case C-309/99 n 65 above, para 47; Case C-218/00 *Cisal di Battistello Venanzio and C. Sas* v *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)*, [2002] ECR I-691, para 22.

[67] Case C-198/01 *Consorzio Industrie Fiammiferi* (CIF) v *Autorità Garante della*

VI. The Antitrust Notion of Economic Activity and DGSs' Non-Refundable Investments

As aforementioned, according to the existing case law, under competition law an activity is economic when it consists of offering goods or services in a given market. In particular, as Advocate General Maduro explained in *FENIN*, what is decisive in determining an economic activity:

> 'is not the mere fact that the activity may, in theory, be carried on by private operators (…) but the fact that the activity is carried on under *market conditions*'.[68]

Thus, to be subject to antitrust scrutiny, the activities at issue must make economic sense: they must be theoretically capable of producing profits, although in some practical cases it may happen that they do not. In other words, activities obey the market rationale when they are worthwhile for rational agents that, at least, are interested in covering the costs of their conduct, although under the circumstances of the case at hand those agents may happen to fail in realizing these goals. For example, the activity of collecting data is economic even when data collectors, such as digital platforms, do not re-sell those data,[69] but instead use them to design new products or to add value to the goods and services they already supply. Indeed, in such a scenario, while not re-selling data, digital platforms obey the market logic on two counts:[70] because they improve the variety and quality of their offer and because they continually attract users, who are among the most important sources of the data they have.[71] Likewise, the same platforms are performing an economic activity, even if they sell the named goods and services at a zero-price,[72] because within their multi-sided business models such an offer is not really for free, but happens in exchange for attention, data,[73] and advertisers' money.[74] More explicitly, the prices of social networking or search services are not zero because firms want to be charitable and satisfy users' needs irrespective of their business revenues and profits; those prices are zero in order to efficiently exploit the indirect network effects that link the several

Concorrenza e del Mercato, [2003] ECR I-8055.

[68] Emphasis added. See Case C-205/03 P *FENIN* v *Commission*, n 56 above, para 13.

[69] D.S. Tucker and H. B. Wellfod, 'Big Mistakes Regarding Big Data' *The Antitrust Source*, 5 (2014).

[70] D. Sokol and R. Comerford, 'Antitrust and Regulating Big Data' 23 *George Mason Law Review*, 1129 (2016).

[71] D. Solove, 'Privacy and Power: Computer Databases and Metaphors for Information Privacy' 53 *Stanford Law Review*, 1393 (2001).

[72] M. Sousa Ferro, 'Ceci N'est Pas un Marché': Gratuity and Competition Law' 1 *Concurrences*, (2015), available at https://tinyurl.com/2a3xmpcz (last visited 31 December 2022).

[73] T. Hoppner, 'Defining Markets for Multi-Sided Platforms: The Case of Search Engines' 38 *World Competition*, 349 (2015).

[74] Case C-352/85 *Bond van Adverteerders* v *State of the Netherlands*,[1988] ECR 2085, paras 54–72.

sides of social network or search markets together.[75] Thus, as these examples show, under EU competition law any activity that in a given context a rational agent interested in maximizing profits considers to be worthwhile is economic, even if the given agent fails to make a profit in the particular case at hand.[76]

In sharp contrast, according to the Court of Justice, there are two scenarios in which physical and legal persons do not perform any economic activity.[77] *First*, when their behaviour 'is connected with the exercise of the powers of a public authority'. In particular, a person is said to exercise 'public powers' when their activity is 'a task in the public interest which forms part of the essential function of the State' and when that activity

> 'is connected by its nature, its aim and the rules to which it is subject with the exercise of public powers … which are typically those of a public authority'.[78]

After all, pursuant to the classic dichotomy between the State and the Market, there can be some activities that the State removes from the competitive arena, by including them among its own prerogatives.

Second, there is no competition to be distorted nor undertaking that can distort it, when the activities at issue are solidarity-laden,[79] that is, 'inherently uncommercial'.[80] The case law on pension funds, social security schemes, health care and insurance services indicates that the classification of an activity as solidarity-laden is 'necessarily a question of degree',[81] depending on the specific circumstances of the case taken into consideration. However, at present, the very same case law clearly establishes that the mechanisms whereby one group of individuals subsidises another do not obey any market logic:[82] they are not economic.

For example, in *Poucet* v *Assurances Générales de France*,[83] *Cisal di*

[75] T. Hoppner, n 73 above, 353.

[76] Joined Cases C-96-102, 104, 105, 108 and 110/82, *N.V. IAZ International Belgium and others* v *Commission*, [1983] ECR 3369; and Case C-155/73, *Giuseppe Sacchi*, [1974] 409.

[77] R. Whish and D. Bailey, *Competition Law* (Oxford: Oxford University Press, 10th ed, 2021), 89 and J. Faull and A. Nikpay, *The EU Law of Competition* (Oxford: Oxford University Press, 3rd ed, 2014), 193-197.

[78] Case C-30/87 *Corinne Bodson* v *SA Pompes funèbres des régions libérées*, [1988] ECR 2479, para 18.

[79] Joined Cases C-159 and 160/91 n 65 above, paras 18–19. See also, Case C-237/ 04 *Enirisorse SpA* v *Sotacarbo SpA*,[2006] ECR I-2843, para 31; and Case C-222/04 *Cassa di Risparmio di Firenze SpA and others* [2006] ECR I-289, paras 120–121.

[80] Case C-70/95 *Sodemare SA and Others* v *Regione Lombardia*, [1997] ECR I-3395, Opinion of AG Fennelly, para 29.

[81] Joined Cases C-264, 306, 354 and 355/01 *AOK Bundesverband, Bundesverband der Betriebskrankenkassen (BKK), and Others* v *Ichthyol-Gesellschaft Cordes and Others* n 65 above, para 36.

[82] Case C-70/95 *Sodemare* v *Regione Lombardia*n 80 above, para 29.

[83] Joined Cases C-159 and 160/91 *Christian Poucet* v *Assurances Générales de France*

Battistello Venanzio & C Sas v *INAIL*,[84] and *AOK Bundesverband*,[85] the Court of Justice excluded that entities administering some social security schemes could be regarded as undertakings, first because such schemes were entered into on a compulsory basis and second because, whereas all the beneficiaries of those schemes received the same rights and economic advantages, their contributions were proportionate to their incomes, so that the luckiest among such beneficiaries financed those who had financial difficulties or low incomes.[86] According to the Court, this sympathetic attitude does not make any economic sense, as it happens in a different case, that is when an entity provides health services 'free of charge to its members on the basis of universal cover'.[87] Differently, in cases such as *Fédération Française des Sociétés d'Assurance*,[88] and *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie*,[89] the Court of Justice found that the entities administering pensions schemes were undertakings, because they have to convince individuals to adhere to those schemes and because they grant benefits depending on the contributions of those individuals as well as on the financial results that their managing bodies were capable of obtaining by investing individuals' funds.[90]

In light of this, one should conclude that DGSs implementing non-refundable financial measures aimed at preventing banking crises are carrying out a solidarity-laden activity that cannot fall within the scope of EU competition law. Indeed, such measures do not obey market logic, because rational agents interested in maximizing their profits would never choose to waste their capital by giving third parties financial resources that will not give them any return. As in cases of some pension and social security schemes, granting non-repayable contributions and free-of-charge guarantees is a clear form of subsidization that is undertaken by a group of wealthy agents – the healthy banks which are part of the DGS in question – to support a group of agents in need, the one or more banks of the very same DGS which instead are in trouble.

Hence, in *Tercas* the decision of FITD to make non-refundable investments in

and Caisse Mutuelle Régionale du Languedoc-Roussillon n 65 above.

[84] Case C-218/00 *Cisal di Battistello Venanzio & C. Sas* v *Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro* (INAIL), [2002] ECR I-691.

[85] Joined Cases C-264, 306, 354 and 355/01 n 65 above.

[86] ibid para 52 reading that 'sickness funds are compelled by law to offer to their members essentially identical obligatory benefits which do not depend on the amount of the contributions. The funds therefore have no possibility of influence over those benefits'.

[87] Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN)* v *Commission of the European Communities*, [2003] ECR II-357, para 39.

[88] Joined Cases C-319, C-40 and 224/94 *Hendrik Evert Dijkstra* v *Friesland (Frico Domo) Coöperatie BA and Others*, [1995] ECR I-4471.

[89] Cases C-67/96 *Albany International BV* v *Stichting Bedrijfspensioenfonds Textielindustrie*, [1999] ECR I-5751.

[90] See R. Whish and D. Bailey, n 77 above, 89 and J. Faull and A. Nikpay, n 77 above, 195-196.

favour of Tercas qualify neither as State aid, nor as an agreement among competing firms, because banks choosing to implement non-refundable financial measures are not undertakings within the meaning of Art 101 TFEU. In other words, although *prima facie* DGSs and their activities may seem to fall within the scope of EU competition law, they do not, at least when they implement non-refundable financial measures to prevent failing banks from exiting the market.

Further arguments support this conclusion.

VII. The Theoretical Sustainability of the Thesis

DGSs aim at using private resources to rescue banks in difficulty, with the final intent of preserving the stability of the overall financial system. Therefore, to counter what is argued above, one could maintain that such an ultimate goal is what gives economic sense to the activity of making non-refundable investments. In other words, one could contend that, while using their funds to save banks in crisis, DGSs still act as self-interested agents. They carry out an economic activity, because their non-refundable investments are intended to prevent any mechanism of contagion and, therefore, to ensure the sustainability of the entire banking system on which their own viability also depends.

However, this argument tries too hard. Even the aforementioned solidarity-laden activities that no one wants to bring under the scrutiny of antitrust law might find similar self-interested, indirect justifications. Namely, if we assume that social stability is in the interests of wealthy people because it ensures that their social position is not challenged, then even compulsory social security schemes producing wealth redistribution and national health systems providing universal coverage are in the interests of the upper classes, because they keep social conflict in check. Likewise, even activities that no one would find difficult to qualify as charitable, such as donations to research organizations or welfare associations, can be portrayed as self-interested, when they confer some kind of tax benefit. In short, those who accept this argument would have to argue that the only activities that can be said to be 'non-economic' are those that are self-defeating, ie, those for which no agent would find any rational justification. On the other hand, under EU competition law there can be activities that, although self-interested, are not economic because they do not obey market logic. There may be an element of self-interest in deciding to use the resources of high-income people to provide low-income people with a certain level of social security or health services and in choosing to subsidize charity associations, but those resources are not capable of covering the costs entailed. In summary, there may be rational, self-interested decisions that still are not economic within the meaning of EU competition law.

In a slightly different way, one could take direction from *Tercas* and

maintain that for the banks grouped in a DGS, choosing to adhere to a DGS and to save a troubled bank via non-refundable investments may be more convenient than being obliged to reimburse the depositors of that bank, were it liquidated.[91] In *Tercas*, FITD voluntarily decided to grant non-repayable contributions and free-of-charge guarantees to the bank in crisis because under the 'least cost principle' the costs of such a preventive intervention were lower than the costs that the very same FITD would have had to bear to keep the depositors of that troubled bank guaranteed. Still, the fact that one solidarity-laden activity may be less costly than another does not change the uncommercial nature of both. Neither the act of making non-refundable investments nor the act of reimbursing some categories of depositors obeys the market rationale, although the former may be less expensive than the latter.

Moreover, to further support the idea that non-refundable investments are not economic activities, one could consider how the very same European Commission qualified them in *Tercas*. There, the Commission was clear in stating that the non-repayable contributions and the unremunerated guarantees that FITD made to the benefit of Tercas, the troubled bank, would never be made by an investor acting under ordinary market conditions.[92] Namely, the Commission noted that FITD's

> 'actions, for which there [was] no expectation of any return and indeed for which no return [was] possible, [were] not those of a market economy operator'.[93]

Under State aid law, the market economy operator test applied to capital injections into profit-seeking companies aims at understanding whether the beneficiary of the alleged State aid would have obtained the same funds on the same terms in the private capital market.[94] Thus, if the Commission establishes that it is not the case, it means that the entity granting funds is not acting in light of the risks and expected returns of its investments, that is, it is not acting

[91] Tercas decision, paras 68-69 and 71. There, the Commission decided that: (*i*) under the MEO test, costs due to reimbursements should not be included in those of a market operator, because no market operator would ever be required to save a failing bank; and (*ii*) there was still a less costly alternative to the non-refundable investments that a true market operator, interested in making profits, would have chosen.

[92] See also Case C-39/94 *Syndicat Français de l'Express International (SFEI) and others* v *La Poste and others*, [1996] ECR I-3547, para 60; Case C-256/97 *Déménagements-Manutention Transport SA (DMT)*, [1999] ECR I-3913, para 22; Joined Cases C-197 and 203/11 *Eric Libert and Others* v *Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others* v *Vlaamse Regering (C-203/11)*, Judgement of 8 May 2013, available https://tinyurl.com/ye2azdwt, para 83.

[93] Tercas decision, para 67.

[94] If it were the case, State Aid law could not find application, because in the EU Member States also retain the right to operate in the market just as any other economic agent – see Joined Cases T-228 and 233/99 *Westdeutsche Landesbank Girozentrale e Land Nordrhein-Westfalen*, [2003] ECR II-435, paras 208-214.

as a rational agent obeying the market rationale. In other words, if the Commission ascertains that a firm has received capital other than under the current market conditions, the Commission must also find that the act of granting those funds cannot be deemed to be an economic activity within the meaning of competition law.

Finally, to counter the conclusion that non-refundable investments are not economic activities, one could argue that excluding DGSs from the scope of application of antitrust law would allow banks to exchange strategic information when they meet to decide how to invest DGSs' funds. However, as stated above, the notion of undertaking is relative: the same entity is or is not an undertaking depending on the activity it carries out. Thus, nothing in theory prevents one from arguing that, while banks making non-refundable investments via DGSs are not undertakings for the purpose of Art 101, they acquire such qualification when they try to use DGSs' meetings to exchange strategic information that could serve to form cartels or other concerted practices. As a matter of practice, the idea that DGSs making non-refundable investments are not consortia of competing undertakings within the meaning of EU competition law does not exclude that, while exchanging information, the member banks of DGSs should comply with non-disclosure obligations as well as put in place 'Chinese walls' to prevent any infringement of Art 101. For example, the bank employees actively engaged in the activity of a DGS should be prevented from communicating or carrying out functions related to the marketing and commercial strategy of their own bank.

In summary, many arguments concur in supporting the idea that DGSs choosing to make non-refundable funds do not perform an economic activity and, thus, cannot fall within the scope of EU competition law.

VIII. Concluding Remarks

Within the EU legal framework for the management of banking crises, DGSs are the private instruments with which Member States' banks demonstrate that they *can be willing to* react to the crises hitting their sector without resorting to using taxpayers' money. Thus, DGSs play a key role within the European banking system, not only because they can save one or more troubled banks, but also because they can consolidate people's trust in that system by conveying the idea that the banks of that very same system are the first to commit themselves to ensuring its proper functioning.

As this article has shown, such activity is covered neither by State aid nor by competition law. Although these rules are often conceived as legal instruments that work in a complementary way to ensure competition in the internal market, DGSs' non-reimbursable investments, firstly, cannot necessarily be charged to Member States and debited from their coffers and, secondly, do not

qualify as economic activities. As a consequence, DGSs that freely choose to bail out a failing bank using their own non-reimbursable resources are free from any competitive control. In other words, at present, the competitive consequences of rescue activities benefiting a firm that would otherwise exit the market are screened out in only two scenarios: (*i*) when they are attributable to the State, because in this case State aid law still might find application; or (*ii*) when they consist in economic activities within the meaning of EU competition law and take the form of either rescue cartels or mergers to save failing firms.

This result may be due to an underlying assumption, which, however, the experience of DGSs refutes, namely, the idea that private economic agents are incapable of performing solidarity-laden activities in defiance of the selection mechanism inherent in the market. Or, this result could be due to a policy choice, that of not assessing the competitive consequences of activities that keep failing firms in the market when the costs of such a rescue are borne by private agents transferring non-repayable capital.

Either way, the protection of financial stability is what justifies this loophole when the troubled firms are failing banks. In other words, the public interest in defending the banking system from crises, snowball effects, and vicious circles is what makes tolerable the lack of competitive checks in cases where agents donate their private funds to rescue a failing bank.

The question that remains unsolved and should be the subject of further researches is what other policy goals could ever justify the existence of this loophole in relation to the cases of agents operating solidarity activities for the benefit of non-financial failing firms that would otherwise exit the market.

Corporate and Financial Markets Law

Pandemic Emergency Measures and Insolvency Laws

Federico Pernazza and Domenico Benincasa*

Abstract

The international spread of the Covid-19 has generated in the past years financial and social consequences affecting the global economy. Despite the different legal frameworks, the response by national governments and financial and international regulators has showed an unexpected convergence in several economic and legal aspects.

In particular, bankruptcy law emergency measures have provided fertile ground for comparative and interdisciplinary analysis of States' approaches. In this field, the underlying common intention of governments to facilitate the continuation of business activities was transposed in emergency measures with different impact on the framework of the insolvency law and in connected subjects, depending on the national jurisdictions.

This paper inquires comparatively the most relevant emergency measures concerning insolvency from an Italian perspective, with particular reference to (i) the suspension of involuntary proceedings, (ii) the duty (and exemptions) to filing for bankruptcy and directors' liabilities, (iii) freezing of capital maintenance rules and (iv) the full or partial postponement or anticipation of the entry into force of the bankruptcy law.

The research highlights the close connection between the regulation of corporate crisis and that of corporate governance and the liability of corporate bodies and the need, therefore, for a coordination of emergency measures in the field of insolvency with the legal framework of company and corporate law. On the other hand, in the context of the European Union, it has emerged how the harmonization effected through supranational sources, most recently with the Insolvency Directive, can be usefully supplemented by fostering the circulation of models through a more intense comparative study of national experiences, as occurred during the Covid emergency period.

I. Methodological Premise

The pandemic has been a dramatic event of a global dimension that has few precedents in recent history and whose effects in many socio-economic spheres are still difficult to assess.

However, in the context of comparative studies, it constitutes an extraordinary and precious opportunity.[1]

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[1] The extraordinary opportunity to carry out comparative research that has been provided by the Covid pandemic has been supported jointly by three Italian Associations of Comparative Studies (Associazione Italiana di Diritto Comparato, Associazione Diritto Pubblico Comparato

In fact, for those who adopt an approach that combines the scientific study of legal systems with an assessment of the operational effectiveness of the respective institutional, normative and jurisprudential approaches, the diversity of phenomena that legal systems are called to deal with represents a fundamental, often underestimated, problem.[2] Therefore, the Covid 19 pandemic, having affected in a short time and with similar characteristics all human communities, offers a paradigmatic hypothesis for comparing, measuring and evaluating in every affected sector the response of legal, social and economic systems, with the risk that the different results achieved depends on the diversity of the phenomenon to which they intend to respond, rather than the specific response of the legal system.

On the other hand, the comparative analysis of the normative interventions, facing the pandemic, should distinguish the pandemic phenomenon in its dimension connected to public health from the many 'derived emergencies', including those connected to the provision of essential services, to the needs of individuals and to institutional and economic activities. Among the latter, the business crisis induced by the restrictions on the movement of people and goods imposed by Covid-19 is the focus of this contribution.

It is therefore necessary to propose a first methodological consideration, which becomes relevant in any study of the so-called emergency laws related to the pandemic.[3] Although the primary origin of the emergency law is constituted in all areas by the epidemic, the analysis, evaluation and comparison in different legal and socio-economic sectors must proceed from a precise identification of the 'derived emergency', which becomes relevant in a given context. Thus, while it is evident, for example, that the measures limiting movement and individual behaviour are closely linked to the epidemiological trend in the context of reference (with an immediate impact from the onset of the pandemic, but also with the possibility of a rapid relaxation of the measures, when the epidemiological trend improves), the derived emergencies, among which the business crisis,

ed Europeo e Società Italiana per la ricerca nel diritto Comparato) setting up a common repository of normative documents of over 120 jurisdictions concerning Covid, available at https://tinyurl.com/mr37mfuk (last visited 31 December 2022).

[2] See F.P. Ramos, 'Parameters for Problem-Solving in Legal Translation: Implications for Legal Lexicography and Institutional Terminology Management', in L. Cheng et al eds,*The Ashgate Handbook of Legal Translation* (London: Routledge, 2014); D. Corapi, 'Diritto commerciale comparato'*Rivista del diritto commerciale e del diritto generale delle obbligazioni,* II, 167, 174 (2016); F. Pernazza, 'L'insegnamento del Diritto Comparato dell'Economia: a problem oriented approach' *Revista Eletrônica do Curso de Direito da USFM*, 255, 263 (2017); I. Candelario Macias, 'Commento sul "I convegno europeo di diritto concorsuale (First European Conference on Insolvency Law and Practice)" '*Il diritto fallimentare e delle società commerciali,* IV, 797, 797 (1999); with even more specific reference to the comparison of this legal matter in a pandemic context, see G. Ivone, 'Il diritto dell'insolvenza al tempo della pandemia' *Giustiziacivile,* available at https://tinyurl.com/dk55k598 (last visited 31 December 2022); L. Panzani, 'L'insolvenza in Europa: sguardo d'insieme' *Il Fallimento e le altre procedure concorsuali,* XX, 1013, 1013 (2015).

[3] This approach will be developed below in paras 3-4.

induced directly or indirectly by the pandemic, constitute a distinct phenomenon, which can have different incidences according to the product sectors, and a development that varies in time according to the contexts. In fact, it is evident that even within the same State, in some business sectors the crisis has been very serious and sometimes fatal, while in others it has been much less serious or even non-existent.

Within the framework of the regulation of business crisis, therefore, the first thought is that the adoption of potentially applicable indiscriminate measures uniformly to all businesses, on the assumption of a pandemic, is logically improper, since the emergency to be faced in this case is not the pandemic itself, but the emergency deriving from the economic-financial crisis induced mainly by the restrictions on the movement of goods and persons. A preliminary assessment to any comparative consideration should therefore verify whether the measures have been adopted assuming, presumably, that the epidemic has determined effects on the performance of the business, or whether law makers noted the emergencies that have occurred in some economic sectors and have intended to respond punctually to them.[4]

Moreover, in terms of the methodological approach, as will be illustrated below (para 3), it should be pointed out that a geo-localization of countries at the time these investigations are undertaken is necessary and useful, since geo-political differences may make it appropriate to create families of 'emergency bankruptcy law' systems that share, beyond the technical profiles of the specific legal regime, aspects of commonality in economic and political terms.

Thus, whereas in some realities, which can be found within most EU States, there is a general feeling that the basic needs of the vast majority of companies are a lack of cash flow and the impossibility of making acceptable forecasts about the future (whence the introduction of forbearance and other legal measures to temporary suspend the exercise of creditors' rights)[5], in others tapering government support and providing greater judicial training and specialization may be a more pressing need.[6]

[4] As will be discussed in more detail below (paras 4, 4.1), some emergency rules concerning business crisis in Italy and England make reference purely to a period of time (assumed to be affected by the pandemic), and not to the pandemic itself, while in France and Germany, the importance of the pandemic on the crisis is also recalled.

[5] See G. Corno and L. Panzani, 'I prevedibili effetti del coronavirus sulla disciplina delle procedure concorsuali' *IlCaso,* 26 March 2022.

[6]As an example, some countries such as Colombia felt the need to implement a previously less developed system of using digital platforms. See also, for a more extensive overview of Latin American countries, C. Cervantes 'Necessary reforms: Adaptation of insolvency regimes in Latin America?' *Eurofenix*, 27, 27 (2021).Other interesting differences and specificities between Africa and Middle East, Americas, Asia and Europe, emerge in the webinars organised within 2021 World Bank & Insol International's Legislative & Regulatory Group: Covid-19 response and the challenges ahead (collected on July 27, 2021, available at https://tinyurl.com/yckkrvty (last visited 31 December 2022)).

II. Lines of Comparative Investigation of Emergency National Laws on Business Crisis

Some lines of comparative research and system considerations are outlined in the following paragraphs, in order to deeply explore the specific analysis of legislation on business crises adopted by some of the main European legal systems (Italy, France, Germany, Spain and England).

In the first phase of the pandemic, the regulatory interventions adopted in various countries in favor of companies were traced and justified by the crisis of liquidity resulting from the sudden drop in income due to the impossibility of providing services or delivering goods; these were mostly financial interventions, similar in the various countries, aimed at ensuring the liquidity of the company and the payment of workers' salaries and supplies.[7]

The worsening and expansion of the epidemic, as well as the increase of companies involved, led to the emergence of a new type of interventions specifically aimed at regulating the phenomenon of business crises, *ie,* of companies that find themselves in the conditions foreseen by the regulations in force, where the legal system mandates to activate restructuring procedures or to initiate a liquidation procedure.

In this context, as will be seen, not only specific types of partially different interventions have emerged, but also differences in approach. We identify below some perspectives of analysis, which will then be traced through the specific comparison of the measures adopted at national level in relation to business crises resulting from the epidemic.

1. National Laws and European Harmonisation

The first point is that, although the subject of business crisis assumes pivotal importance in the construction of the European single market and has been therefore the object of numerous legislative interventions, it is still characterised by significant differences in approaches to corporate governance of companies in crisis, affecting the logic, characteristics and aims of national procedures to deal with it.[8]

[7] See G. Corno and L. Panzani, n 5 above; S. Madaus and F.J. Arias, 'Emergency COVID-19 Legislation in the Area of Insolvency and Restructuring Law' 17(3/4) *European Company and Financial Law Review*, 318, 318 (2020*)*.

[8] See E. Frascaroli Santi, *Gli accordi di ristrutturazione dei debiti. Un nuovo procedimento concorsuale* (Padova: CEDAM, 2009); F. Guernielli, 'La riforma delle procedure concorsuali in Francia e in Italia' *Il diritto fallimentare e delle società commerciali,* I, 256, 258 (2008); A. Flessner, 'L'idea dell'impresa nel diritto fallimentare europeo' *Il diritto fallimentare e delle società commerciali,* IV, 489, 489 (2005); S. Bonfatti and G. Falcone, *La legislazione concorsuale in Europa* (Milano: Giuffré, 2004); A. Nigro, 'Procedure concorsuali e società in Italia e in Europa' *Diritto della banca e del mercato fi*nanziario, I, 3, 3 (2003); VVAA, *Insolvency & Restructuring* 31 *Jurisdictions Worldwide* (London: Law Business Research, 2000). The process of harmonisation in the field of insolvency law has been elaborated also on a substantive level for about twenty

This meant that, even in the presence of a similar, if not identical, phenomenon in various countries, there have been different responses in terms of regulation, as referred to in a broad sense (thus including the role played by jurisprudence).

This phenomenon highlights the importance of context in comparative analysis even between Western countries and within the EU:[9] in our case, as we will see, a valid example is the existence of rules concerning the minimum legal capital of companies and obligations in the event of a loss of capital and, correlatively, the liability of directors of companies in crisis (*infra*, para IV.2 and IV.3).

2. Mandatory Rules or Ex Post Control

A second aspect is the approach to regulation from the perspective of the dialectic between mandatory supranational or national norms (top-down approach) and the adoption of principles or broad criteria, within which it is left to the States (in the relationship with the EU) or to private individuals to adopt the best response strategies, trusting in the adequacy and effectiveness of an ex-post control of jurisprudence. With respect to this fundamental regulatory alternative as the key to the comparison, it is worth noting that the hypothesis of emergency regulation is perhaps not the most straightforward case, since the need for prompt intervention and strict conformity of conduct to collective needs stresses out the appropriateness of mandatory rules. However, as will be seen particularly in the final paragraph, even in this difficult situation there have

years, as will be seen in the following paragraphs and in the conclusions, mainly through a mechanism of circulation of models. However, the distances remain particularly critical on some specific issues which deeply affect the practical experience both in the relationships between interested and involved parties and, in a broader perspective, in the matter of competition of systems. The above has emerged, especially in the European Union, with regard to the applicationof the EU Regulation on Insolvency Proceedings (EIR 2015/848), which has not always succeeded in hindering forum shopping and creditor law shopping, despite the fact that these objectives were present in the original text: see preamble 3) of the former version of the Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, according to which 'It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)'. On this topic, see *ex multis* M.V. Benedettelli, ' "Centro degli interessi principali" del debitore e forum shopping nella disciplina comunitaria delle procedure di insolvenza transfrontaliera' *Rivista di diritto internazionale privato e processuale,* II, 499, 499 (2004).

[9] The interference between a set of rules and the country's legal culture and institutions is a well-known field in comparative studies and research, in particular in the cases of transplant of Western law in countries characterized by different history, culture, religion, resources, economics conditions: see J.S. Gillespie and P. Nicholson, *Law and Development and the Global Discourses of Legal Transfers*, Cambridge: Cambridge University Press: 2012); M. Siems, *Comparative Law*, (Cambridge: Cambridge University Press, 2014), 281. In this paper the word 'context' is used in a much narrow way, making reference to the fundamentals of a national legal system concerning corporate governance, company and bankruptcy law.

been many cases in which State systems have offered differentiated responses, in some cases adopting exclusively the instrument of mandatory regulation, in others preserving a greater space for private autonomy and therefore, in the event of conflicts, for its judicial evaluation.[10]

3. Temporal Perspectives

A third profile of comparative analysis which will emerge in the course of this survey – to be found in general terms in several disciplinary fields (from general procedural law, eg suspension and enforcement of claims, to contract law, eg in case of impossibility and *force majeure*) – concerns the temporal perspective.[11] The emergency in *re ipsa* follows a sudden and unexpected phenomenon, which requires a timely and effective response, in order to bring the situation as soon as possible into the realm of 'normality', even if it is also complex and problematic, and therefore to the adoption of 'ordinary' regulatory tools.

The effects of the epidemic on commercial activities have differed, in terms of intensity and duration, varying from transitory situations to more stable (but still unpredictable) changes, turning into a theory of a permanent evolution (for example, for the activities that can also be carried out through internet connections).

[10] See, for further references, by G. Corno and L. Panzani, 'La disciplina dell'insolvenza durante la pandemia da Covid-19. Spunti di diritto comparato, con qualche riflessione sulla possibile evoluzione della normativa italiana' *Il Caso*, available at https://tinyurl.com/5ebdhrxz (last visited 31 December 2022); A.R. Mingolla, 'L'illusorio allineamento allo spazio concorsuale europeo del nuovo diritto della crisi di impresa'*Il diritto fallimentare e delle società commerciali,* II, 286, 286 (2021).

[11] Particularly significant in Italy was the legislation relating to the suspension of the execution of property release orders, which, initially provided by Art 103, para 6 of decreto legge 17 March 2020 no 18, converted into legge 24 April 2020 no 27, until June 30, 2020, was extended until the end of December 2021 as a result of repeated law decrees. The Constitutional Court intervened in this matter with judgment Corte costituzionale 11 November 2021 no 213, which declared the question of constitutional legitimacy relating to these regulations to be unfounded, noting that the measure was ordered in the presence of an exceptional situation deriving from the pandemic, referring precisely to the temporally limited nature of the measures and not extendable beyond December 31, 2021.

However, with regard to the Italian legal system, it should be noted that some provisions originally intended to have a limited duration – and as such derogating from the ordinary rules – were then extended, losing that exceptional character. This has in some sense happened with regard to the capital maintenance rules, which in the past could only be derogated from in the event of bankruptcy reorganisation proceedings, which are in any case likely to produce effects of publicity and credit impairment (thus making such need no longer applicable in case of confirmation or limiting its scope), as in the case of Art 182-*sexies* of Italian Insolvency Law (IL). Thus, the derogation from the rule set forth in Art 2446 et seq. Civil Code, first implementedwith the emergency legislation (as will be seen below, under 4.3) has now been partially stabilised when considering that, with the new 'assisted negotiation' procedure (decreto legge 24 August 2021 no 118 it is now possible to extend, also in the future and in the medium term, the derogation from the 'capitalise or liquidation rule' even in the (semi-confidential) phases of the negotiations. In this case, the suspension of recapitalisation obligations and the causes of dissolution in the interim phase are a further incentive to initiate the negotiated settlement procedure (which is in several respects a 'non-universally collecting proceedings' and does not involve all creditors).

Against this varied backdrop, national legal systems have reacted differently, including the business crises sector: in some cases, adopting measures that are very limited in time, substantially limited to lock down periods; in others, they have referred to longer periods (with reference or not to the duration of the 'state of emergency'); in others (eg in Italy), measures have been adopted taking into consideration the businesses directly affected by the epidemic phenomenon with the aim to cushion its effects by 'spreading' them over a longer period of time, thus actually slowing down the process of 'normalisation', and bringing the economic-legal system back to the ordinary system.[12]

4. Consistency or Contradiction with the 'Ordinary' Legal System

The dialectic between emergency intervention and the systemic approach of the legal systems in the field of insolvency also concerns another aspect of the investigation, relating to the consistency or contradiction of the emergency regulatory intervention with the legal systems order.

With respect to this issue, two preliminary considerations are necessary.

First of all, emergency law is characterized by the need for a rapid and extraordinarily effective approach in countering the phenomenon that imposes it, and therefore logically can take 'exceptional' characteristics compared to ordinary competences, procedures and rules.

Secondly, with respect to the evolution of the regulation of business crisis in European countries, in the presence of Euro-unitary sources, consisting of recommendations and directives limited to certain specific profiles (in addition to regulations on cross-border insolvency), the national legal systems are characterized by different approaches, especially in the basic dialectic between protection of creditors and protection of the company and between judicial and extrajudicial approaches. Moreover, the recent reforms introduced by Directive 2019/1023 on restructuring, insolvency and discharge are at a different stage of development.[13]

However, while in some legal systems the emergency law, albeit with its peculiarities, appears consistent with the framework of competences, procedures and aims of the current system or the one envisaged by the legislation implementing the Directive, it is noteworthy that in others, the interventions have been inconsistent with, or departed from, the existing rules in the legal system and its doctrines, policies and principles. For example, in Italy, the decreto legge 24 August 2021 no 118 broadened the scope for out-of-court

[12] On these profiles, on which we will return in para 4 and following, see the analysis of A. Gurrea-Martinez, 'Insolvency Law in Times of COVID-19' *Ibero-American Institute for Law and Finance Working Paper*, II, 1, 1 (2020).

[13] Many Member States have notified the Commission of their wish to extend the deadline for transposing EU Directive 2019/1023 by one year. See P. De Cesari, 'Osservatorio internazionale sull'insolvenza' *Il Fallimento e le altre procedure concorsuali,* 427, 427 (2021).

restructuring processes (the so-called negotiated composition of the crisis) in contrast with the approach of the Codice della crisi d'impresa e dell'insolvenza (decreto legislativo 12 January 2019 no 14 – 'CCI') on the alert procedure and on a binding path directly or indirectly controlled by the Judiciary.[14]

In this context, then, rather than appearing as an exceptional or temporary law, the emergency law can be cast as as a provisional, or rather, the first concrete step towards a radical change of systemic approach.[15] This interpretation requires to be verified when the epidemic phenomenon comes to an end, but it is clear that for the systems that have introduced measures of this kind, the emergency period constitutes at least a phase of experimentation from which indications of permanent systemic change can emerge.

III. The Collection and Selection of Emergency Measures on a Comparative Approach

The examination of concrete measures adopted by single countries is aimed at giving a substantial content to the general and introductory premise set out above.

In this context, it should be pointed out that it was barely necessary in the past to adopt new ideas, processes or substantive solutions so immediately and extensively. And that was the case notwithstanding prior experience of rapid spread of crises from one sector of the economy to another, such as in the subprime mortgages saga.[16]

This is already a significant element in terms of the experience and impact of the Covid 19 pandemic in the field of corporate insolvency law, at the same time facilitating the identification of the most convergent (or eventually

[14] The reasons for the different approach, not only due to the effects of the coronavirus, are explored comprehensively in M. Fabiani, 'La proposta della Commissione Pagni all'esame del Governo: valori, obiettivi, strumenti' *Il Caso,* 2 August 2021; M. Arato, 'La scelta dell'istituto più adeguato per superare la crisi d'impresa' *Rivista delle Ristrutturazioni*, 8 October 2021, 1-6; both authors highlight the distance of the decreto legge 24 August 2021 no 118 from the dirigist approach of the Codice della Crisi e dell'Insolvenza di Impresa (CCI).

[15] It is necessary, however, to underline the repeated changes of direction in Italian legislation (unlike, for example, that of the United States system, which has been based on Chapter 11 since 1978). See M. Arato, ibid 1, highlighting the tendency to introduce more flexible rules of bankruptcy law in moments of crisis and more rigid rules in phases of economic recovery. However, it is to be hoped that also in Italy, on the basis of European indications and more advanced models, the prospect of a timely identification of crisis indicators and the consequent voluntary recourse to forms of negotiated settlement will be firmly established.

[16] Regarding the so called 'insolvenza diffusa', that is a condition of pervasive illiquidity caused by an exogenous shock, affecting several markets simultaneously, see V. Minervini, 'La "composizione negoziata" nella prospettiva del recepimento della direttiva "insolvency". Prime riflessioni' *Il Caso,* 4 May 2020, 1-14; G. Brancadoro, *Società di capitali e crisi sistemiche* (Torino: Giappichelli, 2019), 85, and, with particular reference to the Covid 19 Pandemic experience, S. Pacchi and S. Ambrosini, *Crisi d'impresa ed emergenza sanitaria* (Bologna: Zanichelli, 2020).

divergent) aspects of the various national regulatory interventions for the purposes of this survey.

The examination of internet sites that collect and summarise the most significant interventions adopted by the various legal systems in the field of bankruptcy and company law, makes it possible to appreciate how some of these have appeared, at the beginning, more reluctant to tackle the problem in a drastic and interventionist manner - having adopted a fragmentary approach - and have then changed their approach by adopting systematic and more far-reaching solutions.[17]

Thus, for example, some countries, such as Spain[18] and England,[19] initially hesitated and appeared unprepared to adopt comprehensive reforms of bankruptcy law: that is understandable given that in the immediate impact of the pandemic and the economic fallout of social containment measures each legislator is apparently 'inseguro y urgido'.[20] However, these same countries have succeeded in a short time - sometimes borrowing from foreign experiences - in changing their approach and filling any gaps, as well as projecting the

[17] Regarding the so called "copycat coronavirus policies" phenomenon, as the result of regulatory emulation occurring spontaneously, see E. Ghio et al, 'Harmonising insolvency law in the EU: New thoughts on old ideas in the wake of COVID-19 Pandemic' 30(3) *International Insolvency Review,* 427, 427 (2021); I. Krastev, 'Copycat Coronavirus Policies Will Soon Come To An End' *Financial Times*, available at https://tinyurl.com/ycx9utt7 (last visited 31 December 2022)

[18] As pointed out by A. Rojo, 'Reflexiones sobre el Derecho concursual de emergencia' *Blog Facultad de Derecho*, available at https://tinyurl.com/mtzmkd2d (last visited 31 December 2022), among the various option, the one adopted in Spain was the most prudent: to introduce a very fragmentary law, destined to govern for a time, and then, more or less soon, to disappear. Nevertheless, no long after the adoption of Royal Decree 14 March 2020 no 463 (the first to introduce the health emergency), the Spanish legislature, in view of the need to have more modern instruments to deal with the crisis, adopted renewed legislative intervention (as the *Texto Refundido* of the *Ley Concursual* on 5th May 2020). See S. Pacchi, 'Le misure urgenti in materia di crisi d'impresa e di risanamento aziendale (ovvero: i cambi di cultura sono sempre difficili)'*Ristrutturazioni Aziendali*, 30 June 2020, 1-19.

[19] Regarding the initial wait-and-see attitude of the English legislator (on 28th March 2020 the UK Government announced changes to insolvency laws, but until May 2020, the timing appeared uncertain since in the meantime the Parliament was in recess) and the subsequent change of trend by the English legislator, whose measures were mainly concentrated to suspension of wrongful trading and fast-tracking new restructuring plan and moratorium, announced since August 2018, see 'CIG Act - Summary Update' *Lexology*,available at https://tinyurl.com/2p93tkp7 (last visited 31 December 2022); S. Madaus and F.J. Arias, n 7 above, 318; E. Ghio et al, n 17 above, 14, noting that 'although not bound to implement the Directive due to leaving the EU, the UK's CIGA 2020 entails several elements largely reflecting the provisions of the Directive, possibly to defend its position with the ongoing institutional competition with other European countries'.

[20] See A. Rojo, n 18 above, 14, pointing that 'being insecure' is because it is not in a position to know exactly what the impact of the crisis will be; while 'urgent' is because the known, or barely suspected, reality demands that it does not delay its response. Referring to the Spanish Government, the Author adds that 'inseguro, urgido y ensolitario, ha actuado como cirujano de campaña'. From an Italian perspective, see M. Cossu, 'Il diritto e l'incertezza. La legislazione d'impresa al tempo della pandemia' *Il Diritto Fallimentare,* I, 1221, 1221 (2020).

duration of the solutions adopted in the medium term or at least in a perspective of stability.

Among these experiences, particularly useful on an institutional supranational basis are the initiatives of the World Bank and Insol International Global Guide (Measures adopted to support distressed businesses through the Covid-19 crisis),[21] and, to quote the most up-to-date and comprehensive initiatives, on a doctrinal level, the CERIL - *Conference on European Restructuring and Insolvency Law* statement and works. In the national scene, in a wider perspective, the website developed on the initiative and under the auspices of the Italian Association of Comparative Law is noteworthy, aiming

> 'at offering a map of these changes on a global scale, providing a repository of some of the innumerous normative documents which have been prompted by the health emergency and of the first available comments'.[22]

What firstly emerges looking at the relevant insolvency reforms taking place around the world as a response to the global pandemic, as well as other insolvency-related reforms in order to minimize the harmful economic effects of COVID-19, is the opportunity of a geo-localisation of countries in this field of investigations, as pointed out above (para 1).

The European Union is one of those geographical areas where these data collection initiatives have been carried out with greater drive and strenght (including through projects financed by the Union itself)[23] and are also more functional and coherent than elsewhere, if one considers that not only in the field of company law, but also in that of bankruptcy law, the road to harmonisation and unification has now been crossed.

Indeed, while only ten years ago an intervention of the EU legislator in substantive and positive insolvency law would have appeared invasive and unjustified, first with Commission Recommendation 2014/135/EU of 12 March 2014 (on a new approach to business failure and insolvency)[24] and then with

[21] Downloadable athttps://tinyurl.com/3pdhbuw7 (last visited 31 December 2022). See G. Corno and L. Panzani, n 10 above, where further references can be found. See also 'Insolvency and debt overhang following the COVID -19 outbreak: assessment of risks and policy responses' *OECD,* available at https://tinyurl.com/2p9zfv8y (last visited 31 December 2022) and Insol Europe tracker of insolvency reforms, available at https://tinyurl.com/34pcezff.

[22] Respectively downloadable at www.ceril.eu and www.comparativecovidlaw.it. See also, both for further doctrinal references and for the insights provided therein, A. Gurrea-Martinez, n 12 above, 3.

[23] A comprehensive comparative table is downloadable 'Impact of COVID-19 on the justice field' *European Justice*, available at https://tinyurl.com/26x5syxd (last visited 31 December 2022).

[24] Main purpose of the Recommendation was to implement within Member States a framework in order to allow debtors to: (i) Restructure as soon as likely insolvency becomes apparent, (ii) Keep control over the day-to-day operation of their business, (iii) Request a temporary stay of enforcement actions lodged by creditors if such actions would hamper the prospects of a restructuring plan. The length of the stay should depend on the complexity of the

Directive (EU) 2019/1023 the legislator has identified general common rules necessary to preventive restructuring frameworks, discharge and fresh start, and on measures to increase the efficiency of restructuring, insolvency and debtors rehabilitation proceedings.[25]

IV. Assessment of Main Tools and Measures in the Area of Enterprises Insolvency Law from an Italian Perspective

The peculiar interventionism and consequent progressive harmonisation process that marks the European systems also in bankruptcy law, briefly mentioned above, make it easier to discern and recognise, even in emergency law, a spontaneous evolution at the overall level.

A useful yardstick for assessing the various similarities or differences in the courses of action in bankruptcy law in European legal systems that are similar in economic and political terms is represented by the mechanisms introduced and the intervention adopted by the Italian legislator with the decreto legge 8 April 2020 no 23 ('Decreto liquidità', converted into legge of 5 June 2020 no 5),[26] undoubtedly the one that has most significantly affected this matter, at

anticipated restructuring and be granted for no more than 4 months initially and for no more than 12 months in total, (iv) Seek court confirmation of a restructuring plan which affects the interests of dissenting creditors. Creditors would be bound by any court-confirmed plan. The recommendation lists the contents of restructuring plans and the requirements for court confirmation, (v) More easily in new financing for a restructuring plan, as court-confirmed-new financing would be exempt from avoidance actions.

This was an ambitious (and not particularly successful) project which, moreover, was significantly inspired by the major reforms already undertaken independently by the main European insolvency systems.

[25] See N. Tollenaar, 'The European Commission's Proposal for a Directive on Preventive Restructuring Proceedings', 30(5) *Insolvency Intelligence,* 65, 65 (2017)*;* T. Richter and A. Thery, 'Claims, Classes, Voting, Confirmation and the Cross-Class Cram-Down', 1*,* available athttps://tinyurl.com/36uyujat (last visited 31 December 2022); C.G. Paulus, 'La recente legge tedesca sui quadri di ristrutturazione preventiva (The new German preventive restructuring framework), Commento alla legge 22 dicembre 2020 (Legge sul quadro di stabilizzazione e ristrutturazione delle imprese - GesetzüberdenStabilisierungs - und Restrukturierungsrahmen für Unternehmen (StaRUG)) (Germania)' *Orizzonti del diritto commerciale*,1, 9, 9 (2021); A.R. Mingolla, n 10 above, 286.

[26] On the law-decrees adopted from the beginning of the declaration of the state of emergency, after 8 March 2020, until the summer of the same year in Italy (eg, Cura Italia, Liquidity, Relaunch, Semplification decree), see *ex multis* M. Basili, 'L'epidemia di "Covid-19": il principio di precauzione e i fallimenti istituzionali (The "CoVid-19" pandemic outbreak: The precautionary principle and institutional failures)' *Mercato concorrenza regole,* III, 475, 475 (2019); M. Fabiani, 'Prove di riflessioni sistematiche per le crisi da emergenza covid-19'*Il Fallimento e le altre procedure concorsuali,* 2020, 589; F. Macario, 'Per un diritto dei contratti piu' solidale in epoca di "coronavirus" '*Giustiziacivile.com*, 17 March 2020. The primary purposes of these very urgent law decrees were aimed mainly at containing the first negative effects of the blocking of activities, providing for (i) special measures in terms of social safety nets, (ii) prohibitions of revocation of bank credit lines, (iii) facilitations for access to credit for SMEs, (iv) exemptions from liability for contractual failure or delay in debtors directly affected

least in the full emergency of Covid 19. Subsequent interventions, perhaps more far-reaching and lasting (such as the 'Restoration Decree' - decreto legge 28 October 2020 no 137, converted with amendments by legge 18 December 2020 no 176),[27] belong in fact to a less immediate and urgent reality.

As in many other legal systems, interventions have settled on main topics which can be categorised into (i) insolvency and (ii) "insolvency related" reforms, which may also include insolvency tools outside of bankruptcy (*ie*, moratorium against legal actions and out-of-Court negotiation facilitation) as well as tax incentives to promote debt restructuring, and (iii) other legal, economic, and financial reforms.[28]

Although aware of the relativity of some classifications (also due to the systematic internal legislation of each State),[29] the interventions on the aforementioned insolvency and insolvency related matters provided by the 'Decreto liquidità'– based on (i) postponement of entry into force of the insolvency law reform, (ii) temporary deferment of bankruptcy filings or requests, (iii) extension of terms for restructuring proceedings and agreements with creditors, and (iv) rules impacting on the Italian Civil Code, as reduction of

by containment measures, (v) exceptions to the rules of company meetings. Similarly, from a broader and comparative perspective, S. Madaus and F.J. Arias, n 7 above, 321, note that the rules quickly introduced by European lawmakers 'include a variety of solutions which can be grouped as rules relating to the (need to) use insolvency and restructuring proceedings, rules aiming at financial support for businesses and their entrepreneurs and employees, and rules introducing virtual meetings and hearings in courts and companies'.

[27] On the Restoration Decree (which, in the bankruptcy context, has, inter alia, resulted in a sort of anticipation of the entry into force in November 2020 of the crisis code with respect to the 'first rescheduling' of the so-called liquidity decree, so as to coin the expression 'shrimp legislation'), see M. Irrera, 'Le tormentate procedure concorsuali e la nuova legislazione "a gambero" (E' giunto il tempo di un recovery plan per le crisi d'impresa?)' *Il Caso*, 4 January 2021, 1-8; R. Masoni, 'Diritto processuale civile dell'emergenza epidemiologica (a seguito della conversione in legge del decreto ristori)', available at *Giustiziacivile.com,* 11 January 2021*;* B. Bertarini, 'Misure di sostegno a favore delle micro, piccole e medie imprese nel contest della pandemia Covid-19', available at *Ambientediritto.it,* 4, 519, 519 (2020); S. Pacchi, n 18 above.

[28] See for a general overview A. Gurrea-Martinez, n 12 above, 15; G. Corno and L. Panzani, n 10 above, 2; A. Borselli and I.F. Miguel, 'Corporate Law Rules in Emergency Times Across Europe' 17(3-4) *European Company and Financial Law Review,* 274, 274, (2020). On the necessary combination of types of intervention (including State intervention), and the fair balance between them, see *ex multis* L. Stanghellini, 'La legislazione d'emergenza in materia di crisid'impresa' *Rivista delle società*, II-III, 354, 354 (2020).

[29] With these regards, see L. Enriques, 'Pandemic-Resistant Corporate Law: How to Help Companies Cope with Existential Threats and Extreme Uncertainty During the Covid-19 Crisis' *European Corporate Governance Institute - Law Working Paper No. 530/23020*, July 2020, 1-16, including among the bankruptcy law-related measures, tweaking the rules on directors' duties in the proximity of insolvency and freezing the 'recapitalize or liquidate' rule, while, within a framework for tweaking Corporate Law, the introduction of new 'majoritarian defaults', relaxing pre-emption rights in case of capital raising, modification on limits of funds distribution to shareholders, relaxation of rules on related party transaction and several intervention of lenience on Directors' liabilities, aimed at favouring (without excessive deterrent bias) a right attitude towards risk-taking in the current circumstances.

capital pursuant to losses, going concern principle preservation, new financing regime - allow for an interesting and functional comparative survey that leads to the appreciation of common lines of tendency within Member States from which retrieving tested mechanisms to be re-used in case of similar emergencies, albeit with unavoidable specificities.

1. Suspension of Involuntary Insolvency Proceedings

Temporary deferral or suspension of bankruptcy filings or requests have been one of the predominant means of adjusting corporate insolvency laws in the Covid-19 period.

Moreover, compared to most countries that adopted this measure, there has been a consistent and parallel trend with respect to the physical and concrete measures to contain the pandemic.

It is no coincidence, indeed, that Italy was one of the first countries to introduce an *ex lege* inadmissibility ('improcedibilità') of filings for bankruptcy or other insolvency procedures, filed between 9 March and 30 June 2020; since Italy was the first European country to introduce a general lockdown.[30]

For its part, Spain is the country that has longest advocated such a suspension (in particular, until the end of the state of emergency,[31] thus contrasting with other approaches like Germany that decided to suspend the duty to file for bankruptcy for a much shorter or defined period of time). By way of example, to other national legislation, the Greek Government has suspended all court filings and other procedural actions including insolvency petitions until 15 May 2020; in Belgium it has been generally provided that creditor petitions filed between 24 April 2020 and 17 June 2020 would not be processed.[32]

Expressed as a suspension of creditors' rights to file for involuntary bankruptcy petitions,[33] the English legislature introduced it later compared with other European countries,[34] but then had to take action and extend the measure

[30] See D. Vattermoli, 'Pandemic and Insolvency Law: the Italian Answer' *Oxford Business Law Blog*,14 May 2020.

[31] In Spain the reform was implemented in the first package of insolvency responses, and lasted until the end of the state of emergency (Art 43.1 of the Royal Decree 8/2020); in the second package of insolvency reforms, the said suspension has been extended until 31st December 2020 (Art 11.2 of the Royal Decree 16/2020).

[32] Some exceptions are provided whereas a Public Prosecutor's Office or a provisional administrator sue a company in bankruptcy during this period. For further indications and references, see S. Madaus and F.J. Arias, n 7 above,325.

[33]This reform has been introduced, among the others, in Belgium, Russia, Czech Republic; See A.G. Martinez, n 12 above, 10, noting also that 'in the absence of an actual or de facto suspension of the right to file involuntary bankruptcy petitions, creditors will have the ability to force debtors to bear the direct and indirect costs associated with a procedure that, in the absence of Covid-19, would not even be needed', and quoting J.B. Warner, 'Bankruptcy Costs: Some Evidence' 32(2) *The Journal of Finance*, 337, 337 (1997), showing that the direct cost of bankruptcy were 3% to 4% of the pre-bankruptcy market value of total assets in large firms.

[34] The Covid-19 legislation on bankruptcy law has been extended several times since the

several times, with a strong analogy with what happened at the level of the general reaction to the pandemic (where initially there was a strong reluctance to introduce any of the lockdowns, which then turned into a change in trend in the short term).[35] This aspect, even if general and relatively easy to adapt regardless of the specific shapes of each bankruptcy system, was also the subject of discussions aimed at identifying what could be a more efficient approach such as the identification of a desiderable standard period with fixed deadlines and other flanking measures. Thus, an uncertain and generalised period of suspension of involuntary insolvency proceedings could turn into a generalised subsidy by the legislator, who would then no longer adequately distinguish between potentially recoverable companies and others that were not,[36] including zombie companies, which are financially and economically precarious, as parasites, of viable companies.[37] After all, it is already possible to agree with the reasoning, which is also valid for other areas of intervention, that even in an emergency situation it is essential to have a 'systemic vision and, above all, a peripheral and prospective vision'. Indeed, it is advisable to reactivate those

> 'aid measures that on the one hand offer oxygen to businesses, but on the other hand reconvert unsalvageable businesses to a crisis market that

Corporate Insolvency and Governance Act 2020 (Extension of the Relevant Period) Regulations 2020. However, this type of measure is not new in this country, considering that the Courts (Emergency Powers) Act 1914 already gave English judges the power to suspend bankruptcy proceedings in the event of a debtor's inability to pay his debts as a result of war-related circumstances. See S. Baister and J. Tribe, 'The Suspension of Debt Obligations and Bankruptcy Laws during World War I and World War II: Lessons for Private Law during the Corona Pandemic from previous national crises'33(3) *Insolvency Intelligence,* 67, 67 (2020).

[35] Other countries that did not enforced immediately such provisions, at least in the initial period, were Denmark and Poland, while Sweden has totally declined to adopt this measure.

[36] On this subject, see A. Gurrea Martinez, n 12 above, 9, who point out, albeit with reference to a neighbouring aspect and collimating with the one just examined, namely the suspension of the management's duty to file for bankruptcy, that 'the German response seems more desirable than those implemented in jurisdictions just suspending this duty during the state of emergency'. Within these terms and context we can fully endorse and share the reflection that 'a parallel with governments' responses to the pandemic itself may be evocative. The countries that have successfully suppressed the pandemic so far are those that have reacted rapidly, strongly and systematically', used by L. Enriques, n 29 above, 15, arguing that 'in addition to creating a special temporary insolvency regime, relaxing provisions for companies in the vicinity of insolvency, and enabling companies to hold virtual meetings, policymakers should tweak company law to facilitate equity and debt injections and address the consequences of the extreme uncertainty faced by European firms'.

[37] With respect to zombie companies, see R. Banerjee and B. Hofmann, 'The rise of zombie firms: causes and consequences'*BIS Quarterly Rev*iew, September 2018, 67-78; H. Anger and K. Ludowig, 'Insolvenzverwalterwarnenvor Zombie-Unternehmen' *Handelsblatt,* available at https://tinyurl.com/52ccjdyc (last visited 31 December 2022)*;* R. Ippoliti and R. Masera, 'Per un rafforzamento patrimoniale delle imprese italiane: analisi e proposte' *Rivista Trimimestrale Diritto ed Economia,* 1, 23, 23 (2021)

does not tie up wealth'.[38]

As a result, solutions in some jurisdictions appeared less plausible or appreciable, as in the case of Australia and Singapore, who opted for restrictions, rather than a prohibition, on the initiation of insolvency proceedings by creditors. In the latter country, for example, the solution was not a real suspension of creditors' claims, but only an increase of the threshold from S$10,000 (ie Euro 6.550,00 approx) to S$100.000,00 and a doubling of the period to respond to demands from creditors from three to six months.[39] Our legal system has moved in symbiosis with the other main legal systems on this point. Indeed, apart from a technical mistake in the wording of the rule (where reference is made to the concept of 'improcedibilità', ie an effect capable of affecting even pre-investigation proceedings in place in the period of reference even though started before the pandemic and lockdown), the pivotal aspect that appeared to be clearly at odds with the trend in other jurisdictions[40] was the indiscriminately broad scope of the provision, which also included voluntary petitions, thus imposing without empirical or entrepreneurial justification a dispersion of value, even where applications for admission came directly from insolvent entrepreneurs.[41]

Appropriately, the legislator has remedied some of these discrepancies, so that, following the amendment made at the time of conversion, the inadmissibility regime has not been applicable:

(a) to the petition filed voluntarily by the entrepreneur, when the insolvency was not a consequence of the COVID-19 outbreak;

b) to the petition for bankruptcy filed by any person in case of inadmissibility (Art 162, para 2, Italian Insolvency law 'IL') or revocation (Art 173, paras 2 and 3) of the proposal of a restructuring plan proceeding ('concordato preventivo') or failure to approve the same (Art 180, para 7);

c) whereas the request is submitted by the public prosecutor when the same request is made for the issue of precautionary or conservative measures.[42]

[38] See M. Fabiani, n 26 above, 589; Id, *Introduzione,* in P. Trombini et al eds, *Dalla crisi all'emergenza: strumenti e proposte anti-Covid al servizio della continuità d'impresa* (Mantova: Fallco, 2020), 7; D. Galletti, 'Il diritto della crisi sospeso e la legislazione concorsuale in tempo di guerra' *Il Fallimentarista,* 14 April 2020.

[39] See COVID-19 (Temporary Measures) Act 2020, 22(1) and (24 (1).

[40] In this sense, see G. Corno and L. Panzani, n 10 above, 5.

[41] For the main criticism of the original wording of this provision, see S. Ambrosini, 'L'improcedibilità delle istanze di fallimento: ratio legis, tassatività della deroga e corollari applicativi' *Il Caso*, 29 May 2020; Id, 'La "falsa partenza" del codice della crisi, le novità del decreto liquidità e il tema dell'insolvenza incolpevole'*Il Caso*, 21 April 2020, 1-23, for further critical insights into the first emergency regulatory interventions.

[42] Equally appropriately, the third paragraph of Article 10 has been amended to clarify that the period in which bankruptcy petitions and claims are unfeasible is not taken into account not only for the purposes of Arts 10 and 69-*bis* of the Italian insolvency law ("IL"), but also for the purposes of Arts 64, 65, 67, paragraphs 1 and 2, and 14 IL. In particular, in case of a future winding up, the period of suspension will not be counted for the purpose of calculating the terms set forth by:

2. Timely Emergence of Insolvency and Directors' Liability

Another aspect of particular interest, which has been the subject of intervention by various national legislators, appears to be contiguous to the one just discussed in the above paragraph, although this one had a more marked function of containing the pandemic while the one we are about to examine intervenes on a more dogmatic aspect of company law.

This concerns, in particular, the duty of the directors to comply with the obligations and requirements for the detection of insolvency and the commencement of proceedings.

In fact, the suspension of the duty to file for bankruptcy where corporate directors are required to initiate insolvency proceedings once a company becomes insolvent,[43] has been adopted in various jurisdiction, including (among the first to implement it) Germany, France, Spain, Luxembourg, Poland, Portugal and Czech Republic.

In this context, the rules of the German legal system, where insolvency must be filed by the entrepreneur without delay and, in any case, within three weeks from the moment the situation arises, have been particularly careful and detailed.[44]

The German Government has in fact suspended this obligation several times, first until 30 September 2020 and then until 31 December 2020, albeit with some slight exceptions,[45] although the *COVInsAG* authorized the Federal Ministry of Justice to extend the regulations according to these provisions until 31March, 2021 (as was in fact the case, albeit with the introduction of additional and

- Art 10 of the IL, (*ie* winding up within one year from the cancellation from the Register of Companies), and
- Art 69-*bis* IL (forfeiture of claw-back petitions – so called *azioni revocatorie* – after three years from the declaration of winding-up and after a certain period from the completion of the operation). In this latter case, the variability (six months to five years) depends on the specific issues and types of claw back (according to Arts 64, 65, 67, and 69 IL).

[43] On the *ratio* of this rule, whose suspension is highly recommended in these circumstances see B. Wessels and S. Madaus, 'Ceril Executive Statement on Covid-19 and insolvency legislation' *Ceril*, available at https://tinyurl.com/4heyzzxm (last visited 31 December 2022); see P. Davies, 'Directors' Creditor-Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency' 7(1) *European Business Organization Law Review,* 301, 301 (2006).

[44] However, in other countries the provisions are even stricter and time-limited, such as in France where the debtor is obliged to apply for the initiation of collective proceedings within 45 days of the *cessation des paiements*.

[45] On the main aspects of the Covid-19 Suspension Act (GesetzzurvorübergehendenAussetzung der Insolvenzantragspflicht und zur Begrenzung der Organhaftungbeieinerdurch die COVID-19-Pandemie bedingten Insolvenz (COVID-19-Insolvenzaussetzungsgesetz- COVInsAG), see A. Wolf, 'Legal Reactions in Germany: the Covid19 Insolvency Suspension Act'29(5) *Norton Journal Bankruptcy Law and Practice*, 538, 538 (2020). It should be noted that the suspension prolonged (by September 2) until 31December 2020 applied under the condition that the origins for the financial distress are rooted in the pandemic and there is a prospect that the insolvency can be eliminated once the economic situations has recovered.

significant limits).[46] The relevant rules properly specified that his derogation shall not apply if the insolvency situation is not due to the consequences of the spread of the SARS-CoV-2 virus or if there are no prospects of eliminating an existing insolvency. Moreover, the law provides that if the debtor was not insolvent on 31 December 2019, it is presumed that the insolvency maturity is due to the effects of the COVID-19 pandemic and there are prospects of eliminating an existing insolvency. Furthermore, the burden of proof is reversed, so that the creditors (or the insolvency administrator) have to provide evidence of the obligation to submit an application despite the suspension.

In this way, the continuation of the obligation and the ordinary discipline are correctly identified and specified, when, for example, the crisis can be traced back to periods or situations prior to or in any case not connected to the pandemic and the related containment measures; at the same time, an appropriate distinction is made according to whether there is the prospect of recovery or re-establishment of the ordinary cash flow trend.

If this is an aspect that may appear 'static' and 'defensive', as regards the discipline included in the framework of the directors' liabilities and duties, an equally important role is played by the adoption of other rules more related to the dynamic-managerial moment of the company, often implemented through rules, other times configured as standards, in relation to the ordinary and extraordinary management of the company.

From the point of view of regulation by standard mechanisms (ie intended to operate *ex post*) such as agent constraints,[47] a very interesting example of debate was the suspension, implemented by the United Kingdom, of the wrongful trading (under section 213 et seq of the IA 1986).

Such provisions have finally been suspended retrospectively since 1 March 2020 until 30 September 2020 due to the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020, and then re-instated to 30 April 2021. Such suspension is addressed to company directors so they can keep their business going without the threat of personal liability,[48]

[46] For instance, first part of third para, Art 1 provides that 'from 1 January 2021 to 30 April 2021, the obligation to file an insolvency petition pursuant to paragraph 1 shall be suspended for the managers of such debtors who filed an application for the granting of financial assistance under state aid programs to mitigate the consequences of the COVID 19 pandemic in the period from 1 November 2020 to 28 February 2021'.

[47] Regarding the typical classification between *ex ante* and *ex post* mechanisms, both regulatory and governance strategies, see R.R. Kraakman et al, *The Anatomy of Corporate Law* (Oxford: Oxford University Press, 2004), 26.

[48] Moreover, even here from the very first phase, as noted by S. Madaus and F.J. Arias, n 7 above, 326, 'the government consider(ed) legislation mandating the court not to take into account losses incurred during the period in which businesses were suffering from the impact of the pandemic when deciding if a director should be declared liable to contribute to a company's assets under wrongful trading provisions'.

which would otherwise be triggered for having continued the business activity to the detriment of the creditors by not adopting the necessary measures to maximise the value of the business in the interest of the creditors.[49]

Such provision could indeed lead to a prudential and excessively risk-averse approach by the directors in the twilight of a crisis, as it could operate as a sort of reverse business judgment rule (ie, using an *ex post* knowledge).

This profile of inefficiency, which this rule has sometimes proved to be the source of, even in regular situations in the economy, could have an exponential impact in a situation of generalised crisis, in which there is after all a situation of 'extreme uncertainty under which business people are making decisions'.[50]

Furthermore, the UK has not resulted alone with its initiative, since New Zealand and Australia respectively (i) announced, and subsequently implemented, planned changes to Companies Act 1993 aimed to allow directors of companies facing significant liquidity problems because of Covid-19 to take advantage of a period-limited safe harbor from liability for reckless trading and incurring obligations during insolvency (sections 135-136), and passed legislation inserting a new section 588GAAA to the Corporations Act 2001, providing for a temporary safe harbor relief suspending director liability for insolvent trading.[51]

Clearly, there were not entirely unanimous reactions within the UK's debate to this intervention, and different prospective assessments.

In fact, in some respects, there have been doubts about the effective scope of the innovation, on the basis that the wrongful trading rule is but a part of a

[49] See A. Licht, 'What's so Wrong with Wrongful Trading? – on Suspending Director Liability during the Coronavirus Crisis' *Oxford Business Law Blog*, 9 April 2020.

[50] See the insightful reflections of L. Enriques, n 29 above, 12, who notes that 'anticipation of the ensuing liability risks can make managers excessively risk-averse ex ante or, more precisely, averse taking 'actions that change the status quo'. This maybe good from the creditors' perspective, as it may prevent companies from precipitating a crisis by pivoting in the wrong direction. Yet, when a shift in strategy is in fact needed, a mix of risk-aversion and extreme uncertainty creates a status quo bias that may well make insolvency a like lier outcome than swift action'.

[51] These interventions, so widespread in common law with regard to the freezing of wrongful trading could however lead to some rethinking about its 'latent' reference in Article 19 of the Insolvency Directive 1023/2019. See G. Strampelli, 'The European regime of directors' duties in the twilight zone: problems and perspectives' *Orizzonti del Diritto Commerciale,* III, 723, 723 (2020), asserting that Art 19 of Directive 2019/1023/EU cannot lead to an effective harmonisation at the European level of the duties of directors in the twilight zone, on the basis of the analysis of the differences existing between the national rules concerning directors' duties in the vicinity of insolvency (further accentuated by the emergency rules adopted to cope with the effects of the Covid-19 pandemic). The Author also argues that'Art 19 of the Directive, notwithstanding the general nature of the general nature of the provisions contained therein, clearly indicates that (consistently with the overall with the overall approach of the Directive) the European legislator favours a solution geared to the early detection and forecasting of insolvency and based on insolvency and based on standards of conduct (on the model of wrongful model) rather than on the specific duty to file for bankruptcy within a predetermined period, a predetermined deadline'.

> 'broader regime that also includes the common law rule in West Mercia Safetywear v Dodd on directors' duties in the zone of insolvency as well as liability provisions under the Company Directors Disqualification Act 1986. Suspending sections 214 and 246 ZB will thus have only a limited effect'.[52]

On the other hand, there is nevertheless a widespread belief that the existing laws for fraudulent trading and the threat for director disqualification will continue to act as a valid deterrent toward directors' misconduct.[53]

3. Freezing of Capital Maintenance Rules

Among the aspects that can be classified as bankruptcy related matters (some of which cannot be dealt with here for the sake of dimension of this essay),[54] it is appropriate to deal with the amendments connected to the Covid emergency to the requirement to promote the recapitalization, liquidation or bankruptcy of the company whenever, due to the existence of losses, the firm's net assets fall below a certain percentage of the company's legal capital.

Such kind of rule are provided by several jurisdiction and traditionally monitored and regulated in Continental Europe[55] and Latin America,[56] as alternative of the solvency test adopted in USA and other jurisdictions.[57]

[52] A. Licht, n 49 above, quoting the thoughts of K. van Zwieten, 'Director Liability in Insolvency and Its Vicinity' 38 (2) *Oxford Journal of Legal Studies,* 382, 382 (2018).

[53] See C. Serra, 'Directors'duties under COVID-19 legislation: A comparative perspectives' *Eurofenix Summer 2020*, 20, 20. For a broader perspective, see 'Directors' duties and liabilities in financial distress during Covid-19' *Allen Overy*, available at https://tinyurl.com/4a42muyh (last visited 31 December 2022); L. Enriques, n 29 above, 11.

[54] Among the measures provided by the Liquidity Decree, have to be recalled those relating to the suspension of the subordination rule for loans from shareholders, and the facilitation of business continuity with regard to the preparation of financial statements; similar measures have been implemented in various forms in different countries: see O. Blanchard, et al, 'A new policy toolkit is needed as countries exit COVID-19 lockdowns' *12 Bruegel Policy Contribution*, 1, 7 (2020).

[55] B. Wessels and S. Madaus, *ELI Report on rescue of business in insolvency law*, available at https://tinyurl.com/2p8f5rrj (last visited 31 december 2022), highlighting that this duty is grounded in Art 19 of Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on the coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second para of Art 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital. On this topic see L. Stanghellini, 'Directors' duties and the optimal timing of insolvency. A reassessment of the 'recapitalize or liquidate' rule', in P. Benazzo et al eds, *Il diritto delle società oggi. Innovazioni e persistenze* (Torino: UTET, 2011), 731.

[56] See A. Gurrea Martinez, n 12 above,9.

[57] A comparative analysis of those different approaches in terms of efficiency and protection of the stakeholders, the role of the share capital in company law and the mechanisms for preventing agency problems (especially between creditors/stakeholders) have been the subject of lively doctrinal debate also in occasion of a conference organised by the AIDC: *Global law* v *Local law* (Brescia, 12-14 May 2005); the conference proceedings are published in AIDC,

Indeed, the duty to recapitalize or liquidate companies in situation of qualified losses tends to have different implications in various jurisdictions depending on whether their mechanism of insolvency detection is entrusted to the mechanism of balance sheet test or cash flow test.[58]

In connection with Covid-19 emergency, such duty has been temporarily suspended, or at least relaxed, in several countries, including Spain and Italy, and, unlike other reforms discussed above, emergency provisions have been applied or had legal effects for a period of time much longer than the lock down period, due to the evident reason that

> 'most of the losses borne by companies during the toughest part of the Covid-19 crisis will only be reflected in the balance-sheet prepared in 2021'.[59]

In Spain, where the directors are personally liable if they do not promote the recapitalisation of the company or alternatively its liquidation within two months from the moment when the net assets have fallen below half of the company's capital, the first package of insolvency responses to Covid included the provision according to which, during the period of emergency (*estado de alarma*) the debtor was not obliged to file a bankruptcy proceeding, the shareholders' meeting called to ascertain a cause of liquidation were suspended and the directors were not liable for the debts incurred in that period.[60] Later on, during the year 2020 the duty to recapitalize or liquidate in case of losses exceeding half of the capital has been suspended and in the same case for the year 2021 only the duty of the directors to call a general meeting within two

Global law v. Local law.Problemi della globalizzazione giuridica. 17° Colloquio biennale Associazione italiana di diritto comparato (Torino: Giappichelli, 2016). On that occasion, prof Francesco Denozza took up the arguments and references from his essay 'A che serve il capitale? (Piccole glosse a L. Enriques-J. R. Macey, creditors versus capital formation: the case against the European legal capital rules)' *Giurisprudenza Commentata*, 2002, V, 585, 585, to recall the various profiles of relevance of the regulation of share capital and the fundamental role it plays not only as a measure to protect creditors but also in the internal structural organisation of capital companies. The dialectic exchange of thoughts between the two authors may be read in the following articles: L. Enriques and J. R. Macey, 'Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules' 86 (6) *Cornell Law Review,* 1165, 1165 (2001); L. Enriques, 'Capitale sociale, informazione contabile e sistema del netto: una risposta a Francesco Denozza' *Giurisprudenza commentata,* I, 607, 607 (2005); F. Denozza 'Le funzioni distributive del capitale' *Giurisprudenza commentata*, IV, 489, 489 (2006).

[58] For comparative studies, see G. McCormack et al, *European Insolvency Law – Reform and Harmonisation,* (London: Elgar, 2017), 185.

[59] A. Gurrea Martinez, n 12 above, 10, who appreciates the choice of providing for a duration of at least one or two years for this measure, and points out that for this reason the reform recently adopted in Colombia, suspending the recapitalize rule or liquidate rule for 24 months, seems more desirable.

[60] Real Decreto-ley 8/2020, de 17 de marzo, de medidas urgentes extraordinarias para hacer frente al impacto económico y social del COVID-19, artt. 43.1, 40.11 and 40.12.

months since the end of the financial year has been provided.[61]

In Italy, the first emergency rule stated that the duties provided for in the cases of capital losses exceeding the quotas indicated in the civil code (articles 2446, 2447, 2482-*bis*, 2482-*ter*) and the connected duty to liquidate the company were not applicable to the losses emerged since the 9 April to the 31 December 2020.[62]

Later on, the final date has been replaced with the date of 31 December 2021, extending the original provision to one more year.[63] For both financial years 2020 and 2021 the companies are imposed to reduce those losses within the limit of one third of the capital within the fifth following year and the shareholders' meeting approving the balance sheet of that year shall reduce the capital in proportion of the losses.

Those provisions proposed a set of problems in their interpretation and coordination with the 'ordinary' regulation on company law and bankruptcy.

As an example, various questions were raised about the connection between Covid and the companies' losses.

In order to clarify some equivocal provisions, the original wording that provided for an exemption in the period between 9 April 2020 and 31 December 2020, 'for events occurred in the course of the financial years closed by the aforementioned date', due to the conversion into law, has been replaced with reference to 'losses arising in the current financial year as at 31 December 2020' (later on, as above mentioned, the final date has been postponed to the 31 December 2021). The new wording has overcome the risk to exclude companies that close their financial statements after 31 December 2020, and, on the other hand, to encompass companies whose capital losses had occurred during the year 2020 without the need to prove their connection with pandemic.[64]

The amendments of the original text of Art 6 of decreto legge 8 April 2020

[61] Real Decreto-ley 16/2020, de 18 de abril, de medidas procesales y organizativas para hacer frente al COVID-19 en el ámbito de la Administración de Justicia, art. 18. A comparative analysis of the Spanish provisions on this topic is proposed by A. Gurrea Martinez, n 12 above, 10.

[62] Decreto legge 8 April 2020 no 23 converted by legge 5 June 2020 no 40, Art 6. On this topic A. Busani, *'Quinquennio di grazia per le perdite* 2020' *Le Società*, V, 538, 538 (2020); G. D'Attorre, 'Disposizioni temporanee in materia di riduzione del capitale ed obblighi degli amministratori di società in crisi' *Il Fallimento e le altre procedure concorsuali,* 597, 601 (2020); F. Dimundo, 'La "messa in quarantena" delle norme sulle perdite del capitale e sullo scioglimento delle società. Note sull'art. 6 del "Decreto Liquidità" ' *Il Caso,* 21 April 2020.

[63] Decreto legge 30 December 2021 no 228, converted by legge 25 February 2022 no 15, Art 3, para 3. On the extension of the suspension of the above mentioned duty see 'Conversione Decreto Milleproroghe: estensione del regime speciale in tema di riduzione del capitale e scioglimento alle perdite d'esercizio 2021' *Assomime,* available at https://tinyurl.com/yx2yj69c (last visited 31 December 2022) and 'Decreto "Milleproroghe" e disposizioni temporanee in materia di riduzione di capitale' *Fondazione Nazionale Commercialisti*, available at https://tinyurl.com/4h6hb82s (last visited 31 December 2022).

[64] On the different readings of this provision, A. Busani, n 62 above, 201; M. Tola, 'Le società di capitali nell'emergenza' *Banca Borsa Titoli di Credito*, IV, 531, 531 (2020).

no 23 allowed to overcome the ambiguities concerning the period of application of the rule, due to the replacement of the wording 'events occurred' with 'losses arising in the current financial year as by 31 December 2020'. Moreover, it has been provided adequate breathing space to the companies, being the capitalize or liquidate mechanism, originally suspended from April 2020 to 31 December of the same year, then postponed until the shareholders' meeting that approves the financial statements for the fifth subsequent financial year.[65] Finally, the same five years period to recover has been extended to the losses incurred in the year 2021 and therefore up to the approval of the financial statements concerning the financial year 2026.

Nevertheless, the emergency regulation still has a number of weaknesses.

First, the criteria to define the losses included in the special regime (in particular for losses dating from before the start of the pandemic) are not clear, depending on the interpretation of the term 'emergence' of losses.[66]

Moreover, the effects of the losses 'suspended' have to be examined in detail: ie if in the financial year 2022 or during the following years, there is a new loss of more than one third of the capital, and therefore the directors will have to comply with the obligations set forth in Arts 2446, 2482-*bis*, 2447 and 2482-*ter* of the Italian Civil Code,[67] the reference to the long-term continuity of the company shall take in consideration the losses 'suspended' until the final term of the moratorium.

In a different perspective, the emergency regulation provokes some suggestions concerning the function of rules about the capital in case of losses, even though in the context of this pandemic crisis the debate on the value of the rules on share capital and the advisability of replacing them with solvency tests has not surfaced as on other previous cases.[68]

[65] The awareness of such inadequacy led the legislator, in the context of the so-called 'Legge di bilancio' to replace the original wording of article 6.

[66] A broad interpretation that gives the term 'incurred losses' in the new wording both the meaning of 'accrued losses' and the meaning of 'losses recognised in a financial statement approved in 2020' is envisaged in A. Busani, '*Il 2020 come anno "di grazia" per le perdite da COVID-19' Le Società*, II, 208, 208 (2021); *contra* M. De Poli and M. Greggio, 'La suspensione degli obblighi in materia di capitale nel nuovo art 6 del Decreto liquidità' *Diritto Bancario,* 1-20.

[67] The question remains unresolved as to whether the inability of the company to operate as a functioning economic unit intended to produce income, ie the loss of business continuity, can be treated as a cause for dissolution due to the impossibility of achieving the company's object. See R. Guidotti, '*Continuità aziendale e scioglimento della società*' *Diritto Bancario*, 31 January 2021. On the problems deriving from the suspension of losses both for 2020 and 2021 see 'Decreto "Milleproroghe" e disposizioni temporanee in materia di riduzione di capitale' *Fondazione Nazionale Commercialisti,* available at https://tinyurl.com/4h6hb82s (last visited 31 December 2022).

[68] However, see the interesting insights of C. Ebeke et al, 'Corporate Liquidity and Solvency in Europe during COVID-19: The Role of Policies' *International Monetary Fund Working Papers*, March 2021. A detailed survey with some prospective solutions is carried out by D. Latella, 'L'eclissi del capitale sociale ai tempi del Covid-19' *Diritto ed Economia dell'Impresa*,

Assuming that no definitive conclusions have yet been reached on the function of the rules governing the reduction of capital for losses,[69] among the various thesis formulated in this regard,[70] it could be argued that, considering the approaches and amendments recently adopted in various legal systems, the prevailing frame is the recognition of this rule as a mean of adequate internal disclosure and re-emergence of the shareholders meeting as a decision-making forum in the vicinity of insolvency.

Indeed, the Italian scenario shows that the regulatory changes due to the Covid emergency are aimed at pursuing two major scopes.

First, the emergency rules intend to prevent directors from being immediately confronted with the alternative that arises in the event of relevant losses of share capital and the consequent liability, in order to let the companies profit of a convenient period of time to recover the losses without being forced to liquidate.

Moreover, the emergency regulation protects the decision-making role of shareholders, given the continued applicability of disclosure duty.[71]

In this framework, it has to be underlined the major innovation of an exception to the capitalisation or liquidation rule extended to non-court situations and therefore without the protection deriving from an external circulation of information and judicial control.[72]

However, the suspension of the rule has been already provided for in

4, 1, 1 (2020).

[69] R. Nobili, 'La riduzione di capitale', in P. Abbadessa et al eds, *Il nuovo diritto delle società*, *Liber amicorumGian Franco Campobasso* (Torino, UTET: 2007), III, 321.

[70] Following a comparative study on the functions of the share capital in the legal regime of losses, the main scopes envisaged are the following: a) it represents a form of guarantee for creditors; b) the protected interests should be shifted to the shareholders, in particular the minority shareholders, so that the majority do not pursue their own extra-social interests; c) it is a safeguard of the veracity of the nominal value of the shares in order to guarantee the possible purchasers and the interest of the shareholders in disinvesting their shares; see N. De Luca, 'Riduzione del capitale ed interessi protetti. Un'analisi comparatistica' *Rivista di Diritto Civile,* VI, 559, 559 (2010).

[71] The temporary suspension of directors' duties does not affect those set forth in Art 2446, para 1, and Art 2482-*bis*, paras 1, 2 and 3, of the Italian Civil Code and, therefore, irrespective of the Covid-19, the directors' duty to call the shareholders' meeting without delay upon the occurrence of a loss of more than one third of the share capital, even if it does not affect the legal minimum, remains in place. See A. Busani, n 66 above, 538; A. Paolini and M. Garcea, '*Riduzione del capitale sociale per perdite nella legislazione emergenziale "Covid19" e problematiche connesse alla parità di trattamento tra imprese*' 2 *Dirittifondamentali.it*, 1294-1308 (2020); G. D'Attorre, n 62 above, 599, who, however, points out that there are also clear indications of creditors protection, such as the prohibition of distributing profits to shareholders until the losses have been eliminated (although the possibility of 'spreading' losses over a long period of time may in part trigger mechanism of functional diversion).

[72] A similar exemption has in fact operated in the context of bankruptcy proceedings, according to art 182 *sexies* of the Insolvency Law: on this topic see C. Montagnani, 'Disciplina della riduzione del capitale: impresa o legislatore in crisi?' *Giurisprudenza Commerciale*, IV, 754, 754 (2013); F. Lamanna, 'L'art. 182-*sexies* l. fall. e la sospensione delle norme di salvaguardia del capitale sociale al tempo della crisi dell'impresa: effetti positivi, controindicazioni ed effetti collaterali da overshooting' *Il Fallimentarista.it*, 25 September 2015.

favour of start-up and innovative PMI, within the limit of one financial year.[73]

Nevertheless, in comparison with those other cases the extension of suspension due to Covid emergency regulation has a much great importance, both because of the general application of the rule including large corporations and of the long period of time allowed to recover the losses. Moreover, beyond the formal character of emergency rule, it appears to trace a fundamental step in the evolution of the role of the capital regulation.

4. General Interventions with Reference to National Bankruptcy Laws

With regards to the option of modifying the entire underlying insolvency law due to Covid emergency, it should be noted – as already mentioned in the previous paragraphs – that many insolvency laws were already in the process of being codified or reformed in order to be compliant with the Insolvency Directive.

Although almost all Member States have appropriately chosen at first glance to postpone the entry into force of the Directive, the reform processes have slowed down but have not been abandoned. On the contrary, some countries (including Spain, as noted above)[74] have even accelerated the process of general reform of bankruptcy law, on the basis that in a situation of crisis a regulatory stalemate would not have been the most appropriate response.

Looking at the single insolvency regimes and the approach adopted, a key role was played by the background and the situation occurring in the pre-covid systems.

A number of countries have therefore adopted a special law and a new procedure, in particular the Netherlands, which has introduced, as of 1 January 2021, the Wet Homologatie Onderhands Akkoord ('WHOA'), that offers

> 'an efficient process to effect a compulsory restructuring plan/composition between the company and all or certain of its (secured and/or unsecured) creditors and/or shareholders'.[75]

[73] For the start-up see decreto legge 18 October 2012 no 179 (converted by legge 17 December 2012 no 221), Art 26, para 1; for the Innovative PMI, see decreto legge 24 January 2015 no 3 (converted by legge 24 March 2015 no 33), Art 4, para 9. On this topic O. Cagnasso, 'Note in tema di start up innovative, riduzione del capitale e stato di crisi (Dalla "nuova" alla "nuovissima" s.r.l.)' *Il Nuovo diritto delle società*, V, 7, 7 (2014).

[74] See M. Gurrea Martinez, n 12 above, 5; B. Arruñada, 'Interpretación positiva del derechoconcursal español y propuestas para una reforma equilibrada' *FEDEA Policy Papers no. 2021-08*, 1-31 (2021). Among other countries that have profoundly innovated their regulations, also drawing inspiration from the pandemic experience of Covid 19, it is worth mentioning Portugal, characterised by the proliferation of initiatives that led to the 'Pevec' bill, whose new rules on insolvency and restructuring of companies will come into force in mid-April of this year.

[75] See 'An international guide to changes in insolvency law in response to COVID-19' *Dla Piper*, available at https://tinyurl.com/b64fmyzk (last visited 31 December 2022).

Unanimously voted by the Dutch House of Representatives on 26 May 2020 and by the Senate on 6 October 2020, with this new procedural mechanism,[76] of which there are two variants (one private, more reserved, and one public, eventually in accordance with the requirements of Art 24 Reg. EU 2015/848),[77] the lawmaker clearly strengthens the competitiveness policy among EU Member States, in particular considering the deliberate points of contact between this discipline and that of the Scheme of Arrangement, eg a procedural instrument adopted in the United Kingdom and which has shown great success in practical experience also for procedures relating multinational enterprises.[78]

On the other side, countries as France, probably also because already traditionally focused on alert procedures under bankruptcy law, have instead limited the intervention to some amendments, in this case to the *code de commerce,* by introducing changes to the regulation of some of the already existing procedures.[79]

At present, the foremost pivotal aspect of the legislative intervention and reforms for companies in financial distress can be listed as follows: (i) reinforcement of warning procedure, (ii) extension of accelerated safeguard conditions, (iii) creation of a safeguard of reorganization privilege, (iv) extension of safeguard or reorganization plans, (v) simplification of creditors consultation.[80]

[76] It should be recalled, however, that the Dutch legislator has also amended some of the provisions of the Insolvency Act and in particular has passed a proposal that offers business in distress due to the Covid-19 pandemic some breathing spell if they are confronting with creditors filing for their bankruptcy of for conservatory or executory measures (moratorium of payments – *Tijdelijke wet Covid-19 SZW enJenV*).

[77] P. De Cesari, 'Osservatorio internazionale sull'insolvenza'*Il Fallimento e le altre procedure concorsuali,* III, 427, 427, points out in this regard that for this 'public' version of the procedure, the Netherlands may request that it be included in Annex A EIR. In any case, the WHOA also present flexible and complex procedural mechanisms, in compliance with the Insolvency Directive, considering inter alia that cram-down and cross class cram-down are possible. In particular, it is provided, as regards cross class cram down, that the Court may approve the plan even when not all classes have voted in favour (Art 384), provided that the conditions for cram down are met, the plan has been approved by at least one class of creditors other than a class of equity holders and that it respects the absolute priority rule. See K. Durlinger, '*The Netherlands – Wet HomologatieOnderhandsAkkoord*' *Norton Rose Fullbright*, available at https://tinyurl.com/2tv4a7v5 (last visited 31 December 2022).

[78] This is indeed a restructuring instrument that can also be used by non-Dutch debtors, who can apply for approval of the plan by the Dutch courts (irrespective of the COMI) provided that there is a sufficiently close connection.

[79] See L. Panzani, 'La composizione negoziata alla luce della Direttiva Insolvency' *Ristruturazioni Aziendali*, 31 January 2022, 1-20, quoting *Ordonnance no 2021-1193 du 15 Septembre 2021 portant modification du libre VI du code de commerce*. For further references to the more limited French intervention compared to other systems such as Germany, who created by the *StaRUG* a '*brand new standalone and very detailed restructuring procedure, containing no less than 102 paragraphs*' see R. Dammann, 'The transposition of the EU Directive: A great Franco-German convergence' *Eurofenix,* Winter 2021/2022, 20, noting also the importance of the respective different starting points.

[80] On these measures, some of which are of more limited duration, as in the case of the

Within this framework, Italy has distinguished by a counter-trend approach, repeatedly postponing the entry into force of the already promulgated CCI. Less than a month before its lastly provided entry into force – which should have fallen on 1 September 2021 – the Council of Ministers approved a 'draft Decree Law containing urgent measures on business crisis and corporate rehabilitation, as well as further urgent measures on justice'. Arts 1 and 1-*bis* of the new decreto legge 118/2021, have thus provided for the extension of the entry into force of the Code of Crisis and Insolvency ('CCI') to 16 May 2022 – finally postponed to 15July 2022[81] while, as regards Title II (whose rules on the 'procedura di allerta' represented the most relevant and expected novelty), the enforcement had been originally postponed until 31 December 2023 and then finally revoked.

This extension, at the time of the so-called Liquidity Decree, found reasons – in combination with each other – both of a practical nature (for the containment of the pandemic, since it was a procedure that implied organizational meetings and the involvement of various personalities, even third parties with respect to creditors and debtors, within the relevant Chambers of Commerce) and of a regulatory and managerial one, in that the number of companies in such a financial situation as to require the initiation of such procedures would have been (by virtue of the applicable economic indicators)[82] too high, when on the contrary the alert procedure had been designed to operate in a economic and financial stable situation.[83]

At a later stage, following the new and diversified assisted negotiation ('composizione negoziata' – introduced by the same decreto legge 118/2021 also to comply with the Insolvency Directive terms), it was pointed out that the further posticipation also depended on a more acquired distrust at a theoretical and general level regarding the structure of the alert procedure contemplated by Arts 12 et seq of the ICC.

possibility of applying for the opening of an accelerated safeguard or accelerated financial safeguard procedure (specific insolvency proceedings) for any business which so requests, notwithstanding the required thresholds for recourse to such a procedure, considering that this measure applies to all proceedings opened between the ordinance of 20 May 2020 and the ordinance transposition of the Preventive Restructuring European Directive, and no later than 17 July 2021, see C. Texier and M. Abdelouahab, 'French Report, An International Guide to Chances in Insolvency Law in response to Covid 19' *www.dlapiper.com*, 11.

[81] It was so provided by the latest decree for the approval of the PNRR on 13 April by the Council of Ministers. The final version of the CCI has been published in the Gazzetta Ufficiale 1 July 2022 no 152.

[82] Some criticism of the economic criteria are expressed by A. Quagli, 'Sulla necessaria rimodulazione nel codice della crisi degli indicatori e indici della crisi' *Ristrutturazioni Aziendali,* 28 August 2021, 1-13.

[83] It should be noted, thus, that in 2020 the number of insolvent business was (quite unexptectedly) lesser than 2019, and this trend has been confirmed also in 2021 (while the 'emergency legislation' measured had substantially expired). A deep survey conducted by T. Orlando and G. Rodano, 'L'impatto del Covid-19 sui fallimenti e le uscite dal mercato delle imprese' *Banca d'Italia*, 24 January 2022, 1-8.

Actually, the new procedure has a clear change of tendency comparing with the previously provided regulatory framework set out in Arts 12 et seq of the CCI regarding the 'alert procedure', which can be succinctly translated into a higher level of 'extrajudicialism, confidentiality and voluntariness',[84] that has been welcomed by most experts in the practical field and academics[85], although there has been no lack of criticism or remarks also about the latest legislative innovation.[86]

A general point to be highlighted within this framework is that:

i. the aspects of time-scheduling, on the one hand, and primarily, the deadline for implementation of the Insolvency Directive (17 July 2022) together with the deferral of the alert proceeding ('composizione assistita' under arts 12 ey seq CCI) to 31 December 2023,[87] suggested the legislator' will to base the main insolvency reform at a general level on the 'composizione negoziata' of decreto legge no 118/2021, which marks an important 'change of pace' in the identification of the new model of early warning tools, more in line with the

[84] See S. Ambrosini, 'La nuova composizione negoziata della crisi: caratteri e presupposti' *IlCaso*, 23 August 2021.

[85] Positive assessments are expressed, among others, see L. Panzani, 'Il D.L. "Pagni" ovvero la lezione (positiva) del covid' *Ildirittodellacrisi.it*, 25 August 2021, 1-62; M. Fabiani, 'La proposta della Commissione Pagni all'esame del Governo: valori, obiettivi, strumenti' *Ildirittodellacrisi.it,* 2 August 2021, 1-6*;* M. Arato, n 14 above, who adds that 'certainly the negotiated settlement of the crisis will be a very effective tool for the restructuring of housing', that 'it is peculiar that in times of crisis the bankruptcy rules become more 'flexible (just think of the reforms of 2010 and 2012 post-Lehman crisis [...] while in times of economic recovery they return to rigidity (think of the 2015 d.l. that marked the beginning of the pendulum swing towards a tightening of the rules as it introduced a minimum percentage of payment in the liquidation arrangement and the return of the silent-refusal of creditors [...])' and that this 'is an irrational and not shareable attitude'. Among the pivotal points of assisted negotiation it should be noted that (i) it is an out-of-court procedure offered to debtors in crisis or insolvency provided that the latter is irreversible, (ii) it leaves ordinary and extraordinary management in the hands of the entrepreneur, (iii) it provides for the figure of an expert mediator appointed by a commission composed of third parties (iv) can be concluded with an agreement with creditors ensuring rewarding measures, or with one of the instruments already offered by the regulation, or even lead to a 'simplified arrangement', (v) allows a protective umbrella of up to eight months in order to facilitate the reaching of agreements.

[86] See, with several critical points of reflection, D. Galletti, 'È arrivato il venticello della controriforma? Così è se vi pare' *Ilfallimentarista.it*, 27 July 2021; F. Lamanna, 'Nuove misure sulla crisi d'impresa del D.L. 118/2021: Penelope disfa il Codice della crisi recitando il "de profundis" per il sistema dell'allerta'*Ilfallimentarista.it*, 25 August 2021; to some extent also S. Leuzzi, 'Una rapida lettura dello schema di DL recante misure urgenti in materia di crisi d'impresa e di risanamento aziendale'*Dirittodellacrisi,* 5 August 2021,1, 3.

[87] Originally, some Authors assumed (without regret) that this further deferral of the alert procedure may lead to a new formulation of the relative sets of rules or even a withdrawal of such mechanism. See S. Ambrosini, 'Il (doppio) rinvio del CCI: quando si scrive "differimento" e si legge "ripensamento"'*Ristrutturazioni aziendali,* 22 September 2021, 1-10. This approach has been thus definitively confirmed as a result of the so-called Insolvency Decree (decreto legislativo 17 June 2022 no 83), which effectively has recently suppressed the intertemporal discipline relating to the alert procedure, which therefore, as will also be seen below, has been definitively removed from the structure of the Crisis Code.

spirit and the theoretical approaches adopted with these regards by the Insolvency Directive;[88]

ii. on the other hand, there may be marginal aspects of incomplete compliance with the European regulatory framework, as pointed out by the same supporters of the new form of 'composizione negoziata',[89] which will lead to some further intervention in the general regulatory framework.

These arguments reflect the lack of nerve by the legislator, who missed to preserve a text on which there had been a great work and a deep discussion (ie the 'alert procedure' referred in the CCI). From a more practical point of view, they highlight some probable inefficiencies of the new legal regime,[90] because a

[88] See M. Pirollo, 'La nuova riforma del Codice della Crisi d'impresa all'insegna della Direttiva Insolvency' *Dirittobancario.it,* 22 March 2022; V. Minervini, n 16 above*,* 2, noting that decreto legge 118/2021 does indeed mark an important 'change of pace' and that despite the technical form of the emergency intervention... the negotiated settlement seems to be solidly based on the doctrinal approaches established before the pandemic and which, at European Union level, had culminated in the Insolvency Directive. Accordingly, P. Vella, 'La spinta innovativa dei quadri di ristrutturazione preventiva europei sull'istituto del concordato preventivo in continuità aziendale' *Ristrutturazioni Aziendali*, 1 January 2022, 1-31, points out that the three pillars on which the Directive bases the preventive restructuring frameworks are (i) the preservation of the entrepreneurial activity, (ii) the efficiency of the procedure, aimed at reducing issues and costs and requiring a specialization of the judicial authority and professionals, (iii) the dialogue between all interested parties during the negotiations.

[89] See L. Panzani, n 79 above, noting, *inter alia*, that (i) the Directive provides for wide-ranging rules, the system of which is largely contained and implemented by decreto legge no. 118/2021 (slightly amended by legge di conversion 21 October 2021 no 147), but (ii) in any event, in the case of the 'negotiated settlement' (composizione negoziata), there is no restructuring plan at the time when the debtor/enterprise applies for access to the procedure, which is slightly at variance with the Directive, nor is there any real intervention by the judge in questioning and verifying that the plan meets certain conditions, nor any vote by the creditors. However, the Author suggests a reading according to which not necessarily all the measures and instruments of the directive must be present in a single procedure, but that these, where indicated as mandatory, may be simply inside in the national legislation of a Member State and not necessarily in one single procedure, provided that they can be found as a 'general framework' within that State insolvency legal system. This approach is followed also by P. Vella, 'I quadri di ristrutturazione preventiva nella Direttiva UE 1023/2019' *Il Fallimento e le altre procedure concorsuali,* 1489, 1489 (2021). See also F. Minervini, n 16 above, 3, who exalts the change of culture of d.l. 118/2021, which is therefore placed in a long-term perspective, and outlines its attitude to 'inform' the law to come ('il diritto che verrà'). Moreover, the Author underlines that the Report to the said decreto encompasses the need to fully implement the Insolvency Directive and (i) sees in its path the 'composizione negoziata' (effective also in a period of emergency crisis), but (ii) will also require further 'additions' to the provisions of the CCI.

See also P. Liccardo, 'Neoliberismo concorsuale e le svalutazioni competitive: il mercato delle regole'*Giustiziainsieme.com*, 07 September 2021, who critically points out that 'the simplification introduced constitutes a fragile mirage of the legislator of the urgency and that any legitimising reference to the Community provisions of EU Directive 2019/1023 is substantially betrayed by a rewriting in terms of value of the institutional spaces hitherto reserved also by the CCII to the articulations of competition law, both in the negotiated phase and in the more strictly procedural phase'.

[90] It is often highlighted, for example, that decreto legge 118/2021 has strengthened and made a form of liquidation 'concordato preventivo' more flexible and simplified, whereas in the CCI, in continuity with the past, there is still a tendency to marginalize such kind of proceedings.

shorter *vacatio legis* compared to that originally predicted will not allow for *ex-ante* solution settlement, but only in the course of practical-operational experience.

Regardless of the albeit numerous elements of perfectibility,[91] the confidence in this new procedure is progressively gaining ground, thus also favouring comparative reflections in relation to this new legislation, both (i) with systems (such as the French one) in respect of which traditional continuity has been maintained with respect to the recent past[92], and (ii) with systems in which respect the profiles of assonance are certainly more random and unexpected.[93]

In this regard, it is sufficient to consider that, compared to an initial period of impasse, just a few months after its debut, there has been an exponential increase in the number of companies embarking on this new voluntary and out-of-court reorganisation process,[94] whose full assessment will only be possible after the initial running-in period, when standards and best practices will consolidate.

V. Final Remarks and New Perspectives of Harmonisation

The result of this comparative examination, in line with the evidence shown in other recent articles, is that the pandemic crisis and the emergency legislation has created in bankruptcy law a further opportunity for confrontation and a push towards harmonisation, moreover, re-evaluating a different line of path from the current one. As correctly pointed out, the COVID-19 pandemic revealed that top-down harmonization process of insolvency law, that has been

For further references, see *ex multis* P. Vella, n 88 above, 11.

[91] Some Authors have pointed out that some innovation of the decreto legge 118/2021, as the 'concordato sempificato' may be used as a strategic and opportunistic alternative to other liquidation proceedings and may be also unfittable with other articles of the CCI. See P. F. Censoni, 'Il concordato "semplificato": un istituto enigmatico' *Ristrutturazioni Aziendali*, 22 February 2022, 1-23.

[92] See M. Arato, n 14 above, noting that the procedure introduced by Decree-Law 118/2021 was inspired by the French experience of the *conciliateur judiciaire* under Article 611-4 Code de Commerce (introduced about 10 years ago and amended on 15 September 2021 by *Ordonnance* 2021/1193), which is producing good results but which is not allowed in France for companies being in *cessation de paiements* for more than 45 days.

[93] See S. Pacchi, n 18 above, 6, which refers in particular to the recent interventions of the Colombian legislator since Decree 560/2020 (Decreto Ley 560/2020 'Por el cual se adopta nmedidas transitorias especiales en materia de procesos de insolvencia, en el marco del Estado de Emergencia, Social y Ecológica', available at https://tinyurl.com/yx32azaj (last visited 31 December 2022)) and notes that 'the objectives of the new decree coincide in several respects with those of the Colombian legislator: flexibility, negotiability, cost reduction, use of mediation/facilitation, assistance of the Chambers of Commerce, limited intervention of the judge, abolition of the authorization regime'.

[94] Some positive data are collected: see V. Magione and B.L. Mazzei, 'Composizione negoziata, I bilanci spingeranno le istanze' *Il Sole 24 Ore,* 14 February 2022; Id, 'Crisi d'impresa, la via e i primi percorsi volontari per il salvataggio' *Il Sole 24 Ore*, 14 February 2022, according to whom, at the date of 10 February 2022, there were about 800 'experts' (a key role for the practical ongong of the proceeding) already registered and an increasing number of filing (about 80).

a top priority on the European institutions' agenda in the last decade – reaching its peak with the 2019 Insolvency Directive – has been temporarily halted.[95]

Conversely, the measures that have been urgently implemented to mitigate the financial effects of the pandemic, although largely uncoordinated, showed a phenomenon of bottom-up harmonisation, based on the common normative substratum, at the level of general approach and of concrete solutions in the European jurisdictions.

On the other hand, it has become clear that the regulation of business crises is inseparable from the regulatory framework involving other fundamental subject of corporate governance, including, in particular, the regulation of companies' capital and that of the liability of directors and other corporate bodies.

Moreover, even in an emergency phase harmonisation appears useful and functional, in order to assess both in the immediate present and in an *ex post* perspective, the efficiency of individual regulations and solutions in order (i) to update and perfect them and (ii) to have an arsenal ready to be used when it will be necessary, so that it can be compliant with fundamental criteria and parameters even in a physiological economic period, such as the guarantee of competitiveness for companies that can actually be restored and are therefore economically deserving.

With these regards, the statement according to which 'although lack of systematic structure', in this pandemic period, a 'convergence of goals and means' was achieved, is effective and real.[96]

Thus, assuming that this process has been on a bottom-up basis, it can be shared the perspective of those Authors who, from the national legislative experience (at first immediate and confused and then reasoned and 'archived'), that has characterized bankruptcy law in the pandemic emergency, identify or hope for a further/similar change of approach at European level.[97]

After all, a harmonization that proceeds through a different mode of intervention (top-down) inevitably risks imposing a timid or minimalist approach, unable to intervene on many sensitive and substantial aspects of insolvency law.[98]

Indeed, and not only at the EU level, from several decades this process of approximation and harmonisation of regulations has seen at first a spontaneous– and meditated, long and thoughtful – circulation of models and rules between

[95] See E. Ghio et al, n 17 above, 1.

[96] S. Madaus and F. J. Arias,n 7 above, 320.

[97] See E. Ghio et al, n 17 above, 6. On necessary partiality and other criticality of harmonisation initiatives, more generally, see R. Bork, 'Preventive Restructuriong Frameworks: A 'Comedy of Errors' or 'All's Well That Ends Well?' ' 14 (6) *International Corporate Rescue,* 417, 417 (2017); H. Eidenmueller, 'Contraxcting for a European Insolvency Regime' 18 *European Business Organization Law Review,* 273, 273 (2017).

[98] In these terms, referring to the approach and boundaries of the Insolvency Directive, see L. Panzani, n 85 above.

countries, some of which have been more receptive and others more exporters.[99]

In a more recent stage, the promotion of European integration has been covered mainly via EU-driven initiatives (that is 'top-down harmonisation').

This choice, based on solid research plans and studies,[100] has occurred however (i) at first according to a soft law approach (see the 2014/135/EU Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency),[101] in the wake of other international experiences,where initiatives of harmonization are mainly carried out through model laws,[102] and (ii) only recently with a more invasive and binding approach, although the Directive instrument has established 'minimum standards', both

[99] A traditional example of template circulation is represented by US Bankruptcy Code 1978, and, in particular, Chapter 11 proceedings, that spread through various insolvency proceedings with some different characters, as for the best interest of creditors test and cram down rule (for examples within the Italian 'concordato preventivo', evidently inspired to the US experience, or the similar German institute of Obstruktionverbot adopted by § 245 of Insolvenzordnung, see L. Stanghellini, *Le crisi di impresa fra diritto ed economia* (Bologna: il Mulino, 2007), 228, also recalling art 48 of *Ley de concursos y quiebras* n. 24.522 of 20 July 195, providing for a similar mechanism. See also, with these regards, C. Ferri, 'L'esperienza del Chapter 11. Procedura di riorganizzazione dell'impresa in prospettiva di novità legislative' *Giurisprudenza Commerciale,* I, 65, 65 (2002); V. Confortini, 'Between strategic use and abuse of insolvency law: shareholders' rights and corporate reorganisations under German "insolvenzordnung" and Italian insolvency law' *Jus civile,* VII, 14, 14 (2015); F. Di Marzio, *Autonomia negoziale e crisi d'impresa* (Milano: Giuffré, 2010), 75. More recently, the debt restructuring agreements (art 182-*bis* IL) introduced in 2005 into the Italian bankruptcy system have also inspired foreign legislators, as in the case of the acuerdos de refinanciacion in Spain. See B. Quatraro and B. Burchi, 'Gli istituti di composizione della crisi d'impresa in alcune legislazioni straniere' *Il Nuovo Diritto delle Società,* XIX, 7, 7 (2016); J. Pulgar Ezquerra, ' "Holdout" degli azionisti, ristrutturazione di impresa e dovere di fedeltà del socio' *Il Diritto Fallimentare e delle società,* I, 13, 13 (2018).

[100] Regarding these initiatives, as COM(2007)584 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions — Overcoming the stigma of business failure — For a second chance policy — Implementing the Lisbon Partnership for Growth and Jobs; and Report of 17 October 2011 on recommendations to the Commission on insolvency proceedings in the context of EU company law, '011/2006(INI)', seeG. Nuzzo, 'Il debito e la storia: dalla colpa alla fisiologia dell'insolvenza' *Rivista del Diritto Commerciale e del diritto generale delle obbligazioni,* I, 89, 89 (2017); P. De Cesari and G. Montella, 'La proposta della Commissione UE in tema di ristrutturazione preventiva delle imprese in crisi' *Il Fallimento e le altre procedure concorsuali*, XI, 1151, 1151 (2017).

[101] See *ex multis* S. Pacchi, 'La Raccomandazione della Commissione UE su un nuovo approccio all'insolvenza anche alla luce di una prima lettura del Regolamento UE n. 848/2015 sulle procedure d'insolvenza' *Fallimentiesocieta.it*, 27 July 2015, 1-34; G. Corno, 'La disciplina delle ristrutturazioni preventive delle (piccole e medie) imprese in crisi. Il contributo della raccomandazione della Commissione Europea in data 12 marzo 2014' *Il Nuovo Diritto delle Società,* VII, 156, 156 (2015); and, more generally, B. Wessels, 'Europe deserves a new approach to insolvency proceedings' 4 (6) *European Company Law*, 253, 253 (2007).

[102] With regard to various international and supra-State initiatives and, in particular, Uncitral initiatives, as the Model law on Cross-border Insolvency 2007 and further developments, see A. Mazzoni, 'Osservazioni in tema di gruppo transnazionale insolvente' *Rivista di diritto societario,* IV, 2, 2 (2007); G. Mazzei, 'Il nuovo Codice della crisi d'impresa e dell'insolvenza: la continuità aziendale tra legislazione europea e nazionale' 2 *Amministrativ@mente,* 99-110 (2019).

for preventive restructuring procedures for debtors in financial difficulty and for procedures leading to discharge of debts.[103]

The recent experience marked with the pandemic emergency trace a further change of approach and represents a thoughtful synthesis of the previous ones, in any case reassessing the importance of bottom-up harmonisation, via Member States-driven initiatives. This new approach may in fact avoid or limit the negative aspects that are often associated with a hetero-imposed approach, that inevitably narrows the scope and sphere of application, sometimes resulting in programmatic guidelines whose implementation on a national basis still leaves clear differences in the law of each Member State.

Therefore, the lesson that can be drawn within the European framework is that these processes of investigation and self-induced harmonisation have direct effects and shall be adopted as a model also in a phase of economic and financial stability, leading to a reduction of risks and inefficiencies related to the distance still discernible today within the national bankruptcy regimes on fundamental aspects, such as grading of secured creditors, treatment of new-financing, directors duties in the twilight of insolvency, claw back regimes and avoidance actions, etc.

Undoubtedly, uniform provisions at European level represent an incentive for the investments to cross-border level and further step in the operation of the Capital Markets Union, promoting an entrepreneurial spirit and locally affecting certainty and functioning of insolvency frameworks.[104]

This trend already seems to have finally played influence role on the European agenda, recently embarked in a greater synergy and integration between processes of harmonisation at different level, such as in the initiative '*enhancing the convergence of insolvency laws*',[105] launched by the European Commission at the end of 2020 and whose consultation level recently concluded, where even before the type of regulatory text to be adopted (in the awareness of the constant tension between hard and soft law) reflection and investigation dwells on the relevant issues of substantial bankruptcy law, already mentioned above, that

[103] In particular, the minimum standard established by Insolvency Directive, as summarized above, formally relates to: (i) preventive restructuring procedures available for debtors in financial difficulty, when there is a likelihood of insolvency; (ii) procedures leading to a discharge of debts incurred by over-indebted entrepreneurs and allowing them to take up a new activity, (iii) targeted rules on increasing the efficiency of all types of insolvency procedures, including liquidation procedures.

[104] See D. Valiante, 'Harmonising insolvency laws in the Euro Area: rationale, stock-taking and challenges. What role for the Eurogroup?'*Study of the European Parliament*, July 2016, pointing out the four distinct areas where harmonising national insolvency frameworks can improve the functioning of the single market and stability of the Euro area: early restructuring businesses, bank resolution, cross-border insolvency and NPL management. Each of these aspects rely on common features of local insolvency frameworks.

[105] 'Inception Impact Assesment Enhancing the convergence of insolvency laws' *European Commission*, 11 November 2020, expressly encompassing among the target audience 'everyone who might be affected by insolvency proceedings, whatever role they may play in them'.

need effective and readily convergence at EU level.[106]

These goals, indeed, may be achieved only with a common reference and large basis of investigation, overcoming preconceptions and resistance that can arise while adopting a rigid top-down approach, meanwhile allowing local experience, practice and standards to represent important tool in the harmonisation process.

[106] Comments, opinion and papers have been provided indeed at every level, form Ministerial to law firms, sources of legal and law formation and practice, on the assumption that EU Directive did not harmonise core aspects of substantive insolvency law, such as the following endorsed areas: common definition of insolvency, the conditions for opening insolvency proceedings, the ranking of claims, avoidance actions, the identification and tracing of assets belonging to the insolvency estate. On the European Commission, Inception Impact Assessment, '*Enhancing the convergence of insolvency laws*', ibid, see R. Ghio, n 17 above, 13.

Corporate and Financial Markets Law

Adding Sustainability Risks and Factors to the MiFID II Suitability and Product Governance Requirements

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Abstract

This essay proposes a critical analysis of the amendments that introduce sustainability factors and risks into the legal framework for suitability requirements and product governance regulation. It argues that the choice of the European legislator to favour a product-oriented model for sustainability-related financial instruments may undermine the duty of the financial intermediary to act in the best interest of the client.

I. Introduction

The European Commission's Sustainable Finance Action Plan for financing the transition to a sustainable economy gives sustainable finance a key role in supporting financial stability by incorporating environmental, social, and governance (ESG) factors into the investment decision-making process. This perspective has led to a regulatory intervention on Markets in Financial Instruments Directive (MIFID II) package-based disclosure and the conduct-of-business framework for advisors and portfolio managers. The essay proposes a critical analysis of the amendments to the regulation concerned, in particular the suitability requirements and product governance rules through the delegated acts included in the sustainable finance package of 21 April 2021. It argues that EU policy on sustainable finance could jeopardise the rationale for the traditional rules on intermediaries' fiduciary duties, whose goal is to protect financial investors. Indeed, adopting a product-oriented model for sustainable financial instruments within the MiFID II package concerning the suitability assessment and product governance might undermine the financial intermediary's duty to act in the best interest of the client.

To establish the context, the paper begins by outlining the legal basis and rationale for sustainable finance. It goes on to examine the amendments to the legislation that introduces sustainability into the rules on suitability assessment laid down in Regulation (EU) 2017/565 and the product governance norms established in Directive (EU) 2017/593. This analysis highlights the weakness in the legislation, which may actually give rise to a conflict between the interests

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of sustainability and the (economic/financial) interests of the investor.

II. The Legal Basis and Rationale for Sustainable Finance

Acting to fulfil its international commitments,[1] and in line with the role bestowed on it by the Treaty on European Union (Arts 3(3) and (5) and 21(2) TEU) to promote sustainable development, in March 2018 the European Commission published a Sustainable Financial Action Plan (Action Plan). The Action Plan specifically tasks sustainable finance with the dual mission of contributing to sustainable and inclusive growth through long-term financing of society and consolidating financial stability through the integration of environmental, social and governance (ESG) factors in investment decision-making processes.[2]

To this end, the gradual implementation of the European Agenda for Sustainable Finance envisions the use of primary and secondary legislation, as well as soft law measures falling within the competence of the European sectoral Supervisory Agencies (European Banking Authority - EBA, European Securities and Markets Authority - ESMA and European Insurance and Occupational Pensions Authority - EIOPA). These are so numerous that, according to some academics,[3]once it has been fully implemented, the harmonised ESG framework will inevitably become the fifth pillar of financial regulation (together with the pillars of rules, namely prudential, conduct, anti-money laundering, payment systems and market infrastructures).

To date, three pieces of primary legislation implementing the European Action Plan[4] impact on the financial sector. The first is Regulation (EU)

[1] See: Paris Agreement on climate change adopted by 196 Parties at COP 21 in Paris, on 12 December 2015 and entered into force on 4 November 2016, available at https://tinyurl.com/4kyvmmrb (last visited 31 December 2022); the United Nations 2030 Agenda for Sustainable Development Goals available at https://tinyurl.com/mc9ab5h7 (last visited 31 December 2022). About the international initiatives facing sustainability-related issues see M. Siri and S. Zhu, 'L'integrazione della sostenibilità nel sistema europeo di protezione degli investitori' *Banca Impresa Società*, 3 (2020); Id, 'Will the EU Commission Successfully Integrate Sustainability Risks and Factors in the Investor Protection Regime? A Research Agenda' 11 *Sustainability*, 6292 (2019).

[2] See Communication from the Commission, 'Action Plan: Financing Sustainable Growth' COM(2018)097 final,available at https://tinyurl.com/36ypuxdj (last visited 31 December 2022). On this basis, on 6 July 2021, the Commission published the Communication 'Strategy for Financing the Transition to a Sustainable Economy' COM (2021) 390 final, available at https://tinyurl.com/229pw4zy (last visited 31 December 2022). The EC strategy is an ambitious and comprehensive package of measures to help improve the flow of money towards financing the transition to a sustainable economy by enabling investors to re-orient investments towards more sustainable technologies and businesses.

[3] See G. Quaglia, A. Mastroianni, D. Donato and N. Ceruti, 'Rischi finanziari legati al clima: una prospettiva sulle misure prudenziali europee' *dirittobancario.it*, 4 February 2021, 1-11; S. Cavallo, 'Il nuovo paradigma di sostenibilità e la centralità della ESG per l'industria finanziaria'*dirittobancario.it*, 1-5 (22 March 2021).

[4] This regulatory reform is based on the recommendations of a High-Level Expert Group

2019/2088, the so-called Sustainability-related disclosures in the financial sector regulation (SFDR), which deals with sustainability disclosures in the financial services sector.[5] The second is Regulation (EU) 2019/2089, the so-called Low Carbon Benchmark Regulation, which sets forth EU benchmark indices of climate transition, EU benchmark indices aligned to the Paris Agreement, and sustainability-related disclosures for benchmark indices.[6]The last is Regulation (EU) 2020/852, the so-called Taxonomy Regulation.[7] Seeking to encourage sustainable investments in eco-sustainable economic activities, this Regulation establishes harmonised rules to qualify a business as environmentally sustainable, identifying, on the one hand, uniform criteria (sustainability-related objectives, sustainability-related ambitions, and adverse effects on sustainability factors) for classifying an activity as 'eco-sustainable' and, on the other, disclosure rules for the distribution of financial products falling within the category of 'eco-sustainable investments'.

In addition to these Regulations of the European Parliament and the Council (first level legislation), a Sustainable Finance Package[8] was issued on 21 April 2021. It incorporates the European Commission's Proposals for Delegated Acts (second level legislation) in accordance with the provisions of the primary legislation and based on the guidance provided by ESMA in two Technical Advice documents published on 30 April 2019. One relates to the integration of sustainable finance into MiFID II investment services,[9] and the other to the integration of sustainable finance into UCITS (Undertakings for the Collective Investment in Transferable Securities) and AIFM (Alternative Investment Fund Managers) frameworks on mutual investment schemes.[10]

In examining the European Commission's delegated measures, our analysis will focus on the changes arising from the addition of sustainability factors and

on Sustainable Finance set up by the EC to help develop an EU strategy on Sustainable Finance. See M. Siri and S. Zhu, *Will* n 1 above, 6295.

[5] European Parliament and Council Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L317/1. For details see, among the latest, S. Hooghiemstra, 'The ESG Disclosure Regulation - New Duties for Financial Market Participants & Financial Advisers' (22 March 2020), available at https://tinyurl.com/2ts677da (last visited 31 December 2022).

[6] European Parliament and Council Regulation (EU) 2019/2089 of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks [2019] OJ L317/17.

[7] European Parliament and Council Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2019] OJ L198/13.

[8] Available at https://tinyurl.com/2p8b63p9 (last visited 31 December 2022).

[9] ESMA Final Report on integrating sustainability risks and factors in MiFID II of the 30 April 2019 (ESMA35-43-1737), available at https://tinyurl.com/bddbcymh (last visited 31 December 2022).

[10] ESMA Final Report on integrating sustainability risks and factors in the UCITS Directive and AIFMD of the 30 April 2019 (ESMA34-45-688), available at https://tinyurl.com/4nrez4pz (last visited 31 December 2022).

risks in the regulation of sustainability assessment and product governance under the so-called MiFID II package.[11] These changes are contained in Delegated Regulation (EU) 2021/1253 (amending Delegated Regulation 2017/565)[12] and Delegated Directive (EU) 2021/1269 (amending MiFID II Level 2 Directive

[11] For more information about financial investor-protection discipline let me allow to refer to: M.E. Salerno, 'La tutela dell'investitore in strumenti finanziari nella MiFID II: problemi di enforcement della disciplina', in M. Mancini et al eds, *Regole e Mercato* (Torino: Giappichelli, 2016), I, 427-475; Id, 'La disciplina in materia di protezione degli investitori nella MIFID II: dalla disclosure alla cura del cliente'*Diritto della banca e del mercato finanziario*, I,437-492 (2016); Id, 'Prospettive di regolamentazione a protezione dell'investitore finanziario alla luce dell'emergenza Covid-19', in U. Malvagna and A. Sciarrone Alibrandi eds, *Sistema produttivo e finanziario post COVID-19: dall'efficienza alla sostenibilità* (Pisa: Pacini, 2021), 289-294. Among the latest, see: S. Gaffuri and L. Belleggia eds, *I servizi di investimento dopo la MiFID II* (Milano: Giuffré, 2019); M. Pellegrini, 'Le regole di condotta degli intermediari finanziari nella prestazione dei servizi di investimento?, in F. Capriglione ed, *Manuale di diritto bancario e finanziario* (Milano: Giuffré, 2nd ed, 2019), 571-612; A. Bartalena, 'La disciplina dei servizi e delle attività e i contratti', in M. Cera and G. Presti eds, *Il Testo Unico finanziario. Prodotti e intermediari* (Bologna: Zanichelli, 2020), I, 356- 415; E. Rimini, 'Le regole di condotta', in M. Cera and G. Presti eds, *Il Testo Unico finanziario* above, 416-453; M. De Poli, 'I conflitti di interessi e gli inducements', in M. Cera and G. Presti eds, *Il Testo Unico finanziario* above, 454-514; M. Rabitti, 'Prodotti finanziari tra regole di condotta e di organizzazione. I limiti di MiFID II' *Rivista di Diritto bancario*, I, 145-177 (2020); F. Annunziata, *La disciplina del mercato mobiliare* (Torino: Giappichelli, 11th ed, 2021), 143-178. About investor-protection regulation in relation to insurance-based investment products see, among the latest, M.E. Salerno, 'La tutela dell'investitore in prodotti di investimento assicurativi nella nuova disciplina Consob' *Diritto della banca e del mercato finanziario*, I, 565-623 (2020); C.G. Corvese, 'La disciplina del "governo e controllo" dei prodotti assicurativi ed i suoi riflessi sul governo societario di imprese di assicurazione e di intermediari'*Diritto della banca e del mercato finanziario*, II, 146-181 (2020); P. Marano, 'Le regole autarchiche sul governo e controllo (Product Oversight and Governance) dei prodotti assicurativi nel prisma dell'ordinamento europeo' *Rivista di diritto bancario*, I, 217-235 (2021); P. Marano andK. Noussia eds, *Insurance Distribution Directive. A legal Analysis. AIDA Europe Research Series on Insurance Law and Regulation* (Cham: Springer, 2021), III, available at https://doi.org/10.1007/978-3-030-52738-9_3 2020; G. Volpe Putzolu, 'La realizzazione del POG nell'ordinamento italiano'*Diritto dei mercati finanziari e assicurativi*, 163-167 (2020).

[12] This Regulation arises from the European Commission Delegated Regulation (EU) 2021/1253 of 21 April 2021 amending Delegated Regulation (EU) 2017/565 as regards the integration of sustainability factors, risks and preferences into certain organisational requirements and operating conditions for investment firms [2021] OJ L 277/1. The current version of the delegated Regulation is the fourth of a set of drafts issued by the EC between 2018 and 2021. For more details about the evolution of the content of these drafts and its implications see F.E. Mezzanotte, 'Accountability in EU Sustainable Finance: Linking the Client's Sustainability Preferences and the MiFID II Suitability Obligation' *Capital Markets Law Journal*, 16/4, 482-502 (2021); Id, 'The EU Policy on Sustainable Finance: A Discussion on the Design of ESG-Fit Suitability Requirements' 40 *Review of Banking & Financial Law*, 249-313 (2020); M. Siri and S. Zhu, *L'integrazione* n 1 above, *passim*; Id, *Will* n 1 above, *passim*. About the differences between MiFID II- based and IDD-based investor protection disciplines see V. Colaert, 'Integrating Sustainable Finance into the MiFID II and IDD Investor Protection Frameworks' KU Leuvene, Jan Rose Institute for company & financial law, Working paper no 2020/06, 1-20, *passim*, available at https://tinyurl.com/7a6mbtbn (last visited 31 December 2022) (now in D. Busch, G. Ferrarini and S. Grünewald eds, *Sustainable Finance in Europe. EBI Studies in Banking and Capital Markets Law* (Cham: Palgrave Macmillan, 2021), 455-475.

2017/593)[13] respectively.

III. The Objective Scope of Application of Investment-Services Regulation in the Context of ESG

It is first necessary to identify what the provision of investment services from the perspective of sustainable development refers to. It centres around the notion of 'sustainable financial investment', which both the SFD Regulation (Regulation (EU) 2019/2088) and the Taxonomy Regulation (Regulation (EU) 2020/852) contribute to defining.[14] Both are expressly referenced by the European Commission Regulation 2021/1253 and the Delegated Directive (EU) 2021/1269 of interest here.

The SFDR contains a general definition of 'sustainable investment' (Art 2(17)), whereby an investment is considered 'sustainable' when it concerns an economic activity that complies with the following three conditions: it contributes to an environmental or social objective; it does not significantly harm any of these objectives; and the companies carrying it out follow good governance practices (referred to as 'dark green' products). The SFDR does not limit, however, the scope of its sustainability transparency (disclosure) rules to the strict notion of sustainable investment; it also includes products with different levels and objectives of sustainability-related materiality. These range from those that, according to Art 9 (Transparency of sustainable investments in pre-contractual disclosures), pursue the objective of sustainable investments and do not cause significant harm, to those which, falling within the scope of Art 8 (Transparency of the promotion of environmental or social characteristics in pre-contractual disclosures), promote, among other things, environmental or social characteristics, or a combination of those characteristics, provided by companies that follow good governance practices, without becoming a benchmark of sustainable investment (so-called 'light green' products). In addition, the SFDR implicitly envisages in Art 6 (Transparency of the integration of sustainability risks) a third category of investment products developed by the financial industry, which is residual compared to the first two. This category includes the investments in products that consider the likely impacts of sustainability risks on the returns of the financial products, where relevant.

The Taxonomy Regulation contributes in part to defining the notion of sustainable investment (it only considers activities that comply with the

[13] The delegated Directive is published in [2021] OJ L 277/137.

[14] For an analysis of the SFD Regulation and the Taxonomy Regulation and their impact on the MiFID II-based disclosure obligations see, also for references M.E. Salerno, 'L'integrazione dei fattori di sostenibilità nelle regole di comportamento dell'intermediario finanziario: un ritorno al modello di distribuzione 'orientato al prodotto" *Diritto della banca e del mercato finanziario*, I, 53, 70-76 (2022).

environmental goal). It establishes a unified classification system for eco-sustainable activities (ie, those that pursue environmental objectives), leaving it to the Commission's delegated acts to quantify the adequate level of sustainability for economic activities so that they are in line with the various environmental sustainability objectives set out therein.[15] The Taxonomy Regulation (in its Art 9) establishes six environmental objectives: climate change mitigation, climate change adaption, the sustainable use and protection of water and marine resources, the transition to a circular economy, pollution prevention and control, and the protection and restoration of biodiversity and ecosystems, based on which an economic activity can be qualified as 'environmentally sustainable'. Once the environmental objectives have been defined, and in order to establish the degree of eco-sustainability of an investment, the Regulation (in its Art 3), considers an activity to be eco-sustainable if it 1) contributes substantially to the achievement of one or more of the environmental objectives, 2) does not significantly harm any of the environmental objectives, 3) is carried out in compliance with the minimum social safeguards,[16] and 4) complies with the technical screening criteria established by the European Commission. In other words, the qualification of an activity as eco-sustainable (and the corresponding investment as a 'sustainable investment') is based on the concept of a 'substantial' rather than marginal 'contribution' to the achievement of environmental objectives and the principle of 'not significantly harming' any of them, the general contents of which (specifying the technical assessment criteria) are laid down in the Regulation itself (in Art 10 et seq) and referred to the Commission's quantitative indicators.[17]

From the regulatory framework outlined above, we can draw the conclusion

[15] In performing this task the EC is supported by the International Platform on Sustainable Finance. It is a permanent forum for dialogue between policymakers, created by the European Union on 18 October 2019 to replace the Technical Expert Group on Sustainable Finance for updating the taxonomy.

[16] According to Art 18, the minimum safeguards shall be procedures implemented by an undertaking that is carrying out an economic activity to ensure the alignment with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, including the principles and rights set out in the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights.

[17] So far the EC has issued the Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council [2021] OJ L 442/1. The regulation establishes the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives. For more information about the next adoption of complementary Delegated acts of the EU Taxonomy Regulation covering activities not yet covered in the EU Taxonomy Climate Delegated Act see the European Commission Communication of 21 April 2021 'Taxonomy, Corporate Sustainability Reporting, Sustainability Preferences and Fiduciary Duties: Directing finance towards the European Green Deal' COM(2021)188 final.

that the EU taxonomy and the notion of sustainable investment in the SFD Regulation do not wholly coincide, as sustainable investment is potentially broader than the EU taxonomy in that it could, in the presence of the three conditions required (substantial contribution to sustainability, no harm to any sustainable objective, following good governance practices), include investments in activities not incorporated in the list. In addition, the SFDR acknowledges the existence of products financing economic activities that promote environmental or social characteristics and/or take into account the main negative impacts on sustainability, despite not actually making a 'substantial contribution' to the achievement of sustainability objectives, as well as the indicators (of qualification and quantification) of the principle of 'not causing significant harm' to sustainability factors contained in the Taxonomy Regulation and specified in the acts delegated to the Commission.

The European Commission also relies on these considerations when, in adding sustainability factors (as defined in the SFDR) to the provisions of the MiFID II package in question, it (implicitly) expresses itself on the objective delineation of ESG investment advice and portfolio management services by identifying eligible products as being 'sustainable investments in the financial sector'. This category includes investments in all financial instruments that have some impact in terms of sustainability, ie, they are used, at least to some extent, either for activities that comply with the taxonomy set out in Art 3 of the Taxonomy Regulation, or for sustainable investments under Art 2(17) of the SFDR, which also includes taxonomy-compliant assets. Otherwise, they may even be used in investments which, despite not falling into these categories because they do not comply with pre-established sustainability criteria, take into account the material negative externalities they bring to the environment (or society) in terms of the main adverse impacts they have on sustainability.

In other words, in order to apply the MiFID II Regulation on investment advice and portfolio management, the updated versions of Regulation (EU) 2017/565 (on the organisational requirements and rules of conduct of investment firms) and Delegated Directive (EU) 2017/593 (on the product governance obligations) include financial instruments/assets with different declared levels of sustainability and sustainability-related ambitions within the notion of sustainability-compliant financial investment. Starting from the maximum level, referring to taxonomy-compliant activities, which automatically integrate the notion of sustainable investment by distinguishing sustainable activities (and sustainable investments) according to the indicators pertaining to the parameters of the positive effects on 'sustainability factors' and 'not causing significant harm' to them, we reach the (so to speak) minimum level, associated with businesses not directly geared towards promoting sustainable objectives but which anyway take into account their main adverse impact on sustainability

factors (so as to mitigate them).[18]

IV. The Impact of Sustainability on Suitability Assessment and Related Disclosure Requirements

The amendments introducing sustainability factors[19] into the regulatory framework regarding suitability assessment outlined in Regulation (EU) 2017/565 affect all aspects of assessment: from the assessment parameters to the verification methods, to the related disclosure requirements.[20] More precisely, the reform introduced by the European Commission with Regulation (EU) 2021/1253 focuses on Art 54 of the 2017 Regulation entitled 'Suitability assessment and suitability reports'. Its provisions apply to both the investment advice and portfolio management services.

The intermediary's benchmarks for assessing suitability consist of the client profile on the one hand and the product profile, on the other.

As regards investor or potential investor profiling, the updated version of Regulation 2017/565 (Art 54(5)) requires the intermediary to obtain information, including information of a 'non-financial' nature, from the client. This information forms part of the set of data required to ascertain the client's goals in making the investment, which, in addition to the time horizon (the length of time for which the client wishes to hold the investment), risk-taking preferences, risk tolerance, and the purposes of the investment, will also include sustainability preferences.[21] In reality, the legislator's choice in this regard stems from the

[18] In this connection, the EC states 'The rules on sustainability preferences ensure consistency with the SFDR and the Taxonomy Regulation and considerably strengthen the effectiveness of sustainability-related disclosures under those Regulations. The Taxonomy Regulation requires disclosures of the degree to which investments are aligned with the EU Taxonomy'. See EC Explanatory Memorandum to the Regulation 2021/1253, 2 (https://tinyurl.com/yjj7ywdj (last visited 31 Deember 2022)).

[19] The EC Delegated Regulation (EU) 2021/1253 and the EC Delegated Directive (EU) 2017/593 recall the definition of 'sustainability factors' laid down by the SFDR (Art 2, point (24)), of Regulation (EU) 2019/2088). Sustainability factors mean 'environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters'. In addition, in specific connection with the organisation requirements, the Regulation refer to the SFDR (Art 2, point (22)), of Regulation (EU) 2019/2088 notion of 'sustainability risk', that means 'an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment'.

[20] For more details about MiFID II-based suitability regulation see, also for references, M.E. Salerno, 'La disciplina in materia di tutela dell'investitore nella MiFID II: dalla disclosure alla cura del cliente' *Diritto della banca e del mercato finanziario*, I, 437, 474-478 (2016).

[21] ESMA Final Report - Guidelines on certain aspects of the MiFID II suitability requirements (ESMA35-43869) (available at https://tinyurl.com/ycyh3p5v (last visited 31 Deember 2022)) already includes a similar provision (Annex IV, point 28) stating 'it would be a good practice for firms to consider non-financial elements when gathering information on the client's investment objectives, and (…) collect information on the client's preferences on environmental, social and governance factors'. However, being not binding, this rule was not implemented by intermediaries

process of evolution of the amending Regulation (EU) 2021/1253, which saw not a few hesitations, uncertainties, and indecisions on the part of the European Commission concerning whether (as we shall see in more detail shortly) to give greater weight to 'sustainability preferences' from the enforcement perspective by incorporating them in the client's investment objectives, or a lesser impact by generically equating them with the investor's other personal characteristics.[22]

The legislator then proceeded to define the term 'sustainability preferences' (inserting a new point in Art 2 of the 2017 Regulation), referring to the choice of a client or potential client as to whether or not, and to what extent, to include a financial instrument in his or her investment and regarding which he or she determines:

- a minimum proportion (minimum level) to be invested in environmentally sustainable investments within the meaning of the EU Taxonomy Regulation, and/or;

- a minimum proportion (the minimum level) to be invested in sustainable investments according to the SFDR and/or;

- the qualitative (type) or quantitative (degree) elements demonstrating the 'consideration' of principal adverse impacts on sustainability factors at the basis of investments that take that consideration into account.

Three elements relevant to our investigation may be derived from this definition. Firstly, the European legislator identifies three general categories of eligible financial instruments with regard to client sustainability preferences: those that fully or partially pursue sustainable investments in economic activities that, according to the Taxonomy Regulation, are environmentally sustainable; those that pursue sustainable investments in accordance with the SFDR; and those that take the main adverse effects on sustainability factors into account. Secondly, the regulation leaves it to the client to decide his or her 'sustainability preferences' regarding the quality (type) and quantity (degree) of sustainability of the eligible financial instruments that the intermediary may recommend or offer to the client. Lastly, the fact that the legislator incentivises investment in instruments that finance 'environmentally sustainable' businesses, pursue 'sustainable investments', or take into account and reduce significant adverse effects on sustainability factors caused by investments in financial instruments, does not translate into an obligation for clients or potential clients

in an adequate manner, as the EC underlines in its Action Plan on Sustainable Finance (7). On 29 January 2021, ESMA launched a public consultation to gather feedback on how to take into account sustainability factors and risks in the suitability assessment under MiFID II. See ESMA, 'Consultation Paper. Guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements', of 29 January 2021, 1, 16 and Q16 at 18 (available at https://tinyurl.com/5n8bzjad (last visited 31 Deember 2022)).

[22] Unlike the 2019 and 2020 versions of the Regulation, available at https://tinyurl.com/ytbt7buy, and at https://tinyurl.com/4nk4ye9f (last visited 31 Deember 2022). For the analysis of these changes see F.E. Mezzanotte, *Accountability* n 12 above,21-28.

to provide information on their interests in sustainability issues, unlike the requirement to provide other personal and financial information.

In practical terms, applying the provision in question will require the addition of new questions to the profiling questionnaire in order obtain fairly fine-grained information from clients on their preferences regarding sustainability issues.[23] The intermediary will have to take this information into account when deciding on the list of products to recommend as potentially suitable for a specific customer. Thus, according to the new para 9 of Art 54 of Regulation (EU) 2017/565, the intermediaries must implement appropriate policies and procedures demonstrating their ability to understand the nature and characteristics, including costs and risks, of the investment services and financial instruments they select for the client, including any sustainability factors. Advisors and portfolio managers must also assess - taking into account costs and complexity - whether any investment services or equivalent financial instruments match the client's profile. Sustainability performance indicators thus feature among the elements intermediaries have to take into account in the product-selection/offering process when formulating a suitable investment proposal/decision.

According to the updated version of Regulation (EU) 2017/565, once any sustainability factors have been added to the subjective (client preferences) and objective (characteristics of the financial instruments) parameters, the intermediary must also perform a suitability assessment on these. Specifically, new Art 54(2)(a) requires intermediaries to verify whether the specific financial instrument to be recommended or offered when providing investment advice or portfolio management services actually corresponds to their client's investment objectives, including risk tolerance and any sustainability preferences.

Assuming that the expressed sustainability preferences relate to financial instruments falling into the three eligible categories, an intermediary may not propose instruments that fall below the minimum sustainability proportion established by the client for sustainability-related investments in accordance with the taxonomy, sustainable investments under the SFDR, or investments that take into account the main adverse effects on sustainability factors. However, the Commission also points out that

> 'Given the rules on sustainability preferences, financial instruments with different levels of sustainability-related materiality will not need to be adapted. Those financial instruments will either benefit from the regime of sustainability preferences or will continue to be recommendable, but not as financial instruments meeting the sustainability preferences of the client or

[23]In relation to the granularity requirement, many scholars highlight that it this provision is disproportionate and difficult to be implemented, at least at the first stage. See M. Siri and S. Zhu, *Will* n 1 above, 6302-6303.

potential client, as defined in this Regulation'.[24]

This means that, if clients express sustainability preferences, intermediaries may only recommend, or trade on their behalf, eligible financial instruments compatible with the *minimum sustainability proportion* established by the client. Conversely, if an investor does not express any such preferences, an intermediary may offer or recommend a much broader range of financial products (with a wider variety of sustainability levels), provided that they meet the MiFID II suitability criteria. In other words, hypothetically eligible (under the sustainability profile) financial instruments that are not, however, in line with the level of sustainability indicated by the client may not be recommended as matching the individual's sustainability preferences, but they may be proposed on the basis the suitability assessment results, ie, if they are in line with the client's financial and personal characteristics. As part of this process, Regulation (EU) 2021/1253 (new Art 54(10)) allows investors to change their sustainability preferences (ie, the minimum level of sustainability they establish during the profiling phase), adapting them to the sustainability characteristics of the available products. The new para 10 states that if no instrument (among the hypothetically eligible ones) meets the client's (or potential client's) sustainability preferences, the latter may adapt his or her sustainability preferences so that further recommendations may be evaluated. In this case, investment firms must keep a record of the decision to change and the reasons for it, in order to prevent mis-selling and greenwashing.

It is evident that, through this last provision, the legislator has adopted a *product-oriented* distribution model for sustainable financial instruments (ie, adapting the client's profile to that of the product) in order to encourage this type of investment. Nevertheless, the evolution of investment services regulation has gradually abandoned this paradigm for the distribution by investment firms providing investment advice and portfolio management services of financial instruments per se, preferring a *client-oriented' model* (ie, adapting the product profile to that of the client), which offers greater protection for the investor.

The measures contained in the 2021 Regulation reflect the legislator's conception of a dual paradigm regarding the sustainable or non-sustainable nature of the financial instruments to be recommended or offered. In order to curb improper sales practices, despite the inclusion of sustainability preferences feature in the investor's investment objectives, the 2021 Regulation clearly distinguishes between the client's financial and sustainability profiles, laying down in relation to the former more stringent regulation of the intermediary's conduct. With this in mind, and in line with the principle of acting in the best interests of the client, the Commission underlines in its explanatory memorandum to the provision in question (see above para I) that sustainability factors should

[24] Se EC Explanatory Memorandum to the Regulation 2021/1253, 4.

not be considered of greater weight than the client's financial investment objective. It also states that sustainability preferences should only be considered during the suitability assessment process after the client's (financial) investment objective has been taken into account, thus introducing a system of two-pronged and sequential suitability assessment. Similarly, the last para of recital 5 of the Regulation reads:

> 'In order to avoid such [mis-selling] practices or misrepresentations, investment firms providing investment advice should first assess a client's or potential client's other investment objectives, time horizon and individual circumstances, before asking for his or her potential sustainability preferences'.

Among the measures the Commission adopted to ensure the necessary differentiation, in terms of weight, between the investor's financial and sustainability profiles is the updated rule on the consequences of product unsuitability. If an instrument is deemed unsuited to the client's (financial and sustainability) profiles (with a result of unsuitability), it may be neither proposed nor negotiated. If the instrument results incompatible with the client's sustainability preferences, the unsuitability (which must be explained and documented) will block the proposal or transaction presented in accordance with the investor's sustainability profile, but this will not prevent the intermediary from making the proposal or transaction if the characteristics of the instrument are appropriate to the client's financial profile. *Mutatis mutandis,* this means that, with regard to the financial instruments hypothetically eligible when sustainability preferences are expressed, the law allows the intermediary to recommend or trade them insofar as the instrument in question is suited to the client's financial profile even though it is unsuited to his or her sustainability profile (since it does not meet the level of sustainability chosen by the client during the profiling phase). Instead, the opposite is unlawful: Regulation does not allow an investment proposal if the financial instrument is suited to the client's sustainability preferences but not to his or her financial profile. Essentially, a financial instrument that is hypothetically permissible but does not comply with an investor's sustainability preferences may still be recommended insofar as it is suited to his or her financial profile but not because it meets their preferences, unless the client adjusts, as is their right, their sustainability preferences to be compatible with the degree of sustainability of the proposed instrument.

The more stringent regulation regarding the consequences linked to the suitability assessment for the client's financial profile is also confirmed by the fact that the rule contained in Art 54(8) of the 2017 Regulation is unchanged insofar as it does not extend to information regarding the client's sustainability preferences. According to this rule, when an intermediary offers advice, he or she must not propose a transaction in the absence of sufficient information from the client such as to prevent financial profiling (ie, necessary information

regarding knowledge and experience with investments in the type of product or service in question and the client's financial situation, including the ability to bear losses, as well as their investment objectives, including risk tolerance). Instead, in the event of a lack of, or insufficient, information from the client making it impossible to draw up a sustainability profile, the law permits the intermediary to propose financial instruments in general – including those that are hypothetically permissible from the point of view of sustainability – if the intermediary has sufficient information to determine the investors' financial profile, and, on the basis of the suitability assessment, recommended financial instruments are appropriate to this latter aspect.

In addition, pursuing its regulatory objective of finance supporting sustainability, Regulation (EU) 2021/1253, unlike previous proposals, seeks to strengthen the enforcement capacity of the additional regulations concerning sustainability by opting, in the context of the rules on suitability assessment, to equate sustainability preferences with client investment objectives rather than other personal characteristics (as in the 2019 and 2020 versions).[25] This choice brings with it two implications. The first is that, if a client or potential client expresses sustainability preferences, the law requires intermediaries to take them into careful account when selecting the financial instruments to recommend or offer and to conciliate them with the client's financial needs. The second is that if the intermediary fails to take the client's declared sustainability preferences into account during the suitability assessment, and given the relative equivalence to the investor's investment objectives legally imposed as a parameter for assessing suitability, he or she may face liability for breach of the rules of conduct, and specifically for breach of the suitability requirements under Art 25(2) of MIFID II, at least when taking into account sustainability preferences does not compromise compliance with the client's financial objectives.[26]

Despite the lack of an express provision by the legislator, it goes without saying that sustainability preferences should also be taken into account during periodic suitability assessments. This will occur when these preferences have served as a parameter for initial suitability assessment, or else, if the client's sustainability profile changes, due, for example, to subsequent awareness of sustainability issues or, on the contrary, a lack of any such interest. Sustainability preferences must also be taken into account if the product's sustainability characteristics change, due, for example, to an increase in the investment's sustainability risk.

Lastly, the revised text of Art 52 of Regulation (EU) 2017/565 requires (with regard, of course, to the distribution of eligible financial instruments deemed

[25] For a critical analysis of the 2020 version of the Regulation, where the suitability assessment in relation to the sustainability preferences was treated as those connected to other personal characteristics, see V. Colaert, n 12 above, 9-10.

[26] See F.E. Mezzanotte, *Accountability* n 12 above, 32.

suited both to the client's financial profile and sustainability preferences) intermediaries providing the investment advice to supplement the statement on suitability that must be provided before concluding the proposed transaction, by including an explanation of how the recommendation meets the client's financial and sustainability profiles equally.

Concerning periodic suitability reporting, since Regulation (EU) 2017/565 only requires reports subsequent to the initial conclusion of the investment contract to record the changes that have occurred to the services or instruments concerned and/or the client's circumstances, and they do not necessarily have to repeat all the details recorded in the initial statement, it is merely necessary to state the reasons why the investment continues to be aligned to the client's sustainability preferences only in the event of changes to the client's sustainability profile or the sustainability characteristics of the product.

V. The Insertion of Sustainability Factors in Product Governance Regulation

The EU legislator's additional intervention on the investor protection regulation set forth in the Sustainable Finance Package of 21 April 2021 concerns the effects of sustainability issues on the MiFID II-based product governance regulation, by the amendments to Level 2 MiFID II Directive 2017/593 brought by Delegated Directive (EU) 2021/1269 of 21 April 2021.[27] Through this intervention, sustainability factors come to affect the product's entire life cycle, impinging on the definition of the target market, affecting the characteristics of the products and the type of client or potential clients, and therefore the manufacturers and distributors of financial instruments, in reshaping their production and distribution processes.

The EU drive to create *sustainable* product governance processes takes the form of interventions to modify the requirements of manufacturers and distributors in the three phases of a finance product lifecycle, ie, pre-distribution, marketing and distribution, and post-distribution.

The reform, which affects Arts 9 and 10 of the Directive (EU) 2017/565,

[27] The legal framework on product governance is composed of: Art 16 of MiFID II; Arts 9-10 of Directive (EU) 2017/593; ESMA Guidelines on MiFID II product governance requirements of 28 May 2018 (ESMA35-43-869) available at https://tinyurl.com/2entf93r (last visited 31 Deember 2022)). On this subject, see, among the latest, also for references: V. Colaert, 'Product Governance: Paternalism Outsourced to Financial Institution?'KU Leuvene, Jan Rose Institute for company & financial law, Working paper no 2019/2, 1-21, (accepted for publication in the European Business Law Review), available at https://ssrn.com/abstract=3455413 (last visited 31 Deember 2022); E. Rimini, n 11 above, 438-444; A. Perrone, 'Oltre la trasparenza, Product Governance e Product Intervention e le "nuove" regole di comportamento', in E. Ginevra ed, *Efficienza del mercato e nuova intermediazione* (Torino: Giappichelli, 2019), 75-84; M.E. Salerno, *La tutela dell'investitore* n 11 above, 614.

requires manufacturers and distributors of financial instruments to provide, in relation to each financial instrument, a fine-grained description[28] of the positive target market (ie, the set of potential clients or groups of clients targeted by the instrument in question), both in the abstract and actual, taking elements of sustainability into account. Thus, it is necessary to specify, with regard to each financial instrument, the type(s) of client whose financial and sustainability profile (ie needs, financial characteristics and investment objectives, including any sustainability-related objectives) is compatible with its characteristics. To this end, the Community legislator adds the sustainability factors that characterise it to the product's risk-return and suitability characteristics. These are factors which, together with the product's other financial characteristics, the manufacturer must consider when designing and implementing the product in order to assess its compatibility with the financial and sustainability needs of the target market (potential clients). During the pre-distribution phase, the product's sustainability factors are included in the information flow regarding financial instruments from the manufacturer to the distributor; they are also part of the process in which the distributor defines the boundary limits of the real positive target market. Lastly, in the post-distribution phase, both manufacturers and distributors are required to periodically review the financial instruments produced and distributed in order to ascertain that they continue to meet clients' needs and objectives, including those of sustainability.

An examination of the changes imposed by adding sustainability factors to the sphere of product governance shows that the rules underlying the definition of the potential and real negative target market (ie, the categories of clients to whom the product cannot be distributed because their needs, financial characteristics, and investment objectives are not ordinarily and hypothetically compatible with the characteristics of the product) remain unaffected. This is the result of a reasoned choice of the EU legislator in line with the EU product-oriented distribution model, which, in order to ensure that hypothetically eligible financial instruments (compliant with the taxonomy, or falling within the category of sustainable investments according to the SFD Regulation, or simply with no negative impact on the environment and social issues) remain easily available to clients who show preferences, ie levels of sustainability different from those of the instrument in question, has deemed unnecessary and inappropriate – in the case of sustainable instruments/investments – to identify the set of clients or categories of clients to whom the instruments/investments may not be proposed because of incompatible needs, characteristics, and sustainability objectives.[29]

VI. Concluding Remarks

[28] For many doubts regarding this provision, see V. Colaert, *Integrating* n 12 above, 15-16.
[29] See Recital 7 of the Delegated Directive(EU) 2021/1269.

An examination of the rules shows a clear drive on the part of the EU legislator to involve finance in sustainable development. As far as the legislation protecting those investing in financial instruments is concerned, this goal is reflected in the inclusion of sustainability preferences in the client's investment objectives and the adoption of a product-oriented model for distributing products financing sustainable economic activities. However, this is a model that the legislator has gradually and ever-more insistently sought to curb in the distribution of financial instruments in general, requiring intermediaries to adopt a client-oriented model to better protect the investor.

From the provisions examined, it is evident that the product-oriented model is to be favoured when the product has elements of sustainability. As for the norms under pinning the suitability assessment, we have seen that, in comparison with the financial assessment parameters, the inclusion of sustainability as an assessment parameter is regulated less severely. This is true of the legal consequences (no block) when a (sustainable) product does not comply with the client's sustainability preferences and, above all, as the client is free to adjust his or her sustainability preferences so that investment proposals that otherwise would not comply with the type or 'minimum proportion' of sustainability chosen may become available.

Concerning the regulatory framework on product governance, we have highlighted that, with reference to sustainable products, the Community legislator did not deem it appropriate to require manufacturer and distributor intermediaries to identify the negative target market. Consequently, and without prejudice to compliance with the MiFID II financial suitability criteria, there is nothing to prevent them also being distributed to clients who have not expressed sustainability preferences or have expressed different suitability preferences.

Without doubt, this choice is the result of commendable considerations, even though its application will have to be carefully tested and monitored, since it is just as likely that it might produce risky situations for investors by offering intermediaries new opportunities to steer the latter's sustainability preferences to their own advantage. The EU legislator is certainly aware of this and has repeatedly stressed the supremacy of what constitutes the bulwark of the regulations protecting the client, namely the requirement that intermediaries must always act in the (economic) best interest of the client, and that they should consider the investor's financial investment objectives before their sustainability objectives when assessing suitability. However, this does not detract from the fact that integrating sustainability issues into the framework of interest here may create circumstances in which the client's economic and sustainability interests are incompatible, as investing in eligible financial instruments when sustainability preferences have been expressed may not actually serve the client's best interest, which the intermediary must always pursue. There is also no doubt that this integration may give rise to a risk of greenwashing in its

multiple forms of misrepresentation, mislabelling, misinformation, mis-selling, and/or mis-pricing phenomena.[30] In investment services, risks arise with regard to how conduct of business rules, such as suitability, product governance and information requirements, should be applied when selling ESG products. Suffice it to think of cases where the intermediary induces the client to change his or her sustainability preferences in order to sell financial instruments aimed at financing a company with a sustainable business and with which the intermediary has economic or legal ties, even though this would not be in the client's best interest. Consequently, there will be increasingly frequent legal disputes between clients and intermediaries, in which it will be more difficult for the investor to prove the damage caused by the counterparty's conduct;[31] conduct which, under the reform examined, would be formally lawful.

As things stand, we must ask ourselves: are we sure that the legislator has found the right balance between investor protection and sustainability incentives? Are we confident that the legislator's recommendations that the best possible interest of the client must always be the priority are sufficient to contain the aforementioned risks for the investor and at the same time provide the right input for sustainable finance in the investment services sector as well?

Certainly, the supervisory convergence measures to address greenwashing risks to financial investors, envisaged by the ESMA in the Sustainable Finance Roadmap 2022-2024,[32] can make an important contribution to the issue of reconciling potential conflicting (public and private) interests.

We can only wait for the regulatory revision in question to actually be applied and assess the results for the answers to our uncertainties.

[30] About the definition of the term 'greenwashing', see ESMA, Sustainable Finance Roadmap 2022-2024, 8, available at https://tinyurl.com/3crmcx6j (last visited 31 Deember 2022)). In this connection, ESMA notes (12) that 'Investor education also plays a role in making sure that product offerings related to ESG investing can be properly understood, for example in relation to the sustainability impact of different investment strategies put in place to integrate ESG factors'.

[31] About the difficulty for investors to prove the breach of conduct of business regulation by financial intermediaries, see: F. Della Negra, *MiFID II and Private Law. Enforcing EU Conduct of Business Rules* (Oxford-Chicago: Hart Publishing, 2019); Id, 'The civil effects of MiFID II between private law and regulation', in R. D'Ambrosio and S. Montemaggi eds, *Private and public enforcement of EU investor protection regulation*,115-143 (2020); O.O. Cherednychenko, 'Two Sides of the Same Coin: EU Financial Regulation and Private Law' 22 *European Business Organization Law Review*, 147-172 (2021); M. Rescigno, 'La responsabilità civile dei soggetti abilitati e la tutela speciale degli investitori', in M. Cera e G. Presti eds, *Il Testo Unico finanziario. Prodotti e intermediari* (Bologna: Zanichelli, 2020), 513-560.

[32] See, ESMA Sustainable Finance Roadmap 2022-2024, n 30 above, 8 and 27-28.

Hard Cases

'Fail Better' or 'Fail Worse Again'? Reflections on the Holy See, Access to Justice, and *JC* v *Belgium*

John R. Morss*

Abstract

In this paper the findings of the European Court of Human Rights in *JC* v *Belgium* are examined against the background of foreign state immunity for the Holy See. The Strasbourg court found that no breach of complainants' right of access to justice within the Belgian courts had occurred as a consequence of foreign state immunity having been granted in Ghent. Here it is argued that even if foreign state immunity may properly be granted to the Holy See by national courts, in such cases the well recognised territorial tort exception to such immunity provides for process within the forum to proceed to the merits.

I. Introduction

In his fantasy of wish-fulfillment *Hadrian the VII* first published in 1904 the eccentric and impecunious English aesthete Frederick Rolfe explored the geopolitical possibilities of the throne of St Peter. With somewhat more attention to detail than mediaeval popes with their freewheeling Iberian allocations of *terra incognita*, Rolfe's Hadrian carries out 'a re-arrangement of various spheres of (global) influence' preparatory to divesting the papacy of its accumulated wealth.[1] In Hadrian's manifesto, Italy under its Savoyard monarchy was identified as one of only five nations worthy of true independence, along with 'England' (sic), the USA, Japan and Germany. San Marino, confirmed as a republic, was to continue as one of a second class of sovereign states. The King of Italy, Victor Emmanuel III, moreover was to become one of two Emperors in a new Roman Empire, namely the Southern Emperor, empowered to form a confederation out of the European lands south of the Pyrenees, the Alps and the Danube, and including Greece, Albania and Montenegro. In this way the King of Italy would take his place alongside the King of Prussia as dual sovereigns of the whole of Europe barring Britain which itself acquired Africa, Oceania and Asia (except for Siberia allocated to Japan). 'Thus the Supreme Arbitrator provided the human

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[1] F.W. Rolfe, *Hadrian the VII* (Ware: Wordsworth, 1993), 326.

race with scope and opportunity for energy'.[2]

While Rolfe's Pope Hadrian is a creature of fantasy the role of pope as arbitrator of the aspirations of secular sovereigns is of course not. The capacity of the papacy over the centuries to control or even strongly influence the conduct of Christian (and other) Princes has waxed and waned and was already a capacity to plead rather than to command at the time of the Crusades.[3] Yet the state-like entity ruled by the papacy, an entity whose geographical extent has also waxed and waned over the centuries, has enjoyed remarkable longevity as an international actor. In contemporary times it is the global reach of the religious organisation headquartered at the Vatican that most often manifests this papal influence. The Vatican is situated in a zone that since 1929 has been treated by the Kingdom of Italy (and its republican successors) as distinct from Italy as such and is referred to in that context as Vatican City. Concerns expressed by individuals relating to the effects of global papal and otherwise Catholic influence on their lives, frequently take the form of the naming of the Holy See as a defendant in civil litigation initiated within the legal system (national forum) of the complainant. Occasionally decisions taken or omitted to be taken by named officials within the Vatican itself, are called into question. A procedural hurdle identified by many courts across the world, responds to the claim of an immunity from jurisdiction raised by defendants or declared by the court *proprio motu*, based on some kind of sovereign independence and/or statehood.

This paper reflects on the causes and consequences of a state or quasi-state status for the Holy See or for the Vatican City (whether or not those institutions can meaningfully be separated), with especial focus on the associated protections claimed by those institutions against judicial processes taking place in bounded jurisdictions. For the practice of courts around the world, especially in the USA and Europe, demonstrates the widespread acceptance of a foreign sovereignty claim based on sovereignty or statehood. Against this background the 2021 decision of the European Court of Human Rights (ECHR) in *JC et Autres* v *Belgique* (*JC*) will be examined below.[4] The facts of *JC* have been reported and the reasoning analysed by well-informed commentators.[5] It will be treated in the below as a paradigm case of the deference of the judiciary worldwide to the status of a nebulous but puissant entity that fully justifies the term so often applied to it by international lawyers, *sui generis*.[6] From the perspective of

[2] ibid 328.

[3] P. Wilson, The Holy Roman Empire: A Thousand Years of Europe's History (London: Penguin, 2016), 66.

[4] Eur. Court H.R., *JC et Autres* v *Belgique,* Judgment of 12 October 2021, available at https://tinyurl.com/mvbkvk3p (last visited 31 December 2022).

[5] C. Ryngaert, 'The Immunity of the Holy See in Sexual Abuse Cases,'available at https://tinyurl.com/4xp7hsp6 (last visited 31 December 2022); N. Zambrana-Tévar, 'The International Responsibility of the Holy See for Human Rights Violations' 13 *Religions*, 520 (2022).

[6] J. Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 9th ed, 2019), 114.

justice for the complainants, that is to say juridical scrutiny of their primary complaints, is *JC* two steps forward if one back – 'failing better' – or one step forward and two back – 'failing worse again'?[7]

The immediate finding of the Strasbourg bench in *JC* was that the Belgian Courts' reliance on a foreign state immunity, did not disproportionately limit applicants' right of access to justice under the European Convention on Human Rights (EConvHR). The question of denial of access to justice as a complaint against one's state of citizenship – as provided under EConvHR or other instruments – is itself a contested topic. Recourse to the claim of denial of access to justice in one's home state (the forum state) has been challenged both as strategy and in terms of principle. Thus, long before *JC*, it was cogently argued that as a claim under the international law of human rights it runs the risk of constituting something of a distraction in international legal terms. This is despite the understood frustration of litigants looking to in effect or obliquely appeal their national court's decision to foreclose process.[8] But in any event O'Keefe's argument is a more general one since the grounds for the argument by complainants, as here at Strasbourg, that is to say for the granting of state immunity in the forum state to be seen as a disproportionate restriction of right of access to justice, are in essence the same as the grounds for state immunity to be seen as inappropriate within the first instance forum itself.[9] Indeed it can be said that immunity for a foreign entity in the courts of the forum, will always run counter to the interests of native legal persons (corporate or natural) in access to justice; this is the salient clash of norms.[10]

In other words for disproportionate denial of access to justice to be retrospectively identified would seem to call in effect for a substantive reconsideration of the statehood based immunity in relation to those entities. Some aspects of that more general argument will therefore be considered below. Importantly the examples on which O'Keefe focused his attention are cases in which allegations made by the nationals of a forum court, concern ill-treatment at the hands of state officials in a foreign country.[11] Those cases may well be wrongly strategized in the sense urged by O'Keefe, for such actions might distract from the pressing for direct responsibility of the foreign state in its own legal system or, convergently, the pressing for more assertive representation of the complainant by their own state as such, against the foreign state, that is to say raising the matter up to the level of an inter-state dispute.

[7] The apposite Beckettian terminology is due to R. O'Keefe, 'State Immunity and Human Rights: Heads and Walls, Hearts and Minds' 44 *Vanderbilt Journal of Transnational Law*, 999, 1002 (2011).

[8] ibid 1007.

[9] ibid 1040.

[10] P. Rossi, International Law Immunities and Employment Claims: A Critical Appraisal (Oxford: Hart, 2021), 14.

[11] R. O'Keefe, n 7 above, 1039.

The harms alleged in *JC* and in comparable cases elsewhere, however, do not refer to such 'overseas' harms but to harms inflicted within or at least having their harmful effects within the forum state (Belgium in this case). The international dimension and the question of a statehood-based immunity, here arise from the asserted culpability of the worldwide organisation of the Roman Catholic Church especially as comprehended under the term the Holy See. There is considerable merit in O'Keefe's (extrapolated) recommendation that Belgium (in this case) might better take up the complaint on behalf of its nationals rather than leaving the action to them – with the purpose of pressing the Holy See to get its own house in order and perhaps to compensate those harmed by its decisions. However the force of O'Keefe's argument that any litigation at a national level would better take place in the overseas forum of the occurrence of the (alleged) harm, rather than the forum of the nationality of complainants, now operates in the other direction. Harm occurring in Belgium points precisely to judicial enquiry within Belgium as the default forum. This would take place under applicable Belgian law although it is of course important to observe that international law in some form or forms, might well have a role to play conditional on forum constitutional arrangements.

Analysis of this important decision is deferred until some preliminary considerations have been set out. For the decisions made at Ghent and endorsed at Strasbourg, was that the Holy See may not be required to defend its conduct having effects within Belgium in the Belgian courts, because an applicable statehood-derived immunity against suit cloaks the Holy See. When analysis proceeds to the details and the reasoning of *JC*, it will be argued that the Ghent courts were incorrect in their assertion or acceptance of this doctrine so that the complainants at Strasbourg should have been validated in their claim that access to justice under EConvHR had been denied them by their home state. The claim to immunity should have been more fully tested at Ghent, from first principles, as a preliminary step in seizing the dispute. It might be suggested that the immunities routinely granted by national courts to defendant entities or persons with sufficiently close connections to a foreign, sovereign state, however well-founded in the case of genuine states, should be withdrawn from entities that can be shown to fall short of that criterion. Forum courts could then go ahead and scrutinise evidence.

Reasons for denying the protections of immunity from suit to the Holy See are reviewed below. Doubtless, to assert that the wholesale sceptical argument rehearsed above should prevail with respect to the Holy See is to court scholarly resistance and even invective. But in any event an important alternative to what might be thought of as such a bold, high road radical reform, if such would be a denial of immunity based on general principles, would be the closer examination of the exceptions to immunity. If on the facts alleged or other grounds a statehood based immunity is on its face justified, or is maintained through juridical

inertia, then a more pragmatic and likely more realistic low road may beckon. One reason for examining *JC* is its contribution to the jurisprudence of recognized exceptions to statehood based immunities from forum jurisdiction. In particular the so-called territorial tort exception is raised. And here it should be observed that exceptions to immunity are at the same time reaffirmations of forum jurisdiction.[12] The low road and the high road may join up further along.

II. A Kind of State or A State of Mind? The Papacy, the Vatican and a Contested Statehood *Sui Generis*

Much academic ink has been spilled over the contested question of the international legal personhood of the Holy See or Vatican 'City State.' Thus for Cismas, an holistic combination or 'construct' of the Vatican City and Holy See amounts since 1929, to an entity with 'the resemblance to statehood'.[13] That is to say the Lateran Accords of 1929 by which the Kingdom of Italy under Mussolini reached a cohabitation agreement with the papacy, including the definition of an independent Vatican City located within Rome, enable the Holy See as a non-territorial administrative mechanism to achieve substantive international legal status as an independent actor. For Morss, the interconnectedness of the various institutions points to the opposite conclusion with respect to statehood.[14] For Tzouvala, whose focus is in particular on worldwide obligations under the UN Convention on the Rights of the Child (UNCROC), Vatican City and the Holy See are instead distinct legal persons on the international stage. From this perspective the former, as a territorial entity, is a state.[15] The Holy See is itself not a state and is of a dual nature, being both the government of that state, and at the same time, a non-territorial international legal person which 'represent(s) the Catholic Church around the globe'.[16] It is the Holy See that is the named

[12] P. Rossi, n 10 above, 22; Id, 'Italian Courts and the Evolution of the Law of State Immunity: A Reassessment of Judgment No 238/2014' 94 *Questions of International Law*, 41, 45 (2022); for a thorough analysis of the legal accountability of the Roman Catholic Church for clerical abuse of children, with especial reference to the USA and Australia, see M. Edelman, 'Judging the Church: Legal Systems and Accountability for Clerical Sexual Abuse of Children', available at https://tinyurl.com/4vnyu858 (last visited 31 December 2022).

[13] I. Cismas, *Religious Actors and International Law* (Oxford: Oxford University Press, 2014), 155.

[14] J.R. Morss, 'The International Legal Status of the Vatican/Holy See Complex' 26 *European Journal of International Law*, 927, 930 (2015).

[15] N. Tzouvala, 'The Holy See and Children's Rights: International Human Rights Law and Its Ghosts' 84 *Nordic Journal of International Law*, 59, 66 (2015).

[16] ibid 67; as Tzouvala observes, commitment to the purposes of UNCROC as understood by the Holy See overwhelmingly refers to the worldwide practices of the Catholic Church, rather than conduct within the environs of Vatican City itself. Correspondingly, the Holy See's reservations to UNCROC concerned family life and education: W. Worster, 'The Human Rights Obligations of the Holy See under the Convention on the Rights of the Child' 31 *Duke Journal of Comparative& International Law*, 351, 391 (2021). Also see K. Ważyńska-Finck

party to UNCROC. To the extent there is substance to the distinction between a (territorial) Vatican City and a (non-territorial but globally effective) Holy See, it would thus be logical to conclude that any obligations flowing from UNCROC would correspondingly accrue to the Holy See. Broadly agreeing with Tzouvala, for Ryngaert the Holy See 'is not to be characterized as a state (…) (however) it can act internationally without a territorial base'.[17] More recently Ryngaert has reiterated that 'the Vatican' is a state but the Holy See is not.[18]

For Worster, in some ways broadly concurring with Tzouvala and with Ryngaert, it is essential to differentiate the Holy See from the Vatican City as international legal actors. But Worster goes further. While for Worster the Vatican City controls territory and is a state, '(t)he Holy See is the sovereign of (that) state' and is also 'a unique non-state actor in international law'.[19] Importantly, while for Worster Vatican City is a state, the pope is thus not its Head: the pope is instead 'an organ of the Holy See'.[20] For Worster the Holy See is 'an entity that includes the office of the Pope, the College of the Cardinals and other bodies as its organs or offices'.[21] It 'has no territory' so therefore cannot be a state.[22] Worster's concern here, somewhat like that of Tzouvala, is to define the jurisdictional domain of the Holy See as party to UNCROC, and in this context he proposes that a de facto 'extraterritorial' jurisdiction (giving rise to obligations under UNCROC) can be discerned for the Holy See. Evaluation of this project, designed to shed light on global obligations for the Holy See under UNCROC, leads Worster to somewhat expand the usual understanding of extraterritorial jurisdiction and in any case raises issues outside the scope of this article. In any event in highlighting the reluctance of the Holy See to accept obligations under a treaty to which it is apparently a party, Worster is echoing and corroborating the conclusions of Cismas and of Tzouvala.

Converging with Worster on this point, Nicolás Zambrana-Tévar defines the Holy See as an international actor distinct from Vatican City and possessing some kind of sovereignty. While it is not a state there is a basis for the grant of sovereign independence to the Holy See as such in its worldwide spiritual mission which requires such status.[23] Zambrana-Tévar's argument is more of a

and F. Finck, 'The Holy See, Human Rights Obligations and the Question of Jurisdiction,' available at https://tinyurl.com/cfrjwnnx (last visited 31 December 2022).

[17] C. Ryngaert, 'The Legal Status of the Holy See' 3 *Göttingen Journal of International Law*, 829, 859 (2011).

[18] C. Ryngaert, 'The Immunity of the Holy See' n 5 above.

[19] W. Worster, n 16 above, 351.

[20] ibid 377; while beyond the scope of this paper, Worster's argument clearly casts doubt on any claim to Head of State immunity for the pontiff under either Customary International Law or the statutes of a forum state.

[21] ibid 357.

[22] ibid

[23] N. Zambrana-Tévar, 'Reassessing the Immunity and Accountability of the Holy See in Clergy Sex Abuse Litigation' 62 *Journal of Church and State*, 26, 35 (2020).

teleological or 'top-down' argument than Worster's, and thus it is a position closer to that of the Holy See itself in its official statements that for Zambrana-Tévar '(t)he existence of the VCS merely guarantees the independence of the Holy See vis à vis other states'.[24] From that perspective the Holy See is the more important, persisting or central international actor, with Vatican City a token concession to the narrow, Vattelian worldview of secular sovereigns. Indeed, '(t)he Church makes use of the juridical means necessary and useful for carrying out her mission'.[25] Consistent with this evaluation of Vatican City as secondary, from the perspective of the mission of the Roman Catholic Church, Zambrana-Tévar suggests that the Holy See is 'much more of a sovereign and a subject of international law than VCS'.[26] The inferiority in status of Vatican City to the extent it can be differentiated from the Holy See, should be noted. This inferiority is of course in a sense manifest in the history of Vatican City: to the extent the Holy See is separate from Vatican City, the former long preceded the existence of the latter.

In international law it is well established that relationships between sovereigns operate as between those sovereigns, now understood as states, not as between governments. Governments come and go in a qualitatively different manner from the existence of states. Government is always inferior to statehood. It will already be apparent then that there is something strange in treating an entity which is in some respects comparable to a government – the Holy See – as of higher international status than the entity that it may be said to (among other functions), govern. This problem is not clarified, it is in fact made more puzzling, by arguments that (as for Zambrana-Tévar and for Tzouvala), the Holy See has dual capacities in respect both of governance of Vatican City and worldwide authority over the Catholic Church.[27]

To sum up this argument so far: it can be said with confidence that to the extent that (for the purposes of national legal systems) the Holy See is distinct from Vatican City, it may possess some poorly defined international legal personality but it cannot be said to possess statehood.[28] It would therefore have no claim to statehood-based immunities in national courts. From this standpoint, as noted the Holy See is superior in status to Vatican City; the latter serves the larger mission of the former. But the governance and administrative role of the Holy See (again presuming distinctiveness) vis à vis Vatican City points to a status

[24] ibid 34.

[25] Compendium of the Social Doctrine of the Church, Pontifical Council for Justice and Peace (fn 444), available at https://tinyurl.com/2p8uvnwz (last visited 31 December 2022).

[26] N. Zambrana-Tévar, 'Reassessing' n 23 above, 35.

[27] ibid 35.

[28] This can be said in spite of the remarkable extent to which entities in possession of myriad characteristics, have from time to time been recognised as states for particular purposes; the field of ad hoc statehood is admirably documented by W. Worster, 'Functional Statehood in Contemporary International Law' 46 *Brooklyn Journal of International Law*,39 (2020); Id, 'Territorial Status Triggering a Functional Approach to Statehood' 8 *Penn State Journal of Law & International Affairs*, 118 (2020).

under international law inferior to the status of the latter. (Vatican City might at any time experience a coup at the hands of disgruntled gardeners.) From the perspective of international law, including international law as assimilated into national legal systems, a government as such cannot seek foreign state immunity. Moreover the subjugation of Vatican City to the Holy See would seem to negate the independence that is connoted by sovereignty.

Perhaps it is incorrect to treat the Holy See and Vatican City as distinct. As foreshadowed above, it has been argued that the pursuit of distinctiveness between the Holy See and Vatican City is a red herring from the perspective of international law.[29] For its purposes there is a conglomerate or a holistic effect of Holy See, Vatican City, the curia, papacy and so on. These purposes include the international law manifested or generated in national court decisions on state immunities. For the perspective of international law gratefully evades questions about internal arrangements of entities, the relationships of governmental to constitutional or identitarian parameters and so on. Seen from the outside or from above in that dualistic sense, the Holy See, the Vatican City and the institutional leadership of the Roman Catholic Church are in many ways interchangeable.[30]

From this holistic point of view, the best evidence of a sovereign or of a statehood character is to be found in two ways: the party-hood to various international agreements, and the sending and reception of representatives as a form of diplomacy. Yet as to the first, actors entitled neither to statehood nor to sovereign independence may be parties to some varieties of international agreements. Their international personality is thus severely attenuated and might be best thought of as an aggregate of ad hoc bilateral arrangements. Such a fragmented and distributed personality would seem very far from the aspirations of the Catholic Church; yet it seems that humility is called for in this respect.[31] As to the second, the role of what corresponds to diplomacy among states, which manifests a reciprocal and equal interchange between sovereigns, differs markedly from the mission and the function both of the (outgoing) papal nuncio and of the (incoming) foreign state ambassador to the Holy See.[32] The

[29] J.R. Morss, n 14 above.

[30] Both the Holy See and the Vatican City State appear as named parties to various international agreements with no clear pattern to the choice. Thus there seems little weight to a supposed distinction to the effect that the Holy See is party to (non-territorial) human rights agreements and Vatican (City) is party to territorially bound or technical agreements: N. Tzouvala, n 15 above, 71. There is inconsistency bordering on absurdity for both 'Vatican City' and 'the Holy See' to have been at different times named as party to the World Intellectual Property Organization; and for those entities to be thought of as distinct internationally when the Vatican is party to the International Wheat Agreement but the Holy See is party to the International Grains Convention. 'In some cases, the Holy See entered into a treaty as one entity and ratified an amendment to the treaty as the other': W. Worster, 'The Human Rights Obligations' n 16 above, 383.

[31] 'Probably the personality of political and religious institutions of this type can only be relative to those states prepared to enter into relations with them on the international plane': J. Crawford, n 6 above, 114.

[32] W. Worster, 'The Human Rights Obligations' n 16 above, 364, 410.

asymmetry between the sending out and the receiving of representatives, in the case of the Holy See, would itself appear to distort these foundations of diplomacy; and the status of a papal representative among any body of diplomats as first among those who are among each other equals except as for date of accreditation, again reminds us that papal diplomacy is special.[33] In effect these arguments for a state-like status to a combined Vatican/Holy See entity, adequate to meet the high threshold for foreign state immunity from forum jurisdiction, are little more than circular or question-begging.

It might be suggested that a third source of legitimacy for a statehood status for a combined Holy See/Vatican City effect or construct lies in the Lateran agreements themselves. Those agreements might be said to constitute a recognition by Italy of an independent state in its midst and perhaps cession of territory to it. It is true that Italian courts have approached disputes involving the Holy See or Vatican as calling for interpretation and application of those agreements.[34] For example the Italian Supreme Court in 2003 confirmed that harm to Italian nationals in Italy (specifically in parts of Rome) had occurred as a consequence of electromagnetic emissions emanating from within the Vatican City.[35] In making this finding the Supreme Court found that the operation of Radio Vaticana was not such as to attract special dispensation under the Lateran agreements of 1929 in the way that other kinds of activity would have done.[36]

The upshot of all these considerations is the sceptical view that no statehood based immunity should be seen to accrue to the Holy See as defendant or respondent in the judicial proceedings of national courts. To the extent the Holy See is substantively separable in international law from the Vatican City the point seems straightforward. Even if some international legal personality be granted, such a distinct Holy See has no substantive claim to the 'level playing field' or garden-variety statehood on which immunity might arise.[37] It should

[33] Vienna Convention on Diplomatic Relations, 1961, entered into force 1964, Art 16(3).

[34] See P. Rossi, 'Migliorini v Pontifical Lateran University, No 21541/2017, ILDC 2887 (IT 2017)', available at https://tinyurl.com/334p346m (last visited 31 December 2022).

[35] The Vatican Radio 'electro-smog' case is discussed by N. Zambrana-Tévar, 'Reassessing' n 23 above, 37; Corte di Cassazione 21 May 2003 no 22516, *Rivista di Diritto Internazionale*, 821 (2003).

[36] The dependence of Vatican City daily life on its Italian substrate and infrastructure recalls the otherwise vastly dissimilar creation of dependent 'Bantustans' by the apartheid regime of South Africa, rather more than it recalls the creation *ex nihilo* of a new independent sovereign state: J.R. Morss, n 14 above, 943. The *ex nihilo* may be avoided by treating Vatican City as the continuation of an earlier entity, the Papal States, but only at the cost of more difficulties.

[37] Participation among sovereigns as equals, either formal or substantive, would seem to be inconsistent with the mission of the Roman Catholic Church with which the temporal activities of the Holy See, Vatican officials and so on, are so closely interwoven. While there are many degrees of difference in political, economic and military might between ordinary sovereigns, the difference with the Holy See, Vatican City or pope as sovereign is qualitative not quantitative. The global task of the Church and its human instruments both individual and collective, may be thought of as an uphill struggle, or there may be a sense of looking down on the secular world with its petty divisions; but the field is assuredly not a level one.

be noted that complaints laid by individuals against the conduct of priests and concerning the institutional administration of the Church, are typically expressed in terms of the Holy See. If it is deemed by a forum court that the Holy See and Vatican City are to be treated as a package deal, with the entire entity benefitting from any privileges obtaining for any of its components, then it is submitted that relevant considerations still do not add up to an argument adequate to the blocking of the right of access to justice.

III. *JC et Autres* v *Belgique*

As noted above the dispute between complainant *JC* and others, and the state of Belgium, was framed as a complaint under the European Convention on Human Rights. The complainants included Belgian, French and Dutch survivors of abuse by Catholic priests when they were children. They had issued complaints in the Belgian courts against Belgian archbishops, bishops and superiors of religious orders, under the Belgian Civil Code Arts 1382 and 1384. Complaints had also been made against the Holy See. In the courts of Ghent at both first instance and at appeal, it was found that the Holy See was recognised by Belgium as having foreign sovereign status under Customary International Law. Statehood based immunity from jurisdiction in Belgium was therefore applicable. It was also found by the Court of Appeal that none of the recognised exceptions to such immunity, was applicable. The disappointed complainants were advised that the Court of Cassation of Belgium would be unlikely to hear an appeal and hence recourse was made to Strasbourg where the claim was articulated that rights of access to justice guaranteed to them by EConvHR Art 6 had been denied them by Belgium.

The overwhelming majority of the Strasbourg bench rejected the argument that considerations of statehood based immunity by the Belgian courts constituted disproportionate interference with the complainants' right of access to justice provided under the Convention. The grounds on which they did so took account of the substance of the complaint against the Holy See as well as the legitimacy of a statehood based immunity being invoked for that entity.

The substance of the complaint against the Holy See was that the Holy Office in Rome had in 1962 circulated a policy document or 'Instruction', under the title *Crimen Sollicitionis*, which prescribed what has been termed a 'code of silence' for clergy in relation to reports of abuse.[38] This policy was said by the complainants to have been in effect reaffirmed in 2001 with *Sacramentorum Sanctitatis Tutela*.[39] The majority found that the existence of these documents was inadequate to demonstrate a causal connection between the actions or

[38] See N. Zambrana-Tévar, 'Reassessing' n 23 above, 45.
[39] I. Cismas, n 13 above, 204.

omissions of the Holy See as such, and harms inflicted in Belgium. Nor was a substantive relationship of principal and agent found as between the Holy See and the bishops in Belgium. Instead, as found by the Court of Appeal of Ghent, the diocesan bishop was found to possess autonomous decision-making power, possibly highlighting his own responsibility for local conduct but undermining any civil claim against the Holy See based on control from a distance or from above.

In combination with these findings on the complainants' position, the Strasbourg bench reflected that while it had not previously examined the status of the Holy See in the context of state immunity as such, it had previously ruled in other contexts in the affirmative on the international legal status of the Holy See.[40] These decisions were both related to employment rights. One had arisen in the context of a married priest hired to teach in a public funded Catholic school in Spain, and subsequently dismissed.[41] The other arose from the dismissal of a divorced lay teacher of religious education from employment in Catholic schools in Croatia.[42] In *Fernández Martínez* weight was placed on an Agreement between the Holy See and Spain, setting out relationships of responsibility for the Church in Spain.[43] In *Travaš,* an Agreement again played a role in defining the role of State authorities in upholding the requirements of the Church with respect to hiring teachers. Reliance on a canonical mandate issued by the diocesan bishop (as a precondition of relevant employment) was written into the Agreement.[44] Conduct of the Croatian State consistent with this Agreement, was found by the Strasbourg bench not disproportionate in relation to its effects on the complainant's rights. The Strasbourg bench in *JC* was therefore unwilling to entertain the argument of the complainants that the Court of Appeal of Ghent was incorrect in its finding that the Holy See is a state enjoying immunity from jurisdiction.[45] The Strasbourg court also rejected the complainants' plea that state immunity if otherwise valid, is displaced when the conduct complained of is inhuman or degrading. In line with its own previous position no such conditionality was identified.[46] In any event the delinquency alleged against the Holy See does not concern torture but rather an omission to take measures to prevent or repair acts which the complainants characterised as inhuman treatment.[47] An extra

[40] Also, the majority in *JC* refers to the provisions of the Lateran accords as having the status of an international treaty as between Italy and the Holy See: *JC et Autres* v *Belgique* n 4 above, 18.

[41] Eur. Court H.R. (GR), *Fernández Martínez* v *Spain*, Judgment of 12 June 2014, Reports of Judgments and decisions 2014-II, 449

[42] Eur. Court H.R., *Travaš* v *Croatia*, Judgment of 4 October 2016, available at https://tinyurl.com/4vrs4stw (last visited 31 December 2022)

[43] For those judges dissenting in *Fernández Martínez*, the intervention by the Spanish authorities was not proportionate; thus for Sajo J, 'Church autonomy does not mean public recognition of a sovereign religious legal regime': *Fernández Martínez* n 41 above, 506.

[44] *Travaš* n 42 above, para 90.

[45] *JC* n 4 above, para 44.

[46] ibid para 64.

[47] ibid para 65.

step would be needed in order to reverse the immunity otherwise obtaining:

> 'La Cour estime qu'il faudrait un pas additionnel pour conclure que l'immunité juridictionelle des États ne s'applique plus à telles omissions. Or, elle ne voit pas de développements dans la pratique des États qui permettent, à l'heure actuelle, de considérer que ce pas a été franchi'.[48]

The Court did not elaborate on whether the additional step is a conceptual one, as in the recategorization of genres of delict and their consequences for immunity, or an empirical one which might arise from a novel fact scenario. The disclaimer concerning contemporary state practice may suggest the former however the hypothetical possibility of the latter might clearly be entertained.

It should also be observed that the formula here used to express the complaint is '*une omission de prendre des mesures pour prévenir ou réparer des actes* (…)'.[49] This strongly connotes the tort or delict of negligence. It is in this context that established exceptions to state immunity grounded in personal injury were enquired into. Thus with respect to a civil claim in its own terms, the Strasbourg bench made various observations on the alleged liability of the papacy and of the Holy See. It found that neither was in control of day-to-day conduct of priests or bishops in Belgium.[50]

More specifically, neither had acted in such a way as to bring their own conduct within the scope of one of the relevant exceptions to state immunity recognised by international law. Having founded its endorsement of the Belgian courts' immunity decision on international law, the Strasbourg bench was thus checking that in its view, recognised exceptions to immunity under international law were inapplicable.

In defining potential exceptions to immunity, the bench focused on the so-called 'territorial tort' exception codified as Art 12 in the UN Convention on Jurisdictional Immunities of States and their Property (CJISP).[51] CJISP articulates various exceptions to immunities otherwise provided for States.[52] Those

[48] ibid; the form of words in the Press Release appears to be an adequate translation of the first sentence: 'The Court considered that it would require an additional step before it could conclude that the jurisdictional immunity of States no longer applied to such alleged failures:' Press Release ECHR 301 (2021), available at https://tinyurl.com/2p8zw7m2 (last visited 31 December 2022). The second sentence might be translated as 'Current practice of states does not justify the conclusion that this step has been taken.'

[49] ibid; 'an omission to take measures to prevent or repair (certain) acts (…)'.

[50] ibid para 69.

[51] ibid para 68; despite the fact that CJISP is not yet in force, at the ECHR it has been suggested that CJISP in its entirety corresponds to Customary International Law in relation to the rights and obligations that it expresses: Eur. Court H.R., *Oleynikov* v *Russia*, Judgment of 14 March 2013, available at https://tinyurl.com/t5n3ym7s (last visited 31 December 2022); on the application of the territorial tort exception see N. Zambrana-Tévar, 'Reassessing' n 23 above, 39.

[52] R. O'Keefe, 'Article 3', in R. O'Keefe and C. Tams eds, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford: Oxford University Press, 2013), 73.

exceptions include commercial transactions; contracts of employment; dealing in moveable and immoveable property; intellectual and industrial property; and participation in certain collective bodies.[53] At Art 12, immunity is displaced or reversed in the case of

> 'Pecuniary compensation for death or injury to the person (…) caused by an act or omission (…) attributable to (a) State (which) occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.'[54]

For the majority in *JC,* reporting and endorsing what the Ghent Court of Appeal had said,

> '(L)es fautes reprochées directement au Saint-Siège, (…) n'avaient pas été commises sur le terrritoire belge mais à Rome'
>
> and,
>
> 'ni le Pape ni le Saint-Siège n'étaient présents sur le territoire belge quand les fautes reproches aux dirigeants de l'Eglise en Belgique auraient été commises'.[55]

The statement that the pope was not present in Belgium at the relevant time is made as a matter of evidence by way of judicial notice. As a natural human person this is undeniable yet the authority of the pope is not geographically territorial in the sense usually understood by international or municipal law.[56] Given the potential importance of a territorial tort exception, the assertions that the acts or omissions of the Holy See were committed in Rome not Belgium, and (correspondingly) that the Holy See 'was not present on Belgian territory' at the relevant time, requires interrogation as broached in the sole dissent of Pavli J.

For the majority in *JC*, being adequately based on international law the application of statehood-based immunity by the Belgian courts could not have been in itself disproportionately constraining of Convention rights, nor was the application arbitrary or unreasonable. In the sole dissent Pavli J argued that the

[53] CJISPArts 10, 11, 13-15.

[54] CJISPArt 12; see J. Foakes and R. O'Keefe, 'Article 12', in R. O'Keefe and C. Tams eds, n 52 above, 209.

[55] *JC* n 4 above, para 10, para 69: the form of words in the Press Release appears to be an adequate translation thereof: the relevant acts 'had not been committed on Belgian territory but in Rome (…) neither the Pope nor the Holy See had been present on Belgian territory when the misconduct attributed to the leaders of the Church in Belgium had been committed': Press Release ECHR 301 (2021), n 48 above.

[56] Under Canon Law 331, the Pope is 'Pastor of the universal Church on earth; therefore, (…) he enjoys supreme, full, immediate and universal ordinary power in the Church' and 'can always freely exercise' his universal power, suggesting an administrative effect beyond mere temporal borders: I. Cismas, n 13 above, 206.

precision of the reasoning of the Ghent courts had not been adequate to dispel the possibility of a disproportionate limitation of access to justice under the Convention having occurred.

More concretely Pavli J reached a different conclusion to the majority on the applicability of the 'territorial tort' exception to statehood-based immunity as codified in Art 12 CJISP. For Pavli J, that exception to immunity was applicable on the facts insofar as 'a cause of action under the territorial exception must relate to the occurrence or infliction of physical damage occurring in the forum state'.[57] The Belgian courts were for Pavli J in error in applying to the benefit of the Holy See, an exception or carve out from that exception to immunity based on the nature of the acts. Such a carve out for sovereign conduct (acts *jure imperii*) as contrasted with commercial acts broadly defined (*jure gestionis*), had in the reasoning of the Belgian court, the effect of bringing the conduct back into the protected zone, other things being equal. As Pavli J correctly pointed out, it is the case that injury caused to civilians in time of war or otherwise at the hands of foreign military forces, and otherwise tortious, has often been treated as protected by foreign state immunity. The sovereign nature of such acts has been precisely called upon in such contexts.[58] This manifestation of state immunity certainly raises technical difficulties in the context of CJISP because the articulation of such an immunity with Art 12 in particular, remains murky.[59] But the distinction between acts *jure imperii and* acts *jure gestionis* is not applicable to Art 12 CJISP which is concerned with territorial location.[60] Conduct otherwise falling under a form of application of Art 12 cannot be 'saved' in this manner. There is no doubt that Pavli J's analysis is correct on that point.

Importantly, Pavli J raises the possibility that vicarious liability as understood by the law of tort, may apply in the context of Art 12. Thus for Pavli J, the courts in Ghent had failed to adequately address the phrase 'attributable to' in the context of an exception to immunity under Art 12.[61] A relationship of principal and agent should therefore have been examined more carefully in terms of the influence of the Holy See over Belgian Church officials. Finally, Pavli J pointed to the fundamental importance of the location of harms under Art 12, that is to

[57] *JC*, n 4 above, 21, dissenting opinion of Pavli J.

[58] International Court of Justice, *Germany* v *Italy (Greece intervening)*, Judgment of 3 February 2012, Report of the International Court of Justice2012, 37; here the finding applies to conduct of foreign armed forces strictly during war-time.

[59] R. O'Keefe, 'The "General Understandings" ', in R. O'Keefe and C. Tams eds, n 52 above, 22; J. Foakes and R. O'Keefe, n 54 above, 215. The issue of foreign military conduct may best be thought of as an extrinsic limit on the application of Art 12.

[60] J. Foakes and R. O'Keefe, n 54 above, 209. For an innovatory intervention into the larger debate see A. Orakhelashvili, 'Jurisdictional Immunity of States and General International Law – Explaining the *Jus Gestionis v Jus Imperii* Divide', in T. Ruys et al eds, *The Cambridge Handbook of Immunities and International Law* (Cambridge: Cambridge University Press, 2019), 105.

[61] *JC* n 4 above, para 13. On these issues reference should be made to the nuanced analysis of J. Foakes and R. O'Keefe, n 54 above, 215, 220.

say location within the forum state (in this case, Belgium). That criterion was undeniably met. For Pavli J, the term 'author' in the requirement of author to be present in Art 12, refers to agents as well as principals and in that respect the Belgian Church officials constituted 'authors' whose conduct could be attributed to the Holy See.[62]

The strength of Pavli J's dissenting remarks is in his highlighting of the *prima facie* applicability of an exception to statehood based immunity derived from the location of harms. Even if a form of sovereign independence generative of immunity be identified in civil complaints against the Holy See (a point about which Pavli J does not quibble), reference to the spirit at least of Art 12 CJISP suggests scope for judicial examination of facts, that is to say, proceeding toward a merits decision in a manner unhindered by a claim to state immunity. There is some evidence of such a trend in recent US cases.[63]

Moving to the merits would not guarantee the outcome desired by complainants to the extent the Holy See, or Vatican-based officials, are named as defendants. The close connections of local supervisory influence identified by Pavli J as emanating from Rome, which might well assist with a claim in tort, were not found by the Strasbourg majority or by the Belgian courts and such close connections have generally not been found in the USA.[64] Even if systemic connections have not been found, sufficient to ground a claim in tort, connections on the facts may fall to be discerned in future cases. In any event *JC* is an important reminder of the need for a conceptual 'turning onto its feet' of the exceptions to immunity – of treating the exception to immunity not as a disturbance of normality but rather as a restoration of the status quo.[65] Viewed in this way, the claim of a defendant party to immunity from national legal process properly calls for a high bar.

IV. Conclusions

The fundamental issues raised here are incisively expressed by O'Keefe, who has called for:

> 'reflection on whether the territorial conditions found in the exceptions to state immunity generally recognized in national and international law are merely pragmatic, comity-inspired limitations on the forum state's exercise of jurisdiction over another state's non-sovereign acts or instead

[62] *JC* n 4 above, (18) Pavli J; the 'author present' clause is for Pavli J provided mainly to exclude such 'over the fence' trans-border events as the export of fireworks or the firing of weapons across a border. Also see C. Ryngaert, n 5 above.

[63] *Robles* v *Holy See* (State of Vatican City; The Vatican) & ors, 1-20-CV-2106 (VEC) (December 2021) (SDNY).

[64] N. Zambrana-Tévar, 'Reassessing' n 23 above, 27.

[65] P. Rossi, 'Italian Courts' n 12 above, 45.

> manifestations of a positive concern for the territorial sovereignty of the forum state that is perhaps as essential a justification for the restrictive doctrine of state immunity as the non-sovereign character of certain foreign-state activity and use of property'.[66]

Perhaps it may be said that territorial sovereignty with respect to the Holy See, begins 'at home.' Thus the Italian courts have indicated that even constrained as they are by the Lateran agreements, Italian jurisdiction extends at least in some respects to institutions administered under the aegis of the Holy See. The Pontifical Lateran University in Rome (and not within Vatican City) has no 'extraterritorial' status, and nor is it a 'central body' of the Holy See specially protected under the Lateran framework.[67] An employment related decision over one of that University's employees is no more the 'imperial' conduct of a foreign state than is the electromagnetic intensity of the broadcasting of Vatican Radio. Both fall to be evaluated under Italian law. Both *Tutti* and *Migliorini* may be thought of as paradigm cases. As an action in tort, *JC* is conceptually closer to the former. We may now see that activity or conduct that takes place within the geographical limits of Vatican City may on the facts be found to have caused harm beyond those limits. In principle, having crossed a supposed, treaty-based jurisdictional border between Vatican City and Italy proper, the crossing of more orthodox national borders all the way to France or Belgium might be envisioned. The jurisprudential Rubicon, if there is one, so to speak runs around the walls of Vatican City, but it is running dry. For any conduct, whether an act or an omission, the question would then be as it was for the Italian Supreme Court, about the causal links between the conduct and the harm. In other words the question would take the familiar and mundane form of a claim in tort. So the consequences of *JC* remain somewhat in the balance: more than one path of future development can be discerned. What kind of failure it was, will become clear with hindsight. For the present all that one can say is that the struggle continues; in the words of Sam Beckett, 'Go for good'.[68]

[66] R. O'Keefe, 'Review of Tom Ruys and Nicolas Angelet (eds)', Luca Ferro (ass ed), 'The Cambridge Handbook of Immunities and International Law' 32 *European Journal of International Law*,709, 711 (2021).

[67] See P. Rossi, 'Migliorini' n 34 above.

[68] S. Beckett, 'Worstward Ho', in *Nohow On* (London: Alma Books, 1992).

Hard Cases

The Immunity of the Holy See

Luca Pasquet and Cedric Ryngaert*

Abstract

This article offers a critical assessment of the European Court of Human Rights' judgment in the case *JC and others* v *Belgium*, the first pronouncement of an international court concerning the jurisdictional immunity of the Holy See. Rendered in a case concerning sexual abuse within the Catholic Church, the decision raises a number of relevant questions concerning the application of State immunity to a non-state actor and its impact on the right to have access to a court. The article discusses the legal status of the Holy See and whether it enjoys state immunity under international law, focusing on the distinction between sovereign and private acts, and the possibility to qualify the members of the clergy as agents of the Holy See for the purpose of the territorial tort exception. It also discusses how granting immunity to the Holy See may frustrate the attempts of the victims to make the apical organs of the Church accountable for their handling of sex abuse scandals.

I. Introduction

In multiple countries, allegations of sexual abuse in the Catholic Church have led to lawsuits against dioceses and clergy, and the establishment of investigation and claims commissions. However, because of the relatively muted response of the Holy See to the scandals, in some countries, victims have also filed tort suits in domestic courts against the Holy See directly. This has, for instance, happened in the United States,[1] but also in Belgium. In 2011, a group of victims filed suit in the District Court of Ghent against, among other defendants, the Holy See. The victims asked the court to hold the Holy See liable in tort for its failure to take action against the abuses. The District Court and, subsequently, the Court of Appeal dismissed the claim on the ground that the Holy See enjoys immunity from suit.[2] Claiming that their right of access to a court under Art 6(1) of the European Convention on Human Rights (ECHR) had been violated, the victims went on to file an application against Belgium at

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[1] See *Dale and ors* v *Colagiovanniand ors* 443 F3d 425 (5th Cir 2006), ILDC 714 (US 2006); *O'Bryan* v *Holy See*, 556 F.3d 361, 369 (6th Cir 2009).

[2] See the procedural history of the case as related in Eur Court HR, *JC et autres* v *Belgique*, App no 11625/17, Judgment of 12 October 2021 (available only in French), paras 4-15.

the European Court of Human Rights (ECtHR). In its judgment of 12 October 2021 (*JC and others* v *Belgium*, hereinafter referred to as '*JC*'), the ECtHR held that granting State immunity to the Holy See corresponds 'to the international practice on the matter',[3] and concluded that Belgium had not violated the ECHR based on the principle first stated in *Al-Adsani* v *UK* that

> 'measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Art 6 § 1'.[4]

JC is the first pronouncement of an international court concerning the jurisdictional immunity of the Holy See, and raises a number of important questions concerning the application of State immunity. The first of them is whether this kind of immunity applies to the Holy See. Both Belgian courts and the ECtHR seem to assume that since the Holy See entertains diplomatic relations with numerous States and can conclude treaties, it should be treated as a State with regard to immunity as well.[5] Such an inference, however, is not unproblematic. As we contend, different international legal persons may hold different rights and obligations, and the Holy See shall be considered a non-State actor insofar as it acts as the head of an ecclesiastical organizations. In other words, it does not go without saying that an international legal person other than a State enjoys the same immunity as States.

A related question concerns the identification of the acts of the Holy See that would be covered by immunity. Belgian courts held that the relationship between the Pope and Belgian bishops is one of public law, ie one in relation to which immunity always applies. The ECtHR endorsed this conclusion.[6] Also this determination, however, appears problematic. Even assuming that criteria of application tailored to the State – such as the distinction between sovereign acts and private acts – may be applied to the Holy See, one may wonder whether managing an ecclesiastical organization should rather be seen as a private activity, that is one not covered by immunity.

A last issue concerns the application of the territorial tort exception to immunity and the possible application of State responsibility criteria to the Catholic Church. In *JC* the ECtHR indirectly endorsed the reasoning of Belgian courts according to which members of the Catholic clergy cannot be considered agents of the Holy See for the purpose of the territorial tort exception.[7] This

[3] ibid para 63.

[4] ibid; see also Eur Court HR, *Al-Adsani* v *United Kingdom* App no 35763/97, Judgment of 21 November 2001, para 56.

[5] *JC et autres* v *Belgique* n 2 above, paras 8 and 56.

[6] ibid para 9.

[7] ibid para 10.

determination removed the last obstacle to the application of immunity. Nevertheless, this conclusion – which was harshly criticized by the Albanian judge in a separate opinion – seems to ignore the authority and control that the Pope exerts on bishops under Canon Law. As we discuss in the article, moreover, granting immunity to the Holy See without also acknowledging its responsibility for the acts of the clergy may be seen as contradicting the principle that rights always come with corresponding responsibilities.

Since broadening the scope of application of immunity always implies restricting access to court, and given the global dimension of the sexual abuses within the Catholic Church, these technical questions also have a significant human rights dimension. In an *obiter dictum* on the access to alternative remedies, the ECtHR acknowledged the 'gravity of the sexual abuse' the applicants had allegedly suffered.[8] One may speculate, however, that extending the application of State immunity to the Holy See will make it more difficult for the victims to obtain redress and make the Church's apical organs accountable for the way in which they managed sex abuse scandals.

This article offers a critical analysis of *JC and others* v *Belgium*. Section II discusses the legal status of the Holy See in international law, focusing on the question of whether it enjoys State immunity. Section III addresses the question of whether managing an ecclesiastical organization can be considered a sovereign activity covered by immunity. Section IV analyses the arguments that Belgian courts raised (and the ECtHR endorsed) for disapplying the territorial tort exception. Section V addresses the question of whether it is fair that the Holy See invokes jurisdictional immunity without also taking responsibility for the human rights violations that members of the Catholic clergy committed outside Vatican territory. Section VI discusses the ECtHR's *obiter dictum* on alternative remedies and its implication in the context of sexual abuses within the Catholic Church. Finally, section VII offers some conclusions.

II. The Holy See: A State or a Non-State Actor?

The case of *JC* has drawn attention to the vexed question of the Holy See's international legal status: is the Holy See a State, or rather another legal entity? The Belgian Court of Appeal was of the view that the Holy See qualifies as a State, and the ECtHR applied the international rules of *State* immunity to the Holy See, thereby at the very least equating the Holy See to a State for State immunity purposes. These courts are certainly not alone in considering the Holy See as a State or State-like. Even the United Nations treats the Holy See as it if were a State: since 1964, the Holy See has observer status as a non-member

[8] ibid para 71.

State.[9]Also certain scholars have observed that the Holy See resembles a State.[10] This is understandable, as the Holy See has entered into multiple treaties,[11] and sends and receives diplomats, a practice that is recognized by the 1961 Vienna Convention on Diplomatic Relations.[12] Both are attributes of international legal personality which the Holy See shares with States.

Determining the Holy See's legal status is made more complex by its relationship with the Vatican City. The Holy See hints at this complexity in its correspondence to the Committee on the Rights of the Child in 2013 (the Holy See is a party to the Convention on the Rights of the Child):

> 'the Holy See, intended as the Roman Pontiff, in the narrow sense, and the Roman Pontiff with his dicasteries [administrative units], in the broader sense [...] is related but separate and distinct from the territory of Vatican City State (VCS) over which the Holy See exercises sovereignty [...], is related, but separate and distinct from the Catholic Church, which is also a non-territorial entity and may be defined as a spiritual community of faith'.[13]

In our view, the Vatican City, which is the territorial base of the Holy See, is a State. This means that the Vatican enjoys State immunity, and that Vatican high officials – the Pope and the Secretary of State – probably enjoy personal immunity.[14] The Holy See, however, is *not* a State. It is an entity that governs a State (Vatican), but, more importantly, that governs an ecclesiastical organization, namely the Catholic Church. Legally speaking, the Holy See is a universal religious organization with a *sui generis* international legal personality.[15]

That the Holy See has international legal personality, does not mean that it has the same rights and obligations of States, or that it is entitled to immunity to the same extent as States. After all, in the *Reparation for Injuries* case, the International Court of Justice held that

[9] See for the website of the Holy See's permanent observer mission at the UN: https://tinyurl.com/r5km466e (last visited 31 December 2022).

[10] See for instance I. Cismas, *Religious Actors and International Law* (Oxford: OUP, 2014), Chapter 4.

[11] C. Ryngaert, 'The Legal Status of the Holy See' 3 *Goettingen Journal of International Law* 829, 835-836 (2011).

[12] Vienna Convention on Diplomatic Relations, 18 April 1961, Art 14(1) (equating papal nuncios with ambassadors). Id, Art 16(3) (on the 'practice accepted by the receiving State regarding the precedence of the representative of the Holy See').

[13] List of issues in relation to the second periodic report of the Holy See, Addendum, Replies of the Holy See to the list of issues, UN Doc CRC/C/VAT/Q/2/Add 1, 9 January 2014, 4, paras 7-8.

[14] D. Akande, 'Can the Pope Be Arrested in Connection with the Sexual Abuse Scandal?' available at https://tinyurl.com/mwu4nm2s 14 April 2020 (last visited 31 december 2022).

[15] C. Ryngaert, n 11 above, 837. See for such criticism of the Court of Appeal's reasoning in this regard also S. Duquet and J. Wouters, 'Het mysterie van de Heilige Stoel' 79 *Rechtskundig Weekblad*, 1602 (2016).

> '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community'.[16]

International (intergovernmental) organizations, for instance, are subjects of international law, but – although positions on the matter differ –[17] they do not enjoy immunity unless this is provided for by a treaty law, national law, or perhaps customary international law.[18] In any case, international organizations do not enjoy the same immunities as States.

Likewise, the Holy See may not enjoy the same immunities as States. In fact, there is not much State practice which addresses the international immunities of the Holy See.[19]Italy has traditionally regulated the exercise of its jurisdiction over the Holy See based on Art 11 of the Lateran Treaty.[20] According to the Italian Court of Cassation, this provision does not provide for a jurisdictional immunity, but rather prohibits Italian authorities to interfere with the 'patrimonial activity' of the Church's 'central organs'.[21] That being said, in a number of recent decisions, while denying immunity because the relevant acts would have been private in nature, the Court of Cassation did not rule out the application of State immunity in relation to sovereign acts.[22] According to the Court, the Holy See's would enjoy immunity in reason of its international legal personality, considered 'equivalent' to that of States.[23] Similarly, in a few cases concerning children abuse, US courts considered the Holy See to be a State for the purposes of applying the Foreign Sovereign Immunity Act (FSIA).[24] However, US courts have so far confined their reasoning to the application of a domestic legislative act (the FSIA) and never ruled on the conditions for the application of immunity in international law.

[16] Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, ICJ Reports 1949, 174, 178.

[17] See M. Wood, 'Do International Organizations Enjoy Immunity Under Customary International Law?' 10 *International Organizations Law Review*, 287-318 (2014).

[18] On the customary international law status of the immunity of international organizations, see Dutch Supreme Court (*Hoge Raad*), 20 December 1985 (*Spaans* v *Iran US Claims Tribunal*), ECLI:NL:PHR:1985:AC9158.

[19] C. Ryngaert, n 11 above, 857.

[20] Trattato tra la Santa Sede e l'Italia (Patti Lateranensi), 1929.

[21] Corte di Cassazione 21 May 2003 no 22516, available at www.dejure.it; see also J. Pasquali Cerioli, 'Giurisdizione italiana ed "enti centrali" della Chiesa Cattolica: tra immunità della Santa Sede e (intatta) sovranità dello Stato in re temporali', available at *www.statoechiese.it*, 1-36 (2017).

[22] Corte di Cassazione-Sezioni Unite 11 April 2016 no 7022, available at www.dejure.it; Corte di Cassazione-Sezioni Unite 18 September 2017 no 2154, available at www.dejure.it.

[23] In its pronouncement of 2016, ibid, the Court of Cassation specifies that the Holy See is entitled to immunity 'in quanto titolare di personalità giuridica di diritto internazionale equiparabile a quella degli Stati sovrani […]' (as an entity enjoying a legal personality equivalent to that of sovereign states).

[24] See *O'Bryan* v *Holy See* n 1 above.

In such an uncertain situation, and given the impact of jurisdictional exemptions on the right to access to justice, the Holy See's right to immunity should not be presumed. As one of us earlier noted,

> 'in light of the increasing importance of individuals' right to access to a court, immunities ought to be interpreted restrictively, all the more so if the beneficiary of the immunity is not a State but a non-State actor'.[25]

Belgian courts, however, took a different approach. Instead of examining international practice, they resorted to analogical reasoning: like States, the Holy See has the capacity to conclude treaties and enter into diplomatic relations, *ergo* it also enjoys the same immunity as States. In so doing, they joined the US federal courts in considering the Holy See as indistinguishable from the Vatican State. The ECtHR endorsed this reasoning without questioning its premises. While we concede that the Holy See may well be indistinguishable from the Vatican City State when it acts as the Government of the latter, it remains no less true that, insofar as the Holy See deals with the organization of the Church in the United States or in Belgium, it acts as the head of a non-territorial ecclesiastical entity, and not on behalf of the 0.44 square kilometer State. Therefore, one needs to distinguish the acts that the Holy See performs as the Government of the Vatican City State and those it performs as the head of the Roman Catholic Church. For the former acts, it enjoys immunity, for the latter not (as suggested by the plaintiffs in *O'Bryan* v *Holy See*).[26] Confusing the two levels could instead have repercussions in terms of accountability and access to justice, insofar as it would allow the main bodies of an ecclesiastical organization to shield themselves behind institutions and concepts designed for States. In the same vein, as John Morss has argued, it is difficult to understand how the Holy See can legitimately invoke immunities that go with statehood if it does not embrace the responsibilities that go with it, such as its international responsibility in respect of sexual abuse scandals.[27]

Nevertheless, especially in countries with a long-standing relationship with the Holy See, and with a significant presence of Catholics, such as Belgium, an institutional practice may have developed of functionally equating the Holy See with a State for purposes of the application of sovereign immunities.[28] Possibly, there is a rule of regional or special customary international law according to which the Holy See enjoys immunity in particular countries.

[25] C. Ryngaert, n 11 above, 857.

[26] See the plaintiffs' arguments in *O'Bryan* v *Holy See* n 1 above, 373.

[27] J.R. Morss, 'The International Legal Status of the Vatican/Holy See Complex' 26 *European Journal of International Law*, 927–946, 928-929 (2015).

[28] N. Zambrana-Tévar, 'Reassessing the Immunity and Accountability of the Holy See in Clergy Sex Abuse Litigation' 62 *Journal of Church and State*, 26-58, 48 (2020).

III. Is Managing a Church a Sovereign Activity?

Even if immunity were to accrue to the Holy See on the basis of the customary norms of State immunity, such immunity is not absolute. Indeed, the immunity of the State can be invoked only in relation to sovereign acts (*acta jure imperii*), and not in relation to private acts (*acta jure gestionis*). One of the objections raised by the claimants before Belgian courts was precisely that the relationship between the Holy See and Catholic bishops was of a private, or at least non-sovereign nature, insofar as it related to the management of a religious organization. However, the Ghent Court of Appeal held that 'the relationship between the Pope and the bishops' was one 'of public law, characterised by the autonomous power of the bishops'.[29] The Court reasoned not only that 'the faults of the Belgian bishops could not be attributed to the Pope [...], but also that they concerned acts iure imperii'.[30] In other words, the relationship between the Pope and the bishops was held to be one of public law, but at the same time the autonomy enjoyed by bishops was construed as an obstacle to the attribution of the relevant conduct to the Holy See. The ECtHR endorsed this reasoning.[31]

This interpretation is problematic in more than one respect. To start with, one may wonder whether it is logical and fair that the same relationship – between the Holy See and Catholic bishops – is qualified as *jure imperii*, that is, one involving the exercise of sovereign power, but also as one that does not involve enough control to allow for the attribution of the bishops' acts to the Holy See. Belgian courts, and indirectly the ECtHR, seem to characterize this relationship in different ways depending on a shifting standpoint. In a top-down perspective, there appears to be a strong link between the Holy See and the lower organs of the Church, while in a bottom-up one, the bishops seem able to escape the control of the Pope.

Moreover, the argument by which the administrative tasks of a non-state actor and its power to issue directives are sovereign in nature seems far-fetched. The problem with it is that *public law* is hard to conceive in isolation from the State. Scholars of international organizations have traditionally opposed applying the notion of *acta jure imperii* to international institutions because, they claim, these entities 'are definitively not states'.[32] It is therefore surprising that such a notion is applied to an ecclesiastical organization. While international organizations are usually considered public entities, today, in Europe, following a process of separation between churches and State that began at least in the eighteenth century, churches are often associated with private law entities. By

[29] *JC* v *Belgique* n 2 above, para 9.
[30] ibid
[31] ibid
[32] See A. Pellet, 'International Organizations Are Definitely Not States: Cursory Remarks on the ILC Articles on the Responsibility of International Organizations', in M. Ragazzi ed, *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden: Martinus Nijhoff, 2013), 41.

way of illustration, Catholic dioceses in Belgium have the legal status of non-profit private associations.[33] Also, in the United States, dioceses are considered as 'corporations soles', ie, 'a legitimate corporate form that may be used by a religious leader to hold property and conduct business for the benefit of the religious entity'.[34] As of late 2021, 31 Catholic dioceses had sought bankruptcy protection under Chapter 11 of the US Bankruptcy Code.[35] These are strong indications that dioceses are not public law entities.[36]

If administering an organization and issuing directives are the decisive criteria for the qualification of an activity as sovereign, this may lead to the absurd result that any juridical person could invoke *sovereign* immunity. For example, the relationship between the Holy See and Catholic bishops seems entirely analogous to that between the legislative and executive bodies of various Christian churches and their respective bishops or other territorial bodies. Thus, one can wonder whether the relationship between the President of a Lutheran Church and the bishops of her Church should also be considered sovereign in nature, or whether the analogy applies only to the Roman Catholic Church, and if so, why. One can also ask whether this reconstruction implies that the acts related to the administration of associations, foundations, and other private entities is sovereign in nature (again, after all Belgian dioceses are private associations). If one removes the State from the equation, the distinction between sovereign and private acts loses all meaning.

In order to distinguish between the activity of the Holy See as the Government of a State and the acts it performs as head of an ecclesiastical organization, one may want to consider the acts related to the administration of local churches outside the territory of the Vatican State as *private acts*, that is acts not covered by immunity. It is indeed very difficult to see how the activity that the Holy See performs in this capacity is different from that of the director or board of an non-governmental organization. One should also note that, in international practice, for instance when it comes to the participation in the activities of international organizations, all other religious or humanitarian organizations are considered 'civil society', or NGOs. It is really hard to explain then why the Catholic Church should enjoy special treatment.[37] Of course, one could justify this special treatment based on the history of the Holy See, but one should be aware that such a line of argument is likely to be seen as Eurocentric.

[33] JC v Belgique, para 32.

[34] US Internal Revenue Service (IRS), Rev Rul 2004-27.

[35] See for an overview: Penn State Law, 'Catholic Dioceses in Bankruptcy', available at https://tinyurl.com/muufujmy (last visited 31 December 2022).

[36] Note that a US municipality, ie, a political subdivision or public agency or instrumentality of a State, may file for relief under Chapter 9 of the US Bankruptcy Code (11 U.S.C. § 101(40)). However, municipalities, as public law entities, are not subject to Chapter 11 on reorganization/ bankruptcy protection.

[37] See Y. Abdullah, 'The Holy See at United Nations Conferences: State or Church?' 96 *Columbia Law Review*, 1835-1875 (1996).

The idea that contemporary international law should recognize the universal value of a religious institution which developed in the European Middle Ages by granting special privileges to it may arguably reflect the sense of cultural superiority which characterized European colonialism. Finally, someone may argue that the special treatment of the Holy See derives from the fact that the Catholic Church is the only religious community possessing its own territory. We contend, however, that such a reconstruction would be inaccurate. As argued above, the Vatican City State has a territory, but the Catholic Church is a non-territorial 'community of faith' rather than the emanation of a State.

IV. The Territorial Tort Exception

There is not only an exception to State immunity for private acts, but also for 'territorial torts'. The territorial tort exception is provided for in some treaties and national legislation, and may have acquired the status of customary norm.[38] Pursuant to the exception, immunity cannot be invoked in proceedings which relate to compensation for death or injury to persons caused by acts (or omissions) committed at least in part within the territory of the forum state, 'if the author of the act or omission was present in that territory at the time of the act or omission'.[39]

In *JC*, the applicants invoked the territorial tort exception, by pointing out that the damage they had suffered had been caused in Belgium as a result of a 'policy of silence' promoted by the Holy See about the Catholic clergy's behaviour. In a line of reasoning subsequently considered 'reasonable' by the ECtHR, the Ghent Court of Appeal rejected the application of the exception on three grounds: (1) this exception would not apply to *acta iure imperii* such as those performed by the Holy See; (2) the acts of the bishops could not be attributed to the Holy See under Art 1384 of the Belgian Civil Code; (3) the acts directly attributable to the Holy See ('*la politique générale fondée sur des documents pontificaux et l'omission de prendre des mesures ayant un impact en Belgique*') would have been committed in Rome, which for the Court meant that 'neither the Pope nor the Holy See' were in Belgium at the time of the events'.[40]

These arguments fail to persuade, however. To begin with, the exclusion of sovereign acts from the scope of application of the territorial tort exception is not mentioned in the two main reference treaties, the European Convention on State Immunity and the UN Convention on Jurisdictional Immunities of States.[41]

[38] See H. Fox and P. Web, *The Law of State Immunity* (Oxford: OUP, 2015, 3rd ed), 468.

[39] United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, Art 12.

[40] *JC* v *Belgique* n 2 above, para 10.

[41] European Convention on State Immunity, 16 May 1972, Art 11; United Nations Convention on Jurisdictional Immunities of States and Their Property n 39 above, Art 12.

To be sure, it would be difficult to explain it on logical grounds: since State immunity can only be invoked in relation to sovereign acts, this exclusion would render the territorial tort exception practically useless. Moreover, the Belgian courts and the ECtHR ignored the Commentary of the UN Commission on International Law to the Draft Articles on Jurisdictional Immunities of States and Their Property, according to which the territorial tort exception must be applied 'irrespective of the nature of the activities involved, whether *jure imperii* or *jure gestionis*'.[42] As Judge Pavli observed in a dissent to the ECtHR's judgment,[43] the Belgian courts have probably confused the unavailability of the exception in relation to acts performed in armed conflicts with a general unavailability in relation to sovereign acts.[44]

As for the second argument - the acts of the bishops could not be attributed to the Holy See - immunity is a preliminary question pertaining to the jurisdiction of national courts, which precedes the examination of the merits of the case, and the ascertainment of responsibility.[45] Hence, the application of the rules on immunity cannot depend on whether the Holy See is responsible for the acts of the bishops. The two main international instruments on the matter do not construe the attribution of the act to the State as a condition for the application of the territorial tort exception. The European Convention on State Immunity makes no mention of it, while the UN Convention refers to an act or omission 'which is alleged to be attributable to the State'.[46] One should also note that, in his dissenting opinion, ECtHR Judge Pavli found the conclusion of Belgian courts on the non-attributability of bishops' acts to the Holy See insufficiently motivated.[47] Although the parties had not disputed that the Pope had considerable powers over the bishops, and although the claimants had

> 'submitted evidence purportedly showing that the Holy See had sent a letter to all Catholic bishops worldwide in 1962 that mandated a *code of silence* regarding cases of sexual abuse within the Church, on pain of excommunication; and that this direction [...] was reaffirmed in a letter sent by the Holy See in 2001, none of these arguments were addressed by the Belgian courts',

Pavli wrote.[48]

[42] International Law Commission, Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries, commentary to Art 12, para 8.

[43] *JC et autres* v *Belgique* n 2 above, dissenting opinion of Judge Pavli, paras 7-9.

[44] Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Judgment, ICJ Reports 2012, 99, para 78.

[45] ibid para 82;H. Fox and P. Webb, *The Law of State Immunity* n 38 above, 12.

[46] United Nations Convention on Jurisdictional Immunities of States and Their Property n 39 above, Art 12.

[47] *JC et autres* v *Belgique* n 2 above, dissenting opinion of Judge Pavli, paras 12-16.

[48] ibid

The question of which conduct is attributable to the Holy See also impacts the third argument, concerning the presence of the author of the act in the territory of the forum State. As Judge Pavli pointed out,[49]

> 'the reference [...] to the 'author' of the act or omission is to the individual representative of the State who actually does or does not do the relevant thing, as distinct from *the State itself as a legal person'*.

It is therefore not necessary that the Pope or the Secretary of State were in Belgium at the time of the events. It suffices that one of their agents was. It is therefore decisive to establish whether bishops or other representatives of the Catholic Church can be considered agents of the Holy See. Judge Pavli writes in this regard that

> 'the domestic courts should have considered the key question whether the individuals on Belgian soil – the bishops and priests who committed the abuse and who allegedly followed orders issued directly from the Holy See on the handling of such abuse – could trigger the Holy See's tort liability under the circumstances [...]. In the case before us, the Belgian courts dismissed the applicants' arguments, in my view, in an exceedingly summary fashion'.[50]

This discussion, highly technical in appearance, touches on a more general and fundamental aspect of the relationship between the Holy See and international law, to which we now turn.

V. Bishops as Agents of the Holy See

Our impression is that the Belgian courts and the ECtHR used the ambiguities inherent in the Holy See's status to grant the latter as much immunity (and exemption from responsibility) as possible. On the one hand, the relationship between the bishops and the Pope are construed as *jure imperii* activities in order to assimilate the Holy See to a State and allow it to enjoy immunity. On the other hand, the Catholic Church's special features, particularly the autonomy of the bishops as 'local legislators' under Canon law, are used to prevent the clergy from being considered as agents of the Holy See. This allows for the breaking of the chain of attribution, which in turn vitiates the territorial tort exception to the Holy See's immunity.

It appears that the Holy See enjoys the privileges of States without also assuming the responsibilities that correspond to them. This may not be entirely fair. As Morss writes,

[49] ibid para 18.
[50] ibid

> 'with the advantageous incidents of statehood go the responsibilities, such as (…) the responsibility for extraterritorial violations of human rights standards by persons and other legal entities *closely connected* with such a state-like entity'.[51]

Along the same lines, Worster argues that the Holy See exercises sufficiently control over persons for them to fall within the Holy See's jurisdiction, which grounds its extraterritorial human rights obligations, and is in turn the 'price of international legal personality and participation in international law'.[52]

It is of note that, in 2014, the Committee on the Rights of the Child, in its Concluding observations on the second periodic report of the Holy See, addressed the issue of agency as follows:

> 'While fully aware that bishops and major superiors of religious institutes do not act as representatives or delegates of the Roman Pontiff, the Committee notes that subordinates in Catholic religious orders *are bound by obedience to the Pope*'.[53]

Canon law indeed contains more than one indication of a close connection between the Holy See and the bishops. By way of illustration, the Pope has 'supreme, full, immediate, and universal ordinary power in the Church' and particular churches (including dioceses), which 'he is always able to exercise freely' (Can. 331; Can. 333).[54] Furthermore, bishops, who are appointed and can be removed by the Holy See (Can. 192), swear allegiance to the Apostolic See (Can. 380) and are required to report to the Pope (Can. 400).[55] Canon 590 provides that

> '[i]nasmuch as institutes of consecrated life [whether clerical or lay] are dedicated in a special way to the service of God and of the whole Church, they are subject to the supreme authority of the Church in a special way',

and that

> '[i]ndividual members are also bound to obey the Supreme Pontiff as their highest superior by reason of the sacred bond of obedience'.[56]

This agency relationship has recently been brought in stark relief in the context

[51] J.R. Morss, 'The International Legal Status' n 27 above, 928-929.

[52] W.T. Worster, 'The Human Rights Obligations of the Holy See under the Convention of the Rights of the Child' 31 *Duke Journal of Comparative and International Law*, 351, 432 (2021).

[53] Committee on the Rights of the Child, Concluding observations on the second periodic report of the Holy See, 25 February 2014, UN Doc. CRC/C/VAT/CO/2 (emphasis added).

[54] See the Code of Canon Law, available on the Vatican's webpage, https://tinyurl.com/mrwkzadt (last visited 31 December 2022).

[55] ibid

[56] ibid

of the sexual abuse scandals in the Church, when it was reported that the Holy See had issued an instruction (which was not made public) that prevented Polish bishops from transferring records of canon law proceedings to Polish authorities.[57] According to the instruction, files of canonical proceedings can only be transferred by the Vatican/Holy See.[58] This indicates that bishops are supposed to obey to the Pope's orders.

Accordingly, it has been submitted that Catholic bishops and clergy act as agents of the Holy See, and that their acts are attributable to the Holy See on the basis of a *mutatis mutandis* application of Art 8 of the ILC Articles on State Responsibility, which provides that

> 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.[59]

Admittedly, applying the Articles on State Responsibility to a non-State actor, specifically a church, is a complex exercise that requires the adaptation of a corpus of norms to a context that differs from that for which it was conceived. However, should one decide to use this analogy for the purpose of granting immunity, as the Belgian courts and the ECtHR did, then one should perhaps stick to the analogy when it comes to attribution of conduct. This would imply that, if Catholic clergy duly qualify as Holy See agents, the territorial tort exception applies, and immunity does not accrue to the Holy See. It would also mean that, regardless of the immunity issue, the acts of Catholic clergy can engage the international responsibility of the Holy See for violations of international human rights law, in particular the rights of the child, committed by the clergy.[60]

VI. Holy See Immunity and Alternative Remedies

In the international law of State immunity, a State's immunity is not contingent on the State making available alternative remedies to the claimant. This means that State immunity is not denied if the claimant has no other means of redress. In the *Jurisdictional Immunities* case (Germany v Italy), the ICJ emphatically rejected Italy's 'last resort' argument that Germany's immunity should be denied because other attempts to secure compensation for the victims had failed, even if the Court was aware that immunity from jurisdiction

[57] 'The Vatican is Gagging Bishops' *Rzeczpospolita*, 17 January 2022.

[58] ibid

[59] K. Ważyńska-Finckand F. Finck, 'The Holy See, Human Rights Obligations and the Question of Jurisdiction', *Opinio Juris*, 31 March 2022.

[60] W.T. Worster, 'The Human Rights Obligations of the Holy See' n 52 above.

in accordance with international law may thus preclude judicial redress.[61] Insofar as the Holy See is equated with a State for purposes of the application of State immunity, one would thus expect that the Holy See's immunity is not contingent on the availability of alternative remedies or forms of judicial redress. In *JC*, however, somewhat surprisingly, the ECtHR ascertained whether any alternative remedies were at the disposal of the applicants. Admittedly, it did so only in an *obiter dictum* ('*à titre surabondant*'), after duly recalling that a grant of State immunity does not depend on the existence of alternative remedies.[62] It is nonetheless striking that the Court considered it desirable ('*souhaitable*') that the Holy See's immunity be contingent on the provision of alternative remedies.[63]

In so doing, it imported a test which is normally applied only to the immunity of intergovernmental organizations (even if the ECtHR does not explicitly own up to this). In the seminal *Waite and Kennedy* case, indeed, the ECtHR famously laid down the principle that

> '[f]or the Court, a material factor in determining whether granting [an international organization] immunity from [a Contracting Party's] jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention'.[64]

This test is commonly applied by domestic courts in the ECHR area.[65] Some courts even take the view that the availability of alternative remedies is not just 'a material factor' in determining the permissibility of immunity, but that international organizations can under no circumstances avail themselves of immunity if no reasonable available alternative means are placed at the disposal of the claimant.[66] Notably, in a judgement of December 2021, the Dutch Supreme Court held that only if such means have been made available to the claimants, will the essence of their right of access to justice be safeguarded.[67] This implies that courts cannot just 'balance the interests' of the organization and the

[61] Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) n 44 above, paras 98-104.

[62] JC et autres v Belgique, para 71.

[63] ibid

[64] Eur. Court H.R., *Waite and Kennedy* v *Germany*, App no 26083/94, Judgment of 18 February 1999,para. 68.

[65] C. Ryngaert (2010), 'The Immunity of International Organizations Before Domestic Courts: Recent trends', 7 *International Organizations Law Review*, 121-148 (2010).

[66] See for instance: Belgium, Court of Cassation, *Western European Union* v *Siedler*, Judgment of 21 December 2009, Cass no S 04 0129 F, ILDC 1625 (BE 2009); France, Court of Cassation, *X* v *Organisation for Economic Co-operation and Development*, Judgment of 29 September 2010, no 09-41030, ILDC 1749 (FR 2010); Italy, Corte di Cassazione 19 February 2007 no 3718, *Giustizia Civile Massimario*, 2 (2007), ILDC 827 (2007).

[67] Dutch Supreme Court (*Hoge Raad*), Judgment of 24 December 2021, *Supreme* v *SHAPE en JFCB (NATO)*, ECLI:NL:HR:2021:1956, para 3.2.3 (only available in Dutch).

claimants: if there is no alternative remedy, there will be no immunity.[68]

While the ECtHR in *JC* appeared to apply the *Waite and Kennedy* test, it did not do so unreservedly. It is recalled in this respect that *Waite and Kennedy* aims at safeguarding the integrity of a claimant's access to a court under Art 6 ECHR, regardless of the underlying substantive issues at play. This means that it does not matter whether the claimant alleges a bread-and-butter violation of domestic law (eg, unfair dismissal in the employment relation) or whether s/he alleges a serious human rights violation (eg, torture). What matters is that, in all circumstances, they can avail themselves of their procedural right to a remedy. In *JC*, however, the ECtHR based the application of the contingent immunity test to the Holy See on 'the serious interests at play' and 'the gravity of the sexual abuse'.[69] The subtext of this consideration is that immunity may well apply in case of lighter infringements, even if no alternative remedy is available. There is a faint echo here of Italy's – ultimately dismissed – arguments in the *Jurisdictional Immunities* Case before the ICJ, according to which immunity would be abrogated in case of grave crimes, in that case international crimes and violations of *jus cogens*. To be sure, in *JC*, the ECtHR, citing *Jurisdictional Immunities* as well as its own case-law (notably *Al Adsani* and *Jones*), confirmed the inexistence of an immunity exception for international crimes, in response to the claimants' arguments that the alleged sexual abuse rose to the level of the international crime of torture or inhumane and degrading treatment.[70] Still, it is striking that the ECtHR allows considerations of gravity to sneak in via the backdoor, and to inform the scope of the Holy See's immunity.

It is not entirely clear why the ECtHR applied a version of *Waite and Kennedy* in *JC*. Possibly, as a *human rights* court after all, by drawing attention to the desirability of alternative remedies, it wanted to show a humane face and to acknowledge the victims' suffering and legitimate thirst for justice. Alternatively, the ECtHR may have had second thoughts regarding its application of the international law of *State* immunity to an entity – the Holy See - which is not a State after all, but a non-State actor. It may have been influenced in this respect by the applicants' arguments that the Holy See is an international public service or an international organization, rather than a State. In any event, in case an international entity's statehood is in doubt, such as the Holy See's, it seems defensible to apply a contingent immunity test, at least insofar as it enjoys international legal personality. Perhaps unwittingly, the ECtHR may have pushed the boundaries of the immunities accruing to non-State actors. While the relevant passage is only *obiter dictum* (remarking in passing), it is still authoritative.

While the ECtHR's principled application of the contingent immunity test

[68] ibid, para 3.2.4. On this point, the Supreme Court overruled the Court of Appeal.

[69] *J.C. et autres* v *Belgique* n 2 above, para 71.

[70] ibid, para 64 (citing *inter aliaAl-Adsani* v *United-Kingdom* n 4 above, paras 57-66, and Eur. Court H.R., *Jones et autres* v *Royaume-Uni*, App no 34356/06, Judgment of 14 Juanuary 2014, paras 196-198).

deserves cautious praise, its actual application to the case is more problematic. The ECtHR did not inquire whether the claimants had alternative remedies at their disposal to obtain redress from the Holy See itself. Instead, it found that applicants had had the possibility to sue *officials* of the Catholic Church before Belgian courts, namely a bishop, two of his predecessors, other leading figures of the Belgian Catholic Church, and that they could act as civil parties in a future criminal trial.[71] The ECtHR considered this potential remedy as sufficient; hence, the Holy See could avail itself of its immunity.[72] It added that applicants' actions had failed to produce results because of ill-advised procedural choices they made themselves.[73] We will not comment on whether applicants could have successfully sued officials of the Church had they made other procedural choices - which is a question of Belgian procedural law. However, it is remarkable that the Court considered a suit against Church officials as an acceptable alternative remedy to a suit again the Holy See itself.

Such an approach, which considers a remedy against *another person* to be a sufficient alternative remedy, is unfortunately not novel. For instance, in the *Mothers of Srebrenica* litigation, which concerned the immunity of the UN in the context of wrongful acts committed in UN peacekeeping operations, the UN's immunity was, at least in part, upheld on the ground that applicants could always sue the troop-contributing Member State, ie, another person.[74] This substitution approach interprets the notion of alternative remedy very broadly. It includes, over and above the remedies available against the actor enjoying immunity, also those theoretically available against other subjects which may have contributed to the damage. This approach has attracted criticism for two reasons. The first is that two or more subjects may have caused the damage to different extents, or may not have the same financial capacity. This may affect the right of the claimants to obtain an effective remedy. The second relates to the concept of *accountability*: if the person enjoying immunity is exempted from responsibility for human rights violations, there would be much less incentive for it to address the systemic reasons for such violations.[75] Also from a

[71] *JC et autres* v *Belgique* n 2 above, paras 71-74.

[72] ibid para 75.

[73] ibid para 74.

[74] Court of Appeal of The Hague, *Mothers of Srebrenica* v *State of the Netherlands and UN*, Judgment of 30 March 2010, ECLI:NL:GHSGR:2010:BL8979, para. 5.12; Eur. Court H.R, *Stichting Mothers of Srebrenica and Others v the Netherlands,* App no 65542/12, Judgment of 11 June 2013, para 167 ('The Court cannot at present find it established that the applicants' claims against the Netherlands State will necessarily fail. The Court of Appeal of The Hague at least has shown itself willing, […] to entertain claims against the State arising from the actions of the Netherlands Government, and of Dutchbat itself, in connection with the deaths of individuals in the Srebrenica massacre [...] The Court notes moreover that the appeals on points of law lodged by the State in both cases are currently still pending').

[75] See for a discussion of these objections: L. Pasquet, 'Litigating the Immunities of International Organizations in Europe: The "Alternative- Remedy" Approach and its "Humanizing" Function' 36 *Utrecht Journal of International and European Law*, 192–205 (2021).

victim's perspective, even if the other person – who cannot invoke immunity - is eventually held accountable, the remedy can only be incomplete.

The problem, especially its accountability dimension, also exists regarding the Holy See. How can one shed light on the actual existence of a 'policy of silence' if not by suing the Holy See, and more generally, those having the power to tackle the systemic causes of pedophilia within the Catholic Church? Clearly, for applicants, holding the Holy See – which sits at the apex of the Catholic Church – to account, has much more symbolic value than holding a simple clergyman accountable. It is of note in this respect that the Sauvé Report (2021), which recently analyzed sexual violence against minors within the French Catholic Church from 1950 to 2020, devotes an entire chapter to the 'root causes of the problem'.[76] These include a generalized fear of scandal, 'which favoured concealment, secrecy and silence',[77] the absence of a culture of internal control,[78] which together with a culture of obedience, fosters abuses of power,[79] the identification of the power of the sacrament with institutional power,[80] and the 'overvaluation of celibacy'.[81] The report also calls for a 'a strong action plan in the areas of governance, sanction and prevention'.[82] These are fundamental issues that cannot be addressed solely at local level. Moreover, whether or not one agrees with Sauvé, it is apparent that the problem of sexual violence against minors within the Catholic Church acquired global proportions.[83] It is not a matter of single dioceses. It is likely that granting immunity to the Holy See will hinder attempts at shedding light on the responsibilities of the Catholic Church's highest authorities and will not encourage the Holy See to address the systemic causes of sexual abuse.

VII. Concluding Observations

The practice that we have analysed does not allow to provide a univocal answer to the question of whether the Holy See enjoys immunity under

[76] Rapport de la Commission indépendante sur les abus sexuels dans l'Église, *Les violences sexuelles dans l'Église catholique*, France 1950-2020, October 2021, 311-346.

[77] ibid 313 (in French: 'qui a favorisé la dissimulation, le secret et le silence').

[78] ibid 433-434.

[79] ibid 326.

[80] ibid 433, recommendation 44.

[81] ibid 323-325.

[82] ibid 427 (in French : 'un plan d'action vigoureux dans les domaines de la gouvernance, de la sanction et de la prévention').

[83] See C. Méténier, 'Sexual Abuse in the Church: Map of Justice Worldwide' *Justiceinfo.net*, available at https://tinyurl.com/2dum8bxp (last visited 31 December 2022); N. Winfield, 'A global look at the Catholic Church's sex abuse problem' *APNews.com*, available at https://tinyurl.com/53u8hneu (last visited 31 December 2022); 'The global scale of child sexual abuse in the Catholic Church' *Aljazeera.com*, available at https://tinyurl.com/2a6j65hs (last visited 31 December 2022); 'Catholic Church child sexual abuse scandal' *BBC News*, available at https://tinyurl.com/32cxzzz7 (last visited 31 December 2022).

international law. Although one cannot exclude that a regional or special custom may have emerged by virtue of which the Holy See enjoys such a right, one must note that the practice pointing in that direction is limited to a few cases, in a small number of countries. Moreover, in certain instances – such as the case-law of US federal courts - domestic courts grant immunity based on national law, which makes it difficult to identify a clear *opinio juris*. Given this uncertainty, we argue, a right to jurisdictional immunity cannot be derived from the mere fact that the Holy See participates in international law by entertaining diplomatic relations and concluding treaties *like a State*. Rather, it seems reasonable to presume that non-State actors such as the Holy See do not enjoy State immunity, unless the contrary can be proved through an examination of the relevant practice.

Even if the Holy See enjoyed jurisdictional immunity under international law, such an exemption would only apply to sovereign acts. It is admittedly difficult to imagine how such a notion should apply in relation to a subject other than a State. However, it can be argued that whereas governing the Vatican City State may be considered a *jure imperii* activity, administering the Catholic Church should rather be qualified as *jure gestionis*. The Holy See may well be indistinguishable from the Vatican State insofar as it acts as the Government of the latter, but when it administers the Catholic Church outside Vatican territory, it acts as the highest organ of an ecclesiastical organization and should not be treated differently from any other religious non-governmental organization. Consequently, the Holy See should not be able to invoke immunity in relation to the latter activity.

In the case of sexual abuses committed in the territory of the forum State, should the national courts equate the Holy See to a State for the purpose of immunity, it would seem appropriate to apply the territorial tort exception to allow the victims of sexual violence to invoke the responsibility of the highest organs of the Catholic Church. Canon law seems to establish a strong connection between the Holy See and bishops, which can hardly be ignored. If national courts intend to treat the Holy See like a State, they should also apply the Articles on State Responsibility to determine if local bodies of the Catholic Church act as agents of the Holy See on the territory of the forum State.

Making the application of State immunity contingent on the availability of alternative remedies for the claimants, at least with regard to non-State actors enjoying immunity, would be a positive development from the standpoint of human rights. It is not entirely clear, however, whether this is the direction that the ECtHR intends to indicate in *JC*. At any rate, the interpretation underlying the *obiter dictum* on alternative remedies, according to which the existence of a remedy against a person *other* than the subject enjoying immunity would justify the grant of immunity, seems to confirm the Court's intention – already made clear in the case-law on international organizations' immunities – to limit the

practical consequences of the 'alternative remedy' standard as much as possible.

Finally, it is regrettable that the ECtHR endorsed a new restriction on the right of access to a court based on an analogical reasoning, that is without discussing whether a non-State actor can enjoy State immunity. Even if an analysis of relevant practice and norms of general international law is almost absent from the Court's reasoning, its decision will likely constitute a precedent easing up the grant of immunity to the Holy See in sex abuse cases. This may make it more difficult for the victims to hold the apical organs of the Catholic Church accountable for the handling of sex abuse scandals.

Hard Cases

In the Name of the Child: Remedies to Adultcentrism in Naming Law

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Abstract

The Italian legal system undoubtedly belongs to the western legal tradition and yet, until only recently, automatic passing on of the patronymic affected a child's legal naming in Italy in the same way as it still does in countries of no affinity with it, whilst the rest of the world had already abandoned this archaic remnant of the patriarchal society by developing alternative models: unilateral (single surname), bilateral (double surname), and liberal (parents' free choice or multiple options) model. The Italian legal system belongs to the civil law tradition and yet it was the Constitutional Court, not the legislator, who steered the country out from the automatic patronymic mechanism to the gender egalitarian one. The Italian lawmaker has now been urged to intervene. The aim of this paper is to shed light on the adultcentrism found in many naming laws and to propose a more efficient and child-friendly solution.

I. The Long Road Towards Modernity

The Italian legal system undoubtedly belongs to the western legal tradition and yet, until only recently, automatic passing on of the patronymic affected a child's legal naming in Italy in the same way as it still does in countries of no affinity with it (Sharia law countries such as Iran, Iraq, Syria, Yemen, Jordan, Qatar, Saudi Arabia, Kuwait, Lebanon and Tunisia; the poorest of African countries such as Burkina-Faso, Burundi, Ivory Coast, Ghana, Nigeria, Senegal, Sudan and Tanzania; North and South Korea), whilst the rest of the world had already abandoned this archaic remnant of the patriarchal society.

The automatic passing on of the father's name has its roots in an ancient social identification practice (a patronym is, in the strict sense of the word, the name of the father).[1] This practice became a legal custom when patronyms, as well as other nicknames – some related to geographical origins (Leonardo Da Vinci), others to jobs (Sandro Botticelli) and others still to physical traits (Masaccio)[2]–

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[1] In Russia, the name of a child is still composed by a first name and a surname (chosen by the parents from their own surnames) and, between such first name and surname, the first name of the father (Art 58 Russian civil code). In Scandinavian countries most surnames are composed of the father's name and the final ending -søn or -datter (eg § 7 *Navneloven*, Danish Name Act, no 524 of 2005, lately amended by Act no 1815 of 2021 and no 227 of 2022).

[2] Masaccio is the nickname of Tommaso di Ser Giovanni di Mòne di Andreuccio Cassài, a

crystallized in family surnames. The reason was connected with the assumption of man's superiority over women, with the ensuing structure of society in general and of legal orders in particular. Legal determination of paternity consequently played a protective role for the child (there can be certainty of a child's mother, but not of the father –*mater semper certa est, pater numquam*). This made patronyms popular, whilst mothers' surnames were reserved for the offspring of… loose morals. In short, at that time, automatic passing on of the patronymic was regarded, worldwide, as the best solution in the interest of all parties: mother, father, child and legal order.

In relation to children born in wedlock in Italy, the rule wasn't even explicitly laid out in writing,[3] but existed, rather, as a 'norma di sistema'[4] – a rule inferable from other rules,[5] such as Art 262 of the Italian civil code governing children born out of wedlock and according to which, if recognized concurrently by both parents, the child is automatically given the father's surname.[6]

The Italian legal system undoubtedly belongs to the civil law tradition and yet it was a judicial decision, not the legislator, who steered the country out from the automatic patronymic mechanism to the gender egalitarian one. The Italian Constitutional Court took more than a decade to replace the legislative formant and establish a new order. The process of drawing the country out from the family of traditional legal orders described above was long and gradual. The first time the constitutional illegitimacy of the rule was ever questioned goes back to 1988. Indeed, twice[7] that year did the Italian Constitutional Court dismiss any

humorous version of Maso (short for Tommaso), meaning 'messy Tom', according to G. Vasari, *Le vite de' più eccellenti pittori, scultori e architettori* (Firenze: Appresso i Giunti, 1568), II, 296,who wrote about the famous painting: 'E perché e' non volle pensar giammai in maniera alcuna alle cure o cose del mondo, e, non che altro, al vestire stesso, non costumando risquotere i danari da' suoi debitori, se non quando era in bisogno estremo, per Tommaso (che era il suo nome) fu da tutti detto Masaccio'.

[3] In France the rule has a customary character: see P. Hilt and F. Granet-Lambrechts, *Droit de la famille* (Grenoble: PUG, 6th ed, 2018), 187-188. In Italy, the customary character of the rule is maintained by a minority of legal scholars and courts (F. Giardina, 'Il cognome del figlio e i volti dell'identità personale. Un'opinione «controluce»' *Nuova giurisprudenza civile commentata*, 2014, 139; Tribunale di Milano 4 June 2002, *Famiglia e Diritto*, II, 173 (2003), with note of A. Figone, 'Sull'attribuzione del cognome del figlio legittimo'; Corte di Cassazione 29 May 2006, no 16093), the majority considering it to be an implicit rule of the civil code (M. Alcuri, 'L'attribuzione del cognome materno al figlio legittimo al vaglio delle sez. un. della S.C.: orientamenti della giurisprudenza interna e comunitaria' *Diritto di Famiglia e delle Persone*, 1076 (2009); G. Grisi, 'L'aporia della norma che impone il patronimico' *Europa e Diritto Privato*, 679 (2010); S. Troiano, 'Cognome del minore e identità personale' 3 *Jus Civile*, 565 n 13 (2020); Corte di Cassazione ordinanza no 13298 of 17 July 2004).

[4] Corte costituzionale sentenza 16 February 2006 no 61, *Foro italiano*, I, 1673 (2006); Corte di Cassazione 17 July 2004 no 13298.

[5] Arts 237, 262 and 299 Italian Civil Code and also Art 72 para 1 Regio decreto no 1238 of 1939, and Arts 33 and 34 Decreto del Presidente della Repubblica no 396 of 2000.

[6] Art 262 Italian Civil Code. For details see G. Terlizzi, 'In the Name of Equality. The Constitutional Court Rewrites the Rule on Surname Attribution' in this *issue*.

[7] Ordinanza no 176 of 11 February 1988, *Diritto della famiglia e delle persone*, I, 670 (1988),

violation of Arts 3 and 29 of the Italian Constitution in connection with a mother's impossibility of passing her surname on to her child: in the first decision the child had been born in wedlock, whilst in the second decision the child had been recognized by the father at the time of birth. Almost twenty years later the Supreme Court (Corte di Cassazione) resubmitted the question to the Constitutional Court, which court upheld its decision of inadmissibility.[8] The question had, nonetheless, raised relevant issues and proven useful to instigate urgent and necessary legislative intervention. The court declared the patronymic rule, as based on a patriarchal concept of family, to be no longer consistent with the constitutional values of gender equality and the fundamental principles of the Italian legal system.[9] This *obiter dictum* was supported by making reference to the New York Convention on the Elimination of All Forms of Discrimination against Women,[10] especially Art 16, para 1, point g),[11] and to the Recommendations of the Council of Europe's Parliamentary Assembly[12] on discrimination between men and women with regard to the choice of surnames and on the passing on of parents' surnames to children.

The persistent silence of the Italian Parliament eventually forced the Constitutional Court to mend the situation when it was asked to rule on a civil registry officer's refusal to add the maternal surname to a child's (paternal) birth-surname. By declaring the constitutional illegitimacy of the patronymic rule in the part of it that does not provide for exceptions where parents grant their mutual consent, the Court[13] introduced, for the first time ever in Italy, the

with notes of F. Dall'Ongaro, 'Il nome della famiglia e il principio di parità', and ordinanza no 586 of 19 May 1988, *Giurisprudenza costituzionale*, I, 2726 (1988).

[8] Corte costituzionale sentenza 16 February 2006 no 61, n 4 above, with notes of E. Palici Di Duni, 'Il nome di famiglia: la Corte costituzionale si tira ancora una volta indietro, ma non convince' *Giustizia costituzionale*, I, 543, 552 (2006); S. Niccolai, 'Il cognome familiare tra marito e moglie. Come è difficile pensare le relazioni fra i sessi fuori dallo schema dell'eguaglianza' *Giustizia costituzionale*, I, 543, 558 (2006); L. Gavazzi, 'Sull'attribuzione del cognome materno ai figli legittimi' *Famiglia, Persone e Successioni*, 898-908 (2006); V. Carfì, 'Il cognome del figlio legittimo al vaglio della Consulta' *La Nuova Giurisprudenza Civile Commentata*, 1, 35-47 (2007); R. Villani, 'L'attribuzione del cognome ai figli (legittimi e naturali) e la forza di alcune regole non scritte: è tempo per una nuova disciplina?' *La Nuova Giurisprudenza Civile Commentata*, 1, 316 (2007).

[9] ibid. See for translation and comment, G. Terlizzi, n 6 above.

[10] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted the 18 December 1979 by the United Nations General Assembly, signed by 196 countries so far (not the USA) and ratified in Italy by legge 14 March 1985 no 132.

[11] Art 16, para 1, point g, CEDAW: 'States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: … (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.'

[12] Recommendations 1271 (1995) and 1362 (1998) made by the Parliamentary Assembly of the Council of Europe on the Discrimination between men and women in the choice of a surname and in the passing on of parents' surnames to children.

[13] Corte costituzionale sentenza 21 December 2016 no 286, *Giurisprudenza italiana*, 815-

possibility of a double surname. The solution was only partial and unsatisfactory: in order to see her surname added to the legally imposed patronymic the mother still depended on the father's assent. Aware of the inadequacy of its decision, the Court urged the legislator once again; organic regulation of the matter and determination of naming criteria consistent with the principle of gender equality could be deferred no longer.

The European Court of Human Right's (ECHR) decision against Italy in the 2014 Cusan and Fazzo case[14] further increased the urgency for new regulation in Italy. This decision fell within a framework of reiterated action, in European case law, to move towards gender equality and the elimination of all sexual discrimination in relation to surnames passed on to children as well as to those acquired by spouses.[15] In the Italian case, infringement of Art 14 (taken together with Art 8) of the European Convention on Human Rights was determined, by reason of the fact that the Italian rule required that the given surname invariably be – regardless of any different mutual wish of the spouses – that of the father. The European Court did however underline that – on account of its practical use – such a rule 'was not necessarily incompatible with the Convention'.[16] What the European Court ruled against, was the impossibility of deviating from the rule even when parents were in agreement to do so. This excessive rigidity subsequently became the target of the Italian Constitutional Court's decision of 2016.

824 (2017), with notes of R. Favale, 'Il cognome dei figli e il lungo sonno del legislatore'; E. Al Mureden, 'L'attribuzione del cognome tra parità dei genitori e identità personale del figlio' *Famiglia e Diritto*, 213-224 (2017); V. Carbone, 'Per la Corte costituzionale i figli possono avere anche il cognome materno, se i genitori sono d'accordo' *Corriere Giuridico*, 165-167 (2017); C. Favilli, 'Il cognome tra parità dei genitori ed identità dei figli' *La Nuova Giurisprudenza Civile Commentata*, 818-830 (2017); C. Ingenito, 'L'epilogo dell'automatica attribuzione del cognome paterno al figlio (Nota a Corte costituzionale n. 286/2016)' *Osservatorio costituzionale*, 2, 1-18 (2017).

[14] Eur. Court H.R., *Cusan and Fazzo* v *Italy*, Judgment of 7 January 2014. For a comment, see M. Calogero and L. Panella, 'L'attribuzione del cognome ai figli in una recente sentenza della Corte dei diritti dell'uomo: l'Affaire Cusan e Fazzo c. Italia' *Ordine internazionale e diritti umani*, 222-246, (2014).

[15] The Court had had the opportunity to examine somewhat similar issues in the Burghartz (Eur. Court H.R., *Burghartz* v *Switzerland*, Judgment of 22 February 1994), Ünal Tekeli (Eur. Court H.R., *Ünal Tekeli* v *Turkey*, Judgment of 16 November 2004) and Losonci Rose and Rose (Eur. Court H.R., *Losonci Rose and Rose* v *Switzerland*, Judgment of 9 November 2010) cases: The first case concerned the dismissal of a husband's request to have his wife's surname placed before his own; the second case dealt with a Turkish legal rule whereby a married woman could not use her maiden name on its own after marriage, although a married man retained his surname as it was prior to marriage; the third case addressed the Swiss rule according to which the husband's surname was automatically attributed to the couple as the new family name after marriage (*Familienname*) and consequently became the surname of their offspring. For a comment see G. Ferrando, 'Genitori e figli nella giurisprudenza della Corte europea dei diritti dell'uomo' *Famiglia e Diritto*, 1049-1053 (2009). In a critical sense, see A. M. Gross, 'Rights and Normalization: A Critical Study of European Human Rights Case Law on the Choice and Change of Names' 9 *Harvard Human Rights Journal* 269-284 (1996).

[16] Eur. Court H.R., *Cusan and Fazzo* v *Italy* n 14 above.

II. The Principle of Family Unity and the Unilateral Model

The European and Italian decisions both focused on two principles: gender equality and family unity. The latter is prominent in legal systems that belong to the unilateral model (single surname). This model is based on the idea that a family is the fusion of two persons,[17] where each person should therefore be recognized, within the social context, as a member of his or her family. This outcome can be secured by a family name - the same one for all its members, parents and children. The unilateral model was theorized and transposed into the German civil code[18] (*Bürgerliches Gesetzbuch, BGB*) in 1900: the *Familienname* was the husband's surname, acquired by his wife upon marriage[19] and then passed on to their offspring.[20] This model was common to most countries in continental Europe that shared the German language or tradition,[21] such as

[17] The existence of two different concepts of the couple in Europe is theorized by V. Feschet, 'The surname in Western Europe. Liberty, Equality and Paternity in Legal Systems in the Twenty-First Century' *L'Homme Z.F.G.*, 20.1, 65, 63-73 (2009): 'In an equation, in Europe the couple is sometimes thought as the fusion between two persons (father + mother = 1), sometimes as an association of two individuals (father + mother = 1 + 1)'. She compared, in the same ethnological research, names and religious practices, concluding that 'in the countries with a Protestant tendency (Sweden, Finland, Denmark, Germany, Netherlands, Iceland), the lawmakers chose alternative naming procedures which massively reject the double name, pleading the Public Records Office overweight. In predominantly Roman Catholic or Catholic Orthodox countries (Portugal, Spain, France, Italy, Belgium, Switzerland, Greece), the tradition is clearly patrilineal or bilateral and the double name has the status of an ideal formula, or the preferable to the mother's name (though it is never explicit)'. Whilst the first assumption about the couple's equation is inspiring, the latter one raises a complaint because Sweden (§ 4 no 3 and § 20 *Lag (2016:1013) om personnamn*), Finland (Secions 5 and 6 *Etu- ja sukunimilaki*), Denmark (§ 8 *Navneloven*), and Norway (§ 1 and 7 *Navneloven*) already grant the choice of a double name.

[18] In Germany, naming law has gone through several phases, starting from *Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiete des bürgerlichen Rechts* of 1957. At that time § 1355 BGB was modified in order to allow the wife to add her husband's surname to her maiden name. Until 1976 the husband's surname was both *Ehename* and *Familienname* and, consequently, was also name of every child born in wedlock. With the first family law reform (*Erstes Gesetz zur Reform des Ehe- und Familienrechts*: 1. EheRG) the new § 1355 BGB gave spouses the possibility of choosing the *Ehename* from their surnames, which then, under § 1616 BGB, automatically became the surname of their offspring. In the case of disagreement, the father's surname prevailed (§ 1355, para 2, 1, BGB). The German Federal Constitutional Court, Bundesverfassungsgericht 5 March 1991, 44 *Neue Juristische Wochenschrift*, 1602-1606(1991), declared the latter rule unconstitutional and introduced the possibility of a double surname consisting of the spouses' surnames. In the case of disagreement, the order of the surnames wasdecided by lot. The option of the double surname was eliminated by the *Familiennamensrechtsgesetz* of 1993, which confirmed the unilateral model also in 2005 for cohabiting couples, *Lebenspartnerschaft* (*Gesetz zur Änderung des Ehe- und Lebenspartnerschaftsnamensrechts*), and in 2018 for same-sex couples. For an historical reconstruction, see D. Schwab, 'Personenname und Recht' *Namenkundliche Informationen*, 110-134 (2015).

[19] § 1355 BGB was reformed by the Gesetz über die Gleichberechtigung von Mann und Frau auf dem Gebiete des bürgerlichen Rechts in 1957.

[20] § 1616 BGB : 'Das Kind erhält den Familiennamen des Vaters' (The child receives the father's family name).

[21] Like Austria, Holland, Lichtenstein, Switzerland, Turkey, Greece and Japan. Actually, the *Ehename* is compulsory in Turkey (Art 321 Turkish Civil Code, *Medeni Kanun*) and Japan

Scandinavian countries. Conversely, in France, couples are thought of as a '*communauté de vie*' (Art 215, para 1, French civil code), an association of two individuals, where each retain their birth surname in accordance with Art 1 of the Loi du 6 Fructidor an II.[22]

With its first family law reform of 1976,[23] Germany established gender equality by leaving it to the spouses to decide which of their birth names was to become the family name; where no agreement was reached, the husband's name would prevail.[24] Nowadays, in the case of disagreement, under § 1617 BGB the Family Court entrusts one the parents with the decision, thereby safeguarding both gender equality and family unity.

The idea of a *Familienname* is still widespread across continental Europe: Scandinavian countries deem family names, once chosen by the couple, to be the first choice for the child's naming.[25] However, globally, the German unilateral model – which bans the use of double surnames – is only shared by

(Art 790 Japanese Civil Code, 民法): see G. Koziol, 'Befristetes Wiederverheiratungsverbot für Frauen und Verbot der Führung getrennter Nachnamen für Ehepartner. Zu zwei neuen verfassungsrechtlichen Entscheidungen des Obersten Gerichtshofes in Japan' *Zeitschrift für Japanisches Recht*, 51, 63 (2017). In 1983 Greece abolished the *Familienname* and allowed double surnames (Art 1505 Greek Civil Code, Αστικὸς Κώδικας), and likewise Austria (§ 155, par. 1, Austrian Civil Code, ABGB), where, however (just like in Lichtenstein, Switzerland and Holland), the *Familienname* has been maintained only as an option for the spouses. The unilateral model applies in Holland (Art 1:5 Dutch Civil Code, BW), Lichtenstein (Art 139 Lichtenstein Civil Code) and Switzerland (Art 270 Swiss Civil Code, ZGB), as well as Turkey and Japan.

[22] Art 1 Loi du 6 Fructidor an II (23 August 1794): 'Aucun citoyen ne pourra porter de nom ou de prénom autres que ceux exprimés dans son acte de naissance : ceux qui les auraient quittés seront tenus de les reprendre'. Replacement of the maiden name with the husband's surname was common in France (but increasingly less so nowadays), but this was just a custom, referred to by a 1974 ministerial act as follows: 'Le mariage est sans effet sur le nom des époux, qui continuent d'avoir pour seul patronyme officiel celui qui résulte de leur acte de naissance. Toutefois, chacun des époux peut utiliser dans la vie courante, s'il le désire, le nom de son conjoint, en l'ajoutant à son propre nom ou même, pour la femme, en le substituant au sien': *Arrêté* 16 May 1974 *fixant les modèles de livret de famille*.

It is significant that Spain and Portugal both view the couple as an association. As a result of this, the spouses both keep their double surname (as per the bilateral model).

[23] Erstes Gesetz zur Reform des Ehe- und Familienrechts: 1. EheRG.

[24] In 1991 this rule (stated in § 1355, para 2, sentence 1, BGB) was declared unconstitutional by the German Federal Constitutional Court (see n 18 above), giving parents the possibility of creating a double surname composed of each of their birth names. In the case of disagreement, the lot decided. The possibility of having a double surname was eliminated through legislative intervention following the judicial decision. Today, if parents cannot reach an agreement, the Family Court empowers one of parents to decide, and his or her surname is passed on to the children if he or she does not decide. See D. Schwab, n 18 above, 125.

[25] In Finland, Denmark, Sweden and Norway the couple has a very vast choice: mother's or father's surname, both as a double surname or a as a newly invented surname: E. Brylla, 'The Swedish Personal Names Act 1982 and the impact of its interpretation on the surname stock' *Studia anthroponymica Scandinavica*, 23, 71-77 (2005); K. Leibring, 'The new Personal Names Act in Sweden - some possible consequences for the name usage' *Namenkundliche Informationen*, 109/110, 408-419 (2017).

the Netherlands, Switzerland, Lichtenstein, Turkey and Japan.[26]

Family unity is not an issue in the bilateral model, which enhances the child's ties with both parents, giving him or her a double surname. Traditionally, double surnames consist of the father's surname followed by the mother's, as in Spain,[27] but also come the other way around, as in Portugal.[28] Double surnames were not initially aimed at preventing discrimination between men and women since both legal systems provide for the passing on of the father's surname alone, thereby securing prevalence of a patrilinear genealogy, just as in the rest of the continent. Nowadays, however, parents can decide on the order of their names in the composition of their children's surnames, thereby determining which of their surnames gets passed on to the future generation, and the principle of gender equality is fully respected. Family unity is fulfilled with regard to the couple's children, who must all have the same surname.

In actual fact, the concept of family is something that changed over time. In the past, complex societies consisted of a broad family structure, such as the Roman paterfamilias group, the Chinese upper-class family, the Samurai family in Japan or the Indian *Kul* (a joint family usually composed of three generations).[29] In more modern times, especially in the western legal tradition, the concept of family was confined to the nuclear family unit, consisting of a man, a woman and their socially – and consequently legally – recognized children. Stability was ensured by the indissolubility of marriage and formalized by a common shared surname. The introduction of divorce law, the increased likelihood of marital breakdowns and out-of-wedlock births, the proliferation of assisted reproductive technologies, and the gradual social acceptance of new family structures, all brought about changes in typical partnership and childbearing models.[30] The deconstruction of the traditional concept of family brought about by a variety of family patterns other than the nuclear family (stepfamily, single parent family, extended family, blended family, same-sex family, etc), triggered the need for policy changes and for a re-visitation of the legal framework.

III. Individual Freedom and Identity Value: The Liberal Model

[26] n 21 above.

[27] Art 109 Spanish Civil Code. For details, see A. Lamarca Marquès, 'The changing concept of 'family' and challenges for family law in Spain and Catalonia', in J. M. Scherpe ed, *European family law: the changing concept of 'family' and challenges for domestic family law* (Cheltenham: Edward Elgar Publishing, 2016), II, 289-307.

[28] Art 1875 Portuguese Civil Code and Art 103, para 2, point e, *Código do Registo civil*, reformed in 1997 by Decreto-Lei no 36/97.

[29] I.F.G. Baxter, 'Family Groups' *Encyclopedia Britannica*, 24 August 2022, available athttps://tinyurl.com/3sbpmz9c (last visited 31 December 2022).

[30] Highlights of trends and structures together with statistical data can be found in the research of P. Lunn, T. Fahey and C. Hannan, *Family figures: family dynamics and family types in Ireland (1986-2006)* (Dublin: The Economic and Social Research Institute, 2009), 25-38.

Family unity as a main principle is in recession, whilst individual freedom and identity value are becoming dominant in the legal discourse. In this sense, it is the common law approach to the matter that is prevailing, even though its legal transplant in countries of civil law tradition is happening in the most varied of ways. As is well known, the common law model is based on a liberal attitude towards private matters and does not grant public law an overriding power. Conversely, across continental Europe, public law prevails in matters of personal status. In the UK and US[31] individuals have great freedom in naming themselves and their children. In regard to their children, parents may choose between one of their surnames, both their surnames (hyphenated or not, or even originally combined – Dawn Porter, the television presenter, and her husband, Chris O'Dowd, changed their surname upon marriage to O'Porter)[32] or a surname created especially for the newborn,[33] provided it is neither injurious nor misleading.[34] Parents are free to choose a different surname for each of their children and to change it, by mutual agreement or unilaterally by the custodial parent, until such time as the child's coming of age, even for the purpose of adjusting it to the name of a new partner or half-brothers and sisters. This all takes place without the child's consent,[35] but the child has the right to change his or her surname, easily and at will, on coming of age.[36]

Therefore, in the UK and US,[37] '*name is a matter of fact rather than a*

[31] In US the *common law name change* is considered constitutionally granted by the 1st Amendment and the Secion 1 of the 14th Amendment: see E. J. Bander, *Change of Name and Law of Names* (New York: Dobbs Ferry, 1973); J. S. Kushner, 'The Right to Control One's Name' 57 *UCLA L.R.*, 313, 319-321 (2009), with further details on case law; C. Alonso-Yoder, 'Making a Name for Themselves' 74 *Rutgers Law Review*, 3, 911, 934-936, 969-970 (2022).

[32] T. Walker, 'Dawn Porter compromises on a married name with Chris O'Dowd' *The Telegraph*, 31 October 2012. For a critical perspective see H. MacClintock, 'Sexism, surnames and social progress: The conflict of individual autonomy and government preferences in laws regarding name changes at marriage' 24 *Tem, Int'l & com L.J.* 277 (2010).

[33] Evidence of this practice can be found in name generation websites such as Generatorfun: https://generatorfun.com/surname-generator.

[34] See the instructions for the *deed pool*, a form of legal contract needed for official recognition of a name change in the UK: https://tinyurl.com/4754rhem (last visited 31 December 2022). Well known are series of judicial proceedings that took place in New Mexico, when 'Snaphappy Fishsuit Mokiligon' (probably the result of a previous name change), after having granted a name change into 'Variable' by the Court of Appeal, *In re Mokiligon*, 137 N.M. 22 (N.M. Ct. App. 2004), later applied to change his name into 'Fuck Censorship!'. The Court denied the request stating that the 'proposed name change would be obscene, offensive and not comply with common decency': *In re Variable*, 2008-NMCA-105.

[35] See *Re C (Change of Surname)* [1997] EWCA Civ 2783. In Scotland and North Ireland the change is admitted up to the age of 16: https://tinyurl.com/42szfvsd (last visited 31 December 2022).

[36] To change name by Deed Poll in the United Kingdom a person must be at least 16 years of age. To change the name of a child who is under 16 years of age, someone with parental responsibility can apply so long as everyone with parental responsibility for the child consents to the name change: https://tinyurl.com/mwm5tur7 (last visited 31 December 2022).

[37] In the first half of the 20th century some US state laws imposed the husband's name for the wife and the father's name for the children. The rise of feminist movements in the sixties

matter of law'.[38] Elsewhere, however, with the exception of Scandinavia,[39] the translation of this extremely liberal approach into civil law countries, generally limits the naming options to either the mother's surname, the father's surname or a double surname.[40] Differences across countries are revealed by diverse settlement norms that are applied in instances when parents disagree: some countries let the mother's surname prevail,[41] others let the father's surname prevail,[42] and others still the former or the latter depending on whether the children are born in or out of wedlock;[43] some countries solve the matter with a double surname (in which case some resort to alphabetical order[44] and others to the lot[45] to decide on the order of the two surnames. With the exception of Scandinavian countries,[46] which have adopted the extremist version of the model, civil law countries' conservative approach to the liberal model is exemplified by their interdiction of different surnames for siblings.

IV. Adultcentricism in Naming Law: A Story of Competition

set off the legal debate, which ended with the US Supreme Court's decision, *Reed* v *Reed*, 404 U.S. 71 (1971). The decision inverted the trend and applied the Equal Protection Clause under the 14th Amendment.

[38] See E. C. Smith, *The Story of Our Names* (Detroit: Gale Research Co., 1970, but 1st ed New York, 1950), 197. In *Loser* v *Plainfield Sav Bank*, 149 Iowa 672, 677 (1910) is to be found the well-known statement that 'contrary to the apparent thought suggested in argument in this case, there is no such thing as a 'legal name'.

[39] n 25 above.

[40] This is so in France, Belgium, Austria, Switzerland, Greece, Ireland, Croatia, Latvia and Lithuania, Luxembourg, Malta, Poland, Romania, Slovenia, Hungary and Cyprus.

[41] So in Austria (Art 155 Austrian Civil Code, ABGB), Norway, Sweden and Denmark. In Switzerland, has the guardian to choose the surname, than is the mother's (Art 270a Swiss Civil Code, ZGB).

[42] This is so in Greece (Art 1505 Greek Civil Code, Αστικός Κώδικας) and in the Principality of Monaco (Arts 77-2, 2-1 and 2-2 Monegasque Civil Code, modified by the Loi no 1.440 of 5 December 2016). The same rule applied in Belgium until the 2016 decision of the Constitutional Court declaring the illegitimacy of Art 335, para 1, Belgian Civil Code and the subsequent Loi du 25 décembre 2016 modifiant les articles 335 et 335ter du Code civil relatifs au mode de transmission du nome à l'enfant: 'En cas de désaccord, l'enfant porte les noms du père et de la mère accolés par ordre alphabétique dans la limite d'un nom pour chacun d'eux. Lorsque le père et la mère, ou l'un d'entre eux, portent un double nom, la partie du nom transmise à l'enfant est choisie par l'intéressé. En l'absence de choix, la partie du double nom transmise est déterminée selon l'ordre alphabétique'. For a comment, see R. Peleggi, 'Parità tra genitori e cognome dei figli: il Belgio abolisce le discriminazioni, mentre l'Italia resta in attesa di riforma' *Rivista di Diritti Comparati*, 3, 1, 7-8 (2018).

[43] Registered partnership is deemed equivalent to wedlock in Netherlands (Art 1.5, para 13, Dutch Civil Code, BW).

[44] France (Art 311-21 French Civil Code) and Belgium (Art 335, para 1, Belgian Civil Code).

[45] Luxembourg (Art 53, para 5, Luxembourg Civil Code).

[46] As an expression of extreme egocentrism, a John Smith and Jane Doe would, by way of example, have the possibility of naming their first baby-boy John Doe, their first baby-girl Jane Smith, their second baby-boy Jonnie Doesmith and their second baby-girl Janie Smithoe.

When compared with the rigidity and inequality of the patronymic, new models of naming law are clearly welcome. That said, the increasing freedom of choice that arises when moving from the limited unilateral model to the more extensive liberal one goes far beyond mere competition between different traditions and legal systems: it paves the way for competition among individuals, thus far prevented by the prevailing public interest for a standard naming system that disclosed family kinship through generations of males. The competition involves public institutions and private people, once again raising age-old conflicts between progressives and conservatives, men and women, mothers and fathers and their families. The choice becomes the arena where parents fight out their 'child ownership title'.

Just as significant changes to family structures can be challenging and frequently turn into sources of conflict between people of different generations (corroborated by the long time needed[47] new family forms to be recognized by the law),[48] child naming is also addressed from an adult's perspective, without any concern for the individual whose name – consequently identity – is at stake. Notwithstanding the precedence that the western legal system grants to the protection of human rights and to the individual identity associated with such rights over traditional issues of public concern[49] (control, identification and family genealogy of the ruled by the rulers – nowadays achievable through means other than surnames, such as DNA profiling, fingerprinting, voice or face analysis), adultcentrism continues to affect the legal process of child naming.

There is, admittedly, a widely accepted international source of law (the aforementioned New York Convention), which recognizes the right of children to have a name, to know who their parents are (Art 7 UNCRC), to have their

[47] In the long process to free the family from the patriarchal character, both in terms of the internal relationship between spouses as well as the external and social ones by means of multiple forms of union, the Italian legislator invariably lags behind other European countries (eg in eliminating the patronymic rule, in regulating civil unions, in considering filiation without distinctions between in and out of wedlock, in recognizing same-sex parenting) see, among others, R. Torino, *La tutela della vita familiare delle coppie omosessuali nel diritto comparato, europeo e italiano* (Torino: Giappichelli, 2012); G. Ferrando, M. Fortino and F. Ruscello eds, *Legami di coppia e modelli familiari*, in P. Zattied, *Trattato di diritto di famiglia: le riforme 2012-2018* (Milano: Giuffrè Francis Lefebvre, 2019), I; L. Lenti and M. Mantovani eds, *Il nuovo diritto della filiazione*, in P. Zattied, *Trattato di diritto di famiglia: le riforme 2012-2018* (Milano: Giuffrè Francis Lefebvre, 2019), II. As in the name matter also in the same-sex parenting the jurisprudential formant is playing a relevant role in following the social evolution: see Corte di Cassazione 30 September 2016 no 19599, *Giurisprudenza Italiana*, 2365 (2017); Corte d'Appello di Trento 23 February 2017, *Giurisprudenza Italiana*, 2367 (2017), both decisions with notes of A. Diurni, 'Omogenitorialità: la giurisprudenza italiana si apre all'Europa e al mondo' *Giurisprudenza Italiana*, 2368-2379 (2017); Id, 'Il nuovo paradigma della plurigenitorialità nel diritto interno e internazionale' *Rivista di Diritto Privato*, I, 23-50 (2018).

[48] J. M. Scherpe ed, n 27 above.

[49] Interesting, albeit not recent, is the ethnologic research of Yale University's J. C. Scott, J. Tehranian and J. Mathias, 'The production of legal identities proper to states: The case of the permanent family surname' *Comparative studies in society and history*, 44, no 1 (2002), 4-44.

identity – including name and family relations – preserved (Art 8 UNCRC) and to have their own views expressed and heard (Art 12 UNCRC). Moreover, in order to supervise proper application of children's rights, the – howbeit vague[50] – concept of the 'best interest of the child' was developed. Widely adopted in judicial practice and statutory laws, the child's best interest argument is often instrumentalized to legitimize conflicting political and cultural positions: *libertarians* v *authoritarians*, *secularists* v *believers*, *women* v *men*, *courts* v *parents*, *parents* v *each other*. An analysis of US case law demonstrates the misuse of this criterion in a number of opinions[51] – some believe it worthy of being addressed against a welfare checklist[52] – whilst some UK courts apply 'The Welfare Test'[53] to justify measures that are taken against the will of the parents or of the child.[54]

It may therefore be assumed that a libertarian approach is no panacea. What is really needed is an assessment of which solution strikes a balance between the interests of the parents, who wish to see their surnames – as well as their genes – passed on to their offspring, and the interests of their children, who wish to see their identity respected by adults. It would, of course, not be in the interest of a child to be given a name that is the outcome of a family conflict. Likewise, it would not be in the interest of the child to be raised with one of his or her parental bonds severed by the automatic passing on of the patronymic. Greater choice means a higher risk of conflict. No choice means discrimination. The balancing point, as always, lies in the middle.

[50] S. Parker, 'The best interest of the child - Principles and problems' *International Journal of Law, Policy and the Family*, 8.1 (1994), 26-41. About the Italian, European, and international debate on that matter, see Mi. Bianca ed, *The Best Interest of the Child* (Roma: Sapienza Università Editrice, 2020), specifically on the vagueness of this concept see the contribution of U. C. Basset, 'L'interesse del minore: le nuove sfide d'un concetto vago e magari antipatico', 3-11.

[51] See J. S. Kushner, 'The Right to Control One's Name' 57 *UCLA L.R.*, 313, 332 (2009); L. M. Kohm, 'Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence' 10 *JL & Fam Stud* 337, 374 (2008); H. Reece, 'The paramountcy principle: consensus or construct?' 49 *Current Legal Problems* 267, 291 (1996).

[52] Critical on this point E. Sutherland, 'The Welfare Test: Determining the Indeterminate' *EdinLR* 22, 94, 97 (2018).

[53] The leading case for 'The Welfare Test' in UK is the decision of the House of Lords *Dawson* v *Wearmouth* (1999) *UKHL* 18. For a comment, M. Hayes, 'Dawson v Wearmouth 'What's in a name? A child by any other name is surely just as sweet?' *Child and Family L.Q.*, 11, 423 (1999).

[54] In this respect it is not surprising that the United States of America is one of the few countries that didn't sign the UNCRC and the United Kingdom was reprimanded from the UN Committee on the Rights of the Child for its tolerance of parental corporal punishment of children (Section 58 Children Act 2008). In its reply, the British government assumed that, 'within the boundaries set by law, the use of physical punishment is a matter for individual parents to decide. It is an insult to ordinary, decent parents to suggest that they cannot distinguish between smacking and criminal violence, or that one usually leads to the other': Joint Committee on Human Rights, 'Government Responses to Reports from the Committee in the last Parliament' *8th Report of Session 2005-06*, HL Paper 104, HC 850, 82, available at https://tinyurl.com/fc68n26s (last visited 31 December 2022).

Regardless of the contextual circumstances of their procreation and birth, all children develop their identity through their relationships with both parents. Scientific proof of the importance that children be informed of the circumstances of their birth, and have the possibility of getting to know their biological origins, underlines the paramount role played by naming in an individual's identity-building process. Today, the law in western countries falls short of protecting the full spectrum of human dignity; it only protects the dignity of existing beings, the dignity of the adults. In theory, the action of public authorities, whether legislative or judicial, is to satisfy human needs. In practice, however, what is being satisfied are individual wishes whose only limits are set by their feasibility.[55] Medically-assisted procreation is a shining example of this distortion: it has opened new possibilities for parenthood (from genetic, gestational and social mothers to genetic and social fathers, from single parents to same-sex parents)[56]but has required creative regulation to safeguard the welfare of the children born in these new ways. On the one hand, by refusing to legitimize new practices, the conservative stance encourages so-called 'procreative tourism' and creates uncertainty about the destiny of such newborns. On the other hand, by equating the new forms of parenthood with traditional ones (thereby accepting anonymization and registering only two parents among the many who contributed to the child's birth), the progressive stance erases the bonds of such children with their genetic and/or biological parents. Both stances invariably lead to a significant privation of children's rights; the adherents of both positions neglect children's rights in public debate or, even worse, use them as an argument to support their opinions as adults. Today's child is tomorrow's adult. He or she has expectations, which, on coming of age, become rights. The right to be informed of his or her origins (procreation and birth circumstances), the right to know who all his or her parents are (every individual directly involved in his or her existence, whether biological or genetic) and the right to get in touch with all such parents.

So, even with respect to naming, the dominance of an adultcentric approach is still persistent in authorities' statements, whether legislative or judicial – the issue of child identity wasn't even mentioned by the European Court of Human Rights in the Cusan and Fazzo case! – and requires an in-depth reflection or, better still, thorough reconsideration.

The pivotal point is to question the basis of naming as a legal act: should it be considered as an expression of parental rights (*Elternrecht*), and thereby legitimately focus on parents' interests and its 'ownership' perspective, or

[55] M. Paradiso, 'Navigando nell'arcipelago familiare: Itaca non c'è' *Rivista di diritto civile*, 1310, 1314 (2016). In the same sense, C. Castronovo, *Eclissi del diritto civile* (Milano: Giuffrè, 2015), 67.

[56] For a more detailed overview on the same-sex relationship and parenting in Europe see K. Boele-Woelki and A. Fuchs eds, S*ame-sex relationships and beyond. Gender matters in the EU* (Cambridge: Intersentia, 3rd ed, 2017).

should it be considered as an expression of parental responsibility towards its offspring (*Sorgerecht*), and thereby seek to protect the interests of the child[57], his or best welfare and the conditions for him or her to express a real choice in the future? Whilst the transition from paternal authority to parental authority has promoted equality between men and women in relation to their offspring, the gradual acknowledgment of modern concepts of parental responsibility triggers a Copernican revolution of perspective, with a relinquishing of the adultcentric approach also in matters of naming law.

V. The Balance Between Gender Equality and Child Identity: The Bilateral Model

The recent, culminating, decision of the Italian Constitutional Court[58] to declare the constitutional illegitimacy of the patronymic rule in all cases (ie for children born in and out of wedlock or adopted), gives us food for thought along these lines. In its reasoning the court did not shed light on whether naming is or isn't a matter of public interest but focused, rather, on the parties involved. The court even went as far as dismissing the question of family unity altogether, viewing the solution to this matter in a restored equality between mother and father[59] and leaving it to the parents to reach a consensual agreement on which of their surnames to pass on to their child. The court's attention was clearly drawn towards child identity – maintaining that this should prevail and that the gender equality principle should therefore be applied in accordance with it – and ruled for a double surname in instances of indecision or dispute between parents. As a matter of fact, the double surname model, which sees the full parental kinship set into the child's own legal and social identity, is the model that best takes the child's interest into consideration. That said, the Italian lawmaker has been urged – as made once again explicitly clear by the Constitutional Court – to intervene to regulate the generational transition of double surnames and to assess whether parents have a right to choose different surnames for each of their children.

A comparison of the many naming patterns developed by countries of

[57] That was the finding of the German Federal Constitutional Court, Bundesverfassungsgericht 30 January 2002, 1 *BvL* 23/96, *FamRZ*, 306 (2002). The distinction is made also by G. Autorino Stanzione, 'Attribuzione e trasmissione del cognome. Profili comparatistici' *Comparazione Diritto Civile*, 1, 16 (2010).

[58] Corte costituzionale sentenza 27 April-31 May 2022 no 131 available at https://tinyurl.com/3m2m95f6 (last visited 31 December 2022).

[59] The Court quotes its famous saying (Corte costituzionale sentenza 13 July 1970 no 133, § 4) 'it is indeed equality that safeguards that unity and, vice versa, disparity that puts it at risk', to draw the conclusion that, 'unity and equality cannot coexist if one negates the other, if unity works as a limit providing a veil of apparent legitimacy to sacrifices imposed only in a unilateral direction': Corte costituzionale sentenza 27 April-31 May 2022 no 131 n 58 above.

western legal tradition shows, on the one hand, the difficulties faced by the unilateral model[60] (domestically criticized for its rigidity and incoherence)[61] and, on the other hand, a liberal model that works well in its common law countries of origin but which is plagued by issues of diverse nature in civil law countries. Indeed, in countries that are based on civil law, the liberal model requires continuous adjustments (eg, the introduction and subsequent removal of the *mellannamn* in Sweden)[62] or is cause of administrative confusion to the extent of proving impracticable. A perfect example of the latter is France, where parents are not only granted a choice between one of their surnames or a hyphenated or non-hyphenated double surname, but also the right to add – *à titre d'usage* – a new partner's surname or the surname of the parent whose surname was not chosen[63] to their own name or to that of their children.

Conversely, as proven by the Spanish, Portuguese and Latin American examples, the bilateral model does not give rise to fierce competition between parents. The mandatory nature of the double surname means that parents are required to make only two choices: an individual, nonmandatory, choice between which of their double surnames is to be passed on to the child, and a common choice concerning the order of the two chosen (or legally determined) surnames – this latter decision affects generational transition: in Spain it is the first of the two surnames that is passed on to the second generation (unless the latter does not decide otherwise), in Portugal it is the second. The first (nonmandatory)

[60] The unsuitability of the unilateral model for the Italian legal system is clearly explained by S. Troiano, n 3 above.

[61] S. Lettmaier, 'Notwendigkeit einer Reform des (Familien-)Namensrechts?' *FamRZ*, 1, 7-9 (2020), with further references to and additional clarifications of the criticism in German literature.

[62] It may be considered as some sort of a *middle name*, though different from the English, Danish or Norwegian versions of it. It is a name positioned between the first names and the surname (eg the husband's surname, if the spouses choose to take the wife's surname at marriage, or the mother's name if the parents choose to give the father's name to their children). However, according to the names Act of 1982, the Swedish *mellannamn* was not hereditary and the bearer was not to come under it in alphabetical lists to avoid bypassing of the unilateral model (only one person in a marriage could have a *mellannamn*). The 2016 reform abolished this option, ie no more *mellannamn* can be taken, but the existing one remains: K. Leibring, n 25 above, 410-411.

[63] The surname à titre d'usage was first introduced in Art 43 of the French Civil Code by the Loi no 85-1372 of 23 December 1985 relative à l'égalité des époux dans les régimes matrimoniaux et des parents dans la gestion des biens des enfants mineurs (now repealed). Later, once the option for the parents to choose a double surname for their children had been introduced (Art 311-21 French Civil Code in the version introduced by Loi no 2002-304 of 4 March 2002 relative au nom de famille), the surname à titre d'usage remained as a further option for the left-out parent's surname (ie when only one surname had been chosen). The new Loi no 2022-301 of 2 March 2022 relative au choix du nom issu de la filiation, introducing Art 311-24-2, inserted the nome d'usage in the French Civil Code, as regulated in favor of the spouses and parents. This also gave the adult child a right to change his or her surname in several possible ways, such as by using the parental surname not passed on to him or her as a nome d'usage. For further details, see G. Terlizzi, n 6 above, X.

choice gives an adult the chance – with regard to his or her own individual history and formed identity – to reverse the decision taken by his or her parents in the past. The second (common) choice involves both parents; it may become a matter of contention, but is easy to settle through legal recourse based on impartial methods, such as the lot[64] or alphabetical order,[65] or more customized mechanisms, such as the one that assigns the first place to the mother's or the father's surname depending on the sex of the child.[66] The latter is a viable, efficient and nondiscriminatory solution, consistent with the interests of the child.

Furthermore, in order to limit the scope of parental discretion and, therefore, opportunities for parental competition and conflict at the expense of their children, it would be advisable to require that all the couple's children be given the same surname. Such a solution would, at once, satisfy the public interest requirement of ensuring family unity and identification of same family members and the child's interest to have his or her own identity respected vis-à-vis both parents (through the union of their partial surnames in a new double surname), vis-à-vis any siblings (through the same surname) and vis-à-vis half-siblings (through part of their surname as a sign of mutual belonging).

VI. Conclusions

Thus designed, naming law would take into account the diverging interests at stake. Firstly, public interests: ensuring legal order through management of personal status, as traditionally the case in civil law countries; identifying each person in relation to his or her other family members; implementing gender equality and family unity; and protecting the rights of minors. Secondly, the mother's and father's interests: ensuring equal treatment, recognition of their common bond with the child and the right to decide which of their surnames is to be passed on to the child. Thirdly, the child's interests: ensuring the child is given the opportunity of building his or her own identity through a legally and socially identifying name proving full parental (mother and father) and familial (sibling) kinship, and seeing that his or her rights to personally make decisions regarding such name in the future (on coming of age)[67] are respected and protected.

[64] The problem might be the organization of such a lottery by the civil registry office.

[65] Literature underlines the discriminatory nature of this solution towards surnames falling among the lower part of the alphabet: S. Troiano, n 3 above, 591.

[66] In fact, medieval Sardinian documents reveal the existence of this sort of ancient practices on the island, eg in the Nuoro district between the 16th and 17th centuries: see E. Besta, 'L'attribuzione del cognome nella Sardegna medioevale', in *Studi di storia e diritto in onore di Carlo Calisse* (Milano: Giuffrè, 1940), I, 477-484; G. Murru Corriga, 'Di madre in figlia, di padre in figlio. Un caso di 'discendenza parallela' in Sardegna' *La ricerca folkrorica* 27, 53-73 (1993). L. Olivero, 'Ancora sul cognome: due luoghi comuni e due proposte per una riforma annunciata' *Jus Civile* 5, 1371, 1399-1400 (2021) proposes the adoption of a similar mechanism in Italy.

[67] In Spain, this right was recognized to the adult child as early as 1981 by the Ley 11/1981 of 13 May 1981 *de modificación del Código Civil en materia de filiación, patria potestad y*

After years of inactivity, the Italian legislator now has the chance to catch up with – and even surpass –other countries, introducing law by design[68] that does away with old-fashioned adultcentrism and provides for a more efficient, child-friendly and readily-available version of the bilateral model.

régimen económico del matrimonio. Some Italian scholars have criticized the rule, arguing against a decision left to a third party (the child!) and deeming it useless to solve gender inequality: G. Cattaneo, 'Il cognome della moglie e dei figli' *Rivista di Diritto Civile*, I, 702 (1997); M.C. De Cicco, 'Cognome e principi costituzionali', in M. Sesta and V. Cuffaro eds, *Persona, famiglia e successioni nella giurisprudenza costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 244. In fact, name change law has served as a vehicle for liberation as demonstrated by C. Alonso-Yoder, n 31 above, 930-961.

[68] The concept of a 'law by design' was introduced by Margaret Hagan, director of the Legal Design Lab at the Stanford Law School & Institute of Design. She argued for a design-driven approach to legal innovation focused on the solving of concrete human problems - starting with those submitted by the very clients of legal services - by lawyers, judges and legal experts. I'm using this expression to underline the need to re-think the law in general, and re-style naming law in particular, starting, in the latter case, from the child, who is ultimately the final recipient of it. This is a completely different idea from that of achieving legal objectives through technology 'by design', as experimented with the blockchain system or China's Social Credit System and presented by M. Zalnieriute, L. Bennett Moses and G. Williams, 'The Rule of Law 'By Design'?' *Tulane Law Review*, 95 (5), 1063-1101 (2021).

Hard Cases

In the Name of Equality. The Italian Constitutional Court Rewrites the Rule on Surname Attribution

Giulia Terlizzi*

Abstract

With judgment no 131 of 27 April-31 May 2022, the Constitutional Court replied to the question of legitimacy raised by the Court itself in February 2021. The case concerned the rules to transmit the surname as in the Italian civil code. The Court declared such rules unconstitutional, insofar as these rules do not allow the child to take the mother's name in the event of parental consent. With this decision, the Court made not only a radical change with regards to the past discipline, but also affirmed the new rule governing family name that is based on a new fundament: the protection of gender equality as an essential element to guarantee the identity of the child. In a comparative perspective, it is interesting to consider the innovation adopted by the French law on name's attribution– Law no 301 of 2 March 2022 – pushing even further on the role of autonomy in family law. However, both in Italy and France, uncertainties remain once equality is established.

I. Introduction

With judgment no 131 of 27 April-31 May 2022, the Constitutional Court replied to the question of legitimacy raised by the Court itself in February 2021, concerning the rules on surname transmission established by the Italian civil code (Arts 143 bis and 262 of the Civil code). Following these provisions, in the absence of parental agreement, the discipline required the acquisition at birth of the paternal surname, instead of the surnames of both parents. Face to these rules, the constitutional court takes one more time into serious consideration the problem of harmonizing the subject matter with the principles of equality coming from the Constitution and supranational laws, reiterating the importance of assigning the surname of both parents as an expression of personal and family identity. This evolution, however, must be linked to the importance of maximally protecting the choice of parents regarding the right to assign a single surname or both, in the order of preference, and therefore according to a new criterion based on the consent and will of the parents, and no longer based on the authority of the disposition established by the law itself. In this light, with

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the recent decision no 131 of 2022 held by the Constitutional Court, the Court replied to the question of constitutional legitimacy, declaring the rules of the Italian civil code unconstitutional, insofar as these rules do not allow the child to take the mother's name in the event of parental consent. With this decision, the Court made not only a radical change with regards to the past discipline, but also affirmed the new rule governing family name that is based on a new fundament: the protection of gender equality as an essential element to guarantee the identity of the child.

In a comparative perspective, it is interesting to consider the French experience and the recent law on name's attribution – Law 2 March 2022 no 301 – that codified the '*nom d'usage*' in the articles of civil code dedicated to the name's attribution rules, pushing even further on the role of autonomy of the parties in family law. However, both in Italy and France still uncertainties remain once equality established.

II. What's in a Name?

In the contemporary society, the name – composed by first name and surname – represents the major distinctive feature in a human being, and therefore it has been reasonably placed among the fundamental rights protected by the Italian Constitution, which guarantees and protects the right to personal identity. According to Art 2 of the Constitution, in fact, the Italian legislature 'acknowledges and protects the fundamental rights of the human being, both as an individual and as a member of social group'.

If, on one hand, it is undoubtedly true that – as Romeo and Juliet 's quote of Shakespeare taught to all of us –[1] what someone or something is called or labelled cannot completely describe their or its intrinsic qualities, on the other hand, however, it is also true that the name – and family name in particular – is part of the personal identity of the person, both in its individual and social dimension. In this perspective, the name reveals an identity: geographical, national or even professional, but, above all, it reveals the family origins. Beyond the personal value of the first name, the surname has a social value being also a feature that allows the individual to be distinguished by people that are not part of the family, covering a public function, which is strictly linked to the interest of the social community to identify its members.[2]This is also affirmed, although through a negative formulation of the disposition, in Art 22

[1] W. Shakespeare, *Romeo and Juliet*, in W.J. Craig ed, *The Complete Works of William Shakespeare* (London: Oxford University Press: 1914 Bartleby.com, 2000. www.bartleby.com/70/), Act II. Scene II: 'What's in a name? That which we call a rose/ By any other name would smell as sweet'.

[2] See 'Nome e cognome' *Digesto delle discipline privatistiche, Sezione civile* (Torino: UTET, 1995), XII, 136-143.

of the Italian Constitution, which establishes 'No person may be deprived for political reasons of legal capacity, citizenship or *name*'. In particular, the surname 'is a point of emergence of the individual's belonging to a family group and thus a defining profile of personal identity and social personality'.[3] Moreover, the name has a strong value in the psychological and individual sphere of the person, since if it is true that 'through a name the person is distinguished from other persons and individualized',[4] it is also true that 'a name has a special significance for human beings' as it is also well explained by child psychology when teaches that 'even a very young child identifies so strongly with its first name that there is an identity between the psychic existence and the first name'.[5]

III. The Old Discipline of Family Name in Italy

In Italy, the system of rules governing names and surnames remained for long time rooted in a historical heritage based on roman law. As recognized, the rules descended from

> 'the legacy of an ancient legal tradition rooted in Roman family law, based on *agnatio*, on a system of personal, family and inheritance relations at the centre of which is the *pater familias*, as the main subject of rights'.[6]

The Italian civil code of 1942 followed this patriarchal model.[7] For instance, according to the first version of Art 144 of the civil code on marital authority, the husband was considered 'the head of the family', while the wife had to follow his civil status, taking his surname.[8] Moreover, there was no specific rule on the surname of legitimate children in the Italian Civil Code, since it was considered an indisputable axiom that they should take their father's surname.

Beyond these considerations of the utmost importance, however, in the past, this rule was justified by 'the objective inscrutability' of the father's biological derivation relationship'[9] or as a 'form of compensation for the natural uncertainty

[3] Of this opinion F. Astone, 'Il cognome materno: un passo avanti, non un punto d'arrivo, tra certezze acquisite e modelli da selezionare' *Giurisprudenza costituzionale*, 493 (2017).

[4] W. Pintens and M.R. Will, in K. Zweigert and U. Drobnig eds, *International Encyclopedia of Comparative Law*, IV, 1995, 45.

[5] ibid

[6] See, V. Carbone, 'Quale futuro per il cognome?' *Famiglia e diritto*, 457 (2004). See also, Corte Costituzionale 16 February 2006 no 61, *Foro Italiano*, I, 1673-1677 (2006).

[7] See, for an interesting overview in a comparative perspective of the rule in different countries, A. Diurni, 'In the Name of the Child: Remedies to Adultcentrism in Naming Law', in this issue.

[8] See the old version of Art 144 of the Italian civil code which (with a text identical to that of Art 131 of the Civil Code of the Kingdom of Italy of 1865) provided that: 'the husband is the head of the family; the wife follows his civil status, takes his surname and is obliged to accompany him wherever he sees fit to establish his residence'.

[9] See, L. Olivero, 'Ancora sul cognome: due luoghi comuni e due proposte per una riforma

of paternity before the dissemination of genetic evidence'.[10] In other opinions, a customary rule, or a traditional rule was recognized in the rule grounded on the patronymic transmission.[11] In any case, there is also a symbolic value beside the juridical value of the name. As observed by an attentive scholar, there is a symbolic value in the name, and 'this value plays a role in marking the differences of maternal and paternal roles in the process leading to the birth of a new life'.[12] Under this perspective, it has been pointed out that 'a child's bond with his mother is in her flesh, given that she has carried him for nine months, and given she has 'brought him into the world', and it will never be possible for them to erase what has been established in this alliance. A child's bond with his father will only be built, on the contrary, in any case mainly, through words. It is because he 'names' him as his child that a father assumes his paternity, and it is therefore another alliance that will be established (...) in this nomination'.[13]

The situation mentioned above was also reflected in the case law of the Constitutional Court. In fact, firstly, the Constitutional Court, in its orders no 176 and no 586 of 1988, had explicitly stated that there was no constitutional illegitimacy of the system regulating the attribution of the paternal surname to legitimate children, assuming that the constitutional principle of the legal and moral equality of spouses was to be interpreted within the scope of safeguarding family unity.[14]

It was clear, at the time, that the principle governing the whole system of family law was thus the preeminent value of the 'unity of the family', rather than the name as a fundamental component of 'personal identity'.[15]

IV. The Long March Towards Equality in Italian Family Law

An initial slight change arose with the Family law reform of 1975. In a period of social and cultural changes, the traditional vision of the family based on the principle of unity began to disintegrate.

annunciata' *Jus civile*, 1371-1400 (2021), who recalls the interesting opinions of J.-L. Renchon, *Le nom de famille, in Cour constitutionnelle et droit familial*, in N. Massager and J. Sosson eds, Anthemis, Limal, 2015, 20.

[10] On the origins of the paternal surname as a 'form of compensation for the natural uncertainty of paternity before the spread of genetic evidence', see C. Favilli, 'Il cognome tra parità dei genitori e identità dei figli' *Nuova giurisprudenza civile commentata*, 824, (2017).

[11] See the analysis of Pazé, 'Verso un diritto all'attribuzione del cognome materno' *Diritto di Famiglia e delle persone* 326, (1998); F. Giardina, 'Il cognome del figlio e i volti dell'identità' *Nuova giurisprudenza civile commentata* 2014, 139; G. Alpa and G. Resta, *Le persone fisiche e i diritti della personalità*, (Torino: UTET, 2006), 96.

[12] See, L. Olivero, note 9 above.

[13] J.-L. Renchon, n 9 above, 20.

[14] Ordinanza no 176 of 11 February 1988 *Diritto della famiglia e delle persone*, 1988, I, 670, with notes of F. Dall'Ongaro, Il nome della famiglia e il principio di parità, and ordinanza no 586 of 19 May 1988 *Giurisprudenza costituzionale*, 1988, I, 2726.

[15] L. Tullio, n 15 above.

It is worth noting that this shift was also achieved thanks to the contributions of some legal scholars who actively favoured this evolutionary trend and re-designed a new family model described as a 'social formation'[16] within its paramount constitutional function and characterized 'by equal, moral and legal dignity of its members'.[17]

Additional important changes marked a strong break in the traditional structure of family law, in the very last decade, as also documented by previous articles appeared in this journal.[18] Several innovations have been implemented in Italy, following an acceleration never seen before, that completely reshaped the rules governing family law.[19] Concerning name's attribution rules, the Decree no 54 of 13 March 2012 amended the text of Art 33 of the previous Decree 396/2000, allowing for the possibility that the child may also request to 'add another surname to his/her own'.[20]

However, even though times were changing fast and it appeared to be ripe for further innovations, no changes in the general family names discipline had been achieved and no reforms touched this specific issue until the final word held by the Constitutional Court in April 2022.

V. The Silence of the Legislator and the Role Played by the Courts

Until that decision, considering the silence of the legislator, the need for a new discipline governing family name was challenged in the court's rooms.

However, in contrast with two former decisions of the Constitutional Court – in which the Court had instead seen in the safeguarding of family unity pursuant to Art 29 of the Constitution the justification for the limitation of the principle of equality between spouses in terms of the transmission of the

[16] In particular, see P. Perlingieri, 'Sulla famiglia come formazione sociale' *Diritto e giurisprudenza*, 775-778 (1979).

[17] ibid

[18] See, among others, the recent contribution of L. Tullio, n 15 above.

[19] The law 10 December 2012 no 219; decreto legge 28 December 2013 no 154, implementing the uniqueness of the child status, that recognized the equality between children born of a married couple, born out of the wedlock and adopted children; the Law 10 November 2014 no 162, especially at Arts 6 and 12, that introduced measures of 'assisted negotiation' and 'agreements reached before the registrar' in order to allow the friendly and out-of-court settlement of marital separation; the law 6 May 2015 no 55, allowing the so-called 'express divorce'; finally, the law no 76 of 20 May 2016, Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze, that recognized for same-sex couples the same rights of married couples, allowing the registered same-sex couples to enter into same-sex union protected by the law. See, L. Tullio, n 15 above.

[20] Decreto del Presidente della Repubblica 13 March 2012 no 54, Regolamento recante modifica delle disposizioni in materia di stato civile relativamente alla disciplina del nome e del cognome prevista dal titolo X del decreto del Presidente della Repubblica 3 novembre 2000, n 396 (12G0076).

surname to descendants[21]– in 2006 a famous decision of the Constitutional Court (12 February 2006 no 61) expressly marked a radical conceptual overturning. In this judgment the Court expressly stated that

> 'the current system of attributing children's surnames is the legacy of a patriarchal conception of the family, which has its roots in Roman family law, and of an outdated marital power, which is no longer consistent with the principles of the legal system and the constitutional value of equality between men and women'.[22]

At the same time, however, the Constitutional Court declared that the choice among the various options available to overcome discrimination was beyond the Court's powers. Such a choice was left to the discretion of the legislature, but it remained silent on this topic.[23]

VI. The Case Cusan Fazzo and the Condemnation of Italian Rules by the ECtHR

On 31 March 2011, Mr Fazzo and Mrs Cusan applied to the Minister of the Internal Affairs for permission to add the name 'Cusan' to the names of their 'legitimate children'. They explained that they wanted this to enable them to identify themselves with the moral heritage of their maternal grandfather - who had died in 2011 and who, according to them, had been a philanthropist. As the applicant's brother had no descendants, the name 'Cusan' could only be perpetuated, they said, by passing to the children of Ms Alessandra Cusan.

By a decree of 14 December 2012, the Prefect of Milan authorised the applicants to change the name of their children to 'Fazzo Cusan'.

The applicants stated that, despite this authorisation, they wish to maintain their application before the Court. In this respect, they pointed out that the Prefect's decree had been issued following an administrative, not a judicial, procedure and that they had not been authorised to give their child only their mother's surname, as they had requested to the Court of Milan. Without finding

[21] See, G. Passarelli, 'Note sulla attribuzione del cognome materno. Una questione (ancora) de iure condendo' *Famiglia e Diritto*, 551-559 (2021).

[22] Corte Costituzionale 16 February 2006 no 61, *Foro Italiano*, I, 1673-1677 (2006), with notes by: E. Palici di Suni, 'Il nome di famiglia: la Corte Costituzionale si tira ancora una volta indietro, ma non convince' *Giurisprudenza costituzionale*, I, 552-558 (2006)

[23] Some bills and legislative proposals were made, but they did not appear adequate for the social changes and the new model of family. It has been noted that in this context, the decreto legge 28 February 2019 no 1025 entitled *Disposizioni in materia di attribuzione del cognome ai figli* had marked the end of this immovability by the legislature. See on this issue, among the legal scholars, G. Passarelli, n 21 above, and R. Peleggi, 'Parità tra genitori e cognome dei figli: il Belgio abolisce le discriminazioni, mentre l'Italia resta in attesa di una riforma' *Rivista di Diritti Comparati*, 94, 79-98 (2018).

justice in the Italian system, Mrs Cusan and Mr Fazzo[24] decided to appeal to the Strasbourg Court.[25] The European Court of Human Rights, in upholding the appellants' arguments, started from an analysis of Art 14 of the European Convention on Human Rights (prohibition of discrimination) in conjunction with Art 8 (right to respect for private and family life). In particular, the European Court reiterated that the right to a name must be brought within the scope of Art 8 of the Convention insofar as it constitutes the indispensable identifying and distinctive sign of personal identity.

In light of these considerations, in January 2014, the European Court of Human Rights invited the Italian legislature to fill this legislative gap, ie, the right of both spouses to transmit their surnames to children born both within and outside marriage.

In its reasonings, the court stressed that the rule denounced by the applicants was symptomatic of a patriarchal conception of the family and was difficult to reconcile with the relevant international law. Nonetheless, the Court considered that it was up to the legislator to establish a legal regime in this area that was compatible with the Constitution.

Following the decision against Italy by the ECtHR, the Italian debate started to focus firmly on the need of the legislature to protect and guarantee gender equality between men and women, the 'moral and legal equality' of the parents, harmonising the new discipline to the changed needs of the family in the contemporary society, thus overcoming the link with a patriarchal model.

After this recall made by the Court of Strasbourg, a long series of bills were proposed by the Parliament, but none of them was finally approved.[26]

VII. Another Crack in the System: The Constitutional Court's Judgement no 286 of 2016

According to these principles, another crack in the system has been made by the Italian Constitutional Court with the judgement no 286 of 2016,[27] which declared the constitutional illegitimacy of Art 262, para 1, of the Civil Code in the part where it does not allow spouses to attribute by mutual agreement also the maternal surname in compliance with 'the changed situation of constitutional case law and the likely change occurring in the European rules'.[28]

[24] European Court H.R., *Cusan and Fazzo* v *Italy*, Judgment of 7 January.

[25] ibid

[26] ibid

[27] Corte Costituzionale 21 December 2016 no 286, *Giurisprudenza costituzionale*, 2435-2437 (2017), with notes of E. Al Mureden, 'L'attribuzione del cognome tra parità dei genitori e identità personale del figlio' *Famiglia e diritto*, 218-224 (2017); V. Carbone, 'Per la Corte costituzionale i figli possono avere anche il cognome materno, se i genitori sono d'accordo' *Corriere giuridico*, 167-174 (2017).

[28] Decision no 286 declared unconstitutional the following provisions, insofar as they did

The underlying case concerned the name of a child with dual nationality. In fact, it dealt with a minor born in Brazil who held dual Italian-Brazilian citizenship and who requested to be registered in Italy with the last names of both of his parents, as he had been registered in Brazil. The respective civil authorities rejected the request based on existing legislation, and the case was eventually brought before the Italian Constitutional Court. The merit of the Constitutional Court's 2016 ruling was to allow not only, in the case of parental consent, for the child to take on the surnames of both, but above all, for all cases of dual nationality couples residing in Italy, for the children to be identified on Italian territory in the same way as they are identified in the other state.

The Court's reasoning strengthened 'the double dimension of the surname' – personal and social – to justify, especially for the dual citizens in this case, 'a fortified protection not only within the country, but in the wider 'legal space'.[29] Moreover,

> 'the decision to attribute to the child only the father's surname would create an unreasonable disparity in treatment between parents, a disparity that could not be justified in the name of safeguarding family unity'.

As previously declared by the Constitutional Court, family unity 'is strengthened when mutual relations between spouses are governed by solidarity and equality'.[30]

With this decision, the Court made not only a radical change with regards to the past discipline, but also affirmed the new rule governing family name on a new fundament: the protection of gender equality. In the words of the Supreme Court, 'in order to achieve the full and effective realisation of the right to personal identity, which has its primary and most immediate expression in the name, along with the recognition of equal significance to both parents within the process of constructing that personal identity, the child's right to be identified from birth by the surname of both parents must be recognised. Conversely, the provision for absolute priority to the father's surname sacrifices

not allow the parents, by mutual consent, to attribute to their children at the moment of birth the maternal as well as the paternal last name:Arts 237, 262 and 299 of the Italian Civil Code; Art 72, first paragraph, of Royal Decree no 1238 of 1939; and Arts 33 and 34 of Presidential Decree no 396 of 2000. The Civil Code provisions in question refer to the permissible evidentiary means for the establishment of a person's civil status (Art 237), the attribution of a last name to a child born outside of marriage (Art 262), and the attribution of a last name to an adoptive child (Art 299). Prior to the Constitutional Court's decision, these provisions only allowed the paternal last name to be attributed to the child when both parents recognized the child at the moment of birth or adoption. Additionally, Art 72, para 1, of Royal Decree no 1238 of 1939, as amended, on the digital and archival registration of the civil status of a person, and articles 33 and 34 of Presidential Decree no 396, on the change of last name of a person as a result of the change in his or her parents' last name, which would have contradicted the Court decision, were also voided. For the facts and details of the case see, in this review, the clear analysis of L. Tullio, n 15 above.

[29] N. Irti, *Norma e luoghi. Problemi di geo-diritto* (Roma-Bari: Laterza, 2001), 3-16 cited in L. Tullio, n 15 above, 223.

[30] L. Tullio, n 15 above, 224.

the child's right to identity, denying him or her the ability to be identified from birth also by the mother's surname'.[31] In fact, according to the judges' decision

> 'the automatic attribution of only the paternal surname results in the invisibility of the mother and is the sign of an inequality between the parents, which reverberates and imprints itself on the identity of the child'.[32]

This entails the simultaneous violation of Arts 2, 3 and 117 of the Constitution, since the right to personal identity was compromised, and also with respect to the principles of equality and equal dignity of spouses, but also of Arts 8 and 14 of the European Convention on Human Rights'.

According to these new perspectives, the family name must be matter of choice to be solved by both the parents on consensual basis.

VIII. The Preliminary Constitutional Question Before the Italian Constitutional Court no 18 of 2021

By order 78/2020, the Court of Bolzano raised with the Constitutional Court a question of the legitimacy of the rule concerning the surname of children born out of wedlock, in so far as it provides that if the recognition was made simultaneously by both parents, the father's surname is assigned.[33]

On 13 January 2021 the Court, in joint divisions, examined the case and decided to go further, raising before itself a question of the constitutionality of the aforementioned rule, Art 262, para 1, of the Civil Code, deeming the question to be preliminary to that raised by the judge a quo.

On the merits, the question raised by the Court of Bolzano concerns the possibility for unmarried parents to attribute to their daughter, recognised at birth by both, only her mother's surname.

This case is different from the former judgment no 286/2016, which confirms the right to give the child the mother's surname in addition to the father's if the parents agree. The case concerned the question whether it is

[31] Corte Costituzionale 21 December 2016 no 286, *Giurisprudenza costituzionale*, 2435-2437 (2017), available at https://tinyurl.com/48a462yw (last visited 31 December 2022).

[32] ibid

[33] According to Art 262 c.c.: Il figlio assume il cognome del genitore che per primo lo ha riconosciuto. Se il riconoscimento è stato effettuato contemporaneamente da entrambi i genitori il figlio assume il cognome del padre. In the case, parents had insisted on giving only the mother's surname for essentially 'aesthetic' reasons such as the difficulty of understanding the paternal surname and the circumstance that the short name given to the child would better match the mother's short surname; moreover, the mother's surname would be well known to Germans and Italians alike. See, C. Masciotta, 'L'eguaglianza dei genitori nell'attribuzione del cognome: una nuova regola iuris dettata dal giudice costituzionale' 15 Osservatorio sulle Fonti, 262, 251-271 (2022).

possible for two unmarried parents to attribute to their daughter only the surname of her mother in the event of simultaneous recognition of the child. This possibility is precluded by the provision of Art 262 of the civil code.

In October 2019 the Court of Bolzano thus asked the Constitutional Court to declare Art 262 of the Civil Code unconstitutional in that it does not allow for the possibility, in the event of an agreement between the parents, of giving the child the maternal name instead of the paternal name.

Thus, with Order no 18 of 2021, the Constitutional Court raised the question of the constitutional legitimacy of Art 262 of the Civil Code, with reference to Arts 2, 3 and 117, first paragraph, of the Italian Constitution, the latter in relation to Arts 8 and 14 ECHR, in the part where, in the absence of agreement between the parents, it provides for the acquisition at birth of the paternal surname, instead of that of both parents. The order, and therefore the answer to this doubt of constitutionality, was therefore an essential prerequisite for the Court to address the question of legitimacy raised by the Court of Bolzano.

In the aforementioned order, the Court pointed out that, even if 'the right of the parents to choose, by mutual agreement, to transmit only their mother's surname was recognised, the rule requiring the acquisition of only the father's surname should be reiterated in all cases where such an agreement is lacking or, in any case, has not been legitimately expressed. On the other hand, not even the consent, on which the limited possibility of derogation from the general rule providing for the attribution of the father's surname is based, 'could not be considered an expression of real equality between the parties, given that one of them does not need the agreement to have its own surname prevail'.

In addressing to itself the preliminary question of constitutional legitimacy, it is worth noting that the Court enlarges the scope of the question addressed by the Court of Bolzano.

Sharply, the Court observed that, if one were to accept the Court's view, the rule requiring the child to acquire only the father's surname would have to be upheld in all cases where there is no agreement. Since these are probably the most frequent cases, the prevalence of patronymic would thus be reconfirmed, the incompatibility of which with the fundamental value of equality has long been recognised by the Court itself, which has repeatedly urged the legislature to intervene.

In other words, a system that allows derogation from the surname rule only if both parents agree confirms and aggravates gender inequality, since in the event of a conflict between the father and mother, over the decision of the child's surname, it automatically favours the father's will and decision, leaving the mother's will completely unsuccessful.

IX. The Court's Reply. Judgement no 131 of 27 April – 31 May 2022

After more than thirty years, with Judgement no 131 of 27 April - 31 May 2022, the Court strengthens – one more time - its role as guarantor of the Constitutional rights established in the Constitution that, as in the case under comment, have been threatened and jeopardized by the rules contained in the civil code for a long time.

Essentially the Court's judgement declares unconstitutional the articles of the Italian Civil code on three grounds: first, the violation of the personal identity of the children; second, the violation of the right of equality between parents, third the violation of international obligations which condemned in this last thirty years Italy for its discriminatory discipline in the attribution of Family name.

In developing these key issues, the Courts starts declaring in fact that

> 'the surname, together with the first name, represents the core of the person's legal and social identity: it confers identifiability on him, in relations under public law, as under private law, and embodies the synthetic representation of the individual personality, which over time is progressively enriched with meanings'.

This was a constant in the case law of the Court, that always recognized the name as a 'fundamental right of the human person',[34] stressing that it is 'an autonomous distinguishing mark of (...) personal identity',[35] as well as an 'essential trait of (...) personality'.[36]

In the famous judgment no 286 of 2016, the Court recognised the name as an 'asset that is the subject of an autonomous right under Art 2 of the Constitution', and consequently as 'an essential feature of (...) personality'.[37]

It follows that 'the surname, as the fulcrum – together with the first name – of legal and social identity, links the individual to the social formation through the *status filiationis*'.[38] The surname 'must, therefore, be rooted in the family identity and, at the same time, reflect the function it plays, also in a future projection, with respect to the person'.[39]

It is, therefore,

> 'precisely the manner in which the surname testifies to the child's family identity that must reflect and respect the equality and equal dignity

[34] Judgments no 13 of 1994, *Giurisprudenza Costituzionale*, 95 (1994) no 297 of 1996 *Giurisprudenza Costituzionale*, 2475 (1996), and, most recently, Judgment no 120 of 2001 *Il Foro Italiano*, 645/646-657/658 (2002)

[35] Judgment no 297 of 1996 *Giurisprudenza Costituzionale*, 2745 (1996)

[36] Judgment no 268 of 2002; in the same sense, judgment no 120 of 2001 *Il Foro Italiano*, 645/646-657/658(2002).

[37] Judgment no 286 of 2016, *Giurisprudenza costituzionale*, 2435- 2437 (2017).

[38] Judgment no 131 of 27 April -31 May 2022 *Il Foro Italiano* I, 2233 (2022).

[39] Judgment no 286 of 2016 n 37 above.

of the parents'.[40]

The sharp reasoning of the court, and in a way the very interest of the Court in replying to this preliminary question was focused precisely on this knot.

Starting from the logical assumption that 'there is not even a possible agreement without equality', because in the absence of an equality of the parties, the logical basis of an agreement would be threatened. The Court affirmed that if, in the absence of an agreement the rule to be applied would remain the rule of the father's name, equality should not be guaranteed in any case, and the problem would be unsolved, every time there is no agreement between the parties, since one of them shall always prevail on the other. The answer, therefore, it is not only in admitting for the future an agreement for the parties in the choice of the family name, but rather to change the existing rule of the automatic attribution of father's name in the case of disagreement.

Bearing in mind these guiding principles the Courts declared unconstitutional Art 262(1) of the Civil Code in so far as it allows, with regard to the case of recognition made simultaneously by both parents that the child takes the father's surname, instead of establishing that the child takes the surnames of the parents in the order agreed by them, at the time of recognition, or to attribute the surname of only one of them. Consequently, it declares the unconstitutionality of the rule inferable from Arts 262, first para, and 299, third para, of the Civil Code, insofar as it allows that a child born in wedlock takes the father's surname, instead of allowing that the child takes the surnames of the parents, in the order agreed by them, at birth, to attribute the surname of one of them alone; and it declares also the unlawfulness of Art 299, third para, of the Civil Code in so far as it provides that 'the adopted child shall take the surname of the husband's surname', instead of allowing that the adoptee shall take the surnames of the adoptive parents, in the order agreed upon by them, without prejudice to an agreement, reached in the adoption proceedings, to attribute the surname of only one of them. Ultimately, the Court of Laws has declared the illegitimacy of any form of automatic attribution of the paternal surname, with repercussions, therefore, also on Arts 237 and 299 of the Civil Code.[41]

In fact, according to the judges' decision

> 'the automatic attribution of only the paternal surname results in the invisibility of the mother and is the sign of an inequality between the parents, which reverberates and imprints itself on the identity of the

[40] Judgment no 131 of 27 April-31 May 2022.

[41] Art 237 of the Civil Code indicated among the constitutive elements of the possession of the status of legitimate child the fact 'that the person has always borne the surname of the father he claims to have'. That paragraph was repealed by Legislative Decree No 154 of 28 December 2013.

child'.[42]

The Court found discriminatory and detrimental to the child's identity the rule that automatically attributes the father's surname. The constitutional illegitimacy was also extended to the rules on the attribution of the surname to the child born in wedlock and to the adopted child.

In accordance with the principle of equality and in the child's interest, both parents must be able to share the choice on his or her surname, which constitutes a fundamental element of personal identity.

Therefore, the rule becomes that the child takes the surname of both parents in the order agreed by them, unless they decide, by mutual agreement, to give only the surname of one of them.

As to the rules necessary to settle any disagreement, in the absence of different criteria established by the legislator, the Court cannot but point to the instrument that the legal system already provides for resolving disagreements between parents on choices of particular relevance concerning the children. This is the recourse to the intervention of the court, provided for, in simplified forms, by Art 316, second and third paras, of the Civil Code, as well as – with reference to situations of crisis of the couple - by Arts 337-ter, third para, 337-quater, third para, and 337-octies of the Civil Code.[43]

Moreover, the aforementioned provisions are the same ones that, according to the orientations of case law and legal scholarship, settle disagreements between parents also with regard to the attribution of the first name.[44]

In any case, it is up to the legislature to regulate all aspects related to this decision.

It is worth highlight that the Court is clearly aware of the fact that its role is checking norms, and not making norms. The role to legislate, instead, is the task of the legislature. In the judgement rendered by the Court, this is an important issue because the Court, faced to the prolonged silence of the Parliament on the innumerable invitations to legislate, not only declares the unconstitutionality of any norms that establish an automatically attribution of the name but also tries to imagine how the norms should be imagined, offering some useful criteria to the legislator, hopefully waiting for its prompt intervention.

X. More '*Liberté*' Than '*Égalité*': The Insertion of '*Nom d'Usage*' in the French 'Law no 2022 -301 of 2 March 2022 on the Choice of a Name Derived from Filiation'

The comparison with the French legal system appears extremely interesting

[42] Judgment no 131 of 27 April-31 May 2022.
[43] ibid
[44] ibid

as far as the events and vicissitudes around the discipline of name's attribution recall – with some peculiarities – the same path of the Italian experience.

In this view, if, on one side, the French legislator recognised the equality between parents and tried to abandon the rule of patronymic, on the basis of the principle of equality and non-discrimination, the result is only partially achieved and it seems less complete compared to the efforts achieved by the Italian Constitutional Court. On the other side, with the recent Law 2022-301, this new law gives the power of autonomy a role even broader.

The parliamentary debates reveal that the legislator intended to reconcile the objective of equality, which was the primary objective of the initial bill, with greater freedom in choosing one's name.[45]

This is evident at very first sight if one pays attention to the title given to the act: 'Law no. 2022-301: on the choice of a name derived from filiation'. The legislative text was adopted by the National Assembly and published in the *Journal officiel* of 3 March 2022, it came into force on 1 July 2022.[46]

Before briefly illustrating the innovations of the law 2022-301, it seems important to give a synthetic picture of the rules governing name's attribution in France until this recent change.

In France, in the past, the patronymic rule applied together with the admissibility of the so-called *nom d'usage* provided for by the Law n° 85-1372 of 1985. The *nom d'usage* is a peculiarity of the French system. This rule, which is not mandatory and not transmissible- allows the name of the other parent to be added to one's own in social life. The *nom d'usage*, however, did not enter in the civil status registers and it was not transmitted to descendants. It is therefore not a 'real' name. It is not a pseudonym either, since it can, at the request of the person concerned, be registered on identity documents under the heading '*nom d'usage*'. It is therefore a social name.[47] This is why this technique has been opened up more widely for adults and minors.

In the brief excursus concerning family name, the most important changes then resulted from the Acts of 4 March 2002 and 18 June 2003, two essential texts which, once again, tackled the injustice, in the event of the parents marrying, of the paternal preference in the attribution of the name and created the fourfold option of Art 311-21 of the Civil Code.[48]

[45] Débats Parlamentaires (procedure accélérée), LOI n° 2022-301 du 2 mars 2022 relative au choix du nom issu de la filiation, available at https://tinyurl.com/bdzbrkr2 (last visited 31 December 2022).

[46] LOI n° 2022-301 du 2 mars 2022 relative au choix du nom issu de la filiation, JORF n°0052 du 3 mars 2022.

[47] F. Laroche-Gisserot, 'Les apports de la loi du 2 mars 2022 relative au choix du nom issu de la filiation' *AJ Famille*, 360 (2022).

[48] See, for a reconstruction of the evolution of the discipline in French Legal System, C. Petit, 'Difficultés d'application de la législation relative au nom de famille : appel au législateur ?' *RLDC*, 39 (2011); Id, 'Modification des règles relatives au nom de famille des enfants : égalité, liberté et complexité (suite)' *RLDC*, 5162 (2013).

According to Art 311-21 of the French Civil Code (carnal filiation and adoptive filiation) – depending on whether the child has one or two links of filiation at the time of the birth declaration – a child who has two links of filiation may be given the mother's name or the father's name or both in any order they wish, provided they complete a name choice form. Otherwise, the suppletive rules will provide that if there is not perfect simultaneity in the establishment of the two links of filiation, the one who first established the link of filiation transmits his name, while in the case of simultaneity, it is the father's name that is transmitted automatically (reminiscence of the old system: patronymic).

Finally, if there is a disagreement between the parents and it is notified to the *Office de l'État Civil* (OEC), then the two names are transmitted in alphabetical order.

These Acts guaranteed the principle of freedom of choice of family name and the equality between the sexes in the transmission, but with two limits: the first was represented by the choice of no more than two names transmitted and the second by the respect of the principle of unity of name in siblings.

In the absence of marriage, various solutions were available, adapted to the state of parental relation.

In the case of one parent-child relationship, the rule was established by Art 311-23 of the Civil Code: a child who has only one parent-child relationship at the time of the declaration of birth is given the name of his or her only parent. If a second parent-child relationship is subsequently established, and with the agreement of the first parent, the possibility of choosing a name returns with the same limitations as before. If the first parent does not agree, there is no possibility of changing the name.

In this evolutionary trend, another important change occurred with the Law on bioethics 2021-1017 of 2 August 2021, that established new rules for the transmission of specific names to child born through assisted reproductive technology (ART).[49] The new Art 342-12 Civil Code provides for couples of women who have recourse to ART the possibility of transmitting the name of the mother who gives birth, of the mother who does not give birth or of both in the order they wish (via a declaration form to be submitted at the time of the declaration of birth at the latest) within the limit of one name for each (para 1) and respect for the principle of unity of the name in the siblings (para 3). If there is no double recognition because the mother who did not give birth prevents it, the possibility of returning to the rules of Art 311-23 of the Civil Code (transmission of the name of the only parent who established the link) is allowed. In the absence of a choice, the legislator provides for the automatic transmission of both names in alphabetical order. On this particular criterion, shades and uncertainties persist, because of the risk of threatening equality

[49] LOI n° 2021-1017 du 2 août 2021 relative à la bioéthique, JORF n° 0178 du 3 août 2021 ELI: https://tinyurl.com/374huu5y (last visited 31 December 2022).

once more, since the alphabetical order inevitably leads to the survival of only one surname in transfer process involving the next generations. Equality, in this perspective, is one more time attacked by the inevitably abandonment, generation by generation, of all those surnames from the Z backwards. The alphabetical order – as we will point out in the next pages – remains a debated issue also in Italy, since no reference to a criterion in case of no choice of the parents has been evocated in the Constitutional Court's judgement, except for the suggestion to leave the issue on judges. As far as equality is concerned, it is undoubtful that in France, in contrast with the Italian approach, many of the latest reforms concerning name's attribution rules have been made, all guided by the ambition to strengthen equality.

With the new Act of 3 March 2022, French law combines *liberte* and *egalité*, overcoming the problem arose with former provisions of civil codes, according to which, in case of disagreement, the patronymic rule prevailed.[50]

In fact, this reform facilitates the use of the other parent's name, particularly for minors. It also gives any adult not only the right to add but even to substitute the name of their other parent or, if they bear the names of both parents, to reverse the order of their names. This can be done once in a lifetime, by a simple declaration at the town hall, without having to justify a legitimate reason.

As documented in the preparatory work the two major principles taken into consideration by the legislator in the reform were equality between parents and individual freedom.

It is with specific regard to the *nom d'usage* that the Act of 2 March 2022 further strengthens equality between parents, particularly for minors.

In fact, one of the innovations made by Law 2022-301 is the enshrinement in the Civil Code of the *nom d'usage* in Art 311-24-2, among the rules disciplining the name's attribution.[51]

As reported in the explanatory memorandum to the Act

> 'the aim was to respond to the concern of many women who are raising a child alone or who have primary responsibility for it (and for whom) the fact that the child most often bears the father's name can be a source of complication in carrying out administrative procedures'.[52]

The law first allows, as '*nom d'usage*', to add to one's name the name of the parent who did not transmit one's own, in the name of the principle of freedom.

The law then gives every adult the right, once in his or her life, to change his

[50] P. Calendal Fabre, 'La loi relative au choix du nom issu de la filiation : liberté, égalité... simplicité !' *AJ Famille,* 358 (2022).

[51] See, French Civil Code, Section 3 : Des règles de dévolution du nom de famille et du nom d'usage (Arts 311-21 à 311-24-2), https://tinyurl.com/56fknckj (last visited 31 December 2022).

[52] See Assemblee Nationale, Proposition de loi n°4853 pour garantir l'égalité et la liberté dans l'attribution et le choix du nom, Legifrance, https://tinyurl.com/2p94k85k (last visited 31 December 2022).

or her surname, adding or substituting the name of the parent who did not pass on his or her own.

The principle of equality was even more directly invoked by inserting the possibility for the parent who has not transmitted his or her name to the child to decide alone to add it to the child's name, as *nom d'usage*. In so doing, the authors of these amendments intended to 'restore parental equality in the choice of the name used in everyday life'.

In its substance, while the main thrust of Act no 2022-301 of 2 March 2022 is to give the adult child the fourfold choice that his or her parents have not exercised or have, in his or her opinion, exercised incorrectly, the Act has also used and extended the technique of the *nom d'usage*, a name used in everyday life, again to facilitate adaptations that would be desired but had not been implemented for various reasons.[53]

As affirmed, this is a twofold revolution: substantive and procedural.[54] A revolution in substance because this change of name is a right and is therefore not conditional on the demonstration of a legitimate reason that an authority would be responsible for controlling. A revolution in procedure because the change is made by declaration before the civil registrar and no longer by decree prepared by the chancellery after the publicity formalities have been completed.[55]

In any case, as declared by most of the commentators, such discipline does not simplify but confuses the entire system, mixing rules pertaining to different grades and orders in the same provision, without a real equality standard guaranteed.

As observed, if 'the Act of 2 March 2022 thus responds to an egalitarian aspiration' it did not follow 'an egalitarian logic', as it refused 'to impose automaticity of the double name at birth', precisely on the ground of freedom.[56] In contrast with the solution given by the Italian Constitutional Court it did not want to impose the automaticity of the double name at birth.

It is clear that the French rule of *nom d'usage*' is not referrable to our legal system. However, this new rule together with the amended rules of double names – including criteria and limits to regulate the choice of family name – adopted by the French legislator, as they reveal the conceptual basis that guided this insertion in the code: the freedom of choice of both parents, the freedom of choice of the minor once in adult age, aiming essentially to allow the freedom of choice in its greatest expression and in the most different conditions.[57]

[53] F. Laroche-Gisserot, n 47 above, 360.

[54] ibid

[55] ibid

[56] P. Calendal Fabre, n 49 above, 358.

[57] See, for interesting critical thoughts around the so called 'adulcentrism' derived from the guiding principle of the new rules, A. Diurni, n 7 above.

XI. Once Equality Established, Some Uncertainties Remain

The final word given by the Italian Constitutional Court on the issue, together with the above-mentioned case law, confirm the idea that abandoning the principle of automatic attribution of the paternal surname is part of the broader effort of the constant adaptation of family law to the constitutional and community values. On this point, the judgement of the Court no 131 of 31 May 2022 reveals in a clear-cut way the role of the constitutional court as defensor and guarantor of constitutional values and fundamental rights towards the acts and rules enacted by the Parliament or by the Government.

In this context, it should be added that the question of the family name has as its objective the 'egalitarian aspiration' since the aim is to level out the differences between parents. The delicate issue of the protection of minors is also concerned.[58]

In this scenario that is completely reshaped, the power of autonomy earns a privileged role, becoming the parameter through which the regulation of private life: private autonomy has become the dominant approach to the problem of surnames in the different European legal systems as the previous analysis of the Italian and French legal system testifies.

In France, autonomy is even more evident. By facilitating the use of the name of the other parent, particularly for minors, and by giving any adult the right, via a Cerfa form (CERFA stands for centre d'enregistrement et de révision des formulaires administratifs), to add or substitute the name of the other parent or to reverse the order of their names, Act No 2022-301 of 2 March 2022 simplifies matters. This reform, which came into force on 1 July 2022, opens a new breach in the principles of the immutability and unavailability of names.

In Italy, the double name has become an essential step for the recognition of the child's identity. As observed by a legal scholar,

> 'in a context where the emergence of family ties is determined by the generation of a common child, the personal identity of each member and his or her belonging to the family group are effectively guaranteed precisely by the attribution to children of a surname that contains elements identifying both parents, underlining that "common kinship" which today constitutes the essential core and unifying element around which the family unit is cemented'.

In order to give effectiveness to this need,

> 'only the attribution of a double surname would therefore make it possible to highlight the belonging to the "lineages" of the father and mother, as well as the heritage of traditions, culture and family history that

[58] See, for interesting critical thoughts around the so called 'adulcentrism' derived from the guiding principle of the new rules, A. Diurni, n 7 above.

each surname can evoke'.[59]

Once the double name system is adopted and implemented, the next generation of children will have two surnames, and the question will arise as to which surname should be passed on to their children.

In this view, the path built by the Constitutional Court has not yet been accomplished and the legislative power has still an important role in order to give answers to these uncertainties.

As stated by the Court:

> 'as a corollary to the declarations of constitutional illegitimacy, this Court cannot fail to issue a twofold invitation to the legislature. Firstly, it is necessary to act to prevent the attribution of the surname of both parents from leading, in the succession of generations, to a multiplier mechanism, which would undermine the identity function of the surname'.

The other necessary legislative intervention concerns the protection of the child's interest in family identity, ie in not being given a surname different from that of his or her brothers or sisters, and here too the Court indicates a path 'constitutionally viable' even if not a compulsory one: reserving the choice of surname at the time of the recognition, birth or adoption of the first child, binding the parents for subsequent children.

Lastly, the petitum meritoriously allows the Court to limit the effects of this disruptive decision to the sole hypothesis of the original attribution of the surname, excluding applications to change the surname already acquired.

Some perplexities, however, have been brought by the legal scholars about the nearly accessory character of the violation of the child identity, compared to the preponderant claim of equality between parents. If the projection on the child's surname of the dual parental relationship, as the Court maintains, identifies the *status filiationis*, as a pivotal element of personal identity, it is difficult to doubt the fundamental nature of the right at stake and its prevalence in the balance with the consensual principle.[60] The right to be identified by both surnames seems therefore the logical prerequisite for the affirmation of the *regola iuris* of the double surname, whereas it seems ill-suited to the derogatory hypothesis based on consent.[61] As observed, such a judgment clearly leaves unsolved the problem of the order of surnames with respect to which, according to the Court, the parents' agreement must prevail and, failing that, recourse to the court to settle the dispute over choices inherent in the child. It must, however, be

[59] See the contribution of E. Al Mureden, 'L'attribuzione del cognome tra parità dei genitori e identità del figlio' *Famiglia e diritto*, 223, 213-224 (2017)

[60] C. Masciotta, 'L'eguaglianza dei genitori nell'attribuzione del cognome: una nuova regola iuris dettata dal giudice costituzionale' *Osservatorio sulle Fonti*, 268-271, 251-271 (2022).

[61] ibid

observed that the question of the order of surnames undoubtedly falls within the wide sphere of legislative discretion, the legislature being entitled to opt for a different solution such as alphabetical order: even in the absence of obligatory rhymes, the Court adds a *regula iuris* that is not constitutionally imposed but constitutionally compatible.[62]

Ultimately, in the light of this undoubtedly culturally significant judgment, it is doubtful that the general rule introduced by the Court was the only one that was constitutionally viable, thinking for example of the risk of the multiplication of surnames over the generations, with consequent prejudice to the identity of the children, which could have led to a different solution, falling within the legislative discretion, such as the parents' agreement on only one of the surnames, which could be subrogated judicially.[63]

As critically highlighted, 'it is possible to detect essentially four problems'.[64] The first is that the autonomy alone is not enough to guarantee equality; secondly, equality, entrusted to the free play of autonomy, requires in any case a criterion of legal closure which shall be equally egalitarian. A third problem concerns this last element, allowing a choice between the surname of one or both parents, naturally leads to the double name, as the most 'ecumenical' option among those allowed.[65] Finally, once the double name has been chosen, a criterion is needed to combine it, faced with this problem, an instinctive reflex invariably leads to the alphabet, since any other system – and in particular that which consists of putting the paternal surname before the maternal surname, or vice versa – appears discriminatory on gender grounds.[66]

As critically observed, in the case where the alphabetical order is adopted, the cultural and historical heritage of Italian family names will be threatened, because all names from Z backwards will be in second position[67]. This means that, in the case of the successive choice of the son one generation later with the same criterion of transmitting only one name with the alphabetical criterion, sooner or later some names will be erased (no matter if from the mother or the father). In this light, historical family names may be included as 'intangible heritage' by the Convention for the Safeguarding of the Intangible Heritage.[68]

Considering the French solution, it has been observed that a new dispute is likely to arise in matters of parental authority concerning the choice of the child's name. For where freedom of choice increases, the risk of disagreement

[62] ibid
[63] ibid
[64] L. Olivero, n 9 above 1390-91 and 1394-1395.
[65] ibid
[66] ibid
[67] ibid
[68] See L. Olivero, n 9 above 1390-91 and 1394-1395. See also the Basic Texts of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage 2020 Edition, https://tinyurl.com/4p3f73sw (last visited 31 December 2022).

between the two holders of the choice also increases.[69]

At this point, extremely grateful for the huge effort of the Court for an equality at last established, a question still arises: are we sure that the rule of the autonomy alone may solve the complex system of the discipline of Family name, considered in its broad implications and values, without threatening or censoring the values which in one way or another constitute the fabric of a social relationship?

The last word at the legislature.

[69] See Dossier: Réforme du nom (1re partie) *AJ Famille,* 357 (2022)

Insights & Analyses

Drive and Agency in the Age of Algorithm-Based Decision Making*

Chiara Alvisi**

Abstract

This essay seeks to identify the requisites for human personhood so as to meet the legal challenges presented by algorithm-based decision making. Human beings are the archetype of legal personhood with all resulting rights and duties; however, because of the widespread usage of AI, there are potentially significant problems due to the lack of a clear definition of personhood in this context. The essay argues that Freudian psychoanalysis can be used to address this problem by providing a better understanding of personhood in juridical terms. Particular focus is given to the Freudian concept of 'drive'. The argued correspondence between the understanding of drive and the substantive theory of representation is central to the essay's conclusion that autonomous software systems are not real agents or persons even if they can communicate and interact with people in a human-like fashion because they are incapable of juridical cooperation and partnership with others.

I. The Challenges Presented by Self-Learning Algorithm-Based Software in Regard to the Concept of Legal Personhood

If legal scholarship is a science, then legal concepts must be based on real facts.

The reality that is the objects of legal study are made up not only of norms and interpretation of norms but also the facts which are governed and/or affected by norms and interpretations.

Therefore, legal scholars cannot avoid analysing the facts of human reality if they wish to offer to the courts and the legislature concepts that are scientific and not contradictory.

As has been noted, modern society depends ever more on autonomous decisions, which, for the purposes of this analysis, means unforeseeable decisions that are taken by self-learning algorithm-based software. Furthermore, it is implausible that this software will not continue to be used.[1]

People that use this variety of software are consequently subject to

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[1] See G. Teubner, in P. Femia ed, Soggetti giuridici digitali? Sullo status privatistico degli agenti software autonomi (Napoli: Edizioni Scientifiche Italiane, 2018), 22.

autonomous software risk, which is the risk of being considered accountable for unforeseeable declarations and actions decided on by this software because of nothing else but activating it.

To better govern autonomous software risk, some legal scholars argue that this type of software should be considered a self-governing agent and not a mere automatic non-decision-making tool operated by humans. Autonomous software should then be considered legally accountable for communications it autonomously decides upon. Those legal scholars consider this to be an efficient and fair way of solving the problem of the validity of electronic agent-based contracting and of the allocation of damages for injurious autonomous software decisions. They maintain that autonomous software programs are in effect data processing without human understanding; however, such programs are capable of acting if we consider data communication to be an action. Therefore, these scholars argue that autonomous software is capable of communicative interactions with humans notwithstanding their lack of human understanding.

Therefore, these scholars propose autonomous software be given the legal status of an electronic person, non-human entities with full legal personhood, or at least the lower legal status of electronic agents, digital assistants in the service of humans and acting as their representatives.[2]

Legal theories concerning digital autonomy and digital legal personhood are based on the idea that the law should classify a non-human entity as legal person whenever it could be perceived to be a person by society. Therefore, social perception of human identity would be sufficient to justify giving legal personhood to non-human entities. For this social perception of human identity to occur it is normally sufficient that a non-human entity is able to process and communicate data, thereby participating in social communication and interactions with other entities, be they human or not. In short, these scholars argue that this is the only factor necessary for the law to classify non-human entities as legal persons.

This legal doctrine is based on a fiction: a non-human entity, even if capable of social interaction, is not a real person.

If we exclude the sociological perception, we still have to define the requisites for human personhood, as these requisites also define any type of possible person in the eyes of the law and equal accountability. Human beings

[2] Floridi, for example, argues that a non-human entity can be considered able to act if it is capable of interaction, of autonomously deciding on changes to terms and conditions and of adapting its decision-making strategies: see L. Floridi, *The Ethics of Information* (Oxford: Oxford Academic, 2013), 140. Teubner uses Niklas Luhmanm's theory as the basis for his argument that software agents are, like corporation and other organizations, nothing more than 'data flows', that become persons (persons in limited respects) whenever in the communication process they are perceived as having a social identity and a specific capacity to act effectively at a social level: see G. Teubner, n 1 above, 40. For more information about theories concerning self-learning algorithm-based software as agents, see A. Santosuosso, *Intelligenza artificiale e diritto. Perché le tecnologie di IA sono una grande opportunità per il diritto* (Milano: Mondadori Università, 2020), 177.

are indeed the archetype of legal personhood and all resulting rights and duties. To this end, I submit that legal studies can profit from Freudian psychoanalysis, to answer the question of how to define the true meaning of legal personhood.[3]

II. Introduction to the Comparison Between Legal Studies and Psychoanalysis Findings Regarding Legal Personhood

We owe to Giacomo B. Contri the idea that legal studies and psychoanalysis findings can be compared because both sciences, among many other things, research a natural person's decision-making, conduct, willingness and (mental) capacity. A natural person is the *Rechts-individuum* (a legal subject), who exists only as the subject of juridical relationships with others. Contri's doctrine states that only human persons (including collective human entities) can be legal subjects because only humans are capable of '*drive*' and thus of thinking in formal juridical ways to interact with others in order to achieve satisfaction.[4]

But what exactly is this '*drive*' that qualifies a human being as a person in the eyes of the law?

In his work entitled Three 'Essays on Sexuality'[5] (in German, *Drei*

[3] This investigation of requisites for legal personhood takes as its starting point Freud's pioneering findings on 'drive', which contrasted with neuroscientific psychic determinism, which is taken by neurolaw scholars as their starting point. For more information on the comparison between neuroscience and legal study findings see, for example: G. Bombelli and A. Lavazza, 'Di nuovo sulla relazione neuroscienze e diritto' *Teoria e critica della regolazione sociale*, I, 7 (2021); G. Bombelli, 'Categorie giuridiche, giusrealismo e neuroscienze. Sulla nozione di rule-following' *Teoria e critica della regolazione sociale*, I, 73 (2021). For information on Freud's pioneering findings on 'drive' see G.M. Genga, 'Una parola sulla psicologia scientifica', in G.M. Genga and M.G. Pediconi eds, *Pensare con Freud* (Milano: SIC, 2008); Id, 'The human factor in flight and the question of satisfaction' *Italian Journal of aerospace medicine*, VII, 68 (2012), which claims that 'psychoanalysis is a science of human faculties, not functions. It is a widely diffused mistake to bring Freud onto the field of psychic determinism, while he opens the road to a new science of man (…). Freud would have liked to have called psychoanalysis simply psychology (…). It remains true that psychology is the name to reserve for a science of the psyche (a Greek word) that is the soul (anima, Latin word). Psyche, or soul, is nothing but the form of the motion of the human body (…). Freud called drive (Trieb) this law of motion, completely distinguishing it from animal instinct (Instinkt)'. This statement makes evident the weakness of the founder of cybernetics' proposition that 'the problem of the definition of man is an odd one (…). It will not do to say that man is an animal with a soul. Unfortunately, the existence of the soul, whatever it may mean, is not available to the scientific method of behaviorism': N. Wiener, *The human use of human beings. Cybernetic and society* (Cambridge – Massachusetts: The Riverside Press, 1950), 3.

[4] G.B. Contri, 'Norma e pulsione', in Id, *Saggi, testi pro-manuscripto*, *Opera omnia* (Milano: Sic, 1982), 1-17. See also: A. Farano, 'L'obbedienza al diritto tra ragioni e cause' *Teoria e critica della regolazione sociale*, 103 (2021), in particular 107, which argues that the human decision-making is the common subject of research for legal scholarship, neuroscience and psychoanalysis; A. Punzi, *Diritto in formazione. Lezioni di metodologia della scienza giuridica*, (Torino: Giappichelli, 2018), 11, which considers inherent to modern law the need to understand human behaviour to better regulate it.

[5] S. Freud (1905), *Three Essays on Sexuality*, *SE – The Standard Edition of the Complete*

Abhandlungen zur Sexualtheorie[6]), published in Vienna in 1905, Freud defined for the first time the concept of '*drive*' (*Trieb* in the German language), as

> 'die psychische Repräsentanz einer continuierlich fließenden innersomatischen Reizquelle, zum Unterschiede vom Reiz, der durch vereinzelte und von außen kommende Erregungen hergestellt wird (...)'.[7]

In English, according to the translation proposed by Prof Pediconi, Freud defines '*drive*' as the 'psychic representance of an endosomatic and continuously flowing source of stimulation, which differs from single external stimulation'.[8]

Contri described the Freudian concept of '*drive*' as 'the law of motion of bodies (...) to destination or satisfaction'[9] and also as the subject's demand and willingness 'to act in order to mobilise the action of another subject' for the satisfaction of both.[10] The above-mentioned reference to a sort of psychic representation purports to describe the subject's thinking about acting and working with others and by means of others toward their own satisfaction. The Freudian concept of '*drive*' would have remained unclear for jurists if it had not been further clarified by Contri in juridical terms that open the way to further psychoanalysis and legal research work.

Since Freud used the juridical concept of representation in his definition of '*drive*', let me briefly explain the different types of action and relationship described by the legal doctrine of direct voluntary representation in private law. I will use the term 'representation' rather than 'agency' in order to give sharper focus to a situation in which a person (ie the representative) represents another (the principal) in legal transactions and juridical acts with other parties whenever they are authorized by the principal to affect the latter's legal relationships.[11] I find 'representation' and 'representative' better terms than

Psychological Works of Sigmund Freud, translated under the general editorship of James Strachey, (London: The Hogarth Press, 1966), VII, 168.

[6] S. Freud (1905), *Drei Abhandlungen zur Sexualtheorie*, *Gesammelte Werke* (Frankfurt: Fischer Taschenbuch Verlag, 1999), V, 67.

[7] See n 6 above. For the Italian version see S. Freud, *Tre saggi sulla teoria sessuale* (Torino: Biblioteca Bollati Boringhieri, 1975, reprinted 2010, translated by M. Montinari), 50.

[8] In her paper entitled M. Pediconi, *Representance as a norm of psychic life. Freudian roots*, to be published and presented at Icon - S Conference 2022 - *Global problems and prospects in public law*, University of Wroclaw, Poland, July 4-6 July, 2022, 'Representance in crisis' panel.

[9] G.B. Contri, *The Thinking of Nature. From psychoanalysis to juristic thinking*, available at www.studiumcartello.it, 2003, 1-27.

[10] G.B. Contri, 'Norma e pulsione' n 4 above; Id, 'The thinking of nature' n 9 above, which underlines that it is that specific competence 'to make him/her human'.

[11] The terms of the Draft Common Frame of Reference (DCFR) are used in the text for the reasons given by the DCFR's drafters: see *Principles, Definitions and Model Rules of European Private Law. Draft common Frame of Reference (DCFR). Full edition*, Vol I, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), based in part on a revised version of the Principles of European Contract Law, edited by Christian von Bar and Eric Clive (Munich: Sellier, European Law publishers GmbH, 2009), 411.

respectively 'agency' and 'agent', because it is common for the word 'agent' to be used for people who have no authority to affect the principal's legal position. However, generally speaking, neither representation nor agency are ideal terms because ordinary language is rather loose regarding representation and agency-relationships, whilst there are many differences in legal regimes regarding representation in civil law and common law countries. Furthermore, the doctrinal debate regarding the 'true essence of representation' is still ongoing.

Very loosely speaking, in the Continental legal systems inspired by the French Code civil model, whenever the representative has been granted authority by the principal (normally through the latter's power of attorney, which is a principal's unilateral declaration of will), juridical acts carried out by the representative with third parties in the name of the principal are chiefly to the principal's direct benefit, whilst those reducing the principal's wealth could be annulled if the representative has acted in conflict with the interests of the principal.

At the same time, even though power of attorney confers on the representative the power to act on the principal's behalf and to affect the latter's legal relations, it does not oblige the representative to act at all: the representative relationship with the principal may be described as 'a can-do relationship' and it differs from the 'shall-do relationships' that arise from contracts.[12] Once entitled by the principal, the representative can still decide whether to act or not, depending on his or her internal relationship with the principal. The internal relationship established by 'authorization' or 'public investiture' of the representative by the principal is not necessarily a contractual one. The granting of power of attorney is perfectly valid and effective even in the absence of an underlying contract of mandate or any other consideration. At the same time, the principal's authority is necessary but not sufficient for the success of the representative relationship.

III. The 'True Essence of Representation' in Private Law

Voluntary representation in private law, depending on the way it is conceived, can work to increase the principal's autonomy or to increase the power of the representative to affect the principal's affairs, thereby limiting the latter's autonomy.

In 1905, when Freud published 'Three Essays on the Theory of Sexuality', Germany had just codified voluntary representation (die *Vertretung*) and the power of attorney (die *Vollmacht*). The general part of the German civil code of 1900 (the BGB – Bűrg*erliches Gesetzbuch*), under title 5, called *Vertretung und Vollmacht* (representation and power of attorney),[13] incorporated the *formal theory of representation* that had been invented by the German pandectists[14] in

[12] See P. Sirena, *Introduction to private law* (Bologna: il Mulino, 2nd ed, 2020), 310.
[13] para 164.
[14] For information about the Pandectistics, see G. Pugliese, 'I pandettisti fra tradizione

the second half of the nineteenth century in accordance with *Begriffs-jurisprudenz* (jurisprudence of concepts) principles.[15]

The Pandectists' concept of representation was based on the principle of the absolutely abstract nature of the authority (*Abstraktion der Vollmacht*) conferred by the principal to the agent in regard to the third parties. This theory disregarded the internal relationship between the principal and the representative: the carrying out of the principal's interests was not a requisite of validity of the representative's declaration of will on the principal's behalf. It has been observed[16] that:

> 'The theory of the abstract or autonomous character of authority – which has been considered one of the most important discoveries of modern jurisprudence, is normally attributed to Laband (…) (1866)'[17]

who, not by chance, was a public law scholar. However, this theory had already been put forward in a more veiled manner by F.C. von Savigny,[18] around twenty years earlier.[19] The starting point for Laband's theory was the absolute nature of

romanistica e moderna scienza del diritto' *Rivista italiana per le Scienze giuridiche*, III, XXVII, 89, 98, 99, 126 (1973), which states that the founding ideas for the movement were contained in Putcha's two-volume work *Gewohnheitsrecht* (1828) and the first edition of *Pandekten* (1838). The author observes that the Pandectistic school was the direct result of von Savigny's historical school due to its focus on Roman law and maintained that only law scholars were capable of validly interpreting the people's will and establishing legal concepts on the basis of Roman law and derive therefrom the rules to be applied for day-to-day cases. Pugliese points out that the unification of private law in Germany and its adequacy to meet the needs of middle-class interests was the work of a group of law scholars, the Pandectists, because at that time Germany was not a democratic nor liberal country but rather an authoritarian one; this contrasts with the unification of private law process that occurred in England and France.

[15] The *Begriffs-jurisprudenz* (jurisprudence of concepts) is a legal school of thought that proposed a systematic and dogmatic approach to the knowledge of law. It was founded by von Savigny's epigones, mainly Putcha and Windscheid, and was 'concerned with the goal of erecting an organic and coherent conceptual system. In this effort, they mainly sought to present the law and its study as a proper science (scientia juris)': see P. Sirena, n 12 above, 270. F. Wieacker, *Storia del diritto privato moderno* (Milano: Giuffrè, 1980), I, 488, states that the German philosopher and jurist Christian Wolff, one of the most distinguished representatives of Enlightenment rationality in Germany, was the true father of the 'jurisprudence of concepts' (*Begriffsjurisprudenz)* or 'constructive jurisprudence' (*Konstruktionsjurisprudenz*), which inspired Pandectistic works, from Putcha to Windscheid.

[16] By M.J. Bonell, 'The 1983 Geneva Convention on Agency in International Sale of Goods' *The American Journal of comparative law*, 717 (1984).

[17] P. Laband, 'Die Stellvertretung bei dem Abschluss von Rechtsgeschäften nach dem Allgemeinen Deutschen Handelsgesetzbuch' *Zeitschrift für das gesamte Handelsrecht*, X, 183 (1866).

[18] F.C. Von Savigny, *System des heutigen rômischen Rechts* (Berlin, 1840), III, 89-90; Id, *Sistema del diritto romano attuale*, Italian translation by V. Scialoja (Torino: UTET, 1900), III, 108. Subsequently, this theory was reviewed and developed by B. Windscheid, *Lehrbuch des Pandektenrechts*, Frankfurt AM, 1862-70, sechste verbesserte und vermehrte Auflage, zweiter Band, Frankfurt AM, 1887, 859.

[19] J.M Bonell, n 16 above, remarks that one of the important consequences of the theory of

the power of representation granted to the 'Prokurist' (the commercial agent) by the 1861 German commercial code, which stated that once power of attorney had been registered, the 'Prokurist' always legally commits the principal by contracting with third parties even when they go beyond or are not in keeping with the principal's instructions. In this theory, until the power of attorney is revoked, the principal cannot object to the representative's undertakings with third parties even if they involve abuse of or exceeding the granted powers. The theory of the abstract character of authority aimed to protect to the maximum possible degree the validity and effectiveness of commercial transactions in the market and to give third parties faith in the commercial agent's representative power.[20] In short, this theory states that once power of attorney is granted, the representative may substitute for the principal not only in action but also in will: to some extent to represent here means to command.[21]

The nineteenth-century idea of substitutive-representation comes from a doctrine dating back to the late Middle Ages, which was inspired by the canonist

the abstract or autonomous nature of the power of attorney, 'consisting in the impossibility of the principal to invoke against third parties the limitation of authority established in the internal relationship, was sanctioned as early as 1861 by the Allgemeines Deutsches Handelsgesetzbuch in a specific reference to the holder of a statutory commercial authority (Prokurist) (art 43) and to the agency authority of a partner in a partnership (arts 116, 167, 196) and to the authority of administrators of a corporation (art 231). Although this theory represents a typical product of the Bregriffsjurisprudenz which was dominant in Germany at that period, it is important to remember that at its basis was an eminently practical need, viz. the necessity, strongly invoked by the emerging mercantile class, to ensure utmost certainty in commercial transactions undertaken through an agent: on this matter see Müller-Freienfells, Die Abstraktion der Vollmachtserteilung im 19. Jahrhundert, in Stellvertretungsregelungen in Einheit und Vielfalt, Zum heutigen Stand, at 81 et seq'. P.P. Onida, *«Agire per altri» o «agire per mezzo di altri». Appunti romanistici sulla «rappresentanza» Ipotesi di lavoro e stato della dottrina* (Napoli: Jovene, 2018), 106, observes that the theory regarding representation proposed by Rudolph von Jhering, 'Mitwirkung für fremde Rechtsgeschäfte' in *Jahrbücher für die Dogmatik des burgerlichen Rechts*,I, 313, 333 (1857), was *'l'ultima posizione romanistica … prima del diluvio rappresentativo/sostitutivo*'. G. Pugliese, n 14 above, 120, fns nos 81 and 82, remarks that Jhering, in the second phase of his activity, was a proud opponent of the Pandectistic school and a precursor of Interessenjurisprudenz, above all in his work *Der Zweck im Recht* (2, 1877).

[20] V. De Lorenzi, 'La rappresentanza', in F.D. Busnelli ed, *Il Codice Civile Commentato* (Milano: Giuffré, 2012), 54, in particular 59.

[21] P.P. Onida, n 19 above, 99 observes that von Savigny and then the Pandectists, in particular Windscheid and Laband, in their works on 'heutiges Römisches Recht' (contemporary Roman law), explained representation by using the concept of guardianship of people who lack capacity. Nevertheless, in Roman law the legal status of *pupillus* and the legal status of *popolus* were completely different and therefore the parallel does not exist. Indeed, in Roman law, the *pupillus* was the archetype of people *in aliena potestate*, whilst the *populus* (ie, the *societas/ collegium* and/or the *societas/res publica*) were the archetype of people *suae potestatis* ('Il populus, la cui potestas è assomigliata al potere divino, non soltanto è in sua potestate ma ha tutti gli altri nella propria potestà, ivi compresi (anzi: in particolare) i propri magistrati/ magistratus'). Onida observes that this contemporary legal doctrine's reasoning cancelled the Roman law concept of *per quem agere*, to act by means of another, by turning it into the concept of '*alieno nomine agere*', to act instead of another (102).

persona ficta et/vel represaentata (fictitious person)[22] and theoretically developed by Hobbes.[23] Here the representative's will takes the place of the fictitious person's will. In this doctrine, the idea is that to represent is to act for others by substituting for them.

By contrast, the idea of a person's capability to make contracts by means of others (*negotia aliena gerere*) dates back to Roman law, which however did not include the concept of voluntary representation. Indeed, in the Roman *jus civile* there only existed the opposite concept '*per extraneam (o liberam) personam non adquiritur*',[24] excluding certain exceptions admitted by the Roman *ius pretorium*.[25] However, in Roman law it was possible to instruct a servant or a mandatary to enter into contracts and then transfer contractual rights (for instance property and credits) to the *dominus negotii* and be guaranteed by him for the payment to the counterparty.[26] The idea of representation as a form of juridical cooperation was subsequently developed in the context of the modern school of natural law, by the eighteenth-century continental codes[27] and the French Civil Code of 1804[28] which regulated representation together with contract of mandate.[29] Unlike the abstract theory of representation, the concrete concept of

[22] See P.P. Onida, n 19 above, 69, which reminds us that the term *persona ficta* has been attributed to the canonist Sinibaldus Fliscus, Pope Innocence IV, in his work *Super libros quinque Decretalium commentaria, Frankfurt a M 1570*, in reference to oath of the *universitas*.

[23] T. Hobbes, Leviathan or the matter, form and power of a commonwealth ecclesiastical and civil, 1651, Part. 1, Of Man, Ch. 16, Of Persons, Authors and Things Personated. P.P. Onida, n 19 above, 77 underlines that also Hobbes took the guardianship of people who lack capacity as a model of the representation functioning and its substitution mechanism.

[24] See R. Orestano, 'Rappresentanza (diritto romano)' *Novissimo Digesto Italiano*, (Torino: UTET, 1967), XIV, 795, 796, in which he quotes the rule as it is enshrined in the *Corpus juris Iustiniani*: GAI, 2, 95 = *Institutiones*, 2, 9, 5; *Paul Sent*, 5, 2, 2; C I, 4, 27, 1 pr, ecc.

[25] See R. Orestano, n 24 above, 799 and G. Stolfi, *Teoria del negozio giuridico* (Padova: CEDAM, 1961, reprinted), 186, fn 1.

[26] R. Orestano, n 24 above, 796, explains that in Roman *jus civile,* servants and sons were only *de facto* representatives as they were unable to become right-holders through the contracts they entered into in the *pater familias*' interest. See also G. Lobrano, 'Appunti per la lettura delle fonti. L'esempio – da non seguire – della attribuzione della 'rappresentanza' al Diritto romano', in *Diritto @ Storia, Rivista internazionale di Scienze giuridiche e Tradizione romana*, XVI, 2018; Id, *Tradizione romana*, available at www.dirittoestoria.it (last visited 31 December 2022).

[27] Concerning the modern school of natural law and the eighteenth-century continental codes see F. Wieacker, n 15 above, 493 and following pages.

[28] Republished in 1807 as Napoleonic Code (in French, Code Napoleon), in 1814 as Civil Code and finally in 1852-1870 as Napoleonic Code again: see F. Wieacker, n 15 above, 522.

[29] See V. De Lorenzi, n 20 above, 5 and following pages.; P. Cappellini, 'Rappresentanza (diritto intermedio)' *Enciclopedia del diritto* (Milano: Giuffrè, 1987), XXXVIII, 435 and following pages; G. Visintini, 'Degli effetti del contratto. Della rappresentanza. Del contratto per persona da nominare, Artt. 1372-1405', in F. Galgano ed, *Commentario del Codice civile Scialoja-Branca* (Bologna - Roma: Zanichelli, 1993), 175 and following pages, in particular fn 7, which observes that while the Italian civil code of 1865 did not contain specific norms for representation, 'il codice di commercio abrogato, sul modello del code civil, sanciva che il mandato commerciale ha per oggetto la trattazione di affari commerciali per conto e in nome del mandante (art. 349). Tale disposizione modellata sull'art. 1984 code Napoleon (…) traduceva l'idea che la rappresentanza fosse un elemento necessario del mandato (mandat ou procuration)'. P.P. Onida, n 19 above, 96, comparing

representation as a form of juridical cooperation gives great importance to the internal agency-relationship between the principal and the representative.[30]

In Germany, the abstract concept of representation was challenged by Schlossman,[31] who, in keeping with the principles of scientific positivism, considered juridical phenomena to be equivalent to natural phenomena and underlined that normally the power of representation is granted with a contract regulating the internal agency relationship between the principal and the representative. The agency relationship is normally a contract of mandate, but it might also be a different kind of contract (eg an employment contract, a work contract like that with a lawyer or a doctor). This theory states that the true essence of representation is that the representative is entitled to take care of the principal's interests, the principal remaining the *dominus negotii*. Therefore, the representative acts as the principal's substitute for some activities but not in terms of their will.

In this theory the representative is conceived as a partner with the principal because they cooperate for the success of the latter's affairs.

If seen in this way, representation becomes a tool for distributing work and creating cooperation.

As a consequence, the representative should not be seen as a master but rather as a partner: as the case may be, he might be a mandatary or a servant in the broadest sense of the word, such as an employee or a counsellor or a doctor (case law has sometime described the agency-relationship between a doctor and a patient as therapeutical alliance).[32]

The substantive theory of representation, which was proposed by Schlossmann as an alternative to the abstract one, had no followers in Germany at that time.

the wording of Art 1984 in the Napoleonic Code (Titre XIII *Du mandat* – Chapitre 1er *De la nature et de la forme du mandat*, art 1984 (*le mandat ou procuration …*) and the wording of the subsequent Art 164 of the German Civil Code - BGB (Titel 5 *Vertretung und Vollmacht*, par. 164 *Wirkung der Erklärung des Vertreters*, para 1 *Eine Willenserklärung, die jemand innerhalb der ihm zustehenden Vertretungsmacht im Namen des Vertreten abgibt, wirkt unmittelbar für und gegen den Vertretenen*) finds the latter's novelty in the transition from the logic of 'acting by means of another' (still existent in the Napoleonic Code, Art 1984) to the logic of 'acting instead of another'.

[30] See G. Visintini, n 29 above.

[31] S. Schlossmann, *Die Lehre von der Stellvertretung, insbesondere bei obligatorischen Vertrâgen*, (Leipzig: A. Deichert, I, 1900; II, 1902). For more information on Schlossmann, see V. De Lorenzi, n 20 above, 95.

[32] Understood to mean 'cooperation between both parties involved', doctor and patient, in taking decisions regarding therapy with the ultimate aim to protect the patient's health, in accordance with the guidelines of the World Health Organization: see G. Pellegrino, 'Il rapporto medico/paziente e l'alleanza terapeutica', in P. Cendon ed, *Responsabilità civile* (Milano: WKI, 2017), 2751, in particular 2761-2762; L. Chieffi and A. Postignola, '*Bioetica e cura. L'alleanza terapeutica oggi*' *Mimesis Quaderni di Bioetica*, III, (Napoli: Centro interuniversitario di ricerca bioetica, 2014), passim. See also T. Penna, 'Nudging, informed consent and public health: dangerous liaisons between law and neuroscience or opportunity for the future?' *Teoria e critica della regolazione sociale*, I, 117 (2021).

However, it later gained many adherents across Europe. For example in Italy it influenced many moderate followers of legal positivism, starting with Pugliatti, whose work influenced the 1942 Italian codification of representation.[33]

Therefore, even though the Italian civil code for the first time codified representation separately from contract for mandate, it did not accept the Pandectists' idea of the absolute power of the representative, which they believed to favour security of trade in the public interest. On the contrary, the representative agent remains accountable if they act when they have a conflict of interest or exceed the power of attorney, and in these two cases their acts are respectively voidable or without any legal effect. The internal relationship between principal and the representative-agent was thus described by the Italian legal positivists as a fiduciary relationship.[34] In their view of representation, the representative might substitute for the principal for carrying out some tasks but not in terms of will, in other words he or she is a partner, but not a substitute for the principal.[35]

In many Continental countries, the idea of representation as a tool for the principal to increase their autonomy by means of the cooperation of the representative has become mainstream even if there is still an open debate regarding the true essence of representation.

IV. Concluding Remarks

The legal concept of representation as a formal way of increasing the juridical autonomy of individuals by means of the cooperation of another seems to correspond to the functioning of 'drive' as it was described by Freud in his 1905 essay and afterwards, including in the 1915 essay entitled 'Metapsychology - Drives and their Fates'.[36] Indeed, '*drive*' has also been explained by psychoanalysts as

[33]See Salvatore Pugliatti's essays collected in the book S. Pugliatti, *Studi sulla rappresentanza* (Milano, Giuffré, 1965), passim; see also P. Papanti Pellettier, *Rappresentanza e cooperazione rappresentativa* (Milano: Giuffrè, 1984), passim.

[34] See A. Trabucchi, 'La rappresentanza' *Rivista di diritto civile*, I, 576, in particular 382 (1978).

[35] C.M. Bianca, *Diritto civile*, III, *Il contratto* (Milano: Giuffrè, 2000), 71, in particular 80. See also L. Cariota Ferrara, *Il negozio giuridico nel diritto privato italiano* (Napoli: Morano, 1948) 680; G. Stolfi, n 25 above, 184, in particular 198; R. Scognamiglio, 'Contratti in generale', in G. Grosso and F. Santoro Passarelli eds, *Trattato di diritto civile* (Milano: Vallardi, 3rd ed, 1972), IV, 2, 61; F. Messineo, 'Il contratto in genere', in A. Cicu and F. Messineo eds, *Trattato di diritto civile e commerciale* (Milano: Giuffré, 1973), I, 223; U. Natoli, *La rappresentanza* (Milano: Giuffré, 1977), 21; F. Santoro Passarelli, *Dottrine generali del diritto civile* (Napoli: Jovene, 1989, 9thedition, reprinted), 266, in particular 274; F. Galgano, 'Il negozio giuridico', in A. Cicu, F, Messineo,L. Mengoni, P. Schlesinger eds, *Trattato di diritto civile e commerciale* (Milano: Giuffrè, 2002), 397.

[36] S. Freud (1915), *Metapsychology – Drives and their Fates* (London: Penguin Books, 2005, translated by Graham Frankland), 15, 16. See the original version in S. Freud (1915), *Die Verdrängung*, *Gesammelte Werke* (Frankfurt: Fischer Taschenbuch Verlag, 1999), X, 250. See the Italian version in S. Freud, *Metapsicologia. Pulsioni e loro destini*, in the series *Opere*, 8, *Introduzione alla psicoanalisi e altri scritti*, 1915-1917 (Bollati Boringhieri, 2020), 14.

the individual's thinking that creates initiative with others and by means of others in order to be satisfied. Since '*drive*' is a fundamental law governing the functioning of the human psyche – like a sort of human equivalent to a country's constitution – we can draw the conclusion that the psyche functions in a formal and juridical way, which Freud himself described as a kind of representance.

By way of conclusion, we can infer from a comparison between representation in private law and psychoanalytical 'drive' theory that human beings think for themselves and their satisfaction as a result of a partnership in the sense of cooperation with others in formal ways that are juridical in nature. And it is this unique capacity – which is much more than conscience, sensibility and the capacity to communicate and calculate – that qualifies human beings to be legal subjects.

If digitalization challenges our traditional understanding of the scope and limits of personhood, the psychoanalytical finding that only human individuals are capable of thinking for themselves in juridical relationships with others, and therefore are existing and real persons, is of great relevance and use.

Autonomous software are thus not real agents nor persons even if they can communicate and interact with people, because they are incapable of juridical cooperation and partnership with others. Even the more sophisticated algorithms are mindless entities, incapable of representing humans, because they are incapable of understanding and thinking and thus unable to take care of human interests for mutual satisfaction.

For these reasons, there is no justification for classifying autonomous software as legal persons, and to do so has the potential to create enormous problems.

Insights & Analyses

Uber and Digital Platforms: Private Law Issues

Maria Epifania*

Abstract

The article explores the theme of new contractual relationships formed in the sharing economy. Countless are open questions that have considerable repercussions in many fields, such as assessing the existence of unfair competition, consumer protection and the protection of the platforms' employees, as recently addressed by the United Kingdom Supreme Court, with its ruling of 19 February 2021.

There is no shortage of first observations on the recent introduction of the decreto legislativo 4 November 2021 no 173, adopted in Italy to transpose Directive (EU) 2019/770.

I. The Distinctive Features of the Sharing Economy

The spread of digital platforms capable of managing trade and services has fostered the emergence of a new market structure, transforming the way of conceiving legal relations between the various actors involved.

New forms of consumption based on temporary access to resources have emerged in recent years. By exploiting the possibilities of coordinating the shared use of the same asset on a large scale, practices aimed at making the best use of the functionality of resources have become widespread.[1]

This growing process of decentralisation and disintermediation of the relationships of supply of goods and services is called the sharing economy.[2] An

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[1] G. Smorto, 'I contratti della sharing economy' *Foro italiano*, V, 222-228 (2015).

[2] On the subject see, *ex multis,* A. Di Amato 'Uber, and the Sharing Economy' *The Italian Law Journal*, 2, 1, 177-190 (2016); Teresa Rodríguez de las Heras Ballet, 'The Legal Anatomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU' *The Italian Law Journal*, 3, 1, 149-176 (2017); G. Smorto, 'Verso la disciplina giuridica della sharing economy' *Mercato Concorrenza e Regole,* 245-277 (2015); Id, 'I contratti della sharing economy' *Foro italiano,* V, 3 (2015); D. Rauch and D. Schleicher, 'Like Uber, But for Local Governmental Policy: The Future of Local Regulation of the "Sharing Economy"' *George Mason University Law and Economics Research Paper*, 15-01 (2015); C. Koopman, M. Mitchell and A. Thierer, 'The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change' *The Journal of Business, Entrepreneurship & the Law*, 8(2), 529 (2015); M. Cohen and A. Sundararajan, 'Regulation and Innovation in the Peer-to-Peer Sharing Economy' *University of Chicago Law Review Online*, 82, 116 (2015); V. Katz, 'Regulating the Sharing Economy' *Berkeley Technology Law Journal*, 30(385), 1068 (2015); A. Sundararajan, *The Sharing Economy. The End of Employment and the Rise of Crowd-Based Capitalism* (Cambridge: MiT Press, 2017), 27; Q. Di Sabato, 'La prassi contratto nella sharing economy' *Rivista di diritto dell'impresa,* 451 (2016); A. Quarta and G. Smorto, *Diritto privato dei mercati digitali* (Milano: Le Monnier, 2020),

expression describes those models of economic organisation that use digital tools to manage trade in goods and the provision of services thanks to the intermediation of a platform for coordinating supply and demand.[3]

Legal scholars[4] have made countless attempts to outline the characteristic elements of the sharing economy. Some of these endeavours to come up with a definition regard the sharing economy as a new economic system based on sharing interactions between private individuals through the internet. Others see this as 'a new capitalism' created and managed by electronic platforms.[5]

The development of new atypical types of contracts stems from the need to guarantee savings to users in times of deep economic recession while facilitating the flexibility of services according to the particular requests of individuals, as these may only sometimes be fully met through existing typical contracts.

The increasing relevance of such a phenomenon[6] reflects the consumers' demand for an increasing efficiency of traditional services and the goal of expanding consumption opportunities.

The Uber platform, for example, has introduced a valid alternative to a service often regarded by consumers as unsatisfactory and too expensive. As a result, the company can offer the same service at much lower prices.

By placing itself directly on the network, it does not have to bear particular costs for infrastructure.

A similar argument can be repeated for consumer credit, when banks have shown themselves more cautious in the crisis and have conveyed the moments to *crowdlending* or equity *crowdfunding* platforms with their refusal of credit. In both cases, the platform is a more attractive competitor, offering a better service at a lower cost.[7]

120; V. Cappelli, 'Il mercato dell'energia alla prova della sharing economy' *Nuova giurisprudenza civile commentata,* 1398 (2020); D. Di Sabato, *Diritto e new economy* (Napoli: Edizioni Scientifiche Italiane, 2020), 71.

[3] G. Smorto, 'Towards a legal discipline of sharing mobility in the European Union' *Law & Public Issues*, 17-41 (2020).

[4] Refer to A. Cocco, *I rapporti contrattuali nell'economia della condivisione* (Napoli: Edizioni Scientifiche Italiane, 2020), 17-63, and further bibliography for further information.

[5] A. Ciocia, 'L'economicità e la solidarietà nei contratti della sharing economy', in D. Di Sabato and A. Lepore eds, *Sharing Economy. Profili giuridici* (Napoli: Edizioni Scientifiche Italiane, 2018), 29.

[6] On the economic, social, and technological reasons that led to the spread of collaborative platforms, see V. Hatzopoulos and S. Roma, *'Caring for sharing? Collaborative economy under EU law'Common Market Law Review*, 54, 81 (2018); R. Botsman, 'The Sharing Economy Lacks a Shared Definition', available at www.fastcoexist.com.

[7] To learn more about the topic, see A. Lepore, 'Perspectives, and limits of new alternative financial models: social lending and crowdfunding', in D. Di Sabato and A. Lepore eds, *Sharing economy* n 5 above, 61; A. D'agostini, 'La nuova disciplina europea dei modelli finanziari di crowdfunding: il Regolamento Ue 2020/1503 e la Direttiva Ue 2020/1504' *Comparazione e diritto civile*, 2, 675(2021); M.F. Tommasini, 'Il crowdfunding. Autonomia privata e tutela dei soggetti coinvolti nella raccolta fondi' *Annali Sisdic*, 5, 51 (2020); V. Bancone, 'Crowdfunding as a funding tool for innovative start-ups' *Corti salernitane*, 1-2, 215 (2017); G. Pignotti, 'La

In addition, when platforms such as Uber become central to a community, the space for new entrepreneurs to enter is also considerably restricted, thus determining an important limitation to competition.

Identifying the most appropriate legal framework to regulate the exchange relationships within peer-to-peer platforms becomes decisive in this context.

II. UberPop in the Italian Courts Case-Law

The legal classification of collaborative platforms in the *sharing economy*[8] has significant repercussions. Consider, for example, the Italian Uber case concerning the judgment on the existence of a chance of unfair competition and the more complex ones involving workers and consumers, discussed below.

In Italy, the Court of Milan[9] ruled on the anti-competitive effects of conduct carried out by drivers active in a regulated market who used the Uber platform to convey the offer of urban mobility services.[10]

nuova disciplina italiana dell'equity based crowdfunding' *Diritto e Impresa*, 3, 559 (2016).

[8] On the problem, see A. Savin, 'Electronic services with a non-electronic component and their regulation in EU law'23 *Journal of Internet Law*, 13 (2019); M. Inglese, *Regulating the Collaborative Economy in the European Union Digital Single Market* (Berlino: Springer, 2019); I. Domurath, 'Platforms as contract partners: Uber and beyond' 25(5) *Maastricht Journal of European and Comparative Law,* 565-581 (2018); D. Geradin, *Online Intermediation Platforms and Free Trade Principles - Some Reflections on the Uber Preliminary Ruling Case,* available at urly.it/3rpm9 (2016); P. Hacker, 'UberPop, UberBlack, and the Regulation of Digital Platforms after the Asociaciòn Profesional Elite Taxi Judgment of the CJEU' *European Review of Contract Law,* 14, 80 (2018); M. Finck, 'Distinguishing internet platforms from transport services: Elite Taxi v. Uber Spain' 55 *Common Market Law Review*, 1619 (2018).

[9]Tribunale di Milano 25 May 2015, available at www.dejure.giuffre.it. Tribunale di Milano 9 July 2015, *Foro italiano*, 9, I, 2926 (2015), with a note by A. Palmieri, 'In tema di blocco cautelare di un servizio di trasporto non autorizzato' *Mercato concorrenza e regole*,133 (2015), with a note from D. Surdi, 'Concorrenza sleale e nuove forme di trasporto condiviso: il Tribunale di Milano inibisce "Uber Pop"' *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente*, 375 (2015); V. Turchini, 'Il caso Uber tra libera prestazione dei servizi, vincoli interni e spinte corporative' *Munus,* 1, 115 (2016). See *contra* N. Rampazzo, 'Rifkin e Uber. Dall'età dell'accesso all'economia dell'eccesso' *Diritto e informatica,* 6, 958 (2015), which considers Uber a mere intermediary. In the present case, some companies that manage radio taxi services and some trade associations, including trade unions, of taxi drivers in Milan, Genoa, and Turin have requested the Court of Milan with an appeal under Art 700 of the Code of Civil Procedure, as a precautionary measure, against the companies of the Uber group, the injunction of the passenger transport service on private cars called *UberPop*, headed by an international holding company and the obscuring of the website and its smartphone application, with the issuance of all the necessary and consequential measures. That action gave rise to the first conviction order set outabove, then confirmed by the second order of 9 July 2015, pronounced in the complaint following Uber's appeal. The Milanese courts sanctioned the competitive illegality of the *UberPop* service. The Court of Turin also followed this approach (see Tribunale di Torino 1 March 2017, n. 1553, *Guida diritto online*) and that of Rome (Tribunale di Roma 7 April 2017, *Guida diritto online*).

[10] See M.R. Nuccio, 'Le metamorfosi del trasporto non di linea: il caso uber' *Rassegna di diritto civile,* 2, 588(2017).

The Court of Milan had wondered whether the UberPop platform integrated a new and lawful type of atypical transport contract used by a community of private individuals or a business activity arising from unfair competition for violation of general rules. Such as offering a transport service at prices significantly lower than those set administratively.

First, the distinctive features of the UberPop service have been identified concerning the so-called car-sharing. Uber drivers do not share the destination and vehicle with passengers but perform a transportation service as independent carriers.

Furthermore, they do not receive a mere contribution to travel expenses but receive a fee from the service operator for using the vehicle in the interest of third parties.

Likewise, considering the administrative penalties provided against persons without a licence, the Court ruled out the possibility that persons could operate a service comparable to taxis without permission.

In both cases, the tools used to match supply and demand for transport services, namely an IT platform and a radio in the other, perform the same function.

The company controls the quality of the vehicle and the drivers previously selected by the same.

According to that approach, the service offered by Uber could not be classified as a mere intermediation service. On the contrary, the App's contribution appears essential for the existence of the transport service and has a decisive impact on the organization.[11]

Uber puts in place a complex of activities that exceed the scope of operation of a simple intermediary. They include organisational and management aspects of the transport service. Indeed, taking into account the formal schematisation of the triangular relationship between the platform, providers, and users,[12] the Court of Milan[13] found that Uber's role is intermediate. In contrast, the transport relationship occurs directly between the entities active on the platform as 'equals'. Drivers can establish the *an* and *quantum* of their business, not being linked to Uber by any employment relationship.

Uber's conduct must therefore be more correctly classified as the operator responsible for the organisation of the transport service: it is, in particular, an indirect role as regards enforcement (provided materially by its auxiliaries) but active as regards the provision of the means necessary for irregular activity.[14]

Therefore, the question of the competition relationship must be evaluated

[11] See *contra* N. Rampazzo, n 9 above, 958.

[12] See point 5 below.

[13] Tribunale di Milano 25 May 2015 n 9 above.

[14] Tribunale di Milano 2 July 2015, available at www.dejure.it. To learn more, see the note to the judgement ofB. Calabrese, 'Applicazione informatica di trasporto condiviso e concorrenza sleale per violazione di norme pubblicistiche' *Giurisprudenza commerciale*, 202, in particular 208 (2017).

concerning the entire system practised by Uber since it is impossible to separate individual drivers' roles from the application operator's organisational part.

The latter, acting as an indispensable intermediary for the contact between customers and drivers, offers a service comparable to that of the radio taxi centre, making itself responsible for acts of unfair competition, according to Art 2598 no 3 Civil Code, to the detriment of ordinary taxi drivers.

Therefore, it is clear that, by exploiting the potential of digital technologies, some collaborative business models can generate precarious working conditions for those who want to benefit from the employment opportunities offered. Moreover, hold a significant and potentially harmful competitive advantage over pre-existing market structures.

III. The Legal Classification of the Employment Relationship Between Drivers and Uber, Given the Recent United Kingdom Supreme Court's Judgment of 19 February 2021 and the French Court of Cassation's One of 4 March 2020

In this innovative phenomenon, as the European Commission[15] noted, the distinctions between consumer and service provider, employed and self-employed, provision of services on a professional and non-professional basis are less clear.

The relationship between platform and lender is based on flexibility. The platform is free to choose whom to entrust the engagement to, and the lender is free to decide whether or not to accept the 'call'. The activities required of Uber drivers are of concise duration, fragmented and fungible, and well being carried out by a plurality of people.

Not surprisingly, there is also talk of the disaggregation economy and the gig economy in the context of collaborative platforms.

It is a complex phenomenon in which two different forms of work are generally traced: the so-called crowd work and the work on demand through the App. The first consists of distributing work opportunities to an indeterminate crowd of workers through the platform. They carry out the assigned activities on the network and transmit the result to the end customer through the web. On the other hand, the second takes the form of traditional activities, which require physical presence but are organised through computer applications.

Uber drivers belong to the latter category. This type of work allows the platform to offer users services of a good quality standard, saving a large part of the labour costs, both in pay and contributions. It was found[16] that the precarious condition of digital work is qualitatively different from that attributed to the unstable and atypical 'analogue' position of on-demand work: work performance is

[15] See Communication 'A European Agenda for the Collaborative Economy' of 2 June 2016, COM(2016) 356 final.

[16] F. Bano, 'Lavoro povero nell'economia digitale' *Lavoro e diritto*, 129 (2019).

much more fragmented; rating systems strongly affect the 'digital reputation' and future calls of workers.

The legal classification of the employment relationship between Uber and their drivers is the subject of great debate within legal scholarship.[17]

Comparative case law is oriented towards agreeing that the relationship between Uber's platform and its driver is subordinate.

The French *Cour de Cassation*, Chambre Sociale of 4 March 2020 no 374,[18] qualified the contractual relationship between Uber and the driver as an employment relationship. In doing so, the Court highlighted that the worker is not a commercial partner. On the contrary, at the time of conclusion of the contract, he adheres to a transport service entirely organised by Uber through the digital platform and the algorithmic processing systems which determine its operation.

The driver who uses the App cannot create his customer base or freely determine the applicable rates and, in this way, places his work within a framework of rules specified from an external third party.

The impossibility of occupying an autonomously defined position on the market for transport services seems to result in a condition of economic and contractual dependence. In the approach adopted by the French Court, it cannot integrate subordination on its own. The judgment in question, in fact, enhances the insertion of work in a '*service organisé*' that '*peut constituer un indice de subordination*' only when '*employeur en détermine unilatéralement les conditions d'exécution*'.

When the instrumental and integrated nature of the provider's activity

[17] The theme of work through the network, so-called '*the gig economy*', has been the subject of much debate in doctrine, see *ex multis*: D. Garofalo, 'La prima disciplina del lavoro su piattaforma digitale' *Lavoro nella Giurisprudenza*, 1, 5 (2020); L. Foglia, 'Sharing economy e lavoro: qualificazione giuridica e tecniche di regolazione', in D. Di Sabato and A. Lepore eds, *Sharing economy* n 5 above, 143; S. Bini, 'La questione del datore di lavoro nelle piattaforme', in G. Zilio, G. Grandiand M. Biasi,*Commentario breve allo statuto del lavoro autonomo e del lavoro agile* (Milano: Wolters Kluwer, 2018), 158; M. Miscione, 'I lavori poveri dopo l'economia a domanda per mezzo della rete' *Corriere giuridico*, 6, 815 (2018); F. Lunardon, 'Le reti d'impresa e le piattaforme digitali della sharing economy' *Argomenti Diritto del Lavoro*, 2, 375 (2018); A. Perulli, 'Lavoro e tecnica al tempo di Uber' *Rivista giuridica lavoro*, I, 172 (2017); P. Tullini ed, *Web e lavoro: Profili evolutivi e di tutela* (Torino: Giappichelli, 2017); S. Auriemma, 'Impresa, lavoro e subordinazione digitale al vaglio della giurisprudenza' *Rivista giuridica lavoro,* I, 281 (2017); R. Voza, 'Il lavoro e le piattaforme digitali: the same old story?' *WP CSDLE 'Massimo D'Antona'IT*, 336, 9 (2017); J. Prassi and M. Risak, 'Sottosopra e al rovescio: le piattaforme di lavoro on demand come datori di lavoro' *Rivista giuridica del lavoro*, I, 229 (2017); E. Dagnino, 'Uber Law: prospettive giuslavoristiche sulla sharing/on-demand economy' available an www.bollettinoadapt.it; Id, 'Il lavoro nella on-demand economy: esigenze di tutela e prospettive regolatorie'available at www.labourlaw.unibo.it; E. Mostacci and A. Somma, *Il caso Uber. La sharing economy nel confronto tra common law e civil law* (Milano: Egea, 2016); see in case-law, UK Employment Tribunal, case no 2202550/2015, 28 October 2016; Tribunale di Torino 7 May 2018 no 778, *Lavoro nella Giurisprudenza*, 7, 721 (2018); Corte d'Appello di Torino 4 January 2019 no 26, available at *www.lavorodirittieuropa.it*.

[18] Cour de Cassation 4 March 2020 no 374, available at https://tinyurl.com/3jete5c7 (last visited 31 December 2022).

concerning the economic structure of the company is precise, the presence of indices demonstrating the unilateral determination of the rules intended for workers will be sufficient to reach the threshold of subordination.

This perspective does not for evidence as to whether Uber is exercising employer's powers. Instead, it takes advantage of various characteristics of the relationship, which, taken as a whole, can demonstrate that the organization's owner sets the conditions for the performance of the service.

Similarly, the United Kingdom Supreme Court, ruling on 19 February 2021,[19] decided as to whether Uber drivers shall be considered self-employed or employees. The dispute concerned the employment status of drivers of private rental vehicles who provide their services through the Uber app.

Section 230(3) of the Employment Rights Act 1996 includes in the definition of an employee anyone employed under an employment contract, including certain individual workers who may assimilate to self-employed persons. In particular, the definition includes those instances in which, based on a contract,

> 'the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by the contract that of a client or customer of any profession or business undertaking carried on by the individual'.

In the proceedings, both the Employment Appeal Tribunal and the Court of Appeal held that the applicants met this test and worked under employment contracts for Uber employees.

Uber Bv claimed to have acted solely as a technology provider with its subsidiary (Uber London) as a driver's booking agent.

The company argued that drivers were independent contractors who worked under contracts entered directly with customers, without any direct professional relationship with the company.

In its ruling, the British Supreme Court states that although there is no written contract between the drivers and Uber London, the nature of their legal relationship must be inferred from the parties' conduct.

There is no factual basis for saying that Uber London acted as an agent for drivers. According to the supreme judges, it is necessary to focus on the purpose of labour legislation. That purpose is to protect vulnerable persons who cannot argue about their pay and the working conditions to which they are subject because they are in a subordinate and dependent position vis-à-vis the employer who exercises control over the work performed.

The judgment elaborates criteria according to which the worker applicants are subjected to Uber based on contractual relationships. These criteria are the

[19] Supreme Court of the United Kingdom, 19 February 2021, available at https://tinyurl.com/29kjr5c6 (last visited 31 December 2022).

following.

First, to book a ride through the Uber app, the Uber app sets the fare and determines how much drivers are paid for their work.

Secondly, Uber lays down the contractual conditions under which drivers perform their services.

Third, Uber restricts the driver's choice of accepting or rejecting ride requests once a driver has logged into the App. Finally, the App monitors the rate of acceptance (and cancellation) of travel requests by the driver. In this regard, the Court points out that Uber could impose a penalty in case of refusal or revocation of a number considered excessive (by the App itself) of reservations. In fact, in these cases, the drivers were automatically disconnected from the Uber app for ten minutes, thus preventing the driver from working until he was allowed to reconnect.

Fourth, Uber also exercises significant control over how drivers provide their services. For example, the judgment mentions using a rating system by which passengers rate the driver on a scale of one to five after the journey; any driver who failed to maintain the average rating would receive warnings. His relationship with Uber would eventually terminate if his average rating did not improve.

A fifth significant factor is that Uber restricts communication between passenger and driver to the minimum necessary to perform the particular trip and takes active steps to prevent drivers from establishing any relationship with a passenger capacity extending beyond an individual ride. For example, when booking a ride, a passenger is not offered a choice among different drivers, and their request is directed to the nearest driver.

Therefore, based on those criteria, the Court ruled that the drivers are indeed employees of Uber. Consequently, drivers are in a position of subordination and dependence concerning Uber and have little or no ability to improve their economic situation through professional or entrepreneurial skills.

The transport service provided by drivers and offered to passengers through the Uber app is strictly defined and controlled by Uber, including through the rating mentioned above.[20] However, some critical issues[21] about this system can undermine its reliability.

First, individual scores result from essentially subjective assessments of performance. However, personal and aggregate ratings are expressed in a number (one to five stars), effectively creating a deceptive sense of objectivity. Although

[20]To learn more about feedback mechanisms and platform liability profiles, see G. Smorto, 'Reputazione, fiducia e mercati' *Europea e diritto priv*ato, 199 (2016); E. Adamo, 'I meccanismi di feedback nella sharing economy' *Corti salernitane*, 3 (2017); Id, 'I meccanismi di feedback nella sharing economy: situazioni di conflitto e responsabilità della piattaforma on line', in D. Di Sabato e A. Lepore eds, *Sharing economy* n 5 above, 107.

[21] For these surveys, see R. Ducato, 'Scritto nelle stelle. Un'analisi giuridica dei sistemi di rating nella piattaforma Uber alla luce della normativa sulla protezione dei dati personali' *Diritto & questioni pubbliche*, 81-105, and, in particular, see 88 (2020).

the system allows to enter feedback and select the problem encountered from a preset list, these qualitative inputs are limited and not visible to other users.

Moreover, since the user can only assess the performance in its complexity, there is a risk of allowing for more elements of discretion. The voluntary nature of the evaluation is also highlighted. Passengers and drivers are not obliged to evaluate each other's performance at the end of the race, determining some unwanted distortions in the rating. The latter does not consider all the trips made but only those evaluated. It could provide an incomplete reconstruction and not necessarily correspond to reality.

Another important issue concerns the reliability of ratings in general and the possibility that they may become a vehicle for unfair practices. Uber provides a mechanism that obliges the user who has given a negative judgment to justify their choice. However, this remedy operates only for scores equal to or less than three.

These critical issues are very relevant if we consider that the decision to exclude or temporarily suspend the account from the platform risks being based on an automated system that is not entirely reliable. Moreover, these critical issues are accentuated if observed from personal data protection. In the absence of adequate safeguards, aggregate rating systems directly affect the rights or interests of the party receiving the score, risking being a vehicle for prejudice and discrimination.

IV. The Development of Sharing Economy in the Transport and Short-Term Rental Sector at the European Level

As is known, collaborative platforms allow to overcome traditionally centralised and intermediated supply of goods and services by professional actors. They allow for non-professional providers to exchange goods and offer services without the need for the intervention of intermediaries.[22]

[22] Technological innovations have made peer-to-peer exchange between 'prosumers' – producers and consumers – significantly reducing the need for intermediary intervention. On this subject, see A. Cocco, n 4 above, 24, which highlights as a standard feature of all online sharing activities both the dissolution of the boundaries between the figure of the 'producer' and that of the 'consumer' in place of which only 'prosumers' operate. 'Prosumation' appears as an attitude marked by an self-referred principle that each one can produce what is necessary to satisfy his own needs. The strong tendency towards disintermediation and the attitude of today's consumers to be 'co-creators' of the value initially produced by professionals allow private citizens to acquire better opportunities to ask and respond to each other's needs.

On this point, see also D. Di Sabato, *Diritto* n 2 above, 20; G. Ritzer and J. Nathan, 'Production, Consumption, Prosumption. The Nature of Capitalism in the Age of the Digital "Prosumer"' *Journal of Consumer Culture*, 10 (2010), in particular, see 14. Many academic definitions of *prosumer* include neither production nor consumption activities, such as demand response, energy efficiency, and grid services. See H. Van Soest, 'The Prosumer in European Energy Law', available at https://tinyurl.com/3t6zsfft (last visited 31 December 2022), who claims these definitions are examples of a tendency in the literature to expand the concept of *prosumers*. Such activities concern the active consumer rather than the *prosumer*. 'An active

One of the main issues of this growing phenomenon concerns the legal regime applicable to contractual relationships in collaborative platforms offering mixed services.[23] Because of the continuous overlapping of online and offline dimensions, it proves rather complex to classify and regulate these IT platforms.[24]

Recently the Court of Justice has tried to develop interpretative criteria concerning two of the leading platforms linked to the phenomenon of the sharing economy:[25] Uber[26] and Airbnb.[27]

consumer is a consumer who makes operational decisions relating to his energy consumption, that is, a consumer committed to demand management. (...) The *prosumer* is a market participant who produces and consumes energy and consequently engages in supply and demand management. It means that all *prosumers* are also active consumers. On the contrary, all active consumers must undertake production activities to be *prosumers*. There is a clear delimitation between these two concepts based on the need to engage in productive activities. In reality, however, several arguments justify a partial or complete overlap between the idea of active consumer and *prosumer*. First, production and consumption are not two opposite concepts but two sides of the same coin'. For further arguments, see H. Van Soest, n 22 above, 5. For more information, see B. Jacobs, 'The Energy Prosumer' *Ecology Law Quarterly*,43, 519 (2016); K. Huhta, 'Prioritising energy efficiency and demand-side measures over capacitymechanisms under EU energy law' *Journal of Energy & Natural Resources Law,* 35, 7-10 (2017).

[23] Reference refers to services consisting of an element supplied electronically and another feature provided differently. See Case C-380/18 *Airbnb Ireland*, Judgment 19 December 2019, available at www.eur-lex.europa.eu, with a note by N.A. Vecchio, 'La Corte di Giustizia e la (difficile) arte del distinguishing: il caso Airbnb e la revisione del c.d. Uber test' *Giustizia civile* (2020).

[24] See Opinion of the European Committee of the Regions - The local and regional dimension of the sharing economy, 4 December 2015 (2016/C, 051/06).

[25] In the case of Uber, it is the activity carried out exclusively to maximise profit. Above all, since there is no honest sharing with other subjects of underused resources, it would not be entirely correct to speak of *sharing economy*. However, it should be noted that some scholars consider a profit-making objective incompatible with the concept of the economy of sharing. Although, it is essential to distinguish between *profit-oriented* activities and those for which the purpose of profit is not the primary objective. It has been observed that an attempt at identifying the 'real' sharing economy would be a bit sterile; see S. Ranchordas, 'Does Sharing Mean Caring?, Regulating Innovation in the Sharing Economy'16 *Minnesota Journal of Law*, 435 (2015) and G. Smorto, 'Verso la disciplina' n 2 above, 256, to which reference is made for further doctrinal concerns on this point. See E. Caruso, 'Regolazione del trasporto pubblico non di linea e innovazione tecnologica. Il caso Uber' *Il diritto dell'economia*, 95, 1, 223-264 (2018).

[26] See Case C-320/16 *Uber France SAS* v *Nabil Bensalem*, Judgment 10 April 2018, available at www.dejure.it, which considers the activity of Uber regarding the so-called service. *UberPop,* relating to the transport sector rather than information society services and, consequently, also excluded from the scope of Directive no 123/2006 on the free movement of services (for the express provision of recital no 21), falling, on the contrary, within the exception provided for in Art 58 TFEU (1). The criteria laid down by the Court are sufficiently detailed and specific to suggest that the activity provided by Uber about the various services (*UberBlack, UberVan, UberPool*) can instead be traced back to the Directive no 31/2000, presenting itself as an added value for transport services that professional drivers would provide. For these findings, see M. Turci, 'Sulla natura dei servizi offerti dalle piattaforme digitali: il caso Uber' *Nuova giurisprudenza civile commentata,* 7-8, 1088 (2018).

[27] See N.A. Vecchio, n 23 above, 291; and also M. Colangelo, 'Piattaforme digitali e servizi della società dell'informazione: il caso Airbnb Ireland' *Diritto dell'Informazione e dell'Informatica* 35(2), 291-302 (2020), on the Case C-380/18 *Airbnb Irelandn* 23 above. In the present case,

In those cases,[28] the Court of Justice asked whether it could apply the Directive on e-commerce, favouring ICT (information and communications technology) service providers.

For both Uber and Airbnb, the 'connecting' of supply and demand[29] is central since one of the disruptive innovations[30] connected to ICT technologies is just that of allowing responding to any request through an adequate supply.[31]

It is also evident that both platforms are not limited to operating in the virtual dimension but also offer services in the material reality attributable to the underlying offline market.

Even though the premises were identical,[32] the Court regarded the activity

the Grand Chamber of the Court of Justice called upon to rule under Art 267 TFEU by the Paris Court of Great Instance, ruled that the services offered by *Airbnb* (through its subsidiaries, *Airbnb Ireland UC* and *Airbnb Payments UK*) constitute an 'information society service'. It follows that it is fully applicable to the service of the discipline provided for by Regulation (EEC) No 2000/31 on electronic commerce, including the limited derogation from their 'free movement' (Art 3(2) of Directive 2000/31), which is doubly subject to compliance with specific substantive and procedural requirements (article (a) and (b) of Art 3(4) of Directive 2000/31). About tax law in Italy, see Tribunale amministrativo regionale Lazio-Roma 18 February 2019 no 2207; Consiglio di Stato 18 September 2019 no 6219; Consiglio di Stato 26 January 2021 no 777; Case C-83/21 *Airbnb Ireland UC, Airbnb Payments UK Ltd* v *Agenzia delle Entrate*, Judgment 15 May 2021, available at www.eur-lex.europa.eu, request for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 9 February 2021.

[28] Case C-320/16 *Uber France* n 26 above; Case C-434/15 *Asociación Profesional Elite Taxi* v *Uber Systems Spain SL*, Judgment 20 December 2017, *Rivista di diritto dell'impresa*, 2, 471 (2018), with a note by M.R. Nuccio, 'Il trasporto condiviso al vaglio della Corte di Giustizia' *Foro italiano*, IV, 95 (2018). See also M. Y. Schaub, 'Why Uber is an information society service? Case Note to CJEU 20 December 2017 C-434/15 (Asociación profesional Élite Taxi)' *Journal of European Consumer and Market Law* 3, 109 (2018).

[29] See Case c-390/18 *Airbnb Ireland* n 23 above, highlighting, in particular, how *Airbnb* allows the *match* between 'potential tenants with landlords, professional or not, who offer short-term accommodation services'. See also G. Pignataro, 'Pacchetti turistici su digital platforms: la sharing economy' *Comparazione e diritto civile*, 2, 449 (2020).

[30] A good, a service, or an innovative production model are defined as 'disruptive' where they prove capable of rapidly changing the economic relations consolidated in the social fabric, unpredictably determining, at the same time, the emergence of new productions more useful for consumers (or efficient for producers) and the overcoming of previous industrial structures. See G. Basini, 'Innovazione disruptive e limiti dell'azione di concorrenza sleale per violazione di norme pubblicistiche, dopo il caso uber' *Responsabilità civile previdenziale*, 3, 1028 (2108). In the case of technological services for mobility, the Consiglio di Stato 23 December 2015 no 3586, noted that: the regulation of the public non-scheduled transport service shows the signs of time and the development of technological innovation, so the problem arises of verifying whether the new types of non-scheduled passenger transport are admitted or prohibited and, in the first case, whether the principles of the framework law — with the related penalties — apply to them or whether they are an expression of the contractual freedom of the parties. This uncertainty will persist until the legislator intervenes with a discipline that can include under its validity all the possible range of transport services, whether they are to be classified as public or private, about their concrete methods of carrying out. See M. Massavelli, 'Il servizio di trasporto c.d. Uber: qualificazione giuridica e sanzioni applicabili' *Disciplina del commercio e dei servizi*, 2, 5-44 (2016); P. Manzini, 'Uber: tra concorrenza e regolazione del mercato' *Diritto e trasporti*, 79-92 (2017).

[31] Case c-390/18 *Airbnb Ireland* n 23 above.

[32] See G. Basini, n 30 above, 1028.

of the Airbnb platform as an information society service, allowing it to benefit from the principle of freedom to provide services[33] and the applicability of Directives on electronic commerce.

On the other hand, in the two previous judgments,[34]Uber was defined as a transport service[35] excluded both from the scope of the Directive on e-commerce and the Bolkestein Directive,[36] with the obligation to comply with the more restrictive access requirements laid down by the sectoral regulations remit to the Member States.[37]

The Court found that the service offered by Uber is not merely an intermediation service consisting of connecting, through an app, a non-professional driver using his vehicle and a person wishing to make a journey in an urban area. On the contrary, however, it also generates an offer of transport services whose organisation and general operation it manages for the benefit of the users who wish to use them, thus exerting a decisive influence on the conditions of drivers' performance.

Since that application is indispensable for drivers and users who use the offer, the Court considers Uber's intermediation subsistent. In addition, however, it exists to be an integral part of an overall service in which the main element is a transport service and, consequently, meets the classification, not as an information society service[38] but as a service in the transport sector, under Art 2(2)(d) of the Bolkestein Directive.[39]

That classification is also supported by the concept of service in the transport field[40] developed by European case law itself. It covers transport services regarded as such and any service intrinsically linked to a physical act of transfer of persons or goods from one place to another through transport.[41] It should also be emphasised that the Court of Justice has also increased the scope of

[33] Guaranteed by Art 56 TFEU.

[34] Case C-434/15 *Asociación* n 28 above, and Case C-320/16 *Uber France* n 26 above.

[35] Arts 58 and 90 to 100 TFEU.

[36]Art 2(2)(d) of Directive 2006/123.

[37] See Case C-434/15 *Uber Spain* n 34 above.

[38] Under Art 1, (2), of the directive 98/34, to which Art 2, letter a), of the directive 2000/31.

[39] See Case C-320/16 *Uber France* n 26 above.

[40] 'Transport services' include not only taxis but also roadworthiness tests for vehicles, *ie,* services related to 'urban transport', a concept which can also absorb Uber, to be considered, if not as a carrier in the strict sense, at least as an 'organiser of transport services'. To that effect, see Case C-168/14 *Grupo Itevelesa SL and Others v Oca Inspección Técnica de Vehículos SA e Generalidad de Cataluña*, Judgment 15 October 2015, *Foro amministrativo*, X, 2455 (2015). Otherwise, see the Opinion of the Advocate General in Case C-62/19 *Star Taxi App s.r.l.c. Unitatea Administrativ Teritorială Municipiul Bucureşti prin Primar General e Consiliul General al Municipiului Bucureşti*, Judgment10 September 2020, available at *www.curia.europea.eu.*

[41] Thus R. Lobianco, 'Servizi di mobilità a contenuto tecnologico nel settore del trasporto di persone con conducente: brevi riflessioni sulla natura giuridica del fenomeno "Uber" ' *Responsabilità civile e previdenza*, 1046 (2018). See Case C-434/15, *Asociación* n 28 above, para 41.

intervention of individual Member States, adopting sanctioning rules against companies that provide an intermediation service in case of abusive exercise of passenger transport activities with the driver.

V. Sharing Economy and Consumer Protection: The E-commerce Directive and First Observations on the Changes Made to the Consumer Code by Decreto Legislativo 4 November 2021 no 173

In the cases noted, the Court of Justice has used the criterion of decisive influence to resolve the issue. Using an approach that, looking at the specific point, aims to exclude the applicability of the Directive on electronic commerce whenever the IT platform determines or, in any case, exercises significant control over the contractual conditions under which the underlying non-digitise service is offered.[42]

Following that approach, the service IT platforms, characterising the sharing economy business element, would have an utterly marginal relevance for determining the applicable rules.[43]

From this point of view, it is clear that consumers would suffer an adverse effect since they could not take advantage of the protection instruments provided by the E-commerce Directive, which defines the transparency requirements and the content of contracts concluded *online*. The Directive predisposes consumer protection instruments precisely to compensate for information asymmetry in which they find themselves concerning the service provider. The complex system of safeguards provides a detailed list of the information made easily accessible by service providers to users and the information required to be delivered in commercial communications. Also, a discipline dedicated to the content of contracts concluded electronically specifies the knowledge, clauses, and general conditions to be communicated to the consumer before placing the order.

The Directive also requires more excellent consumer protection than 'free' digital services, for which consumers do not pay an amount of money but provide personal data. Data increasingly represent the new currency of exchange.[44] Users grant their data, often required for registration, as a counter-performance for

[42] See G. Pignataro, n 29 above, 427; M.R. Nuccio, 'Le metamorfosi' n 10 above, 588; C. Busch, 'The Sharing Economy at the CJEU: Does Airbnb pass the "Uber test"? Some observations on the pending case C-390/18 – Airbnb Ireland' *Journal of European Consumer and Market Law*, 4, 172 (2018); A. De Franceschi, 'Uber Spain and the Identity Crisis of Online Platforms' *Journal of European Consumer and Market Law*, 1, 1 (2018).

[43] See V. Cappelli, n 2 above, 1398.

[44] On the subject, see C. Perlingieri, 'Data as the object of a contract and contract of epistemology' *The Italian Law Journal*, 5, 615-631 (2019); G. Resta, 'I dati personali oggetto del contratto. Riflessioni sul coordinamento della Direttiva (UE) 2019/770 e il Regolamento (UE) 2016/679' *Annuario del contratto*, 142 (2018).

obtaining the service, unknowingly restricting the area of their confidentiality.[45]

It should be noted, among other things, that with the decreto legislativo 4 November 2021 no 173, the Italian legislator implemented Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects of contracts for the supply of digital content and digital services. However, the new regulation did not address the problem of the legal classification of the agreement based on which the consumer allows access to personal data as a non-pecuniary consideration for the supply of digital content and digital services.

Nevertheless, it has extended to the latter the protections provided by the consumer legislation for lack of conformity and non-supply.

According to paras 3 and 4 of Art 135-*octies,* the provisions of Chapter I-*bis* apply to any contract in which the trader supplies, or undertakes to supply, digital content or digital service to the consumer. The consumer pays or undertakes to pay the price, or if he gives or undertakes to provide personal data.

This last hypothesis poses considerable coordination problems with the discipline for protecting personal data outlined by Regulation (EU) 2016/679 (GDPR). Moreover, by recital 24 of Directive (EU) 2019/770, a margin of discretion has been left to the Member States on the subject of the use of personal data for consideration. Since it is not clear whether this type of agreement can meet the contract formation requirements laid down by the various national legislations, therefore each country must be able to decide for itself on point.[46]

Therefore, it is clear that the European volition does not make personal data similar to consideration but guarantees, even in these situations, increasingly frequent in practice, the same legal protections provided for contracts to supply digital content or services.

However, in the Italian legal system, the interpretative problems concerning the legal nature of that agreement were not addressed by the national legislature when transposing the Directive. On the contrary, the Italian legislator has limited himself to the mere transposition of the letter of the Directive into internal law. He left open the question of how to coordinate this type of agreement with the general contractual discipline of the Civil Code and with the remedies provided for by the same legislation just introduced.

Beyond Arts 135-*octies* (4) 135-*novies* (6) (the latter affirming the prevalence

[45] In this regard, see G. Malgieri and B. Custers, 'Pricing Privacy: The Right to Know the Value of Your Personal Data' *Computer Law & Security Review*, 34, 289 (2018); A. De Franceschi, 'European Contract Law and the Digital Single Market: Current Issues and New Perspectives', in A. De Franceschi ed, *European Contract Law and the Digital Single Market. The implications of the Digital Revolution* (Cambridge: Intersentia, 2017), 8.

[46] According to the Directive (EU) 2019/770, recital 24: 'This Directive should apply to any contract where the consumer provides or undertakes personal data to the trader. (...) Member States should, however, remain free to determine whether the requirements for a contract's formation, existence, and validity under national law are fulfilled'.

of the GDPR over the provisions of the new Chapter I-*bis* in the event of a conflict), the case of the use of personal data of the consumer as consideration has not been subject to further review.

These protections do not replace those covered sectors, such as electronic commerce. However, they are in addition to the latter to ensure the highest possible consumer protection level. A fortiori, if we consider the increasing diffusion of these new contractual schemes.

Therefore, it is considered that classifying platforms offering mixed services as *internet service providers* does not hinder their simultaneous qualification as providers of the underlying services that cannot be digitised.

On the contrary, making the most of the dual nature of those interests in identifying the applicable rules would make it possible to balance reasonably all the stakes involved, not only the conflicting interests of traditional operators and collaborative platforms but, at the same time, also those of consumers who would be guaranteed a high level of protection.[47]

To this end, it is, therefore, necessary to analyse the structural dimension of contractual relationships in collaborative platforms.

In the sharing economy, there are several specific negotiating schemes: 'one to many' is a model in which a single supplier provides goods or services to multiple users; 'many to many' in which there are numerous suppliers and many other users and finally, the so-called 'peer to peer' model, in which all the negotiating relationships of supply and access to goods or services are established between private citizens, devoid of any professional competence.[48]

Since the digital platform is the meeting place between the parts of the store, there is a triangular training[49] of the subjects involved: the owner of the platform, the user supplier, and the user. Generally, the platform maintains unique relationships with each user without appearing as a part of their relationship. Consumers are part of a broader contractual relationship that is composed, in turn, of three different contracts:

- the contract between the platform and the consumer, relating to the

[47] Promoters of an interpretative technique always attentive to the balancing of principles and the comparative evaluation of interests: P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), II, passim; Id and P. Femia, *Nozioni introduttive e princípi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2004), 21; G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), passim; Id, 'Venticinque anni della Rassegna di diritto civile e la «polemica sui concetti giuridici». Crisi e ridefinizione delle categorie', in P. Perlingieried, *Temi e problemi della civilistica contemporanea*, (Napoli: Edizioni Scientifiche Italiane, 2005), 543; Id, 'Il patto di famiglia tra bilanciamento dei princípi e valutazione comparativa degli interessi' *Rassegna di diritto civile*, 146(2008). Moreover, E. Betti, *Interpretazione della legge e degli atti giuridici (Teoria generale e dogmatica)* (Milano: Giuffrè, 1949), 181.

[48] See A. Cocco, n 4 above, 23.

[49] On the triangular structure of contractual relationships referable to the *sharing economy*. O., Vallejo, 'Contractual relationships in collaborative economy platforms' *European Review of Private Law* 5, 995 (2019); I. Domurath, n 8 above, 565–581.

provision of the digital interconnection service;

- the contract between the platform and the provider of the non-digitised service, which is also inherent in the digital service, allows the provider to offer its service through the platform's IT tools;

- the contract between the supplier and the consumer to provide the non-digitised service.

The relations of suppliers and consumers with the platform form a separate contract – autonomous and independent of that between consumers and suppliers concerning the underlying service – which must comply with the transparency and content requirements of the Directive on electronic commerce.[50]

Consequently, those contracts are not to be understood according to conflictual relationship, which seeks to exclude the applicability of the E-Commerce Directive or sectoral legislation based on the relevance of the control exercised by the platform over the conditions of the service provided to the provider. On the contrary, it is necessary to consider such contractual relationships in a broader triangular relationship. Two different services are provided, the online and the offline, subject to two other disciplines, which are not mutually exclusive but can coexist, oriented towards achieving different objectives. At the heart of this triangular scheme, the platform undoubtedly constitutes a necessary intermediation tool that allows consumers to relate and conclude agreements with the supplier.[51]

VI. Concluding Considerations *de iure condito* and *de iure condendo*

In light of the above, it is considered that the distinctive feature of contractual relationships arising in sharing economy context does not lie only in the content and nature of the service but in how it is provided to consumers.

The intermediation activity determines the new decentralised market structure through collaborative platforms that are inevitably reflected in conceiving the legal relations between the various actors involved. The fact that the services are provided through digital platforms makes them completely different and not comparable with those offered with traditional offline means.

Therefore, consumers do not consider the importance of the control exercised by the platform on contractual conditions under which the underlying service is offered. Consumers also rely on the intermediation activity between them, and the non-professional suppliers carried out by the platform itself, without which even those contractual relationships would not arise.

In conclusion, it is necessary to elaborate on a valid criterion to identify the legal regime applicable to market relations in the context of the sharing economy. Furthermore, it is essential to consider all the interests at stake and, in particular,

[50] See V. Cappelli, n 2 above, 1400.

[51] See on the triangular structure of contractual relationships in the context of the collaborative economy, I. Domurath, n 8 above, 578; A.O., Vallejo, n 49 above, 995.

the pre-eminent role of IT platforms, in the absence of which no contractual relationship is established.

Recognising the dual qualification of collaborative platforms – as information society service providers in any case and, at the same time, as providers of offline services by a concrete assessment to be carried out on a case-by-case basis – would make it possible to ensure a homogeneous framework of consumer protections, without neglecting the relevance of licenses, authorisations, and requirements under sectoral regulations.

Therefore, it is necessary to rethink the traditional ways of managing contractual relationships in the context of the sharing economy. The need to devise protection instruments at a higher level is becoming increasingly apparent. The multiplicity of offline services offered through collaborative platforms does not achieve, in practice, a reduction in the protection instruments envisaged in favour of consumers.

In such a context, the E-commerce Directive would appear to be the most appropriate instrument to ensure consumer protection for all collaborative platforms. On the other hand, from a *de iure condendo* perspective, an *ad hoc* legislative intervention has been repeatedly called for, also at the European level,[52] to provide a 'univocal and updated legal framework' of the sharing economy starting from consumer protection. In the doctrinal debate[53] on the regulation of this phenomenon, there are mainly three different attitudes: the first consist of subjecting the services provided through IT platforms to the existing discipline; a second is aimed at deregulating their activity or at subjecting them to a minimum regulation; finally an 'intermediate' third, consisting in the introduction of an *ad hoc* regulation for new services, made up of rules lighter than those to which traditional operators are subject.[54] Nevertheless, it remains impossible to disregard a concrete assessment to be carried out on a case-by-case basis that considers the peculiarities of the reference sector and the type of on-demand services established in that particular market. In particular, in the regulatory choices, it is necessary to consider the distinction between activities in which the collaborative component is prevalent and for-profit activities in which the innovative element is represented almost exclusively by a new way of doing business.[55]

[52] See the Opinion of the European Economic and Social Committee on 'Collaborative or participatory consumption, a sustainability model for the 21st century' (2014/C 177/01).

[53] See G. Smorto, 'Verso la disciplina' n 2 above, 17; Id, 'The Sharing Economy as a Means to Urban Commoning' *Comparative Law Review,* 9 (2016).

[54] To deepen the different approaches that emerge from the doctrinal debate on the sharingeconomy regulation, see E. Caruso, n 25 above, 259; G. Smorto, 'Verso la disciplina' n 2 above, 17.

[55] See E. Caruso, n 25 above, 259.

Insights & Analyses

The Mobile Borders Between the Right to Be Forgotten and Freedom of Information

Federica Lazzarelli*

Abstract

This essay investigates the topic of the right to be forgotten, off and online, in the context of freedom of information, proposing an innovative reconstruction that differs from the prevailing orientation, also accepted by the GDPR, which largely gives it priority over other fundamental rights. Stemming from a line of interpretation attentive to the values of personalism and solidarism (Art 2 of the Italian Constitution), the reconstruction seeks to demonstrate that, although it is an expression of human personality, the right to be forgotten must be seen in relation to the right to information (Art 21 of the Italian Constitution), which too is an indispensable tool for the cultural growth of the human person and the implementation of the principle of *favor veritatis*. This principle, which is at the basis of the current legal order, does not permit limitations with no axiological justification, unless a specific balancing operation, based on principles of proportionality and reasonableness, has been performed in advance.

I. From Privacy to the Right to Be Digitally Forgotten

Before taking on a physiognomy of its own and becoming a discipline in its own right, the right to be forgotten joined the legal landscape as one aspect of the right to privacy. After a lengthy process, where many scholars denied its recognition in the absence of an express general[1] legislative provision, the right to confidentiality gradually gained recognition in the more attentive case law and authoritative scholarship.[2] These authorities ground the right to confidentially

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[1] Cf Corte di Cassazione 22 December 1956 no 4487, *Giurisprudenza italiana*, I, 366 (1957), with a commentary by G. Pugliese, 'Una messa a punto della Cassazione sul preteso diritto alla riservatezza'. Similarly, see also A. Pace, *Problematica delle libertà costituzionali* (Palermo: CEDAM, 1983), 3; V. Ricciuto, 'I danni da dequalificazione professionale. A proposito della proliferazione delle fattispecie di danno' *Diritto dell'informazione e dell'informatica*, 657 (1993).

[2] In particular, A. Ravà, *Istituzioni di diritto privato* (Padova: CEDAM, 1938-XVI), 153; F. Carnelutti, 'Diritto alla vita privata' *Rivista trimestrale di diritto pubblico*, 3 (1955); G. Giampiccolo, 'La tutela giuridica della persona umana e il c.d. diritto alla riservatezza' *Rivista trimestrale di diritto e procedura civile*, 465 (1958); P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Jovene Editore, 1972), 175 and 370; Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti*, III, *Situazioni soggettive* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), 5. In case law, see Corte di Cassazione 10 May 2001 no 6507, *Giustizia civile*, I, 2644 (2001). *Contra* Consiglio di Stato 6 October 2010 no 5881, *Foro amministrativo* C.d.S., 2928 (2003).

in the absolute principle of the protection and promotion of the human person, enshrined in Art 2 of the Italian Constitution, on the assumption that human personality constitutes a unitary value to be guaranteed in all its manifestations, whether typified or not.[3]

The Supreme Court of Cassation reaffirmed this orientation in 1998[4] when, for the first time, the right to be forgotten received expressed protection against the dissemination of defamatory news related to a person in print media.[5] It was formulated as a specification of confidentiality in the broader sense, to be protected whenever a person is harmed by the spreading (or publication) of information which, albeit true, nevertheless causes him or her harm.

There are two situations in which case law, in line with eminent legal scholarship,[6] grants the right to be forgotten prevalence over the protection of the interest of the community in remembering facts that happened or information inherent to the private sphere of an individual: when there is a disparity between fact or information and the situation of the person concerned today and in the absence of 'social utility', namely the public interest in remembering the fact or information. The right to be forgotten thus becomes a part of the system of constitutional safeguards relating to another fundamental right: the right to report news, an articulation of the freedom of manifestation of thought (Art 21 of the Italian Constitution)[7] defined as the right to inform and to be informed, an essential and indispensable instrument for the 'growth of the economic and social system today'.[8]

In the digital society, the right to be forgotten takes on more complex characteristics than those relating to the off-line dimension, both when, for example, it is the person concerned who directly posts information concerning him- or herself on the internet (eg, on social networks) and when it is spread by a third party.[9] Information published online enters the public domain in real

[3] See Corte di Cassazione 27 May 1975 no 2129, *Foro italiano*, I, 2895 (1976). This hermeneutical standpoint is still held today. See, among the more recent, Corte di Cassazione 19 July 2016 no 14694, available at www.dejure.it.

[4] See the definitive Corte di Cassazione 21 February 1994 no 657, *Giurisprudenza italiana*, I, 1, 298 (1995).

[5] See Corte di Cassazione 9 April 1998 no 3679, *Foro italiano*, I, 1834 (1998), with a commentary by P. Laghezza, 'Il diritto all'oblio esiste (e si vede)'.

[6] See G.B. Ferri, 'Diritto all'informazione e diritto all'oblio' *Rivista di diritto civile*, 807 (1990); G. Giacobbe, *Lezioni di diritto privato* (Torino: Giappichelli, 2006), 53.

[7] See Corte di Cassazione, 8 May 2012 no 6902, available at www.foroplus.it.

[8] Cf P. Perlingieri, 'L'informazione come bene giuridico' *Rassegna di diritto civile*, 326 (1990), now in P. Perlingieri ed, *Il diritto dei contratti fra persona e mercato* (Napoli: Edizioni Scientifiche Italiane, 2003), 337 (from which it is quoted). For a different reconstruction, see D. Messinetti, *Oggettività giuridica delle cose incorporali* (Milano: Giuffrè, 1970), 36.

[9] The specific topic of the right to be forgotten online has been the subject of extensive scholarly study. Of note, among others, are G. Finocchiaro, 'La memoria della rete e il diritto all'oblio' *Diritto dell'informazione e dell'informatica*, 391 (2010); F. Di Ciommo, 'Quello che il diritto non dice. Internet e oblio' *Danno e responsabiità*,1101 (2014); S. Martinelli, *Diritto all'oblio e motori di ricerca* (Milano: Giuffrè, 2017), 1; A. Sirotti Gaudenzi, *Diritto all'oblio:*

time,[10] and anyone can retrieve it by visiting the source website but, above all, through search engines capable of capturing and indexing information, which becomes technically impossible to hide, unless specific action is taken to remove it.

II. The Contribution of Italo-European Case Law

The contribution of Italian-European case law[11] played a fundamental role in establishing the right to be forgotten, even before legislation came into being. Until relatively recently, the Court of Justice of the European Union and the Italian Court of Cassation[12] held different positions regarding remedies; however, the most recent pronouncements seem to show the hoped-for convergence.[13]

The decisive turning point came with the well-known judgment of the Court of Justice of the European Union[14] confirming full recognition of the right to be forgotten, but it also introduced an unprecedented means of redress: the right to have information or news 'de-indexed' by a search engine. Essentially, a person intending to assert their right to be forgotten is entitled to ask search engines (eg Google, as in the case at hand) to delete from the list of results any links to data or information concerning them that appears when their name is entered. In the event of refusal, the interested party may appeal to the Data Protection Authority or, alternatively, to the judicial authorities. These authorities

responsabilità e risarcimento del danno (Rimini: Maggioli Editore, 2016), 1. Lastly, see also P. De Martinis, *Oblio, internet e tutele. L'inibitoria* (Napoli: Edizioni Scientifiche Italiane, 2021), 1.

[10] On this point, see G. Giannone Codiglione, *Internet e tutele di diritto civile* (Torino: Giappichelli, 2020), 136; F. Pizzetti, 'Il prisma del diritto all'oblio', in F. Pizzetti ed, *Il caso del diritto all'oblio* (Torino: Giappichelli, 2003), 38; A. Mantelero, 'Il diritto all'oblio dalla carta stampata a Internet', in F. Pizzetti, n 10 above, 156; F. Russo, 'Diritto all'oblio e motori di ricerca: la prima pronuncia dei tribunali italiani dopo il caso Google Spain' *Danno e responsabilità*, 303 (2016).

[11] See M.G. Stanzione, 'Libertà di espressione e diritto alla privacy nel dialogo delle corti. Il caso del diritto all'oblio' *Europa e diritto privato*, 991 (2020).

[12] The obligation to de-index ordered by the Luxembourg Court in the well-known *Google Spain* ruling, which will be discussed later on (see n 14), was treated differently by the Court of Cassation, which only obliged the manager of the site to update any out-of-date information, as in Corte di Cassazione 5 April 2012 no 5525, available at www.dejure.it.

[13] The Corte di Cassazione, reaffirming that the right to be forgotten, 'closely linked to the rights to privacy and personal identity', must be balanced with the right to collective information, recognised the petitioner's right to have the article containing his personal information de-indexed from the search engine in order to prevent easy access to information concerning him by typing in keywords, see Corte di Cassazione 31 May 2021 no 15160, available at www.foroplus.it. Similarly, see also Corte di Cassazione, 30 August 2022, no 25481, available at www.foroplus.it.

[14] Case C-131/12 *Google Spain SL and Google Inc.* v *Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Judgment of 13 May 2014, available at www.eur-lex.europa.eu. Previously, the Court of Justice had dealt with privacy on the Internet in its decision case C-101/01, Judgment of 6 November 2003, *Danno e responsabilità*, 382 (2004), with a commentary by A. Giannaccari, 'Il trasferimento di dati personali in Internet' and T.M. Ubertazzi, 'Sul bilanciamento tra libertà di espressione e privacy'.

might disagree with the decision taken by the search engine operator and might order the deletion of the information.[15] Through this pronouncement, the European Court crystallised certain principles which lay down precise but, in some respects, questionable guidelines. First of all, a broad power of control is granted to a non-impartial actor, unsupported by adequate assessment criteria. The search engine is

> 'called upon to perform the difficult task of identifying the correct balance between the fundamental rights of the individual, deriving from Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, and the (potentially conflicting) legitimate interest of Internet users wishing to have access to that given information'.[16]

The search engine could, in fact, simply make the most convenient but not adequately thought-out decision, which, if the interested party's request was granted, would exclude any further review, thus precluding any action to protect other interests.

The other unconvincing aspect concerns the preference that the Court accords, as a matter of principle, to the individual's right to protect his or her personal sphere to the detriment of the interest of the community in having access to information, which outlines the contours of the balancing act that the judge will be called upon to perform. The lack of a requirement to ascertain that harm has actually been caused appears to reveal an intent to favour the protection of the right to be forgotten over other constitutional rights, regardless of any assessment of the individual case and exceeding the limits that the European legislator would soon lay down in the Art 17 GDPR.[17] A few years later, the European Court addressed the issue once more and reaffirmed Google's obligation to de-index, limiting it, however, to the European domains (eg, Google.it) but not the global one (Google.com),[18] on the assumption that extending this obligation outside Europe would create problems for national authorities.[19]

The European reconstruction thus took a different direction from that

[15] However, this deletion does not imply the deletion of the page on which the information is contained from the internet nor the deletion of other links to it, thus V. D'Antonio, in S. Sica and V. D'Antonio, 'La procedura di de-indicizzazione' *Diritto dell'informazione e dell'informatica*, 151 (2014).

[16] V. D'Antonio, n 15 above, 150.

[17] Para 3 states that the right to be forgotten must be reconciled with the limits of freedom of expression and information, as well as the interest of the public in the preservation of the data or information.

[18] Case C-507/17, Judgment of 24 September 2019, *Diritto e giustizia*, 171, 3 (2019), with a commentary by G. Milizia, 'Google deve indicizzare i dati sensibili degli interessati da tutte le sue "versioni europee" '.

[19] On the decision, see D. Messina, 'Diritto all'oblio e limite territoriale europeo: la sentenza della Corte di Giustizia UE C-507/17 del 24 settembre 2019' *De iustitia*, 1 (2020).

followed by the Italian Court of Cassation up until then.[20] Shortly beforehand, overturning the decision of Data Protection Authority, the Court of Cassation stated that, rather than addressing the search engine, interested parties could protect their right to be forgotten by turning directly to the website source but not to have the information cancelled; it could only ask to update the information, so that it would always reflect the applicant's current situation.[21]

After the GDPR[22] entered into force, this issue, particularly the question of balancing right to be forgotten vis-à-vis right to be informed, once more came to the attention of the Italian Court of Cassation. Initially, the Court affirmed the general prevalence of the right to be forgotten over the right to information.[23] Subsequently, however, it fully followed the European Court case law, including the matter of remedies. However, the Italian Court added some clarifications, which seem to demonstrate a tendency to reposition the right to be forgotten within the framework of constitutional protections, without endowing it with general preference. The Italian Court stated that

> 'de-indexing web content represents (...) the actual balancing point of the interests at stake. It constitutes, in fact, the solution that (...) achieves the aforementioned balance by excluding the extreme solutions configurable in the abstract (...)'.[24]

The positions adopted are thus moving increasingly towards a uniform line in the Italian-European sphere, both in terms of balancing criteria and remedies. It should also be recalled that the Court of Justice of the European Union s position has recently been also accepted by the European Court of Human Rights.[25] Setting aside the previously-accorded remedy of anonymisation,[26] the

[20] In the case law on the merits, the principles contained in the aforementioned decision of the Court of Justice were accepted, for the first time, by the Tribunale di Roma 3 December 2015 no 23771, *Danno e responsabilità*, 299 (2016), with a commentary by F. Russo, 'Diritto all'oblio e motori di ricerca: la prima pronuncia dei tribunali italiani dopo il caso google Spain'. However, in this case, it rejected the application for protection of the right to be forgotten.

[21] Cf Corte di Cassazione 5 April 2012 no 5525, n 12 above. On this point, see also F. Di Ciommo, 'Oblio e cronaca: rimessa alle Sezioni Unite la definizione dei criteri di bilanciamento' *Corriere giuridico*, 11 (2019).

[22] See para IV.

[23] Corte di Cassazione 20 March 2018 no 6919, available at www.foroplus.it. This principle was then confirmed by Corte di Cassazione Sezioni Unite 22 July 2019 no 19681, available at www.deiure.it with a commentary by R. Pardolesi, 'Oblio e anonimato storiografico: «usque tandem...»?'; also interesting is the commentary by C. Crea, 'Oblio, "cronaca rievocativa" e anonimato' in C. Granelli ed, *I nuovi orientamenti della cassazione civile* (Milano: Giuffrè, 2020), 34.

[24] Thus Corte di Cassazione 8 February 2022 no 3952, available in www.dirittodiinternet.it. Similarly, cf Corte di Cassazione, n 13 above, and in certain respects also Corte di Cassazione 9 May 2020 no 9147, available at www.foroplus.it.

[25]Eur. Court H.R., *Biancardi* v *Italia*, Judgment of 25 November 2021, available at www.dirittifondamentali.it.

[26] See Eur. Court H.R., *Hurbain* v *Belgium*, Judgment of 22 June 2021, available at

European Court of Human Rights conforms to the European approach of de-indexing, reaffirming the existing criteria based on which courts are called upon to strike a balance between the public interest of the right to information, the prominence of the person concerned, and the content, manner, and consequences of publication.

Also in the light of subsequent European legislation (Art 17 GDPR), two elements seem to have been established so far. The first is that, according to current provision, recognising the right to be forgotten always results from finding a balance between this and other fundamental rights. The second is that this interpretative technique does not operate in the abstract but considers the particularities of the case at hand.[27] This means that there can be no single and predetermined remedy; the solution must be found on the basis of the specificities of the case to which it is to be applied since '(i)t is not the interest that is structured around the remedy, but the remedy that is adapted according to the interests to be protected'.[28]

III. The Existing Legal Framework

While the right to privacy was first legally recognised in the international sphere, in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome in 1950 and ratified by Italy in 1955,[29] the right to be forgotten was granted legal recognition in 2016, through Reg 2016/679/EU (the GDPR, General Data Protection Regulation).[30]

www.giustiziacivile.com, in which was then referred to the Grand Chamber of the Eur. Court H.R. In this regard, see A. Malafronte, 'Rinviato alla Grande Camera della CEDU un rilevante caso in tema di tutela del diritto all'oblio in àmbito di contenuti ricercabili su Internet', available at www.giustiziacivile.com.

[27] Further, P. Perlingieri, *Il diritto civile nella legalità costituzionalesecondo il sistema italo-europeo delle fonti, II, Fonti e interpretazione* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), 399.

[28] Again, P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti, IV, Attività e responsabilità* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), 144.

[29] Art 8 para 1 states that 'everyone has the right to respect for his private and family life, his home and his correspondence'. The Strasbourg Convention drawn up by the Council of Europe in 1981 and ratified in Italy in 1989, which aims to protect 'fundamental rights and freedoms, and in particular the right to privacy, with regard to the automatic processing of personal data' (Art 1), takes its inspiration from this provision.

[30] Among the numerous studies devoted to the right to be forgotten in the light of recent European regulations, see, in particular, V. D'Antonio, 'Oblio e cancellazione dei dati nel diritto europeo' in S. Sica, V. D'Antonio and G.M. Riccio eds, *La nuova disciplina europea della* privacy (Padova: CEDAM, 2016), 197; F. Di Ciommo, 'Privacy in Europe after regulation (Eu) n. 2016/679: what will remain of the right to be forgotten?' *Italian Law Journal*, 623 (2017); Id, 'Il diritto all'oblio (oblito) nel Regolamento Ue 2016/679 sul trattamento dei dati personali' *Foro italiano*, 306 (2017); A. Thiene, 'Segretezza e riappropriazione di informazioni di carattere personale: riserbo e oblio nel nuovo regolamento europeo' *Nuove leggi civili commentate*, 410

Art 17 is titled 'Right to erasure' and, in parenthesis to the side, 'right to be forgotten' in the English version.

The provision recognises the

> 'right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay'

if certain conditions are fulfilled (Art 17 para 1). Para 2 completes the rule, adding that the data controller must not only cancel information if he or she 'has made the personal data public(...)' and, 'in accordance with paragraph 1, to erase them', but also to

> 'inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data';

Para 3, lists the situations when it is considered necessary to process personal information.

The provision in question has not been received with unanimous enthusiasm by legal scholars, especially with regard to the remedies granted to the data subject, given that anything uploaded on the internet will remain there forever; it will be copied automatically by other sites or servers and, using search engines, anyone will be able to find the information or news with a click. It should be remarked that merely obliging the data controller to delete data may be insufficient to protect the data subject, who might, in this case, obtain more effective protection by requesting de-indexing from the search engine, for example. Nevertheless, the right to de-indexing is not expressly provided for in the remedies system of European law, which renders the latter incomplete and deficient.[31] This observation brings the role of the courts and the dividing line between exegesis and interpretation[32] back to the fore. While interpretation functions to connect law and fact and aims to situate a regulatory provision within the legal system for practical purposes,[33] ie, to identify, on the basis of

(2017); D. Barbierato, 'Osservazioni sul diritto all'oblio e la (mancata) novità del regolamento Ue 2016/679 sulla protezione dei dati personali' *Responsabilità civile e previdenza*, 2100 (2017).

[31] Again F. Di Ciommo, n 21 above, 18. Sharing this view, M.A. Livi, 'Sub artt. 16 e 17 Rettifica e cancellazione', in A. Barba and S. Pagliantini eds, *Delle persone*, *Leggi collegate*, II, in *Commentario del codice civile* directed by E. Gabrielli (Torino: UTET, 2019), 306.

[32] On this issue, please refer to the valuable insights of P. Perlingieri, 'Il diritto civile tra regole di dettaglio e princípi fondamentali. "Dall'interpretazione esegetica all'interpretazione sistematica" ', in Id ed, *Lezioni (1969-2019)*, III *(2011-2019)* (Napoli: Edizioni Scientifiche Italiane, 2020), 395.

[33] See P. Perlingieri, *Il diritto civile* n 27 above, 341; Id, 'Applicazione e controllo nell'interpretazione giuridica' *Rivista di diritto civile*, 307 (2010), now in P. Perlingieri ed, *Interpretazione e legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2012) 320,

reasonability, the rule most suited to the case at hand,[34] hermeneutic activity must not be limited to a literal interpretation of the wording. Thus, the wording of the legislation certainly constitutes a starting point, which, however, when interpreted from a 'systematic and axiological'[35] standpoint, also makes it possible to apply remedies which, despite not being expressly contemplated, may be the most reasonable and proportionate in a specific circumstance.[36] Consequently, the 'obstacle' of the wording that would prevent recourse to the requirement to de-index, even if not provided for, is deprived of foundation if – in the case at hand – this proved to be the most axiologically appropriate means of protection.[37]However, the 'de-index' is a tool protection recognized to the data subject from the GDPR, even without an express rule. The Guidelines 5/2019[38] provide that

> 'the Right to request delisting implies two rights (Right to Object and Right to Erasure GDPR). Indeed, the application of Article 21 is expressly foreseen as the third ground for the Right to erasure. As a result, both Article 17 and Article 21 GDPR can serve as a legal basis for delisting requests' (p 5).

It also establishes that

> 'delisting requests do not result in the personal data being completely erased. Indeed, the personal data will neither be erased from the source webside nor from the index and cache of the search engine provider'.[39]

(from which it is quoted); A. Federico, 'Applicazione dei princípi generali e funzione nomofilattica' *Rassegna di diritto civile*, 797 (2018); P. Femia (ed), *Drittwirkung: princípi costituzionali e rapporti tra privati* (Napoli: Edizioni Scientifiche Italiane, 2018) VII .

[34] 'It represents the constant and necessary connector between a specific case and the legal system of reference, making it possible to choose, from several possible solutions, the one that is most consistent, appropriate, and congruent with the interests involved and the regulatory values present in a given system' (author's translation), significantly G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 121.

[35] Cf P. Perlingieri, 'L'interpretazione della legge come sistematica e assiologica. Il broccardo in claris non fit interpretatio, il ruolo dell'art. 12 disp. prel. c.c. e la nuova scuola dell'esegesi' *Rassegna di diritto civile*, 990 (1985), now in P. Perlingieri ed, *Interpretazione e legalità costituzionale* n 33 above, 153 (from which it is quoted).

[36] '[T]he remedy is an instrument, the possible response that the legal system offers to instances deserving protection. It is not the interest that is structured around the remedy, but the remedy that is modulated according to the interests to be protected', as P. Perlingieri observes, *Il diritto civile* n 28 above, 144, but, extensively, see also Id, 'Il "giusto rimedio" nel diritto civile' *Il giusto processo civile*, 1 (2011).

[37] Again, P. Perlingieri, *Il diritto civile* n 27 above, 333.

[38] See Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR (part 1), adopted on 7 July 2020, available at https://edpb.europa.eu.

[39] "For example, a data subject may seek the delisting of personal data from a search engine's index which have originated from a media outlet, such as a newspaper article. In this instance, the link to the personal data may be delisted from the search engine's undex;

Only in exceptional cases, the search engine providers must 'to carry out actual and full erasure in their indexes or caches'.[40]

The search engine provider is obliged to respond to the request of the interested party no later than one month from receipt of the same, unless extended by a further thirty days.[41] If it refuses to act on the request, it «shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request». So, the data subject can lodge a 'complaint with a supervisory authority and seek a judicial remedy' (Art 12 para 4, GDPR).

IV. A Comparison with Other Contexts: Europe and the US

The ruling of the Court of Justice mentioned above initiated a gradual process of harmonisation in the European context and led to the regulatory uniformity endorsed by the enactment of the GDPR.[42]

However, the subject of the right to be forgotten extends beyond the European borders and, assuming a global dimension, comes up against interpretative trends of a different nature, especially in the English-speaking world and, in particular, the United States of America. In Europe, the introduction of Art 17 GDPR codified a position long held in numerous European Member States, favouring the recognition of the right to be forgotten, even in the absence of any express legal provision to that effect. As in Italy, national data protection laws in Spain, France, and Germany do not explicitly provide for the right to be forgotten. However, they do establish time limits within which data subjects' personal information may be retained. Albeit with some different stipulations, the various national courts contributed significantly to configuring the right to be forgotten as a fundamental right[43] well before the European Regulation came into force, a right to be balanced, with the right to freedom of information. This approach is also firmly upheld by German case law. In this regard, it is worth recalling two twin judgments through which, in relation to the right to be forgotten, the Federal Constitutional Court (BVerfG) highlighted the age-old distinction between harmonised and non-harmonised European law, identifying different balancing parameters: the European

however, the article in question will still remain within the control of the media outlet and may remain publicly available and accessible, even if no longer visible in search results based on queries that include in principle the data subject's name." (point 9, Guidelines 5/2019).

[40] "For example, in the event that search engine providers would stop respecting robots.txt requests implemented by the original publisher, they would actually have a duty to fully erase the URL to the content, as opposed to delist which is mainly based on data subject's name" (point 10, Guidelines 5/2019).

[41] Art 12 para 3 GDPR.

[42] See para II and III.

[43] On these aspects, see the extensive O. Pollicino and M. Bassini, 'Diritto all'oblio: i più recenti spunti ricostruttivi nella dimensione comparata ed europea', in F. Pizzetti ed, *Il caso del diritto all'oblio* (Torino: Giappichelli, 2013), 185.

Charter of Fundamental Rights for the former, and the German Basic Law (Grundgesetz) for the latter.[44]

The pressing need to ensure the privacy of the interested party, especially in the online dimension, seems to have increased the European tendency to favour, in substance, the right to be forgotten over the freedom of information, except in exceptional circumstances that might justify limitations. The opposite view is found, instead, in the United States, where the conception of privacy is not connected to human dignity; instead, it is 'prevalently centred on the protection of the individual's living space' and stems from

> 'the absolute pre-eminence of freedom of expression [which] limits the scope of privacy protection with respect to the publication of personal information through any type of media, including the Internet'.[45]

In the US view, the protection of the individual's private sphere also comes second to the freedom of economic action of traders, except in some particular sectors, such as genetic data or technological innovation, which must be free and without authorisation, 'permissionless innovation', as the slogan of Vinton Cerf, one of the inventors of the Internet, expressed it.[46] The distance between the legal culture of the United States and that in the European Union inevitably leads to divergent corollaries, giving rise to interesting points for reflection.

V. The Right to Be Forgotten, Freedom of Information, and Constitutionality

Unquestionably, recognising the right to be forgotten as a tool to protect an individual's private sphere and personal identity represents a major step forward. It is worth remembering that, first, the right to privacy – and then the

[44] See BverfG, 6 November 2019, 1 BvR 16/13 (*Right to be forgotten* I) and BvR 276/17 (*Right to be forgotten* II) available at www.bundesverfassungsgericht.de. In the first decision (BvR 16/13), on the assumption that the question did not technically concern the right to privacy, but rather 'more general rights of the personality', which are not fully harmonised within the EU, the Court held that the hermeneutical benchmark should be the German Basic Law (*Grundgesetz*). In the second decision, (BvR 276/17), on the other hand, concerning the right to the protection of personal information, the subject of fully harmonised legislation at European level, the Court held that balance had to be found on the basis of the Nice Charter. See, among others, M. Goldmann, 'As Darkness Deepens: The Right to be Forgotten in the Context of Authoritarian Constitutionalism' *German Law Journal*, 45 (2020); F. Fabbrini and E. Celeste, 'The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection Beyond Borders' *German Law Journal*, 21, 55 (2020).

[45] Cf G. Sartor and M. Viola De Azedevedo Cunha, 'Il caso Google e i rapporti regolatori USA/EU' *Rivista diritto dell'informazione e dell'informatica*, 658 (2014). On this issue, see also the precise observations of C. Crea, 'The Right to Be Forgotten: la prospettiva italiana e la dialettica tra modello americano ed europeo' *Rivista giuridica del Molise e del Sannio*, 2933 (2017).

[46] Again, G. Sartor and M. Viola De Azedevedo Cunha, n 45 above, 661.

right to be forgotten – have acquired legal bearing, even beyond the legislatively regulated cases. In fact they are considered an expression of the human person, deserving protection as an individual by virtue of personalism, which, in a *unicum* with solidarism, constitutes the mainstay of the regulatory system in force. It must be emphasised, however, that the same principles underlie other safeguards, some of which are expressly enshrined in the Italian and European charters of fundamental rights, while others are derived through interpretation. The result is a composite framework of protections which does not allow the construction of an a priori hierarchical scale within it regardless of the specifics of a particular situation. The recognition of one safeguard rather than another cannot be left to the arbitrariness of courts but must always be the outcome of a balancing act that will vary according to the specific case before them.

The right to be forgotten is antithetical to the many manifestations of the freedom of information, also guaranteed by the Italian Constitution (Art 21), at the basis of every democratic society.[47] Case law has repeatedly confirmed this. The right to be forgotten[48] 'is linked, in a dialectical pair, to the right to report news', which is an expression of freedom of thought and must be balanced[49] against it. The Italian Court of Cassation had already affirmed this by speaking of the fundamentally relevant relationship between the right to report news, 'placed at the service of the public interest of information' and the right to be forgotten 'put in place to protect the privacy of the individual'.[50] It is therefore necessary to resort to the so-called criterion of 'mobile hierarchy' in cases where there is

> 'a clash between two constitutionally protected rights, that is, between equally protected values, (…), the judge having to proceed as and when required (…) to identify the interest to privilege after a balanced comparison of the rights at stake (…)'.[51]

[47] P. Perlingieri, 'Informazione, libertà di stampa e dignità della persona', *Rassegna di diritto civile*, 624 (1986), now in P. Perlingieri ed, *Lezioni (1969-2019)*, I, *(1969-2004)* (Napoli: Edizioni Scientifiche Italiane, 2020), 117, from which it is quoted. In agreement, L. Boneschi, 'L'informazione come essenza della democrazia moderna: la strada della disciplina giuridica per difendere i valori della persona e per attaccare il "potere" dei mezzi di comunicazione', in G. Alpa, M. Bessone, L. Boneschi and G. Caiazza eds, *L'informazione e i diritti della persona* (Napoli: Jovene, 1983), 4.

[48] Corte di Cassazione Sezioni Unite, n 23 above.

[49] This thesis was put forward in the 1990s by G.B. Ferri, n 6 above, 801. On this particular aspect, see also S. Morelli, 'Fondamento costituzionale e tecniche di tutela dei diritti della personalità di nuova emersione (a proposito del c.d. "diritto all'oblio")' *Giustizia civile*, II, 515 (1997); G. Finocchiaro, 'Il diritto all'oblio nel quadro dei diritti della personalità', in C. Perlingieri and L. Ruggeri eds, *Internet e diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 139.

[50] Cf Corte di Cassazione 5 November 2018 no 28084, available at www.dejure.it.

[51] See Corte di Cassazione sezione lavoro 5 August 2010 no 18279, available at www.foroplus.it.

VI. Rethinking the Right to Be Forgotten from the Perspective of Reasonableness

Information is axiologically fundamental because it forms the bedrock of the *favor veritatis*, on which the Italian legal system is founded.[52]Hence the need to protect the current memory and, equally importantly, historical memory regarding facts, which represent 'an inalienable collective resource',[53] necessary for a community's cultural, economic, and social progress. The call for rigorous oversight of journalism and compliance with the obligations arising from it in order to ascertain that news, fed into the 'information machine' via the printed page but, even more so, through the internet, not only responds to truth and social utility expressed in a civilised manner but is also essential.[54]

The importance of the right to be forgotten and its protection, especially in the digital society, cannot justify it becoming an instrument for censoring information, because it would alter the truth of facts. The information heritage would be compromised to the considerable detriment of the community, which has a deserving interest that must be protected by stringent controls and strict penalties for those who release the information.[55]

Therefore, if lawful and correct, information is (and must be) an inalienable good of all and may not be elevated to the status of 'tyrannical cage',[56] from which individuals are forced to defend themselves. Thus, the envisaged 'rule-exception' relationship between the right to be forgotten and freedom of information is clearly without foundation. Undoubtedly, 'the right to be forgotten must be affirmed, but without undermining the right to information and its prevalence over any need for censorship'.[57] It 'may undermine *favor veritatis*: an event cannot be arbitrarily erased – (…) out of respect for historical truth, which must be preserved over time (…)',[58] so generalisations cannot be permitted.

The justification for this conclusion derives from the value scale created by the identifying principles of the Italian and European legal system. An

[52] Cf P. Perlingieri, 'L'informazione come bene giuridico' n 8 above, 337.

[53] P. Perlingieri, M. D'Ambrosio and C. Perlingieri, 'Diritto all'oblio', in P. Perlingieri (directed by), *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2022), 199.

[54] In addition to the three aforementioned criteria, which have long been identified in case law (see Corte di Cassazione 18 October 1984 no 5259 *Giustizia civile*, I, 2941 (1984), it must also be essential, as evidenced by P. Perlingieri, *Il diritto civile* n 2 above, 138.

[55] Again, P. Perlingieri, *Il diritto civile* n 2 above, 134. On this matter, see also L. Lonardo, *Informazione e persona. Conflitti di interessi e concorso di valori* (Napoli: Edizioni Scientifiche Italiane, 1999), 1.See also the later G. Biscontini and B. Marucci eds, *Lealtà dell'informazione e diritto di cronaca* (Napoli: Edizioni Scientifiche Italiane, 2022), 11.

[56] Cf S. Rodotà, *Il diritto di avere diritti* (Roma-Bari: editori Laterza, 2016), 406.

[57] The former takes on the nature of an 'exceptional limitation' of the public interest in being aware of a fact or piece of news, which is axiologically justified only upon the outcome of a case-by-case balancing act according [to the criterion of] reasonableness. P. Perlingieri, M. D'Ambrosio and C. Perlingieri, n 53 above, 200.

[58] P. Perlingieri, *Il diritto civile* n 2 above, 123.

inadequately considered openness to recognising the right to be forgotten risks downgrading personalism – of which it is an expression – into selfish individualism, which is unquestionably unconstitutional. It is worth repeating that, under Article 2 of the Italian Constitution, personalism inseparably goes hand in hand with solidarism, which 'expresses cooperation and equality in affirming the fundamental rights of all'.[59]

The right to be forgotten must, therefore, necessarily be balanced, case by case, with other subjective situations worthy of protection, such as, for example, the right to inform and be informed.[60]Among the balancing criteria that have been identified in case law and designed to guide the work of the courts, the nature of the concrete interest underlying the recognition of the right to be forgotten assumes particular importance. Confidentiality vis-à-vis a person's assets is one thing, but confidentiality concerning the existential sphere is quite another. In the first case, there is no 'value to be preserved as secret'; in the second case, on the contrary, confidentiality is axiologically functional to the protection of the human person from the harm caused by revisiting information that, with time, is no longer of any interest for the community.[61]

Therefore, the nature of the interest to be protected constitutes a parameter that courts receive from the Italian Constitution itself and which, although sometimes overlooked, prevails when striking a balance. This convincing perspective has also been adopted in a recent ruling in which the Italian Court of Cassation denied the right to be forgotten to a person who believed he had been harmed by the manner in which the cancellation of a mortgage against him had been recorded.[62]According to the Court, a cancellation that leaves no trace of the past would distort the facts, 'making a tabula rasa of what has been'.[63]There is, here, a clear intention to consider *favor veritatis* pre-eminent over an interest relating to the patrimonial sphere of the individual.

VII. Concluding Remarks

The considerations expressed here, also supported by this last pronouncement,[64] lead to one conclusion. The 'dialectical pair' consisting of the right to be forgotten and freedom of information requires courts to perform a careful hermeneutic analysis. Far from any presumption of general absolutisation, courts are called upon to strike a balance between the opposing interests on a case-by-case basis and to identify the most suitable normative

[59] P. Perlingieri, *Il diritto civile* n 27 above, 159 and 162.

[60] See para V.

[61] Cf P. Perlingieri, *Il diritto civile* n 2 above, 123.

[62] They 'made it possible to know about the previous mortgage and thus enabled third parties to know that he had, at a specific time in his life, failed to pay some mortgage instalments'.

[63] Corte di Cassazione 18 May 2021 no 13524, available at www.dejure.it.

[64] Corte di Cassazione 18 May 2021 no 13524, n 63 above.

solution according to the criterion of reasonableness[65], aware that 'the need to preserve historical facts and *favor veritatis*'[66] justifies not protecting the right to be forgotten per se but the 'reasonable' right to be forgotten.

[65] See, importantly, G. Perlingieri, 'Reasonabless and Balancing in Recent Interpretation by the Italian Constitutional Court' *Italian Law Journal*, 385 (2018); Id, n 34 above, 141. On the subject, see also G. Vettori, 'Regole e princípi. Un decalogo' *Nuova giurisprudenza civile commentata*, II, 126 (2016).

[66] P. Perlingieri, M. D'Ambrosio and C. Perlingieri, n 53 above, 200.

Insights & Analyses

Medical Negligence During the Pandemic: The Italian Choice for Criminal 'Shields' and the Need for Further Reform

Sara Prandi*

Abstract

Despite the many reforms carried out by the Italian lawmaker over the years, the subject of healthcare professionals' criminal liability has remained strongly controversial among scholars and has raised some criticism regarding the current state of the domestic framework. Ever since the outbreak of the pandemic, then, concerns have been growing due to the inadequacy of the system to properly face the crisis.

After an introduction aimed at providing an overview of the domestic legislation and case law, the paper specifically focuses on the issues posed by the sanitary emergency. By analysing the Italian choice to introduce specific shield-provisions (*norme scudo*), it will be argued whether a better regulation of the subject-matter, together with a careful evaluation of the subjective features of negligence, would represent a preferable approach to deal with the long-standing issue of criminal responsibility arising from medical malpractice.

I. Introduction

In the last few years, the dramatic outbreak of Covid-19 pandemic has severely tested the responsiveness of both the national health system and the legal framework. Besides the difficulties deriving from the spread of a dangerous disease and the need for a concrete strategy to deal with its health-related damages, one of the most challenging problems that has been faced on a legal level was related to the issue of responsibility of healthcare professionals involved in the management of the crisis.

Worries have been expressed, in particular, regarding the legal consequences that were likely to affect the professionals who fought the pandemic since its very beginning, often without adequate means or specific knowledge, and necessarily relying on off-label medications. Not only those individuals had to deal with an unprecedented sanitary crisis, but also with the risk of facing legal proceedings aimed at assessing their civil and criminal responsibility for the deaths and damage occurred.

In this scenario, the calls for a better protection of healthcare professionals

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have arisen from many parts. In Italy, such claims have been granted, leading to the approval of provisions that were intended to narrow criminal responsibility in relation both to vaccine inoculation and to medical activity in a broader sense.

The decision to resort to shield laws to protect healthcare professionals from criminal charges started a lively debate, inspiring a deeper analysis on the adequacy of the Italian legal framework. In a field that has always been controversial,[1] indeed, the new challenges posed by the pandemic have contributed to enrich a years-long debate on the subject, underpinning the discussion around a new reform in this area.

This article aims to recall the main issues of such a significant debate: through an analysis of the evolution of the relevant legal framework, as shaped in the past and during the pandemic, it will point out the major flaws of the existing regulation in order to draw some conclusions and suggest possible improvements.

II. The Evolution of Healthcare Professionals' Liability Model

The subject of criminal liability of healthcare professionals has always been a matter of deep consideration in Italy, where both law and case law have known relevant changes through the years.

Before 2012 and 2017, when specific provisions were adopted to introduce a special regime for medical responsibility, cases of deaths or injuries caused by medical malpractice were adjudicated under Arts 589 (manslaughter) and 590 (negligent injuries) and 43 (negligence) of the Italian Criminal Code. Besides specific negligence, which implies the breach of written precautionary rules, Art 43 Criminal Code defines three forms of so-called generic negligence: unskillfulness (*imperizia*), negligence (*negligenza*) and imprudence (*imprudenza*). Generally speaking, negligence can be defined as lack of care resulting in the omission of the required measures; imprudence is involved when some action is carried out without taking all the precautions needed; unskillfulness is a form of qualified negligence that implies non-compliance with technical rules (so-called *leges artis*).

When dealing with healthcare activity, generic negligence is usually at stake: the perspective of immutable written rules appears inconsistent in a field where every clinical situation presents its own peculiarities and demands individual solutions that the professional has the duty to provide with due diligence, according to the parameters of Art 43 Criminal Code.

For a significant time period, however, when applying the law, judges

[1] See, among the others, P. Piccialli, *La responsabilità penale in ambito medico sanitario* (Milano: Giuffrè Francis Lefebvre, 2021); D. Chindemi, *Responsabilità del medico e della struttura sanitaria pubblica e privata* (Milano: AltalexCedam, 5th ed, 2021); M. Caputo, *Colpa penale del medico e sicurezza delle cure* (Torino: Giappichelli, 2017); S. Aleo et al, *La responsabilità penale del medico* (Milano: Giuffrè, 2007).

tended to exclude criminal liability, rarely convicting the individuals involved in cases of malpractice.[2] The grounds for this mild approach towards defendants were usually found under Art 2336 of the Italian Civil Code:[3] the provision, which applies to work performance contracts, limits the responsibility of the professional to gross negligence, if the service required is characterised by a significant level of technical complexity.

The Constitutional Court, when requested to assess the legitimacy of such an approach under the principle of equality set forth in Art 3 Constitution,[4] highlighted the importance, on the one hand,

> 'not to mortify the initiative of the professional with the fear of unfair retaliation in the event of failure and, on the other, not to indulge on the behalf of the inconsiderate decision or reprehensible omissions of the professional'.[5]

Therefore, the Court found that Art 2236 Civil Code could be used to limit healthcare professionals' liability without representing an unequal treatment in their favour.

As interpreted by the Constitutional Court, however, Art 2236 Civil Code could only by applied in cases of high complexity, where some technical mistake had been committed. Such a limitation, though, raised significant doubts on the borders between unskillfulness, imprudence and negligence, due to the uncertainty of the distinction.[6]

Later, the same idea of a direct application of Art 2236 Civil Code in criminal proceedings was strongly objected by scholarship and jurisprudence; firstly rejected 'for the purposes of criminal law, on the assumption that civil law and criminal law are different domains',[7] the regime of Art 2236 Civil Code was lately intended as a mere rule of experience, that the judge could deploy in the assessment of individual fault.[8]

[2] This period lasted until the 1980s: see L.M. Franciosi, 'Italy - The New Italian Regime for Healthcare Liability and the Role of Clinical Practice Guidelines: A Dialogue Among Legal Formants' 11 *Journal of Civil Law Studies*, 371, 381 (2018).

[3] Art 2236 Civil Code (Liability of the performer of a work): 'If the performance implies the solution of technical issues of particular difficulty, the performer is not liable for damages unless in the event of her malice or gross negligence'.

[4] Art 3 Constitution: 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country'.

[5] L.M. Franciosi, n 2 above,381-382.

[6] F. Basile and P.F. Poli, 'La responsabilità per 'colpa medica' a cinque anni dalla legge Gelli-Bianco' *Sistema penale*,17 May 2022, 1, 16.

[7] L.M. Franciosi, n 2 above, 382.

[8] Corte di Cassazione 5 April 2011 no 16328, *Rivista italiana medicina legale*, 859 (2011);

The overcoming of the old judicial deference towards healthcare professionals led to a strong reaction of healthcare professionals, who started hiding behind the so-called defensive medicine,[9] a phenomenon that can relate both to the refuse to treat the most critical patients – negative defensive medicine – and to the habit of prescribing several analyses, mostly useless, in order to avoid future disputes and complaints – positive defensive medicine. This occurrence caused a huge increase in the health costs coupled with a general decline in the quality of health care and in the transparency of the therapeutic alliance between doctors and patients.

It was in order to fight this ineffective and expensive trend that some specific provisions were introduced, in 2012 and, shortly after, in 2017.

III. Legislative Intervention

1. Decreto Balduzzi

The first attempt to reduce the area of criminal liability of healthcare professionals was made in 2012, with the so-called 'decreto Balduzzi'; Art 3 of decreto legislativo 13 September 2012 no 158 stated that

> 'the healthcare professional who, in carrying out his/her professional activities, adheres to the guidelines and best practices accredited by the scientific community, cannot be held criminally liable for minor negligence, whilst the obligation for compensation, as defined in Art 2043 Civil Code, persists'.[10]

The rationale behind the reform was found in the will to exempt from criminal consequences those cases of negligence where the doctor – or another healthcare professional – was accused of a slight deviation from the precautionary rule, regardless the fact that is was qualified in terms of imprudence, negligence or unskillfulness. As the previous experience had proven, the distinction

see also Corte di Cassazione 1 February 2012 no 4391, *Diritto penale e processo*, 1104 (2012).

[9] D.M. Toraldo et al, 'Medical malpractice, defensive medicine and role of the "media" ' in Italy' 10 *MultidisciplinaryRespiratoryMedicine*, 1-7 (2015). See also G. Forti et al eds, *Il problema della medicina difensiva. Una proposta di riforma in materia di responsabilità penale nell'ambito dell'attività sanitaria e gestione del contenzioso legato al rischio clinico* (Pisa: Edizioni ETS, 2010); A. Roiati, *Medicina difensiva e colpa professionale medica in diritto penale. Tra teoria e prassi giurisprudenziale* (Milano: Giuffrè, 2012); A. Manna, *Medicina difensiva e diritto penale. Tra legalità e tutela della salute* (Pisa: Pisa University Press, 2014); R. Bartoli, 'I costi «economico-penalistici» della medicina difensiva' *Rivista italiana di medicina legale*, 1107 (2011).

[10] A. Feola et al, 'Medical Liability: The Current State of Italian Legislation'22 *European Journal of health law*, 357 (2015); A. Vallini, 'L'art. 3 del 'Decreto Balduzzi' tra retaggi dottrinali, esigenze concrete, approssimazioni testuali, dubbi di costituzionalità' *Rivista italiana di medicina legale*, 735 (2013).

between such notions was often problematic; with decreto Balduzzi, instead, the qualification of the mistake in terms of imprudence, negligence or unskillfulness became irrelevant, as the law introduced a form of exemption for every error that was expression of slight negligence.

The main issue, in this case, arose from the interpretation of that provision: it was deemed somehow contradictory to refer such a limitation to conducts described as perfectly consistent with the guidelines and best practices, resulting in a sort of '*culpa sine culpa*'.[11] As the behaviour of the professionals were described by law as matching the ideal rule to be followed, the true meaning of the provision was questioned by the jurisprudence that sought to understand the scope of application of the waiver of responsibility.

Nonetheless, as the case law later suggested,[12] the provision had to be interpreted as an exemption clause intended to avoid criminal consequences for those professionals who adapted their conduct to guidelines and best practice, but failed in applying them, or followed them in situations where the peculiarities of the case should have suggested to disregard them.

Besides those guidelines and practices, indeed, a whole set of ordinary precautionary rules was still existing: violating those rules may constitute negligence, despite adhering to the clinical recommendations. Nevertheless, the law intended to partially exclude criminal liability, as long as the deviation from the diligence expected was slight: in other terms, the professionals were shielded in cases of wrong or inappropriate application of the guidelines, as far as the mistake wasn't expression of gross negligence.[13]

As regards the distinction between gross and slight negligence, though, the law did not provide any clue: the definition of the degree of negligence that could entail the punishability of the agent was in fact left to the judicial interpretation,[14]that enhanced factors such as the discrepancy of the conduct from the required behaviour, the degree of predictability of the harmful event and the specific context where the action or omission took place.[15]

[11] P. Piras, '*In culpa sine culpa*. Commento all'art. 3 I co. l. 8 novembre 2012 n. 189 (linee guida, buone pratiche e colpa nell'attività medica' *Diritto penale contemporaneo,* 26 November 2012, 1-5; Id, '*Imperitia sine culpa non datur*. A proposito del nuovo art. 590 *sexies*' *Diritto penale contemporaneo*, 269 (2017); L. Risicato, 'La metamorfosi della colpa medica nell'era della pandemia' *Discrimen,* 25 May 2020, 1-9.

[12] Corte di Cassazione 9 April 2013 no 16237, *Cassazione penale,* 2984 (2013), with note of C. Cupelli, 'I limiti di una codificazione terapeutica. Linee guida, buone pratiche e colpa grave al vaglio della Cassazione'.

[13] G.M. Caletti, 'Tra 'Gelli-Biancoe'Balduzzi': un itinerario tra le riforme in tema di responsabilità penale colposa del sanitario' *Responsabilità medica Diritto e pratica clinica,* 97, 109 (2017).

[14] P.F. Poli, *La colpa grave. I gradi della colpa tra esigenze di* extrema ratio *ed effettività della tutela penale* (Milano: Giuffrè, 2021), 388.

[15] F. Basile and P.F. Poli, n 6 above, 23. See Corte di Cassazione 9 April 2013 no 16237, n 12 above; Corte di Cassazione 11 May 2016 no 23283, *Diritto penale contemporaneo*,27 June 2016, with note of C. Cupelli, 'La colpa lieve del medico tra imperizia, imprudenza e negligenza:

Further issues, then, involved the quality of guidelines and best practices. The sources that were likely to be taken as parameters for the professionals' behaviour were not defined by the law, hence not only Medical Associations but also private firms could elaborate their own guidelines, thus resulting in a problem of legitimacy. Especially when drafted by stakeholders carrying economic interests, such as pharmaceuticals companies, the lawfulness of the guidance provided was highly controversial: profit-driven interests and considerations of resource-saving could ultimately affect the quality of the drafting.[16]

In order to solve the problems pointed out during the short period of time where decreto Balduzzi was in force, a new reform was developed and approved, less than five years later: so-called legge Gelli-Bianco.

2. Legge Gelli-Bianco

With legge 8 March 2017 no 24, a further step was made towards a better definition of the concept of accountability for medical malpractice: according to Art 590-*sexies* of the Italian Criminal Code, as introduced by legge Gelli-Bianco,

> 'if death or injuries have been caused by lack of skill, conviction is to be ruled out, provided that the guidelines published by the National Health Service had been complied with, or, in the absence of these, best healthcare practices, under the condition that such recommendations were well-suited to the specific case'.[17]

Compared to the past, the 2017 reform has been praised for some relevant improvements, such as the attempt to entrust the approval of Guidelines to a formal and public procedure: according to the system of accreditation designed by the law, the guidelines 'need to be crafted by public and private bodies and institutions, as well as scientific and technical orders and associations listed in a specific registry'.[18] Therefore, healthcare professionals need to conform their conduct to directives crafted on the basis of evaluations aimed to ensure the best care possible, and not guided by profit motives or potential cost-savings.

Meanwhile, the role of best practices becomes ancillary: unlike decreto Balduzzi, which equalised them with guidelines, legge Gelli-Bianco allows the

il passo avanti della Cassazione (e i rischi della riforma alle porte)'; Corte di Cassazione 8 May 2015 no 22405, available at www.dejure.it.

[16] G.M. Caletti, 'Tra 'Gelli-Biancoe'Balduzzi': un itinerario'n 13 above, 103.

[17] C. Cupelli, 'Lo statuto penale della colpa medica e le incerte novità della legge Gelli-Bianco' *Diritto penale contemporaneo,* 200 (2017); A. Massaro, 'L'art. 590-sexies c.p., la colpa per imperizia del medico e la camicia di Nesso dell'art. 2236 c.c.' *Archivio penale,* 1-52 (2017); G.M. Caletti and M.L. Mattheudakis, 'Una prima lettura della legge "Gelli-Bianco" nella prospettiva del diritto penale' *Diritto penale contemporaneo*, 84 (2017).

[18] G.M. Caletti, 'Tra 'Gelli-Biancoe 'Balduzzi': un itinerario'n 13 above,121, where the Author underlines that the model of accreditation, monitoring and updating of the guidelines seems inspired by the National Institute for Health and Care Excellence (NICE) in England.

use of best practices only in case where no guideline is available, as it happened right after the approval of the law, during the extended period of accreditation of official recommendations. As a result of the complexity of the accreditation process, the implementation of the system took in fact a long time: suffice to say that, before February 2020, only three official guidelines had been approved.[19]

Nonetheless, Art 590-*sexies* Criminal Code has also raised some concerns: the absence of any reference to the degree of the negligence, in contrast to the previous provision from decreto Balduzzi, has been strongly criticised and shortly led to the intervention of the United Sections of the Court of Cassation.

Right after the approval of the bill, indeed, a conflict emerged within the Italian Supreme Court: the first decision that applied the new provision[20] stated its logical contradictoriness,[21] due to the inconsistency between the two conditions required – the lack of skill and the accordance to appropriate guidelines. It was deemed impossible, indeed, to imagine a situation where the conduct, perfectly fitting the one described by guidelines and adequate to the clinical situation, was nevertheless characterised by lack of professional skill.

Considering the supreme value of health set forth in Art 32 Constitution, moreover, the Court suspected the unconstitutionality of a waiver of criminal responsibility for medical mistakes that, relying on the literal drafting of the provision, could also be macroscopic. According to the judges, ultimately, Art 590-*sexies* Criminal Code could only entail that the conducts of healthcare professionals had to be judged pursuant to the standards set by official guidelines.

Shortly after, instead, a second judgment[22] referred the new provision to those cases of 'un-skilled execution of proper and adequate clinical guidelines',[23] intending the new exemption as meant to operate where the error consisted in *imperitia in executivis,* with exclusion of any waiver for gross or slight negligence in the choice of the guideline (*imperitia in eligendo*).

According to this decision, moreover, the real purpose of the law was 'to avoid any differences in the degree of fault in the event of harm due to unskillfulness of the healthcare provider':[24] the lack of skill that could trigger the non-punishability clause of Art 590-*sexies* Criminal Code was therefore to be intended as including both slight and gross negligence.

The conflict was solved, after few months, by a decision held by the United Sections of the Court of Cassation:[25] although finding it possible to apply Art

[19] Nowadays, seventy guidelines are published in the national system for the guidelines (so-called S.N.L.G.), some of which have already been updated since their approval.

[20] Corte di Cassazione 7 June 2017 no 28187, *Diritto penale contemporaneo*, 280 (2017).

[21] See L.M. Franciosi, n 2 above, 397.

[22] Corte di Cassazione 31 October 2017 no 50078, *Diritto penale contemporaneo*, 7 November 2017.

[23] L.M. Franciosi, n 2 above,399.

[24] ibid 400.

[25] Corte di Cassazione-Sezioni unite 22 February 2018 no 8770, *Diritto penale contemporaneo,* 1 March 2018. See G.M. Caletti, 'Il percorso di depenalizzazione dell'errore

590-*sexies* Criminal Code in the event of a mistake occurred during the execution of an appropriate guideline, as stated in the latter decision, the judge rejected the idea of an exemption unbound from the degree of the violation, sharing the issues of constitutional legitimacy that justified the *interpretatio abrogans* followed by the Court in its first decision.

Therefore, the Court stated that

> 'the release of the healthcare professional from liability occurs when the harmful event is caused by the slight unskillfulness of the professional during the execution of the adequate accredited guidelines'.[26]

In this way, it reintroduced the requirement – previously foreseen under decreto Balduzzi – of the slight deviation from the standard of conduct. Although justified by the necessity to grant a satisfactory level of safeguard for health and to avoid inequalities, the solution went against the literal wording of the law, setting a clear example of judicial 'creationism', carried out in breach of the principles of separation of powers and legality.[27]

IV. New Challenges Arising from the Pandemic

With the epidemic outbreak, the achievement of a reasonable balance between health protection and the creation of a sheltered environment for healthcare activities was made even more complicated;[28] when dealing with a new disease in the exceptional context of a world-wide crisis, facing unexpected risks and an unconceivable pressure on the National Health Service, errors were made, and the problem of their legal consequences arose dramatically.

medico. Tra riforme 'incompiute', aperture giurisprudenziali e nuovi orizzonti per la colpa grave' *Diritto penale contemporaneo,* 1 (2019).

[26] L.M. Franciosi, n 2 above,403.

[27] R. Blaiotta, 'Niente resurrezioni, per favore. A proposito di S.U. Mariotti in tema di responsabilità medica' *Diritto penale contemporaneo,* 28 May 2018, 1-10; C. Cupelli, 'L'art. 590-*sexies* c.p. nelle motivazioni delle Sezioni Unite: un'interpretazione 'costituzionalmente conforme' dell'imperizia medica (ancora) punibile' *Diritto Penale Contemporaneo*, 246 (2018). In fact, even if the clarification was meant to overcome the doubts of constitutionality of the new regulation, it determined a significant reduction of the area of exemption granted by the law.

[28] F. Palazzo, 'Pandemia e responsabilità colposa' *Sistema penale,* 26 April 2020; R. Bartoli, 'Il diritto penale dell'emergenza 'a contrasto del coronavirus': problematiche e prospettive' *Sistema penale,* 24 April 2020, 1-15; Id 'La responsabilità colposa medica e organizzativa al tempo del coronavirus. Fra la "trincea" del personale sanitario e il "da remoto" dei vertici politico-amministrativi' *Sistema Penale*, 85 (2020); A. Gargani, 'La gestione dell'emergenza Covid-19: il 'rischio penale' in ambito sanitario' *Diritto penale e processo,* 887 (2020); M. Caputo, 'La responsabilità penale degli operatori sanitari ai tempi del Covid-19. La gestione normativa dell'errore commesso in situazioni caratterizzate dall'emergenza e dalla scarsità di risorse', in G. Forti ed, *Le regole e la vita. Del buon uso di una crisi, tra letteratura e diritto* (Milano: Vita e Pensiero, 2020), 109-113; P. Veneziani, 'La colpa penale nel contesto dell'emergenza Covid-19' *Sistema penale,* 28 April 2022, 1-17.

The need for a special protection against the criminal risk, in particular, stemmed from the impossibility to apply Art 590-*sexies* Criminal Code to the harmful events occurred during the pandemic; as a consequence of the unprecedented situation and the unknown disease, no guideline or good practice could be found and used to reduce the area of fault to gross negligence, especially in the early stages of the epidemic. Moreover, given the rapidly evolving scientific landscape, a system relying on accredited guidelines seemed unsuited to face the emergency: the situation required, instead, great adaptation to new circumstances and a significant speed in updating.[29] Furthermore, many of the doctors, nurses and professionals employed to tackle the pandemic were either retired or un-qualified to carry out the required tasks. It was thus important to grant an exemption from the ordinary functioning of so-called fault 'for taking up the task', which occurs when someone accepts and carries out assignments that transcend his/her skills and knowledge: once again, as this kind of fault falls out of the area of unskillfulness, Art 590-*sexies* Criminal Code proved incapable of protecting them.

Apart from giving rise to reservations about the real usefulness of the provision introduced in 2017, the pandemic highlighted the inadequacy of the legal system and required special provisions to be urgently adopted.

V. The Italian Response to the Crisis: The Drafting of Shield-Provisions

1. The Shield from Vaccine-Inoculation Liability

The first attempt to narrow doctors and other healthcare professionals' accountability during the pandemic was realised in the peculiar field of the vaccine-inoculation activity: in order to safeguard professionals from the danger of trials and complaints in relation to the use of vaccines that could provoke harmful events, the Parliament adopted legge 28 May 2021 no 76, converting prior decreto legge 1 April 2021 no 44.[30] The decree provided a specific rule of non-accountability for deaths or injuries related to the inoculation of vaccine, which occurred despite the full compliance with the protocols and instructions issued for the administration of the treatment.

[29] F. Furia, 'Lo 'scudo penale' alla prova della responsabilità da inoculazione del vaccino anti SARS-CoV-2' *Archivio penale,* 1, 8 (2021).

[30] See P. Piras, 'La non punibilità per gli eventi dannosi da vaccino anti Covid-19' *Sistema penale*, 23 April 2021; E. Penco, '"Norma-scudo" o "norma-placebo"? Brevi osservazioni in tema di (ir)responsabilità penale da somministrazione del vaccino anti Sars-Cov 2' *Sistema penale*, 13 April 2021; G. Amato, 'Scudo penale per i vaccinatori che somministrano le dosi. La responsabilità penale' *Guida al diritto* 47 (2021); L. Fimiani, 'Nuovo 'scudo penale' (decreto-legge 1° aprile 2021, n. 44): è una norma tautologic*a?'Giurisprudenza penale,* 1-6 (2021); D. Micheletti, 'Lo scudo penale a favore dei vaccinatori nel quadro delle norme dichiarative di atipicità' *Discrimen,* 7 March 2022, 1-9.

With Art 3 of decreto-legge no 44/2021, the lawmaker pursued the goal of a 'responsibility lockdown',[31] meaning the creation of an area of total impunity for those employed in the vaccination campaign. On the nature of the provision, the legal doctrine seemed divided: some referred to it as a 'memento-provision'[32] or a 'placebo-provision',[33] meant to stress the concept of negligence as already known, while others preferred qualifying it as a non-punishability clause, deriving from political consideration,[34] or an excuse,[35] referring to conducts lacking culpability. At a closer look, though, a strong argument in favour of the first stance is that the Report accompanying the decree clearly specifies that Art 3 must be considered 'expression of the general principle of subjective imputation'.[36] As the limitation of criminal accountability is intended to operate when the vaccine is inoculated in accordance with the instructions from the competent authorities and the Government, such a requirement should exclude criminal liability on the common grounds of negligence: it follows that Art 3 doesn't seem to add anything to the normal functioning of fault.

Nonetheless, this opinion carries the idea that the instructions given by sanitary and governmental authorities must be regarded as authentic precautionary rules, apt to constitute and exhaust the objective element of the negligent violation. Under Art 590-*sexies* Criminal Code, on the contrary, the potential ability of other rules of conduct, different and additional to the technical rules, to justify some reprimand, has always been acknowledged.[37] In addition, unlike Art 590-*sexies* Criminal Code, the provision of Art 3 of the decree doesn't require the professional to determine whether the given instructions fit the singular case.

In this way, Art 3 appears broader than Art 590-*sexies* and different from the ordinary assessment of fault: it can be argued that, according to the provision, the respect of the instructions is enough to exclude any other form of guilt, at least for what concerns the procedure of triage and inoculation.[38] Other

[31] G. Losappio, 'Responsabilità penale del medico, epidemia da 'Covid19' e 'scelte tragiche' (nel prisma degli emendamenti alla legge di conversione del d.l. c.d. 'Cura Italia" *Giurisprudenza Penale*, 1, 7 (2020).

[32] Relazione n. 35/2021 dell'Ufficio del Massimario della Corte di Cassazione, in *Sistema penale,* 24 June 2021, 10.

[33] E. Penco, n 30 above.

[34] F. Furia, n 29 above,9, but also A. Amato, n 30 above, 47.

[35] J. Della Valentina, 'La responsabilità penale medica negli scenari post covid-19: appunti sulla natura dogmatica delle aree di esclusione della punibilità' *Sistema penale,* 3 December 2021, 1, 22-23.

[36] Relazione illustrativa al decreto *Sistema penale,* 2 April 2021, 1, 5.

[37] S. Dovere, 'Linee guida, regole cautelari e responsabilità colposa del sanitario', in P. Piccialli ed, n 1 above, 167-198, and Corte di Cassazione 5 April 2018 no 15718, available at www.dejure.it, where it is excluded the binding nature of guidelines. See also G.M. Caletti, 'Tra 'Gelli-Bianco' e 'Balduzzi': un itinerario'n 13 above, 106-107.

[38] The vaccination process, however, needs to be respectful of the instructions given by EU and national authorities, in regard to personal exemptions (eg hypersensitivity to the active

authors, by contrast, deem it possible to preserve the area of negligent accountability for all those behaviours held by the vaccinator in breach of common precautions, such as the wrong use of face-mask or the failure to sterilise the seat.[39]

In any case, although it achieved the highly symbolic task to soothe and reassure those involved in the vaccination activities – thus preventing a defensive attitude that would have risked hindering the campaign itself – the choice to introduce such a limitation was strongly objected by those who found it useless, if not counterproductive.

The choice to introduce a specific cause of non-punishability for vaccinators, indeed, could increase – and had actually increased – the population's feeling of insecurity, giving the impression of an unknown and unsafe medication. On a general level, moreover, the approval of a vaccination shield proved some lack of trust in the work of the judicial authorities,[40] who had often showed a strict attitude towards medical malpractice.

This last critical issue, though, appeared even more clear right after the approval of the second shield, introduced during the parliamentary debate on the decree.

2. The General Limitation of Healthcare Professionals' Liability

Besides the vaccination-shield, Art 3-*bis* of decreto-legge no 44/2021 provided a peculiar form of impunity for deaths and injuries caused by the healthcare professionals during the pandemic: according to that provision, indeed, the offences set forth in Arts 589 and 590 of the Italian Criminal Code could be punished only if committed with gross negligence.

The effect of the new provision, qualified as a clause of exclusion of responsibility,[41] was a reduction of the area of liability for healthcare professionals who caused deaths or injuries during the state of emergency, due to the exceptional circumstances. Those individuals, indeed, could be held responsible for such events only if found guilty of gross negligence. Art 3-*bis,* comma 2, clarified that the assessment of negligence had to be carried out taking into consideration the context of intense pressure deriving from the pandemic, and, more specifically, the poor understanding of the disease, the circumstances of staff and equipment shortages, as well as the lower level of

substance), storage, dosage, inoculation, and so on.

[39] F. Furia, n 29 above, 10. In such cases, nonetheless, it seems that major issues would be posed by the difficulties in proving causation. In the assessment of criminal liability for Covid-related deaths, in general, the issue of causation raised serious issues: P. Piras, 'Il nesso causale SARS-CoV-2 e le morti nelle R.S.A.: si può provare?'*Sistema penale,* 14 April 2022, 1-11 and S. Zirulia, 'Nesso di causalità e contagio da covid-19' *Sistemapenale,* 20 April 2022, 1-19.

[40] F. Furia, n 29 above, 2.

[41] J. Della Valentina, n 35 above, 29. As a consequence, it must be deemed as an exception to the rule, subject to strict interpretation.

knowledge and skill of the non-specialised personnel employed.

Unlike the system foreseen under legge Gelli-Bianco, the exemption was not limited to unskillfulness: even though the novelty of the disease and the lack of knowledge might emphasise the issue of unskillfulness, it was clear that the emergency situation and the pressure it determined on both sanitary structures and professionals was likely to determine errors of inactiveness and imprudence too; as far as the mistake was strictly linked to the emergency, though, every kind of slight negligence had to be regarded as non-punishable. In this respect, the clause provided by Art 3-*bis* of decreto-legge no 44/2021 seemed to reject some of the main features that distinguished legge Gelli-Bianco from the previous system: for the purposes of the exception clause, indeed, the difference between unskillfulness, negligence and imprudence returned to be irrelevant, while the evaluation of the degree of fault was made – once again – essential.

In any case, the exemption was temporally limited to the duration of the state of emergency, which was firstly declared on 31 January 2020 and ended on 31 March 2022.[42]In addition to the temporal limitation, the clause was also functionally restricted to those events that occurred because of the state of crisis determined by the first outbreak of the pandemic and the following peaks. In addition, it has been noted that the rule expressly covered the case of manslaughter (Art 589 Criminal Code) and negligent injuries (Art 590 Criminal Code) caused in the exercise of the profession, other than causally linked to the emergency situation:[43] as they are not recalled by the provision, doubts persist whether different criminal offences, such as epidemics (Arts 438 and 452 Criminal Code) or misconduct in public office (Art 328 Criminal Code)[44] should be somehow exempted too. The introduction of the shield, moreover, could not serve the purpose of regulating the so-called 'tragic choices'[45] in the event of an imbalance between needs and available resources.

The choice to introduce in the legal system such an exemption – albeit temporally and functionally limited – confirmed the importance of the distinction between slight and gross negligence, and represented a clear sign in support of the professionals employed in the fight against the virus.

At the same time, the need for such a provision exposed some of the flaws

[42] P. Piras, 'La non punibilità' n 30 above. Nonetheless, the shield will also cover deaths and injuries occurring after the deadline of the state of emergency, as a consequence of conducts carried out during its duration.

[43] ibid

[44] ibid

[45] C. Newdick et al, 'Tragic choices in intensive care during the COVID-19 pandemic: on fairness, consistency and community' 46 *Journal of Medical Ethics*, 646 (2020); P. Sommaggioand S. Marchiori, 'Tragic choices in the time of pandemics' 1 *BioLawJournal. Rivista di BioDiritto, Special Issue* (2020); G.M. Caletti, 'Emergenza pandemica e responsabilità penali in ambito sanitario. Riflessioni a cavaliere tra 'scelte tragiche'e colpa del medico' *Sistema penale*, 5 (2020); G. Losappio, n 31 above, 1-16; L. Risicato, n 11 above, 6-7. On the subject, see also C. Newdick, *Who Should We Treat?* (Oxford: Oxford University Press, 1995).

of the pre-existing system. The main problem appears to be that all the parameters listed by the decree to evaluate the intensity of the violation should be normally considered in every instance of malpractice – and, more generally, in every case of negligence. It has been affirmed for years, especially by scholars, that the reproach for a negligent conduct should not give up a thorough assessment of the subjective element of fault, in accordance with Art 27 of the Constitution.

After verifying that a precautionary rule has been violated, and that the violation has ended in the occurrence of the foreseeable and avoidable event it was meant to prevent, the judge should always wonder whether the required behaviour – the one that would have prevented the harm from happening – could also be demanded from the individual who found himself in that situation. It is in relation to such factors as a stressful environment, the urgency of the situation, the tiredness of the agent due to shifts' organisation or heavy workloads, that the context becomes significant in order to measure the diligence that could reasonably be required from any individual in that same position. It is clear, then, that the choice to equip the law with some expressly listed criteria with the aim to determine the degree of negligence may also be seen as an attempt to mitigate the unpredictability of the decisions issued by Courts, often reluctant to assess the subjective features of fault.

In the light of the above, it is possible to make a criticism of the general state of the criminal system, as it results from both the law and the case law. Apart from the risk of being intended as an unjustified privilege for certain categories of individuals,[46] the need for a specific exemption gives the impression of a system which does not normally enhance the factors listed in Art 3-*bis* comma 2 but rather sentences the accused on the basis of the mere assumption of an objective violation of a precautionary rule, with disregard for any other consideration related to the author of the conduct or the specific environment.[47] The exemption of criminal responsibility for those individuals who couldn't do any better because of the abnormal context of action where they found themselves, on the contrary, should derive from the application of general principles: it should be seen as the direct result of the principle of culpability and not as a form of unjustified immunity.

Overall, therefore, the recent experience shows the inadequacy of the present legal system, as resulting from the previous reforms, and underpins the need for more systematic responses.

[46] A. Gargani, n 28 above, 889, where it is also noted that the creation of a shield can give the impression of an impunity space made necessary due to serial violations of the precautionary rule.

[47] See C. Cupelli, 'Gestione dell'emergenza pandemica e rischio penale: una ragionevole soluzione di compromesso (d.l. 44/2021)' *Sistema penale,* 1 June 2021.

VI. Conclusions

The spread of the pandemic has shown all its devastating power, not only on the sanitary level, but also on the legal one. Besides imposing new challenges, the emergency revealed all the flaws of the legal framework, which appeared helpless in front of its magnitude. The criminal risk, that immediately followed the sanitary one, has endangered the very tightness of the system, showing a lack of natural antibodies – or at least a total underestimation of the existing ones – and revealing the urge for better rules.

As the shields are falling due to the end of the state of emergency, the issue of healthcare professionals' liability suggests that it could be the right moment for a general rethinking of the matter.[48]

With a view of improving the overall regulation of negligence, indeed, the recent experience seems to suggest the need to take into serious consideration the subjective profiles of the conduct, giving credit to the theories of negligence based on what can be reasonably demanded from the agent under the circumstances.

Furthermore, the legislative choice to provide sanitary personnel with a shield restricting their criminal liability clearly demonstrates the possibility – or even the necessity - to go beyond the provision of Art 590-*sexies* Criminal Code and provide a remedy against its unsatisfactory formulation by adding, in the first place, a clear reference to slight negligence.

In addition, the possibility to extend the favourable treatment to all the forms of negligence should be evaluated too, in order to solve the problems deriving from the distinction between carelessness, negligence and unskillfulness: the borders of those types of fault, indeed, often appear too subtle to allow an objective and foreseeable classification of the conduct.[49]

As concerns the subjective scope of application of the exemption of slight negligence, lastly, it should also be considered whether to extend the waiver of responsibility to other classes of professionals that can be involved in the solution of highly technical and complex problems: in order to remedy the potential disparity of treatment between different professional orders, however, the attenuation of the criminal liability should be always carried out having regard to the specific interests that are involved in each field and their fair balancing.[50]

It is not under question that, to realise any of these changes, a careful

[48] M.L. Mattheudakis, La punibilità del sanitario per colpa grave. Argomentazioni intorno a una tesi (Genzano di Roma: Aracne, 2021).

[49] C. Cupelli, 'La legge Gelli-Bianco e il primo vaglio della Cassazione: linee guida sì, ma con giudizio' *Diritto penale contemporaneo,* 280, 284 (2017).

[50] P.F. Poli, n 14 above, 433. The Author also considers the perspective of a general limitation, in order to exclude the criminal relevance of slight negligence in every situation (416-432). See also G.M. Caletti, 'Tra 'Gelli-Bianco' e 'Balduzzi"n 13 above, 99, where the Author draws a comparison with other countries, where the model of negligence is already limited to gross negligence (Common Law systems), or *faute qualifiée* (France, at least for what concerns medical malpractice).

evaluation and a strong political commitment are needed; nonetheless, in the wake of the sanitary emergency which clearly showed the urge for a better regulation, the perspective of a future reform appears closer, and even more desirable.

Insights & Analyses

Informed Consent to Processing of Genetic Data*

Benedetta Sirgiovanni**

Abstract

The paper focuses on the role of informed consent to processing of genetic data in the current and multi-level legal framework.

Firstly, it will seek to determine if it is possible to process genetic data even without any form of consent according to the GDPR. Then, it will show that accountability principle plays a key role not only in the GDPR, but also at international and national levels.

Finally, the paper will point out that nowadays data processing can no longer be regarded as a private relationship between the controller and the data subject. In this context administrative fines imposed by the Data Protection Authority have to be added to the civil liability of the controller. Furthermore, it is recommended to add a preventive remedy like injunctions brought not only by individuals but also by associations, since the approach of data processing is preventive.

I. The Role of Consent in the Processing of Special Categories of Personal Data According to EU General Data Protection Regulation 679/2016

Nowadays everyone is aware that if you want to use digital services you have to give your consent to the processing of your personal data.[1] Consent has become nothing more than ticking a box and is one of the steps to access a

* The paper develops the presentation 'Informed Consent to Processing of Genetic Data' given at the Yufe Law Conference 'Informed Consent', University of Bremen, 27 May 2021.

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[1] According to Art 4 (11) GDPR, "consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her'. According to Art 7, para 2, 'If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language'. Therefore, the consent is valid if it is informed and specific for that particular matter.

On the rethinking of consent in the data protection framework, see D.J. Solove, 'Introduction: Privacy Self-management and The Consent Dilemma' 126 *Harvard Law Review*, 1883-1888 (2013); A. Mantelero, 'The future of consumer data protection in the E.U. Rethinking the 'notice and consent' paradigm in the new era of predictive analytics' 30 *Computer Law and Security Review*, 643-660 (2014); C. Irti, *Consenso "negoziato" e cirolazione dei dati personali* (Torino: Giappichelli, 2021), passim.

service.[2]

After all, consent is not always necessary for the lawfulness of processing of data according to European Union General Data Protection Regulation 679/2016[3] (hereafter GDPR). According to Art 6 of the GDPR[4] consent is only one of the lawful bases for processing data. For example, consent is an alternative option to the pursuit of the legitimate interest of the controller.

What about the processing of special categories of personal data, such as personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, genetic data, biometric data, data concerning health or data concerning a natural person's sex life or sexual orientation? Is consent necessary for the processing of these special categories of personal data?

According to Arts 9(1) and (2)(a) GDPR, processing of special personal data is prohibited unless the data subject has given explicit consent to the processing of those personal data for one or more specified purposes. Therefore, consent makes the processing of special data lawful if it is given for specific purposes.

However, if you analyse Art 9 in detail, you will notice that consent is an alternative condition in the processing of special categories of personal data. Art 9(2) states, in fact, that the processing of special categories of personal data is not prohibited if 'processing is necessary for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment, or the management of health or social care systems and services (see point h); for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high

[2] According to Recital 32 GDPR, a written statement seeking consent 'could include ticking a box when visiting an internet website'. On the consent as a mechanical matter of 'ticking the box', seeE.M.L. Moerel, 'Big data protection. How to Make the Draft EU Regulation on Data Protection Future Proof', 2014, 9, available at https://tinyurl.com/ym7wea55 (last visited 31 December 2022): '(...) the granting of consent becomes a mechanical matter of 'ticking the box', ie, becomes subject to 'routinisation' and therefore meaningless'.

[3] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), available at https://tinyurl.com/yuckr3sk (last visited 31 December 2022).

[4] Para 1 of Art 6 GDPR states that 'Processing shall be lawful only if and to the extent that at least one of the following applies: (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; (c) processing is necessary for compliance with a legal obligation to which the controller is subject; (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person; (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'.

standards of quality and safety of health care and of medicinal products or medical devices (see point i); for scientific, research or statistical purposes (point j)'.

If one of these conditions is met, it is possible to process special categories of personal data even without any form of consent. So, consent is not the only possible legal basis for data processing, according to Art 9.

II. The Role of Accountability According to the GDPR

The rationale behind these rules is that the perspective of the protection of personal data has completely changed.[5] All of us are, in fact, aware that it is inevitable that personal data move electronically and physically, and that denying consent to the processing of their personal data means not being able to access a service which is often crucial in modern society. So, the protection of personal data is not based anymore on the ownership of data (where the data subject is the owner of the personal data and can decide to give or to deny consent to the processing of personal data),[6] but on the accountability principle.[7]

Accountability means that the controller has to implement appropriate technical and organisational measures, such as pseudonymisation[8] and data

[5] On the evolution of privacy protection, and, in particular, from the right to be let alone to the right over one's own data, seeP. Hummel et al, 'Own Data? Ethical Reflections on Data Ownership' 34 *Philosophy & Technology*, 545 (2021); S. Rodotà, *Il diritto di avere diritti* (Roma-Bari: Laterza, 2012), 396; A.D. Moore, 'Privacy: Its Meaning and Value?' 40 *American Philosophical Quarterly*, 215 (2003); D.J. Solove 'Conceptualizing Privacy' 90 *California Law Review*, 1088 (2002).

[6] On the different opinions about the relationship between personal rights and the ownership right, see S. Thobani, *Diritti della personalità e contratto: dalle fattispecie più tradizionali al trattamento in massa dei dati personali* (Milano: Ledizioni, 2018), 53; G. Resta, *Autonomia privata e diritti della personalità* (Napoli: Jovene, 2005), 33; P. Rescigno 'Persona (diritti della)' *Enciclopedia Giuridica* (Roma: Treccani, 1994), XXVI, 3. On the doctrine that critizes the application of the ownership model to personal rights, see S. Thobani,*Diritti della personalità e contratto: dalle fattispecie più tradizionali al trattamento in massa dei dati personali*, ibidem, 56; D. Messinetti, 'Persona (diritti della)' *Enciclopedia del diritto* (Milano: Giuffrè, 1983), XXIV, 335; O.T. Scozzafava, *I beni e le forme giuridiche di appartenenza* (Milano: Giuffrè, 1982), 543; A. Nicolussi, 'Autonomia privata e diritti della personalità' *Enciclopedia del diritto* (Milano: Giuffrè, 2011), *Annali* IV, 135.

[7] On the accountability principle in the GDPR see, D. Poletti, 'Comprendere il Reg. UE 2016/679: un'introduzione', in A. Mantelero and D. Poletti eds, *Regolare la tecnologia: il Reg. UE 2016/679 e la protezione dei dati personali. Un dialogo fra Italia e Spagna* (Pisa: Pisa University Press, 2018), 15; C. Colapietro, *Il diritto alla protezione dei dati personali in un sistema delle fonti multilivello* (Napoli: Editoriale Scientifica, 2018), 89.

On the accountability as a proof of liability, see G. Finocchiaro, 'Introduzione al regolamento europeo sulla protezione dei dati' *Nuove Leggi civili commentate*, 11 (2017). On the accountability as a sign of a paradigm change in the General Data Protection Regulation, see C. Basunti, 'La (perduta) centralità del consenso nello specchio delle condizioni di liceita` del trattamento dei dati personali' *Contratto e impresa*, 863 (2020).

[8]Art 4(5) of GDPR states that "pseudonymisation' means the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept

minimisation,[9] in order to protect the rights of data subjects.

For this reason, accountability plays a key role in the GDPR (Art 25.1 GDPR): the controller has to account for implementing

> 'appropriate technical and organisational measures to ensure a level of security appropriate to the risk, taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons'.[10]

In particular, the controller has to ensure that

> 'by design and by default, only personal data which are necessary for each specific purpose of the processing are processed (…). In particular, such measures shall ensure that by default personal data are not made accessible without the individual's intervention to an indefinite number of natural persons'.[11]

In this way the GDPR enhances preventive measures in order to protect data subjects.

III. Predictive Ability of Genetic Data and the Prohibition of Discrimination

According to Art 4(13) GDPR,

> "Genetic' data means personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question'.

Genetic data are personal data which are particularly sensitive in relation to fundamental rights. They '(…) merit specific protection as the context of their processing could create significant risks to the fundamental rights and

separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person'.

[9] Art 5.1 of GDPR states that 'Personal data shall be: (…) (c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation')'.

[10] See J. Alhadeff et al, 'The Accountability Principle in Data Protection Regulation: Origin, Development and Future Directions', in D. Guagnin et al eds, *Managing Privacy through Accountability* (London: Palgrave Macmillan, 2012), 49-82.

[11] See K. Demetzou, 'Data Protection Impact Assessment: A tool for accountability and the unclarified concept of 'high risk' in the General Data Protection Regulation' 35 *Computer Law & Security Review*, 6 (2019).

freedoms'.[12]Such data, in fact, not only identify a natural person, but are also able to predict possible future events relating to the person or people biologically close to them. The disclosure of genetic data may inform third parties on any possible future diseases that the data subject and their blood relatives are susceptible to developing throughout life.[13] Therefore, these people could be discriminated against.[14]

For example, insurance companies[15] – as has happened in the United States – may refuse to stipulate insurance contracts for the civil liability of motor vehicles with a person having or possibly developing a genetic disease, or they may decide to stipulate them but ask higher insurance costs, as soon as they become aware of a genetic predisposition of that customer to a neuromuscular disease. This may happen even if the person does not develop that disease or condition, but the person is simply predisposed to it.

Moreover – as observed by the doctrine[16] – genetic information may also influence the choices of an employer. The latter could choose a person who is more genetically resistant to certain environmental working conditions.

We can also imagine that a bank could acquire the information on a possible genetic disease of a specific person and might refuse to conclude a loan contract, or it might decide to conclude it but on condition of the taking out of a credit protection insurance, because it fears the person may not pay all of the loan instalments.[17]

Due to risks of breaching the prohibition of discrimination, the controller has to implement all measures in order to control the flow of genetic data and to

[12] See Recital 51 GDPR, available at https://tinyurl.com/mr3n8v7e (last visited 31 December 2022).

[13] On the relationship between genetic information, the individual and the family, see E. Rial-Sebbag, 'Genetic Information: The individual, the family and the Humankind' *Bio Law Journal*, Special Issue, 13 (2021).

[14] On the influence of genetic data on discrimination against a person on the grounds of their genetic heritage, see D. Nelkin, 'Informazione genetica: bioetica e legge' *Rivista Critica del Diritto Privato*, 491-502 (1994), C. Faralli, 'Dati genetici e discriminazione' *Jura Gentium*, 179 (2020).

[15] On the relationship between insurance contracts and genetic data, see S. Barison, 'Assicurazioni «sanitarie» e test genetici in Italia e negli Stati Uniti: affinità materiali e differenze giuridiche fondamentali' *Rivista di diritto civile*, 143 (2000); Y. Joly et al, 'Genetic discrimination in private insurance: global perspectives' 29 *New genetic and society*, 351 (2010), M. Tomasi and C. Casonato, 'Regulating genetic data in insurance and employment: the Italian 'up-stream' way' *Annuario di diritto comparato e di studi legislativi*, 441 (2018).

[16] B. Godard et al, 'Genetic information and testing in insurance and employment: technical, social and ethical issues' 11 *European Journal of Human Genetics*, 129 (2003), M. Simonato and G. Verlenga, 'Law, genes and bioethics: a biomedical perspective' *BioLaw Journal, Special Issue*, 10 (2021).

[17] On data as a new asset class, see K. Birch et al, 'Data as asset? The measurement, governance, and valuation of digital personal data by Big Tech' 1 *Big Data & Society*, 8 (2021) T. Beauvisage and K. Mellet 'Datassets: Assetizing and Marketizing Personal Data', in K. Birch and F. Muniesa eds, *Assetization: Turning Things Into Assets in Technoscientific Capitalism* (Cambridge: MIT Press, 2020), 75-95.

ensure a high level of security to avoid any unauthorised disclosure.[18]

The goal of genetic data protection is to prevent any form of discrimination connected with the use of genetic data by third parties.

IV. International Declaration on Human Genetic Data of 16 October 2003

International institutions were also aware of risks linked to the processing of genetic data. Therefore, UNESCO adopted the International Declaration on Human Genetic Data on 16 October 2003.[19] As you can read in the preamble to this Declaration, 'the collection, processing, use and storage of human genetic data have potential risks for the exercise and observance of human rights and fundamental freedoms and respect for human dignity' and Art 7(a) of this Declaration states that

> 'Every effort should be made to ensure that human genetic data (…) are not used for purposes that discriminate in a way that is intended to infringe, or has the effect of infringing human rights, fundamental freedoms or human dignity of an individual or for purposes that lead to the stigmatization of an individual, a family, a group or communities'.

These risks are the consequence of the predictive ability of genetic data.[20]

The genetic data protection in this Declaration is based on informed consent of the collection, and on privacy and confidentiality of processing.

Therefore, on the one hand, a person has to be informed about

> 'the purpose for which human genetic data (…) are being derived from biological samples, and are used and stored. This information should indicate, if necessary, risks and consequences. This information should also indicate that the person concerned can withdraw his or her consent, without coercion, and this should entail neither a disadvantage nor a penalty for the person concerned' (see Art 6(d) of the Declaration).

On the other hand,

[18] On the genetic privacy, see E.W. Clayton et al, 'The law of genetic privacy: applications, implications, and limitations' 6 *Journal of Law and Bioscienses*, 1 (2019).

[19] Available at https://tinyurl.com/5bxdsjnv (last visited 31 December 2022).

[20] As stated in the preamble, genetic data '(…) can be predictive of genetic predispositions concerning individuals and that the power of predictability can be stronger than assessed at the time of deriving the data; they may have a significant impact on the family, including offspring, extending over generations, and in some instances on the whole group; they may contain information the significance of which is not necessarily known at the time of the collection of biological samples; (…)', available at https://tinyurl.com/5bxdsjnv (last visited 31 December 2022).

> 'Human genetic data, (…) biological samples linked to an identifiable person should not be disclosed or made accessible to third parties, in particular, employers, insurance companies, educational institutions and the family, except for an important public interest reason in cases restrictively provided for by domestic law consistent with the international law of human rights or where the prior, free, informed and express consent of the person concerned has been obtained provided that such consent is in accordance with domestic law and the international law of human rights' (see Art 14(b) of the Declaration)

and

> 'the persons and entities responsible for the processing of human genetic data, (…) and biological samples should take the necessary measures to ensure the accuracy, reliability, quality and security of these data and the processing of biological samples' (see Art 15).

This International Declaration is soft law; therefore, it is not binding. Rather, it is a model for States to draw upon for their domestic legislation, regulations, ethical codes of conduct and guidelines. Art 1(a) of the Declaration provides that one of the aims of this Declaration is

> 'to set out the principles which should guide States in the formulation of their legislation and their policies on these issues; and to form the basis for guidelines of good practices in these areas for the institutions and individuals concerned'.

In other words, States play a key role because they have to implement effectively the provisions laid down by the Declaration.

Art 23(a) of the International Declaration on Human Genetic Data states that

> 'States should take all appropriate measures, whether of a legislative, administrative or other character, to give effect to the principles set out in this Declaration, in accordance with the international law of human rights'.

V. Decisione Autorità Garante per la Protezione dei Dati Personali 5 June 2019 no 146

Art 9(4) GDPR states that

> 'Member States may maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or

data concerning health'.

The European lawmaker considers that the processing of '*genetic data, biometric data or data concerning health*'[21]needs a multi-level protection, even though this may compromise the main goal of the EU GDPR, ie, a homogeneous legal system on the processing of personal data in all EU Member States.

The provision in Art 9(4) GDPR has, in fact, to be read taking into account the whole view of the EU GDPR.

On the one hand, the GDPR aims to ensure a consistent and homogenous application of the rules for the processing of personal data throughout the EU, providing a high level of protection to fundamental rights and freedoms of any person. On the other hand, it

> 'also provides a margin of manoeuvre for Member States to specify its rules, including for the processing of special categories of personal data ('sensitive data'). To that extent, this Regulation does not exclude Member State law that sets out the circumstances for specific processing situations, including determining more precisely the conditions under which the processing of personal data is lawful' (see Recital 10 EU GDPR).

For these reasons Art 21(1) of the decreto legislativo 10 August 2018 no 101[22] (ie the decreto legislativo laying down provisions for the adaptation of national legislation to the provisions of the EU GDPR) has tasked the Italian data protection authority (the 'Italian DPA') to adopt an order on sensitive data.

The Italian DPA approved order no 146 on sensitive data on 5 June 2019.[23]

This order contains provisions relating to the processing of genetic data, and in particular relating to the safekeeping and security of genetic data and biological samples.[24]

The aim is to restrict access to these data to identified and authorised people and to use any measures to avoid third parties acquiring these data, even unintentionally. Therefore, this order states that access to a premises must be carried out by a documented procedure established by a document controller. This must include the identification of people who are allowed to access the data in any way out of hours, and such people must be authorised beforehand (para 4.2.a).

Moreover, the transfer of genetic data via electronic messaging systems, including mail, must be carried out using the encryption of data, ensuring the recipient is informed of the cryptographic key by means of communication

[21] On genetic data privacy solutions in the GDPR, see K. Harbord, 'Genetic data privacy solutions in the GDPR' 7 *Texas A&M Law Review*, 269 (2019).

[22] Available at https://tinyurl.com/yx3wcxja (last visited 31 December 2022).

[23] Available at https://tinyurl.com/bddz8eae (last visited 31 December 2022).

[24] See Annex 1 (4.2) of order no 146/2019, available at https://tinyurl.com/3ta4duw2 (last visited 31 December 2022).

channels other than those used for data transmission (para 4.2.c). The storage of genetic data and biological samples in databases must also be carried out using encryption or pseudonymisation techniques (para 4.2.e).

These techniques make data and samples temporarily unintelligible to any person entitled to access them and allow identification of the data subjects only where necessary, in order to minimise the risks of accidental disclosure or unauthorised or illegal access.[25] The goal is to avoid the identification of the person to whom genetic data or biological samples belong.

The Italian DPA is aware of the role that nowadays control and security play in genetic data protection in order to avoid third parties using these data unlawfully. The order, in fact, starts with specific requirements regarding safekeeping and security. In this context consent is only one step of the processing.[26]

The data subject has to be informed of the purpose of the processing and of the results that can be achieved with the data. The information has to include the unexpected findings that may arise from the processing of genetic data (para 4.3.a).[27] The data controller must give the data subject the chance to limit the scope of genetic data communication and the transfer of biological samples, as well as the possible use of such data for further purposes (para 4.3.b). Thus, the data subject can restrict the movement of their own genetic data.

Nevertheless, it is not laid down that data subject has to be informed of risks and consequences of data communication and of biological samples transfer. For example, the disclosure of data may entail the unlawful use by third parties (such as private companies) and discrimination against the data subject.

Order no 146/2019 entitles the data subject to withdraw consent. In this case processing operations must cease and the data must be erased or made anonymous, including through the destruction of biological samples (para 4.5.1).

[25] On encryption or pseudonymisation techniques, see V. Mayer-Schönberger and Y. Padova, 'Regime change? Enabling big data through Europe's new data protection Regulation' 17 *Science and Technology Law Review*, 328 (2016).

[26] If a data controller changes, the new controller has to provide information to the data subject and acquire new consent. See the Tiziana Life Case, inC. Piciocchi et al eds, 'Legal issues in governing genetic bio banks: the Italian framework as a case study for the implications for citizen's health through public-private initiatives' 9 *Journal of Community Genetics*, 177-190 (2018). Tiziana Life Science is a UK biotechnology company that purchased Shardna, an Italian company, during its bankruptcy proceedings. This Italian company had collected a critical mass of biological samples from 11,700 individuals from ten villages in the mountainous region of Ogliastra in Sardinia in order to identify genes for complex diseases. The aim of Tiziana Life Science was to continue the Shardna project. On 6 October 2016 the Italian Data Protection Authority established the blocking of the processing of the biobank data, and the re-contacting data subjects to provide information and acquire new consent. On 18 May 2017 the Cagliari Tribunal annulled the Italian order. On 7 October 2021, the Supreme Court quashed the decision of the Tribunal. In particular, the Supreme Court stated that the assignment of data causes a new processing. Therefore, the new data controller had to provide information to the data subject and acquire new consent.

[27] On the unexpected findings, see A.O. Cozzi, 'Incidental findings and the right not to know in clinical setting: Constitutional perspectives' *BioLaw Journal, Special Issue*, 106 (2021).

However, the order does not provide that the data subject should be informed of the right of withdrawal of consent and the withdrawal should entail neither a disadvantage nor a penalty for them.

It is true that the Art 13.2(c) GDPR states that

> 'the controller shall, at the time when personal data are obtained, provide the data subject with (…) the existence of the right to withdraw consent at any time, without affecting the lawfulness of processing based on consent before its withdrawal'.

Nonetheless, in my opinion, it would be better (*de iure condendo*) not only to introduce a rule providing for the information on risks and consequences of genetic data communication and of biological samples transfer, as laid down by Art 6(d) of the International Declaration on Human Genetic Data, but also the rule in the Italian order providing for the information on the right of withdrawal of consent, as laid down by this Art 6(d) of the International Declaration on Human Genetic Data.

In any case all of us are aware that the withdrawal of consent does not remove genetic data which have already been processed. That is why the withdrawal of consent is not sufficient in order to protect data subjects. It has to be added to all measures aimed at checking genetic data disclosure in order to avoid the unlawful use by third parties.

After all, the Italian DPA lays down requirements for the processing of genetic data without previous consent of the data subject in the case of impossibility of obtaining consent owing to incapacity to act or for natural incapacity. In these cases, the processing may be carried out within the limits of the available genetic data where it is essential for the third party to make an informed reproductive choice or it is justified by the need for the third party to take measures of a preventive or therapeutic nature. If the data subject has died, the processing may also include genetic data extrapolated from the analysis of biological samples of the deceased, provided that it is essential for the third party to make an informed reproductive choice or that it is justified by the need for the third party to take preventive or therapeutic measures (par. 4.7).

Order no 146/2019 also lays down provisions on the processing of genetic data for scientific and statistical research purposes.[28] It is permitted only if it is aimed at protecting the health of data subjects and third parties in the medical, biomedical and epidemiological field. It usually requires the data subjects' consent; in such cases, the data subjects are required to state whether or not they wish to know the results of the research, including any unexpected news concerning them,[29] if it entails a concrete and direct benefit to them in terms of

[28] See Annex 1 (4.11) of the order no 146/2019, available at https://tinyurl.com/3ta4duw2 (last visited 31 December 2022).

[29] On the right not to know, see A.O. Cozzi, 'Incidental findings' n 27 above, 106.

treatment or prevention or awareness of reproductive choices.[30]

If the data subject withdraws consent to the processing for research purposes, the biological sample must also be destroyed if it has been taken for such purposes, unless the sample cannot be related to an identified or identifiable person by origin or as a result of the processing.[31]

The order provides for further two cases in which consent is not provided. Firstly, genetic data and biological samples of people incapable of giving their consent may be processed for scientific research purposes that do not confer a direct benefit on them. It may be carried out if all of the following conditions are met: (a) the purpose of the research is to improve the health of other people who belong to the same age group or are affected by the same disease or who are under the same conditions as the data subject, and the research programme has received a favourable opinion from the competent ethics committee at local level; (b) research seeking a similar purpose cannot be achieved by processing the data relating to people who can give their consent; (c) consent to the processing is acquired from the lawful guardian, a close relative, a member of the person's family, a cohabitee or, in the absence of them, from the person responsible for the facility where the person concerned is staying; and (d) the research does not entail any significant risks to the dignity, fundamental rights and freedoms of the data subject.[32]

Secondly, it is provided that in the absence of the data subject's consent, biological samples taken and genetic data collected for health protection purposes may be stored and used for scientific or statistical research purposes in the following cases: (a) statistical surveys or scientific research which are required by European Union law, by law or, where so provided for by law, by a regulation; and (b) for the pursuit of further scientific and statistical purposes that are *directly* related to those for which the data subjects' informed consent was originally acquired.[33]

Order no 146/2019 provides that genetic data and biological samples collected for scientific or statistical research purposes may be communicated or transferred to research institutes and organisations, associations and other public and private bodies pursuing research purposes.

This is possible, on condition that it is restricted to information without identifying data, for scientific purposes that are directly linked to those for which the data were originally collected, and as clearly specified in writing in the request for the data and/or samples. In this case, the requesting party must

[30] See Annex 1 (4.11.1) of the order no 146/2019, available https://tinyurl.com/3ta4duw2 (last visited 31 December 2022).

[31] See Annex 1 (4.11.2) of the order no 146/2019, available at https://tinyurl.com/yu5arfdb (last visited 31 December 2022).

[32] ibid

[33] See Annex 1 (4.11.3) of the order no 146/2019, available at https://tinyurl.com/yu5arfdb (last visited 31 December 2022).

undertake not to process the data and/or use the samples for purposes other than those indicated in the request and not to communicate or further transfer them to a third party.

If you compare the EU GDPR and the Italian Order, it can be concluded that the GDPR is research oriented, whereas in the Italian framework the individual's rights regarding genetic data prevails over the interest of society to benefit from scientific progress.

The GDPR is aware that it is often impossible to fully identify the purpose of personal data processing for scientific research purposes at the time of data collection. Therefore, data subjects should be allowed to give their consent to certain areas of scientific research, and not to a specific research project.

In fact, Recital 33 GDPR states that

> 'Data subjects should have the opportunity to give their consent only to certain areas of research or parts of research projects to the extent allowed by the intended purpose'

and Art 5 GDPR lays down that

> 'further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Art 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation')'.

In the Italian Order, the data subject can limit the scope of genetic data communication and the transfer of biological samples, as well as the possible use of such data for further purposes. In addition, in the absence of the data subject's consent, biological samples taken and genetic data collected for health protection purposes may be stored and used for scientific or statistical research purposes in for the pursuit of further scientific and statistical purposes that are *directly* related to those for which the data subjects' informed consent was originally acquired.

The connection between further scientific purposes and the purpose for which the data subjects' informed consent was originally acquired is necessary in domestic provisions. The rational under the Italian provisions is to protect the data subject who has the right to control the use of genetic data for specific research taking into account also unexpected findings that may arise from the processing of genetic data. The Italian perspective is that the more you use genetic data the more third parties might be informed of any possible future diseases that the data subject and their blood relatives are susceptible to developing throughout life. Therefore, these people and communities could be discriminated against.[34]

[34] On the relationship between the GDPR and Italian framework in governing genetic

In any case, all provisions (European and domestic Italian provisions) show us that consent is not sufficient, and in some cases, not even necessary, to protect the data subject.

The approach of data processing is preventive: it is based on risk assessment and on prevention measures in accordance with the principle of prevention and with a precautionary principle.[35]

The controller has to take all measures in order to guarantee the non-identification of data subjects to which genetic information refers, keeping the identifying data separate from biological samples and genetic information at the time of collection. Furthermore, the controller has to take all measures to avoid any disclosure of data to third parties that could use them unlawfully, infringing the right of the data subject not to be discriminated against due to their genetic heritage.

In other words, the controller must take every measure to prevent damage, even though the connection between the processing of genetic data and consequential damage is uncertain at the point of collection.

VI. Algorithms in the Processing of Big Data

The GDPR (and not the Italian Order no 146/2019) contains a provision on automated individual decision-making, including profiling (see Art 22.1). It states that

> 'The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her'.

In this case the decision-making is based on the processing of data that evaluates personal aspects relating to a person, and in particular to analyse or predict aspects concerning the data subject's performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movement (see Recital 71).[36]

biobanks, see C. Piciocchi et al, 'Legal issues in governing genetic bio banks: the Italian framework as a case study for the implications for citizen's health through public-private initiatives' 9 *Journal of Community Genetics*, 177-190 (2018).

[35] On the difference between the principle of prevention and the principle of precaution, see C. Byk, 'Precautionary principle and civil law' 28 *Journal international de bioethique et d'etique des scienses* 35 (2017); A. Trouwborst, 'Prevention, precaution, logic and law. The relationship between the precautionary principle and the preventative principle in international law and associated questions' 2 *Erasmus Law Review*, 105 (2009); R. Andorno, 'The precautionary principle: A new legal standard for a technological age' 1 *Journal of International Biotechnology Law*, 11 (2004).

[36] 'The data subject should have the right not to be subject to a decision, which may

Art 22(2) provides that automated decision-making is allowed under some conditions: (a) if it is necessary for entering into, or performance of, a contract between the data subject and a data controller; (b) if it is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or (c) if it is based on the data subject's explicit consent.

These exceptions, though, do not apply when the processing is based on special categories of personal data such as genetic data. Automated individual decision-making may cause, in fact, discriminatory effects on people on the basis of genetic status. Algorithms create classes of people through machine learning processes.[37] The selection of genetic data should be avoided because it could generate discriminatory effects against a class of people due to their genetic heritage.[38]

Discrimination against a person on the grounds of their genetic heritage is prohibited in the Italian (and many other) legal system(s). It would infringe the right to dignity and the right to identity guaranteed by Art 2 of the Italian Constitution as inviolable rights of the person.[39]

Furthermore, the prohibition of any form of discrimination against a person on the grounds of his or her genetic heritage is expressly laid down by Art 11 of Oviedo International Convention on Human Rights and Biomedicine adopted on 4April 1997: 'Any form of discrimination against a person on grounds of his or her genetic heritage is prohibited'.[40] Likewise, Art 6 of the

include a measure, evaluating personal aspects relating to him or her which is based solely on automated processing and which produces legal effects concerning him or her or similarly significantly affects him or her, such as automatic refusal of an online credit application or e-recruiting practices without any human intervention. Such processing includes 'profiling' that consists of any form of automated processing of personal data evaluating the personal aspects relating to a natural person, in particular to analyse or predict aspects concerning the data subject's performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, where it produces legal effects concerning him or her or similarly significantly affects him or her (…)', available at https://tinyurl.com/2p8xuy4e (last visited 31 December 2022).

[37] On the consequence of the use of algorithms in the big data era, seeA. Mantelero, 'Personal data for decisional purposes in the age of analytics: From an individual to a collective dimension of data protection' 32 *Computer Law & Security Review*, 238 (2016). On risks of profiling, see B.W. Shermer, 'The limits of privacy in automated profiling and data mining' 27 *Computer Law & Security Review*, 45 (2011); K. Wiedemann, 'Profiling and (automated) decision-making under the GDPR: A two-step approach' 45 *Computer Law & Security Review* (2022).

[38] On the risk of big data, see D. Bollier,*The Promise and Peril of Big Data* (Washington: The Aspen Institute, 2010), 25-29; E.M.L. Moerel, *Big data protection*n 2 above, 9.

[39] 'The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled', available at https://tinyurl.com/2acmusvy (last visited 31 December 2022).

[40] Available at https://tinyurl.com/2p9b49hs (last visited 31 December 2022). On Oviedo International Convention on human rights, see R. Andorno, 'The Oviedo Convention: A European legal framework at the intersection of human rights and health law' 2 *Journal of*

Universal Declaration on the Human Genome and Human Rights states that

> 'No one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity'.[41]

The GDPR makes no reference to data aggregation and to the use of algorithms in the processing of genetic data.[42]In my view, it would be better (*de iure condendo*) to add a provision - at least in the order of the Italian DPA – on algorithms applied to the processing of genetic data. In particular, it would be desirable to prohibit explicitly them.

VII. Private and Public Enforcement

At this point, it is crucial to show what happens if a data controller does not take all appropriate measures with respect to genetic data.

First of all, Art 82.1 of the GDPR states that 'Any person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered'. Thus, civil liability of the controller is one of the enforcement regulatory instruments in respect of data protection. This involves compensatory measures for the data subject.

Nevertheless, the European Parliament is aware that data protection has not only an individual dimension, but also a collective one. Data processing – due to the size it has reached in the globalisation era and due to the use of technologies, including algorithms – can no longer be regarded as a private relationship between the controller and the data subject.[43] That is why the public enforcement is necessary. Administrative fines imposed by the Data Protection Authority force the controller to take all appropriate measures to manage risks connected with the processing.[44]

For this reason, Art 21(5) of the decreto legislativo no 101/2018 expressly states that infringements of provisions laid down in the Italian DPA order are

International Biotechnology Law, 133 (2005).

[41] Available at https://tinyurl.com/3v72k7d4 (last visited 31 December 2022).

[42] On data aggregation in data processing, seeL. Floridi, *The Fourth Revolution: How the Infosphere is Reshaping Human Reality* (Oxford: Oxford University Press, 2014), 96.

[43] On the change of perspective of data processing, see A. Mantelero, *Personal data* n 37 above, 238, L. Marilotti, 'I dati genetici tra dimensione individuale e collettiva' *BioLaw Journal*, 165 (2021).

[44] On the key-role of independent authorities for data processing in the big data era, see A. Mantelero, *Personal data* n 37 above, 245. You will read the following statement '(..) independent authorities may play an important role in safeguarding interests related to the collective dimension of privacy and data protection in the big data environment'.

subject to an administrative fine under Art 83(5) GDPR.[45] The latter states that the infringement of the basic principles for processing, including conditions for consent, pursuant to Art 9 on processing of special categories of personal data, including genetic data, are subject to administrative fines of up to € 20 million, or in the case of an undertaking up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher.[46]

The pecuniary administrative fine is a very strong incentive for the controller to take all measures to implement GDPR and laws.

VIII. Conclusions

Informed consent to processing of genetic data is not sufficient (and in some cases, not even necessary) to protect the data subject, according to the GDPR and to the decisione Autorità Garante per la protezione dei dati personali no 146/2019.

The protection of personal data relies on the accountability principle in the current legal system. The controller has to implement appropriate technical and organisational measures, such as pseudonymisation and data minimisation, in order to control the flow of genetic data and to ensure a high level of security to avoid any unauthorised disclosure. In other words, the controller has to take all measures in order to guarantee the non-identification of data subjects to which the genetic information refers, and to avoid any disclosure of data to third parties that may use them unlawfully.

If the genetic data controller does not take every measure to prevent damage, it is liable for damage suffered by any person as a result of this

[45] Available at https://tinyurl.com/3w23k4zt (last visited 31 december 2022).

The possibility for national authorities to impose sanctions for cases of infringements is provided for by Art 9, last para, GDPR, which allows Member States to maintain or introduce further conditions, including limitations, with regard to the processing of genetic data ('Member States may maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health'). Available at https://tinyurl.com/yuckr3sk (last visited 31 december 2022). Therefore, the Italian DPA order, which establishes infringements, incorporates EU General Data Protection Regulation provisions with regard to genetic data processing.

[46] '5. Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 20000000 EUR, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher: (a) the basic principles for processing, including conditions for consent, pursuant to Articles 5, 6, 7 and 9; (b) the data subjects' rights pursuant to Arts 12 to 22; (c) the transfers of personal data to a recipient in a third country or an international organisation pursuant to Arts 44 to 49; (d) any obligations pursuant to Member State law adopted under Chapter IX; (e) non-compliance with an order or a temporary or definitive limitation on processing or the suspension of data flows by the supervisory authority pursuant to Arte 58(2) or failure to provide access in violation of Art 58(1)', available at https://tinyurl.com/yuckr3sk (last visited 31 december 2022).

infringement.

Civil liability of the controller is only one of instruments of data protection. The lawmaker, in fact, is aware that civil liability is not a sufficient instrument for the compliance with data protection provisions. Pecuniary administrative fines imposed by the DPA (in short, public enforcement) have to be added to the civil liability of the controller (in short, private enforcement) because they truly force the controller to take all appropriate measures to manage risks connected with processing.

Nevertheless, it should be pointed out that pecuniary administrative fines and civil liability of the controller are both *ex-post* remedies, whereas the approach of data processing is preventive.

Therefore, genetic data subjects, or the group of people biologically close to them, may be interested in intervening immediately in order to prevent any disclosure of genetic data to third parties. That is why it is recommended to expressly include – at least in the order of the Italian DPA – injunctions brought not only by individuals but also by associations as a preventive measure for individual and collective protection of genetic data subjects.[47]

The European Court of Justice is aware that injunctions brought by associations are effective measures in order to prevent infringements of the rights of data subjects to the processing of their personal data.

In fact, in a recent judgment adopted on 28 April 2022, Case C-319/20,[48] the Court ruled that

> 'Art 80(2)[49] of the GDPR must be interpreted as not precluding national legislation which allows a consumer protection association to bring legal proceedings, in the absence of a mandate conferred on it for that purpose and independently of the infringement of specific rights of the data subjects, against the person allegedly responsible for an infringement of the laws protecting personal data, on the basis of the infringement of the prohibition of unfair commercial practices, a breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions, where the data processing concerned is liable to affect the rights that identified or identifiable natural persons derive from that

[47] See L. Marilotti, *I dati genetici* n 43 above, 165; R. Vecellio Segate, 'Shifting Privacy Rights from the Individual to the Group: A Re-adaptation of Algorithms Regulation to Address the Gestaltian Configuration of Groups' 8 *Journal of Regulatory Compliance Loyola University Chicago*, 55 (2022).

[48] Available at https://tinyurl.com/4z3dkhv2 (last visited 31 December 2022).

[49] Art 80(2) provides that 'Member States may provide that any body, organisation or association referred to in paragraph 1 of this Art, in- dependently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Art 77 and to exercise the rights referred to in Arts 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing'.

regulation'.

This could be the prelude to a strengthening of injunctions brought by associations in order to prevent any infringements of rights of data subjects including the disclosure of genetic data to third parties.

* «The articles in the section ‘Insights and Analyses’ are accepted by the Editors-in-Chief without peer-review».