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Essays

Public Services Beyond State and Market.
Rethinking Contract as a Tool for Decommodification Within European Private Law

Rocco Alessio Albanese*

Abstract

This work discusses how different conceptions of contract within European Private Law shape the way of managing and providing public services.

The argument builds on an overview of the EU legal framework in the domain of public services. The regime of public procurement and the divide between economic and non-economic Services of General Interest are addressed. Attention is given to the recent focus on both social and environmental issues and the social economy. This broad analysis gives room to question competition as the major organizational criterion in the legal arrangement of public services,in this respect, the trends characterising the Italian laboratory are discussed to deal with the implementation of EU rules at the domestic level.

The critique of the dominant market-oriented and regulatory schemes leads to a new understanding of the overall topic. While antagonistic conceptions of contract serve as basic infrastructures of the market as a socio-legal institution, more sophisticated approaches can play an unexpected role in experimenting with alternative organizations of public services. From this perspective a commons-oriented view of the new property theory is adopted too, to provide end-users with a new legal zone of agency.

Although some questions remain open, one can claim that contract can be a tool of de-commodification, capable of bringing public services beyond state and market.

I. Public Services, Competition and European (Private) Law. A Critical Overview

The domain of public services is pivotal in contemporary societies and can

* Assistant Professor of Private Law, University of Piemonte Orientale Amedeo Avogadro. The article must be regarded as a sketch of a broader research program: because of this, the development of the reasoning is sometimes quick and footnotes are limited to the essential. This work has been conceived during two visiting research fellowships at the Vrije Universiteit Brussel and at the University of Groningen. I wish to thank Serge Gutwirth, Alessia Tanas and Björn Hoops for having welcomed me and for the thorough conversations we had. Very useful inputs for the argument I try to develop came from an interview with policy officers of the European Commission (DG Internal Market, Industry, Entrepreneurship and SMEs): I am grateful for their availability. A first presentation of this piece of research took place on 12 December 2022 at the Conference 'Commodification and the Law' at the European University Institute in Florence. I want to thank all the participants in the Conference for their inspiring comments: they allowed me to definitively improve my work. Many grateful thanks to the organizing committee as well (especially to Tommaso Fia and Ian Murray) for having invited me. All remaining mistakes are the sole responsibility of the author.

be included among the most complex and delicate sectors of the whole body of EU law, from a technical point of view as well as in terms of policy. The sole market of public procurement, for instance, owns a crucial legal and economic weight, amounting to 14% of the EU GDP.[1] While building on such a basic awareness, this article is not aimed at providing a detailed analysis of the European legal framework relevant to the public services sector or public procurement. Indeed, such an analysis has been made elsewhere.[2] More humbly, the goal of this paper is to highlight some core evolutive trends in the European (and the Italian) regulation of such intertwined domains, then to adopt the perspective of European private law to discuss whether and how different legal understandings of contract are capable of shaping the concrete way of producing, managing and providing some essential services for human wellbeing.

As a very preliminary remark, one can notice that the history of public services in the EU is about a contradiction between two cultural and political foundations of the European legal project. On the one hand, any theoretical and operational reflection on public services must be traced to the special mission of these activities since objectives such as the promotion of solidarity and effectiveness of social inclusion and territorial cohesion lie at the core of the so-called European social model.[3] On the other hand, public services can and should be regarded as an economic phenomenon. In this respect, the possible extension of competition law to the organization and provision of such utilities has been resulting a major issue, in light of the EU's foundational goal of establishing a common internal market.[4]

Such a longstanding dialectic can be noticed by reading the relevant provisions of the current sources of EU primary law. At the most general level, it is easy to refer to Art 3(3) of the Treaty on the European Union (TEU), affirming both the *constitutional* goal of a 'highly competitive social market economy' – the expression

[1] E. Varga, 'How Public Procurement Can Spur the Social Economy' *Stanford Social Innovation Review*, (2021), available at https://tinyurl.com/3n5txsxc (last visited 30 September 2023).

[2] R. Caranta and A. Sanchez-Graells eds, *European Public Procurement. Commentary on Directive 2014/24/EU* (Cheltenham: Edward Elgar Publishing, 2021); H.W. Micklitz, *The Politics of Justice in European Private Law. Social Justice, Access Justice, Societal Justice* (Cambridge: Cambridge University Press, 2018); P. Valkama et al eds, *Organizational Innovation in Public Services. Forms and Governance* (London: Springer, 2013); M. Cremona ed, *Market Integration and Public Services in the European Union* (Oxford: Oxford University Press, 2011).

[3] J. Ottmann, 'The Concept of Solidarity in National and European Law. The Welfare State and the European Social Model' 1 *ICL Journal*, 36-48 (2008); G. de Búrca ed, *EU Law and the Welfare State. In Search of Solidarity* (Oxford: Oxford University Press, 2005). More recently see E. di Napoli and D. Russo, 'Solidarity in the European Union in Times of Crisis: Towards "European Solidarity"?', in V. Federico and C. Lahusen eds, *Solidarity as a Public Virtue? Law and Public Policies in the European Union* (Baden-Baden: Nomos, 2018), 195-248.

[4] Among many, on the internal market as a systemic goal of the EU see M. Cremona ed, n 2 above; and D. Simeoli, 'Contratto e potere regolatorio (rapporti tra)' *Digesto delle Discipline Privatistiche* (Torino: UTET, 2014). To understand the dominant views at the beginning of the current century it is worth referring to the Commission Green Paper of 21 May 2003 on services of general interest: this groudbreaking document is available at https://tinyurl.com/bd6hpjhj (last visited 30 September 2023).

of the very ordoliberal imprinting of the Union –[5] and that the EU 'shall combat social exclusion and discrimination, and shall promote social justice and protection'. More important inputs for the field of public services come from the Treaty on the Functioning of the European Union (TFEU). As is well-known, Arts 14 and 106 of the TFEU contain specific references to the 'services of general economic interest' (SGEI), thus introducing a notion that is crucial for several reasons. First, the mere fact that the interest connected to the services is qualified as general and economic at once alludes to the above-mentioned interference between the welfare-oriented organization of such services and the promotion of competition. In this respect, under Art 106(2) TFEU

> 'undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them'.

Such a statement should be read in conjunction with the parallel provision of Art 36 of the Charter of Fundamental Rights of the European Union (CFREU), according to which

> 'the Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union'.[6]

In light of the combination of these provisions, one could foresee a principle lying at the very core of the EU legal framework, namely a general derogation from the major organizational criterion of opening up societal activities and exchanges to competition (ie the means for creating and promoting the internal market) for services pursuing missions of general interest.

Of course, this has not been the dominant understanding of the issue throughout the last two decades. The Green Paper on Services of General Interest delivered by the European Commission in 2003 can be seen as the groundbreaking document for the establishment of a market-oriented policy in the sector of public services. Four pillars should be recalled. First, the traditional notion of 'public service' was found to be confusing and thus abandoned, while the

[5] For the roots of ordoliberalism see W. Röpke, *A Humane Economy. The Social Framework of the Free Market* (Chicago: Henry Regnery Company, 1960).

[6] On how the rise of fundamental right has affected the EU legal framework see H.W. Micklitz ed, *Constitutionalization of European Private Law* (Oxford: Oxford University Press, 2014); F. Costamagna, *Diritti fondamentali e rapporti interprivati nell'ordinamento dell'Unione Europea* (Torino: Giappichelli, 2022); and E. Scotti, 'Servizi pubblici locali' *Digesto delle Discipline Pubblicistiche* (Torino: UTET, 2012).

distinction between economic and non-economic services of general interest (SGI) was enhanced. Second, even though the Green Paper explicitly recognised that

> 'the distinction between economic and non-economic activities has been dynamic and evolving, and in recent decades more and more activities have become of economic relevance',

such an awareness about the relativity of the divide did not prevent the Commission from affirming the expansive character of the concept of services of general economic interest.

The Green Paper has therefore been the source of two intertwined legal axioms. On the one hand, a very naturalistic and *a priori* approach is in that 'any activity consisting in offering goods and services on a given market is an economic activity'. On the other hand, since the economic character of an activity depends on the potential existence of a market, EU law is called to give effect to its foundational commitment by opening up such activities to competition within the field and for the field (the latter case occurring when a service is a natural monopoly so that there could be just an upstream market). Third, and consequently, a competition-oriented interpretation of the Treaty was given in that Art 106(2) TFEU (former Art 86(2) of the Treaty on the European Community) was read as ruling that

> 'providers of services of general interest are exempted from application of the Treaty rules only to the extent that this is strictly necessary to allow them to fulfil their general interest mission'.[7]

Fourth, some major regulatory principles and obligations, such as universal service, continuity and quality of service, affordability and end-user protection, were foreseen to introduce social aspects capable of balancing the overall policy of opening up public services to liberalization and competitive markets.[8]

One cannot but highlight the tremendous role of the choices to ignore the legal and political relativity of the divide between SGEI and SGI, as well as to naturalise the economic quality of services by tracing them to the market as a socio-legal

[7] Already in 2005 it was possibile to acknowledge that 'the peculiar structure of the European political process sometimes seems to lead policy outcomes that may not be comparable to those of a traditional representative democracy. The solution to these difficulties would require a radical change in the structure of the European political process that would make it conform better to basic democratic principles' (J. Baquero Cruz, 'Beyond Competition: Services of General Interest and European Community Law', in G. de Búrca ed, n 3 above, 169-212, 212).

[8] In recent year, the development of such legal arrangements led an influential scholar to remark how 'the shift from public to private does not alter the character of the public service. (…) even the private universal service provider is bound by standards on access and principled minimum substance. We are no longer dealing with a bilateral concept of shared competences and shared responsibilities but with a trilateral one – the EU, Member States and private companies. All three stand on an equal footing. There is no hierarchy and no primary or secondary or tertiary responsibility' (H.W. Micklitz, *The Politics* n 2 above, 314).

institution. The topic will be critically discussed later on, however, it should be clear that it is also because of these remarks that this article refers to the comprehensive category of public services instead of maintaining the distinction between SGEI and SGI (despite the importance it is provided with in the EU legal framework).[9]

Within the above-described framework, from the perspective of this work it is also worth underlining how the *economic* qualification of public services has been crucially relevant to the relationship between law and commodification. While they certainly are and remain also a matter of public and administrative law, the market-oriented management and provision of public services have been stimulating major evolutions of European private law thanks to the hegemony of influential legal and economic theories. The most apparent instance in this respect is perhaps the problem of natural monopolies. Although it often emerges in the domain of public services, such an institutional issue has long been addressed simply by enhancing the aforementioned notion of competition for the field, thus opening up core utilities (eg water services, waste collection, management of highways, and the like) to the market through a procedural competition among private companies aiming at becoming the sole actor within a certain socio-economic sector.[10] Thus, it is no exaggeration to see the increasing influence of ordoliberal views of European private law also as an attempt to deal with the major challenges deriving from the privatization of welfare.[11]

One can trace to this framework some core legal developments: the choice to protect end-users interests first and foremost under consumer law; the increasing role of Authorities as concurrent heteronomous sources of administered contracts; the proceduralization of contractual relationships between public administrations and private providers; the overall regulatory approach, aimed at using private (and public) law mostly as a technical device for tackling market failures and for establishing a highly competitive economic framework.[12]

[9] Under Art 2 Protocol no 26 to the TFEU, 'the provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest'. However, in its 2003 Green Paper the European Commission noted that 'the distinction between economic and non-economic activities has been dynamic and evolving, and in recent decades more and more activities have become of economic relevance' (section 45). The issue will be discussed in depth throughout the following sections.

[10] Among the seminal works in this respect see, even before the neoliberal turn of the Seventies, H. Demsetz, 'Why Regulate Utilities?' 11 *Journal of Law and Economics*, 55-65 (1968).

[11] The presence of a private monopolist in economic fields often characterized both by the inelastic demand of end-users and the institutional responsibility of public administrations for the provision of a utility can be certainly counted among these challenges.

[12] See F. Cafaggi and H. Muir Watt eds, *The Regulatory Function of European Private Law* (Cheltenham: Edward Elgar Publishing, 2009). For a critical contribution focussed on the Italian legal framework see G. Carapezza Figlia, 'Concorrenza e contratto nei mercati dei servizi pubblici locali' *Rivista di diritto dell'impresa*, 39-79 (2012). For a different and historically meaningful view of the interplay between regulation and market see the 'American-style perestroika' model advocated by C.R. Sunstein, *After the Rights Revolution. Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1993).

Such an understanding of both the domain of public services and the role of European private law has long been dominating European legal culture. Still, the prevailing mindset has always been questioned by that scholarship aware of the need for providing the EU legal framework with a private law capable of being both socially grounded and enriched by interdisciplinary inputs, far beyond the sole hegemony of market-oriented law and economics.[13] For instance, almost twenty years ago many prominent scholars already pointed out the risks and opportunities of the Europeanization of contract law. The sector of public services being one of the most relevant to their argument, these scholars noted that

> 'as far as direct public provision of goods and services through the agencies of the Welfare State is dismantled and replaced by contractual relations – for education, health, utilities, pensions, communications – contract law supplies the rules that govern how citizens obtain the satisfaction of their basic needs. The content of those rules becomes of even greater political significance, because they express the central principles of contemporary ideals of social justice'.[14]

If one carries such a theoretical claim further, it is eventually easy to see how the supposed natural neutrality of the whole European private law is questionable. To put it in simple terms, modern and contemporary private law has always been dealing (either expressly or implicitly) with the rise, changes and fall of the welfare state and the public sphere, the changing role and expansion of the market as a major socio-legal institution based on competition, the never-ending crisis and blur of the supposedly clear public-private divide, the delicate dialectic between democratic claims, political choices and technocratic professionalism.[15] This is true for contract law.[16] And the same is for property law, the most relevant reference in this respect being the seminal intuition about the 'new property' provided, from a traditional individualist standpoint, by Charles A. Reich in discussing the US welfare state's growing capability (and political arbitrariness) of affecting people's life.[17] The

[13] See S. Grundmann, H.W. Micklitz and M. Renner, *New Private Law Theory. A Pluralist Approach* (Cambridge: Cambridge University Press, 2021); U. Mattei and A. Quarta, *The Turning Point in Private Law. Ecology, Technology and the Commons* (Cheltenham: Edward Elgar Publishing, 2018).

[14] Study Group on Social Justice in European Private law, 'Social Justice in European Contract Law. A Manifesto' 10 *European Law Journal*, 653-674, 655 (2004).

[15] After decades of quasi oblivion, a new awareness of the need for a critical understanding of the deepest trends in modern and contemporary private law is at the core of the discussions within legal scholarship. See, for instance, K. Pistor, *The Code of Capital. How the Law Creates Wealth and Inequalities* (Princeton and Oxford: Princeton University Press, 2019); F. Capra and U. Mattei, *The Ecology of Law. Toward a Legal System in Tune with Nature and Community* (San Francisco: Berrett-Koehler Publishers, 2015). See also the Law and Political Economy Project at https://lpeproject.org/.

[16] See P. Zumbansen, 'The Law of Society: Governance Through Contract' 14 *Indiana Journal of Global Legal Studies*, 191-233 (2007).

[17] See C.A. Reich, 'The New Property' 73 *The Yale Law Journal*, 733-787 (1964). An updating of

currently established discourse on the constitutionalization of European private law – with its concern for the interplay between contract law, public services and fundamental rights – can be traced to this overall cultural and legal framework as well.[18]

It is therefore time to question the aforementioned set of legal mentalities and practices, deeply grounded in a market-oriented and ordoliberal thought. Since today meaningful contradictions in the way in which regulatory private law deals with public services are well-known, a new understanding of these issues can be developed. The argument goes as follows. Section 2 discusses EU secondary law, namely the European Parliament and Council Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ('2014/24/EU Directive' or simply 'Directive'). Instead of dealing with the sectoral pieces of European law devoted to the regulation of single public services, the choice to analyze the 2014/24/EU Directive – that is a general legal reference for understanding how public bodies are supposed to contract out services in the EU legal framework – will allow showing the rise of social and environmental concerns within the European regulation of public activities. In Section 3 a critique of competition as the major organizational criterion in the legal regime of public services is provided, and alternative views are introduced. Section 4 represents a demonstrative interlude dedicated to the Italian legal framework, which is meaningful since it has been mirroring and somehow emphasising European trends. Section 5 presents the core theoretical claim of the article by asserting that contract could be a tool of decommodification, once this major legal institution is understood and put into practice from relational and organizational standpoints (instead of maintaining rather simplistic and antagonistic views of it). In Section 6 the legal entitlements of end users are discussed and a commons-oriented view of Reich's new property theory is proposed. Section 7 contains some concluding remarks since open questions and possible shortcomings should be considered when one foresees alternative modes of producing, managing and providing public services.

II. EU Secondary Law and the Rise of the Contexts. Public Services in Their Social and Environmental Dimensions

The above-mentioned market-oriented and ordoliberal hegemony has been crucial during the last two decades of the last century and the first years of the current one, acting as a supportive narrative in the age of privatizations of the welfare state and public services. This has often resulted in a peculiar pro-competition implementation of EU secondary law at the level of Member States (see section 4 below), even beyond the textual contents of the relevant Directives. In

the argument is Id, 'The New Property After 25 Years' 24 *University of San Francisco Law Review*, 223-271 (1990).

[18] See again H.W. Micklitz ed, *Constitutionalization* n 6 above.

this respect, it is worth thinking of the 2014/24/EU Directive, which is one of the core legal documents for understanding the interplay between the rules on public procurement and the European regime of public services. Without going into the details of the complex regulation provided for by this piece of law, one can just refer to some meaningful recitals. While recital 1 clarifies that public contracts are first and foremost relevant to the EU's four fundamental freedoms, this implying that 'above a certain value'[19] they should be 'opened up to competition', other recitals contain important provisions for a better understanding of EU policies in the field of public procurement. In fact, according to recitals 5, 6 and 7, the 2014 legal framework is declared to be neither relevant to non-economic SGI (being such services out of the scope of the Directive) nor to the liberalization of SGEI.

In more general terms, the Directive recognises the very meaning of the provisions contained in the TFEU in that the EU acknowledges the freedom of Member States to organize and provide some utilities 'as services of general economic interest or as non-economic services of general interest or as a mixture thereof', since 'nothing in this Directive obliges Member States to contract out or externalise the provision of services'. While such statements are of crucial importance in reiterating the relative and context-sensitive character of the distinction between SGEI and non-economic SGI, other recitals give further information by pointing out some subjective and objective exclusions from the application of the Directive. In this respect, under recital 28 an exclusion is established, within the 'strictly necessary', for 'certain emergency services where they are performed by non-profit organizations or associations'.[20] The application of the Directive is also excluded for public contracts awarded to legal persons falling into the scope of 'in-house providing', according to recital 32.

More importantly, recital 33 enables contracting authorities 'to choose to provide jointly their public services by way of cooperation without being obliged to use any particular legal form'. Even though this cooperative dimension can be put in place under certain conditions – namely that the contracts should be 'exclusively between contracting authorities, (…) and that no private service provider is placed in a position of advantage *vis-à-vis* its competitors' – a crucial input comes from the very 'cooperative concept' sketched in the recital. Indeed, 'such cooperation does not require all participating authorities to assume the performance of main contractual obligations, as long as there are commitments to contribute towards

[19] Both the thresholds and some relevant exclusions are defined under Art 4 to 12 of the Directive. For instance, according to Art 4 twohundred seven thousand euros is the threshold 'for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities'.

[20] Much case law of the CJEU deals with the implications of such a provision. Among many judgments see Cases C 213/21 and C 214/21 *Italy Emergenza Cooperativa Sociale* v *Azienda Sanitaria Locale Barletta-Andria-Trani and Azienda Sanitaria Provinciale di Cosenza*, Judgment of 7 July 2022; Case C-50/14 *CASTA and others* v *Azienda sanitaria locale di Ciriè, Chivasso e Ivrea and Regione Piemonte*, Judgment of 28 January 2016. The decisions are available at https://curia.europa.eu.

the cooperative performance of the public service in question. In addition, the implementation of the cooperation, including any financial transfers between the participating contracting authorities, should be governed solely by considerations relating to the public interest'.

This provision is of major importance for the following analysis, since it shows that the EU legislature explicitly recognises the possibility to organize, manage and provide public services through contractual relationships different from and more sophisticated than the rather traditional concept of a bilateral and antagonistic contract.

In spite of such a remark, the latter view of contract seems the foundation of the 2014/24/EU Directive, since according to recital 4

> 'rules on public procurement are not intended to cover all forms of disbursement of public funds, but only those aimed at the acquisition of works, supplies or services for consideration by means of a public contract' (purchase, leasing and so on).

Alongside this overall understanding, the Directive is relevant to this article also because it shows the rising context-sensitive character of EU law, namely the role of environmental and social dimensions in the regulation of contractual relationships between public administrations and privates, as well as between service providers and end-users.

Once again, within the scope of this piece of research, there's no need to go into the details, while it is worth remarking that the EU is increasingly aware that public procurement can result in a pivotal driver of social and environmental innovation (see recital 95). Therefore, it is not surprising that under the 2014/24/EU Directive the monetary amount of tenders should no longer be considered the exclusive element to be taken into account by contracting authorities in awarding procedures. On the contrary, by complementing quantitative criteria with a rather qualitative legal approach the EU legislature has been able to provide 'a non-exhaustive list of possible award criteria which include environmental and social aspects' (recital 92).

Arts 67 to 69 of the Directive contain meaningful provisions in this respect. For instance, on the one hand, the life-cycle costing is indicated to the contracting authorities as the major methodology for individuating the most economically advantageous tender. On the other hand, among the criteria which the life-cycle costing should be based on public administrations are supposed to take into account

> 'environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs'.

Social aspects, such as both the specific character of a given service and the

subjective organization of certain providers, are also capable of affecting the procedures provided for by the 2014/24/EU Directive, especially by derogating from the overall policy of opening up public procurement to competition and market. This is the case for Art 77, according to which contracting authorities have the competence to provide some specific organizations – those pursuing a public service mission, mainly committed to reinvesting possible profits in reaching collective goals, and functioning on the basis of participatory features such as 'the active participation of employees, users or stakeholders' – with a reserved right 'to participate in procedures for the award of public contracts', although for several listed health, social and cultural services[21] and under certain time conditions ('the maximum duration of the contract shall not be longer than three years').

The aforementioned remarks certainly lead to acknowledgement that public procurement remains a market-based instrument. Deriving from the sole 2014 provisions a paradigm shift in EU policies would probably be over-interpretation. However, such novelties can be seen as a noticeable change within the cultural and economic views accepted and implemented by the European Institutions. To be clearer, by building on such a reading of the 2014/24/EU Directive one can problematize some proposals made by recent Italian legal scholarship and question arguments claiming that the rise of green public procurement could, *per se*, eventually result in one of the major inputs for a deep and ecological revision of the general theory of contract.[22] Notwithstanding this, the current EU legal framework on public procurement can certainly be seen as an attempt to integrate environmental and social concerns in both an established legal narrative and a former technical infrastructure that have tended to treat public services (as well as products and works) as commodities, subject as a matter of principle to the very rationality of the market.[23]

It seems possible to trace such findings to a broader trend, according to which the overall legal policies and political discourses of the EU have been changing in a (certainly contradictory and maybe insufficient yet, although) meaningful manner. Not to mention the strategic challenges connected to the implementation of NextGenerationEU, the Recovery plan for Europe launched to face the manifold crisis caused by the covid-19 pandemic,24 for the purposes of this article it is worth highlighting that on 9 December 2021, the European Commission delivered a Communication titled 'Building an economy that works for people: an action plan

[21] To tell the truth, the list does not seem too strict in light of the provisions contained in Annex XIV of the Directive.

[22] For this standpoint see M. Pennasilico ed, *Contratto e ambiente. L'analisi "ecologica" del diritto contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2016).

[23] Such important novelties provided by the 2014/24/EU Directive have been noticed by E. Varga, n 1 above. For a comprehensive analysis see R. Caranta and A. Sanchez-Graells eds, n 2 above.

[24] See https://tinyurl.com/429xykz3 (last visited 20 September 2023).

for the social economy'.[25] This plan represents a possible step forward in those EU policies aimed at making both the activities of public administrations and the undertakings of economic actors more and more committed to the effective fulfilment of major societal needs. At a general level, the Commission has explicitly recognised the increasing role of the social economy by pointing out how this model covers a varied range of legal and organizational arrangements as well as economic sectors. In other words, even from the European Commission's standpoint the wording *social economy* seemingly alludes to an overall mode of producing, managing and providing goods and services, characterized by the following principles:

> 'the primacy of people as well as social and/or environmental purpose over profit, the reinvestment of most of the profits and surpluses to carry out activities in the interest of members/users ("collective interest") or society at large ("general interest") and democratic and/or participatory governance'.[26]

Such an acknowledgement is linked to the most updated debates on the issue – think of that scholarship claiming that we are

> 'at a crossroads: either the social economy will remain separate from the rest of the economy, or it will permeate the broader global economy and contribute to changing the way all business is done'[27]

– and entails some important legal implications. For instance, the Commission regrets that 'most public tenders are still awarded based only on the price criterion'[28] and expresses its commitment to reinforcing as much as possible the awareness among the member States about the potential of socially responsible public procurement. An effort to foster experimentation of new legal and organizational models, such as social outcome contracting, is mentioned as well.[29]

However, one has to bear in mind that the main focus of the recent action

[25] All the relevant documents can be accessed at https://tinyurl.com/33ednxrj (last visited 20 September 2023). For a first analysis of the Communication and its implications in the Italian legal framework see G. Gotti, 'Il Piano d'azione europeo per l'economia sociale e i riflessi sull'ordinamento italiano' *Impresa Sociale*, 30-44 (2022).

[26] European Commission, 'Building an economy that works for people: an action plan for the social economy', 2021 (5).

[27] J. Battilana, 'For Social Business to Become the Norm, We Need to Build a Social Business Infrastructure' *Stanford Social Innovation Review*, (2021), available at https://tinyurl.com/3rxmbb2r (last visited 20 September 2023). For another contribution by this author see I. Ferreras, J. Battilana and D. Méda, *Democratize Work. The Case for Reorganizing the Economy* (Chicago: The University of Chicago Press, 2022). See also G. Krlev et al, 'Reconceptualizing the Social Economy' *Stanford Social Innovation Review*, (2021), available at https://tinyurl.com/yavk9ydt (last visited 20 September 2023).

[28] European Commission, n 26 above, 10.

[29] In this respect see L. Klimavičiūtė, V. Chiodo, *Study on the Benefits of Using Social Outcome Contracting in the Provision of Social Services and Interventions* (Luxembourg: Publications Office of the European Union, 2021).

plan for the social economy is still on the established field of public procurement, whereas different legal relationships between contracting authorities and private actors involved in the social economy are not explicitly considered. Even though during the consultation process many stakeholders

> 'highlighted the need to revise and adapt EU competition and State aid rules to the particularities of social economy entities and called on specific changes to legislation and initiatives',[30]

the European Commission's primary goal has been about developing the full social potential of existing EU law, according to the view that 'it's good if you have a new law, but it's better to fully implement existing laws'.[31]

III. Questioning Competition as the Major Organizational Criterion for Public Services

The trends described in the preceding section seem capable of providing the longstanding contradiction between market-oriented views and alternative goals of policy with unprecedented intensity. In this respect, it has become commonplace that the EU's ordoliberal legal framework on public services is not neutral in at least two senses. First, crucial importance should be assigned to the rising awareness that the distinction between economic and non-economic SGI is not at all about *ontology* or *nature*, since the economic quality of a given service – and the consequent need for opening up it to the market – depends on the political choices and the legal features through which that service is managed and provided. Second, it is currently easy to notice the inner polyfunctionality of regulatory approaches in that a legal framework cannot be solely aimed at fostering competition and assuring the well-functioning of the market: on the contrary, it is supposed to pursue either complementary or conflicting goals, such as the protection of end-users rights and redistribution.[32]

[30] Commission Staff, 'Working Document Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Building an economy that works for people: an action plan for the social economy', 27 (2021), available at https://tinyurl.com/2vdhceya (last visited 20 September 2023).

[31] Here I quote one of the policy officers of the European Commission I met for an interview about the action plan for the social economy.

[32] According to H.W. Micklitz, recent developments of the so-called *rationality doctrine* could lead to see the dialectic between the well-functioning of the market (ie the full deployment of the four fundamental freedoms) and other legal and political concerns from an unprecedented perspective. In particular 'in secondary EU law, it [the rationality doctrine] offers new opportunities for efficient (in the meaning of redistribution) and effective (in the meaning of societal impact) legislative means in labour, non-discrimination and consumer law. First and foremost, however, it allows for the reversal of the priority between freedom and restrictions. Not only do restrictions have to be justified, but so too freedoms' (H.W. Micklitz, *The Politics* n 2 above, 264). For a general

This new perspective has given room to a twofold critique of those dominant market-oriented conceptions which have been providing competition with a pivotal role in the domain of public services.

Some remarks, eg those coming from non-orthodox economic analysis of law, have long been representing the negative side of the critique and have become widespread in the contemporary reflection on public services. The rise of competition within the field and for the field in societal sectors formerly focussed mostly on their missions of general interest has been found to be problematic for several reasons. Natural monopolies are no doubt a major challenge since they could entail monopoly rents, socially unjust supply and profits, informational asymmetries in favour of the monopolists and lack of adequate investments in the quality of service, not to mention the barriers newcomers have to deal with if they aim at competing for the field.[33]

In another respect, in spite of some improvements in terms of legal protection (eg the so-called universal service obligations and the application of rules on unfair clauses), possible threats to social cohesion derive from the transition from the legal status of citizens to one of end-users/consumers. Indeed, citizens are supposed to have multifaceted and politically meaningful relations with public administrations and service providers, whereas end-users/consumers use to conclude bilateral contracts with the providers in order to access utilities at market conditions unless either regulatory interventions or their fundamental rights come into the picture.[34] Regardless of the variety of their legal arrangements, privatization processes tend to result in a lowering of employees' conditions as well, both in terms of wages and with respect to the overall legal treatment as workers. The establishment of Authorities as new institutional actors and their crucial role in giving effect to regulatory frameworks can be traced to another set of critical issues. Indeed, the legal understanding of administered contracts has been a major topic in European private law since such contracts are relevant to the interplay between freedom of contract, private autonomy, heteronomous sources of the very content of the contract, presence of multiple interests in the contractual relation. From a general and rather traditional standpoint, even the political legitimacy of Authorities and the compatibility of their role with the rule of law have been an open question for a while. Lastly, a major focus is on the shortcomings of the legal relations between contracting administrations and privates. In this respect, the overall strategy of opening up public services to the market has often meant incremental losses of know-how and human resources within the public sector, with negative

understanding of the topic see D. Simeoli, n 4 above; and D. Oliver, T. Prosser and R. Rawlings eds, *The Regulatory State: Constitutional Implications* (Oxford: Oxford University Press, 2010).

33 Two classical readings in this respect are V.P. Goldberg, 'Regulation and Administered Contracts' 7 *The Bell Journal of Economics*, 426-448 (1976); and C.D. Foster, *Privatization, Public Ownership and the Regulation of Natural Monopoly* (Oxford and Cambridge, MA: Blackwell, 1992).

34 Some of these issues are noticed by P. Vincent-Jones, 'The New Public Contracting: Public Versus Private Ordering?' 14 *Indiana Journal of Global Legal Studies*, 259-278 (2007).

consequences for administrative efficiency in the long run. Weakened public administrations are more exposed to outcomes such as growing costs and difficulties in monitoring as well as the rise of many forms of regulatory capture, especially when concentrations of economic power arise. Indeed, the latter phenomenon was already noticed sixty years ago, since

> 'in any society with powerful or dominant private groups, it is not unexpected that governmental systems of power will be utilized by private groups. Hence the frequency with which regulatory agencies are taken over by those they are supposed to regulate'.[35]

The aforementioned issues are more or less commonplace within European legal culture. What is less obvious, even though the topic is a usual one, is the extent to which the supposedly clear-cut public-private divide has been challenged by the interplay between public services, the State and market. Both the depth of such an ongoing 'blurring or fusing of public and private' and the pivotal role of public services for such an institutional process were already noticed at the apex of the welfare state era.[36] Then the rise of neoliberalism has been a turning point: all relevant actors (contracting authorities, private actors, legislatures, scholars) were forced to reflect on the changing boundaries between state and market; the potential integration of diverse social and legal rationalities became an open and delicate issue.

To tell the truth, the first wave of privatization policies was not so involved in such a discussion, being mostly focussed on opening up to the market as many sectors as possible of the traditional publicly organized and provisioned welfare. Well soon different perspectives came into the picture, challenging the dominant idea of an ineluctable withdrawal of the public sector and foreseeing a more sophisticated institutional framework. From this standpoint,

> 'quasi-market organization entails an intensification of governmental activities directed at building markets, allocating responsibilities among the public and private agencies engaged in public service networks, and establishing other regulatory conditions for more effective or efficient service provision'.[37]

In light of the increasing role of contractual relations in dealing with such evolving issues, these debates must be regarded as one of the major foundations of the overall reflections on the interplay between contractual governance and governance through contract. Indeed, one has to bear in mind

[35] C.A. Reich, 'The New Property' n 17 above, 768.

[36] The quotation comes again from ibid 746. The author clarified that the blurring was apparent in that 'many of the functions of government are performed by private persons; much private activity is carried on in a way that is no longer private'.

[37] P. Vincent-Jones, n 34 above, 263.

> 'that contractual governance of a post-industrial welfare state, whether in terms of democratic participation, effective governance, or a "constitutionalization" of private law, must endorse a non-unifying understanding of the public-private divide in one way or the other'.[38]

Such a renovated approach is among the major building blocks of those more constructive criticisms of the role of competition that have been trying to foresee viable alternatives to traditional views in the legal and institutional domain of public services. On the one hand, one can notice that the trust in market and competition as the dominant organizational criteria for these core societal activities has been questioned – and somehow complemented – by the rise of both new political awareness and new legal objectives (see the preceding section in this respect). On the other hand, the attempt to go beyond competition has enabled a variety of theoretical proposals which have in common the development of more sophisticated views of contracts. This can be seen in the aforementioned reflection on the 'quasi-markets' of public services, which can be traced to a broader and socially oriented understanding of new public contracting.[39] The application of the contractual governance perspective to the domain of public services must be considered as well since it leads to questioning the traditional conception of contract – grounded in its very bilateral, discrete and antagonistic model – and highlights the rising long-term, organizational and hybrid potential of this legal institution, this implying the crisis of the pillar of the privity in light of contract's increasing capacity to serve multiple (either concurring or conflicting) interests.[40] Another instance is the influential claim aimed at addressing public services and regulation by enhancing the relational contract paradigm instead of accepting ordoliberal approaches. According to this standpoint, 'regulation can be viewed, in effect, as a long-term, collective contract for provision of a changing set of services'.[41]

IV. Demonstrative Interlude: A Look at the Italian Laboratory

[38] P. Zumbansen, n 16 above, 223.

[39] P. Vincent-Jones, n 34 above and, later on, Id, 'Relational Contract and Social Learning in Hybrid Organization', in D. Campbell, L. Mulcahy and S. Wheeler eds, *Changing Concepts of Contract. Essays n Honour of Ian Macneil* (London: Springer, 2013), 216-234.

[40] See S. Grundmann, F. Cafaggi and G. Vettori eds, *The Organizational Contract. From Exchange to Long-Term Network Cooperation in European Contract Law* (London: Routledge, 2013); and K.H. Ladeur, 'The Role of Contracts and Networks in Public Governance: The Importance of the "Social Epistemology" of Decision Making' 14 *Indiana Journal of Global Legal Studies*, 329-351, especially 333 (2007). For a general discussion see S. Grundmann et al eds, *Contract Governance. Dimensions in Law and Interdisciplinary Research* (Oxford: Oxford University Press, 2015). For the Italian perspective see G. Carapezza Figlia, 'I rapporti di utenza dei servizi pubblici tra autonomia negoziale e sussidiarietà orizzontale' *Rassegna di diritto civile*, 440-466, especially 448 (2017).

[41] V.P. Goldberg, 'Protecting the Right to Be Served by Public Utilities' 1 *Research in Law & Economics*, 145-156 (1979). In more general terms see I. Macneil, *The New Social Contract. An Inquiry Into Modern Contractual Relations* (New Haven: Yale University Press, 1980).

The above-discussed arguments eventually allow us to conceive contract as a possible tool of decommodification, capable of dealing with the several shortcomings connected to an excessively competition-based regulation of public services. Further discussion in this respect is in the last three sections of this work, while in introducing this brief section it is worth endorsing the opinion that

> 'privatization has the effect of re-importing these conflicts into the economic arena. Paradoxical as it sounds, after privatization, political conflicts about public services are indeed increasing'.[42]

In fact, since it has been mirroring and somehow emphasising the European trends in both enacting former market-oriented policies and enhancing more recent collaborative and social issues, the Italian legal framework on public services can be seen as a clear explanation for the argument developed throughout these pages. At the dawn of the age of austerity policies, the Italian legislature passed the decreto legge 25 June 2008 no 112, whose Art 23-*bis* went far beyond the EU regulatory framework by setting the principle of the privatization of all local public services characterized by 'economic relevance'. Such a regulation was dealt with by Corte Costituzionale 17 November 2010, no 325.[43] The very notion of economic relevance was at the core of this landmark judgment and was read by building on a *radical* understanding of the (*per se* questionable) European concept of economic activity. On the one hand, the Court clarified that under Italian law there is economic relevance whenever a service can be managed by a plurality of operators in even potential (and not only actual) market conditions. On the other hand, the legal definition of the conditions of economic relevance was found to be the competence of the State's exclusive legislative power in the field of the protection of competition (Art 117, para 2 lett e) of the Italian Constitution). As a result, the naturalistic view of economic relevance led to considering constitutionally lawful imposing to public administrations a generalised obligation (presenting very strict exceptions) to put on the market local public services, through an expansive application of the domestic regime of public procurement (currently the decreto legislativo 31 March 2023 no 36, 'code of public contracts').[44]

In addition to the influence of the dominant European views on the economic

[42] G. Teubner, 'After Privatization? The Many Autonomies of Private Law' *Current Legal Problems*, 393-424 (1998). See also U. Mattei and F. Nicola, 'A "Social Dimension" in European Private Law? The Call for Setting a Progressive Agenda' 41 *New England Law Review*, 1-66 (2006).

[43] The judgment is available at www.cortecostituzionale.it. For two comments see A. Lucarelli, 'Primissime considerazioni a margine della sentenza n. 325 del 2010' *Rivista AIC* (2011), available at https://tinyurl.com/m7h7dwrn (last visited 20 September 2023); and L. Cuocolo, 'La Corte costituzionale "salva" la disciplina statale sui servizi pubblici locali' *Giornale di diritto amministrativo*, 484-493 (2011).

[44] On the understanding endorsed by the Italian Constitutional Court see, in addition to the references contained in the preceding note, E. Scotti, n 6 above. For a private law perspective see G. Carapezza Figlia, 'Concorrenza' n 12 above. The new code, which is the product of a significant effort of legislative reform, has been in force from 1st April 2023.

character of SGI, it seems possible to trace such a radical market-oriented legal and interpretative policy to at least two peculiar features of the Italian way of dealing with the institutional problem of public services. The first one is recent and is about how the horizontal subsidiarity principle was understood in the aftermath of its inclusion within the Italian constitutional framework in 2001. Even though revised Art 118, para 4 of the Italian Constitution just provides that

> 'State, Regions, metropolitan Cities, Provinces and Municipalities facilitate autonomous initiatives of both individual and organised citizens in carrying out activities of general interest, by building on the subsidiarity principle',[45]

during the first decade of the current century this sentence was mostly found to be a clear constitutional choice in favour of privatization and of opening up as many activities as possible to the rationality of the market.[46] The second aspect is much more ancient since it regards the roots of the Italian legal conception of public services. In fact, according to an influential scholarship, one can notice that at the very origins of the welfare state – late XIX century, early XX century – the Italian legal culture rejected the rising French theory of the *service public*. Instead of grounding the understanding of the legal relations among public administrations, providers and citizens on the collective and solidarity-oriented character of public service activities, Italian scholarship chose to defend the institutional dominance of the State's sovereignty by adopting the epistemological framework established by German jurisprudence. To put it in simple terms, a theoretical individualization and binarization of the complex social relationships regarding public services was reached through the isolated and correlative relation between the *duty of* and the *right to* public services performance (the Italian wording alluding to the category of 'rapporto giuridico di prestazione').[47]

This conceptual move can be seen as the legal prerequisite of two long-lasting intertwined outcomes. On the one hand, once recognised as legally meaningful the collective entitlements to the utilities provided through public services (or, from

[45] Translation is mine.

[46] The year before the reform of the Italian Constitution a useful introduction to the issue was provided (in Italian) in P. Duret, 'La sussidiarietà «orizzontale»: le radici e le suggestioni di un concetto' *Jus*, 95-145 (2000). In recent years an influential Italian scholarship has been building on a richer reading of the horizontal subsidiarity principle to develop a new understanding of contract as a major legal institution. See in this respect P. Perlingieri, 'Persona, ambiente e sviluppo', in M. Pennasilico ed, n 22 above, 321-342; and F. Maisto, 'Subsidiarity and the New Frontiers of Freedom of Contract' 7 *The Italian Law Journal* 2, 731-742 (2021).

[47] For such an insight see B. Sordi, 'Dall'attività sociale ai pubblici servizi: alle radici ottocentesche dello Stato sociale' 46 *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 175-198, especially 187 to 196 (2017). The concept of binarization is addressed in P. Femia, 'Il civile senso dell'autonomia' 25 *The Cardozo Electronic Law Bulletin* (2019) available at https://tinyurl.com/4cp8nc6z (last visited 20 September 2023). On correlatives see the classical reference of W.N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Juddicial Reasoning' 26 *Yale Law Journal*, 710-770 (1917).

Victor P. Goldberg's standpoint, the rights to be served) have been deemed to be dependent on an institutionally asymmetric legal relationship so that it has been rather easy – think of the successful Italian category of 'financially conditional social rights' – to allow the State to limit citizens' rights in light of its sovereign and discretionary choices.[48] On the other hand, throughout the last decades, individualization and binarization have facilitated rather antagonistic conceptions of contractual relationships between service providers and end-users, this having constituted one of the basic frames of reference for the above-noticed rise of consumer law and of Authorities' interventions.[49]

Although such elements could partially explain its success, the aforementioned dominant policy caused grassroots reactions so that widespread political conflicts arose and the alternatives to privatization in the production, management and provision of public services became an open question in the Italian public discussion. In fact, the 2008 legislative regulation on local services was repealed in 2011 by virtue of a popular referendum whose major claims were twofold: first, water was reclaimed as a commons, with an effort to challenge any attempt to commodify the resource and its management; second, the pivotal democratic importance of combining transparency, participation and affordable access in the whole domain of public services was pointed out.[50]

Since describing the evolving interplay of statutory provisions, case law and political struggles about the Italian regime of local public services is not so relevant to this article, one can just notice that the domestic legal framework has changed in the last few years. In the attempt to enhance and systematise the potential of some European case law concerning emergency services,[51] Art 55 to 57 of decreto legislativo 3 July 2017 no 117 ('code of the third sector') eventually provided for general regulation of the involvement of non-profit organizations in the *co-planning* of social services interventions. Although the scope of these new pieces of law is rather limited from both a subjective and an objective perspective – only third-sector organizations are supposed to be involved in the regulation; the procedures established by the legislature are relevant to some social services of general interest

[48] On financially conditional social rights see S. Pellizzari, 'New commons e servizi sociali. Il modello dell'amministrazione condivisa tra autonomie territoriali, terzo settore e società civile organizzata', in M. Bombardelli ed, *Prendersi cura dei beni comuni per uscire dalla crisi. Nuove risorse e nuovi modelli di amministrazione* (Trento: Università degli Studi di Trento, 2016), 249-278, especially 259-260. More comprehensive reflections on the topic are in A. Baldassarre, 'Diritti sociali' *Enciclopedia giuridica* (Roma: Treccani, 1989), XI; and F. Merusi, *Servizi pubblici instabili* (Bologna: il Mulino, 1990). A recent and very significant critique of the notion came from the constitutional case law: see Corte Costituzionale 16 December 2016 no 275, available at www.cortecostituzionale.it.

[49] For a discussion on the Italian legal framework see G. Carapezza Figlia, 'I rapporti' n 40 above, especially 441-442.

[50] In this respect see U. Mattei, 'Protecting the Commons: Water, Culture, and Nature: The Commons Movement in the Italian Struggle against Neoliberal Governance' 112 *South Atlantic Quarterly*, 366-376 (2013).

[51] See n 20 above.

only –, the relational and collaborative view they assume has been stimulating a broader discussion on the potential conflict between the cooperative and socially-oriented approach of the code of the third sector and the more traditional trust in competition and market for the overall regulation of public services.

In this respect, the Consiglio di Stato dealt with the possible interferences between public procurement and co-planning in the Opinion 20 August 2018 no 2052. A very restrictive reading of the rules on co-planning was provided together with a reiteration of the naturalistic and competition-oriented views of the economic relevance of service. However, the Constitutional Court rejected such a mindset with two judgments: Corte Costituzionale 26 June 2020 no 131 and Corte Costituzionale 26 November 2020 no 255.[52] These decisions enhanced the role of the provisions contained in the code of the third sector. In the Court's opinion, contracting authorities and privates (non-profit organizations) are capable of establishing not only antagonistic bilateral contracts under the code of public contracts, but also more relational agreements, based on shared goals and on the aggregation of public and private resources for planning in common services and interventions aimed at fostering social security and citizens' participation, far beyond the mere utilitarian exchange.

The understanding developed by such a groundbreaking constitutional case law is very close to the 'cooperative concept' analyzed with respect to the 2014/ 24/EU Directive (recital no 33). Accordingly, one can notice that in recent years the Italian legal framework has been unexpectedly capable of putting a strong emphasis on the social potential of public contracting, even before the European Commission delivered the action plan for the social economy in 2021. Indeed, with decreto legge 16 July 2020 no 76 the domestic legislature upheld the doctrine of the Constitutional Court through a revision of Arts 30, 59 and 140 of the previous code of public contracts. Art 6 of the current code (the aforementioned decreto legislativo 31 March 2023 no 36) eventually provides, as a matter of principle, that

> 'in fulfilling the social solidarity and horizontal subsidiarity principles, with respect to notably social activities the public administration can adopt cooperative organizational models, based on contractual relations lacking consideration and on the sharing with privates of the public function, provided that Third Sector entities contribute to reach social objectives in conditions of equal treatment, with effectiveness and transparency, in base of the outcome principle. (…)' (translation is mine).[53]

[52] With respect to such a major case law see E. Rossi, 'Il fondamento del Terzo settore è nella Costituzione. Prime osservazioni sulla sentenza n. 131 del 2020 della Corte costituzionale' *Forum di Quaderni Costituzionali* (2020), available at www.forumcostituzionale.it; and G. Arena, 'L'amministrazione condivisa ed i suoi sviluppi nel rapporto con cittadini ed enti del Terzo Settore' *Giurisprudenza costituzionale*, 1449-1457 (2020).

[53] A detailed overview on such collaborative relations is provided for by the guidelines contained in decreto ministeriale of 31 March 2021 no 72. It is also worth noticing that the future code

V. Dealing with Public Services in Light of Different Conceptions of Contract

In summarising the above discussion, one can recognise that the recent trends in the regulation of public services have led major institutional issues to a point of no return. On the one hand, the interplay between competition and cooperation in the organization of activities of general interest has become apparent. The dominance of the market-oriented category of SGEI has been questioned. Public contracting models which are beyond public procurement have been regulated even at domestic levels. On the other hand, the rise of social and environmental commitments has come so far that the traditional public procurement paradigm is affected. Environmental aspects should be at the core of all public tenderings. Both objective and subjective characters of some services and of potential providers (eg emergency or social nature of the service; not-for-profit and participatory organization of the provider) are relevant to meaningful derogations from the general legal framework, such as reserved procedures and exclusions.

In spite of these novelties, there are some persisting doubts on whether and to what extent the rising cooperative and context-sensitive mindset is effective and capable of gradually reshaping the organization of public services. In this respect, the choice of the European Commission to launch an action plan in late 2021 can be found to be the evidence of a still insufficient social orientation of the domestic legal frameworks and practices in the domains of public services and public procurement.

While further issues will be mentioned in the last section of this work, at this stage in the development of the argument one can notice that the aforementioned state of the art certainly alludes to a matter of mentalities. In the end, the long-lasting hegemony of market-oriented views has affected the way in which all involved actors and stakeholders – contracting authorities, providers, end-users, workers – deal with and reproduce the very functioning of the public services sector.

Beyond this, in the analytical framework of this article a rather legal argument is crucial, since one can claim that a core obstacle to the establishment of cooperative and participatory organizational settings for public services is in the epistemological and technical limits of the very concept of public procurement. While it maintains a pivotal role from both an institutional and a symbolic perspective, the notion of public procurement seems indeed grounded in the bilateral, discrete and antagonistic view of contract. In spite of the increasing regulatory complexity of this branch of the law, such an original linkage is apparent

of public contracts will eventually contain a more general provision. According to Art 6 of the draft decreto legislativo approved by the Italian Government, 'in fulfilling the social solidarity and horizontal subsidiarity principles, with respect to notably social activities the public administration can adopt cooperative organizational models, based on contractual relations lacking consideration and on the sharing with privates of the public function, provided that Third Sector entities contribute to reach social objectives in conditions of equal treatment, with effectiveness and transparency, in base of the outcome principle. (…)' (translation is mine).

in EU secondary law and implies that binarization and privity remain, at least in principle, the core institutional features of those contractual relations deriving from public procurement procedures.[54] One can notice that such a framework is not accidental. The above-mentioned traditional understanding considers contract (together with individual and exclusive property rights) as the basic infrastructure of a well-functioning market,[55] and this has been going hand in hand with the major goal of EU policies in the domain of public services, namely the attempt to open up as many *economic* SGI as possible to the rationality of the market. In fact, the 'troubling coincidence' between the privatization of the welfare state and the renovated influence of traditional contract theory has been clearly pointed out. As put forward by Zumbansen,

> '(…) just as we can perceive a return of formalism in the public law discourse over regulatory governance, we see in current contract law discourses a striking insulation of contractual bargaining from the social relations that are shaped by contract. This insulation of contract rights from the political economy that is shaping them, and in which they are simultaneously implicated, is the more troubling as its success rests on the reintroduction of the public-private distinction, which we had believed we had productively overcome already a long time ago'.[56]

Far from being obsolete, the traditional view of contract seems capable of maintaining a strong influence. This seems true for the theory considering contracts as morally meaningful collaborative communities. Even though the reflection is explicitly limited to certain transactions among individual persons (even the most self-interested ones, whereas 'relations involving organizations (…) cannot directly participate in the value of contractual collaboration'), such a standpoint is important since it posits that bargain owns an intrinsic value in being the logical scheme of a specific collaborative relation among individuals:

> 'bargains therefore generate relations in which the bargainers engage each other, and subject themselves to each other's authority, in precisely the pattern that collaboration requires. Bargains also underwrite such collaborative relations simply by virtue of their formal structure, and regardless of their

[54] On this point see, again, P. Femia, n 47 above, and G. Teubner, 'After Privatization?' n 42 above.

[55] The groundbreaking work on the topic is R.H. Coase, 'The Problem of Social Cost' *Journal of Law & Economics*, 1-44 (1960). Another classical contribution is H. Demsetz, 'Towards a Theory of Property Rights' 57 *The American Economic Review*, 347-359 (1967). Critical contributions are in A.T. Kronman, 'Contract Law and Distributive Justice' 89 *The Yale Law Journal*, 472-511 (1980); and in G. Calabresi, 'The Pointlessness of Pareto: Carrying Coase Further' 100 *The Yale Law Journal*, 1211-1237 (1991).

[56] P. Zumbansen, n 16 above 206.

substantive fairness'.[57]

The legacy of traditional conceptions of contract is also apparent with respect to the networks of contracts, a topic of major importance which seems capable of offering helpful insights for a better understanding of the domain of public services and their organizational patterns. Both the economic importance of networks and their 'provocative power' have given rise to a new era of contract theory: (i) the complex relational and organizational dimensions of contract have been enhanced; (ii) contractual relations have been seen as the dynamic point of intersection of multiple interests and rationalities, as well as the expression of unprecedented tensions between private ordering and heteronomous regulations; (iii) scholars have been trying to understand whether and how contract law is capable of regulating and governing contemporary 'trans-subjective evolutionary structures'.[58] In spite of such a theoretical and operational complexification, some reflections have maintained a narrow understanding of the issue. In this respect, the term network has been considered

> 'a legal concept in a wider sense' only. Networks have been found to be relevant to competition law and contract law in spite of such a status of quasi-legal concept, the reason being 'simply that contracts are the legal media to organize competition'.[59]

Findings coming from the discussions on networks of contracts should be carried further, since they seem relevant to the way in which European private law affects the management and provision of public services. Indeed, the attempt to take seriously the cooperative approach to public services requires to go beyond the traditional view of contract. In order to foster and refine these emerging organizational models a 'radical understanding of contract theory'[60] should be pursued, this implying first and foremost that the 'extreme caricature of contract'[61] based on discreteness, presentiation and anonymity should be abandoned.

To put it in simple terms, the rising trend toward cooperative and participatory production, management and provision of public services can be seen as one among the major laboratories for rethinking the institutional role of contract within European

[57] D. Markovits, 'Contract and Collaboration' 113 *The Yale Law Journal*, 1417-1518 (2004). The quoted sentence regarding organizations is at 1465. Alongside the core theoretical claim, this work eventually recognises that there could be forms of contractual collaboration that are beyond consideration (at 1488).

[58] G. Teubner, ' "And if I by Beelzebub Cast out Devils, ...": An Essay on the Diabolics of Network Failures', in S. Grundmann, F. Cafaggi and G. Vettori eds, *The Organizational Contract* n 40 above, 113-135, especially 125. See also K.H. Ladeur, 'The Role of Contracts' n 40 above.

[59] M. Martinek, 'Networks of Contracts and Competition Law', in S. Grundmann, F. Cafaggi and G. Vettori eds, *The Organizational Contract* n 40 above, 163-178 (178).

[60] M.W. Hesselink, 'The Right to Justification of Contract' 33 *Ratio Juris*, 196-222 (2020).

[61] V.P. Goldberg, 'Regulation' n 33 above. See also Id, 'Toward an Expanded Economic Theory of Contract' 10 *Journal of Economic Issues*, 45-61 (1976).

private law. In fact, the organization of such activities highlights that contract is capable of being the legal infrastructure both serving and shaping complex societal exchanges, characterized by long-term and multi-party legal relations.

This cannot but lead to question the privity of contract and to challenge the insulation of single contractual relations – eg those between public administrations and service providers; those between service providers and end-users; those between service providers and public services employees – from the contexts in which they are embedded. Externalities and distributive implications of such contracts can no longer be ignored.[62] The dynamic relational dimension of contracts organizing the production, management and provision of public services should be enhanced as well, so that opening up the 'black box'[63] of contract becomes possible by tracing the very legal regime of these activities not only to the mere economic rationality of the market, but also to a variety of sectorial rationalities that have long been asking private law theory to accept 'to rethink the one (*de facto*, economic) autonomy of the free individual into the many autonomies of different social worlds'.[64]

By building on these findings, claiming that contemporary contract law is able to definitively overcome the binary divide between economic and non-economic SGI is not exaggeration. More importantly, one can eventually foresee that the technical and institutional sophistication of contract allows it to function as a possible tool for decommodification. Several theoretical contributions relevant to public contracting and the legal regime of public services can be gathered in this respect since they share the attempt to challenge the simplistic equivalence between contract and market by adopting a rather pluralistic contract theory.[65] For instance, the above-mentioned understanding of regulation and administered contracts as relational contracts (see section 3) can be enhanced since it shows the long-lasting existence of alternatives to the ordoliberal view of regulatory private law.[66]

The relational contract theory – with its focus on the integrity of contractual roles, flexible planning and renegotiation, not to mention the overall awareness of the social matrix to which a contractual relation should be traced[67] – has also been the epistemological base for those reflections on new public contracting both defining public services as quasi-markets and pointing out

[62] Almost twenty years ago the Study Group on Social Justice in European Private Law pointed out that 'to the extent that nation states reduce their use of the direct re-distributive mechanisms of the welfare state, the distributive effects of the market become the determining force governing people's life chances. A modern statement of the principles of the private law of contract needs to recognise its increasingly pivotal role in establishing distributive fairness in society' ('Study Group on Social Justice' n 14 above, 665).

[63] V.P. Goldberg, 'Regulation' n 33 above, 427.

[64] G. Teubner, 'After Privatization?' n 42 above, 399.

[65] For the debates on pluralism in contract theory see S. Grundmann, H.W. Micklitz and M. Renner, n 13 above; H. Dagan and M.A. Heller, *The Choice Theory of Contracts* (Cambridge: Cambridge University Press, 2017); D. Markovits and A. Schwartz, 'Plural Values in Contract Law: Theory and Implementation' 20 *Theoretical Inquiries in Law*, 571-593 (2019).

[66] Compare V.P. Goldberg, 'Protecting' n 41 above; and D. Simeoli, n 4 above.

[67] I. Macneil, n 41 above.

> 'the potential of contracts to serve in the public interest as mechanisms for the promotion of social learning among all parties with interests or stakes in the services under consideration'.[68]

Other influential doctrines on contractual governance and on reflexive autonomy come into the picture as well, since they have shown how public contracting is a delicate and experimental field for understanding contract beyond the binary confrontation between both autonomy and heteronomy and private and public.[69] In this respect, the contract can eventually be

> 'perceived as a highly sensitive framework, concept and instrument with which most divergent societal expectations and rationalities can be brought into confrontation, channelled, reformulated, and sustained'.[70]

VI. End-Users, Consumers, Citizens. Carrying Reich Further

Recognising that contractual relations serve and shape a variety of interests in the production, management and provision of public services entails a major implication in that the legal entitlements of all involved subjects should be reconsidered in understanding the organization of such activities of general interest. Although actors such as workers, or even regulatory Authorities, could be relevant to this reflection, in this work it is particularly worth dealing with the position of end-users. The reason for focusing on the sole entitlements of end-users to public services is that this issue has been stimulating major theoretical reflections, strongly connected with both the rise and fall of the welfare state and the above-discussed transformations of contractual relations.

One point of departure in this discussion can be seen in the already mentioned contribution by Charles A. Reich, who proposed the new property theory exactly as a way to deal with his problematic understanding of the expansion of public policies in the everyday life of the United States. On the one hand, Reich highlighted in a pioneering manner the *dark side* of the welfare state by showing the political relevance of many possible conditions in the provision of what he used to call 'government largess' – from the systemic discrimination of subjects suspected of communism or other subversive political engagement under McCarthyism to a

[68] P. Vincent-Jones, 'Relational Contract' n 39 above, 225. Some relational and institutional conditions for having successful new public economic contracting are indicated in Id, 'The New Public' n 34 above, especially 270-275.

[69] In a theoretical perspective see K.H. Ladeur, 'The Role of Contracts' n 40 above, especially 349. Some insights about the Italian legal framework are in G. Carapezza Figlia, 'I rapporti' n 40 above.

[70] P. Zumbansen, n 16 above, 230. On the pluralistic and reflexive view of private autonomy see G. Teubner, 'And if I' n 58 above, and Id, 'After Privatization?' n 42 above, especially 397-399.

broader disciplining potential.[71]

On the other hand, such an awareness led him to advocate the rise of the new property in order to defend the epistemological and legal standpoint of individualism in a context where 'there can be no retreat from the public interest state'. According to Reich, in fact,

> 'if public and private are now blurred, it will be necessary to draw a new zone of privacy. If private property can no longer perform its protective functions, it will be necessary to establish institutions to carry on the work that private property once did but can no longer do'.[72]

At the time when it appeared Reich's reflection on the new property was received with a certain scepticism in Europe for two reasons. First, scholars working on property law were aiming at questioning rather than renovating the role of (individual) property as a major legal institution, since they tended to base their analyses on the deep connection between private property, individualism, exclusion and inequality. Second, national legal frameworks such as the Italian one were experimenting with a huge democratic expansion of the welfare state, grounded in both the post-World War II Constitutions and in the public positive actions implementing social rights of the citizens.[73] In spite of this, Reich's intuitions have been crucial for understanding both ancient problematic aspects of the welfare state and some of the core transformations that occurred also in Europe throughout the last decades, as is discussed in the preceding sections.

With respect to the legal entitlements of end-users to public services, the debate on the new property certainly paved the way for framing the tension between the right to be served (of the citizens) and the right to serve (of the providers). In the Seventies, Victor P. Goldberg's reflections in this regard have been groundbreaking, since they highlighted the complex interfering entitlements relevant to the organization of public services. Such contributions enhanced the theoretical consideration for the elements – eg the rather inelastic structure of the user demand curve, especially after he or she enters into a long-term contractual relation involving the provision of public service – causing 'the vulnerability of the individual customer to arbitrary treatment by the utility'.[74] The analytical framework developed by Guido Calabresi and A. Douglas Melamed[75] has been adopted as well in order to discuss the variety of property rules and liability rules

[71] See C.A. Reich, 'The New Property' n 17 above, 746-751. For an overview regarding the last decades see J. Soss, R.C. Fording and S.F. Schram, *Disciplining the Poor. Neoliberal Paternalism and the Persistent Power of Race* (Chicago: The University of Chicago Press, 2011).

[72] C.A. Reich, 'The New Property' n 17 above, 778.

[73] A clear and influential instance of such approaches is in S. Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni* (Bologna: il Mulino, 2013).

[74] V.P. Goldberg, 'Regulation' n 33 above, 440 (the quoted sentence is at footnote 57).

[75] G. Calabresi and A.D. Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' *Harvard Law Review*, 1089-1128 (1972).

capable of protecting the right to be served of end-users and of balancing it with the right to serve of the providers.[76] Even in light of his overall view of regulation as a relational contract, providing end-users with a combination of rules – namely with

> 'a *choice* between (1) termination with compensation for reasonable reliance and (2) enjoining termination, but paying damages (a higher price) to the producer' –[77]

seems the favoured alternative from Goldberg's standpoint.

In spite of this thorough understanding of the problems related to the regulation of end-users' entitlements to public utilities, the rise of neoliberalism and the age of privatizations have implied major changes in the legal conception of the position of citizens. As has been noticed above, a transition from the status of citizens to the qualification as consumers occurred. Accordingly, the right to be served has been traced to the BtoC relation between providers and consumers so there has been a shift from the politically meaningful former category to a narrower and market-based view. In fact, while it is worth underlining their important role and their connection with the emerging constitutionalization of European private law, one cannot but recognise that principles and rights such as universal service and affordability, continuity and quality of service have been initially established in an overall ordoliberal legal framework, namely to protect weaker parties in long-term bilateral and antagonistic contractual relations subject to the very rationality of the market.[78]

The standpoint adopted in this work is substantially different. Through a technical complexification and a cultural repoliticization of the legal discourse on contractual relations regarding public services, it becomes possible to carry Reich's intuition further by claiming that end-users are less consumers than citizens, whose collective (rather than individualistic) entitlement to public services should be recognised and promoted. Since such activities are crucial for both the quality of individual life and the fulfilment of societal and environmental well-being and inclusion, in recent years some influential scholarship already endorsed the idea that 'the joint reading of primary and secondary EU law, however, justifies the existence of an enforceable right', so that 'access to universal service is non-negotiable'.[79] By building on these findings, it is time to go further in the analysis and to reach a commons-oriented understanding of public services, thus acknowledging in favour of end-users a (collective or even trans-subjective) new property based on

[76] V.P. Goldberg, 'Protecting' n 41 above, especially 150-152.

[77] ibid 151.

[78] See H. Collins, 'On the (In)compatibility of Human Rights Discourse and Private Law', in H.W. Micklitz ed, *Constitutionalization* n 6 above, 26-60; C. Mak, 'The Lion, the Fox and the Workplace: Fundamental Rights and the Politics of Long-Term Contractual Relationships', in S. Grundmann, F. Cafaggi and G. Vettori eds, *The Organizational Contract* n 40 above, 97-110. From the Italian perspective see G. Carapezza Figlia, 'I rapporti' n 40 above, especially 444-452.

[79] H.W. Micklitz, *The Politics* n 2 above, 295 and 307.

the free access to a decent level of utility and on the capability of having a voice in organizational issues.[80] On the one hand, access entitlements are an emerging building block in the debates on the reconceptualization of property: this rising relevance should be recognised in the domain of public services too, since

> 'against the market logic of freedom [and privity] of contract, the counter-principle (of collective access) needs to be established right in the centre of private law regimes'.[81]

On the other hand, enabling private law theory to provide end-users with a real capability of co-determining strategic choices in the management and provision of public services affecting their very lives can certainly give rise to delicate challenges, such as the risks of corporative outcomes.[82] However, this complex pathway is a desirable one, since citizens' incremental involvement and consciousness can be considered major means for establishing a 'post-privatization'[83] regime of public services, characterized by more transparency, fostered effectiveness[84] and the aspiration toward a renovated political legitimacy related to 'a more radically democratic European private law'.[85]

To put it in simple terms: while the traditional theorization was focused on the need for zones *of privacy*, a renewed and commons-oriented understanding of the new property paradigm could provide citizens and other stakeholders involved in the organization of public services (eg workers) with new zones *of agency*.

[80] On the interplay between public services, commons and sovereignty see P. Napoli, 'Indisponibilità, servizio pubblico, uso. Concetti orientativi su comune e beni comuni' *Politica & Società*, 403-426 (2013); and E. Scotti, n 6 above. For a trans-subjective look at private law see M. Spanò, 'Making the Multiple: Toward a Trans-Subjective Private Law' 118 *South Atlantic Quarterly*, 839-855 (2019). For the qualification of the welfare system as the new property of the dispossessed see C.A. Reich, 'The New Property After' n 17 above, especially 236-240.

[81] G. Teubner, 'After Privatization?' n 42 above, 411. For an access-based property theory see A. Quarta, 'Towards an Access-Based Paradigm of Ownership. A Plea for Inclusion in Property Law', in B. Hoops et al eds, *Property Law Perspectives V* (Den Hague: Boomuitgevers, 2017), 191-208.

[82] How could one assure that the participatory management of a certain utility is eventually open and democratic instead of being collusive and reserved to the most organized stakeholders? How could one reach a satisfactory trade-off between free access to a service and the possibility to use tariffs to avoid congestion and over-consumption?

[83] G. Teubner, 'After Privatization?' n 42 above.

[84] These profiles are highlighted in P. Vincent-Jones, 'The New Public' n 34 above, especially 268; in R.Q. Grafton, 'Governance of the Commons: A Role for the State?' 76 *Land Economics*, 504-517 (2000), especially 512; and in S. Pellizzari, 'New commons' n 48 above. Among the groundbreaking contributions in this respect see N. Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' 25/26 *Social Text*, 56-80 (1990).

[85] M.W. Hesselink, 'Private Law Subjects in Citizens' Assemblies. On the Dialectics of Private and Public Autonomy in the EU', (2022) available at https://tinyurl.com/2vnyau7j (last visited 20 September 2023).

VII. Concluding Remarks and Open Questions

Is the combination between the relational and reflexive view of contract and the commons-oriented conception of entitlements of end-users enough for fostering a different mode of organizing public services? Are the above-discussed findings sufficient to go beyond State and market, ie beyond the possible shortcomings of bureaucratic arrangements and especially beyond the commodification of these core societal activities?

Similar questions have been fostering intense discussions for the last fifteen years. This is not surprising, since the long-lasting and ongoing transition from the hegemony of market-oriented views towards more pluralistic legal and institutional frameworks is not an easy task. At a preliminary level, technical issues rapidly come into the picture once the clear-cut divide between economic and non-economic SGI is abandoned because of its theoretical weakness and operational shortcomings.[86] Lawyers and decision-makers shall find new legal and economic criteria – not to mention the need for recognising the role of other social rationalities relevant to specific public services – to deal with the choice among at least three interfering organizational models: the traditional public management; the opening up to competition and market; the experimentation of new cooperative and hybrid arrangements.

In particular, some questions arise with respect to the growing attention to the latter cooperative and participatory models. First, one could wonder how to select the services whose management and provision could become the field for testing such new organizational arrangements. Second, the procedures and the contractual frameworks enabling cooperation among public administrations, providers and other relevant stakeholders (especially end-users and workers) should be assessed. Third, remedies for dealing with possible conflicts within and beyond the contractual relations – eg abusive behaviours of the contracting authority; providers failing in performing their service activities; new forms of regulatory capture; congestion-related issues and their interplay with the access-based view of the position of end-users; lack of attention for participatory commitments; problematic working conditions – shall be outlined.

Such open questions show that the dissemination of cooperative models has shed light on their possible limits. In this respect, one should bear in mind that these new contractual relations run the risk of being another (more surreptitious perhaps) withdrawal of the public sector from the welfare system, rather than an innovative paradigm in the organization of public services.[87] For instance, the growing focus

[86] However, as is well-known technical issues are never just technical, since law – as an infrastuctural technology – is always regarded and irritated by political and social discourses: for an instance on contract law see D. Kennedy, 'The Political Stakes in "Merely Technical" Issues of Contract Law' *European Review of Private Law*, 7-28 (2001).

[87] In this respect one should remind 'not everything that looks cool and collaborative really does represent a diffusion of power or a working anarchy, as opposed merely to cheap outsourcing of labor that offers its workers no meaningful degree of freedom' (Y. Benkler, 'Practical Anarchism:

on the social economy could be discussed to assess how public contracts awarded solely (or mostly) on the cost/price criterion can affect working conditions.[88] Moreover, clientelism, lack of transparency and unlawful anti-competitive outcomes are possible shortcomings of such non-market-based models, even though influential scholars highlight both the difference between privatization and new public contracting[89] and the need for making private law more *network friendly*, ie capable of fostering cooperation among different interests and within multi-party contractual relations.[90] From a more general standpoint, the overall rise of governance as a new dominant institutional setting has been increasing complexity and creating delicate issues to such an extent that it has been possible to conclude that 'in this realm of entropy, the concept of public contract itself loses its meaning'.[91]

It is exactly in light of all the aforementioned issues that a context-sensitive approach should be adopted. Since 'there is no general formula according to which the logics of economic action necessarily contradict the internal logics of other socio-cultural activities',[92] the cooperative and participatory management of public services should be a field of case-by-case (or also service-by-service) experimentation. While the domain of social services of general interest is likely to be the first sector of innovation, thanks to both its traditional characters and its established legal regime (eg such activities have often been qualified as non-economic), it should be clear that each and every public service once analyzed in its peculiarities, could be turned into a cooperative and participatory organizational model. In this respect, it is also worth underlining that the commons-oriented turn in the legal conception of end-users entitlements should be capable of affecting every form of public service management, including the traditional public and the privatezed ones.

In this broader institutional perspective, a renovated European contract law seems capable of giving some positive contributions. First, its unprecedented cooperative potential could foster the involvement of the stakeholders, namely end-users and workers, in the management of public services. This shift would imply not only recognising new entitlements in favour of end-users (see the preceding section) but also and above all trying to bring contractual arrangements to organize and reinforce intrinsic motivations among the involved stakeholders.[93] Second, its hybrid character can be enhanced in that the rise of cooperative and participatory

Peer Mutualism, Market Power, and the Fallible State' 41 *Politics & Society*, 213-251 (2013)).

[88] J. Battilana, n 27 above.

[89] P. Vincent-Jones, 'The New Public' n 34 above, especially 277-278.

[90] See G. Teubner, 'And if I' n 58 above, especially 116-118.

[91] K.H. Ladeur, 'The Role of Contracts' n 40 above, 348.

[92] G. Teubner, 'After Privatization?' n 42 above, 408.

[93] Commons-based peer production, commoning and mutualism are the most inspiring instances of such an intrinsic and socially-oriented potential of the transactions among privates. See Y. Benkler, 'Peer production, the commons, and the future of the firm' *Strategic Organization*, 1-11 (2016); E. Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' 100 *The American Economic Review*, 641-672 (2010); D. Spade, 'Solidarity Not Charity, Mutual Aid for Mobilization and Survival' 38 *Social Text*, 131-151 (2020).

approaches among providers and stakeholders does not necessarily entail the withdrawal of the public sector from its responsibilities in the domain of public services. Since the emerging organizational models are not – or at least should not be – a new version of privatization, public administrations are supposed to question their practices and attitudes. On the one hand, they could 'act as facilitator[s]',[94] going beyond the insulated and antagonistic view of contract and fostering contractual innovation in public contracting, such as co-planning and multi-party cooperative contracts of service. On the other hand, they should reshape still widespread mentalities, according to which

> 'procurement officers often prefer to keep procurement criteria simple and ignore social considerations for fear of distorting competition. They also tend to be risk averse and reluctant to try new approaches'.[95]

In this respect, it is worth concluding by recognising that the ongoing transformations of contract theory and practice within European private law allow this major legal institution to definitively overcome the divide between economic and non-economic SGI[96] and to eventually be a tool for decommodifying public services in two senses. In a rather traditional sense, it is easy to notice that the legal regime of public procurement has gone through meaningful innovations and that this process has shown how contract law is capable of taking into account environmental and social issues. Accordingly, the whole functioning of the market of public services has changed: service providers often have to deal with universal service obligations; considerable reserved markets and exclusions are currently possible; the choice of opening up a service to competition is supposed to be taken far beyond the mere price criterion. In a more innovative sense, contract law could decommodify public services by testing and refining cooperative and participatory contractual relations among public administrations, providers and relevant stakeholders. Since they have been one of the major issues dealt with in this work, it is now clear that such relations can be considered as a new form of public contracting, an alternative to public procurement – ie to the ordoliberal and market-oriented imprinting of the relevant European regulation – and grounded in the core findings of recent contract theory. Such hybrid contracting is supposed to reshape both the legal organization and the governance of public services through the lessons of relational contract theory and the potential of reflexive and pluralistic autonomy.

In conclusion, still today one can endorse the opinion that 'in many respects

[94] R.Q. Grafton, n 84 above, 514.

[95] E. Varga, n 1 above.

[96] In fact, from this renewed legal perspective the core elements to be considered are the structures and the contents of certain contractual relations, whereas the supposedly natural distinction between the economic and the non-economic character of a service is no longer a relevant aspect.

what happens to the law of contract will be a defining moment in the history of Europe'.[97]

[97] Study Group on Social Justice n 14 above, 653.

Essays

The Efficiency Function of the *Numerus Clausus* Principle of Property Rights in Land

Enrico Baffi*

Abstract

This paper seeks to identify a possible justification in terms of economic efficiency of the *numerus clausus* principle of property rights in land. At the outset, the current law in several legal systems is examined to show that this principle appears to be present everywhere.

The two justifications that have been proposed in economic terms to explain this principle are then considered: (1) the information costs rationale according to which the property rights that can be established in a piece of land are limited in order not to excessively increase the information costs that potential buyers need to bear (indeed, property rights in land run with the land) and (2) the anticommons rationale according to which this limitation stems from the need to prevent some lands from becoming inefficient anticommons.

A third theory is then put forward according to which the *numerus clausus* of property rights in land stems from the need to prevent the creation of property rights that may become inefficient over time and cannot be eliminated through the use of a contract because of the high transaction costs due to the existence of a bilateral monopoly. Indeed, the property rights cannot even be eliminated by a unilateral act of the owner of the burdened land since they are protected by means of property rules.

The final section analyzes the benefits that would arise if legal systems provided rights that run with the land but are protected only by means of liability rules and seeks to understand why rights of that kind are not currently a feature of legal systems.

I. Introduction

In this paper, I aim to address a particular issue pertaining to the regulation of property rights in land. The issue consists of the justification in terms of economic efficiency of the so-called 'typicality of property rights' principle, also referred to as the 'numerus clausus of property rights principle'. This principle, which is fairly similar across many legal systems, implies that people are not free to create any kind of real right in property other than those only expressly identified by law or the courts. Thus, the freedom of the parties is limited. Although the existence of a *numerus clausus* of property rights has long been known in civil law legal systems, awareness of the presence of such a limitation on parties' freedom has developed only recently in common law jurisdictions.[1]

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[1] Concerning the presence of the principle of the *numerus clausus* of property rights in various legal systems, see B. Rudden, 'Economic Theory v. Property Law: The Numerus Clausus

In this paper, the analysis is limited to real rights of enjoyment and does not extend to real rights of security, in that it cannot be asserted without a full analysis that the solutions obtained also apply to that latter category of rights. Finally, the analysis focuses exclusively on real rights of enjoyment in land and will not address chattels.

The limitation on the freedom of parties to create property rights in land contrasts with the almost full autonomy enjoyed by persons in creating contractual obligations. While obligations with content freely chosen by the parties may be created in contracts, the parties cannot establish property rights in land through a contract other than those that are provided by law. If a contract provided for a property right other than one established by law, such a right *in rem* would not come into existence or at most could constitute only a right *in personam*.

At the outset, it appears to be necessary to define the term 'property right in land'.

This right is characterized by three aspects:

1. The right is tied to the land. If the owner of the land on which it is established transfers ownership of that land, the property right is not extinguished and must also be respected by the new owner. From this point of view, the property right differs distinctly from a claim because when such a right exists, the obligation of the landowner is not transferred to the purchaser of the land who is therefore free not to respect it.

2. Secondly, a property right is an *erga omnes* right, namely, all persons within the legal system are required to respect it. Thus, if a person possesses land over which a property right exists but does not own the land, that person will still be required to respect the property right. In this regard, too, property rights differ from claims. Indeed, the latter must be respected only by the obligor, and third parties generally have no obligations to do so.

3. Thirdly, a property right is a one protected by means of property rules.2 This concept means that whoever infringes it is liable not only to pay damages for the loss thereby occasioned but must also reinstate the factual situation that existed prior to the violation of the right. In legal systems that allow for injunctions, this concept means that the holder of the property right can have the court issue that type of judicial order against the person who has infringed upon the right. In legal systems that do not allow for injunctions, the holder of the property right may obtain the restoration of the *status quo ante* through the various available legal means.

Problem', in J. Bell and J. Eekelaar eds, *Oxford Essays on Jurisprudence* (Oxford: Oxford University Press, 1987), 239-263. The recognition of this principle in the American legal system is due to T.W. Merrill and H.E. Smith, 'Optimal standardization in the Law of Property: The Numerus Clausus Principle' 110 *The Yale Law Journal*, 10 (2000): 'Yet notwithstanding the absence of compulsion behind the *numerus clausus* in common-law systems, it is reasonably clear that common-law courts behave toward property rights very much like civil-law courts do: They treat previously-recognized forms of property as a closed list that can modified only the Legislature'.

[2] For the concept of property rules and the distinction between property rules and liability rules, see the seminal paper by G. Calabresi and D.A. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' 85 *Harvard Law Review*, 1089 (1972).

This last aspect also distinguishes a property right from a claim. Indeed, in many legal systems that kind of right is protected exclusively by liability rules, so the obligor, in the event of an infringement upon the right, is only liable to pay damages.

When compared with a traditional claim, the difference that is most emphasized by legal scholars lies in the fact that while a claim does not run with the land, a property right does. This concept means that if an owner has a personal obligation to behave in a certain way and transfers ownership of the land, this obligation does not transfer to the new owner. Even if the landowner has many contractual obligations inherent in the use of the land *vis-à-vis* various obligees, in the event that the property right in the land is transferred, the new owner will not become subject to these obligations. By contrast, when one or more property rights exist in land, transfer of ownership does not result in the elimination of such rights. Rather, they will remain in place with the consequence that the new owner will have to respect them.

This aspect is also emphasized in the various works written to justify the principle of the typicality of property rights from an economic perspective, and this perspective is where the rationale for this principle should be sought. However, I believe that the identification of the justification in terms of efficiency of the principle of the *numerus clausus* of property rights requires us to also keep in mind the third feature that has been highlighted, namely, that property rights are protected by property rules. This specific feature is not taken into account in some of the literature.

II. Classification of Property Rights in Land

Property rights in land can be divided into two categories.

The first category consists of those property rights that are accessory to ownership of an asset. These property rights therefore cannot be transferred separately from the ownership of benefited land. This type of right accrues to anyone who owns the benefited land as an accessory to his or her ownership right from which it cannot be severed. They may be called 'burdens for the benefit of one who owns land'.

In civil law systems, such rights are referred to as 'predial servitudes' and are distinct from 'personal servitudes', which are defined as rights for the benefit of persons that do not necessarily need to be owners of another asset. In common law systems, these rights take on different names, but they can basically be divided into the three categories: (1) easements, (2) real covenants and (3) equitable servitudes. In civil law systems, the expression personal servitude has fallen into disuse, and when scholars speak of servitude, reference is made to a predial servitude. In common law models, it has been suggested that the three categories may be combined into one that could be called 'servitude'.[3]

[3] The idea that the various categories represented by easements in gross, real covenants,

In this paper, I will refer to servitude as any property right that is necessarily accessory to a right of ownership in land.

The second category of property rights in land consists of those rights held by a person who does not necessarily need to be the owner of other land. They can be defined as 'burdens for the benefit of one who does not own land'. As stated above, in civil law systems, such rights were usually referred to with the expression personal servitude although that has fallen into disuse mainly due to the fact that the possibility of constituting them is highly limited. In common law systems, they are referred to as 'property rights in gross' and are divided into several subcategories. Among them, 'profits in gross' and 'easements in gross'[4] should be highlighted. In this paper, I too will refer to these rights as property rights in gross.

III. The Typical Property Rights Established in Various Legal Systems

1. Servitudes in Various Legal Systems[5]

a) Anglo-American Law

Servitudes in Anglo-American systems are divided into easements, real covenants and equitable servitudes.

Easements are enforceable in courts of common law as distinguished from courts of equity. It is commonly said that they cannot 'benefit the landowner personally'.[6] In other words, they must 'confer a benefit on the dominant tenant as such'[7] rather than some personal advantage on its owner. Easements can still be enforced against an owner who bought property without knowledge of them.

A real covenant consists of the landowner's right that the owner of the burdened land not perform certain activities. Such a covenant is enforceable only when the parties who originally created it were in a personal relationship to each other, which is termed 'horizontal privity'. In England, they must be landlord and tenant.

Finally, the third category of servitudes is defined as equitable servitudes. An equitable servitude is not subject to the requirement of privity. It is enforceable only

and equitable servitudes in American law can be combined into a single legal category called 'servitude' subject to uniform rules is developed by U. Reichman, 'Toward a Unified Concept of Servitudes' 55 *Southern California Law Review*, 1177 (1982).

[4] Although the expression 'easement in gross' in the United States (US) legal system generally tends to denote certain rights that do not have the characteristic of running with the land, in this article we use that expression in the manner of English jurists who use it to denote rights that instead run with the land: see, by way of example, M.F. Sturley, 'Easements in Gross' 96 *The Law Quarterly Review*, 557 (1980).

[5] The reconstruction of the regulation of property rights in the various legal systems largely follows that proposed in T.J. Gordley and A.T. Von Mehren, *An Introduction to the Comparative Study of Private Law* (Cambridge: Cambridge University Press, 1st ed, 2009), 196-203.

[6] P. Sparkes, *A New Land Law* (London: Bloomsbury Publishing, 1999), 574.

[7] R. Megarry, W. Wade and C. Harpum, *The Law of Real Property* (London: Sweet & Maxwell, 6th ed, 2000), para 18.

against a purchaser who had notice of it. The notice may be actual or it may be constructive. When the required notice is only constructive, the purchaser of the burdened land cannot object on the basis of a lack of actual knowledge of the servitude. Indeed, the purchaser should have known about it by checking public records. The servitude must 'touch and concern' the land, in other words, it must 'benefit or accommodate' the dominant land.[8]

b) French and Italian Law

In the French system, servitudes are governed by Art 637 of the Civil Code, which provides that a 'servitude is a charge imposed on one parcel of land for the use and benefit of the land belonging to another owner'.[9]

The Italian system tends to overlap with the French one in that the Italian Civil Code was drafted using the French one as a model.

Art 1027 of the Italian Civil Code provides that a 'servitude is a charge imposed on one parcel of land for the benefit of the land belonging to another owner'.

c) German Law

Servitudes, which are referred to by the legal term *Grunddienstbarkeit*, are governed in the German Civil Code by Art 1018:

> 'A parcel of land can be burdened in favor of the owner of another parcel of land in such a manner that this owner is allowed to use the parcel I particular ways, or that certain actions cannot be performed on that parcel, or that the exercise of a right is not permitted that belongs to the ownership of the burdened parcel in relation to the other parcel'.[10]

The possible content of a servitude is specified by Art 1019:

> 'A *Grunddienstbarkeit* can be only consist in a burden that advantages the use of the benefited property: The content of such a servitude cannot extend beyond that limit'.[11]

Finally, it should be added that in all legal systems, servitudes can be either time-limited or perpetual.

Taking into consideration the various rules in different legal systems, the characteristics that a right must have in order to exist as a right of servitude should be considered, and it should be pointed out that the rules are quite similar, which bolsters the view that a single rationale behind the limitation of party freedom

[8] K. Gray and S.F. Gray, *Elements of Land Law* (Oxford: Oxford University Press, 3rd ed, 2001), 625.

[9] Translation taken from T.J. Gordley and A.T. Von Mehren, n 5 above, 198.

[10] ibid 199.

[11] Translation taken ibid 199.

in the creation of rights of servitude exists. Considering Anglo-American law first, it was seen that the existence of a right of servitude requires for its existence that it touches and concerns the benefited land.

Although different definitions of this requirement have been developed, it can be said that the courts attribute a meaning to it according to which a right of servitude touches and concerns the benefited land when it is quite likely that through the various transfers of ownership it will retain its value for the holder. In other words, even in the event of a transfer of ownership of the land to which the right of servitude is accessory, this right will have an equal value for the new owner as for the previous owner. In short, servitudes whose value is stable over time even in cases in which a change in ownership occurs are permissible. If the value for the initial holder was greater than the cost to the owner of the burdened land, with the transfer of ownership by the owner of the benefited land the right of servitude continues to have a value for the holder greater than the cost to the owner of the burdened land.

The touch and concern requirement is also expressed by stating that the right should benefit the land rather than the individual owner. This idea seems to indicate that the right that can be created with a servitude must increase the value of the land, that is, lead to an increase in the value that the majority of people attribute to that land and not just the individual owner. A right of servitude that is aimed at satisfying an idiosyncratic preference of the current owner cannot be validly created because it leads to an increase in the value of the land only for the current owner and thus does not benefit the land.

Indeed, this touch and concern requirement is also found in the other legal systems considered here.

With regard to the French Civil Code, Art 637 that states that a servitude 'is a charge imposed on one parcel of land for the use and benefit of the land belonging to another owner'. Thus, reference is made to a benefit attributed to land, and not to a person.

With regard to the Italian Civil Code, the same observation applies. Indeed, Art 1027 provides that a servitude is 'the burden imposed on land for the benefit of other land'.

Finally, with regard to the German Civil Code, Art 1018 introduces the general definition of servitude while Art 1019 takes care to specify that 'it can only consist of a burden that advantages the use of the benefited property'. We return, then, to the principle that the servitude cannot satisfy a particular and idiosyncratic preference of the owner of the dominant land but must attribute an authority to the set of rights that constitutes the ownership of the dominant land that increases its value for all potential owners.

2. Property Rights in Gross in Various Legal Systems

The regulation of property rights in gross is not as uniform among the various

legal systems as that of servitudes.

In the English legal system, since *Keppel* v *Bailey* (1834)[12] it has been ruled out that easements in gross can be validly established. This principle has remained firm over time. However, the system allows the possibility of creating profits in gross with extensive freedom.[13]

The American legal system has not followed the British system in this matter. In fact, the parties are given the opportunity to establish many forms of easements in gross. As has been stated, 'almost without exception', American courts have held that easements in gross could be established 'for railroads, for telephone and telegraph and electric power lines'.[14] It can be said that in the American system the only easements in gross that cannot be created are 'recreational' easements (easements for hunting, fishing, boating and camping).[15]

In the French and Italian systems, the power of people to create property rights in gross is rather limited.[16] The main and almost only category is usufruct and the corollary categories of use and habitation.

The situation is entirely different in the German legal system, in which people are allowed to create property rights in gross with considerable freedom.

Indeed, Art 1090 of the German Civil Code provides as follows:

> 'A parcel of land can be burdened in such a manner that the person in whose favor the benefit operates is entitled to use the parcel in certain way or possesses the kind of authority that can form the content of a *Grunddienstbarkeit*'.

However, the limitations that the German rule establishes should be noted: the parties are given the power to create property rights in gross but in order to come into existence those rights must have the same content as a servitude might have had.

[12] *Keppell* v *Bailey* [1834], CH 39, [1834] ER 1042.

[13] In order to briefly outline some definitions of these property rights in general, it can be said that an easement in general is a legal right to use someone else's land in a particular way. Common easements are for water, power, and/or access. A profit in gross is a legal right to take natural resources from another person's land. Examples of profits include parts of the lands itself such as sand, peat or minerals, products growing on the land such as grass or timber, and/or wild animals, such as fish or game.

[14] R.R. Powell and M.A. Wolf, *Powell on Real Property* (Albany: Matthew Bender, 2001), para 34.16.

[15] J. Dukeminer and J.E. Krier, *Property* (New York: Aspen Publishing, 5th ed, 2002), 830.

[16] However, it should be highlighted that a jurisprudential strand is developing in France that recognizes the admissibility of property rights in gross other than those expressly codified. On French case-law, see in particular F. Mezzanotte, *La conformazione negoziale delle situazioni di appartenenza* (Napoli: Jovene, 2015), 62-69.

IV. The Rationale of the Principle of Typicality of Property Rights in Land

As the analysis above has shown, in the legal systems considered, the parties are not granted the power to create any property right in land that they desire. Although it has different limits, the *numerus clausus* principle of such rights is present in various legal systems.

Scholars who have searched for the possible economic rationale for the principle of typicality of property rights in land have developed several theories. The most widely embraced theory is that property rights are typified because of information costs.

1. The Information Costs Rationale

According to this justification of the principle of the *numerus clausus* of property rights, since property rights run with the land, to obtain accurate information about the burdens on the land that they intend to purchase, potential buyers must invest resources to acquire that information. This need is especially present in those legal systems that do not provide for any type of real estate records but also exists in others since searching and understanding real estate registries can be costly.[17] The more property rights that can be created, the higher the information costs for third parties. Hence the need to limit the power to create property rights through the introduction of the *numerus clausus* principle.

In the famous English *Keppel* ruling cited above, which established the impossibility for parties to create easements in gross, the court expressly identified the rationale therefor as the need not to impose too many information costs on potential purchasers of burdened land while also preventing the purchaser of the burdened land from discovering that burdens exist on the purchased land only after it is purchased:

> 'No harm can be done by allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer to damages for breaching their obligations. This process creates no problems and is a reasonable liberty to bestow, but great detriment would arise and much confusion of right if parties were allowed to invent new modes of holding and enjoying real property and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. It would hardly be possible to know what rights the acquisition of any parcel conferred or what obligations it imposed'.[18]

[17] The information costs rationale is developed mainly by T.W. Merrill and H.E. Smith, n 1 above; H. Hansmann and R. Kraakman, 'Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights' 31 *The Journal of Legal Studies*, 373 (2002).

[18] *Keppell* v *Bailey* [1834], CH 39, [1834] ER 1042.

Richard Epstein argued that the information costs rationale may be the only reason behind limiting the freedom of the parties in the creation of property rights in land. He concluded that from a *de iure condendo* perspective, in systems in which there is public record system, such freedom should no longer be limited because third parties can acquire information about the existence of such rights through a search at public registries.[19] Therefore, if a real estate records system exists, in Epstein's view the parties should be free to create any property right and the principle of the *numerus clausus* of property rights should be eliminated. However, it is worth pointing out that the problem of the information costs that the parties need to bear in order to be informed about the existence of property rights over a piece of land exists even in systems that have a public record system, since searching the public registries necessarily entails costs. These costs would increase if the parties could devise rights that do not correspond to the types prescribed by law.

However, it should be pointed out that this justification of the principle of the *numerus clausus* of property rights in land, even if it were convincing, would not appear to be entirely comprehensive. Indeed, it cannot offer an explanation of the criteria followed by legal systems to determine which property rights can be created and which cannot. Examining the individual legal systems, the information costs rationale theory fails to fully explain several choices made by the legislature or the courts.

With regard to English law, the principle does not offer a justification for why easements in gross in general cannot be created while profits in gross can.

With reference to the American legal system, the information costs theory does not provide an explanation for the fact that easements in gross in general can normally be established with the exception of those that are exclusively recreational in nature.

With regard to the German legal system, this theory does not explain the particular way in which the issue is regulated in the Civil Code, which permits only property rights in gross with content identical to that which servitudes might have had.

With regard to the two similar legal systems of Italy and France, the information costs theory fails to provide an explanation for the fact that these systems severely limit the ability of people to create property rights in gross despite the fact they have public registry systems, so information costs are somewhat abated.

Finally, and with regard to all of the legal systems that have been considered, the information costs theory fails to explain the need for the touch and concern requirement in order for a right of servitude to come into existence.

So even if one were to find the idea that the principle of the typicality of

[19] R.A. Epstein, 'Notice and Freedom of Contract in the Law of Servitudes' 55 *Southern California Law Review*, 1353-1354 (1982): 'under a unified theory of servitudes, the only need for public regulation, either judicial or legislative, is to provide notice by recordation of the interests privately created'.

property rights derives from an information costs problem persuasive, it would be necessary to supplement it in order to understand which criteria have been followed by the various legal systems in determining which property rights can be created. At this point, the information costs theory does not appear to be comprehensive. As an example, consider the development of the recognition of equitable servitudes in the English legal system. At first, it was established that equitable servitudes bound the purchaser of burdened land if the latter had received notice of the existence of the encumbrance. However, as early as 1882, beginning with the *London & South W. Ry Co*. ruling,[20] the courts 'made clear that covenants would be enforced against subsequent purchasers only if covenants were made for the protection of other land'.[21] Thus for the transfer of an equitable servitude to the purchaser, it became necessary not only for the purchaser to be given notice of the existence of the burden but also for the equitable servitude to fulfill the touch and concern requirement. The information costs theory does not explain the imposition in the English system of the touch and concern requirement for servitudes although the courts have required the purchaser to be informed of the burden in order to be bound.

Again, as an example, note what Hansmann and Kraakman,[22] two authors who embrace the information costs rationale, state with regard to the regulation of servitudes:

> 'The civil law's *numerus clausus*, after all, limits only the categories of property rights that can be created and not the content of specific rights within those categories. For example, servitude on land, and security interests in chattels are two of the property rights included in the *numerus clausus*. Within these categories, there is substantial freedom to tailor the terms of specific rights. Thus, easements of a potentially infinite variety of types can be created within the permitted category of servitudes on land (…). The common law regulation of property rights (…) likewise operates at the category level'.[23]

When the two authors come to the point of having to justify the need for the touch and concern requirement for a servitude to come into existence, they state:

> 'The law's general requirement that easements and similar servitudes 'touch and concern' neighboring land is, in fact, a familiar example of the relationships between verification rules and forms of property rights. Servitudes that meet the requirement are much easier to verify by physical inspection of the property and its surroundings, which remain an important component of

[20] London & South Western Ry. v Gomm [1882] CHD 20, [1882] 562.

[21] U. Reichman, n 3 above, 1225-1226. The same paper provides a reconstruction of the decisions whereby the English courts came to recognize the admissibility of equitable servitudes, 1225-1226.

[22] H. Hansmann and R. Kraakman, n 17 above.

[23] ibid para 400.

the verification rules employed for them (given the weakness of the recording system)'.[24]

It can be noted that the two authors' reconstruction does not appear to be entirely convincing. First, the touch and concern requirement is also required by legal systems that have a public records system. Consider in particular, the French and Italian legal systems. Second, the explanation of the need for the touch and concern requirement (represented by the need for such a servitude to be verifiable by physical inspection) clashes with the fact that many of the servitudes that meet this requirement are not verifiable by this form of inspection. The attempt by the two authors to provide an overall explanation of the principle of the *numerus clausus* of property rights only on the basis of the information costs rationale does not lead to entirely satisfactory results.

However, on closer inspection, this theory does not appear to be convincing either as very few of the choices of legal systems appear to be consistent with it.

With regard to the English legal system, we have seen that it allows for the establishment of a large number of profits in gross. These rights could be established even before the introduction of the public registry system. There is no doubt that the possibility that there may be a number of profits in gross on a piece of land greatly increases the information costs that need to be borne by potential buyers in order to have adequate knowledge of the burdens on the land. If the information costs problem had inspired the regulation of property rights in land, a greater limitation on the creation of such rights likely would have been necessary and introduced.

With regard to the US legal system, it was pointed out that easements in gross with the most varied content can be created. Such a large number of easements in gross that could potentially be created seems inconsistent with the information costs theory, as the possible existence of these property rights in land greatly increases information costs.

With reference to the Italian and French legal systems, the fact that the property rights in gross that can be created constitute a very narrow category would seem to argue, by contrast, in favor of the theory under consideration. However, this theory is unconvincing in explaining the regulation of servitudes, as we shall see with reference to all of the legal systems examined.

With regard to the German legal system, the information costs theory appears to be conspicuously unconvincing because that system allows for a large number of property rights in land. One need only think of property rights in gross which can exist with the most varied content, leading to a significant increase in information costs for those wishing to acquire property ownership.

Finally, a consideration that relates to rights of servitude in general is worth mentioning. The legal systems reviewed here require that right of servitude to

[24] ibid para 402.

touch and concern the benefited land. Thus, a limitation in the possibility of establishing rights of servitude exists, and this limitation could, at first glance, be justified by the need to lower information costs. However, this requirement may exist in a wide variety of scenarios with the result that multiple rights of servitude may exist on the same land. Information costs can therefore be quite high.

As an example, in the Italian legal system rights of servitude can have the most varied content. It has been pointed out as follows:

> 'There are servitudes of a more distinctly agricultural nature, such as that of drawing water from the nearby land or letting the flock raised on its own land graze there. Others are normally associated with industry: right-of-way for electricity lines, oil pipelines, methane pipelines or railways, the right to discharge debris onto the nearby land or to introduce fumes, noises or shakings exceeding normal tolerability. Still others are of a commercial nature: it is possible, for example, a servitude which forbids the running of a shop or hotel on the serving land in competition with that exercised on the dominant land. Or it can be a question of constraints imposed for the greater convenience or amenity of the dominant land: thus, the building on the serving land can be prohibited, or subjected to special limits as regards the height, the dimensions, the distances, the windows, the architectural features; or the neighboring land may be restricted to exclusively residential use. And the exemplification could continue'.[25] (our translation)

The possibility of multiple rights of servitude existing on the same land, resulting in increased information costs, is also expanded by the fact that the legal systems reviewed here do not expressly establish the requirement of 'proximity' of the potential dominant land to the potential servient land in order for it to create a servitude. Even land that is distant from the servient one can thus become dominant land, increasing the chances that many rights of servitude may exist on the burdened land.

2. The Anticommons Rationale

According to proponents of this theory, party freedom in creating property rights in land is limited to avoid the creation of anticommons.[26] An anticommons is

[25] P. Trimarchi, *Istituzioni di diritto privato* (Milano: Giuffrè, 20th ed, 2018), 496-497.

[26] The anticommons theory can be found in the works of various authors but was mainly developed by Francesco Parisi. See F. Parisi, 'Entropy in Property' 50 *The American Journal of Comparative Law*, 595 (2002); Id, 'Freedom of Contract and the Laws of Entropy' 10 *Supreme Court Economic Review*, 65 (2003); B. Depoorter and F. Parisi, 'Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes' 3 *Global Jurist*, i-41 (2003). The anticommons rationale is also proposed by E. Baffi, 'Gli anticommons e il problema della tipicità dei diritti reali' *Rivista Critica del Diritto Privato*, 455 (2005). The arguments against the anticommons rationale are listed by F. Mezzanotte, 'The Interrelation Between Intellectual Property Licenses and The Doctrine of Numerus Clausus. A Comparative Legal and Economic Analysis' 3 *Comparative*

an asset for which decisions about its use must be made by a large number of parties, each of which has veto power.[27] It is observed that when more than one property right is created over a piece of land, that property takes on the characteristics of the anticommons, in the sense that the consent of all holders of the various rights is required to change its intended use. Each holder of a property right could veto the change in the intended use of the land. In these cases, coming to an agreement with all parties who must give their consent may be prevented due to behavior usually referred to as 'holding out'.[28]

The need to limit the creation of property rights in land stems from the risk of possible inefficiencies brought about by the anticommons nature of the land on which many property rights exist. It may, in fact, be the case that after the creation of various property rights, the possibility of using the land in a way other than that in which it is used may emerge. That is, it would be more efficient to eliminate all property rights existing on the land in order to use the land for a different purpose. More precisely, such a situation will be inefficient when the increase in the value of the asset would be greater than the sum of the losses incurred by the various holders of the individual if the various property rights were eliminated. In such a situation and in the absence of transaction costs, all parties involved would reach an agreement to extinguish the various property rights. However, in this scenario, transaction costs are quite high, if not prohibitive, due to 'holding out' with the result that an agreement that would benefit all and be socially desirable cannot be reached. The land would thus maintain its former intended use, and an inefficient situation would remain.

The theory that the principle of the *numerus clausus* of property rights is in place in the various legal systems because of the problem of anticommons justifies this limitation on the freedom of the parties with the need to prevent the creation of lands with the characteristics of anticommons. Over the course of time, a piece of land's use could become inefficient due to the emergence of the possibility of using it in a different way but transaction costs would prevent this change in the intended use of the land.

Examining this theory in detail, it is arguable that it would be persuasive if legal systems considerably limited the possibility of multiple property rights existing

Law Review, 1 (2012).

[27] On the concept of anticommons, see M. Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' 111 *Harvard Law Review*, 621 (1998); J.M. Buchanan and Y.J. Yoon, 'Symmetric Tragedies: Commons and Anticommons' 43 *The Journal of Law and Economics*, 1 (2000); F. Parisi, N. Schulz and B. Depoorter, 'Simultaneous and Sequential Anticommons' 17 *European Journal of Law and Economics*, 175 (2004). For a concise introduction see M. Heller, 'The Tragedy of the Anticommons: A Concise Introduction and Lexicon' 76 *The Modern Law Review*, 6 (2013).

[28] With regard to English law, Sturley identifies in the various rulings over time that have prohibited the creation of easements in gross an argument and can be traced back to the anticommons theory that he calls 'clogs on the title argument' along with the 'surcharge concern' and the information costs argument (M.F. Sturley, n 4 above, 564-565).

on the same land. From this point of view, the persuasiveness of the anticommons rationale requires legal systems to have the same limits on party freedom as required by the information costs rationale. In both cases, legal rules should not permit the creation of an excessive number of property rights in land, in one case to avoid the emergence of anticommons and in the other not to cause an excessive increase in information costs. It can then be argued that the anticommons rationale faces the same explanatory difficulties as those identified with regard to the information costs rationale. Indeed, considering the rules in the various legal systems, it was pointed out that they do not prevent the presence of a large number of property rights in the same land. With reference to the information costs theory, it was argued that this aspect makes that theory unconvincing; it seems that the same conclusion must be reached with reference to the anticommons theory.

In fact, the anticommons problem poses a need that legal systems could actually keep in mind when deciding whether or not to give private parties total freedom in the creation of property rights. Situations in which property over which several property rights exist cannot be reunified in order to use it for a different purpose may exist due to the high transaction costs. In such cases, serious situations of inefficiency may remain.

Consider, by way of example, the servitudes that may exist in a condominium against one apartment and for the benefit of the other apartments. The servitude may consist, for example, of prohibiting the burdened apartment from being used for a nonresidential purpose. In the event that a strong need arises to use that apartment for hotel purposes, the owner would need to enter into agreements with each individual unit owner. Transaction costs under this scenario would be prohibitive and the asset would not be put to its new and more efficient use. Since property rights are protected by property rules, if the owner of the burdened apartment proceeded to put the property to its new use without first reaching an agreement with the owners of the other apartments, each owner of the other apartments could appeal to the court for an injunction or specific restitution. The problem arises similarly in common interest communities in which an individual who wishes to remove a burden on his or her property would have to negotiate with the owner of each property in the community.

Therefore, if the possibility of inefficient anticommons coming into existence could concretely justify some form of limitation on party freedom in the creation of property rights in land, it seems reasonable to ask the question as to why this need is not reflected in the legal regulation of property rights. Most likely, the answer could be found in the kind of economy that existed when the rules governing property rights in land were developed. In civil law systems, this regulation derives from Roman law. In common law systems, it appears to have arisen as early as the mid-19th century. It can then be assumed that this regulation developed with reference to an agricultural economy, which is predominantly static in nature. In such an economy, lands are generally used for the same purpose over time, and the need to

release them from the encumbrances existing on them for use for other purposes rarely arises. As a result, legislatures and courts did not feel the need to govern the creation of property rights in land in consideration of the hypothetical but remote risk that inefficient anticommons could emerge. In today's economy, which is characterized by strong dynamism due in part to technological innovation and in which land can with high probability be put to new uses over time, the problem of the existence of inefficient anticommons becomes extremely relevant.

3. The Efficient Property Rights Rationale

A third theory, which appears to be partly structured with regard to servitudes but not with regard to property rights in general and which can be proposed instead with regard to all property rights, holds that the property rights that parties can validly constitute are those that remain efficient over time. When it is said that they remain efficient, this term means that the value that the holder attributes to them remains higher than the cost borne by the owner of the land on which the burden is placed.

It has already been pointed out that the touch and concern requirement can be found in all legal systems considered. The servitude should benefit the benefited land rather than the holder. An economic rationale in prohibiting the establishment of servitudes that meet a highly specific (idiosyncratic) preference of the dominant land exists: indeed, in this case it would be highly likely that with the transfer of ownership of the land, the servitude would become inefficient, resulting in a cost for the owner of the burdened land greater than the benefit for the holder of the servitude. In other words, private harm is greater than private benefit.[29]

It could be argued that the legal system should not be concerned about such inefficiencies as the obligated party could negotiate with the holder of the right of servitude and on that basis eliminate the inefficient burden on the land. However, as many authors have already pointed out,[30] since this is a situation of a bilateral monopoly, the transaction costs can be very high and prevent the agreement from being reached with the consequence that the inefficient servitude would continue to exist. Therefore, by requiring the servitude to benefit the land rather than the right holder, the touch and concern requirement reflects the will of legislatures and

[29] Alexander interprets Posner's thinking about the touch and concern requirement by stating that from it follows 'enforcing promises that, absent transaction costs, would have survived rounds of bargaining among subsequent generations of owners': see G.S. Alexander, 'Freedom, Coercion and The Law of Servitudes' 73 *Cornell Law Review*, 588-589 (1998). The economic rationale of the touch and concern requirement is also identified by U. Reichman, n 3 above, 1132-1133.

[30] See J.F. Stake, 'Toward an Economic Understanding of Touch and Concern' 1988 *Duke Law Journal* 925, 935-939 (1988). A general analysis of transaction costs that prevent agreement from being reached in a bilateral monopoly situation is made by I. Ayres and E. Talley, 'Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade' 104 *The Yale Law Journal*, 1027 (1995).

the courts for the content of the servitude to be such that a majority of potential purchasers of the land would attribute the same value to the power inherent in the servitude as the selling owner. When this assumption is met, the value that the holder attributes to the right of servitude will remain stable over time. It will also generally be greater than the cost borne by the owner of the burdened land.

Indeed, it should be pointed out that the main instrument for establishing a servitude is a contract. By its very nature, a voluntary act in which each party wins, leading to what one supposes will be an efficient servitude in the sense the party acquiring it will attribute a value to it that is greater than the cost borne by the party granting it. If the servitude meets the touch and concern requirement so that the majority of the potential purchasers of the land attribute to it the same value as the original holder, the servitude will remain efficient in the event of transfer of ownership of the land and the servitude.

This rationale, which seems to underlie the limitation of party freedom in the establishment of servitudes, can also be identified with regard to property rights in gross. Such rights are generally not transferable and, therefore, the concern of legal systems cannot be that they become inefficient because of their transfer from one party to another. Instead, the need of legal systems seems to be for property rights in gross to remain efficient over time even while still remaining in the hands of the same holder. Thus, those property rights in general whose value to the owner is highly likely to remain stable over time and therefore, not decrease, are allowed. Since these rights are primarily constituted through the instrument of a contract, they will be created efficiently, and since their value over time will tend to be stable, they will remain efficient. On the other hand, legal systems do not permit the establishment of property rights in gross whose value to the holder is highly likely to decrease over time with the consequence that they would become inefficient.

Thus, the proposed theory can be summarized by stating that:

- the regulation of servitudes aims to exclude the creation of servitudes that could become inefficient by virtue of a transfer of ownership of the dominant land; and

- the regulation of property rights in gross aims to exclude the creation of rights whose value over time could decrease for the same original holder, thus becoming inefficient.

In short, it can be said that legal systems permit the establishment only of those property rights whose value remains stable over time and is not, therefore, volatile. A logic in this concept can be found in terms of efficiency in that it prevents rights from remaining in existence that produce an inefficiency caused by the fact that the value that the holder attributes to them is less than the cost borne by the owner of the burdened land. To test the validity of this hypothesis, the regulation of property rights in gross in the various legal systems must be examined just as the regulation of servitudes has already been analyzed.

Starting from the English legal system, it was pointed out that this system does not permit the creation of easements in gross in general while it does allow for the establishment of profits in gross in general. This different rule would seem to be justified on the basis of the proposed theory. Profits in gross are defined as rights to extract natural resources from the burdened land. The right to extract these resources from land may have a value for the holder that can be considered stable over time. In fact, the holder may in any case decide to sell the goods taken from the land in the market (consider natural plant products or natural resources such as ferrous materials). Easements in gross, by contrast, consisting of the right to carry out an activity on the burdened land, may have a value that varies over time for the same holder. As an example, an individual may have a right to cross someone else's land, but that right may lose considerable value if the holder's habits change. It can then be argued that while profits in gross tend to remain efficient over time, easements in gross risk becoming inefficient. Hence the choice of the English courts is to make profits in gross permissible in general and instead, to exclude the possibility of creating easements in gross.

Unlike English law, US law authorizes parties to establish easements in gross in general. However, as noted above, recreational easements cannot be granted under modern case-law (such as easements for boating and camping). This limitation introduced by the US courts in the possibility of creating certain easements in gross can be understood in light of the theory put forward. Indeed, recreational easements are rights for which the value that the holder attributes to them can easily change over time, thus becoming inefficient. Thus, by way of example, the desire to go boating or camping may diminish and as a result, the corresponding right would lose value for the holder.

The German legal system has a special provision applicable to property rights in gross. Under Art 1090 of the German Civil Code, property rights in gross may be established, but only those 'that can form the content of a *Grunddienstbarkeit*'[31] are permitted. The interpretation of this provision may be difficult but it could be accomplished on the basis of the theory put forward in this study. The German legislature established this limitation on the creation of property rights in gross with the intention of excluding the creation of rights whose value to the holder can easily change and possibly decrease over time. By establishing that only a right that could be subject to a servitude could also be the subject of property rights in gross, the German legislature seems to have intended to exclude the creation of property rights in gross that reflect a particular, idiosyncratic preference of the potential holder and that could be valued less by such holder over time as the holder's idiosyncratic preference could diminish.[32]

[31] Please recall that this term refers to servitudes.

[32] F. Mezzanotte, *La conformazione negoziale* n 16 above, 75, states that German law does not permit the creation of property rights in gross that satisfy an idiosyncratic preference of the holder. On this topic also see J. Mayer, 'Beschränkte Persönliche Dienstbarkeiten', in *Staudinger Komm. BGB, Buch 3. Sachenrecht* (Berlin: de Gruyter, 2002), paras 108-112.

The French and Italian legal systems strongly circumscribe the possibility of creating property rights in gross. Those that are permissible can be justified on the basis of the theory put forward. Indeed, they are of such a nature that their value for the holder should not change over time, thus remaining efficient (consider usufruct in particular).

To recapitulate, the theory states that legislatures and courts have allowed only those property rights that over time are highly likely not to lose value for the holder and hence will not become inefficient. Rights that may instead become inefficient cannot be established because the resulting deadweight loss cannot be eliminated by negotiation between the parties. When faced with bilateral monopoly situations, the transaction costs can be very high. On the other hand, the owner of the burdened land cannot remove the burden on the land by paying damages, as could be done if property rights were protected by liability rules, but must respect the right since he or she would face an injunction or specific restitution in the event of a violation.

It should be pointed out that the inefficiency that would result in the event that the value of any property right in land decreased depends on the particular form of protection that such rights have. Protection by property rules requires reaching an agreement to eliminate a property right in land, and such an agreement often cannot be reached because of transaction costs. If this is true, it could be argued that if such rights were protected by liability rules (with the consequence that the owner of the burdened land could have a property right extinguished without the need for an agreement), the problem of inefficiency would be solved and limitations on party freedom in the establishment of property rights would no longer be justified. However, legal systems have chosen to protect property rights through the use of property rules and have not contemplated rights that run with the land but are protected only by liability rules.

V. New Rights Protected by Liability Rules

The fact that property rights in land are given protection by legal systems in the form of property rules does not preclude that these same systems could also provide rights that have the same characteristics as property rights but with the difference that they are protected by means of liability rules. In such a case, the owner of the burdened land would have the power to have a right existing on his or her land extinguished by engaging in conduct inconsistent with that right or by making a declaration of will, and by paying damages, without therefore having to enter into a contract with the holder of the right. Such rights would have the advantage of not resulting in the survival of inefficient situations due to the inability to reach an agreement, as the owner of the burdened land would not need such an agreement in order for the right to be extinguished.

In the event that a legal system made these particular rights permissible, the

following scenarios could arise:

- Firstly, one could imagine that parties could create rights that run with the land, protected only by liability rules and whose content is identical to that of the property rights in land already envisaged by the legal systems. As an example, a traditional right of way could be replaced by a right that has the same content but is protected exclusively by liability rules. If the parties choose to create such a right instead of a traditional servitude this would indicate that they maximize their aggregate welfare by doing so. On the other hand, the rest of society would also gain since the inefficiencies that traditional property rights can create would not arise.

- Secondly, rights that run with the land, which are protected only by liability rules and whose content is prohibited by traditional property rights, might be considered permissible. As an example, in those legal systems in which the possibility for people to create property rights in gross is very much circumscribed, one might consider it permissible to create rights with the content of those prohibited property rights in gross, which would be protected by liability rules. This idea is particularly true of the French and Italian legal systems, which exclude property rights in gross with rare exceptions. In this way, the concern that inefficient situations would come into existence would not be justified because the owner of the burdened land could have the property right on his or her land extinguished by engaging in a given behavior and paying damages. By way of example, in the Italian legal system, it is certainly impermissible to create a property right in gross entailing the right to park a car on a certain piece of land but that same right backed up by a liability rule could be established.

- Finally, a further possibility is worth mentioning. In some legal systems that have been considered, situations may arise in which the owner of the burdened land with a servitude owes one and the same obligation to owners of different lands, for example in the case of condominiums and common interest communities. Currently, legal scholars and the courts are of the view that servitudes may be created burdening an apartment in a condominium or land falling within the territory of common interest communities to the benefit of each owner of the units forming part of the condominium or the common interest community. In these situations, the owner of the burdened apartment who wishes to extinguish the burden on his or her property would have to come to an agreement with all parties belonging to the condominium or the common interest communities. Problems of holding out, which are particularly important due to the large number of parties with whom one would have to negotiate, along with other problems also related to the existence of transaction costs would generally prevent such arrangements from being implemented and any situation of inefficiency would remain. In the two cases examined here, there would be room for people to exclusively create rights that run with the land but are protected by liability rules and not by property rules, an option not permitted by traditional servitudes protected by property rules. This process would mean that the owner of the burdened land could have the various

encumbrances on his or her land extinguished by engaging in conduct inconsistent with respect for them and by paying damages to the holders of the affected rights. An agreement with all entitled parties would not be necessary.

VI. In Search of a Justification for the Current Impermissibility of Rights in Land Protected by Liability Rules

We have pointed out on the basis of our analysis that it would appear socially desirable for legal systems to empower people to create rights that run with the land protected exclusively by liability rules. However, so far legal systems do not expressly provide for this option (with a partial exception being the Restatement Third on Property). Moreover, to date not even the courts have established this particular type of right. The legal systems examined include rights that run with the land protected by property rules but do not contemplate rights that run with the land protected by liability rules.

One possible justification for this orientation of legal systems could be found in the traditional criticism that is leveled at liability rules. In the presence of a right protected only by liability rules, another person may appropriate or bring about the extinction of that right by paying damages for the loss thereby occasioned. If the function of liability rules is to permit the efficient transfer of a right in cases in which that transfer cannot take place by agreement between the parties because of the transaction costs, this function requires that the compensated sum be no less than the actual loss suffered by the injured party. Indeed, in this manner the benefit for the party that infringed upon the right will be greater than the cost borne by the injured party and thus the right passes from the one who values it less to the one who values it more.

However, this calculation of the loss to be compensated is made by the courts or by law and there is a real possibility that the loss will be underestimated. That can occur in particular when the right satisfies an idiosyncratic preference of the holder who attributes to it a value much higher than that which other people would attribute to it (the market value). The courts or the law may fail to capture exactly what the right is worth for its holder and require the payment of a sum that is actually less than the harm actually suffered by the injured party. In these situations, a possible inefficient transfer could be authorized and take place. On the other hand, the problem of inefficient transfer does not arise when an exchange takes place between the third party and the right holder under a contract, as it will be certain that the right holder will transfer the right for a sum that is higher than the value that it attributes to the right, while the sum that the buyer will pay will be less than the value that it attributes to the right.

Liability rules, in other words, carry the risk of giving rise to inefficient transfers in which the right is transferred from the one who values it more to the one who values it less. This drawback of liability rules has been well described by those

authors who do not consider it socially desirable for legal systems to make frequent use of such forms of protection.[33] In the face of these criticisms of liability rules, it can be argued that their application would be efficient on the whole if one considers a large number of cases because the loss of value that would take place in cases of inefficient transfers would be outweighed by the gains achievable thanks to those efficient transfers that could not have occurred without liability rules in view of the high transaction costs.

The aim here is to put forward a different explanation of why legal systems prefer property rules and why, therefore, those rights that run with the land but are protected by liability rules that have been pointed out in this paper as socially desirable are not found in legal systems. This different justification is based on a particular bias found in individuals that has likely been reflected in the rules of the various legal systems. This bias is represented by loss aversion. Loss aversion is the tendency to prefer avoiding losses to acquiring equivalent gains. If we imagine that the loss aversion of individuals has influenced the formation of legal rules,[34] then it is possible to theorize that because of it legal systems prefer to avoid losses for some people even if it means that other people forgo greater gains.

As an example, consider the regulation – very similar in the different legal systems – of commercial impracticability. If an obligor comes to face very high costs to fulfill its obligation, it is released from the obligation. The regulation has an efficiency rationale in that it is not socially desirable for an obligor to bear costs that exceed the benefit that the obligee would obtain. This same logic of efficiency would also militate in favor of the obligor being released in the event that it has the option of using its resources to produce a good or service for a third party that has a higher value than that which the obligor has to produce for its obligee. However, in these cases, the legal theory of commercial impracticability is not applied and the obligor will not be released from the obligation. The influence of loss aversion in the development of the rules of the various legal systems may explain why the regulation of loss for the obligor in the case of intervening excessive onerousness is different from the regulation of windfall gain for the obligor.[35]

It could then be argued that although rights that run with the land protected by liability rules are socially desirable from an efficiency point of view, nevertheless they may result in losses to some people in cases in which there is an underestimation of the harm borne by the person who has had his or her right extinguished (a likely possibility given the limited information of the courts). These losses represent an unacceptable sacrifice because of people's loss aversion that has been reflected in legal rules and, therefore, the legal systems exclude the possibility of creating these

[33] Consider, for example, R.A. Epstein, 'The Clear View of the Cathedral: The Dominance of Property Rules' 106 *The Yale Law Journal*, 2091 (1997).

[34] A comprehensive analysis of the influence of loss aversion bias on legal rules can be found in E. Zamir, 'Loss Aversion and the Law' 65 *Vanderbilt Law Review*, 829 (2012).

[35] This is particularly evident in those legal systems, such as Italy's, in which the creditor can obtain specific performance.

particular rights.[36]

VII. Caveat

Returning to the economic justification of the *numerus clausus* principle of property rights, it is necessary to introduce a caveat. The examination thus far is based on the idea that parties in the absence of this limitation on their freedom to negotiate would create property rights that are destined with a high probability to become inefficient.

However, it could be argued that, when deciding whether to create new property rights in land, the landowner will make choices that maximize the value of the land and that from this point of view are socially desirable.

As Harold Demsetz states:

> 'If a single person owns land, he will attempt to maximize its present value by taking into account alternative future streams of benefits and costs and selecting that one which he believes will maximize the present value of his privately-owned land. We all know that this means that he will attempt to take into account the supply and demand conditions that he thinks will exist after his death'.[37]

Richard Epstein also believes that the choices of the individual owner are always efficient:

> 'Further, it is not possible to justify the touch and concern requirement on economic grounds by arguing that under some independent test of welfare, servitudes fail to promote efficient land use. One objection to this argument is that it does not explain why the original parties cannot take into account future transaction costs and incentive effects in drafting their original agreement. If a seller insists that a personal covenant bind the land even though it works to the disadvantage of the immediate or future purchasers, then the seller will have to accept a reduction in the purchase price to make good his sentiments. If he is prepared to accept that reduction, does there exists an independent theory that measures the strength and worth of his preference – be they for consumption or investment – or that condemns his choice as unwise or irrational?'.[38]

However, it can be assumed that individuals will not take into account how

[36] Addressing the issue of how behavioral economics can explain many legal institutions, C. Jolls et al, 'A Behavioral Approach to Law and Economics' 50 *Stanford Law Review*, 1471 (1998).

[37] H. Demsetz, 'Toward a Theory of Property Rights' 57 *The American Economic Review* 2, 347-359, 355 (1967).

[38] R.A. Epstein, 'Notice and Freedom' n 19 above, 1360.

their land may be used after their death and therefore do not consider these aspects when making choices regarding whether or not to create a new property right. The choice the owner makes could significantly compromise the use of the land after his or her death, causing it to lose much of its value and affecting the efficient use of resources by subsequent generations. If this can be considered possible, one response from the market economic system might be that that land would be bought forward by a third party who intends to consider the value of the land with a longer period of time in mind. But in the real world, not all the markets that would be desirable exist. The efficient allocation of resources among generations requires the existence of forward markets in which an owner of an asset over which he or she would like to create new property rights can sell it forward and in unitary form for a given consideration. Unfortunately, forward markets for many particular goods cover only a very limited period of time, and the market mechanism therefore generally fails in protecting the interests of future generations.[39] Therefore, this permanent impact factor[40] exists in accordance with which the burden can survive even for generations, which justifies limiting the parties' autonomy.[41]

VIII. Conclusion

Thus, the rationale of the principle of typicality of property rights has been identified as the need to prevent people from creating rights that run with the land and could, with a good probability, become inefficient over time. Legal systems only allow for the creation of those property rights whose value remains stable over time.

The identification of such a rationale would seem to take on purely theoretical significance, without any practical repercussions, but in fact this is not the case. In the event that a rule of law covering a category of property rights appears to have uncertain boundaries, recourse to the rationale of the principle of typicality of property rights may be necessary in order to determine these boundaries.

Consider, by way of example, what has happened in the French legal system. Although the French Civil Code seems to clearly enshrine the principle that the property rights in gross that parties can create are rigidly identified in a few categories, the *Cour de cassation*, with its decision in the *Maison de la Poésie* case (2012),[42] essentially held that the principle of typicality of property rights is now outdated, especially for property rights in gross. It established the principle

[39] On this point, see H. Shäfer and C. Ott, *The Economic Analysis of Civil Law* (Cheltenham: Edward Elgar Publishing, 1st ed, 2004), 408; E. Baffi, n 26 above, 474.

[40] This expression is used by U. Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Westport, Connecticut: Praeger, 2000), 39.

[41] Highlighting the need for party autonomy to be limited in the fragmentation of lands in order to protect subsequent generations, M. Heller, 'The Boundaries of Property Rights' 108 *The Yale Law Journal*, 1163 (1999).

[42] Cour de cassation 31 October 2012, *Sem. Jur. Éd. Gén.*, 2352 (2012), with note by F. X. Testu, 'L'autonomie de la volonté, source de droits réels principaux'.

that the owner, consistent with public order requirements, may establish for the benefit of another party a property right that gives it the benefit of special enjoyment of the property. French legal theory has embraced this new case-law orientation by immediately counting it among the ranks of *grands arrêts*. The decision was partly superseded by subsequent rulings, and thus, and to date, it cannot be said that there has been a definitive expansion in the French legal system of the property rights in gross that parties can create.[43]

It can be argued that should the principle become entrenched, the problem would arise of identifying the limits, if any, on this power of the owner to create new property rights in gross. In this case, recourse should undoubtedly be made to the rationale of the principle of typicality of property rights. If this rationale, as has been argued in this paper, consists of the need to avoid the creation of rights that may become inefficient over time, it would become necessary to limit this power of the owner by granting him or her exclusively the power to create property rights in gross whose value remains stable over time and is therefore not subject to volatility. The creation of property rights in general that satisfy a preference but could easily fade over time would not be permissible.

[43] An account of this event is given by E. Calzolaio, 'La tipicità dei diritti reali: spunto per una comparazione', in Unidroit ed, *Eppur si Muove: The Age of Uniform Law* (Rome: Unidroit, 2016), 1945-1950.

A Bottom-Up Financial Strategy for a Sustainable Society

Adele Emilia Caterini*

Abstract

This paper examines the Social Impact Bond as a form of Impact Investment to finance policies of ecological transition. Due to the lack of sufficient traditional financial resources, the involvement of the private sector in the pursuit of environmental, social and economic objectives could actively contribute to sustainable development. This study seeks to analyse these bottom-up interventions which, albeit with limited and long-term remuneration, fight against climate change through the use of renewable sources. Thus, besides favouring carbon neutrality, these interventions promote the overcoming of the current economic crisis. However, the measures presuppose a concrete assessment of their merit according to the criteria of reasonableness, proportionality and sustainability, as well as an analysis of how adequate they are with respect to the positive results pursued.

I. Introduction

The climate emergency is highly correlated with the economic crisis.[1] The connection between the two derives from the 'financialisation of the economy', since the 'fundamental value' of financial products is not strictly linked to the market price. The sudden change in the prices of fossil fuels, such as oil, do not depend on the deregulation of real supply or demand, but on the relative operations on the derivative markets.[2] European monetary policy usually responds to increasing relative prices, and therefore inflation, by raising interest rates. These measures cause a contraction in demand to the detriment of economic growth. A suitable solution

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[1] J. Tirole, *Économie du Bien Commun* (Paris: Presses Universitaires de France, 2016), 293, where the link between the economy and ecological transition is explained: 'L'impératif écologique ne peut être respecté que si l'impératif économique l'est. (…) Les mécanismes de prix (taxe ou marché) ne sont donc pas les ennemis d'une politique écologique, mais bien au contraire la condition necessaire pour qu'une politique écologique de grande envergure puisse se realiser'.

[2] G. Giraud, *Transizione ecologica. La finanza a servizio della nuova frontiera dell'economia* (Verona: EMI, 2015), 76-78. According to the author, 'The "engine" of inflation in our globalized economy is not, in fact, the price-wage circuit, but the price of energy', 26-27.

to combat the climate emergency, mainly caused by the use of fossil energy sources,[3] and to promote economic development, is to invest in ecological transition. Recourse to credit constitutes a means for the pursuit of general interests, as long as it is sustainable. The increase in competitiveness, for the benefit of future generations, must be balanced with solidarity.

A thorny issue concerns public and private finances and their relative inadequacy to fully bear the cost of eco-friendly measures. The instability of the two sectors is connected to the strong interrelation between the two that intervene to cover one another. The European Central Bank and national banks have bought public debt securities where States in exchange rescue bankrupt credit institutions.[4] In addition, there is a strong credit squeeze due to the banks' 'distrust of savers' solvency' following the 2006 subprime mortgage crisis.

From the aforementioned situations, the need arises for the involvement of the private sector to achieve *ultra partes* interests. The principle of horizontal subsidiarity[5] establishes the 'autonomous initiative of citizens' in the pursuit of general interests, implementing the value-person. This concept allows their widespread participation in the legal system, and also through negotiation autonomy. In addition, Art 43 of the Italian Constitution establishes the possibility of reserving or transferring to 'communities of users' the provision of essential public services, energy sources or monopoly situations for purposes of general utility.

The 'financialisation of welfare'[6] expresses the engagement of financial operators in the realisation of social policies.[7] The use of private savings which have grown as a result of the recent pandemic is an indispensable resource for the implementation of ecological transition.

Overcoming the public-private dichotomy[8] allows for the coexistence of the

[3] ibid 102: 'Climate warming is due to greenhouse gas emissions, about 60% due to CO2 resulting from the combustion of fossil energy sources (coal, oil and gas)'.

[4] For an in-depth analysis, see G. Giraud, n 2 above, 152-157.

[5] '(…) a clear demarcation between negotiating autonomy and initiative pursuant to Art 118 cost. cannot be supported; on the contrary, it is the same negotiating autonomy that finds its foundation in subsidiarity. Art 118 cost. (...) is no other than the explicit formal recognition of autonomy as an initiative, an act of impulse, which finds in itself both the capacity for self-regulation and that of regulation, with external relevance. (…) The separateness or even the contrast between Art 1322 of the Italian Civil Code and Art 118 Cost does not exist'. P. Perlingieri, 'La sussidiarietà nel diritto privato' *Rassegna di diritto civile*, II, 687 (2016).

[6] M. Francesca, 'Inclusione finanziaria e modelli discriminatori. Note introduttive sugli epigoni della discriminazione razziale', in Id and C. Mignone eds, *Finanza di impatto sociale. Strumenti, interessi, scenari attuativi* (Napoli: Edizioni Scientifiche Italiane, 2020).

[7] In accordance with C. Mignone, 'Terzo settore e strumenti finanziari ad impatto sociale' *Giustiziacivile.com*, II, 9 (2014), the new models of 'organized solidarity' lead to a vision of forms of funding that are no longer merely patrimonial but are based on 'mixed performance', that is, the combination of social benefits and financial profits.

[8] According to J. Tirole, n 1 above, 63, the economy, being at the service of the common good, contributes to the pursuit of the general interest and collective well-being. With reference to the climate issue, the author argues that the suggestions of economists, such as taxation on emissions

pursuit of social objectives and the profit-making intent of investors. A systematic and axiological reading[9] entails, in accordance with personalist and solidarity principles, the functionalisation of the market to the value of the person[10] and the realisation of the 'vital minimum'.[11] The latter, in fact, is guaranteed through horizontal subsidiarity and, thus, the welfare society contract.[12]

II. Social Finance: Bottom-up Intervention for Ecological Transition

An example of the forms of investment that combine profit-making and social purposes is Sustainable Responsible Investments (SRIs), an investment approach that takes into account positive social or environmental effects as a complementary aim with respect to the main business goal. The investment assessment and decision are, therefore, based on the so-called ESG criteria.13 While Responsible Investment aims to avoid the harm, excluding investments that could create negative social

and the provision of negotiable emission rights, have considerably reduced the level of ecological policies and improved environmental conditions.

[9] Relating to the need for a systematic and axiological interpretation, 'the principle of legality implies compliance with individual precepts, but coordinated with a set of normative propositions and harmonised with the fundamental principles of primary importance (...), through the comparison and contextual knowledge of the problem to be regulated – a fact historically determined – in order to identify the most appropriate legislation for the interests and values it bears. The interpretation, therefore, is by definition logical-systematic (...) and teleological-axiological, that is, aimed at the implementation of the values characterising the legal system'. P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti* (Napoli: Edizioni Scientifiche Italiane, 4th ed, 2020), II, 334-335.

[10] 'The market is only an idea serving the primary objective of protecting the person and his rights, not the result to be achieved'. P. Perlingieri, 'Relazione conclusiva', in Id and L. Ruggeri eds, *Diritto privato comunitario*, (Napoli: Edizioni Scientifiche Italiane, 2009), II, 401.

[11] 'The "vital minimum" is the "essential content" of the inviolable rights of man, it is the *res cogitans* of human dignity as the nucleus of the *status personae*, where the *res extensa* is the *status civitatis*'. E. Caterini, 'Il "minimo vitale", lo stato di necessità e il contrasto dell'esclusione sociale' *Rassegna di diritto civile*, IV, 1129, 1141 (2016).

[12] 'There is the triple functional sequence of the contract. One linked to the economic balance between performances (between peers or spontaneous competitiveness), a second one governed by an induced economic balance (interclass or guided competitiveness), the third one based on sine-allagmatic satisfactory performance. The latter does not present competitive reasons while emphasising sustainable social justice. This does not cancel itself out in the first two contractual functions, although it can cooperate to improve the efficiency of the market. (...) These contracts have their roots in the 'social community' rather than in the market as a legal construct. The contracts of the social community still have a patrimonial content. They can be of exchange but they are not compensatory'. E. Caterini, *Sostenibilità e ordinamento civile. Per una riproposizione della questione sociale* (Napoli: Edizioni Scientifiche Italiane, 2018), 100-103.

[13] 'They take into account a company's performance with respect to its effects on nature, its relationships with employees, clients and society, and the transparency of its governance'. European Parliament, 'Social Impact Investment, Best Practices and Recommendations for the Next Generation', 2020, 16, available at https://tinyurl.com/3efv5mx2 (last visited 20 September 2023). In addition to the intrinsic convenience of the economic operation, environmental and social factors guide the choices of investors. Receiving a positive opinion from the market, they also become indexes of return on investment.

value, Sustainable Investment tries to produce social benefits in addition to economic ones by prioritising investments that meet environmental, social and governance sustainability standards.[14]

In contrast, (Social) Impact Investing[15] represents a proactive method[16] that intends to achieve, in addition to a financial return, a measurable and positive impact[17] on the environment or society. Following the new and exacerbated social challenges of the recent Covid-19 pandemic and the subsequent economic crisis, as well as the current war conflicts, '(...) Social Impact Investment (SII) has emerged as one of the most effective potential strategies for solving the key societal challenges of our time'.[18]

Although subsidiary welfare measures have also been established at the national level,[19] it is necessary to analyse the Impact Investing negotiation schemes

[14] ibid 16.

[15] This expression, coined in 2007 during a meeting organised by the Rockefeller Foundation, describes, according to the Global Impact Investing Network (GIIN), a set of 'investments made with the intention to generate positive, measurable social and environmental impact alongside a financial return'.

[16] The 'proactive' intentionality constitutes the characterising element of impact investing with respect to the SRI models. M. Falkowski and P. Wisniewski, 'Impact Investment as New Investment Class' *Review of Business and Economics Studies*, 78-79 (2013).

[17] It has been considered 'a silent revolution that is spreading in the capital market, which evolves from the two-dimensional represented from risk and revenue, to a three-dimensional identity, induced by the introduction of a third dimension: the impact' A. Casadei, 'La rivoluzione silenziosa del social impact investing' *Amministrazione e finanza*, III, 71-72 (2016).

[18] European Parliament, 'Social Impact Investment', 9, available at https://tinyurl.com/3efv5mx2 (last visited 20 September 2023).

[19] Based on their practical dissemination, in Italy an initial regulation of these forms of supplementary and subsidiary welfare with respect to public intervention can be found in Title IX of decreto legislativo 3 July 2017 no 117, relating to the solidarity bonds of third sector entities and other forms of social finance, the intent of which is to favour the financing of social utility activities carried out by Third Sector entities (Art 77). These solidarity securities consist of bonds and other debt securities, as well as certificates of deposit, issued by credit institutions to raise capital restricted to finance the activities of general interest carried out by third sector entities. The peculiarity consists in the fact that placement commissions are not applied. The only form of remuneration is the interest related to the use of the capital raised by non-profit entities. Since the applicable interest rate is not set by the legislator, the bank can also grant the loan at an interest rate lower than the yield of the securities. In this case, it will be responsible for paying the remaining part to the subscribers, thus renouncing a part of the profit. C. Mignone, 'Meritevolezza dell'iniziativa, monetizzazione del benessere e nuovi modelli di welfare sussidiario' *Rassegna di diritto civile,* I, 115, 126-127 (2017). In addition, the Provvedimento 8 November 2016 no 584 of Banca d'Italia, laying down provisions for the collection of savings from entities other than banks, disciplines in Section IX Social lending or lending based crowdfunding. It constitutes a tool through which a plurality of subjects can request repayable funds for personal use or to finance a project of a plurality of potential financiers, through online platforms. Art 100-*ter*, decreto legislativo 24 February 1998 no 58 (TUF), as replaced by Art 4, lett a), decreto legislativo 3 August 2017 no 129, includes social enterprises among the subjects entitled to raise risk capital through the subscription of financial instruments based on the proposed economic initiative published on authorised portals. Again, Art 10, legge 6 June 2016 no 106 of the Third Sector reform establishes the Italy Social Foundation with the aim of supporting, through financial resources and management skills, the implementation and development of innovative interventions by non-profit organisations. Having a subsidiary function

adopted in practice. It has been authoritatively affirmed, 'social impact finance is a phenomenon that comes from below'.[20]

1. Applicative Experiences of Impact Investing: The Social Impact Bond

Among the Social Impact Finance tools,[21] the Social Impact Bond (SIB) stands

with respect to public intervention, it is characterised by the prevalent use of resources from private entities. The raising of capital can also take place through investment instruments and methods, directly or in partnership with third parties, welfare models supplementary to those guaranteed by public measures and other social finance instruments (Art 10, Para 2, letter b), legge no 106/2016). Moreover, forms of involvement of non-profit entities are envisaged through co-programming tools that relate to the needs to be met, the interventions necessary for this purpose, the methods of implementation of the same and the resources available (Art 55, Para 2, decreto legislativo 3 July 2017 no 117), and the co-design of specific service or intervention projects (Art 55, Para 3, decreto legislativo no 117/2017).

[20] C. Mignone, 'Meritevolezza dell'iniziativa' n 19 above, 115, 119.

[21] Debt-for-nature swaps (DNS) are further 'low profit' (C. Mignone, 'Finanza alternativa e innovazione sociale: prolegomeni ad una teoria dell'«impact investing»', in *Benessere e regole dei rapporti civili. Lo sviluppo oltre la crisi, Atti del 9° Convegno Nazionale in ricordo di Giovanni Gabrielli, 8-9-10 Maggio 2014* (Napoli: Edizioni Scientifiche Italiane, 2015), 368, models that combine social benefits and financial profits. These so-called Environmental Agreements provide for the purchase of debt of developing countries by NGOs (so-called private DNS) or States (so-called public DNS) with subsequent cancellation or reduction of the same. For an in-depth analysis, M. Meli, 'Ambiente e mercati finanziari: i Debt-for-Nature Swaps' *Osservatorio del diritto civile e commerciale*, I, 79-93 (2016). These are, unlike Social Impact Bonds, solutions of a centralized nature. The current public and private financial situation, however, requires the promotion of initiatives of private autonomy for the pursuit of general interests, such as environmental ones.

Social crowd-funding and European social entrepreneurship funds (EuSEF) are also financial instruments that constitute forms of integration between market and environment. The first consists of the risk capital fundraising through an online portal for the financing of innovative start-ups, also aimed at ecological purposes. The imbalance between risk and financial return of such policies is mitigated through a risk reduction with the involvement of non-professional investors, generally not inclined to default risk (C. Mignone, ibid 354). European social entrepreneurship funds governed by European Parliament and Council Regulation (EU) 2013/346 of 17 April 2013, instead, establish a diversification of risk as the manager has the obligation to invest 70% of the subscribed capital in 'qualifying portfolio undertaking'. The latter is defined as such that, among the requirements, 'has the achievement of measurable, positive social impacts as its primary objective in accordance with its Arts of association, statutes or any other rules or instruments of incorporation establishing the business' (Art 3, Para 1, letter d (ii), European Parliament and Council Regulation (EU) 2013/346). A measurable and positive social impact includes activities concerning environmental protection with a societal impact, such as anti-pollution, recycling and renewable energy (recital 14, European Parliament and Council Regulation (EU) 2013/346). However, it is not excluded the use of 30 % of its aggregate capital contributions and uncalled committed capital for speculative purposes (Art 5, Para 1, European Parliament and Council Regulation (EU) 2013/346). As it has been authoritatively argued, while in social crowdfunding the social value of the financed activity is the justifying reason for a special regulation, in EuSEF funds and Social Impact Bonds the interest of the investor changes as it affects not only the financial result but also the achievement of measurable positive social impacts (C. Mignone, ibid 360).

The green bonds are thematic bonds that qualify as debt capital investments issued and underwritten because of an environmental benefit. Relating to them 'there is, therefore, a functional interpenetration of the realization of a common benefit in the contractual cause of the financial

out. The first one was experimented with in 2010 by the UK Minister of Justice to reduce the recidivism rate of three thousand short-term inmates of Peterborough Prison and, consequently, the daily public spending for each prisoner.[22] The main agreement was stipulated between the aforementioned Minister and a vehicle company, invested in and constituted by the intermediary Social Finance Ltd. It provides for the fulfilment of the Minister's obligation to remunerate investors in the event of a predetermined reduction in the recidivism rate among the beneficiaries of the programme.[23]

This form of public-private partnership is characterised by the raising of capital from private investors for the implementation of social policy programmes.[24]

instrument, so that the cause of the contract assumes in concrete an original configuration, which (...) imposes its subjection, in its functional complexity, to checks of lawfulness and merit of the pursued interests' (D. Lenzi, 'La finanza d'impatto e i green e social bonds. Fattispecie e disciplina tra norme speciali e principi generali' *Banca Impresa Società*, I, 124 (2021)). In this sense, a further development of the market for high quality green bonds is enhanced at European level by the Proposal for a Regulation of European Parliament and Council (EU) 2021/0191 of 6 July 2021 on European green bonds. In addition, the recent Proposal for a Regulation of European Parliament and Council (EU) 2023/0077 of 14 March 2023 to improve the Union's electricity market design, also aims to boost renewable energy investment partly by improving the markets for long term contracts. Among them, two-way contracts for difference are direct price support schemes that not only give renewable energy suppliers reliable revenues, limiting their financial risk and greatly reducing their cost of capital, but also provide consumers with stable prices. They, in fact, with an upward limitation of the market revenues, establishes that the revenues are passed on to all final electricity customers, including households, SMEs and industrial consumers, based on their consumption.

[22] A. Nicholls and E. Tomkinson, 'The Peterborough Pilot Social Impact Bond', in A. Nicholls, R. Paton and J. Emerson eds, *Social Finance* (Oxford: Oxford Academic, 2015), 335-380.

[23] The pilot project, lasting five years, provided for a minimum remuneration of 2.5% per year in the event of a reduction in the recidivism rate of 10% for each of the three groups into which the beneficiaries were divided or a reduction in the recidivism of 7.5% on average with respect to the total number of beneficiaries. A better result would have resulted in higher returns with a cap equal to 13% while a lower result would have resulted in the loss of the capital invested. In 2017, the intermediary announced the success of this project with a reduction in recidivism equal to 9% at a collective level with a consequent return to the seventeen investors of the capital and an additional 3% per annum for the investment period.

[24] The main figures of SIB are: a public authority that, on the basis of issues of general interest, identifies a social result to be pursued, the programme to be implemented in agreement with the service provider and the remuneration of the investment deriving from the hypothetical positive outcome of the programme; private investors who provide the necessary financing, generally through phased payments established to achieve interim results; a specialised intermediary acting directly or through a vehicle company (special purpose vehicle set up to manage this contract specifically); the service provider, usually a third sector organisation, responsible for rendering the service and for its quality, which is remunerated, to compensate for the costs incurred, by the intermediary with the capital of the investors, generally regardless of the achievement of the predetermined objectives; a neutral evaluator, a third and independent body whose task is to measure the outcomes achieved with the relative social impact and to determine the consequent return of investors. Additional figures may intervene, such as an advisor as technical support to public figures; the guarantors of the investment, parties to a surety agreement with the intermediary, and investors who ensure to the latter the return of at least part of the amount; the managers of the guarantee instruments who reduce the risk borne by the investors by encouraging forms of coverage of part or all of the capital. C. Napolitano, 'Il social impact bond: uno strumento innovativo alla ricerca del suo diritto', in M. Francesca and C. Mignone eds, Finanza di impatto sociale n 6 above.

This constitutes a rather flexible tool that implies the participation of a multiplicity of actors. Its essential content is the agreement between the public body and an intermediary or vehicle company with which the former undertakes to pay the amount set for the achievement of the social purpose in terms of public spending savings.

The main characteristic of this negotiating scheme is the conditioning of the reimbursement in the invested sum and the payment of the related interests[25] on the pursuit of the pre-established social results, measurable *ex post* by a neutral evaluator (for this reason, called 'outcomes-based contract'). Arguably, the term 'bond' does not express the nature of the security, but the correlation between profitability and the social results.[26] It follows that SIBs, rather than debt securities that attribute to the holder the repayment of the loaned capital and fixed interest (coupon) accrued within a certain period, are comparable to equity securities as the financial return depends on the achievement of specific social results.[27]

According to this approach, investors aim to achieve a dividend defined as 'mixed', ie consisting of

> 'identifying those social benefits that a prevention activity is able to generate, quantifying the economic aspect in terms of future spending savings and using a rate of these savings to remunerate the investor who has 'bet' on the success of a project'.[28]

Therefore, the financial return depends on a variable, the social impact,[29]

[25] Investments could target a range of returns from below the market rate to the market rate, depending on the investors' strategic goals. In the first case, investors primarily aim to generate the social or environmental good, and are often willing to give up some financial return if necessary (so-called impact first investors). In the second case, however, they are typically commercial investors who seek subsectors that offer market-rate returns while achieving some social or environmental good (so-called financial first investors). For this distinction, see J. Freireich and K. Fulton, 'Investing for Social & Environmental Impact. A Design for Catalyzing an Emerging Industry', 2009, 33, available at https://tinyurl.com/3znwruj8 (last visited 20 September 2023).

[26] A. Del Giudice, *I Social Impact Bond* (Milano: FrancoAngeli, 2015), 45.

[27] N. McHugh et al, 'Social Impact Bonds: A Wolf in Sheep's Clothing?' 21 (3) *Journal of Poverty and Social Justice*, 247-257 (2013).

[28] A. Del Giudice, n 26 above, 12. The remuneration dependent on the achievement of the environmental or social impact in accordance with Art 2411, para 2, Italian Civil Code, is considered admissible, provided that it depends on objective parameters. It is therefore necessary to identify clear quantitative thresholds for the impact of which the specific remuneration arrangements will apply. (D. Lenzi, n 21 above, 139).

[29] The impacts are defined in the Glossary of Key Terms in Evaluation and Results Based Management published by the OECD-DAC in 2002, as the '[p]ositive and negative, primary and secondary long-term effects produced by a development intervention, directly or indirectly, intended or unintended'. The most widespread approaches are the counterfactual ones, based on quasi-experimental verification methods through which the achievement of the objectives pursued and the existence of a direct causal link between the programme and the impact achieved by comparison with a control group are measured. However, they are effective only in 5% of projects characterised by simplicity, stability of environmental conditions and brevity. The adoption of evaluation methods, so-called 'case sensitive' ones, based on the experience of the beneficiaries, could allow a modification of

correlated to factors that cannot be controlled by investors or by other actors in the operation. The achievement of the expected result, however, is partially influenced by the quantitative and qualitative adequacy of the service provider's performance.[30] Furthermore, the *ex ante* assessment of the probability of verification of the social impact is very difficult for the investor who does not have the power to control

the interventions for their greater effectiveness. F. Rucco, 'La valutazione di impatto sociale nei modelli payment by result: scelta degli indicatori e limiti dell'approccio controfattuale', in M. Francesca and C. Mignone eds, *Finanza di impatto sociale* n 6 above, 431-449.

In accordance with Art 7, para 3, legge 6 June 2016 no 106, this formula implies an impact assessment of both a quantitative and qualitative nature. While the first one provides investors with objective parameters of risk and profitability management, the second allows for the adequate and effective ascertainment of the resolution of the social problem and the effects produced. For these reasons, a programme similar to that of the London Homelessness SIB, which collects from private lenders the amount necessary for the provision of a social service with the aim of eradicating the problem of homelessness, whose indicator is represented by the number of homeless people with stable housing and of foreign ones repatriated, is undeserving as it distorts the interest underlying the function of the service. In this case, the Mungo Foundation, the service provider, participates in the formation of the capital of the vehicle company (Street Impact Ltd), bearing a significant share of the risk. It is, therefore, incentivised to achieve the numerical objectives set out in the main contract. C. Mignone, 'Finanziarizzazione del welfare e funzione degli atti di autonomia' *Rassegna di diritto civile*, II, 567, 592 (2021).

To assess the environmental or social impact pursued by SIB model, there are several standards aimed at measuring it, such as the GRI Standards developed by the Global Reporting Initiative. They enable an organization to report information about its most significant impacts on the economy, environment, and people, including impacts on their human rights, and how it manages these impacts. They are organized into three series: GRI Universal Standards which apply to all organizations; GRI Sector Standards applicable to specific sectors; and GRI Topic Standards each listing disclosures relevant to a particular topic. According to them '(a)ssessing the significance of the impacts involves quantitative and qualitative analysis. How significant an impact is will be specific to the organization and will be influenced by the sectors in which it operates, and its business relationships, among other factors. In some instances, this may need a subjective decision. The organization should consult with relevant stakeholders […] and business relationships to assess the significance of its impacts. The organization should also consult relevant internal or external experts' (GRI 3: Material Topics 2021, available at https://tinyurl.com/2s3dhsju, 12, (last visited 20 September 2023)). According to these Standards, the significance of an actual positive impact is determined by the scale (beneficial impact assessment) and scope of the impact (impact spread) as well as the likelihood of the impact. The latter, relating to the chance of the impact happening, can be measured or determined qualitatively or quantitatively. It can be described using general terms (eg, very likely, likely) or mathematically using probability (eg, 10 in 100, 10%) or frequency over a given time period (eg, once every three years) (GRI 3: Material Topics 2021, available at https://tinyurl.com/2s3dhsju, 13 (last visited 20 September 2023)). There are also several techniques for measuring non-financial results including the Social Return On Investment (SROI), with regard to social impact. It consists of the measurement in monetary terms of the costs, benefits and any negative consequences of an activity, in addition to a report of the effects deriving from the program. For an in-depth analysis, J.J. Cordes, 'Using cost-benefit analysis and social return on investment to evaluate the impact of social enterprise: Promises, implementation, and limitations' *Evaluation and Program Planning*, 64, 98-104 (2017); R. Barone, 'Impact investing e ruolo della pubblica amministrazione: rischi e opportunità', in M. Francesca and C. Mignone eds, *Finanza di impatto sociale* n 6 above, 427, in which it has been underlined that '[t]his tool allows not only to evaluate and know the produced social impact, but it can be helpful to investors in order to make a comparison between different possibility of investment and to make their choice'.

[30] This is a variable 'never experienced before in finance'. See A. Del Giudice, n 26 above, 106.

the disbursement activity.[31] Indeed, it is a high-risk operation that falls entirely on the investors.[32]

For these reasons, a guarantee fund[33] was set up by Bloomberg Philanthropies in the Rikers Island model adopted in 2012 in New York to reduce the recidivism rate of young prisoners. It performs the task of limiting the risk of loss of the invested capital in the event of failure to achieve the social objective[34] or, in the reverse case, collects resources usable for new operations of the same type.[35]

Another thorny aspect of this negotiating tool would be the risk of exploiting personal services for profit-making purposes.[36] This maximisation of the financial return with the potential degradation of the underlying public interest would

[31] C. Mignone, 'Meritevolezza dell'iniziativa' n 19 above, 115, 123 (2017).

[32] It has been stated that from the development of this new way of financing the non-profit organisation that includes 'support from an asset class structured with the aim of generating financial returns and achieving positive social impacts' comes the problem of the 'financial-social return gap. The social benefit is considerable, but the risk of losing the entire capital is not offset by a sufficient return to make the investment attractive'. C. Mignone, ' "Impact Investing" in the European Legal System: An Italian Perspective on Investors' Protection and Regulatory Compliance' *Rivista di diritto bancario*, III, 303, 312 (2016).

[33] Similarly, the Municipality of Naples launched a programme for the disposal of waste through the construction of a composting plant in Scampia which provides for the cold extraction of biogas and without the emission of substances and odours. The peculiarities of the operation can be seen: in the issue of a bond called TRIS (Public Expense Reduction Title) not by a public entity but by the Intesa Sanpaolo Group, through Banca Prossima; in the certainty of savings in public spending equal to € 40 per ton of wet waste (from €140 spent to dispose of waste outside the region to € 100 per ton to deliver the collected waste to the new plant); in the absence of risk for investors thanks to the guarantee offered by Banca Prossima and, if successful, in remuneration corresponding to that of government bonds; in the pursuit of a further social objective, namely the reduction of unemployment or inactivity through the involvement of social enterprises in the various phases of the waste valorisation cycle. C. Mignone and R. Di Raimo, 'Strumenti di finanziamento al Terzo settore e politiche di intervento locale nella «società inclusiva» europea. (Dalla filantropia alla finanza alternativa)' *Giustizia civile*, I, 179-180 (2017).

[34] The SIB is a $ 9.6 million loan launched to support the delivery of therapeutic services to 16- to 18-year-olds incarcerated on Rikers Island. It will be repaid based on the actual and projected cost savings realised by the New York City Department of Correction as a result of the expected decrease in recidivism. The Goldman Sachs loan is a multiple-draw term loan to MDRC, an experienced intermediary, to provide funding to the service provider, the Osborne Association. The Vera Institute of Justice, an independent, nonpartisan, not-for-profit centre for justice policy, serves as the evaluator of the programme and evaluates the extent to which the programme has reduced the rate of recidivism. The main feature is that Bloomberg Philanthropies provided a $7.2 million grant to MDRC to guarantee a portion of the loan, thus reducing Goldman Sachs' risk. See J. Olson and A. Phillips, 'Rikers Island: The First Social Impact Bond in the United States' *Community Development Innovation Review*, 97 (2013).

[35] By virtue of the fund's existence, the early closure of the programme to reduce the recidivism rate below the pre-established threshold was followed by a loss for investors of $ 1.2 million compared to the $ 7.2 million paid.

[36] 'Consequently, those most vulnerable and in greatest need may be "parked" and neglected due to the difficulty, cost and time involved in dealing with them satisfactorily, while operations are focused instead on "creaming" clients with less need, but who are easier to remove from claimant counts, thereby fulfilling incentivised or contractual outcomes'. See N. McHugh et al, 'Social Impact Bonds: A Wolf in Sheep's Clothing?' 21(3) *Journal of Poverty and Social Justice*, 247, 250 (2013).

determine the choice of programmes and objectives with an easily measurable impact and, therefore, with a reasonable probability of success. A further consequence would be the tendency of the service provider to maximise the numerical objectives set out in the agreement.[37]

With a view to the prevalence of profit-making purposes, the selection of the target group could take place in a discriminatory way. This danger of so-called 'cherry-picking' or 'adverse selection of beneficiaries' consists in the exclusion of individuals with personal qualities that could reduce the chances of the success of the programme. However, the assessment of this inequality presupposes the verification not of hateful intent[38] but of an objective justification.[39] Discrimination would be prohibited only if it were of a disproportionate measure with respect to the prejudice suffered by the discriminated and to the possibility of finding valid alternatives, or an inadequate method compared to other solutions involving less sacrifice of the users' interest. In these cases, the lawfulness and merit of the cause of the contract would be affected and, therefore, the illegitimacy of the administrative discretionary activity and of the power of autonomy would ensue.[40]

Furthermore, given the uncertainty of the model, small organisations in the non-profit sector would hardly be able to participate in an SIB due to the lack of sufficient resources to bear the resulting risks.[41]

These risks, however, are limited if not almost entirely eliminated in the case of financing ecological transition where they consist of interventions with an easily measurable socio-environmental impact and whose success is highly probable. The yield of these interventions, although limited and in the long term,[42] is more solidly guaranteed, since the uncertainty to which investors are generally exposed, even for climatic emergencies, is significantly reduced.[43] It is also remuneration in the broad sense, including not only the financial profit but the achievement of environmental results to which the social and economic ones are

[37] C. Mignone, 'Una via costituzionale all'impact investing', Parte II, in M. Francesca and C. Mignone eds, *Finanza di impatto sociale* n 6 above, 34-35.

[38] The discrimination carried out by economic operators is attributable to a 'profit maximisation or, in general, (to) an efficient resource allocation strategy'. See P. Femia, *Interessi e conflitti culturali nell'autonomia private e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 534.

[39] C. Mignone, 'Una via costituzionale all'impact investing' n 37 above, 44.

[40] ibid 42.

[41] A. Del Giudice, n 26 above, 101.

[42] According to G. Giraud, n 2 above, 27, this would be a profitability of 3% over ten years.

[43] Unregulated markets are, in fact, incomplete, as they are exposed to adverse risks, also climatic ones, which are not hedged. They are therefore always exposed to sunspot, that is, 'an extrinsic random variable (➔), which is not connected to market fundamentals (such as the preferences and resources of agents or production technology), which nevertheless influences the behaviour of operators through their expectations (➔ expectation) on the choices of everyone else'. 'Macchia solare', *Dizionario di Economia e Finanza Treccani*, 2012, available at https://tinyurl.com/bdzbw29k (last visited 20 September 2023). This leads to inefficient fluctuations in the economy. G. Giraud, n 2 above, 74.

correlated in favour of the community, and consequently to the benefit of the investors themselves.[44] These operations, therefore, ensure for the purposes of the target group, a selection of diversified subjects who voluntarily join the initiative, including those of low income and in conditions of vulnerability. This involves wide participation and accessibility even for subjects whose economic potential is limited.

2. Legal Issues: The Involvement of Public Entities and the Merit of the SIB

With reference to the compatibility of this negotiation model with internal legal regulation, since the SIB provides social services,[45] it is necessary to assess the compliance of the model with the application of the legislation on public procedures.

The first legal issue concerns the regulation on public accounting of the public administration. On one hand, the certainty or predictability that characterises the formation of the financial statements of public bodies requires the latter to draw up a multi-year financial statements showing the spending commitments for the obligations assumed determined in the *an* and in the *quantum*.

[44] J. Tirole, n 1 above, 280-281, in underlining the need for international actions to combat climate change, argues that social co-benefits can lead to eco-sustainable behaviours: '*certain pays pourraient encourager leurs habitants à manger moins de viande rouge, non pas pour lutter contre les émissions de methane (qui est un GES) et donc contre le réchauffement climatique, mais afin de réduire la prevalence des maladies cardiovasculaires. Ces «cobénéfices» créent un incitant, très insuffisant mais un incitant tout de même, à réduire les émissions*'.

Since the financing of ecological transition policies through the use of private savings offers the investor not only economic benefits but also social and environmental benefits, this phenomenon seems to be attributable to so-called positive sanctions. Relating to positive sanctions, see A. Lepore, *Prescrizione e decadenza. Contributo alla teoria del «giusto rimedio»* (Napoli: Edizioni Scientifiche Italiane, 2012), 61; P. Perlingieri and P. Femia, *Nozioni introduttive e principi fondamentali del diritto civile* (Camerino-Napoli: Edizioni Scientifiche Italiane, 2nd ed, 2004), 7; N. Bobbio, 'Le sanzioni positive', in P. Perlingieri and P. Femia ed, *Dalla struttura alla funzione* (Milano: Edizioni di Comunità, 1977), 33.

[45] According to the Consiglio di Stato, Adunanza della Commissione speciale, 20 August 2018 no 2052, *giustizia-amministrativa.it*, '[…] the assignment of social services, in any case governed by the national legislator, must comply with the pro-competitive legislation of European origin, as it represents a method of commitment, a service (in Euro-unitary terms, a 'contract') which falls within the perimeter of application of the current Euro-unitary law. Nevertheless, under certain conditions, the procedure for assigning social services governed by domestic law is not subject to the regulation of Euro-unitary origin. This happens when: the procedure governed by domestic law is not selective in nature; it does not tend, even prospectively, to the assignment of a social service; the procedure governed by domestic law aims at entrusting a social service to a private law body which, however, the entrusted body will carry out entirely free of charge […]. In this sense, the actual gratuitousness, with regard to the content, is resolved in terms of non-economic service since it is managed, from a cost and benefit point of view, necessarily at a loss for the provider. Consequently, it is not provided by the market, rather it is out of the market'. Consequently, the gratuitousness of the SIB is excluded by virtue of the existence of a remunerable or in any case guaranteed investment although in a future and conditional way. C. Napolitano, 'Il social impact bond' n 24 above, 368-369, no 34.

In the SIB, contrarily, the remuneration of the investors and, therefore, the payment by the public-promoter subject is conditioned by the achievement of a certain level of social impact and, consequently, of a saving in public spending. Based on the negotiation choice, the financial return can consist of a fixed and predetermined amount or can be proportional to the level of social impact. In the latter case, the fulfilment of the payment is uncertain not only in the *an* but also in the *quantum*,[46] resulting in it being incompatible with the rules of public finance.

Firstly, in order to ensure compatibility with the aforementioned regulation, it is necessary for the measure of the social impact to be predetermined, quantifiable, recognisable and controllable.[47] In this way, it is possible to identify the maximum amount that the public authority is required to pay in the event of a successful outcome of the programme. An authoritatively proposed solution suggests, following the stipulation of the SIB, registration in the current year of the aforementioned maximum amount by the entity. Based on the progress of the transaction, this is followed by the payment to investors of an amount equal to or less than the item recorded in the balance sheet or the recording of extraordinary income that can be reinvested in other public or social policies.[48]

Another question of particular importance concerns the legal classification of the model. In fact, various reconstructions have been proposed aimed at connecting the SIB with one of the figures governed by the code of public contracts.[49]

[46] C. Napolitano, 'Il social impact bond' n 24 above, 361.

[47] ibid 361.

[48] ibid 362.

[49] With regard to public contracts for the provision of services, the critical issues raised concern the different distribution of market risk. As can be deduced from the ANAC determination 23 September 2015 no 10, 'Linee guida per l'affidamento delle concessioni di lavori pubblici e di servizi ai sensi dell'articolo 153 del decreto legislativo 12 aprile 2006, n 163', what differentiates this contract from that of the concession of both works and services 'is the sharing of the risk between the administration and the concessionaire. In the absence of risk related to management, regardless of the *nomen iuris* used, not the concession but the contract is configured (...)' (6). While in the public contract it weighs both on the contracting authority-public administration and on the economic operator, in the SIB it falls entirely on the investors. In the absence, therefore, of an essential element, it does not seem that the SIB can be identified with this negotiating scheme. See C. Napolitano, 'Il social impact bond' n 24 above, 372. A different approach recognises the concessionary nature of the SIB, understood as a contract between the Administration and the 'implementing body' made up of private investors, the service provider and the specialised intermediary (*L'applicazione di strumenti pay-by-result per l'innovazione dei programmi di reinserimento sociale e lavorativo delle persone detenute*, coordinated by the Human Foundation with the contribution and support of the Development and Growth Foundation (Fondazione Sviluppo e Crescita CRT), with the contribution of the Polytechnic University of Milan, the University of Perugia and KPMG, January 2016-2017, 83). Similar to the service concession where the management risk is transferred to the economic operator (his remuneration derives from the provision of the service to third party users), in the SIB the financial risk of the transaction is borne by private investors and not by the public side. Doubts arise, however, from the fact that the service provider is remunerated by a third party, ie the investors. According to a jurisprudential orientation, however, the onerousness of the contract would exist, albeit in a substantial or weak sense, 'whenever the contractor may seem to derive a legitimate and autonomous economic benefit from the execution of the contractual service, even if not paid to him as an exchange contractual by

Overcoming the rigidity of subsumption[50] in a typical scheme and classification,[51]

the contracting authority'. Consiglio di Stato 4 October 2017 no 4631, *giustizia-amministrativa.it*. In the operational reality, however, given the heterogeneity of the negotiating scheme, the contract is not always stipulated with subjects linked by the 'aggregative bond'. In fact, *uti singuli* relationships could be established. See C. Napolitano, 'Il social impact bond' n 24 above, 372. Furthermore, there is no management risk borne by the service provider. As for the one burdening the investor, the risk of the private investor in the SIB does not correspond to an entrepreneurial risk in the strict sense. In the SIB, it derives from the uncertainty of the realisation of the expected social impact. In accordance with a different doctrinal orientation, the SIB can be qualified as an 'atypical random contract of public-private partnership'. See A. Blasini, 'Nuove forme di amministrazione pubblica per negozio: i "social impact bonds" ' *Rivista trimestrale di diritto pubblico*, I, 69 (2015). The latter, as deducible from Arts 3, para 1, lett eee) and 180, decreto legislativo no 50/2016, constitutes a versatile negotiating tool that pursues a public interest and, for this reason, is subject to public procedures. In this scheme there is also the transfer of risk to the economic operator, under the triple profile of construction risk, of availability and demand for the services rendered as defined respectively by Art 3, para 1, lett aaa), bbb) and ccc). However, the lack of risks, such as those of construction, or the diversity of the same in the SIB, has already been highlighted. See C. Napolitano, 'Il social impact bond' n 24 above, 385. With reference to the availability risk, the typical one of the SIB is characterised by conditional repayment. The service provider does not perform with the aim of generating revenues for himself but to provide a service with a positive social impact such as to determine public cost savings. The demand risk, on the other hand, does not exist, as the beneficiaries of the services are predetermined on the basis of the social problem to be solved. Another essential element of the public-private partnership is the economic-financial balance understood as covering the management and investment costs with revenues. Otherwise, the SIB is a transaction that is by nature uncertain. In fact, in the event of failure to achieve the social result, the Administration must not use public resources to balance the losses. See C. Napolitano, 'Il social impact bond' n 24 above, 387, in which, 'the financial results – crucial in the PPP – have marginal importance in the SIB, where instead it is the social value that assumes full centrality'. The last distinctive feature is the monitoring by the contracting authority of the activity of the economic operator, in particular the permanence of the risk borne by the operator itself (Art 181, para 4, decreto legislativo no 50/2016) where, in the SIB, the supervisory activity is entrusted to a third party. It also consists of *ex post* control relating to service quality standards. The Social Impact Bond is also associated with project financing. See G. Pasi, 'Credito e innovazione sociale: l'avvento di nuovi schemi negoziali nell'amministrazione delle carceri. La direzione suggerita dai Social Impact Bond' *Rassegna economica*, I, 213, (2015). The first mechanism, however, unlike the second, does not finance a specific subject (a specially constituted company, a so-called project company) but a complex project and it is subject to 'conditional remuneration': remuneration of the investors from the public authority depends on achieving a positive social impact. See C. Napolitano, 'Il social impact bond' n 24 above, 359-360. Otherwise, in project financing, the repayment of the loan and the achievement of a profit derive from the effective management of the financed activity in which the same private subjects participate.

[50] The reconstruction of the contractual phenomenon as multiple and as a minimum unit enriched by the particular circumstances of the concrete cases determines the necessary integration of the so-called general discipline with those relating to individual contracts. The result is 'a single open system, from which to draw from time-to-time principles and rules more appropriate to the interests at stake according to an interpretation that respects and uses the fact and which proceeds to identify the legislation most compliant with it, definitively moving away from the rules and by the hermeneutical techniques inspired by the mechanism of the subsumption of the fact in the abstract case. Subsumption, moreover, is exhausted in the underestimation of the peculiarities of concrete, subjective and objective circumstances, making the most congruous, most adequate, most reasonable solution inaccessible'. See P. Perlingieri, 'Nuovi profili del contratto' *Rassegna di diritto civile*, 545 (2000), now in Id ed, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 421.

[51] Categories 'must be abandoned when they represent an obstacle to the reasonable decision

this bottom-up intervention finds its constitutional foundation in the principle of horizontal subsidiarity pursuant to Art 118, para 4, of the Italian Constitution. Given the organisational and financial heterogeneity of this model, as an expression of private autonomy,[52] what is relevant is the

> 'unitary functional foundation, which finds due anchoring in the hierarchy of constitutional principles, whatever the concrete source of regulation or source of financial supply'.[53]

To this end, it is necessary to evaluate the merit of the structure of interests,[54] as the positive implementation of the fundamental principles, since

> '(...) subsidiarity is not a source in itself, autonomous, independent, separate from the legal system. Subsidiarity is deserving if it conforms to the hierarchy of values of the overall system: *pacta sunt servanda*, but only if those agreements correspond to the hierarchy of values of the system'.[55]

Similarly to the limits of legislative power in the matter of fundamental rights,

of the concrete case, trying to found new categories that are more adequate to the new normative needs. In the awareness that the categories have no ontological value, what exists in reality are concrete problems'. See P. Perlingieri, 'Metodo, categorie, sistema nel diritto del commercio elettronico', in P. Stanzione and S. Sica eds, *Commercio elettronico e categorie civilistiche* (Milano: Giuffrè, 2002), 9.

[52] Private initiative is, therefore, to be included in the legal system as a whole 'as part now implementing, now conforming, now creative and constitutive'. P. Perlingieri, 'La sussidiarietà nel diritto privato' n 5 above.

[53] C. Mignone, 'Una via costituzionale all'impact investing' n 37 above, 47-48.

[54] C. Mignone, 'Meritevolezza dell'iniziativa' n 19 above, 115, 118. As authoritatively stated, it is necessary 'not to stop the evaluation of the act to the mere judgment of lawfulness and to also request its merit, if we consider that the constitutional values require full implementation: therefore, negatively, the non-invasion of a limit of protection is not enough, but positively, the fact must be representable as a practical realisation of the juridical order of values, as a coherent development of systematic premises set out in the constitutional charter'. P. Perlingieri, *Il diritto civile* n 9 above, 611. Therefore, 'it does not appear correct to exhaust the scope of Art 1322, paragraph 2, of the Italian Civil Code in the judgment of lawfulness. This solution is contradicted by the awareness (...) that the contract, even typical – thus the distinction between typicality and atypicality enters into crisis – must always be subjected to the control of merit: that the parties can conclude atypical contracts, provided they are aimed to achieve deserving interests of protection according to the legal system (Art 1322, para 2, Italian Civil Code), is a general principle. (...) It is not enough that the act is lawful, but it needs to be, even if typical, worthy of protection in that particular context (in consideration of those subjects, of that moment, of that added clause, etc.). (...) The negotiation act is valid not so much because it is wanted but if, and only if, it is intended to achieve, according to an order based on personalism and solidarity, an interest worthy of protection' (ibid 348).

[55] P. Perlingieri, 'La sussidiarietà' n 5 above. It has been recognised that from *pacta sunt servanda* dogma there is a shift to *licet tamen pacta emendari*. E. Caterini, *Lineamenti di diritto civile italoeuropeo. Dal mercato alla persona* (Napoli: Edizioni Scientifiche Italiane, 2009), 130. Similarly, according to J. Ghestin, 'La formation du contrat', in Id, *Traité de droit civil* (Paris: Librairie générale de droit et de jurisprudence, 3rd ed, 1993), 28, both individual and public benefit and fairness, aimed at rebalancing the assets of the contracting parties, constitute fundamental principles of the general theory of the contract.

negotiating welfare interventions by both private individuals and public administrations must also be proportionate,[56] reasonable[57] and sustainable.[58] This control of merit, therefore, implies a concrete verification that also concerns the adequacy of the model to achieve the social result.[59]

III. Conclusions

As all these considerations demonstrate, with a view to overcoming the dichotomy between negotiating autonomy and subsidiary intervention,[60] that the SIB represents a negotiating model that is functional to satisfy interests that transcend those of the parties to cover the primary needs of third parties.[61] It guarantees finding resources that are additional to and of greater value than those stemming from traditional channels (bank credit, public financing and private donations). This leads to an improvement of services, of both a quantitative and qualitative nature, in terms of greater efficiency and innovation. Besides, medium- and long-term preventive interventions are more affordable and effective than interventions of a subsequent and restorative nature.[62] Further, since the risk of failure falls on the investors, the use of Impact Investing would favour the

[56] The principle of proportionality 'consists in the right proportion or quantification and configures a distinct but inseparable parameter with respect to that of reasonableness (understood as abstract justifiability), a different way of assessing the entity of the patrimonial [and non-] interest, a measure of its legal protection but still to be compared and balanced with that of other interests'. P. Perlingieri, *Il diritto civile* n 9 above, 122.

[57] Reasonableness 'is a criterion that, in compliance with the principle of legality, helps to identify the solution in the moment of application (…) most of all compliant not only with the letter of the law, but with the overall logic of the system and its normative values (…)'. G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 22-23.

[58] According to E. Caterini, *Sostenibilità e ordinamento civile* n 12 above, the judgment of sustainability, involving a control of commutative and distributive justice, becomes an evaluative parameter of the actions of individuals and the public for the best qualitative satisfaction of the vital needs of the person. It 'makes what preserves the person and the community worthy of increasing self-preservation. The parameters of measurement of the growth or well-being of a people change from exclusively quantitative to qualitative-quantitative' (33-34). 'In summary, reasonableness and proportionality, together with sustainability, delimit the concrete meaning of the merit of the civil law activity, as a judgment that sometimes adjusts, other times interrupts, the continuity of the legal system to ensure the best implementation of the fundamental principles' (148-149).

[59] C. Mignone, 'Meritevolezza dell'iniziativa' n 19 above, 115, 139-140.

[60] 'At the centre of the question there is no autonomy, but autonomies: from legislative autonomy to the discretion of the public administration, up to negotiation autonomy'. P. Perlingieri, 'La sussidiarietà nel diritto privato' n 5 above.

[61] C. Mignone, 'Meritevolezza dell'iniziativa' n 19 above, 115, 118 (2017).

[62] Regarding the costs of COVID-19, they are over US $11 trillion with a future loss of US $10 trillion in earnings, while investments in preparedness are measured as US $5 per person annually. It has been stated that 'it would take 500 years to spend as much on investing in preparedness as the world is losing due to COVID-19'. Global Preparedness Monitoring Board, annual report, 'A World in Disorder: Global Preparedness Monitoring Board annual report 2020' (6) available at https://tinyurl.com/4cwazrf4 (last visited 20 September 2023).

experimentation of socially relevant measures without affecting public finance.[63]

Given the constitutional foundation of the SIB on the principle of horizontal subsidiarity (Art 118, para 4, Italian Constitution),[64] control of the merit of the structure of interests concretely established for a specific programme is fundamental, in consideration of the underlying values and of the adequacy of the model for the social results pursued.

In this direction, the SIB represents a 'win-win' system to bring benefits to all the parties involved in the operation, and it presupposes a collaborative relationship among the actors of the operation.

It is therefore appropriate to provide for a sharing of the risk of programme failure between them, albeit proportionate to the type of participation.[65]

Special attention should be paid to the service provider whose remuneration is generally not influenced by the outcome of the programme. It is necessary for this body to be held accountable if the outcome is not achieved for a cause attributable to it. In fact, the social result and the economic return for investors depend in part on the service provider's conduct.[66] In the light of the need to control, even if indirectly, its activity,[67] monitoring by the third party should,

[63] C. Mignone, 'Una via costituzionale all'impact investing' n 37 above, 34.

[64] '[T]he participatory structures aimed at «self-handling» in the field of social utility services perform an essential inclusive and equalising function where the social private is called upon to contribute equally to finding the necessary resources to support growth and innovation' (C. Mignone, 'Finanza alternativa' n 21 above, 370. In this sense, the Third Sector Code favours the autonomous initiative of citizens who contribute, even in an associated way, to the pursuit of the common good, to raising levels of active citizenship, cohesion and social protection, encouraging participation, the inclusion and full development of the person, to exploit the potential for growth and employment (Art 1).

[65] An innovative SIB model that takes this aspect into consideration is Epiqus Occupational Wellness I. It was adopted in Finland in 2015 to solve the social problem of low productivity and high absences from work due to illness and the high stress of public employees. The peculiarity consists in providing for an allocation of the risk of failure of the initiative through the subordination of the liquidation margin of 20% of the service providers and the management fee of the intermediary to the total return to the lenders of the invested capital and through the distribution of the profits deriving from the success of the programme in the amount of 70% for the investors and 30% for the suppliers and the manager of the SIB. Another peculiar element is the absence of a public contracting authority and, in its place, the establishment of a fund that collects and manages the revenues of customers, that is, public employers.

[66] Regarding Public-Private Partnerships, it has been argued that it is a good option 'if the quality of the service can be well specified in the initial contract (or, more generally, if there are good performance measures which can be used to reward or penalise the service provider)'. See O. Hart, 'Incomplete Contracts and Public Ownership: Remarks, and an Application to Public-Private Partnerships' 113(486) *The Economic Journal*, C69, C74 (2003). Consequently, 'Following Hart's logic, SIB transactions also should be optimal only in those situations where quality and related performance measurements can be described *ex ante* in the pay for success contract'. D. Burand, 'Contracting (Incompletely) for Success: Designing Pay for Success Contracts for Social Impact Bonds (SIBS)' 29(1) *Cornell Journal of Law and Public Policy*, 1, 19 (2019).

[67] In the USA, most of the SIBs have a 'a dual oversight structure that includes two separate committees, one tasked with providing *operational* oversight and the other with *executive* oversight. The operating committee focuses on monitoring the delivery of social services and usually has limited decision-making authority. (…) In comparison, the executive or steering committee has

therefore, not be limited only to the final qualitative assessment of the service provided, but should cover the entire duration of the operation.

Furthermore, with a view to the effective protection of a weak contractor,[68] investors who participate in a highly uncertain transaction must receive clear, complete and non-fraudulent information.[69] In order to make a conscious decision,

greater decision-making authority and, among other things, may shorten or extend the duration of the project and replace parties' (ibid 23-24). In this governance and oversight structure, however, investors do not have direct decision-making power, although it can be indirect through the figure of the project manager or intermediary, except for the Denver and two Salt Lake County SIBs, launched in 2016, where investors have voting rights on the Executive Committees (ibid 25).

[68] In a critical perspective of the subjective doctrinal positions, linked to the quality of a weak contractor, and the objective one related to the act of consumption, the notion of consumer as a 'profane' contractor is affirmed, including in the protection of acts 'relating to the profession'. It is therefore considered that 'with regard to professional consumption, only the hypotheses in which the agent does not have the necessary skills to assess the consequences of the act must be included in the scope of protection, and therefore the latter has to be considered a professional with regard to acts which, although not constituting the object of the profession, are placed with respect to it in a relationship of non-occasional instrumentality'. See E. Gabrielli, 'Sulla nozione di consumatore' *Studi in onore di Cesare Massimo Bianca* (Milano: Giuffrè, 2006), III, 227. Relating to overcoming the identification of the weak contractor with the consumer in the context of guarantee contracts, a concrete assessment is required of the contractual weakness deriving from the lack of specific knowledge or of a technical or economic nature or from difficulties in accessing information in the context of certain contractual relationships. L. Ruggeri, 'Contratti di garanzia e tutela del contraente debole', in E. Caterini, L. Di Nella et al eds, *Scritti in onore di Vito Rizzo. Persona, mercato, contratto e rapporti di consumo* (Napoli: Edizioni Scientifiche Italiane, 2017), II; with reference to the impact of energy transition policies on the figure of the consumer, see L. Ruggeri, 'Just Energy Transition: From Energy Consumer Protection to Energy Consumer Empowerment', in Id and F. Pascucci eds, *Prosumerism and Energy Communities Expanding Concepts in a Global Perspective* (Vienna: SGEM WORLD SCIENCE (SWS) Scholarly Society, 2022), 6, in which 'European policies on the energy market have led to a rethink of the notion of consumer, which can no longer be based on the legal definition of the term "consumer", the consequences of which is that serious and well-founded protection needs can come from legal entities that cannot be subsumed under the legislative definition'.

[69] In this regard, European Parliament and Council Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L168/12, states that 'The information on the public offer of their admission to trading on a regulated market is essential to protect investors, as it eliminates the information asymmetries between the latter and the issuers (...)' (recital 3) and that '(t)he provision of information which, depending on the characteristics of the issuer and the securities, is necessary for investors to make informed investment decisions ensures, together with the rules of conduct, investor protection. Furthermore, such information is an effective tool for increasing confidence in securities and thus contributing to the proper functioning and development of the securities markets (…)' (Recital 7). This is even more true in social impact investments where the social variable that generates the financial income is related not only to the provided services but also to conditions independent of the actors in the operation.

In fact, European and national regulations have been drawn up to increase investor protection in ethical/responsible finance. In implementation of Art 117 ter TUF, Art 136 and 137 of Consob Intermediaries Regulation 15 February 2018, no 20307, amended by resolution no 22430 of 28 July 2022, establish greater reporting and information obligations for those who provide 'ethical' or 'socially responsible' products and services relating to the social or environmental objectives to be pursued and the associated criteria for selecting financial instruments.

it is necessary for these information requirements not to be limited to the mere profitability of the securities and the material factors from which they derive, but also to include the social objectives, related measurement procedures, as well as reasonable projections of and information on past outcomes achieved in the sector.[70]

In this perspective, it also notes the preventive management of conflicts of interest, also by virtue of the exponential number of subjects involved and the heterogeneous nature of interests.[71] It follows that in the case of deviation from

Also in relation to the European social entrepreneurship funds, the European Parliament and Council Regulation (EU) 2013/346 identifies a specific discipline of contractual correctness and transparency. It provides, in fact, information obligations for managers of qualifying funds for social entrepreneurship, including those relating to 'the positive social impact being targeted by the investment policy of the qualifying social entrepreneurship fund, including, where relevant, projections of such outcomes as may be reasonable, and information on past performance in this area' (Art 14, para 1, lett *d*)) and to 'the methodologies to be used to measure social impacts' (Art 14, para 1, lett *e*)). A policy of harmonisation of the non-financial disclosure system is implemented by European Parliament and Council Directive 2014/95/EU of 22 October 2014 amending European Parliament and Council Directive 2013/34/EU with reference to a certain large undertakings and groups and by the relative decreto legislativo 30 December 2016 no 254. The discipline establishes a non-financial statement containing information relating to environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including a description of the policies to those matters, the outcome of them, the related principal risks and non-financial key performance indicators relevant to the particular business. For an in-depth analysis, G. Strampelli, 'L'informazione non finanziaria tra sostenibilità e profitto' *Analisi Giuridica dell'Economia*, I, 145-164 (2022).

[70] C. Mignone, 'Investimento a impatto sociale. Etica, tecnica e rischio finanziario' *Rassegna di diritto c*ivile, III, 924 (2016). In addition to these disclosure requirements, common and homogeneous assessment criteria of activities and measurement metrics for environmental impact should be identified. With reference to the former, in order to combat the phenomenon of greenwashing and to standardise activities among Member States to achieve the common goal of ecological transition, European Parliament and Council Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending European Parliament and Council Regulation (EU) 2019/2088 [2020] OJ L198/13 established criteria at the Union level for determining whether an economic activity can be qualified as environmentally sustainable.

With reference to sustainable investment, European Parliament and Council Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector 'aims to reduce information asymmetries in principal-agent relationships with regard to the integration of sustainability risks, the consideration of adverse sustainability impacts, the promotion of environmental or social characteristics, and sustainable investment, by requiring financial market participants and financial advisers to make pre-contractual and ongoing disclosures to end investors when they act as agents of those end investors (principals)' (recital n 10). Some, however, believe that the transparent use of ESG factors is not guaranteed exclusively by the provision of disclosure obligations to financial market participants and financial advisers but by ensuring that 'this information is such as to make the sustainable risks comparable to each other […] or the level of the sustainability of the various financial products [that are] potentially attractive for the consumer who intends to give their investments an ESG imprint'. See G. Berti De Marinis, 'Patrimonio culturale e fattori ESG nel mercato assicurativo' *Rivista del mercato assicurativo e finanziario*, I, 53, (2020).

[71] The European social entrepreneurship funds Regulation, in fact, establishes a preventive identification of conflicts and an adequate management and control of them to prevent that they

the interest underlying a particular financial instrument, even if it is not economic, there is an abuse attributable to Art 1394 of the italian Civil Code by the person responsible for such conduct,[72] as in the case of Social Impact Bonds by the service provider.[73]

With a view to sustainable development, it is therefore necessary to use private savings to finance the ecological transition.[74] In this sense, Impact Investing would constitute an adequate and reasonable solution that generates a balance between profit and redistribution. The application of this model to the environmental sector, in fact, is in itself suitable to limit and/or reduce the risks to which investors are generally exposed and ensures a more solidly guaranteed profit, albeit limited and in the long term. This does not exclude the need for an evaluation of the merit and sustainability of the project to be financed in practice,[75] with the aim of preventing the implementation of operations for pure profit instead of ecological purposes.

affect the interests of the qualifying social entrepreneurship funds and of the investors and to ensure that the qualifying social entrepreneurship funds that they manage are fairly treated (Art 9). Also in the framework of the Proposal for a Regulation of the European Parliament and of the Council 2021/0191 are provided forms of management of actual or potential conflicts of interest in relation to external reviewers who have the task of assessing the ecological character of obligations and the activities financed by them (Art 27). This discipline is intended to ensure the achievement of environmental objectives and, therefore, the protection of the interests of investors who 'sacrifice' a profitable financial return for the realization of a positive ecological impact.

[72] In this sense, C. Mignone, 'Finanza alternativa' n 21 above, 363.

[73] With a view to an effective remedy, the prevention of abusive conduct is left to private autonomy through the preparation of appropriate methods, measure and level of impact of the implementation of the environmental impact in the emission regulation (D. Lenzi, 'La finanza d'impatto' n 21 above, 136).

[74] The choice of these assets represents the personalist and solidarity vision to which it is intended to adhere. It guarantees greater democratic autonomy by overcoming the concept according to which 'everyone is condemned to try to anticipate what the dictatorship of the majority of investors (representing a minimum number of people, but with considerable power) will think'. G. Giraud, *Transizione ecologica* n 2 above,79.

[75] These operations can, therefore, represent effective models for the pursuit of general interests provided that the pan-patrimonial conception of economic initiative is exceeded, 'to begin to look with the eyes of the legal system to the descriptive functional profile of the interests – including non-economic ones – deductible in the [concrete] investment relationship' (C. Mignone, 'Finanza alternativa' n 21 above, 368).

Essays

Burdens of Proof in Establishing Negligence: A Comparative Law and Economic Analysis

Francesco Parisi* and Giampaolo Frezza**

Abstract

Inherent in any judicial system is the need to allocate the burden of proof on one party. Within the realm of negligence torts, that burden is traditionally placed on the plaintiff, meaning that the plaintiff must bring forth sufficient evidence to establish negligence by the defendant. In effect, this is a legal presumption of non-negligence in favor of the defendant. In some jurisdictions for specific torts, defendants are, instead, presumed negligent, therefore requiring defendants to come forth with sufficient evidence to prove their due diligence. In this paper, we discuss the legal origins and effects of these differences in a comparative law and economics perspective. We explore the interesting interaction between evidence and substantive tort rules in the creation of care and activity level incentives and discuss the ideal scope of application of alternative legal presumptions under modern-age evidentiary technology.

I. Introduction

Recent scientific and technological innovations have changed the landscape of evidence practice quite substantially. New frontiers of evidence have been made possible by genetic testing, computer recording of data, digital timestamping, third-party certified data storage systems, black-box technology, traffic surveillance cameras, satellite imaging, Snapshot® technology, and GPS tracking devices. Though the usefulness and invasiveness into our private lives remain relevant normative questions, these transformations have changed our routine information protocols. Scientific and technological advances will continue to provide new opportunities and open new horizons in the domain of legal evidentiary discovery.

Legal presumptions play two interrelated roles in negligence cases. First, legal presumptions allocate the burden of proving negligence between the parties.[1]

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[1] The way in which allocation of the burden of proof affects both care decisions and incentives to invest in information is well known outside the area of negligence liability, such as pointed out in the context of US toxic torts by W.E. Wagner, 'Choosing Ignorance in the Manufacture of

Given the differing accessibilities to relevant evidence and information by the parties, this may affect a court's ability to assess the defendant's negligence in the case at hand. Second, the use of different legal presumptions can affect the parties' expected liability and their incentives with respect to both care and activity levels.

In this paper, we employ a comparative law and economics perspective to attempt to understand the interdependent relationship between new evidentiary technology, legal presumptions, and discovery rules, with special focus on negligence liability. The paper is structured as follows. In Section 2, we survey the different legal presumptions of negligence used in European legal systems from a historical and comparative perspective, with special attention to the rules governing traffic accidents. Our analysis builds upon two separate bodies of literature looking at the interaction between evidentiary and substantive rules in tort law. We consider some of the theoretical and practical difficulties in the adoption of presumptions of negligence. We examine the 'cheapest evidence-producer' criterion elaborated in the current literature and discuss the applications of this criterion in the context of the US and European rules. In Section 3, we consider the interrelated effects of legal presumptions on the parties' tort incentives and incentives to invest in private evidence technology. We discuss the possible diluting effects of alternative discovery regimes on the parties' incentives to adopt evidence technology. Section 4 concludes with policy considerations.

II. Presumptions of Negligence

The need to allocate the burden of proof on one party is inherent in any judicial system. Traditionally, within the realm of negligence torts, that burden is placed on the plaintiff. This means that the plaintiff must bring forth sufficient evidence to establish negligence by the defendant. In effect, this is a legal presumption in favor of defendants.[2] In some European jurisdictions, defendants

Toxic Products' 82 *Cornell Law Review*, 773, 774–75 (1997). See also, eg, Restatement (Third) of Torts: Products Liability §2 comment a ("To hold a manufacturer liable for a risk that was not foreseeable when the product was marketed might foster increased manufacturer investment in safety. But such investment by definition would be a matter of guesswork').

[2] To frame the scope of our analysis, we should clarify some of the terminology that will be used in our analysis, distinguishing interrelated concepts that are commonly associated with the notion of 'burden of proof.' These concepts are operationally interdependent, but theoretically distinct: 'legal presumptions', 'burden of production,' and 'burden of persuasion.' Legal presumptions are rules that allocate the initial burden of production of evidence, specifying which party is required to 'produce' the evidence (or, as J. Adler and M. J. Michael, *The Nature of Judicial Proof: An Inquiry into the Logical, Legal, and Empirical Aspects of the Law of Evidence* (1931), 63 put it, which party has the 'burden of coming forward with the evidence'). A favorable presumption shifts the burden (and costs) of producing evidence on the other party. The concept of burden of persuasion, instead, defines how evidence should be weighted and 'how much' probative evidence should be offered to convince the fact finders. Standards of proofs, such as 'reasonable possibility,' 'preponderance of the evidence,' 'clear and convincing evidence,' or 'beyond a reasonable doubt,' are standards that determine the applicable burden of persuasion. In this paper, we focus on the

are presumed negligent for specific torts, therefore requiring the defendant to produce sufficient evidence of their non-negligence. These rules have gone through periods of reformulation as the underlying principles of evidentiary production and presumptions of negligence have changed.

1. Legal Socialism and the Origins of Presumed Negligence

Across European legal systems there are many diversified models of presumptions of negligence.[3] In several countries, the fault principle of 'no liability without negligence' is strongly rooted, so most presumptions of negligence have been introduced by special legislation. Because presumptions of negligence can easily lead to presumed liability, or 'semi-strict liability', many countries have found difficulty in accepting alternative presumption of negligence regimes. This creates a tension with the underlying traditional general fault principle: in the absence of proof of negligence, judges must leave things as they are.[4]

Outside the area of traffic accidents, we can find trace the earlier examples of rules of presumed negligence in modern codifications to the provisions contained in the *code Napoléon* of 1804.[5] In particular, Arts 1384, 1385, 1386 (in the original version of the *code*) established liability for (i) custodians of property that cause harm; (ii) parents for the harm caused by their cohabiting minor children; (iii) employers for the harm caused by their employees; (iv) teachers and craftsmen for the harm caused by their students and apprentices; (v) owners of animals, or whoever is using the animal, for the harm the animals caused; and (vi) owners of buildings for the harm caused by their collapse or destruction. In their original formulation, however, these presumptions were a form of presumed liability that did not admit rebuttal evidence and did not allow for avoidance of liability (eg, fortuitous event or force majeure). These exceptions were only introduced by French courts later in the 19th century, following the spread of civil wrongs brought about by the industrial revolution.[6] Rules of presumed negligence have

effect that changes in the burden of producing evidence have on the parties' care and activity level incentives. Hereinafter, we'll refer to the burden of production as 'burden of proof.' We compare the traditional rules that place the initial burden of proof on the plaintiff (we refer to these rules as 'presumptions of non-negligence'), to the alternative rules introduced in Europe that have reallocated the burden of proof on the defendant (we refer to these rules as 'presumptions of negligence'). These legal reforms have not modified the standards of proof applicable to the case, so we will set that dimension of the probatory problem aside for the purpose of our analysis.

[3] See G. Alpa, La responsabilità civile, Trattato di diritto civile (Milano: Giuffrè, 1999), 313.

[4] In these jurisdictions, only the legislature can introduce new cases governed by strict liability. This is because strict liability is still considered one of the exceptions to the general fault principle governing tort liability. Extensive interpretations or applications by analogy of the legal presumptions of negligence would thus be inadmissible, since they would *de facto* introduce new areas of semi-strict liability, infringing the general principle of fault liability.

[5] See generally, M. Comporti, *Fatti illeciti: le responsabilità presunte, Il Codice Civile Commentario* (Milano: Giuffrè, 2012), 99.

[6] See F. Laurent, *Principes de droit civil* (Paris: Librairie A. Marescq, Aine, 1878), 691; L. Josserand, *Cours de droit civil positif français* (Paris: Recueil Sirey, 1932), 523–53; R. Demogue,

later appeared in several other European codifications.

Like the *code Napoléon*, the Spanish legal system included rules of presumed liability in special circumstances which depart from the otherwise applicable fault principle. Art 1903 of the Spanish Civil Code of 1889 encompasses these forms of civil liability in a single provision, specifying that the obligations are enforceable 'not only as a result of one's own acts or omissions, but also of those of such persons for whom one is liable.' This includes parents being liable for the harm caused by their children; guardians being liable for damages caused by minors or incapacitated individuals under their supervision; owners or managers of a company being liable for damages caused by their employees in the exercise of employee functions; and teachers and schools being liable for damages caused by students under their control during school and extracurricular activities. This rule does not attach strict liability on the injurers or their supervisors,[7] as liability only arises because the supervisors are presumed to have failed in their duties to properly supervise, educate, or control those under their authority or control. In other words, under Spanish law, defendants face a rebuttable presumption of negligence. As specified by the last para of Art 1903 of the Spanish Civil Code,[8] to avoid liability, a defendant must establish that he or she acted with the same diligence as that of a reasonable person ('a good family man'), although the undertaken precautions did not suffice to prevent the accident.

As discussed above, the drafters of Arts 1384, 1385, and 1386 of the *code Napoléon* initially took an intermediate position between a rule of strict liability and a rule of presumed liability. The *code* also had a clear influence on the rules introduced in Italy. Arts 1153–1156 of the Italian Civil Code of 1865 represent a mere transplant of the French rules into the Italian system. Presumptions of negligence are found in similar set of tort cases under Arts 2047, 2048, 2050, and 2054 of the Italian Civil Code of 1942. Unlike France, under both codifications, Italian courts interpreted these presumptions as rebuttable from their initial applications. Under Art 2047, para 1, of the Civil Code, in the event of damage caused by an individual lacking legal capacity, the supervisor or guardian of the individual becomes liable for the harm, unless they are able to prove that they could not have prevented the harmful act.[9] According to Art 2048, the parents or

Traitè des obligations en génerale (Paris: Rousseau, 1925), 983; R. Savatier, *Traitè de la responsabilité civile en droit français* (Paris: Librairie générale de droit et de jurisprudence, 1951), 421; H. Lalou, *Traité pratique de la responsabilité civile* (Paris: Dalloz, 1962), 665. On liability for risk, see n 7 below.

[7] See Arts 1905, 1908 and 1910 of the Spanish Civil Code.

[8] Art 1903 of the Spanish Civil Code: 'The liability provided in the present Article shall cease if the persons mentioned therein provide evidence that they acted with all the diligence of an orderly [good family man] to prevent the damage.'

[9] Art 2047 Civil Code. According to Corte di Cassazione 26 January 2016 no 1321, in order to be held not liable, it is necessary that the duty of care (of supervision), and its related liability, be transferred to another subject by contract, by law, or some other mechanism. For the presumption of liability provided by Art 2047 Civil Code, regarding who is liable for watching

guardians are liable for civil wrongs committed by non-emancipated minor children or persons subject to their guardianship and who live with them.10 Moreover, para 2 states that teachers and those who teach a trade, art, or profession are liable for any tort damages caused by their students or apprentices occurring while under their supervision.[11] Under para 3, such teachers are exempted from liability if they prove that they acted diligently or would have been unable to prevent the act.[12]

In analyzing these topics, the literature frequently focuses on whether these provisions operate as a rule of presumed negligence or, de facto, as one of strict liability. The effects of a presumption of negligence can be seen in the concept of imputed risk contained in these provisions and their wording. Liability can be avoided on two interrelated grounds. First, the presumption can be overcome by showing that due care was exercised in supervising the injurer and that the accident occurred, notwithstanding the adoption of diligent precautions. Second, the provisions explicitly allow for the parent or teacher who failed to take due care to show that, even if they had taken reasonable precautions, they would not have been able to prevent the accident. In this case liability can be avoided on causation grounds, even in the shadow of the unrebutted presumption of negligence. In other words, even if the supervisor had acted diligently, the accident could not have been avoided.[13] A similar argument applies with respect to presumed *culpa in vigilando* and presumed *culpa in educando*. According to Italian case law, to rebut the presumption of negligence, the parent must prove that he has properly educated and adequately supervised the child based on their age, character, and nature (which in turn is a function of the environment, attitudes, and personality of the child).[14] Short of that proof, the parent can still avoid liability on causation grounds, demonstrating that a proper education and supervision would not have been sufficient to prevent the accident.

over an unable person and for the admissibility of liability against the healthcare provider, see Corte di Cassazione 20 June 2008 no 16803. According to Corte di Cassazione 12 December 2003 no 19060, the recovery of a firearm used as a toy by incapable children does not constitute an exceptional and unforeseeable fact suitable to excuse a parent's liability under Art 2047 Civil Code, since the supervision of the incapable child must be constant and uninterrupted as well as not occasional nor from a distance.

[10] Art 2048 Civil Code.

[11] ibid para 2. According to Corte di Cassazione 18 September 2015 no 18327, a parent's liability for the tort of the minor child exists pursuant to Art 2048 Civil Code and is not excused even when the harmful behavior of the child was carried out in a place subject to the supervision of others. For references regarding presumed liability, see generally Corte di Cassazione 22 April 2009 no 9542, *Massimario Giustizia civile*, 663 (2009); Corte di Cassazione, 20 October 2005 no 20322, *Massimario Giustizia civile,* 1919 (2005); Corte di Cassazione 28 March 2001 no 4481, *Massimario Giustizia civile,* 607 (2001).

[12] Art 2048 Civil Code. See M. Franzoni, 'Fatti illeciti', in A. Scialoja and G. Branca eds, *Commentario al codice civile, Libro quarto: Obbligazioni, Art. 2043*-2059 (Bologna-Roma: Zanichelli, 1993), 326, 347, providing a detailed analysis of case law.

[13] G. Alpa, *Responsabilità civile e danno. Lineamenti e questioni* (Bologna: il Mulino, 1991), 303.

[14] See ibid 304-305, for references to cases.

Legal presumptions of negligence are also present in Germany. The German BGB of 1900 adopted the so-called binary system of legal presumptions:

> 'this expression indicates all the various types of cases in which the person is faced with liability not based on negligence deriving from an action or omission, but rather grounded on a rebuttable presumption of negligence or, at times, liability without negligence…'[15]

This latter category includes cases of vicarious liability, where the principal is liable for the harm caused by his agents in the performance of an activity. The principal can avoid liability by proving that he used reasonable care in the choice and supervision of the agent, or if the damage would have resulted even if reasonable care had been exercised.[16] Similarly, supervisors of minors and legally incapacitated individuals are liable for the harm caused by individuals subject to their supervision, unless they can prove that they diligently fulfilled their duty of care.[17] This second category also includes the liability of an animal's owner and keeper. An animal owner, under § 833 must compensate any individual who is killed or injured by their animal, regardless of whether they exercised reasonable care.[18] Under § 834, this provision is also applicable to those who supervise the animal by contract for the owner.[19] Similarly, under §§ 836– 837, whoever owns or possesses property is liable for any harm caused by the collapse or destruction of a building or any other structure on the land, unless the owner or possessor proves that they exercised due care in preventing the risk of damage.[20]

2. Presumed Negligence Rules for Enterprise and Motor Vehicle Liability

At the end of the nineteenth century, in some European legal systems, we observed a gradual transition from negligence-based models of liability to models of liability based on the notion of 'risk creation.' Legal academics belonging to the so-called 'legal socialism' movement in Italy and France[21] denounced the failure of negligence as a general foundation of liability and developed what became

[15] G. Alpa, n 4 above, 304.

[16] BGB § 831.

[17] ibid § 832. Note that in 1999, the *Bürgerliches Gesetzbuch* (BGB) was reformed. Liability for obligations arising for minors was restricted. The new § 1629a provides that the financial liability for transactions concluded before the eighteenth year by the legal representatives of the minor (or personally by the minor with the consent of the legal representatives) is limited to assets that exist upon reaching the age of majority. The limitation does not apply to liability coming from wrongs committed by the minor. M. Löhnig and D. Schwab, 'La legge sulla limitazione di responsabilità del minore' *Responsabilità civile e previdenza,* 1215 (2000).

[18] ibid § 833.

[19] ibid § 834.

[20] ibid §§ 836-837.

[21] See P. Ungari, 'In memoria del socialismo giuridico' *Politica del diritto*, 248 (1970); A. Loria, 'Socialismo giuridico' *La scienza del diritto privato*, 519 (1893).

known as the 'risk theory of profit'.[22] The idea centered on the premise that the risk generated by a firm through its economic activity is a risk that needed to be considered as a cost of production. Theories of liability that were developed based on the risk theory of profit reframed negligence liability by creating a presumption of liability on the person who generated the risk, unless proven otherwise.[23] This intellectual evolution led to the paradigms of strict liability or semi-strict liability and the broader use of legal presumptions of negligence.

From a functional perspective, rules of presumed negligence should not be confused with the Common law doctrine of *res ipsa loquitur*. Under the rule of res ipsa loquitur, courts depart from the traditional presumption of non-negligence because the facts are so obvious that requiring parties to argue any further would be redundant and contrary to procedural economy.[24] This principle of law, also known in Germany as *prima facie-Beweiss*, is particularly widespread in other civil law systems: the fact that a harm has occurred provides prima facie evidence of the wrongdoer's negligence.[25]

In several European jurisdictions, drivers of vehicles not guided by rails (ie, vehicles other than trains), are presumed negligent and thus face semi-strict

[22] For a presentation of the legal socialism movement and the risk theory of profit developed by A. Loria, see G. Frezza and F. Parisi, *Achille Loria (1847-1943)* (Elgar Companion to Law and Economics, J.G. Backhaus ed, 1999), 392–402.

[23] M. Philonenko, 'Faute et risque créé par les énergies accumulées' *Revue trimestrielle de droit civil*, 305 (1950).

[24] See A. Guerra, B. Luppi and F. Parisi, 'Do Presumptions of Negligence Incentivize Optimal Precautions?' 53 *European Journal of Law and Economics*, 511-533 (2022). According to the exemplary quote of Chief Justice Erle, 'there must be reasonable evidence of negligence. But where the thing is shown to be under the management and control of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.' Scott v. London & St. Katherine Docks Co. (1865) 159 Eng. Rep. 685; see *also* Byrne v. Boadle (1863) 159 Eng. Rep. 299, 300–01. In the US, a minority of states find that *res ipsa loquitur* creates a presumption of negligence, including California and Colorado. See, eg, Blackwell v. Hurst, 54 Cal. Rptr. 2d 209 (Cal. Ct. App. 1996); Stone's Farm Supply, Inc. v. Deacon, 805 P.2d 1109 (Col. 1991).

[25] See P.G. Monateri, *La responsabilità civile. Le fonti delle obbligazioni* (Torino: UTET, 1998), 11; V. Fineschi, '*Res ipsa loquitur*: un principio in divenire nella definizione della responsabilità medica' *Rivista italiana medicina legale*, 419 (1989). Along these lines, the Italian Supreme Court affirmed that 'in matters of tort liability, it is up to the plaintiff, who sues for damages, to put forth evidence of the injurer's negligence; this principle, however, does not necessarily imply that the judge requires negligence be proven exclusively from the evidence offered by the injured party, as the proof can be inferred from the facts and circumstances of the specific case. The evidence can also be presumptive, and, in this regard, a fact can be inferred circumstantially due to the *id quod plerumque accidit* rule, taking into consideration that it is not always easy to acquire direct evidence.' That specific case dealt with products liability, and more specifically, involved a bottling company sued for damage caused by the bursting of a bottle containing a carbonated beverage. Corte di Cassazione 28 October 1980 no 5795; G. Monateri, above, 111. There is no general rule that indicates when it is possible to apply *res ipsa loquitur* or other presumptive inferences based on the *id quod plerumque accidit* because they are called upon to operate based on circumstantial evidence and findings of the specific case. ibid 114.

liability for any harm caused to people or things while operating the vehicle, unless the driver or operator is able to prove that he has undertaken reasonable precautions to avoid the harm.

In the field of traffic accidents, Germany adopted a mix of strict liability and presumed negligence rules, as early as 1909. Specifically, the Liability Provisions of § 7 of the German Road Traffic Act (*Strassenverkehrsgesetz*, hereinafter StVG) provides the central rule establishing a form of semi-strict liability for the owner or keeper (eg, lessor) of a motor vehicle, for the damage caused by the operation of the vehicle killing, injuring, or creating material damage to third parties. In such cases, liability can only be avoided showing that the accident was the result of force majeure, or the vehicle was used without the knowledge and permission of the owner.[26] When the driver is not the owner, the Traffic Act introduces a second ground for avoiding liability under § 18 StVG, allowing the operator to prove that the loss was not due to his or her fault.[27] Under this rule, liability can be avoided also by the owner and the keeper by showing that due care was exercised or that the accident was not caused by the failed adoption of diligent precautions.[28] Under the German Traffic Act § 17, when an accident occurs between two motor vehicles, a rule of presumed liability applies. In such cases, liability is apportioned according to the circumstances and the principles of comparative negligence and can only be entirely avoided by the parties by proving they have acted with due care.[29]

3. Presumed Joint Negligence Rules

The Italian rules presuming negligence in traffic accidents are a bit more elaborate, leaving less room for discretionary evaluations based on the circumstances of the case if parties cannot prove to have acted with due care. Art 1156 of the Italian Civil Code of 1865 introduced, for the first time, joint liability for torts ascribable to more than one person. Based on this rule, the current civil code uniquely applies joint liability for vehicles coupled with a presumption of negligence. Italy's regime resulted in a novel legal rule, creating a legal 'presumption of joint negligence' for accidents between motor vehicles.[30] This interesting spin on legal

[26] See § 7 StVG: 'If a person is killed or injured or material damage incurred from the operation of a motor vehicle, the owner of the vehicle is obligated to compensate the injured party for the resulting loss, unless the accident was the result of force majeure, or the vehicle was used without the knowledge and permission of the owner'.

[27] § 18 StVG: 'In the cases of § 7(1), the operator is also liable to pay compensation pursuant to §§ 8–15, unless the loss is not the fault of the operator.' This amounts to a reversal of the burden of proof (Beweislastumkehr) on the issue of negligence.

[28] Van Dam (2013, 412) point out that German case law has found drivers not negligent when they prove to have taken the level of due care of 'the ideal driver who takes into account the considerable chance that other people make mistakes.' BGH 17 March 1992, BGHZ 117, 337; BGH 28 May 1985, NJW 1986, 183.

[29] Although not explicitly stating so, § 17 StVG de facto introduces a rebuttable presumption of joint negligence, like the Italian rule of presumed joint liability discussed in the text.

[30] G. Frezza and F. Parisi, *Responsabilità civile e analisi economica* (Milano: Giuffrè, 2006), 93.

presumptions specifies that in the event of a collision, unless proven otherwise, parties are presumed jointly negligent. According to this rule, it is presumed that each party equally contributed to producing the harm and is proportionally liable to compensate for the harm suffered by each vehicle (ie each driver is presumed equally negligent and liable for fifty percent of the damages caused).[31] As originally written, this rule only applied when the collision resulted in harm to both vehicles. The Italian Constitutional Court found this to be unconstitutional.[32] The Constitutional Court stated that the presumption of bilateral negligence and the resulting joint liability should also apply when only one of the vehicles has suffered harm in the accident, indicating that the presumption of joint liability was based on evidentiary principles, and was not created for the purpose of spreading the accident loss between the parties.[33]

The evidence needed to rebut the presumption of joint liability consists of proving that the drivers undertook reasonable precautions to avoid the accident. To avoid their share of liability, drivers must show that they obeyed all relevant traffic rules and undertook reasonable precautions, under the circumstances of the case.[34] Furthermore, Italian law includes a specific rule for the collision between vehicles, both those moving and those temporarily parked.[35] In these cases, concurrent liability of drivers is presumed until proven otherwise. In tort situations involving two or more parties, each party is assumed to have contributed equally to the accident, even when the vehicle was not moving. Each party bears the burden of producing evidence. Paradoxically, the owner of the parked car may be in a worse position to produce evidence, notwithstanding the fact that in most cases a parked car is less involved in the causation of an accident.

If only one party can produce satisfactory evidence about their diligent behavior, the other party is held unilaterally negligent and bears the entire loss, as injurer (facing full liability) or as victim (facing the full loss, with no compensation). When neither party can prove his or her diligent behavior, the Italian rule leads to a sharing of the loss, like a rule of comparative negligence. Liability increases

[31] Art 2054 civil code. For an articulated analysis of applicable case law, see generally M. Franzoni, n 12 above, 326-347. According to Corte di Cassazione 23 October 2014 no 22514, the principle stated by Art 1227 civil code (also applicable to tort law due to the express reference contained in Art 2056 of civil code) of the proportional reduction of damage based on the percentage entity of the causal efficiency of the injured party applies not only to the injured party, which claims compensation for the harm directly suffered, but also against the relatives who, in relation to the reflected effects on them, start legal action in order to be redressed for the damage suffered *iure proprio*.

[32] Corte costituzionale 14 December 1972 no 205.

[33] ibid

[34] Corte di Cassazione 19 September 1980 no 5321; Corte di Cassazione 21 June 1979 no 3443. Additional discussion can be found in G. Spina, 'L'accertamento della responsabilità da sinistro stradale nella recente giurisprudenza. Profili sostanziali e giurisprudenziali' *Responsabilità civile e previdenza*, 1806 (2014).

[35] G. Alpa, n 3 above, 711.

and decreases in relation to the extent of the proven negligence of the driver.[36] When both parties can prove their diligent behavior, each party bears the loss suffered in the accident and no liability or compensation is owed to one another.

Other European legal systems, including the Netherlands introduced rules of presumed liability, creating rebuttable presumptions of negligence against injurers. In the Netherlands, however, a stronger presumption applies in favor of victims of motor vehicle accidents. Art 185 (1), *Wegenverkeerswet* (Road Law), 1994:

> 'If a vehicle driven on the road is involved in a road accident, causing damage to persons or things (not to another motor vehicle), the owner or keeper of the vehicle is liable to compensate the harm, unless he can be proved that the accident was due to force majeure or by a person, for whom the owner or the keeper are not responsible.'

According to these European rules of presumed liability, evidence of harm and causation are sufficient elements to establish liability, effectively shifting the burden onto the defendant to show that he behaved diligently. Thus, in the event of an accident, injurers are by default liable and must pay full compensation unless they can rebut the presumption by proving their own diligence or showing that the victims' behavior was itself negligent or not foreseeable, or that the accident was somehow not avoidable.

Other countries are debating a change from the conventional presumption

[36] According to Tribunale di Catania 7 May 2020 no 1497, 'the concrete ascertainment of the fault of one of the drivers does not involve the overcoming of the joint liability presumption of the other if the latter has not concretely provided satisfactory evidence relating to the lack of any possible charge against him'. Tribunale di Grosseto 7 May 2020 no 324 believes that in car accidents, para 2 of Art 2054 of the Italian Civil Code provides a presumption of liability for both drivers of vehicles involved in an accident. In this regard, the aforementioned rule does not constitute a strict liability hypothesis for the driver, but rather one of presumed liability. The driver can overcome this presumption by proving that he has done everything possible to avoid the damage, or by demonstrating sufficient diligence, ie, behavior free of negligence and in compliance with the traffic laws, as evaluated by the judge accounting for the circumstances of the specific case. In this sense, the presumption of negligence has a merely subsidiary function and operates only when it is impossible to determine the concrete extent of the respective liabilities. In other words, if the negligence of one driver is ascertainable, the other driver is exempt from the presumption of liability and is not required to prove that he has done everything possible to avoid the damage. According to the Tribunale di Pisa 25 March 2020 no 354, the first para of Art 2054 of the Italian Civil Code contemplates a form of presumed liability that can be overcome by the driver proving that he has done everything possible to avoid the damage. For example, if a driver strikes a pedestrian outside of a crosswalk, then the driver may avoid joint liability by demonstrating that the pedestrian failed to give the driver the right of way, resulting in an unforeseeable and inevitable obstacle, and that the driver had otherwise behaved correctly. According to Corte di Cassazione 20 marzo 2020 no 7479, on the subject of a collision between vehicles, the presumption of joint liability established by Art 2054, para 2, of the Civil Code has a subsidiary function, operating only in the event that the evidentiary findings do not allow to ascertain in a concrete manner to what extent the conduct of the two drivers caused the damage and to allocate the actual liability for the accident (in the specific case, two different technical experts were not allowed to reconstruct the exact dynamics of the accident).

of non-negligence to presumed liability in various tort situations.[37] The push to shift the burden of proof from victims to injurers is advanced on several grounds. One argument is that a shift in the burden of proof would provide protection to more vulnerable road users, such as cyclists (in accidents with motorcycles, cars, trucks, etc) and pedestrians (in accidents with cyclists, motorcycles, cars, trucks, etc), as well as victims below the age of sixteen and over seventy and disabled individuals. Advocates say these rules are needed for both fairness and efficiency reasons. Another argument is that the shift in the burden of proof onto the injurer is fairer than the standard fault-based evidence rule, as it shields more vulnerable victims from the burdensome task of proving the negligence of their injurer.[38] Yet other arguments in support of the presumption of negligence point to the widespread availability and rapid development of new evidence technologies, such as helmet cameras, black-box technology, and GPS location technologies, which make it easier for injurers to record accident events and provide evidence to rebut a presumption of negligence.

As will be discussed below, a jurisdiction's choice of which party should bear the burden of proof can have a significant impact on the parties' tort incentives, as well as on their incentives to invest in private evidence. Given the new range of evidentiary technologies, the choice of legal presumptions would benefit from a broader reassessment. In Section 3, we will offer a broad-brush outline of some of the relevant considerations, which we frame under the general umbrella of the 'cheapest-evidence-producer criterion.'

III. The Effect of Legal Presumptions on Tort Incentives

As pointed out by Castronovo, presumptions of liability in contemporary legal systems are

> 'a dogmatically heterogeneous category because they combine the presumption, that is a qualification of the fact, with the resulting liability, that is a judicial effect.'[39]

While the policy rationales and theoretical foundations of the presumptions of negligence vary greatly across jurisdictions—from simple inversions of the burden of proof for procedural economy or fairness, to goals of risk-spreading between the parties, to other policy objectives—the legal and economic consequences of

[37] In the UK see the Parliamentary debate 24 March 2011, Parl Deb HC (2011) col. 1222 W 81 (UK).

[38] R.H. Grzebieta, J. Olivier and S. Boufous, 'Reducing the Rate of Serious Injuries to Cyclists' *Medical Journal of Australia*, 242 (2017); S. Boufous, 'It Is Time to Consider a Presumed Liability Law that Protects Cyclists and Other Vulnerable Road Users' 28 *Journal of the Australasian College of Road Safety*, 65 (2017).

[39] C. Castronovo, 'Sentieri di responsabilità civile europea' *Europa e diritto privato*, 797 (2008).

these presumptions are straightforwardly uniform: when there is a lack of evidence pertaining to the relevant facts that led to an accident, a shift in legal presumptions turns a case that would have favored the defendant into a case favoring the plaintiff (or a splitting of the loss, under the Italian rule of presumed joint negligence for motor vehicle accidents).[40]

1. Effects of Presumptions of Negligence Under Alternative Liability Regimes

Shifts in burdens of production of evidence are not neutral to truth-finding. Shifting the burden from one party to the other unavoidably affects the parties' respective probabilities of success in litigation. To the extent to which the case has one objective truth, the fact that the burden of proof affects the parties' likelihood of success in litigation must also imply that shifts in the burden will affect the probability that one or another type of judicial errors (Type-I or Type-II) takes place. Think of automobile accidents. A presumption in favor of defendant reduces the probability of imposing liability on a negligent driver, while a presumption in favor of plaintiffs increases the probability of imposing liability on a non-negligent driver.

The effects of these errors are not only distributive.[41] Besides the obvious desire to reduce the frequency of judicial errors, it is also important to consider the effect that different types of errors may have on tort incentives.[42] The associated social cost may differ, given the effects of these errors on the incentives of prospective injurers and prospective victims. When parties expect probatory difficulties, legal presumptions shift care incentives from one party to another.

When shielded by a presumption of non-negligence in their favor, injurers may strategically rely on their victims' difficulty in satisfying their burden of proof. This may dilute their precautionary care incentives. As probatory difficulties increase, a negligence ruler with a non-negligence presumption gradually degenerates into a no liability rule, entirely diluting potential injurers' care incentives. The adoption

[40] See G.A. Micheli et al, *L'onere della prova* (Padova: CEDAM, 1942), 313.

[41] There is nothing deterministic about the optimal allocation of the burden of proof in the face of the possible judicial errors. By shifting the burden from one party to the other, the probability of error also shifts from one party to the other party. For example, a presumption in favor of the defendant (like the traditional negligence rule) may give him an advantage and lead to a margin of error in his favor (a fraction of cases may be erroneously decided in favor of the defendant when the plaintiff is unable to prove the negligence of his injurer). The adoption of a presumption in favor of the plaintiff, however, creates a mirror-image problem, giving the plaintiff an evidentiary advantage that may lead to a margin of error in his favor (a smaller or larger fraction of cases may be erroneously decided in favor of the plaintiff when the defendant is unable to prove his diligence).

[42] As pointed out by R. Cooter, D. Robert and A. Porat, 'Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict' 29 *Journal Legal Studies*, 19-34 (2000), prospective victims will not necessarily act differently depending on the legal liability rule-prospective victims who are already facing substantial risks of serious personal injury that vary with the degree of care that they take, are not affected by changes in liability rules, except in very rare cases.

of legal presumptions of negligence could correct this problem. When faced with a presumption of negligence, probatory difficulties shift the expected accident loss on injurers. As probatory difficulties increase, a negligence rule with a presumption of negligence gradually degenerates into a rule of strict liability, inducing injurers to undertake efficient care. The choice of presumptions of negligence can thus be desirable to mitigate the diluting effects of judicial errors on injurers' tort incentives.

However, the same reasoning applies with respect to the legal presumptions applicable to victims. When shielded by a presumption of non-negligence in their favor, prospective victims may strategically rely on their injurers' difficulty in proving their contributory or comparative negligence, and this may dilute the victims' care incentives. As probatory difficulties increase, the incentives created by a defense of contributory or comparative negligence may gradually disappear entirely. The adoption of legal presumptions of joint negligence, like those adopted in some European jurisdictions for traffic accidents, corrects this problem. When faced with a presumption of joint negligence, probatory difficulties shift the burden of proof back on victims. As probatory difficulties increase, prospective victims will fear being barred from receiving full compensation, inducing them to undertake efficient care.[43] The adoption of presumptions of joint negligence can thus be desirable to mitigate the effect that judicial errors may have on both victims' and injurers' tort incentives.

A second effect of legal presumptions and discovery regimes is on the parties' activity levels. As discussed above, in a world of imperfect adjudication, a shift of the burden of proof also transfers the cost of legal errors. A change in legal presumptions would affect the cost and desirability of a given activity, due to the shift in expected liability associated with the ability to satisfy the burden of proof. More specifically, a presumption that shifts the burden towards the defendant increases the expected cost of the defendant's activity. This is because, in the event of an accident, the defendant will have to incur the cost of producing evidence, or bear the liability associated with his inability to produce evidence (even when his behavior was non-negligent).

The costs associated with the burden of proof can be analogized to a tax imposed on the risk-generating activity. This tax will reduce the optimal level of activity for the party facing the burden of proof. Those familiar with the economic analysis of tort law will soon realize that this effect could be a curse or a blessing, depending on which party bears the burden.[44] This is because the burden of

[43] For a formal analysis of the effects of legal presumptions on care incentives in the presence of judicial errors, see A. Guerra, B. Luppi and F. Parisi, n 24 above.

[44] As per Shavell's activity level theorem, no negligence-based regime can incentivize optimal activity levels for both parties. This is because the party who does not bear the residual liability is only concerned about avoiding liability by undertaking due care and does not internalize the additional cost of non-negligent accidents. Conversely, the bearer of residual liability wants to avoid harm altogether and will be incentivized to undertake both optimal care and optimal activity level. The cost imposed by the burden of proof can therefore do either of two things: sub-

proof imposes a tax on activity level which can alternatively *distort* the already optimal incentives of the residual bearer or *mitigate* the inefficiently high activity levels of the party who does not bear the residual loss. The optimal use of the burden of proof as an activity level tax requires the creation of a legal presumption in favor of the party burdened with the accident loss when both parties acted diligently. This would entail imposing the burden on the defendant when the dispute arises under negligence-based regimes (ie, simple negligence, negligence with contributory negligence, or negligence with comparative negligence) and instead shifting the burden on the plaintiff when the dispute arises under strict liability regimes (ie, strict liability with contributory negligence, or strict liability with comparative negligence). Accordingly, the European rules of presumed joint negligence create a desirable alignment of incentives, bringing the activity levels of both parties closer to the socially optimal levels.

2. The Negative-Proof Problem and the Role of Evidence Technology

One of the common explanations for the use of presumptions of non-negligence and the allocation of evidentiary burdens on plaintiffs (in establishing the fault of their injurers) is that if plaintiffs did not have the burden, there could be an increase in potentially litigation, including a substantial fraction with little merit, brought to extract settlements from defendants. In the absence of fee-shifting rules or other correctives against frivolous claims, defendants might settle a case for a positive amount to avoid having to spend a greater amount proving that they were not negligent. The availability of new evidence technologies has reduced the cost of evidence production and the reliability of the evidence produced by defendants who invested in due care, weakening the practical rationales for the adoption of presumptions of non-negligence in tort cases.

Further, the availability of new evidence technologies has mitigated a theoretical and practical objection that was frequently raised against the use of legal presumptions of negligence. The objection consisted in the fact that a burden placed on the defendant would often entail a negative proof and would de facto deteriorate into a semi-strict or strict liability rule. The procedural laws of evidence were traditionally viewed as embracing this basic principle by allocating the burden of proof on plaintiffs; shifting the burden of proof on the person denying an assertion or a claim would constitute a logical fallacy, creating a presumption of truthfulness of the claim unless otherwise disproven. According to this principle, the victim

optimally reduce the activity levels of the residual bearer or mitigate the excessive activity level incentives of the non-residual bearer. Shavell's proposition has become known in the law and economics literature as 'Shavell's activity level theorem.' See F. Parisi, *The Language of Law and Economics: A dictionary* (Cambridge: University Press, 2013) for the standard restatement of this theorem. An ideal remedy in tort law should instead incentivize optimal precautionary care levels and optimal activity levels for both parties. S. Shavell, 'Strict Liability Versus Negligence' 9 *The Journal of Legal Studies*, 1 (1980), showed that this ideal is not achievable under negligence-based regimes, because only the bearer of residual liability will have incentives to mitigate its activity level.

should bear the burden of proof of the elements of negligence necessary to establish the injurer's liability, because shifting the burden of proving the non-existence of those elements on the injurer would reproduce the same logical fallacy. By creating a presumption of negligence, the injurer would face the formidable burden of proving a negative—the lack of negligence on his part. This would create a presumption of truthfulness of the tort claim, unless successfully disproven by the defendant.

The implicit premise of this argument is that negations often involve universal negatives, while affirmations do not. The proof of a universal negative is what ancient Romans called *probatio diabolica* (literally, 'devil's proof'), to signify its heinous difficulty. Consider, as an example, the allegation of a fact: 'Defendant signed a contract promising X.' A signed document and a few additional pieces of corroborating evidence would suffice to establish such an assertion. On the contrary, the negative claim by defendant 'I have never signed a contract promising X' would entail the proof of a universal negative, necessitating omniscience and omnipresence on the part of the defendant, and ultimately requiring the examination of a potentially infinite amount of evidence by the factfinder.

Despite its logical soundness, in today's world, the negative-proof argument presents a more limited logical objection to the use of legal presumptions of negligence. Consider the case of a negligence tort. Contrary to the example used to illustrate the negative-proof fallacy, proving the non-negligence of the injurer at the time of the accident (or, for this matter, proving that any other element of the tort is not present) does not entail the proof of a universal negative requiring omniscience and omnipresence-proving non-negligence amounts to proving due diligence.

The logical foundations of the law of proof do not dictate that in this case the burden of proof should necessarily be placed on the plaintiff making an assertion or a claim.[45] While at times it may be easier for a plaintiff to prove the negligence of the defendant, in other situations it may be easier for a defendant to prove his own diligence. Neither type of proof requires supernatural abilities. The choice of an optimal allocation of the burden of proof in these cases hinges upon a test of comparative advantage in the access to relevant information. *Ceteris paribus,* when the factual premises of the negative-proof argument do not hold, the party who has a comparative advantage in providing truthful evidence (hereinafter, the 'cheapest evidence producer') should bear the burden of proof.

[45] The inapplicability of the philosophical constructs to the legal notions of burden of proof and choice of legal presumptions was pointed out in the early 1930s by Columbia law professor Jerome Michael and Chicago philosopher and law professor Mortimer Adler, who observed: 'The principles of logic do not place upon either party any burden of proving the propositions which they have respectively alleged. The principles of logic are concerned only with the validity and the structure of the processes by which proof and disproof are accomplished.' M. Adler and J. Michael, *The Nature of Judicial Proof: An Inquiry into the Logical, Legal, and Empirical Aspects of the Law of Evidence* (New York: Colombia Law Review, 1931), 60.

The test of comparative advantage is informed by some general assumptions and guiding rules of thumb. For example, when the standard of due care entails the undertakings of many actions, proof of diligence can be more burdensome than the proof of negligence. Proof of negligence could be satisfactorily obtained by showing that any one of the required actions had not been undertaken. Proof of diligence would instead require evidence that each and every required precautionary action was undertaken. In the limiting case in which an infinite number of actions need to be undertaken to satisfy due care, a negative proof of non-negligence would become virtually impossible. Thankfully, no such infinite list of burdensome duties of care is legally expected from ordinary humans.[46]

If, as it seems, there is nothing fundamentally necessary behind the idea of placing the burden of proof on plaintiffs, the next logical question becomes identifying the factors that should drive the optimal allocation of the burden of proof. On this matter, it is important to consider that new technology is substantially increasing the amount of information that can be acquired and preserved, with far-reaching applications in the field of legal evidence and discovery. Scientific and technological innovations play a dual role in evidence and discovery. Some technologies can give factfinders insights, allowing them to look back and gather information about past events, while others record and preserve present information for future uses. We shall refer to the first group as 'investigative technologies' and to the second group as 'fact-keeping technologies.'

1. *Investigative Technologies*. The characteristic feature of investigative technologies is that they can be employed *ex post* even though no such technology was used or available at the time of the event. Consider, for example, evidence obtained through genetic testing. Like a lie detector, genetic testing can shed light on past events. This technology need not be adopted by the parties at the time of the original event but instead can be deployed when a need for discovery arises later.

2. *Fact-Keeping Technologies*. Other technologies collect information about present events and preserve it for future investigations. This category encompasses two subgroups. The first is technology that can be adopted by parties who are neither prospective injurers nor victims, including local governmental authorities, such as traffic surveillance cameras and satellite imaging, capable of documenting facts and events that occur within their range. We shall refer to them as '*public* fact-keeping technologies.' The second involves technologies that individuals and firms can privately adopt. These are instruments that are tailored to a specific set of applications, determined by their user. Examples that fall within this category include adoption of black-box technology on vessels, cameras on body vests or helmets, Snapshot® and dash-mounted cameras on cars, use of digital timestamp

[46] For a collection of cases describing the innumerable list of duties that a 'reasonable man' should fulfill to avoid being held negligent in torts, see the humorous book by A.P. Hebert, *Uncommon Law* (London: Methuen, 1937), 3–11.

certification methods, use of electronic tamper-proof data storage systems managed and certified by third parties, and various applications of GPS technology. We shall refer to them as '*private* fact-keeping technologies'. Private fact-keeping technologies consist of two distinct subgroups, each with different focuses and applications. Some technologies, such as black-box technology, Google Timeline®, Snapshot®, and cloud data storage, are better able to track the user's own actions. We shall refer to them as '*first-party evidence technologies*.' Other technologies, such as private surveillance cameras, fingerprints and face recognition devices, are better able to document the activity of others. We shall refer to them as '*third-party evidence technologies*.'

As will be discussed below, these evidence technologies have changed the relative cost and reliability of providing evidence in a court proceeding, and thus altered the resulting optimal allocation of burdens of production under the cheapest-evidence-producer criterion.

3. Accuracy of Tort Adjudication and the Effects of Adversarial Discovery

As Alice Guerra and Francesco Parisi pointed out, much of the conventional wisdom underlying the choice of legal presumptions rests on the now-outdated assumption that the amount of evidence available in any given situation (eg, the number of witnesses or the amount of physical evidence available after an accident) is not controlled by the parties. The advent of new evidence technology has radically changed this situation. Individuals involved in a prospective accident can endogenously control the amount of available evidence with the adoption of evidence technology.[47]

In this respect, legal presumptions influence the type of evidence technology likely to be adopted. As summarized in *Table 1* below, under traditional presumptions of non-negligence, prospective injurers have limited incentives to invest in first-party evidence technology, since in the event of an accident, it would primarily be the victims' burden to come forth with the necessary evidence. Prospective victims would instead have incentives to adopt third-party evidence technology to prove the negligence of their injurers. The opposite would hold under legal presumptions of negligence. In this case, prospective injurers would be more likely to adopt first-party evidence technology, and victims would have fewer incentives to invest in third-party evidence technology. Presumptions of joint negligence would, instead, incentivize both parties to invest in first-party evidence technology. Under this latter presumption, prospective injurers would prevalently adopt evidence technology focused on themselves to prove their non-negligence, and prospective victims would similarly adopt evidence technology focused on themselves to prove lack of

[47] A. Guerra and F. Parisi, 'Investing in Private Evidence: The Effect of Adversarial Discovery' 14 *Journal of Legal Analysis*, 657–671 (2021).

contributory or comparative negligence. Hence, both parties would have greater incentives to adopt first-party evidence technology.

Table 1: *Legal Presumptions and Adoption of Evidence Technology*

	Injurers' Evidence Technology	**Victims' Evidence Technology**
Presumption of Non-Negligence	—	Third-Party Focused
Presumption of Negligence	First-Party Focused	—
Presumption of Joint Negligence	First-Party Focused	First-Party Focused

The availability of new evidence technology increases the verifiability of diligent and/or negligent behavior, increasing the benefits of the owner's investment in precautions. Precautions decrease the probability of an accident, but also help individuals prove their diligent behavior to avoid liability. By increasing the *ex post* verifiability of the parties' behavior, evidence technology reinforces the parties' incentives to act diligently. An increase in evidence and accuracy of adjudication will change the relative price of negligent versus non-negligent behavior. A burden placed on the defendant increases the wedge between the payoffs in cases of diligent versus non-diligent behavior. That is to say, the relative payoff of diligent behavior over non-diligent behavior is increased, causing a substitution effect.[48] These investments may lead to desirable adjustments in the parties' care investments. Think, for example, of a motorcyclist fearing to harm pedestrians in a regime of presumed negligence. In the event of an accident, the motorcyclist would have to prove lack of negligence to avoid liability. Evidence technology could help him satisfy the required burden of proof. The motorcyclist may thus put a dashcam on his motorcycle to present footage of the accident in a courtroom. Evidence technology renders past behavior more verifiable and increases the value of his investments in precautions. This would strengthen the motorcyclist's incentives to act diligently

[48] As shown in the law and economics literature, for a sufficiently moderate cost of evidence, this substitution effect should not be observed given the discontinuity of payoffs created by a negligence standard.

and to undertake the due level of care, further reducing the probability that he will find himself in the role of injurer in the event of an accident. The overall care level incentives created by legal presumptions of negligence would be further amplified by the adoption of presumptions of joint negligence. Under presumptions of joint negligence, both parties would adopt technology that increase the value of their care investments, making them more verifiable.[49]

It should be further observed that evidence rules concerning discoverability of evidence can play an important role in determining the parties' decisions to invest in evidence technology.[50] The differences between the rules governing adversarial discovery in the United States and Europe are significant. In 1938, the enactment of the Federal Rules of Civil Procedure in the United States gave origin to one of the most far-reaching discovery systems in the world, authorizing discovery into any matter that is not privileged which is relevant to the subject matter of the case.[51] As Allen et al pointed out, in most litigation settings modern US discovery rules make a fetish out of free access to all information, rendering most of the available evidence discoverable.[52] As Subrin put it, the federal discovery rules have opened the doors to 'fishing expeditions' through adversarial discovery, where litigants are allowed access to documents and data of the opposing party for exploratory reasons in the search for information that may strengthen their case or weaken the case of their opponent.[53] Rules of civil procedure at the state level have followed the federal example, introducing some limits on discovery only in the interest of procedural economy.

The reach of adversarial discovery as practiced in the United States. is not available in civil law jurisdictions. The non-adversarial procedural traditions of

[49] It should be noted that better verifiability of facts reduces the variability in the outcome of the results: court decisions will be correct more often. The increase in accuracy does not necessarily affect the parties' activity levels. The risk of being incorrectly found negligent, and required to pay damages despite having taken care, does not will deter activities. The increased variance in judicial outcomes also entails a counterbalancing hope of being incorrectly found diligent, and required to pay no damages, despite not having taken due care. Unless we assume that lack of accuracy in adjudication entails a systematic bias toward the incorrect finding of negligence (with no offsetting dismissals in favor of negligent defendants), on average, courts' unbiased inaccuracy would not affect expected liability and the resulting activity levels.

[50] For a formal economic model, assessing the effects of discovery rules on the incentives to invest in private evidence, see A. Guerra and F. Parisi, n above 47.

[51] See US Federal Rules of Civil Procedure, Rule 26.

[52] R.J. Allen et al, 'A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine' 19 *Journal Legal Studies*, 359 (1990). US evidence law generally makes most of the available evidence discoverable. See A.R. Miller and C.E. Tucker, 'Electronic Discovery and the Adoption of Information Technology' 30 *The Journal of Law, Economics, and Organization*, 217 (2014); R.S. Haydock and D.F. Herr, *Discovery Practice* (New York: Wolters Kluwer, 2016).

[53] S.N. Subrin, 'Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules' 39 *Boston College Law Review*, 691 (1998). For example, in *United States* v *Microsoft*, 87 F. Supp. 2d 30 (D.D.C. 2000), prosecutors used e-mails sent between Microsoft executives to prove anti-competitive intent towards Netscape. For other examples of e-discovery, see A.R. Miller and C.E. Tucker, n 52 above.

Europe adopt a different approach in legal discovery, letting each party produce the evidence that is available to them, with very narrow use of court-ordered discovery of evidence.[54] These approaches are deeply entrenched in the civil law tradition and echoed in current case law, as best exemplified by the rules and cases governing adversarial discovery in Europe. A few representative examples are offered below.

The relevant laws governing the discovery of evidence in France are Arts 10, 138, and 139 of the Code of Civil Procedure ('*Code de procédure civile*'). Under the French Code of Civil Procedure Art 10, parties may petition the court to order the other party or third parties to produce evidentiary material, but the judge's decision to allow discovery is discretionary.[55] However, French judges do not allow adversarial access to evidence for exploratory reasons, and only force production of evidence in cases where the opposing party already has knowledge of the content of the sought-after evidence and has no other means to prove its claim (eg, to obtain a signed agreement that remained in possession of the opposing party).[56]

The opportunity for adversarial use of evidence under the Italian Code of Civil Procedure ('*Codice di Procedura Civile*') is even narrower. Art 670 allows parties to seek sequestration of physical documentary evidence (now interpreted to also include electronic, audio, and video evidence) that contains information already known to the other party and that — if later admitted by the court — could be critical for the resolution of the dispute.[57] The role of the sequestration, reflected in Art 671, is purely conservative: evidence is placed in the trust of a third party, and it is not given to the opposing party for the search of other information that could help to corroborate their case. The admissibility of the preserved evidence in court is governed by Art 210 of the Italian civil procedure code. Italian case law—ranging from trial courts to a recent decision of the Italian Supreme Court ('Corte di Cassazione')—has narrowly interpreted Art 210, affirming that adversarial discovery is granted at the discretion of the judge, and should not be granted as an instrument to aid a party in meeting its burden of proof.[58] Case law restated that the content of the requested evidence should be known and specified by the requesting party, and discovery should not be asked

[54] European legal systems follow a more conservative approach with respect to adversarial discovery of private evidence. See M.H. Redish, 'Electronic Discovery and the Litigation Matrix' 51 *Duke Law Journal*, 561 (2001); G. Foggo et al, *Comparing E-Discovery in the United States, Canada, the United Kingdom, and Mexico,* (London: McMillan, 2020). For extensive references, see T.P. Harkness et al, 'Discovery in International Civil Litigation: A Guide for judges' *Procedure, Advocacy, Strategy and Tactics in Arbitration,* 14 (2017).

[55] G. Serge, F. Frederique and C. Cecile, *Procèdure civile* (Paris: Dalloz, 2009), 341-42, 341-52.

[56] See J. El-Ahdab and A. Bouchenaki, *Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?* (Arbitration Advocacy in Changing Times ICCA Congress Series no 15, 2011), 65-117. Requirements on the petitioning party further limit the application and viability of forced production petitions within the French legal system. P. Harkness et al, n 54 above.

[57] For discovery practices in selected jurisdictions, see P. Harkness et al, above n 54.

[58] Tribunale di Frosinone 18 April 2018 no 379; Tribunale di Grosseto 7 January 2020 no 8.

for exploratory reasons.[59] If the requesting party fails to specify the exact content of the document requested through adversarial discovery, the request should be denied.[60] In 2016, the Italian Supreme Court reaffirmed this principle, highlighting its rationale when it stated that

> 'the purpose of discovery is not to help the party prove something that he would not have been able to prove in the absence of the new information acquired through discovery.'[61]

The relevant rules governing the adversarial discovery of evidence in Germany are found in the German Code of Civil Procedure ('*Zivilprozessordnung*'). Like its French and Italian counterparts, the German Code of Civil Procedure does not offer procedures for pretrial discovery similar to those found in US jurisdictions, and the German principle against the use of discovery for exploratory reasons is upheld in case law.[62] Furthermore, under German law there is no general obligation to produce documents to assist the opposing party in transnational litigation. This procedural principle led Germany to introduce reservations in the ratification of the Hague Service of Process Convention, which entered into force on 26 June 1979. In ratifying the Hague Convention, Germany introduced declarations and reservations that excluded the application of Chapter II of the Convention. As a result, in transnational disputes, Germany will not execute requests of pretrial discovery of documents as known in the United States (according to Art 23 of the Declaration).

The differences in the adversarial discovery of private evidence have obvious consequences on the parties' incentives to invest in evidence technology. Under a fully discoverable evidence regime, keeping track of one's actions makes the saved information subject to being discovered and subpoenaed, and possibly used as evidence by opposing parties in the event of a dispute. Under US evidence law, private investments in evidence could thus have a backlash effect on the party that invested in the technology.[63] As an example, think of a dashboard webcam that can be installed in a car. If the information gathered by the dashcam could be

[59] Tribunale di Spoleto 1 July 2019 no 461.

[60] Corte d'Appello di Torino, 8 July 2019 no 1153.

[61] Corte di Cassazione 15 March 2016 no 5091.

[62] Federal Court of Appeals (BGH) 4 June 1992, NJW 1992, 3096, 3099.

[63] F. Parisi et al, 'Access to Evidence in Private International Law' 23 *Theoretical Inquiries in Law*, 77 (2022), use a simple analytical model to illustrate the effect of these procedural differences on individuals' incentives to invest in private evidence technology, suggesting that the tension between the retrospective and the prospective effects of discovery of private evidence should be considered in the allocation of probatory burdens and the design of evidence rules. The impact of discovery practice on private information technology in the US has been widely documented in the empirical legal literature. A.R. Miller and C.E. Tucker, n 52 above studied the effects of state e-discovery rules on the adoption of electronic medical records by hospitals. The study suggests that in states that adopt e-discovery rules, hospitals reduced the use of electronic records to limit risks that they could be adversely discovered and used against them in future litigation.

used in court against the driver to prove his negligence when his non-negligence is presumed, the driver may be disincentivized from installing the dashcam.[64] Imagine the case of two individuals facing the risk of an accident in a regime of negligence liability with a defense of comparative or contributory negligence. The parties need to decide whether to invest in evidence technology, which can gather and save information that can be used as evidence in the event of an accident. The two individuals make their investment decision without knowing whether they will find themselves in the role of victims or injurers. In the absence of evidence technology, facts related to the accident are only partially verifiable by the factfinder.

Evidence technology can increase the verifiability of the information presented by the parties by recording the events of the accident. By investing in evidence technology, the party facing the burden of producing evidence has an increased probability to satisfy his or her burden of proof.

However, if the evidence in possession of one party is discoverable by the opposing party the evidence collected by the technology could be discovered by the opposing party and would also increase the opposing party's ability to satisfy its burden in the event of an accident. In cases characterized by role-uncertainty, such as ordinary traffic accidents by average drivers, the advantages and disadvantages of the evidence technology would be offset in most tort situations, eliminating the parties' incentives to invest in new evidence technology. Individuals would invest in private evidence when undertaking activities that put them in a position of prospective victims more often than in a position of prospective injurers, and/or in situations where defenses of contributory or comparative negligence have a high likelihood of application.[65] Making private evidence discoverable discourages investments in technology in tort scenarios characterized by symmetric role-uncertainty.[66]

[64] In turn, insurance companies would not want to encourage the adoption of dashcams by offering premium discounts, knowing that the evidence collected by this technology would increase the exposure of their insureds, with an increase in the expected liability of the insurance company. Not surprisingly, although in the US several insurance companies offer discounts if 'telematic' devices without video recording are installed to monitor drivers' driving patterns (eg, Progressive Insurance's Snapshot®), no US insurance company offers premium discounts to their insureds for installing dashcams with video recording. Conversely, many insurance companies in Europe—and every insurance company in Italy—offer premium discounts to drivers who voluntarily install webcams on their vehicles. See A. Guerra and F. Parisi, n 47 above.

[65] Asymmetries in the parties' role-probabilities can arise for a variety of reasons: activities differ in nature; riskier activities are statistically more likely to cause harm to others; parties may differ in their abilities to undertake effective precautions; etc. When role probabilities are asymmetric (eg, individuals who fear becoming victims of a tort of trespass or assault) the adoption of evidence technology, such as a webcams or bodycams, could be beneficial to record information that could enable victims to produce the necessary evidence against their injurers, with limited risk of backlash from the adversarial discovery of the evidence.

[66] As a plausible development in the future regulatory landscape of jurisdictions with discoverable evidence, it is conceivable that policies may be introduced to mandate the adoption and use of recording devices: if such recording devices exist and are not expensive, why should lawmakers encourage those who are more likely to be in violations of duties of care to shield their

Things work differently when parties operate in jurisdictions that grant limited discovery of private evidence technology. In the face of a tort scenario with role-uncertainty, evidence technology will increase a party's ability to satisfy his burden of production with no backlash effect. When private evidence technology is not discoverable, the optimal strategy for the parties in both prospective roles as injurers and victims is to adopt evidence technology when the benefit of the evidentiary advantage is higher than the cost of acquiring and using the technology. The adoption of affordable technology becomes a rational decision for both parties.[67]

IV. Conclusions

Activities that provide grounds for liability vary in complexity and access to information. Consider the case in which the injurer's negligence took the form of a given action or omission, like speeding above the posted limit. The proof by the plaintiff that speeding occurred is the equivalent of the proof by the defendant that speeding did not occur. There is nothing that logic can say about which of the two parties can more easily prove that fact and should bear the burden of proof in this case. If one party has better access to that information and can reliably supply new evidence to the factfinder, the optimal allocation of the burden of proof should then be on that party. So, if the plaintiff can more easily prove the speed at which the defendant was driving, thanks to the adoption of third-party evidence technology (eg, bodycams or other technology that might be available for those types of accidents), the burden should optimally be imposed on him. Conversely, if the injurer has a comparative advantage in proving lack of speeding, thanks to first-party evidence technology available on his car (eg, GPS or Blackbox technology capable of keeping track of his speed), the burden should optimally fall on him.[68] In many situations, drivers may be better able to keep a complete record of their own driving speed than prospective victims. Hence, the use of legal presumptions of negligence for traffic accidents and the resulting adoption of evidence technology observed in European jurisdictions may well be justified under the cheapest-evidence-producer criterion.

In this paper, we presented the diverse origin of rules of presumed negligence and presumed joint negligence in modern and contemporary European systems and compared their workings to the US system with special attention to negligent torts. Our discussion emphasized the fact that technology increasingly makes it possible for parties to keep records of their behavior. For example, car drivers can have a dashcam or a black box installed on their vehicles, capable of recording speed,

behavior, avoiding the adoption of socially desirable evidence technology?

[67] For a formal proof of these results, see the analysis carried out in A. Guerra and F. Parisi, n 47 above.

[68] On this point, see the reliability conditions identified by C.W. Sanchirico, 'Evidence Tamperingì' 53 *Duke Law Journal*, 1215 (2004).

braking, and other information. A driver facing a presumption of negligence and a burden of proving his diligent conduct might have an incentive to invest in a camera and black box (at least if the driver planned to exercise due care. Investing in such technology, however, could be to the driver's disadvantage if he failed to take due care: if a driver exceeded the speed limits or violated other traffic laws and his devices recorded his behavior, under US discovery rules, his counterpart in litigation could use the driver's recorded information against him. The more protective discovery rules followed in European jurisdictions would avoid this problem and encourage also drivers who are less likely to exercise due care to invest in evidence technology. The discussion further showed that the use of alternative legal presumptions leads to the adoption of different types of evidence technology by different groups of individuals. Presumptions of non-negligence incentivize prospective victims to adopt third-party focused technology. Presumptions of negligence incentivize prospective injurers to adopt first-party focused technology. Presumptions of joint negligence incentivize both prospective victims and prospective injurers to invest in first party focused technology.

In sum, jurisdictions such as Italy, that limit discovery of private evidence and adopt presumptions of joint negligence, provide superior tort incentives. By requiring both parties to provide evidence of their diligent behavior, these presumptions increase the access to evidence by courts, increasing the accuracy of adjudication and preserving tort incentives in the face of adjudication errors. Unfortunately, these conclusions do not provide an easy pathway for legal reform in different jurisdictions. Procedural rules on adversarial discovery affect the conditions for the effectiveness of presumptions of negligence and, in a way, explain the observed differences between the laws of different countries.

Essays

Accountability of NGOs in the Italian Legal Framework of International Adoption

Alessandra Pera*

Abstract

The paper focuses on the accountability of private and public entities with competence in the international adoption of minor children in the Italian legal framework.

The author detects sources of law, models, and operative rules implemented by legislation, court rulings, and practitioners, distinguishing two different levels and relationships.

The first involves the relationship between the Commission for International Adoption and the NGOs, focusing on the nature of the NGOs (Non-governmental organizations) which are private bodies with public functions that implement private rights, acting in the public interest.

The second level involves the contractual relationship between the appointed NGO and the aspiring parents.

The survey offers a critical perspective on some relevant issues, such as:

- the centrality of trust, in both the public and the private law domain, as a fundamental element of the model;

- the nature and the contractual obligations of the NGOs who assist the prospective parents; and

- alternative legal arguments that courts could follow to better protect the rights and values of the parties involved, or to fill gaps in the rationales already adopted.

I. Introduction

International adoption is the adoption of a foreign child in his/her birth country through the authorities and laws that operate there. In Italy, the competencies in matters of intercountry adoptions, provided for by the Hague Convention of 29 May 1993 and *legge* 31 December 1998 no 476, derive from the Commission for Intercountry Adoptions (CAI), which is the Central Authority established at the Presidency of the Council of Ministers.[1] In brief, the requirements for international adoption are the same as those for national adoption and are provided by Art 6[2]

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[1] Art 39-*ter* legge 4 May 1983 no 184, as modified by legge 31 December 1998 no 476, Ratification and execution of the Convention for the protection of minors and cooperation in the field of intercountry adoption, The Hague, 29 May 1993.

[2] Art 6 provides that adoption is allowed 'to spouses who have been married for at least

of *legge* 4 May 1983 no 184, as amended by *legge* 28 March 2001 no 149 (Adoption Act).[3]

Thus, individuals residing in Italy who meet the conditions prescribed by Art 6, and who intend to adopt a foreign minor residing abroad, must submit a declaration of willingness to undertake an international adoption to the *Tribunale per i Minorenni* of the district where they reside, and ask the court to certify their suitability to adopt. In the case of Italian citizens residing in a foreign country, the *Tribunale per i Minorenni* of the district where their last residence is located is competent; failing that, the *Tribunale per i Minorenni* of Rome is competent. The role of social services is to get to know the couple and to evaluate their parenting potential by collecting information on their personal, family, and social history. At the end of the investigation, a report is prepared and sent to the *Tribunale per i Minorenni*. The *Tribunale per i Minorenni* then summons the couple and may request further information, or it may decide to issue either a decree of suitability or a decree certifying that parents do not meet the requirements to adopt.

Therefore, once the couple has a decree of suitability, they must start the international adoption procedure within one year of receiving it by contacting one of the NGOs authorized by the CAI. This step is compulsory.[4] The institution assists the couple by handling the necessary paperwork throughout this complex procedure. It transmits all the documentation referring to the child, together with the certification of the foreign judge or a competent authority, to the CAI. When the adopted child is ready to travel to Italy, the CAI authorizes the child's entry and stay in Italy after certifying that the adoption complies with the provisions of the Hague Convention. After the child has entered Italy and the pre-adoptive fostering period has elapsed, the procedure ends with the order by the *Tribunale per i Minorenni* to enter the adoption in the civil status registers.

In spite of that, before going deep into the analysis, it is useful to consider the relevant data, to better understand the dimension of international adoption, the number of families and children involved, and the costs, both private and public.

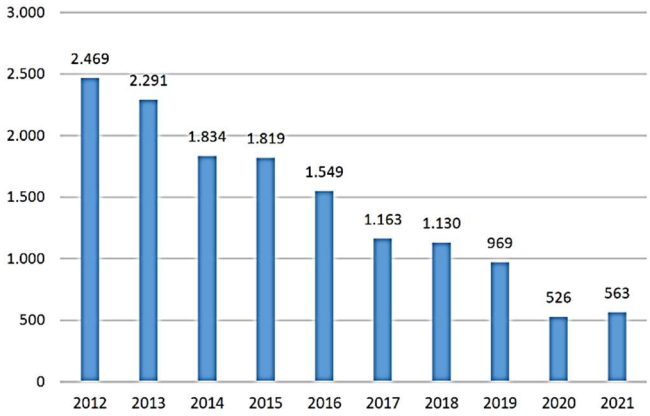
Figure 1 – Couples who requested authorization for foreign minors to enter Italy for adoption purposes, years 2012-2021.[5]

three years, between whom there is no personal separation, not even de facto, and who are suitable for educating, instructing and maintaining the minors they intend to adopt'.

[3] G. Autorino and P. Stanzione, *Le adozioni nella nuova disciplina. Legge 28 marzo 2001 n. 149* (Milano: Giuffrè, 2001); M. Dogliotti, 'Adozione di maggiorenni e minori. Artt. 291-314. L. 4 maggio 1983, n. 184. Diritto del minore a una famiglia' in P. Schlesinger and F. Busnelli eds, *Il codice civile. Commentario* (Milano: Giuffrè, 2002).

[4] The list of authorized entities is online on the Commission's institutional website: www.commissioneadozioni.it.

[5] Source: Presidency of the Council of Ministers, Commission for Intercountry Adoptions, Data and Perspectives in International Adoptions. Summary Report of records from January 1 to December 31, 2021, Istituto degli Innocenti, Florence, available at https://tinyurl.com/bdcsb862 (last visited 20 September 2023).



The progressive decrease, which emerges in the figure, is probably due to: - the scientific and technological development of artificial insemination procedures; - the diffusion of special forms of adoption and foster-care; - the increase of Migrant Non-Accompanied Minors, which enter the adoption national circuit; - the Covid pandemic lockdown in many States and the consequent stop of the intercountry adoption procedures, having regard to 2020 and 2021. In considering these numbers, it should be noted that the median cost for aspiring parents is € 15,000 to € 20,000, in addition to other direct and indirect costs like travel to the country of origin of the child and vaccine expenses.

Moreover, this paper investigates what happens when international adoption goes wrong, who the different actors in this process are, and how their relationships and responsibilities are configured. I examine the sources of law, the models and operative rules implemented by legislation, courts rulings, and practitioners while offering a critical perspective on some relevant issues, such as:

- the centrality of trust, in both the public and the private domain, as a fundamental element of the model;

- the nature and the contractual obligations of the NGOs who assist prospective parents;

- the legal arguments that courts could follow to better protect the rights and the values of the parties involved in the procedure, or to fill gaps in the rationales already adopted.

Thus, I examine two different levels or relationships of trust. The first level involves the relationship between the CAI and the NGOs. Here, I focus on the nature of the NGOs, which are private bodies with public functions that implement private rights, but also in the public interest (paraII). The second level involves the contractual relationship between the appointed NGO and the prospective parents (paraIII). There is also a third level, which implies many connections between foreign country authorities, NGOs in the child's country of origin, and Italian NGOs. While investigating these connections is beyond the scope of this

paper, I intend to address them in a forthcoming article.

Therefore, to provide the international reader (who is not Italian or a civil lawyer) with a better understanding of these issues, I use footnotes in which I discuss the meanings of certain legal concepts, categories, and institutions that cannot be translated directly from Italian into English.[6] When referring to those concepts, I either use the Italian term or a roughly equivalent English term. Moreover, I seek to provide adequate definitions and explanations for each of the categories I am using, and for the functions of the legal concepts cited.[7]

II. The Relationship Between the CAI and the NGOs: Public Trust, Public Control, and Public Interest

The central issue is the legal nature of the entities that carry out the procedure for adopting foreign minors, because it affects the obligations, rights and duties, and the regime of accountability of the NGO in front of the aspiring parents and the legal system.

In this context, Art 39 *ter*, lett d) of the Adoption Act,[8] among other requirements the entities must meet to obtain (and retain) the authorization to carry out intermediation activities in international adoptions, expressly excludes profit-making activities. Thus, the entity cannot and must not engage in the division of profits deriving from this activity.[9] After the CAI has issued its authorization, these entities are assigned powers of a public nature (mainly certification powers). However, the control and the direction of these powers are established by the CAI.

As a matter of fact, the Italian legal system recognizes the category of 'private entities of public interest': *id est*, entities of a private nature, which, due to the public importance of their activities, are subject to a particular legal regime that differs from the regime that generally oversees private entities. Thus, these entities represent a *tertium genus* halfway between public and private entities.[10] There is abundant literature on this point,[11] but for the purpose of my research, it is

[6] S. Sarcevic, *New Approaches to Legal Translation* (The Hague: Kluwer Law International, 1997), 145-160.

[7] V. Jacometti and B. Pozzo, *Traduttologia e Linguaggio Giuridico* (Padova: CEDAM, 2019), 91-117.

[8] Art 39-*ter*, letter d) of the Adoption Act expressly states that the NGOs must 'be non-profit, ensure absolutely transparent accounting management, even on the costs of the procedure, and operate correctly and fairly, with a verifiable method'.

[9] P. Morozzo Della Rocca, *La riforma dell'adozione internazionale. Commento alla Legge 31 dicembre 1998 n. 476* (Torino: UTET, 1999); Id, 'Gli enti autorizzati a curare l'adozione quali associazioni di diritto privato esercenti pubbliche funzioni: regole, poteri e responsabilità' *Diritto di famiglia e delle persone,* II, 516, 514-529 (2002).

[10] V.M. Sessa, *Gli enti privati di interesse generale* (Milano: Giuffrè, 2007).

[11] G. Rossi, *Gli enti pubblici* (Bologna: il Mulino, 1991), 213; Id, 'Gli enti pubblici in forma societaria' *Servizi pubblici e appalti,* 221, (2004). For a different view, see G. Corso, *Manuale di*

reasonable to construct a concise category of private entities of public interest because certain issues concerning these entities often arise:

- whether (substantially) private entities – being subject to a public law regime – are compatible with the constitutional principles that protect freedom of association; and also, guarantee equality and social solidarity are unclear;

- these special regimes confer privileges of various kinds, especially financial and tax privileges, which must be controlled to verify that public resources are not being used for purposes other than those for which they were granted;

- these privileges and prerogatives cannot and must not be exercised in violation of the non-discrimination principle, and they must be exercised in compliance with the principle of reasonableness.

Moreover, the adoption system outlined in the legge no 184/1983 has been reformed several times by Italian legislators, including under the provisions of international agreements. These reforms took place in two stages. The first part was carried out under the legge no 476/1998, which ratified and implemented the 1993 Hague Convention on the protection of minors and cooperation in the field of international adoption; while the second part was implemented under legge no 149/2001, which amended legge no 184/1983 concerning national adoption, together with some provisions of the civil code.[12] Following the 1998 reform, government regulations were issued that contained rules for the constitution, organization, and functioning of the CAI,[13] which plays a pivotal role in the mechanisms built by the Hague Convention. In this sense, the Convention (Art 22, para 1) provides that the functions conferred on the central authority can also be exercised by public authorities or authorized bodies.[14] Italian legislators made

diritto amministrativo (Torino: Giappichelli, 2022), 89; G. Napolitano, *Pubblico e privato nel diritto amministrativo* (Milano: Giuffrè 2003), 171; Id, 'Soggetti privati 'enti pubblici'?' *Diritto amministrativo*, 4, 801 (2003).

[12] R. Pregliasco, 'Come cambia l'adozione in Italia', in I numeri italiani. Infanzia ed adolescenza in cifre. Edizione 2007 - Quaderni del Centro nazionale di documentazione e analisi per l'infanzia e l'adolescenza no 43 (Firenze: Istituto degli Innocenti, 2007), 75-78.

[13] Decreto del Presidente della Repubblica 1 December 1999 no 492, emended by Decreto del Presidente della Repubblica 8 June 2007 no 108.

[14] Art 22 states that '(1) The functions of a Central Authority under this Chapter may be performed by public authorities or by bodies accredited under Chapter III, to the extent permitted by the law of its State.

(2) Any Contracting State may declare to the depositary of the Convention that the functions of the Central Authority under Arts 15 to 21 may be performed in that State, to the extent permitted by the law and subject to the supervision of the competent authorities of that State, also by bodies or persons who: a) meet the requirements of integrity, professional competence, experience and accountability of that State; and b) are qualified by their ethical standards and by training or experience to work in the field of intercountry adoption.

(3) A Contracting State which makes the declaration provided for in para2 shall keep the Permanent Bureau of the Hague Conference on Private International Law informed of the names and addresses of these bodies and persons.

(4) Any Contracting State may declare to the depositary of the Convention that adoptions of children habitually resident in its territory may only take place if the functions of the Central Authorities are performed in accordance with para 1.

use of this option by establishing a central authority (the CAI) and allowing other bodies to exercise relevant public functions, including public or private authorities duly accredited under national law.

In addition, the entire adoption procedure must pass through intermediary bodies. Thus, couples wishing to adopt a foreign minor must contact these authorities. This appears to be consistent with the intention of legislators to avoid overburdening the central administrative authority with very large bureaucratic apparatuses, which certainly would have happened if the CAI had been assigned the task of directly managing the international adoptions that take place in Italy. The obligatory recourse to these bodies was then reinforced by severe criminal sanctions, provided by Art 72-*bis* of the Adoption Act, for intermediation carried out without authorization, and for aspiring parents who seek to adopt through bodies that are not duly authorized. Furthermore, Art 39-*ter* of the Adoption Act provides the requirements that entities must meet to obtain authorization: eg, having a registered office in the national territory; having an adequate organizational structure in at least one Region or Autonomous Province in Italy, and the personnel structures needed to operate in the foreign countries where they intend to act; being directed by and composed of people with adequate training and competence in the field of international adoption, and with suitable moral qualities; making use of the contributions of professionals in the social, legal, and psychological fields registered in the relevant professional register; and participating in activities to promote the rights of the child.

In this context, the tasks of authorizing and supervising the intermediation organizations are assigned to the CAI. Therefore, the Administrative Authority is responsible for receiving the authorization applications and reaching decisions on them after checking the requirements. If an application is rejected or only partially accepted, the bodies concerned may submit a request for re-examination to the Commission, which must be decided within thirty days, or sixty days in total if further information relevant to the investigation is demanded.[15] Therefore, if, following the checks, the CAI detects irregularities, it can (depending on the seriousness of the violation): censor the entity; demand that the entity adapt its operating procedures to the provisions of the Act or regulations; order the limitation of the assumption of offices; or order the modification of the territorial extension of the operations of the authorized body at the national level. In the most serious cases of non-compliance, the Commission has the power to suspend the NGO's authorization for a specific period and to set a deadline by which it must eliminate the irregularities. If, after the deadline has passed, the entity has not complied, the CAI can revoke its authorization. The revocation is also ordered if

(5) Notwithstanding any declaration made under para 2, the reports provided for in Arts 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with para 1'.

[15] Art 17, Decreto Presidente della Repubblica 8 June 2007 no 108.

the conditions under which the authorization was granted cease to exist, or if the activities of the entity do not comply with the principles and provisions established by the Convention, the Adoption Act, and the regulation.[16]

However, the NGOs that have obtained the authorization are registered in a specific record.[17] This record is kept by the Commission, which is required to check it every three years. Moreover, given the proliferation of authorized bodies, according to the above Art 6, letter d), the CAI must act to ensure the homogeneous diffusion of the entities, while encouraging them to coordinate and improve their effectiveness and quality. The purpose of the regulation is to limit the number of organizations operating in a specific foreign country.

Despite that, this legislation has been criticized not only by those involved in the system but also by scholars. In particular, the decision of the Italian legislator to assign responsibility for the adoption procedures exclusively to private entities has strongly complained.[18] It has been pointed that this regulation, which was not imposed by the Convention, makes it impossible for couples to adopt in countries where no authorized body operates. Because the entities are private, they tend to ask for authorization to operate in some countries rather than in others, mainly based on criteria that (above all) consider the preferences of the aspiring adoptive parents, as well as the ease of obtaining children for adoption. Thus, it is argued, there is a well-founded risk that international adoptions are excessively influenced by the preferences of aspiring adopters while neglecting the interests of the abandoned children themselves.[19] However, unless the Commission has the power to limit the authorization of entities to certain countries, it would no longer have the power to impose conditions on entities operating in countries that fail to meet the requirements. It has been suggested that the CAI should be given the power to proceed directly, thereby filling the role that Italian law reserves exclusively to authorized entities. Alternatively, public adoption services operating in countries with few, or any private intermediation organizations could be created.

Subsequently, by choosing a pluralistic model, Italian legislators were rejecting a monopolistic approach, while also seeking to prevent adoption practices outside of institutional channels and to stop the proliferation of so-called independent adoptions. However, this model is not able to fully meet its goals. This is also because we are dealing with the category of private entity of general interest: *id est*, private subjects that pursue public purposes, but through activities that are not obligatory in nature. These activities always remain private, and are therefore not compulsory, even if they are of public relevance. Thus, when speaking of the

[16] Art 16 of the above Decreto Presidente della Repubblica.

[17] Art 6, para 1, letter c) of the above Decreto Presidente della Repubblica.

[18] L. Lenti, 'Introduzione, vicende storiche e modelli di legislazione in materia adottiva', in G. Collura et al eds, *Filiazione*, *Trattato di diritto di famiglia* (Milano: Giuffrè, 2011), II, 767-820.

[19] L. Fadiga, 'Gli enti autorizzati nella convenzione dell'Aja e nella legge 1983/184' *Studi Urbinati, A - Scienze Giuridiche, Politiche Ed Economiche*, II, 55, 259–274 (2014).

private exercise of public functions, it is not enough that the activities are aimed at satisfying a public interest. Instead, the entity must be ordered to achieve the general purposes predetermined by the law. It is only then that the activities can be considered public, and not just of general interest.

As this discussion clearly shows, it is impossible to include these NGOs in the 'private exercise of public functions' category. Instead, it appears that these NGOs should be considered private entities of general interest governed by our legal system.

III. The Contractual Relationship Between the NGO and the Family

The courts have qualified the relationship between the parties, respectively a couple of aspiring patents and the NGOs as a *mandato*, defined by Art 1703 of the Italian Civil Code as the contract in which one party (*mandatario*) undertakes to perform legal acts on behalf of the other (*mandante*).

For no-Italian or no-civil lawyer readers, it could be useful to clarify that quite often the civil law contractual scheme of *mandato* has been equated and compared to the common law's 'agency', even if the two figures are non-exactly homologous because the *mandato* is a contract, that can be *a titolo gratuito* (for free and without valuable consideration, not for value) or *a titolo oneroso,* which means with the remuneration of the *mandatario* (the agent) supported by a good and valuable consideration. While in the common law agency, the agent is always paid for his activities, as the bargain of the mutual obligations by parties (respectively, the principle and the agent) and the be-side consideration ensure the validity of the contract itself. There are also many differences having regard to the powers of the agent and the ones of the *mandatario* and on the effects of the acts and contracts concluded by the agent or the *mandatario* in the name and on the behalf of the principal and the *mandante*.

Whereas a deep distinction between these two legal categories is beyond the scope of this essay,[20] where the two concepts will be considered improperly as

[20] On the agency, from a common lawyer perspective, see O. W. Holmes, 'Agency' 2 *Harvard Law Review*, 5, 1-23 (1891); F.M.B. Reynolds, 'Agency: theory and practice' 94 *Law Quarterly Review*, 224 (1978); R.E. Barnett, 'Squaring Undisclosed Agency Law with Contract Theory' 75 *California Law Review*, 1969 (1987); E. Rasmusen, 'Agency law and contract formation' 62 *American Law and Economics Review,* 369-409 (2004); W. Muller-Freienfels, 'Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty' 13 *American Journal of Comparative Law*, 193 (1964). In the Italian literature, see F. Menozzi ed, *Fiducia, trust, mandato ed agency* (Milano: Giuffrè, 1991); V. De Lorenzi, *La rappresentanza* (Milano: Giuffrè, 2012) 2-40; R. Calvo, 'La rilevanza esterna del mandato' *Rivista trimestrale di diritto e procedura civile*, 793-801 (2009); Id, 'L'estinzione del mandato', in P. Rescigno and E. Gabrielli eds, *I contratti di collaborazione. Trattato dei contratti,* (Torino: UTET, 2011), XVI, 241-278; S. Delle Monache, *La contemplatio domini: contributo alla teoria della rappresentanza* (Milano: Giuffrè, 2001). With a comparative approach R.E. Cerchia, 'Agency e privity', in Id et al eds, *Il contract in Inghilterra: lezioni e materiali* (Torino: Giappichelli, 2012), 101-113; Id, 'Legal mentality and its influence in shaping legal rules: the

homologous. However, having regard to the relationship here involved, some scholars believe that the contract concluded by the aspiring parents with the NGOs represents an atypical form of *mandato*, as there should be a real legal obligation for the entity to accept the assignment. Thus, the authorized entities should not be free to refuse an assignment given to them by the aspiring adoptive parents. It is argued that in practice, given the legal obligation of the aspiring adopters to contact the authorized bodies, there should be a legal obligation to contract on the latter.

Overall, I disagree with this interpretative solution, first, because the *mandato* contract is *intuitu personae*[21] – and is therefore freely renounceable by the agent – *mandatario*[22] – and the obligation to contract must be considered incompatible with the legal nature of the authorized entities; and, second, because the obligation to contract represents a strong limit on private autonomy, which can be expressly allowed by the law only under specific conditions.[23] Legislators, in exercising their discretion, are strictly limited by the constitutional principles that guarantee the autonomy of all private subjects, including associative ones, protected under Art 18 of the Constitution.[24] The case law in this regard has recently held,[25] that 'the deed of assignment' to the entity

> 'in charge of mediating the request for international adoption has the legal nature of a contract: *mandato* with representation. The public relevance of the function that the entity performs does not affect the essential core of the contract, which remains regulated by arts 1703 and subsequent of the civil code'.

Previously, the *Corte di Cassazione*[26] clarified that the main obligation of the body specialized in intercountry adoptions is an '*obbligazione di mezzi*'.[27] This

relationship between principal and agent' *Global Jurist*, 1-19 (2019); M. Graziadei, 'Il conflitto di interessi nei rapporti di agency: alcuni tratti salienti dell'esperienza inglese', in R. Sacchi ed, *Conflitto di interessi e interessi in conflitto in una prospettiva interdisciplinare* (Milano: Giuffrè Francis Lefebvre, 2020), 39, 331-347.

[21] *Intuitu personae* is a Latin expression which applies to a contract signed by one of the parties by virtue of the personality of the other party. Thus, as the contract is based on the personal skills and characteristics (of the parties), it may not be transferred.

[22] Cf Art 1727, para 1, Civil Code.

[23] Some examples could be the need to protect the citizen-consumer before the monopolist (art 2597 of the Civil Code) or before the operator of a public service for the transport of persons or things (art 1679 of the Civil Code).

[24] Under Art 18 of the Italian Constitution 'Citizens have the right to form associations freely, without authorization, for ends that are not forbidden to individuals by criminal law. Secret associations and those associations that, even indirectly, pursue political ends by means of organizations having a military character, are prohibited'.

[25] Tribunale di Ascoli Piceno 9 January 2018, available on www.dejure.it. All the cited parts of courts' decisions in quotation marks are translated by the author.

[26] Cassazione Civile – Sezioni Unite 1 June 2010 no 13332/2010, available on www.dejure.it.

[27] On the distinction between *obbligazioni di mezzi* and *obbligazioni di risultato*, see A.

means that the NGO must offer a service and a standard of performance that comply with the diligence criteria, but is not obliged to ensure the outcome, as its obligations certainly cannot include ensuring that a couple can adopt a foreign minor. Moreover, there is no right to adopt, just as there is more generally no 'right to have a child', which is protected and enforced under Italian law.

However, believing that the entity is not liable for the failure to achieve the 'result' (duly presented in quotation marks) is not the same as arguing that it is exempt from any legal liability, as will be discussed below. Under the civil code, a *mandato* contract can be drawn up free of charge or in exchange for payment. This is usually burdensome, even if the fee to be paid by the principal-*mandante* (the couple) is not fully at the discretion of the agent-*mandatario* (the entity), as it must be within the limits set by the CAI. According to Art 32 of the Hague Convention:

> 'No undue material profit is allowed in relation to services for an international adoption. Only charges and expenses, including fees due to the people who took part in the adoption can be requested and paid. Managers, administrators and employees of the bodies involved in the adoption cannot receive a disproportionate remuneration in relation to the services rendered'.

> The couple, as the principal, can revoke the assignment at any time, without having to explain the reason why. For its part, however, the NGO can, as an agent, refuse the appointment only for 'justified reasons', which can consist of 'subjective factors, such as the behavior of the principal, or objective events that hinder the normal performance of the management activity; in both cases, however, they must be objectively relevant events'.[28]

Based on this, in the absence of a justified cause, the refusal of the assignment could give rise to a breach of contract, with a consequent obligation to compensate the principal for the damages. In the event of a dispute, the existence of a justified reason must be ascertained in court. The entity may insert a specific clause in the contract that provides for the possibility of refusing the assignment in *ad hoc* cases; for example, if the couple refuses the proposed match without a justified reason (subjective), or if international adoptions are blocked in the countries where the institution operates (objective). Regarding the obligations that the

Ciatti Caimi, 'Crepuscolo della distinzione tra le obbligazioni di mezzi e le obbligazioni di risultato' *Giurisprudenza italiana,* 1653-1657 (2008); F. Piraino, ' 'Obbligazioni di risultato' e 'obbligazioni di mezzi' ovvero dell'inadempimento incontrovertibile e dell'inadempimento controvertibile' *Europa e diritto privato,* 83-153 (2008); Id, 'Corsi e ricorsi delle 'obbligazioni di risultato' e delle 'obbligazioni di mezzi': la distinzione e la dogmatica della sua irrilevanza' *I contratti,* 891-913 (2014); G. Sicchiero, 'Dalle obbligazioni di mezzi e di risultato alle obbligazioni governabili e non governabili' *Giurisprudenza Italiana*, 2322-2329 (2015); V. De Lorenzi, 'Obbligazioni di mezzi e obbligazioni di risultato' *Digesto delle discipline privatistiche, Sezione civilistica* (1995), 397; A. Procida Mirabelli and M. Feola, *Diritto delle obbligazioni* (Napoli: Edizioni Scientifiche Italiane, 2020); A. Berlinguer ed, *La professione forense: modelli a confronto* (Milano: Giuffrè, 2008).

[28] Tribunale di Napoli 27 April 2009, available on www.dejure.it.

NGO assumes when it accepts the couple's *mandato*, it can be argued that the entity should not have to accept the assignment if it is already aware that it cannot fulfill it within a reasonable period, as otherwise, the entity may be held accountable for its negligence or bad faith in accepting the *mandato*. Reasonableness must be determined based on objective data, and not simply on the needs or expectations of the couple. As a matter of a fact, in a case decided by the *Tribunale di Ascoli Piceno*,[29] it was ascertained that the NGO did not propose the adoption until four years after the assignment was conferred. The court determined that such a period was not reasonable and was thus a violation of the commitment that occurred.

1. Duty of Information

The responsibilities of the NGO can be determined at the time of the assignment, and thus in the pre-contractual phase, but also during the performance of the *mandato*. In general, the entity may be held liable if it does not operate with due diligence, or if it violates the principle of good faith in its compliance.

Failure to comply with its duties to provide the couple with essential information is a clear example of the violation of this principle. The NGO has the task of collecting all relevant information relating to the age, history, the causes of the child's abandonment (where known), the minor's living conditions, and physical and psychological health situation, and promptly transmitting this information to the couple. If an NGO fails to send this information, or if it sends incorrect information, this could constitute a source of contractual liability, provided it is attributable to NGO's negligence.

The rationale is clear: having timely and correct information will enable future parents to give their informed consent after assessing whether they have the personal and emotional resources to meet the needs of the child. In the Ascoli Piceno decision, the negligence of the NGO in providing the couple with all the necessary technical information not only to conclude the procedure but also to facilitate the relationship between the minor and the couple, is evident. Four years after the assignment, the NGO contacted the couple for possible adoption, which was not successful.

The NGO then proposed a further adoption, but of a minor who was housed in an orphanage structure, which, as the plaintiffs demonstrated, was at the center of an international scandal. Thus, the defendant NGO violated its primary obligation of choosing the local NGO partner and the children carefully and ultimately failed to provide the couple with the potentially useful information, including on the caring institution where the child was living, on the postponement of the hearing that would certify the adoption in the state of origin, and on the contact between the child and the parents at the very moment when the couple was having to decide whether or not to accept the adoption.

[29] Tribunale di Ascoli Piceno 9 January 2018, available on www.dejure.it.

2. The 'Country Situation' and the Non-Accountability of the NGOs

Undoubtably, no liability can be attributed to the NGO if the lack of information is due not to the negligent actions of the entity, but to the foreign authority failing to transmit information or sending misleading information.[30] In a case before the *Corte di Appello di Venezia*,[31] the NGO assumed the obligation to contact the national authorities of the Russian Federation and to undertake complex bureaucratic procedures. In this case, it emerged that the difficulties and uncertainties that arose in managing these relations were due less to linguistic barriers than to the peculiarities of the Russian bureaucratic-administrative organization, the rigidity of the legislation, and the substantial barriers to accessing the jurisdiction given the provisions of the administrative authorities. The conferral of the *mandato* necessarily presupposed that the NGO understood the environmental, legal, and administrative difficulties involved.

In this context, the NGO's limited room for maneuver became clear, as the evaluations were under the full discretion of the officials and civil servants of Russia. Therefore, the NGO had an obligation to establish contact with the authorities of the Russian Federation, and to facilitate the matching of the adopters with a minor, the identification of whom was, however, left to the authorities of that country. Those authorities provided generic information, reserving the right to approve or reject the adopting couple; and to communicate at their discretion the details relating to the history, the private life, and the health condition of the minor, but only to the couple who was proposed for the match. Conversely, the NGO could not guarantee the completeness, the veracity, or even the verisimilitude of the information provided by the foreign authorities, or anything that happened after the match had been made. Thus, the NGO had specified that the couple had agreed to accept a match with a minor who was in a satisfactory state of health, or who had mild and treatable medical problems. This agreement was integrated into a pre-filled standard Russian form and was not even modifiable.

Moreover, detailed information could only be acquired on-site by the couple interested in adopting the child. Therefore, according to the court, there was no non-fulfillment of the *mandato*, since the NGO reported the information in its possession and offered the logistics and administrative support network for the procedure to the adopting couple, the outcome of which would be unknown until it was completed. In addition, the adopters were aware of the 'country situation', having already experienced the conditions in which the association operated because of the potential incompleteness of the information provided by the granting country in response to the couple's requests. The NGO was obliged to offer the couple all possible means to ensure the result, but not to guarantee the result itself.

Likewise, in a case before the *Tribunale di Bologna,*[32] it was ascertained that

[30] Tribunale di Pisa 16 March 2018 no 247, available on www.dejure.it.
[31] Corte di Appello di Venezia 17 September 2019 no 3700, available on www.dejure.it.
[32] Tribunale di Bologna 28 September 2020 no 1314, available on www.dejure.it.

the NGO violated its duty to provide information, but it was not ordered to pay damages, as the non-fulfillment was attributable to the 'country situation'. According to Art 1710 of the Italian civil code:

> 'The agent (*mandatario*) is required to inform the principal (*mandante*) of the unforeseen circumstances that may determine the revocation or modification of the *mandato*'.

In fact, the *mandatario*-agent is required to inform the

> '*mandante*-principal not only of the circumstances that have occurred, but also of any pre-existing circumstances that the agent became aware of after the assignment of the *mandato*, as well as of any circumstances the agent was aware of before or around that time, which may have resulted in the revocation or modification of the *mandato*'.[33]

In this specific case, the *Tribunale* recognized that the NGO's information duties were not executed with the requested standard of diligence and that there was a lack of transparency in the management of the adoption procedure. The court focused on the NGO's disclosure obligations, which also included the burden of proposing other solutions regarding the two states indicated in the form filled in by the aspiring adopters at the time the assignment was granted. However, the judge found it difficult to determine that the violation was of sufficient gravity to justify the revocation of the mandato with the consequent restitution or reduction of the fees due to the non-profit organization, as governed by the contractual clause that states:

> 'If the relationship between the Body and the couple is interrupted, in the face of sums paid, the Body will retain the amount pertaining to it'.

Even more important, is to consider that in this case, the main obligation of the *agent-mandatario* was to perform all of the activities necessary to implement the adoption procedure on behalf of the principals, but the principals could not demand a good outcome, as foreseen in the clause that regulates the object and content of the assignment, because the will of the foreign authorities is considered decisive in this regard. According to the judge, the couple had to be aware that the liability of the non-profit organization was excluded, as agreed upon,

> 'in the case of extension of the foreseen or foreseeable times for the completion of the adoption, or the interruption of the adoptive procedure, caused by political events, revocation of the adoptability provision of the child, regulatory/legislative changes, calamities, wars or other unforeseen and

[33] Corte di Cassazione 24 February 1987 no 1929, available on www.dejure.it.

unforeseeable circumstances'.[34]

However, as was already mentioned, the NGO was held accountable for a lack of transparency and a failure to communicate all these issues, which might have induced the couple to revoke the assignment, or to ask the NGO to file their application in some of the other countries identified as a potential place of birth or origin (of children for adoption) at the time the assignment made. Furthermore, Art 22, para 2, of the Adoptions Act establishes that 'at any time those who intend to adopt must be provided, if requested, with information on the state of the proceedings'. Although this norm is established in the part of the Act that governs pre-adoption foster care, and not the part that directly governs the relationships with the organizations that deal with adoptions, it is evident that during the entity's periodic meetings with the couple, such information could be requested or given.

From my perspective, this rule can be taken into consideration for a systematic interpretation that could lead to different decisions, and that would, in any case, be differently argued. However, the trial judge did not pronounce the termination of the contract and did not order the NGO to compensate the couple for their economic and non-economic losses. Indeed, the judge did not even address the issue of the *culpa in vigilando*[35] of the CAI, since, in the end, the NGO's violation of its information duties was not considered serious enough. Therefore, after the NGO was excluded from contractual liability, the issue of the CAI's failure to supervise was set aside.

By contrast, in the case of Ascoli Piceno, the non-fulfillment of the duty to properly handle the file was considered directly attributable to the NGO and its appointed professionals. In this case, the judge found that the NGO had neglected to update the dossier relating to the minor to include the in-depth study of the condition of the minor, who was, as was previously mentioned, living in a notorious caring structure that was at the center of a criminal case that attracted media attention. It is, therefore, evident that there was a violation of the principle of good faith in the fulfillment of the *mandato*. The Ascoli Piceno NGO failed to provide the levels of transparency and seriousness that must be expected from a professional entity, as it did not provide the couple with a true picture of the institution that housed the child, which they ultimately gleaned from other sources.

[34] In the *Tribunale di Bologna*'s case, such circumstances were: the ratification and execution of the Hague Convention in 2011 by the Senegalese state, the change of the competent Judge at the Court of Dakar, the revocation of the adoptability of the child.

[35] *Culpa in vigilando* can be translated as 'fault in supervising'. A failure to supervise properly or to exercise due diligence. It has sometimes been hypothesized that the basis of state liability under international law for the acts of its officials (or sometimes nationals or persons within its territory) is attributable to the state's failure to observe its duty to control these persons. See https://tinyurl.com/5456ekup (last visited 20 September 2023).

3. The Free-Of-Charge *Mandato* Downgrades the Assessment of the NGO's Responsibility

Moreover, in the *Corte di Appello di Venezia* case, the judges, while ascribing the relationship to the *mandato*, held that, because the assignment was free of charge, the standards of diligence and expertise in the execution of the services to which the NGO is supposed to perform should be assessed more leniently:[36]

> 'the *mandato* is presumed to be onerous; in the event that it is free of charge, the responsibility for the agent-*mandatario*'s fault must be assessed with less rigor'.

The finding in the case is significant, as the NGO

> 'carries out its activity in accordance with its nature: association for charitable purposes, in the spirit of collaboration with those who aspire to be adoptive parents, for the benefit of the people who turn to it to fulfill their family life project'.

From my personal standpoint, these are not sufficient grounds to either exclude profit or determine the downgrading of liability. Here, it should be noted that while the accredited bodies were NGOs, and were thus non-profit associations, this does not necessarily mean that the services were free of charge, as it is established practice that these bodies can pursue indirect profit strategies. For example, they can offer couples a series of paid professional services that are carried out by collaborators external to the institution, but with whom they have friendly relations.[37] I agree with this approach in part, since the contractual responsibility represents a qualified social contact from which the diligence obligations of the specialized operator can be derived, regardless of whether the contract is or is not based on payment, such as in cases in which a surgeon performs a free procedure or a lawyer argues a *pro bono* case. The non-fulfillment of the contract or the seriousness of the incorrect or inadequate fulfillment of the contract must be assessed through a process that has been called 'posthumous prognosis': if another entity was able to perform a similar service in the same country and the same period, this means that the service was executable with ordinary diligence.

In any case, the NGO has the right to argue that the failure of the procedure was due to facts and circumstances related to the couple's behavior, or to the 'country situation'. However, I certainly disapprove of the interpretation that the expertise and the seriousness, and professionalism of an NGO can be lower because it is a non-profit entity. From a systematic point of view, these risks reducing the reliability of the entire model, would have serious repercussions for

[36] Corte di Appello di Venezia 17 September 2019 no 3700 n 31 above.

[37] P. Morozzo della Rocca, 'La condizione giuridica del minore straniero: norme, giurisdizione e prassi amministrative' *Minorigiustizia*, 3, 4, 30, 29-57 (2002).

minors and for couples and would increase the danger of system distortions. As a result, the NGO has specific obligations to the couple: the relationship, qualified as an atypical *mandato* and governed by Arts 1703-1730 of the civil code, has a fiduciary nature, which arises after the assignment by the couple to the institution. In the event of an explicit request from the adopters, the NGO can carry out support activities for the adoptive nucleus,[38] in collaboration with the local authority services. As part of the *mandato* agreement, it is the agent-*mandatario* who must prove that the non-fulfillment is not attributable to them. Therefore, the circumstances and facts that support the non-accountability depending on the 'country situation' and socio-political conditions must be proven by the NGO, not simply pleaded. This also applies if the non-fulfillment is based on the couple's refusal to accept the child with whom they were matched and if these circumstances lead to the incorrect or delayed fulfillment of the assignment.

Furthermore, proof of true fulfillment is, in any case, borne by the provider of the service, even for the services the NGO is obliged to provide, such as 'a contact person, legal advice and activity abroad'.[39] In any case, the NGO must provide proof that it correctly, adequately, and promptly informed a couple of all impeding or delaying circumstances. However, in almost all the cases analyzed, liability was excluded either because the evidence was obtained that the NGO was not responsible for the non-compliance, or because the NGO's breach of its obligations was not deemed serious enough.

4. Nature of the Damages

As specified by case law, pecuniary damages resulting from expenses incurred by the couple for the adoption procedure and paid for various reasons to the institution can be awarded. For example, in the case of Ascoli Piceno, the court ordered the NGO to pay compensation for damages in favor of the plaintiffs due to a breach of contract in the form of both pecuniary and non-pecuniary damages as well as to reimburse the plaintiff's costs of litigation.

However, in all other cases analyzed here, moral (non-pecuniary) damages were denied, since Art 2059 of the Civil Code provides for the compensation of non-economic loss only when a right has been infringed that is expressly recognized by the legislation or is otherwise constitutionally protected.[40] In this

[38] For the qualification of the relations between the NGO and the professionals and on the lucrative nature of the activity, see Corte di Appello di Venezia 16 March 2021 no 13, available on www.dejure.it.

[39] Tribunale di Pisa 16 March 2018 no 247, available on www.dejure.it.

[40] On the compensation for non-economic loss for rights and values that must be enforced by legislation or protected by the Constitution, the debate is huge and various, for all, see M. Barcellona, *Il danno non patrimoniale* (Milano: Giuffrè, 2008); G. Ponzanelli, 'Sezioni Unite: il 'nuovo statuto' del danno non patrimoniale' *Il Foro italiano*, 134-138 (2009); C. Castronovo, 'Danno esistenziale: il lungo addio' *Danno e responsabilità*, 1-6 (2009); E. Navarretta, 'Il danno non patrimoniale contrattuale. Profili sistematici di una nuova disciplina' *I Contratti,* 728-735 (2010); M.

regard, judges have ruled that in the Italian legal system, a couple does not have the right to have a child.[41] Thus, non-pecuniary damages cannot be paid even if the failure of the adoption process is attributable to the entity.[42]

In my opinion, nevertheless, the judges could have decided and argued these cases differently by relying on the right to private and family life, under Arts 8-12-14 of the European Convention on Human Rights, and on Art 2 of the Italian Constitution, which 'recognizes and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed'. In fact, among those social groups, we can mention, of course, the family.

IV. Consequences of the Collapse of Trust Between the ONG and the Family. Conclusions

From the perspective of the couples, the most relevant consequences of these cases were that the procedure failed, the court decree that permitted them to enter an international adoption was revoked, and their chances of adoption – and thus their right to private and family life – were curtailed. The complexity of this phenomenon and the different actors involved must be kept in mind. Therefore, it is also important to consider the failures that are based on the behavior of the couple, and the cases in which the *Tribunale per i Minorenni* revoked the eligibility to adopt of couples who aspired to adopt, but who refused the proposed matches. Thus, it is up to couples to decide whether to accept the proposals for matching with adoptable children that come from foreign authorities. However, it must be stressed that when couples refuse one or more combinations with reasons linked to a preconceived idea or, after having met and known the child, for the desire to 'receive' proposals for 'easier minors', the risk is to completely

Franzoni, *Il danno risarcibile,* II (Milano: Giuffrè, 2010); L. Nivarra, 'La contrattualizzazione del danno non patrimoniale: un'incompiuta' *Europa e diritto privato*, 475 (2012); M.R. Marella, 'Struttura dell'obbligazione e analisi rimediale nei danni non patrimoniali da inadempimento' *Rivista critica del diritto privato*, 35-57 (2013); P. Virgadamo, *Danno non patrimoniale e ingiustizia conformata* (Torino: Giappichelli, 2014); Id, 'La funzione equitativa del risarcimento del danno non patrimoniale e la prova del pregiudizio: un binomio inscindibile' *Archivio giuridico*, 107-151 (2014); C. Castronovo, 'Il danno non patrimoniale nel cuore del diritto civile' *Europa e diritto privato*, 293-333 (2016); R. Pardolesi, 'Danno non patrimoniale, uno e bino, nell'ottica della Cassazione, una e Terza' *Nuova giurisprudenza civile commentata,* 9, 1344-1348 (2018).

[41] The debate whether this right exist or not in the Italian legal system had started having regard to artificial insemination and assisted reproduction cases, but has been extended also in the adoption's field, as is well explained in 'Avere un figlio con procreazione assistita di tipo eterologo: alcuni parallelismi con l'adozione' *Minorigiustizia* (2014) in an essay provided by the editorial board of the review. See also I. Rivera, 'Quando il desiderio di avere un figlio diventa un diritto: il caso della legge n. 40 del 2004 e della sua (recente) incostituzionalità' *BioLaw Journal-Rivista di BioDiritto*, 37 (2014). G. Gambino, 'Desiderare un figlio: linee per una riflessione biogiuridica sul diritto al figlio a partire dalla sentenza della Corte Costituzionale sulla fecondazione eterologa' *Archivio giuridico*, 375-400 (2014).

[42] Corte d'Appello di Venezia, 17 September 2019 no 3700, available on www.dejure.it.

lose the opportunity to adopt.

Moreover, the choice to accept or not the pairing has a different weight according to the moment in which it is made: in particular, if an adoptive couple rejects the pairing after having initially accepted it and after having also tried the harmony with the child abroad, the subsequent 'renunciation' – often done in the hope of finding 'less problematic children' or with 'less provocative behavior'[43] – results, on the one hand, in damage to the child who experiences double neglect and, on the other, in a manifestation of change in the balance of the couple that had led the judges to consider her suitable.

In all the cases presented here in the previous paragraphs, the couples, faced with these tortuous procedures, must have felt that they had not received adequate assistance from their NGO, and ended up revoking the *mandato* to appoint another NGO. Some couples who have come before the courts have tried to (so far unsuccessfully) claim that the CAI was responsible for *culpa in vigilando,* or failed to properly control and supervise the NGO,[44] especially in cases of more serious violations of duties of information and good faith, which should have led to the revocation of the authorization. However, in other cases, the authorized entity became the scapegoat for couples who had difficulties in recognizing the limits of their situation, because the adoption process turned out to be more complex than they had imagined. Quite often it is hard for the judge of the case to evaluate the different situations through the trial evidence because the assessment is about the attitudes of the parties involved (aspiring parents), which shouldn't be part of the logical assumptions in the court's ruling.

[43] M. Cavallo ed, *Viaggio come nascita. Genitori e operatori di fronte all'adozione internazionale* (Milano: Franco Angeli, 1999).

[44] Tribunale di Bologna 28 September 2020 no 1314 n 31 above.

Malebolge

The Italian Far Right's Attack on Queer Children

Matteo M. Winkler*

'How does it feel to be a problem?'
W.E.B. Du Bois

Abstract

With 'queer' acting as an umbrella term for lesbian, gay, bisexual, trans, and intersex (LGBTI) people, this article argues that the Italian far right's attempt to remove same-sex parents from their children's birth certificates reflects an ideology under which queer individuals are excluded from the notion of 'family' and queerness is depicted as an abnormality in a child's upbringing. By deconstructing these narratives through a human rights lens, this article aims to help queer activists, lawyers, scholars, and parents raise solid arguments in court, to recover, on behalf of all queer children, the dignity that the government is trying to take from them.

I. Introduction

Queer oppression is like a cockroach: once queer individuals are afforded new freedoms, repressive gatekeepers enact even more insidious and harmful alternatives.[1] This pattern occurred in the United States during the 1970s, when just a few years after the declassification of homosexuality as a mental illness, a new diagnosis was introduced to pathologize effeminate boys.[2] It later returned

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[1] The term 'queer' is used here, either as an adjective, a substantive, or a verb, to refer to persons who do not identify as 'cisgender' (their experience of gender coincides with the sex determined at birth) and/or *heterosexual* (their experience of attraction is directed toward a person of the same gender as theirs). In this article, 'queer' is a synonym for the popular acronym *LGBTI*. However, this is not the only possible definition of queer: see S.S. Raj, *Feeling Queer Jurisprudence. Injury, Intimacy, Identity* (New York: Routledge, 2020), 2-3; W.B. Turner, *A Genealogy of Queer Theory* (Philadelphia: Temple University Press, 2000), 8. On the 'backlash politics' in queer contexts see L.R. Helfer and C. Ryan, 'LGBT Rights as Mega-Politics: Litigating before the ECHR' 84(4) *Law and Contemporary Problems*, 59 (2021); P. Ayoub, 'With Arms Wide Shut: Threat Perception, Norm Reception, and Mobilized Resistance to LGBT Rights' 13(3) *Journal of Human Rights*, 337, 340 (2014), comparing Poland and Slovenia; W.N. Eskridge, 'Backlash Politics: How Constitutional Litigation has Advanced Marriage Equality in the United States' 93(1) *Boston University Law Review*, 275, 292 (2013).

[2] The new diagnosis, introduced in 1980, was called 'Gender Identity Disorder in Childhood'

in the United Kingdom during the 1980s, when the decriminalization of homosexuality was followed shortly by a ban on queer visibility in public schools.[3] And it is happening in Italy today. Only a few years after a civil partnership law affording constitutional protection to same-sex couples was enacted,[4] the newly elected radical-right populist government is engaged in a *war* with the sole objective of destroying arduously earned queer freedoms.[5]

On 19 January 2023, the Minister of the Interior commanded all of Italy's prefects to remind the mayors to comply with a recent Sezioni Unite judgment of the Corte di Cassazione (no 38162 of 30 December 2022) in which a child's foreign birth certificate indicating two men as the parents was refused registration on the grounds that such registration would circumvent the domestic surrogacy ban.[6] Two months later, quoting both the Minister's order and the Sezioni Unite judgment, the prefect of Milan requested that the mayor halt registration of both male and female same-sex parents on birth certificates, which the municipality had been granting for six months. Shortly thereafter, thousands of people peacefully marched in Milan, Rome, and other cities to ask the mayors to continue the registrations while condemning the government's decision as an attack on children of same-sex

and pathologized a child's discomfort with their own sex. See E. Kosofsky Sedgwick, 'How to Bring Your Kids Up Gay' 29 *Social Text*, 18 (1991), republished in M. Warner ed, *Fear of a Queer Planet: Queer Politics and Social Theory* (Minneapolis and London: Minnesota University Press, 1993), 69; K. Bond Stockton, *The Queer Child. Or Growing Sideways in the Twentieth Century* (Durham and London: Duke University Press, 2009), 14. On the 1973 declassification see J. Drescher, 'Out of DSM: Depathologizing Homosexuality' 5 *Behavioral Science*, 565, 570 (2015); on the 1980 amendment see K.J. Zucker and R.L. Spitzer, 'Was the Gender Identity Disorder of Childhood Diagnosis Introduced into DSM-III as a Backdoor Maneuver to Replace Homosexuality? A Historical Note' 31 *Journal of Sex and Marital Therapy*, 32 (2005).

[3] Repealed in 2003, Section 28 of the Local Government Act, 1988, c. 9, stated that local authorities 'shall not intentionally promote homosexuality or publish material with the intention of promoting homosexuality or promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship'. See P. Johnson and R.M. Vanderbeck, *Law, Religion and Homosexuality* (New York: Routledge, 2014), 175-186 (examining the religious origin of this law).

[4] Legge 20 May 2016 no 76, regulating registered partnerships between persons of the same sex and cohabiting couples (*Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*). See N. Cipriani, 'Unioni Civili: Same-Sex Partnerships Law in Italy' 3 *Italian Law Journal*, 343 (2017); S. Mezzanotte, 'The Civil Union in the Italian Legal System' *International Studies Journal*, 17, 49–74 (2020); M.M. Winkler, 'Same-Sex Marriage and Italian Exceptionalism' 12(4) *Vienna Journal on International Constitutional Law (ICL) Journal*, 431 (2018); M.M. Winkler, 'Italy's Gentle Revolution: the New Law on Same-Sex Partnerships' 25(1) *Digest: National Italian American Bar Association Law Journal*, 1 (2017); G.M. Cavaletto and E. Stewart, 'Civil Unions in Italy' 32 *Italian Politics* 194, 202 (2017); I. Ferrari, 'Family Relationship in Italy after the 2016 Reform: The New Provisions on Civil Unions and Cohabitation' *International Survey of Family Law*, 169 (2017).

[5] See D. Broder, 'Giorgia Meloni's Government Declares War on Same-Sex Parents' *The Nation*, 12 April 2023 available at https://tinyurl.com/33juvnbt (last visited 20 September 2023).

[6] Minister of Interior, Circular 19 January 2023 no 3, available at https://rb.gy/7ars (last visited 20 September 2023). See Corte di Cassazione-Sezioni unite 30 December 2022 no 38162, available at https://rb.gy/x0mm (last visited 20 September 2023).

parents.[7] On 30 March, after the mayors of several Italian cities decided to continue the registrations, the European Parliament officially called on the government to withdraw its decision, as it had gone 'against not only same-sex couples, but also primarily their children' and was considered 'a direct breach of children's rights (and) part of a broader attack against the LGBTQI+ community in Italy'.[8]

This article scrutinizes two main viewpoints that are indispensable to this assault on same-sex parents: the notion of family and the fear of the queer child. Section II specifically criticizes the idea of a 'traditional family' as a purely ideological model that is foundational to the far right's world view and ontologically constructed on the very act of demonizing queer people, transforming them into 'monsters' so that the traditional family may continue to exist.[9]

Section III debunks the hypocrisy behind the government's seemingly innocuous claim that 'a child needs a mother and a father' by arguing that it reflects an irrational anxiety resulting from the idea that children raised by two same-sex parents are either 'indoctrinated' into queerness or under the *influence* of queer role models, which will eventually 'turn' them into queer individuals.[10] This section also highlights how the far right's systematic demonization of surrogacy in Italian media reflects a fear of children's 'commodification', which coalesces popular anxieties about artificial bonds *versus* assumedly 'natural' ones. By upraising biology over biography, Italy's government is effectively erasing the rights of all children who have already been born through medically assisted procreative techniques, and at the same time 'weaponizes' this fear against couples who resort to these methods.[11]

In trying to deconstruct the far right's rhetoric about family and queer children through the human rights lens, this article aims to help queer activists, lawyers, scholars, and parents understand the dangers behind this rhetoric and contest it in court, so they can recover, on behalf of all queer children, the dignity that Italy's far-right government is attempting to take from them.

II. Defending the Traditional Family (by Demonizing Same-Sex Parents)

[7] See O. Bonnel, 'In Italy, the Meloni Government Attack Same-Sex Parenthood' *Le Monde*, 23 March 2023, available at https://rb.gy/rowi (last visited 20 September 2023).

[8] European Parliament, '2022 Rule of Law Report - The Rule of Law Situation in the European Union', P9_TA(2023)0094, 30 March 2023, para 10.

[9] See R. Braidotti, 'Mothers, Monsters and Machines', in Id ed, *Nomadic Subjects* (New York: Columbia University Press, 1994), 59, 61-62; P.B. Preciado, *Can the Monster Speak? Report to an Academy of Psychoanalists* (Cambridge: Massachusetts Institute of Technology Press, 2021), 19-21 (explaining how the *universal* is constructed on psychanalytic *monsters* such as the trans).

[10] See C.J. Rosky, 'Fear of the Queer Child' 61(3) *Buffalo Law Review*, 607 (2012).

[11] See S.L. Washington, 'Weaponizing Fear' 132 *Yale Law Journal*, 163, 166 (2022), using this term 'to describe how state actors – whether intentionally or unintentionally – use a structural environment that induces, benefits from, or relies on fear, ultimately producing further marginalization'.

1. The Far Right's Conception of Family

There is no better synthesis of the Italian far right's family ideology than the following excerpt from the Fratelli d'Italia (FDI) program for the 2022 National Elections, where it was planned to:

> 'contrast all discriminations based on sexual and sentimental choices, maintain the civil partnership law while at the same time reiterating the prohibition of same-sex parent adoption and the fight against all forms of surrogacy, in the supreme interest of the minor'.[12]

Unable to repeal the civil partnership law because of its constitutional foundations,[13] FDI made queer children their new target. In fact, this text reveals a precise three-dimensional anti-queer strategy. The first dimension is the labeling of sexual orientation as a 'choice', so that any option other than heterosexuality can be self-restrained and re-directed.[14] The second dimension consists of 'the rejection of both same-sex parent adoption and surrogacy', which are already barred under existing laws.[15] Reinforcing these prohibitions will not prevent the creation of new families abroad and will only destabilize any established family bonds. The third and final dimension reflects the conviction that these prohibitions fulfill the child's 'supreme interest'. As has been made clear on multiple occasions, FDI's official stance is that 'between a homosexual's legitimate 'desire' of being a parent and a

[12] Fratelli d'Italia, 'Il Programma per risollevare l'Italia. Elezioni politiche 25 settembre 2022', available at https://tinyurl.com/45d7f8rf, 21 (last visited 20 September 2023).

[13] Corte Costituzionale 14 aprile 2010 no 138, para 8 (concluding that the Italian Constitution mandates the Parliament to pass 'legislation of general nature, aimed at regulating the rights and duties of the members of the couple'), on which M.F. Moscati, *Pasolini's Italian Premonitions: Same-Sex Unions and the Law in Comparative Perspective* (London: Wildy, Simmonds & Hill, 2014), 109-15; M.M. Winkler, 'Italy's Gentle Revolution' n 4 above, 14-17; see also Eur. Court H.R., *Oliari and Others* v *Italy*, Judgment of 21 July 2015, available at www.hudoc.echr.coe.it, paras 184-185.

[14] Yet, sexual orientation is not only a sexual choice. It instead embraces extremely diverse forms of desire, intimacies, and erotic practices, all of which disappear behind the *choice* label. For a discussion see, among others, L.A. Boso, 'Disrupting Sexual Categories of Intimate Preference' 21(1) *Hastings Women's Law Journal*, 59, 69-73 (2010).

[15] Respectively, Art 6(1), legge 4 May 1983 no 184 (*Diritto del minore ad una famiglia*) and Art 12(6), legge no 40 of 19 February 2004 (*Norme in materia di procreazione medicalmente assistita*, hereinafter Medically Assisted Procreation Act, MAPA). See V. Camboni Miller, 'Legal and Ethical Considerations on the Use of Assisted Reproductive Technology in the United States and Italy' 24 *Digest: National Italian American Bar Association Law Journal*, 17 (2018); G. Montanari Vergallo et al, 'How the Legislation on Medically Assisted Procreation Has Evolved in Italy' 36(1) *Medicine and Law*, 5 (2017) (exposing the case law of the Constitutional Court on the Law no 40 of 2004); S. Penasa, 'Converging by Procedures: Assisted Reproductive Technology Regulation within the European Union' 12 *Medical Law International*, 300 (2012) (highlighting 'the shift from an ethics-focused approach to a right-centered perspective' in the judicial interpretation of MAPA). On the criminal aspects of foreign surrogacy see Corte di Cassazione 17 November 2016 no 48696; Corte di Cassazione 10 March 2016 no 13525 *Diritto penale e processo*, 1085 (2016) (finding that performing a surrogacy abroad is irrelevant *vis-à-vis* Italian criminal law).

child's 'right' to have a father and a mother', the latter must always prevail. On this specific point, all three of the right-wing coalition parties that obtained the majority in the 2022 National Election have strategies that coincide and, remarkably, overlap with the doctrine of the Catholic Church, which expressly affirms 'the child's right to be born of a father and mother known to him'.[16]

The far right's triangular mother-father-child agenda, which recurs systematically in all public discussions concerning same-sex parents, is nothing but a specification of the 'traditional family' notion at the core of their political strategy. 'Family', so states FDI's electoral program quoting Pope Jean Paul II, 'is the foundational element of society and is what makes a Nation truly sovereign and spiritually vigorous'.[17]

This discourse is characterized by three distinct tropes. First, the notion of the traditional family is not conceived in relative historical terms, but is instead depicted as immutable and absolutized both as an 'anthropological' necessity – the foundation of an assumed 'natural order' – and a national priority.[18] Second, the far right's concept of family is always construed 'negatively' as the alleged victim of violent ideological attacks that aim to destroy it, with its bonds being strenuously claimed as 'different from' and its boundaries being drawn over overwhelming external threats.[19] Third, legal status determined by biological traits is considered to be superior to affective bonds; from this perspective, as Stefano Rodotà pointed out, 'biology wants to erase biography, resulting in a dangerous cultural and social regression'.[20]

With this rhetoric, not only do demonic forces attacking the family dominate the public discourse more than the family itself, but the latter, given its deep connection to the objective of fertility decline reversion, also acts as a mere instrument to pursue racial and ethno-nationalist ambitions, as is made clear by the repeated insistence of subsisting biological links within the family.

[16] See Catechism of the Catholic Church (Vatican: Vatican Press 1992), Canons 2376 and 2378. On the relationship between Italy's legislative (under)development and the Catholic Church see R. Bottoni, 'Challenges to the Catholic Notion of Family and the Responses of the Catholic Church in Italy' 6 *Journal of Law, Religion and State*, 274, 283-287 (2018).

[17] Fratelli d'Italia, 'Il programma' n 12 above, 5. The pope's full quotation so reads: 'Every effort should be made so that the family will be recognized as the primordial and, in a certain sense "sovereign" society! The "sovereignty" of the family is essential for the good of society. A truly sovereign and spiritually vigorous nation is always made up of strong families who are aware of their vocation and mission in history'. John Paul II, *Letter to Families from John Pope II. Gratissimas Sane*, 2 February 1994, available at https://rb.gy/cyfi1, para 17, (last visited 20 September 2023).

[18] See E. Fassin, 'Same-Sex Marriage, Nation, and Race: French Political Logics and Rhetorics' 39 *Contemporary French Civilization*, 281 (2014).

[19] The need to 'defend the family' from a series of alleged violent aggression by 'ideologies', so reads the program of the European conservatives, that 'deny biological and social reality and undermine citizens' identities' and creepingly manipulates their minds is clearly affirmed in the conservatives' campaigns. See European Conservatives and Reformists (ECR), *Policy Group on Family and Life*, available at https://tinyurl.com/4a52pwk3 (last visited 20 September 2023).

[20] S. Rodotà, *Il diritto di avere diritti* (Roma-Bari: Laterza, 2012), 171.

2. Popular Movements and Demographic Concerns

Remarkably, these disturbing tropes have developed through a patient cultivation of public rhetoric that has united religious language and secular stances under the same pro-family flag.

Inspired by the French anti-queer movement *La Manif pour tous* (LMPT), created in 2012 to contest the *mariage pour tous* law on same-sex marriage, dozens of local movements, associations, and committees of concerned Italian citizens took to the streets to oppose the legal recognition of same-sex couples.[21] This popular mobilization, with its rhetorical bases in the Church's doctrine and the support of neo-fascist underground organizations, was soon secularized and appropriated by right and far-right parties like *Lega* and FDI, and gave rise to a tentacular transnational network which supports the strenuous fight against 'gender theory', the systematic ridicule of gender equality, and the demonization of all sexual diversity. The 2019 Word Congress of Families in Verona, attended by both Lega and FDI leaders, was the tipping point for the Italian right's participation in this global strategy.[22]

The 'demographic winter' element also has a strong presence in the far right's rhetoric, coalescing typically ethno-nationalist concerns about the disastrous consequences of the fertility decline for the nation's endurance.[23] Here the dominant narrative stresses the dangers of impending European depopulation for the cultures, the traditions and, more importantly, the biological integrity of European nations, weaponizing popular anxieties while simultaneously dismissing the nefarious consequences of current overpopulation as someone else's problem.[24]

[21] See I. Heinemann and A. Minna Stern, 'Gender and Far-Right Nationalism: Historical and International Dimensions. Introduction' 20 *Journal of Modern European History*, 311, 316 (2022), (describing the demonization of gender and sexuality equality by far-right movements); S. Garbagnoli, 'Italy as a Lighthouse: Anti-Gender Protests in Italy', in D. Paternotte and R. Kuhar eds, *Anti-Gender Campaigns in Europe. Mobilizing against Equality* (Washington: Rowman & Littlefield, 2017), 151, 156-160.

[22] See C. Cossutta and A.J. Habed, 'From Verona, with Love: Anti-Gender Mobilizations and Transfeminist (Re)Actions', in A. Henninger et al eds, *Mobilisierungen gegen Feminismus und Gender: Erscheinungsformen, Erklärungsversuche und Gegenstrategien* (Berlin: Verlag Barbara Budrich, 2021), 139-154, 143.

[23] The expression 'demographic winter' (*hiver démographique*) was coined by Gérard-François Dumont, a professor at Sorbonne, France, in *La France ridée. Les conditions du renouveau* (Paris: Hachette, 1986), 21 (the term referred to a demographic model suggesting that it needs two hundred and ten children from every one hundred women for a generation to be replaced, any level below this threshold being qualified as winter 'wishing to call for the spring's arrival'; in 2021, Italy witnessed four hundred point two hundred forty-nine newborns, equal to one point twenty five for each woman).

[24] In this regard, R. Trimble, 'The Threat of Demographic Winter: A Transnational Politics of Motherhood and Endangered Populations in Pro-Family Documentaries' 25 *Feminist Formations*, 30 (2013), 38, observes that 'the global population-decline framework provides an international scale for the World Congress of Families' discussion of procreative habits and proffers economic justifications for worldwide investment in encouraging natural family formation. The demographic winter theme sets a tone of decline and forms a frame for positing decreasing

In far-right leaders' speeches the connection between the demographic winter and queerness is especially omnipresent. For them, any positive representation of same-sex desire, intimacy, and love would result in human extinction because of queer individuals' (alleged) inability to procreate. This argument is identical to that which emerged from the United Kingdom's parliamentary debate and resulted in the enactment of the infamous Section 28, a law between 1988 and 2003 which prohibited local authorities from supporting queer-friendly initiatives.[25] With this law, as Carl F. Stychin observed,

> '(h)omosexuality is linked to death – not only of the individual gay male (for lesbianism largely is rendered invisible in this discourse) – but the death of the body politics through the failure to reproduce. The promotion of a positive image of gay sexuality is the causal link to these catastrophic consequences'.[26]

A relatedly interesting experience is that of the aforementioned World Congress of Families, whose foundational manifesto, elaborated on in the 2000s by two American authors, draws an explicit link between the survival of the nation and scientific evidence reportedly demonstrating that

> 'children do best when they are born into and raised by their two natural parents (whereas) under any other setting – including oneparent, stepparent, homosexual, cohabitating, or communal households – children predictably do worse'.[27]

The religious origin of this argument is unquestionable.[28]

The scenario that the far right decries in their rhetoric is reminiscent of Guido Morselli's novel Dissipatio H.G., which was published posthumously in 1977 after the author committed suicide. The novel tells the story of a man who, after a vain attempt to take his own life, finds out that human beings have totally vanished. As he walks alone in the deserted streets of Chrysopolis, he enquires about the people's whereabout:

> 'On the streets, in the squares, on the quays, and in the center, it is as calm and orderly as it must have been at two AM, but empty. How many were there? Four hundred thousand, four hundred twenty thousand. In any

population as a global crisis'. See also M. Mieli, *Towards a Gay Communism. Elements of a Homosexual Critique* (London: Pluto Press, 2018), 41-42 (claiming that 'overpopulation is determined above all by the oppressive insistence of the anti-gay taboo').

[25] See n 3 above.

[26] C.F. Stychin, *Law's Desire. Sexuality and the Limits of Justice* (New York: Routledge, 1995), 42.

[27] A.C. Carlson and P.T. Mero, *The Natural Family: A Manifesto* (New York: Routledge, 2009), 11.

[28] It suffices to read Cardinal Alfonso López Trujillo's 'The Nature of Marriage and Its Various Aspects' 4(2) *Ave Maria Law Review*, 297, 341 (2006).

event, they were'.[29]

Whereas the prospect of a future where humanity *was*, instead of *is*, acts as the basis for the far right's obsession with defending the family, none of its arguments or rhetoric respond to the key question: 'how does destabilizing the legal status of the children with same-sex parents reinforce the traditional family'? Intuitively, frustrating the desire of same-sex couples to become parents and making the lives of children born to them harsher and more vulnerable would definitely not cause straight couples to make more children. Indeed, if given access to medically assisted procreation techniques and a well-regulated surrogacy, same-sex parents could contribute to reverting the fertility decline, and their legal recognition would increase the number of families. Why are they not considered worthy of legal recognition then?

If one is looking for 'bugs in the programming jargon' of the far-right rhetoric 'in the hope of coaxing unplanned stories or delightful nonsense',[30] this is one of multiple contradictions in anti-queer rhetoric that unveils a motivation other than slowing down the country's population decline. If it is hard to believe that any threat to Italy's demography could come from zero point twenty five percent of Italy's population, as such is the number of children born to same-sex couples, certainly denying these children their rights does not curb the problem: it only exacerbates it.[31]

3. Recovering the Language of Human Rights

Foreign and supranational courts have scrutinized 'the protection of family' on multiple occasions as an alleged basis for denying same-sex couples the same rights enjoyed by straight married couples, yet have found this ground untenable.

In *Obergefell* v *Hodges*, for instance, the US Supreme Court held that, instead of protecting children, same-sex marriage bans 'harm and humiliate the children of same-sex couples', forcing them to

> 'suffer the stigma of knowing their families are somehow lesser [and] the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life'.[32]

[29] G. Morselli, *Dissipation H.G.* (New York: New York Review of Books, 2020), 5. The original Italian version was published by Adelphi in 1977.

[30] M.L. Ryan, 'Narrative and Digitality: Learning to Think with the Medium', in J. Phelan and P.J. Rabinowitz eds, *A Companion to Narrative Theory* (Malden, MA: Blackwell Publishing, 2005), 515, 518.

[31] Equaling to one hundred thousand – one hundred and fifty thousand children. E. Tebano, 'I veri numeri sui figli delle coppie dello stesso sesso che hanno bisogno di essere riconosciuti all'anagrafe' *Corriere della Sera*, 21 March 2023, available at https://tinyurl.com/25k6ssus (last visited 20 September 2023).

[32] *Obergefell* v *Hodges*, 576 U.S. 644, 646 (2015).

In that case, invoking concern for queer children, the federal government observed that marriage bans

> 'crystallize in an acutely painful way the stigma that lesbian and gay adolescents experience as they come to understand that an essential attribute of their being marks them for second-class status'.[33]

On this side of the Atlantic, the European Court of Human Rights (ECHR) has repeatedly stated that in terms of sexual orientation, restrictions on one's rights to private and family life, to free speech, and to association must 'not just be proportionate but necessary' to attain the purported protection of family.[34] Significantly, only in one case (which is now twenty two-years-old) has the court been persuaded to hold that the protection of family dictates a restriction on these rights.[35] In *Fedotova* v *Russia*, the ECHR ultimately explained that:

> 'there is no basis for considering that affording legal recognition and protection to same-sex couples in a stable and committed relationship could in itself harm families constituted in the traditional way or compromise their future or integrity. Indeed, the recognition of same-sex couples does not in any way prevent different-sex couples from marrying or founding a family corresponding to their conception of that term. More broadly, securing rights to same-sex couples does not in itself entail weakening the rights secured to other people or other couples'.[36]

For the court, although distinctions can be made between different families at the national level and are at times 'even praiseworthy', these distinctions nonetheless cannot 'prejudice' non-traditional families, whose members 'enjoy the guarantees of (private and family life) on an equal footing with the members of the traditional family'.[37] Indeed, heterosexuality is not required to create a

[33] ibid, Brief for the United States as Amicus Curiae Supporting the Petitioners, 14-15.

[34] See Eur. Court H.R., *Karner* v *Austria*, Judgment of 24 July 2003, available at www.hudoc.echr.coe.it, para 41.

[35] Compare Eur. Court H.R., *Mata Estevez* v *Spain*, Judgment of 10 May 2001, available at www.hudoc.echr.coe.it (holding that in the protection of family based on marital bonds, differences in treatment fall within the State's margin of appreciation) with *Shalk and Kopf* v *Austria*, Judgment of 24 June 2010, available at www.hudoc.echr.coe.it, para 94 (holding that 'in view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Art 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would').

[36] Eur. Court H.R. (GC), *Fedotova and Others* v *Russia*, Judgment of 17 January 2023, available at www.hudoc.echr.coe.it, para 212; see also the judgment of 31 July 2021 in the same case (deferral to the Grand Chamber), available at www.hudoc.echr.coe.it, para 55. For identical statements see Eur. Court H.R., *Bayev* v *Russia*, Judgment of 20 June 2017, available at www.hudoc.echr.coe.it, para 67.

[37] Eur. Court H.R., *Marckx* v *Belgium*, Judgment of 3 June 1979, available at

family and enjoy the right to a governmentally protected family life.[38]

The first counterstrategy against the far right's fear-weaponizing rhetoric on the traditional family is to subject this rhetoric to judicial scrutiny and distill it to the 'real rigor' required to justify restrictions on someone's rights.[39] In addition to being defamatory, public statements like 'gays buy children on the Internet' or 'surrogacy is worse than pedophilia' might succeed on a television talk show or on social media, but would hardly carry weight in a courtroom.

III. Fear of the Queer Child

1. The Child as a Metaphor

When LMPT threatened the French Parliament, arguing that a law on same-sex marriage would destroy both the family and human civilization, Spanish queer philosopher Paul B. Preciado wrote a pointed critique against LMPT's stance on the child's alleged 'right to have a mother and a father':

> 'The child that (LMPT) claims to be protecting does not exist. The defenders of childhood and family conjure up the political image of a child that they construct, a child presumed to be heterosexual, with a standard binary gender. A child who is being stripped of any power to resist, any possibility of making free, collective use of their body, their organs and their sexual fluids. This childhood they claim to be protecting necessitates terror, oppression and death. (LMPT) takes advantage from the fact that it is impossible for a child to rebel politically against the discourse of adults: the child is always a body whose right to self-govern is not recognized'.[40]

For Preciado, the child invoked by the far right is 'a political artefact that guarantees the normalization of the adult'.[41] In Luce Irigaray's terms, this child is a 'metaphor for the norm', an oft-inaccurate yet nonetheless appealing representation of what a child should be: sharply projected toward a heterosexual adulthood 'if all goes well'.[42] This rhetoric labels children born to heterosexual parents as 'normal', whereas those born to same-sex parents - as well as those

www.hudoc.echr.coe.it, para 40.

[38] Likewise K. McK. Norrie, 'Constitutional Challenges to Sexual Orientation Discrimination' 49 *International and Comparative Law Quarterly*, 755, 770 (2000). See Eur. Court H.R., *Salgueiro da Silva Mouta* v *Portugal*, Judgment of 21 December 1999, available at www.hudoc.echr.coe.it, paras 35-36.

[39] K. Yoshino, *Speak Now. Marriage Equality on Trial* (New York: Crown Publisher, 2015), 277-279 (praising courts' fact-finding as a remedy against the propagation of misinformation).

[40] P.B. Preciado, *An Apartment on Uranus* (London: Fitzcarraldo Editions, 2019), 54.

[41] ibid 56.

[42] K. Bond Stockton, n 2 above, 27. The text refers to L. Irigaray, *To Be Born. The Genesis of a New Human Being* (New York: Springer, 2017), on which see S. Thorgeirsdottir, 'Luce Irigaray's Philosophy of the Child and Philosophical Thinking for a New Era' 61 *Sophia*, 203, 209-210 (2022).

with only one parent, those living with their grandparents or other siblings, or any other variation - are considered dysfunctional and harmed. This powerful metaphor sends a clear message to both children and parents: it tells children that their future is childless and that they will never have a family of their own unless they 'choose' to assimilate into heterosexuality; it tells parents that they must be ashamed of their queer children and try to correct them at all costs.[43] Against this non-existent right to have a mother and father, we should affirm the child's right to be free from violence and from the false rhetoric of a childless future.

A rally in Domodossola, a small city in Northern Italy, illustrates how the rhetoric surrounding the child's right to have a mother and father is deeply connected to the classification of queer children as pathological. On 23 July 2022, Lega's leader Matteo Salvini delivered the following speech at this rally:

> 'In an elementary school, and also in a middle school, on the registry, they do not speak to pupils with their first names, so when they do the roll call, when they call out for a test, there are no Elena, Giorgio, Riccardo, Antonella, Matteo, Maria Grazia. They call them by their family name. Not to discriminate. For there may be perhaps a kid that at seven years old *feel themselves as fluid*. Let me tell you this: this is not future; this is absolute madness'.[44]

Sarcasm aside,[45] Salvini's speech attributes children's agency to determine their own gender identity, as well as the related need for public accommodation and respect, to the world of madness, perhaps, one may add, in a Foucauldian sense.[46] For him, as for the far right's discourse generally, queer children's self-determined expression is a conceptual impossibility, a collective hardship, and certainly not a right. This logic, which condemns queer children's mere existence or a queer adult's desire to become a parent as monstrous, reflects an egregious exercise of queer erasure.[47]

The whole rhetoric is encompassed by what Clifford J. Rosky, a professor at the University of Utah, calls the 'fear of the queer child', the fear that by being

[43] P.B. Preciado, *An Apartment on Uranus* n 40 above, 56.

[44] The video is available in Italian at https://tinyurl.com/296a3ttn (last visited 20 September 2023).

[45] N. Kumar, 'Salvini: "Absurd: At School They Appeal by Surname to Respect Fluid Children". Comments on Social Media: "It Has Always Been like This" ' *The Times Hub*, 25 July 2022, available at https://rb.gy/efm1r (last visited 20 September 2023).

[46] This point urges a reconsideration of societal oppositions to accommodations for queer children in public and private education, emphasizing that any *spectral difficulties* may as a matter of fact be remedied through recognition of these children's self-determination. In Eur. Court H.R., *Goodwin* v *United Kingdom*, 11 July 2002, available at www.hudoc.echr.coe.it, para 91, the ECHR concluded that 'society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost'.

[47] The fact that Salvini's story occurs in a school is not at all casual, as schools have always been a place of queer erasure. See C.A. Lugg, *US Public Schools and the Politics of Queer Erasure* (New York: Palgrave MacMillan, 2016), 2 and P.B. Preciado, *An Apartment* n 40 above, 149-152.

exposed to queerness – to two same-sex parents or simply a gay, lesbian, transgender parent or sibling, either in person or through imagery such as a drag queen show – children will *turn* queer.[48] Rosky proposes four models of this fear. First, at the historical level comes the *seduction* fear, which depicts queer adults as pathological seducers who try to make children queer through violence or simple advances. Rosky significantly observes that this fear dates back to Aristotle, who associated same-sex pleasure in adulthood with sexual abuse in childhood, and it has remained a constant theme in western culture for centuries.[49]

Among modern fears is, second to seduction, the *indoctrination* fear, where queer individuals are perceived as actively recruiting children to increase the queer population.[50] Anita Bryant's homophobic and racist campaign 'Save Our Children' was launched in the 1970s to oppose local anti-discrimination regulations in Florida; it epitomized this fear and was based on the total farce that 'because homosexuals cannot reproduce, they must recruit'.[51] Third, the campaign against the queer child is concretized by the *role modeling* fear, that is the fear that children will imitate queerness by influential adults like parents and teachers. Last in Rosky's analysis is the *public approval* fear, that children accept their queerness as a *lifestyle* because of equal marriage and analogous antidiscrimination laws.[52]

All of these models are represented in the Italian far right's rhetoric. Salvini's aforementioned speech may be categorized as a model of public approval fear. Moreover, FDI's 9 September 2022 request not to broadcast an episode of *Peppa Pig* titled 'Families' because it displayed co-parenting lesbian bears exemplifies the indoctrination fear.[53] Finally, the role modeling fear is manifested every time – such as during the annual Sanremo Music Festival in February 2023 – a gender

[48] C.J. Rosky, n 10 above, 608, 645.

[49] See ibid 618-619. Aristotle stigmatized *the pleasure of sex with males* as an *unnatural propensity* that he believed arose particularly intense 'in those who are wantonly abused from childhood'. R.C. Bartlett and S.D. Collins eds, *Aristotle's Nicomachean Ethics* (Chicago: Chicago University Press, 2000), 145-146. One of Aristotle's disciples, moreover, theorized that a boy's memory of the pleasure experienced for being a passive partner would be replicated in his adulthood since 'on account of their habit they desire to be the passive partner as if they were naturally so constituted', Pseudo-Aristotle, 'Problems 4.26', in T.K. Hubbard ed, *Homosexuality in Greece and Rome. A Sourcebook of Basic Documents* (Berkeley and Los Angeles: University of California Press, 2003), 262, 263-264.

[50] C.J. Rosky, n 10 above, 641.

[51] See G. Frank, 'The Civil Rights of Parents: Race and Conservative Politics in Anita Bryant's Campaign against Gay Rights in 1970s Florida' 22(1) *Journal of the History of Sexuality*, 126, 135 (2013); W. Frank, *Law and the Gay Rights Story. The Long Search for Equal Justice in a Divided Democracy* (New Brunswick: Rutgers University Press, 2014), 51-53.

[52] C.J. Rosky, n 10 above, 650 and 655 respectively.

[53] 'We cannot accept gender indoctrination', FDI's Federico Mollicone claimed, blaming 'the politically correct (…) at the expense of our children. Can't children just be children?', he questioned. A. Giuffrida, 'Italian Politician Demands Ban on Peppa Pig Episode Showing Lesbian Couple' *The Guardian*, 9 September 2022, available at https://rb.gy/m1xbi (last visited 20 September 2023).

ambiguous or even queer-friendly character takes part in a television program.[54]

The *commodification* fear, the fear that children become tradable goods,[55] is another theme that has quickly emerged in public discourse and has progressively acquiring a dominant space therein, together with women's exploitation.[56] A symbol of this fear is the contempt for foreign surrogacy by male couples as well as the use of in vitro fertilization procedures by female couples abroad that allow them, in the words of one of FDI's leaders, 'to pass kids off as their children'.[57]

It is noteworthy that the commodification fear is weaponized against not only male couples but also female couples, coalescing popular anxieties surrounding the alleged artificiality of the procedure as opposed to being born to a natural conception prescribed by religious discourse. Here the far right's metaphor of the child is supported by a 'DNA mystique', the ultimate result of which is the *purely materialistic view* that children are better off with people who share their DNA and not with people who love them.[58] Remarkably, the obsession with biology in this rhetoric does not consider queerness to be biologically determined but, contradictorily, shares the same political terrain as the qualification of queerness as a merely personal choice that deserves to be socially repressed.

2. Debunking the Exposure Myth

[54] On 2 February 2023, two weeks before the start of public broadcasting company RAI's Sanremo Italian Music Festival, MP Maddalena Morgante from FDI publicly requested that RAI reconsider the participation of a gender fluid singer. Morgante claimed that the festival 'is the emblem of the television tradition and keeps families and children glued to the screen'. 'In its last editions', she continued, 'the festival has mutated into a one-direction propaganda, a true distillation of the worse gender ideology which diminishes the identity of women and is disrespectful of the most important religious symbols' *Il Fatto Quotidiano*, 2 February 2023.

[55] See the classic M.J. Radin, *Contested Commodities* (Cambridge: Harvard University Press, 1996), 136-153 (discussing the baby-selling in relation to surrogacy).

[56] Notably, the fear of women's exploitation is foundational to the domestic prohibition of surrogacy in some judicial decisions regarding the recognition of foreign birth certificates for children born to surrogacy: see Tribunal Supremo (Spain) 6 February 2014 no 853/2013, *Revue critique de droit international privé*, 531 (2014), paras 4.7-4.8 (citing 'the respect for the dignity and the moral integrity of the surrogate woman, the avoidance of the exploitation of the state of need in which young women may be found in poverty and the prevention of the commodification of pregnancy and kinship'). On this point see S. Rudrappa, 'Why Is India's Ban on Commercial Surrogacy Bad for Women' 43(4) *North Carolina Journal of International Law*, 70 (2018); A. Cattapan, 'Risky Business: Surrogacy, Egg Donation, and the Politics of Exploitation' 29(3) *Canadian Journal of Law and Society*, 361 (2014). Regarding Italy, according to I. Kriari and A. Valongo, 'International Issues regarding Surrogacy' 2(2) *Italian Law Journal*, 331, 332-333 (2016), the prohibition of surrogacy is based on protecting the dignity of the surrogate woman, as mandated by Art 2 of the Italian Constitution. According to Corte Costituzionale 23 November 2017 no 272, *Foro Italiano*, 5 (2018), para 4.2, 'surrogacy (…) unacceptably offends the woman's dignity and profoundly undermines human relations'.

[57] See Huffpost Italia, 'L'attacco di Rampelli. Coppie gay spacciano per propri figli bambini avuti con la maternità surrogata' *Huffington Post*, 19 March 2023, available at https://tinyurl.com/37txzpjd (last visited 20 September 2023).

[58] D. Nelkin and M.S. Lindee, *The DNA Mystique: The Gene as a Cultural Icon* (Ann Arbor: Minnesota University Press, 2004), 152.

The idea of *exposure*, which provides a powerful template for queer people's criminalization, discrimination, and marginalization, is a recent development. At its origin is the pretense – oftentimes used, as University of Utah professor Kathryn Bond Stockton emphasizes, by 'right-wing fundamentalists (who) find themselves in bed with Darwin and Freud'[59] – that a child's growth can at one point be *arrested* by external factors, in this case by exposure to queerness, and diverted from a *normal* development of *natural bisexuality* to a *deviant* queerness.[60] This claim appears in various Italian and European legislative and court reports.

In 1961, the Italian social-democratic MP Romano Bruno filed a bill with the Parliament seeking to punish both homosexual acts and the apologia of these acts with jailtime in order to 'defend the youths from this social cancer that leads them to a life of shame, degradation and progressive moral involution'.[61] In 1968, at the end of a questionable criminal trial, the *Corte d'Assise* of Rome sentenced communist intellectual Aldo Braibanti to nine years in prison for bringing two young adults

> 'under his own power, in such a way as to reduce them to a total state of subjection' – such was the definition of *plagio* (plagiary) under the criminal code at the time, as was defined as the 'corruption of minors'.[62]

In his closing argument, the alleged victim's counsel Rinaldo Taddei affirmed that acquitting Braibanti would equate to a 'sign on a flag with written "Pederasts of the world, unite!" *What about the youths then?*', he wondered, '*What about the family?*'[63]

In its 1981 milestone judgment in *Dugdeon* v *United Kingdom*, the ECHR conceded that, even if the criminalization of homosexuality infringed upon queer individuals' right to private life, democratic societies must nonetheless maintain 'some degree of control over homosexual conduct, notably in order to provide safeguards against the exploitation and corruption of (...) youth'.[64] For dissenting judge Franz Matscher, 'it is well known' that having 'homosexual relations with minors as well (...) is a widespread tendency in homosexual circles'.[65] As has been

[59] K. Bond Stockton, n 2 above, 22.

[60] In a reversed perspective, the Italian activist Mario Mieli talked about *educastration* to designate the process that 'forces the child, through a sense of guilt, (...) to identify with a mutilated monosexual (heterosexual) model'. M. Mieli, n 24 above, 5.

[61] Proposta di legge 29 April 1961 no 2990.

[62] Corte d'Assise di Roma 14 July 1968, *Foro Italiano*, 154, 176-177 (1969), finding that, although homosexuality is not a crime per se, it can *causally lead* to criminally relevant events. See M. Mieli, n 24 above, 76–77 (arguing that plagiary represented an *indirect* way of punishing homosexuality); for a contemporary account see A.I. Borowitz, 'Psychological Kidnaping in Italy: The Case of Aldo Braibanti' 57 *American Bar Association Journal*, 990 (1971). Art 603 of *Codice penale* on *plagio* was declared unconstitutional by Corte Costituzionale 9 April 1981 no 96, *Giurisprudenza costituzionale* I, 806 (1981).

[63] G. Ferluga, *Il processo Braibanti* (Turin: Zamorani, 2003), 90.

[64] Eur. Court H.R., *Dudgeon* v *United Kingdom*, Judgment of 22 October 1981, available at www.hudoc.echr.coe.it, para 12.

[65] ibid. Dissenting opinion of Judge Matscher. For a commentary see P. Johnson,

observed, this logic has long affected refugee law, where it served to transform the refuge-seeker persecuted for his homosexuality into 'a predator, against whom the law must marshal its full strength to protect […] the young and vulnerable'.[66]

In more recent cases, however, the ECHR has firmly rejected the exposure claim through two techniques. The first technique involves de-weaponizing the alleged danger inherent to exposure – a child's parent cohabiting with a partner of the same sex – by qualifying it as *a mere prejudice*, such that causation cannot be determined as to justify human rights restrictions.

For example, in the case of a father who had formed a new family with his boyfriend, maintaining that this was 'a decision which is not normal according to common criteria' and that he should therefore be denied custody because 'children should not grow up in the shadow of abnormal situations' amounts to an unacceptable discrimination on grounds of sexual orientation.[67] Moreover, when adoption is pursued by a woman who happens to live with another woman, the lack of a *paternal referent* as a basis for rejecting the adoption application also amounts to a mere prejudice based on the applicant's sexual orientation, and is therefore insufficient to support the discrimination.[68] The same logic applies to stepparent adoption, whose prohibition in relation to the biological mother's same-sex partner has been found to be discriminatory.[69] Relatedly, Italy's *Corte di Cassazione* has found that it is a 'prejudice' to 'believe that it is harmful for the well-balanced development of a child to live in a family centered on a couple of the same sex'.[70]

The second technique entails relying on *the existing empirical research* confirming that children's exposure to queerness is *not detrimental* to them. In a recent slew of judicial rulings, including the 2023 judgment in *Macatė* v. *Lithuania* concerning two queer-friendly fairy tales published by Lithuanian writer and poet Neringa Dangvydė, the ECHR employed this technique to reject the government's claim that expressions of queer identities may harm children, therefore justifying restrictions on the visibility of queer materials and people. The ruling in *Macatė* v *Lithuania* delineates two bases for this technique:

> 'First, with respect to the best interests of the child, (…) there is no scientific evidence or sociological data […] suggesting that the mere mention of

Homosexuality and the European Court of Human Rights (New York: Routledge, 2014), 53.

[66] J. Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003' 14(1) *Social & Legal Studies*, 115, 128 (2005).

[67] Eur. Court H.R., *Salgueiro da Silva Mouta* v *Portugal* n 38 above, paras 15 and 34-36. For an identical case in Italy see Corte di Cassazione 11 January 2013 no 601, *Giurisprudenza italiana*, 1036 (2013).

[68] Eur. Court H.R., *E.B.* v *France*, Judgment of 22 January 2008, available at www.hudoc.echr.coe.it, paras 87-98.

[69] Eur. Court H.R., *X and Others* v *Austria*, Judgment of 19 February 2013, available at www.hudoc.echr.coe.it, paras 87-98.

[70] Corte di Cassazione 11 January 2013 no 601 n 67 above.

> homosexuality, or open public debate about sexual minorities' social status, would adversely affect children. Second, to the extent that minors who witnessed demonstrations in favour of LGBTI rights were exposed to the ideas of diversity, equality and tolerance, the adoption of these views could only be conducive to social cohesion. Shortly, there is no scientific evidence that such information, when presented in an objective and age-appropriate way, may cause any harm to children. On the contrary, (…) it is the lack of such information and the continuing stigmatization of LGBTI persons in society which is harmful to children'.[71]

These statements remind us of the motto 'silence = death' from late 1980s AIDS-prevention campaigns, and affirm the cathartic effect of naming as an act of freedom.[72] Importantly, it is not just that there is *no evidence* of detrimental effects; on the contrary, there is *specific and overwhelming evidence* that children of same-sex couples – who, on a possible spectrum of exposure, would fall within the highest extreme – are psychologically and physically healthy.[73] There is an explicit agreement among all major pediatric, psychological, and psychiatric organizations that children need love, not the stigmatization of how they came into the world.[74]

3. Taming the Commodification Fear

The final prong of the far right's claim that children must be protected from queer individuals who would otherwise deprive them of their right to have a mother and a father is represented by FDI's strategy to strengthen the prohibition of surrogacy, and as of now Italian law already provides for extremely harsh criminal sanctions (jailtime from three months to two years and a fine from six hundred thousand to one million euros).[75] It is because of this ban that male Italian couples pursue their parental projects abroad, mainly in Canada and California, where the process is legal, well-regulated, and comes with the assurance that children born to

[71] Eur. Court H.R., *Macatė* v *Lithuania*, Judgment of 23 January 2023, available at www.hudoc.echr.coe.it, para 210-211. See also Eur. Court H.R., *Bayev* v *Russia* n 36 above, para 82; *Alekseyev and Others* v *Russia* and 2 others, Judgment of 21 October 2010, available at www.hudoc.echr.coe.it, para 86, on which P. Johnson, *Homosexuality* n 65 above, 58.

[72] See K. Gümüsay, *Speaking and Being. How Language Binds and Frees Us* (Münich: Hanser, 2020), 40.

[73] Specifically, in 2011 the Italian Association of Psychology (*Associazione Italiana di Psicologia*) affirmed that 'psychological research has highlighted that what is important for children's well-being lies in the quality of the environment that parents offer to their children, regardless of the fact that they are cohabiting, are separated, re-marries, single, of the same sex'. V. Lingiardi, *Citizen gay* (Il Saggiatore: Milano, 2013), 135-136.

[74] See F. Ferrari, *La famiglia* in*attesa. I genitori omosessuali e i loro figli* (Udine: Mimesis, 2015), 147-168; N. Carone et al, 'Italian Gay Father Families Formed by Surrogacy: Parenting, Stigmatization, and Children's Psychological Adjustment' 54(10) *Developmental Psychology*, 1904, 1913-1914 (2018).

[75] Art 12(6), MAPA.

surrogates are legally recognized as both men's children. Joint adoption is also an option in certain other countries, though subject to residency.[76]

For the last decade, Italian courts have navigated the complexity of cross-border surrogacy by relying on the French saga of Valentina and Fiorella Mennesson, two French twins born to surrogacy in California.[77] In its 2014 judgment in *Mennesson* v *France*, the ECHR ruled that children born abroad to surrogacy have a right 'to establish the substance of his or her identity, including the legal parent-child relationship' with *the biological parent* (in that case, the intended father).[78] Contrarily, regarding this parent's partner (the *nonbiological or intended parent*, in that case the intended mother), the ECHR clarified in its first advisory opinion arising from the same proceedings that the children's right to identity does not necessarily require recognition of the foreign birth certificate *if* stepparent adoption is made 'promptly and effectively' available at the domestic level, 'at the latest when (…) the relationship between the child and the intended mother has become a practical reality'.[79]

There seems to be no issue with transposing these principles into the same-sex parents context.[80] In fact, adhering to the ECHR's conclusions, the *Corte di Cassazione* has insisted that foreign birth certificates of children born to surrogacy should be registered immediately in relation to the biological father, whereas the intended parent must petition for stepparent adoption and await a positive outcome from the proceedings.[81] Similarly, on two occasions the Constitutional Court has required Parliament to legislate on the rights of this 'new category of non-recognizable children' by picking from 'all the possible options, all compatible with the Constitution', including, evidently, the immediate registration of foreign

[76] See Corte di Cassazione-Sezioni unite 12 January 2021 no 9006, *Foro Italiano*, 2054 (2021), which recognized a child's adoption by a same-sex couple in the United States and confirmed that the birth certificate can be registered in Italy.

[77] See V. Mennesson, *Moi, Valentina, née par GPA* (Paris: Michalon, 2019).

[78] See Eur. Court H.R., *Mennesson* v *France*, Judgment of 24 June 2014, available at www.hudoc.echr.coe.it, paras 99-100 and Labassee v France, Judgment of 24 June 2014, available at www.hudoc.echr.coe.it, paras 78-79. See also Eur. Court H.R., *Valdis Fjölnisdóttir and* Others v Iceland, Judgment of 18 May 2021, available at www.hudoc.echr.coe.it, para 75 (finding, in this specific case, no practical hindrances to the child's enjoyment of family life vis-à-vis the two intended parents, who had no biological relationship with the child).

[79] See Eur. Court H.R., 'Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother', Request no P16-2018-001 by the French Court of Cassation of 10 April 2019, para 54, 56. See L. Bracken, 'The ECHR's First Advisory Opinion: Implications for Cross-Border Surrogacy Involving Male Intended Parents' 21(1) *Medical Law International*, 3, 11 (2021); A. Margaria, 'Parenthood and Cross-Border Surrogacy: What is "New"? The ECHR's First Advisory Opinion' 28(2) *Medical Law Review,* 412, 419 (2020).

[80] See M.M. Winkler and K. Trilha Schappo, 'A Tale of Two Fathers' 5(1) *Italian Law Journal* 359, 365 (2019).

[81] See also Corte di Cassazione-Sezioni unite 31 December 2022 no 38162, n 6 above; Corte di Cassazione-Sezioni unite 8 May 2019 no 12193, *Rivista di Diritto Internazionale*, 1225 (2019); Corte di Cassazione 30 September 2016 no 19599, *GenIUS - Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere*, 8 (2017).

birth certificates in relation to the intended parent as well.[82] For children born in Italy to female couples, on the other hand, the *Cassazione* has refused to register the intended mother on her child's birth certificate despite the genetic link between the two, claiming that MAPA applies to different-sex couples only and therefore parenthood cannot be recognized outside said framework.[83]

Against this complex background, the far right's strategy of amending and expanding the surrogacy ban resembles an act of pure sadism. This strategy consists of *transforming surrogacy into a universal crime* by expanding current criminal sanctions 'if the act is committed abroad' in order to prevent 'the banal commercialization of women and children'.[84] While this strategy's punitive obsession is too self-evident to require comment, the crucial question is whether reworking surrogacy as a universal crime responds to the Constitutional Court's urgent call for children's rights to be regulated: it clearly does not.

With this amendment, future parenthood-claiming Italian citizens and foreign travelers with children born to surrogacy alike could be prosecuted, jailed, and fined in Italy for having legally resorted to surrogacy *in their country of residence*. In the worst-case scenario, children would remain without personal and financial support while their parents faced jailtime and collected the funds to pay the huge fine required by law: *how would these measures fulfill the supreme interest of the child that the far right so boastfully claims to defend?*[85]

What counterstrategies should be pursued? First, an amendment of this tenor, if passed, could be challenged in courts based on its proportionality to the pursued objective. For criminal and constitutional lawyers, this challenge could be based on the consideration that punishing the intended parents in Italy for

[82] Corte Costituzionale 28 January 2021 no 32, *Giurisprudenza Costituzionale*, 306 (2019), para 2.4.1.4; Corte Costituzionale 9 February 2021 no 33, *Il Diritto di Famiglia e delle Persone*, 528 (2021), para 5.9. For a commentary see A. Schillaci, 'Non imposta, né vietata: l'omogenitorialità a metà del guado, tra Corti e processo politico' *Genius - Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere,* 1-37, 22 (2021).

[83] Corte di Cassazione 25 February 2022 no 6383, para IV. In relation to the MAPA, the Constitutional Court has found that guaranteed access to medically assisted procreation techniques for same-sex couples is for legislators, not courts, to decide. As a result, until the Parliament intervenes, same-sex couples are barred from accessing these techniques in Italy and must therefore resort to them abroad. See Corte Costituzionale 18 June 2019 no 221, *Guida al diritto*, 36 (2020).

[84] See Proposta di legge 15 February 2023 no 887 (Modifica all'articolo 12 della legge 19 febbraio 2004, n. 40, in materia di perseguibilità del reato di surrogazione di maternità commesso all'estero da cittadino italiano), 2, identical to the prior Proposta di legge 23 March 2018 no 306.

[85] A further question is whether Italy's extraterritorial application of the surrogacy ban would protect women from exploitation, as the bill's sponsors claim, in countries where surrogacy is permitted and the surrogate's rights are already fully protected by local laws. In this regard, the Portuguese Constitutional Court has observed that, 'as such, the human dignity of the woman who takes on the role of gestational surrogate is not violated; on the contrary, her participation in the gestational surrogacy affirms a freedom of action which, at the end of the day, is founded on that same dignity'. Portuguese Constitutional Tribunal 24 April 2018 no 225. See V.L. Raposo, 'Rise and fall of surrogacy arrangements in Portugal (in the Aftermath of Decision n. 465/2019 of the Portuguese Constitutional Court)' *BioLaw Journal* 339 (2020).

doing something that is perfectly legal in another country would protect neither the surrogate, whose consent and conditions are usually monitored by local courts in countries where surrogacy is heavily regulated, nor the child born to her, who will end up paying for their intended parents' actions.[86] Not all vulnerabilities necessitate the expansion of criminal law.[87]

Second, the results in *Mennesson* relate back to birth certificate registration *vis-à-vis* stepparent adoption. In its follow-up to the ECHR's advisory opinion, the French *Cour de Cassation* found that *fifteen years of litigation* sufficed so that Sylvie, the intended mother of Valentina and Fiorella Mennesson, now in their twenties, did not have to file for stepparent adoption, and instead immediate registration of the birth certificates in France was ordered.[88] In a subsequent case, the ECHR found that *four to five months of waiting time* in France satisfied the requirement for stepparent adoption to bring about a 'prompt and effective' recognition of the parent-child relationship, and that *three years well* exceeded the required time for 'the concretization of the bond between the children involved and the intended mother'.[89]

In light of these elements, depending on their children's age and family history, same-sex parents could challenge the possibility of relying on stepparent adoption as a prompt and effective substitute to birth certificate registration, resorting once again to the ECHR's decision on whether the average of two years required before stepparent adoption in Italy passes the above-mentioned test. Of course, the fact that establishing parenthood depends on initiative from the intended parent, who can only file for stepparent adoption, remains a problem.[90] Meanwhile, Italian mayors are certainly entitled to proceed with birth certificate registrations to curtail the current precarious legal status of same-sex couples' children. As the far-right government pursues the annulment of these registrations, activists, lawyers, scholars, and caring parents should work together to debunk the rhetoric surrounding the family and the child, and should unreservedly affirm that children with two same-sex parents are families like any other and that there is nothing wrong with growing up queer.

Overall, the Parliament's deliberate dismissal of the Constitutional Court's urgent call to legislate the matter of non-recognizable children is a dangerous violation of democracy and the rule of law. As the ECHR has determined on multiple occasions,

[86] See Art 2, New York Convention on the Rights of the Child, signed on 20 November 1989 and entered into force on 2 September 1990.

[87] See A. Cattapan, 'Risky Business' n 56 above, 366.

[88] Cour de Cassation-Assemblée Plénière 4 October 2019 no 10-19.053. For a critical comment see S. Bollée and B. Haftel, 'L'art d'être inconstant. Regards sur les récents développements de la jurisprudence en matière de gestation pour autrui' *Revue critique de droit international privé,* 267, 275-277 (2020).

[89] See Eur. Court H.R., *C.* v *France* and *E.* v *France*, Judgment of 19 November 2019, available at www.hudoc.echr.coe.it, para 42-44.

[90] See M.M. Winkler and K. Trilha Schappo, n 80 above, 385.

> 'a deliberate attempt to prevent the implementation of a final and enforceable judgment and which is, in addition, tolerated, if not tacitly approved, by the executive and legislative branches of the State, cannot be explained in terms of any legitimate public interest or the interests of the community as a whole. On the contrary, it is capable of undermining the credibility and authority of the judiciary and of jeopardizing its effectiveness, factors which are of the utmost importance from the point of view of the fundamental principles underlying the Convention. (...) This repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein relating to consistency with the Constitution over a significant period of time, potentially undermines the responsibilities of the judiciary and in the present case left the concerned individuals in a situation of legal uncertainty which has to be taken into account'.[91]

Clearly, the Italian government's campaign to cancel the birth certificate registrations has nothing to do with enforcing the law, protecting the family, or promoting the child's right 'to have a mother and a father', but it instead 'bears down in the heaviest and often deadliest way on those with least resources to combat it: queer children and teens'.[92] This is a fight for all children's right to exist.

IV. Conclusion

This article puts forth a critical analysis of the Italian government's assault on same-sex parents and their children. This is an assault that, while formally motivated by the need to enforce a *Corte di Cassazione* ruling, is actually the result of anti-queer narratives – the narrative of the traditional family and the child's right to have a mother and a father – that the far right has been cultivating for at least a decade. The main argument raised here is that before litigating the government's attack, it is useful to understand these narratives' origin, context, content, and objective.

As to their *origin*, these narratives build on religious discourse and are replicated under a secular framing. The *context* in which they grow and succeed is that of backlash against the progress made in queer freedoms, backlash that the far right intends to exploit and strengthen at the same time. The *content* is that of ideological, abstract, and absolute notions of the family and the child with no connection back to reality and children's rights. Finally, the *objective* of these narratives is queer erasure, with far-right leaders operating as frontline agents of queer oppression.

Affirming all children's right to exist means challenging these narratives in public discourse and the courts. While both protests and the mayors' initiative

[91] Eur. Court H.R., *Oliari and Others* v *Italy* n 13 above, para 184.
[92] M. Warner, 'Introduction', in Id ed, n 2 above, 7-16.

regarding birth certificate registrations are steps in the right direction, it is in the courtroom where the battle will eventually be won. If the fight for queer freedom is a fight for pluralism, democracy, and the rule of law, then this is a fight no one can afford to lose.

Corporate and Financial Markets Law

DLT-Based Trading Venues and EU Capital Markets Legislation: State of the Art and Perspectives Under the DLT Pilot Regime

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Abstract

This paper aims to analyze the interconnection of the recently published DLT Regulation with traditional pieces of EU financial legislation, particularly MiFID II and the CSDR, as to the treatment of market infrastructures. Therefore, the study's main purpose is to scrutinize the legislative choices concerning the use of DLT in trading and settlement transactions, especially given the principle of technological neutrality. To reach such an objective, the paper briefly evaluates whether, and to what extent, the applicable legislation is indeed incompatible with DLT. As a result, questions are posed to the design of a pilot regime and to the short-term solution ultimately adopted by EU legislators, given the feasibility of more efficient coordination of the regimes in light of the new technology.

I. Introduction

The Regulation on a pilot regime for market infrastructures based on distributed ledger technology ('DLT Regulation')[1] lies at the core of the Digital Finance Package,[2] together with the new Regulation on Markets in Crypto-Assets ('MiCA')[3] and the Digital Operational Resilience Act ('DORA').[4]

The three legislative measures represent the first concrete actions to provide

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[1] Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU [2022] OJ L 151.

[2] See https://finance.ec.europa.eu/publications/digital-finance-package_en.

[3] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L 150.

[4] Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 [2022] OJ L 133.

appropriate levels of investor protection and legal certainty for digital finance in the European Union, enabling markets to make use of blockchain, distributed ledger technology ('DLT'), and crypto-assets while ensuring financial stability.

MiCA broadly defines crypto-asset as 'a digital representation of a value or a right which may be transferred and stored electronically, using distributed ledger technology or similar technology', which seems to indicate that, by definition, crypto-assets under MiCA necessarily make use of DLT-based infrastructures for storage or transfer. However, MiCA carves out from its scope of application any crypto-assets that may qualify as 'financial instruments' under the Markets in Financial Instruments Directive ('MiFID II').[5] Alternatively, The DLT Regulation, specifically covers crypto-assets falling under the 'financial instruments' definition, thus complementing the MiCA regime.

The DLT Regulation aims at, on the one hand, establishing operating conditions to allow crypto-assets to be traded and settled using DLT and, on the other hand, enabling regulators to remove regulatory constraints capable of inhibiting the development of DLT-based solutions in the Union. The latter goal, in particular, is pursued through the adoption of a 'sandbox' approach, ie, a controlled space with temporary derogations from existing financial services rules to foster the development of initiatives using DLT (the so-called 'Pilot Regime').[6]

Given the foregoing, this paper investigates to what extent the trading and settlement of crypto-assets qualified as financial instruments might result in a fundamental change to the existing EU financial market architecture. The query relies on the assumption, which seems to emerge from the DLT Regulation – and which we do not fully share, as it will be further discussed below – that the trading and settlement of crypto-assets qualified as financial instruments is only possible on the DLT market infrastructures introduced by the DLT Regulation, ie, excluding traditional structures typically established under MiFID II regime.

A further issue derives from the fact that the DLT Regulation only deals with some of the financial instruments governed by MiFID II, namely shares, bonds, money market instruments, and units of UCITS funds, and does not cover other financial instruments, most notably derivatives, and units of non-UCITS funds. In this case, questions arise as to which regulatory regime would apply to financial instruments not included in the DLT Regulation whose underlying technology is, however, based on DLT.

[5] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173.

[6] As described in the *ESAs Report on Regulatory Sandboxes and innovation hubs*, 7 January 2019, JC 2018 74, 16, the aim of such sandboxes is 'to provide a monitored space in which competent authorities and firms can better understand the opportunities and risks presented by innovations and their regulatory treatment through a testing phase, and to assess the viability of innovative propositions, in particular in terms of their application of and their compliance with regulatory and supervisory requirements'. The report is available at https://tinyurl.com/52bfusuj (last visited 20 September 2023)

This paper also seeks to provide critical reflections on two different but interconnected questions: whether the DLT Regulation indeed follows and promotes the alleged principle of *technological neutrality* ('same business, same rules') and whether, and to what extent, the use of DLT is incompatible with the existing financial services regulatory framework.

II. The DLT Regulation

The DLT Regulation represents a significant step towards the creation of an EU framework that enables both the development of markets in crypto-assets as well as the tokenization of traditional financial assets under a wider use of DLTs in financial services.[7]

The 'tokenization' of financial instruments - that is to say, the process of creating a digital representation of an underlying physical financial instrument in the form of a cryptographic token, enabling their issuance, storage, and transfer through DLT[8] - has required the European legislator to assess the compatibility and the suitability of the existing EU legislation with the new framework introduced by the DLT Regulation.

The Union's financial services legislation was not designed with DLT and crypto-assets in mind, and, in principle, there could be provisions in the existing EU framework that could preclude or limit the use of DLTs in the issuance, trade, and settlement of crypto-assets qualifying as financial instruments.

The introduction of a 'sandbox approach' by legislators was justified due to the finding of concrete legal obstacles for the development of the technology. This allowed for experimentation through derogations for the use of DLTs in the trading and post-trading of crypto-assets, where existing legislation precludes or limits their use. As it stands, the DLT Regulation became effective on June 23rd, 2022 and will be applicable through March 23rd, 2023.

1. The Road to the Current Scope of Application

To self-circumscribe its scope of application, the DLT Regulation sets out a definition of 'DLT financial instruments', referencing the notion provided under MiFID II.[9]

According to the Regulation, a 'DLT financial instrument' is a *financial instrument* that is issued, recorded, transferred, and stored using distributed ledger technology, where a 'financial instrument' is defined in Art 4(1), point (15),

[7] D.A. Zetzsche and J. Woxholth, 'The DLT Sandbox under the EU Pilot Regulation' *University of Luxembourg Law Research Paper,* I, 1-30 (2021), available at https://tinyurl.com/wn37jke4 (last visited 20 September 2023).

[8] See Recital (3) of the DLT Regulation.

[9] In the first drafts of the DLT Regulation, only transferable securities were covered by the regime.

of MiFID II.

This provision is further specified by Art 3 of the DLT Regulation, which lays out limitations on the DLT financial instruments which may be admitted to trading or recorded on DLT market infrastructures.

Accordingly, DLT financial instruments shall only be admitted to trading on a DLT market infrastructure, or be recorded on a DLT market infrastructure, if, at the moment of admission to trading or recording, the DLT financial instruments are either: (a) shares, the issuer of which has a market capitalization, or a tentative market capitalization, of less than EUR 500 million; (b) bonds, other forms of securitized debt, (including depositary receipts in respect of such securities) or money market instruments, with an issue size of less than EUR 1 billion, excluding those that embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved; or (c) units in collective investment undertakings covered by Article 25(4), point (a) (iv), of Directive 2014/65/EU, the market value of the assets under management of which is less than EUR 500 million.[10]

In addition, DLT financial instruments should meet the volumetric thresholds provided by Art 3.[11]

It should be noted, however, that the path to the final draft of the Regulation was not so obviously inclined toward the alignment of concepts and definitions.

In the first draft of the DLT Regulation, in fact, the admission to trading and the recording on DLT market infrastructures were not permitted to *all* financial instruments – as in the final text – but only to a specific subset, namely the 'DLT transferable securities'.

DLT transferable securities were defined as 'transferable securities within the meaning of Art 4(1)(44) (a) and (b) of Directive 2014/65/EU that are issued, recorded, transferred, and stored using a DLT'.

In this sense, many of the issues primarily raised in connection with the scope of the DLT Regulation were due to the fact that the definition of 'DLT transferable securities' contained MiFID II did not only include shares and bonds but also depositary receipts in respect of shares or bonds, meaning

[10] UCITS funds and money-market instruments were not included in the first version of the DLT Proposal. The European Parliament, in a Position adopted on 24 March 2022, suggested to include units, or shares of exchange-traded funds into the DLT Regulation's scope.

[11] The aggregate market value of all the DLT financial instruments that are admitted to trading on a DLT market infrastructure or that are recorded on a DLT market infrastructure shall not exceed EUR 6 billion at the moment of admission to trading, or initial recording, of a new DLT financial instrument. Where the admission to trading or initial recording of a new DLT financial instrument would result in the aggregate market value referred to in the first subparagraph reaching EUR 6 billion, the DLT market infrastructure shall not admit that DLT financial instrument to trading or record it. Where the aggregate market value of all the DLT financial instruments that are admitted to trading on a DLT market infrastructure or that are recorded on a DLT market infrastructure has reached EUR 9 billion, the operator of the DLT market infrastructure shall activate a 'transition strategy'.

> 'those securities which are negotiable on the capital market and which represent ownership of the securities of a non-domiciled issuer while being able to be admitted to trading on a regulated market and traded independently of the securities of the non-domiciled issuer'.[12]

Initially, the European Parliament was of the view that depositary receipts ought to be excluded from the scope of the DLT Regulation based on the assumption that 'in a DLT environment, shares and bonds could be considered as 'native' security tokens while depositary receipts can be considered as 'asset-backed' security tokens representing ownership rights of an underlying traditional share or bond'.[13]

Nonetheless, as mentioned, depositary receipts have been now included by the DLT Regulation among the financial instruments which may be admitted to trading or recorded on DLT market infrastructures.

This choice seemed consistent with the principle of technological neutrality, according to which the use of a given technology, such as DLT, should not be seen as a distinguishing feature for identifying, or regulating, a new distinct category of assets.

Once the scope of application of the DLT Regulation is clarified, we will now focus on whether the DLT is compatible with the existing EU financial services rules on trading venues.

2. Intermediaries and Secondary Markets in DLT

The DLT Regulation offers a definition of 'market infrastructures' that includes: (i) DLT multilateral trading facilities ('DLT MTFs'), (ii) DLT settlement systems ('DLT SS') and (iii) DLT trading and settlement systems ('DLT TSS').

A DLT MTF is an MTF under MiFID II (subject to additional requirements), while a DLT SS relies on the securities settlement system ('SSSs') definition contained in the Central Securities Depositories Regulation ('CSDR').[14] Arts 8, 9, and 10 of the DLT Regulation set out the conditions under which market participants may apply for a specific permission to operate, respectively, a DLT MTF, a DLT SS, or a DLT TSS.[15]

[12] European Parliament, Committee on Economic and Monetary Affairs, Draft Report 2020/0267(COD) on Digital finance: Pilot regime on distributed ledger technology market infrastructures (DLT) [2021], 47 OJ.

[13] ibid 18.

[14] Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 [2014] OJ L 257.

[15] The DLT Regulation mandates ESMA to develop guidelines to establish standard forms, formats, and templates for the submission of the information by market participants to the competent authorities to be authorized as DLT Market Infrastructures. On 11 July 2022, ESMA published a Consultation Paper on guidelines on standard forms, formats, and templates to apply for permission to operate a DLT market infrastructure, ESMA70-460-34.

As detailed below, a DLT TSS should be either: (i) a DLT MTF that combines the services performed by a DLT MTF and by a DLT SS, operated by an investment firm or a market operator that has received a specific license to operate a DLT TSS, or (ii) a DLT SS that combines the services performed by a DLT MTF and by a DLT SS, operated by a Central Securities Depository ('CSD') that has received a specific permission to operate a DLT TSS.

Considering DLT MTFs, therefore, the DLT Regulation draws a clear line between secondary markets in financial instruments issued on DLT, and secondary markets in financial instruments issued in a 'traditional' way, providing the former with a specific set of rules and thus apparently aiming at designing a separate regime for DLT-based trading venues.

This apparent issue, however, arises from an opaque and unclear justification of the background for this legislative choice, which is vaguely addressed in Recital (41) of the Regulation, stating that:

> 'secondary markets in financial instruments issued on distributed ledger technology or similar technology are still nascent and therefore their features may differ from markets in financial instruments using traditional technology'.

The solution adopted by the European legislator – to create a Pilot Regime rather than to amend the existing legislation – seems to be driven by reasons of simplification (in particular, as stated in the DLT Regulation, to avoid the complication of identifying all the regulatory obstacles that would require an immediate legislative action), as well as by the unquestionable and undisputed differences between DLT and other markets.

Nonetheless, even though a cautious approach is quite understandable for the proper handling of such new technologies, one could consider the EU legislator to be inconsistent in its ambiguous stance on regulating such markets. While, on the one hand, the legislator takes a clear position as to the need for an *ad-hoc* legal framework regulating the trading and settlement of crypto-assets qualifying as financial instruments, on the other hand, reference is still made to the existing legislative framework, mainly MiFID II and MiFIR, when dealing with crucial concepts, such as MTFs or settlement systems, for instance. Nevertheless, such a position does not properly consider that, as long as concrete rules dedicated to regulating decentralized finance and, in particular, decentralized autonomous organizations, are not introduced, the influence of MiFID as the main regulatory landmark is unavoidable.

III. MiFID II Trading Venues and DLT

In order to properly address the interconnections between the legal frameworks created by the DLT Regulation and MiFID II, it is appropriate to briefly review the definitions of market infrastructures and the different types of trading venues

provided for in MiFID II and in the DLT Regulation.

The DLT Regulation defines 'market infrastructures' which explicitly includes trading venues. In the past, however, the generally accepted view was that only payments systems, central securities depositories, central counterparties, securities settlement systems, and trade repositories were considered as market infrastructures, but not trading venues.

This is also confirmed by certain studies published by the Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO), which, in addressing the rising of the DLT phenomena, referred only to post-trading infrastructures. It seems, therefore, that the financial industry initially recognized the role that DLT could have on clearing and settlement activities, while trading venues or other trading facilities were, at first, considered less likely to be affected by the technology.

However, the rise of new market players, including trading platforms, that are largely unregulated and that offer disintermediated access to investors, has required legislative action on this front as well.

1. Regulated Markets and Alternative Trading Venues in the EU

MiFID II distinguishes between three types of trading venues: (i) regulated markets; (ii) multilateral trading facilities (MTFs); and (iii) organized trading facilities (OTFs).[16] While regulated markets can be seen as traditional exchanges, MTFs and OTFs are 'alternatives' to regulated markets.[17]

MiFID II provides a similar definition of regulated markets and MTFs: both trading venues are multilateral systems, meaning that in their systems they can bring together multiple third-party buying and selling interests in all financial products (equity and non-equity). Moreover, both regulated markets and MTFs are based on non-discretionary rules, leaving no discretion as to how the interests may interact. Despite their similarities, the two trading venues are not identical: the main difference is that an MTF can be run by investment firms or market operators while regulated markets can be managed only by market operators.[18]

An OTF is a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances, or derivatives are able to interact in the system in a way that results in a contract. The main features of OTFs are as follows:

[16] 'Systematic internalisers' defined in Art 4(1), point (20), MiFID II, are not trading venues, although they share some features with trading venues, in particular transparency and organizational rules.

[17] For further reference on trading venues, see N. Moloney, EU Financial Markets and Securities Regulation (Oxford: Oxford University Press, 2014); M. Gargantini, The European Regulation of Securities Exchanges Regulated Markets in an Evolving Technological and Legal Context (Torino: Giappichelli, 2021).

[18] Art 47 MiFID II. A 'market operator' can operate a regulated market, MTF, or OTF, whereas investment firms can only operate an MTF or OTF, but not a regulated market.

First, OTFs can only be used for the execution of non-equity financial instruments (while in regulated markets and MTFs both equity and non-equity financial instruments can be traded); Second, the OTF must execute on a discretionary basis, whereas regulated markets and MTFs are subject to non-discretionary rules; Third, an OTF can, under certain conditions, trade on its own account, whereas regulated markets and MTFs can never trade on their own accounts.

MiFID II introduces a strict set of organizational requirements on investment firms and trading venues that can be divided into four categories: (i) general requirements for all investment firms (including for MTFs, OTFs, and systematic internalisers); (ii) additional requirements for MTFs and OTFs; (iii) requirements for regulated markets; and (iv) additional requirements for systematic internalisers.

The general organizational rules include rules on (i) compliance, (ii) risk management, (iii) complaint handling, (iv) personal transactions, (v) outsourcing, and (vi) the identification, management, and disclosure of conflicts of interest.

In addition to the abovementioned general organizational rules - applicable to all investment firms - MiFID II requires MTFs and OTFs to comply with additional organizational requirements.

In this sense, both MTFs and OTFs must, *inter alia*: (i) have transparent rules and processes for fair and orderly trading; (ii) set-out objective criteria for the efficient execution of orders; (iii) put in place arrangements for the sound management of the technical operations of the facility; (iv) implement transparent rules regarding the criteria for determining the financial instruments that can be traded; (v) provide access to sufficient publicly available information so as to enable its users to form an investment opinion, taking into account the nature of the users and the types of instruments traded; and (vi) establish transparent and non-discriminatory rules.

With respect to OTFs, it should be noted that the rules to which they are subject are specific, *vis-à-vis* regulated markets and MTFs.

First, OTFs have a degree of discretion with respect to the order-matching process. 'Discretion', in this context, means that the OTF may decide whether to place an order on, or retract an order from, the OTF concerned (discretion at execution level) and/or not to match a specific client order with other orders available in the OTF system (discretion at order level), provided it complies with specific instructions received from a client and in accordance with best execution-obligations.[19]

Second, OTFs are allowed to trade on their own account only (i) through matched principal trading and (ii) when trades in illiquid sovereign debt are involved.

Moreover, MiFID II requires MTFs – in addition to the above-mentioned requirements for all investment firms and for MTFs/OTFs – to comply with the

[19] D. Busch and H. Gulyas, 'Regulated Markets, Alternative Trading Venues & Systematic Internalisers in Europe' *European Banking Institute Working Paper*, 75, 15 (2020), available at https://tinyurl.com/mr48vz3a (last visited 20 September 2023).

following specific organizational requirements originating from the definition provided by MiFID II:

i. 'MTFs must have non-discretionary rules for the execution of orders in the system;
ii. MiFID II sets out similar requirements for MTFs as for regulated markets with respect to member/participant criteria;
iii. MTFs must have arrangements in place with respect to (a) the risks to which the MTF is exposed, (b) efficient and timely finalization of transactions (settlement), and (c) financial resources of the MTF;
iv. MTFs are not subject to client-facing roles, such as client order handling and best execution requirements;
v. MTFs are not permitted to trade for their own account (ie, proprietary trading) or to engage in matched principal trading'.[20]

Finally, with respect to regulated markets, it is worth noting that the rules for regulated markets and MTFs are becoming even more closely aligned under MiFID II than they were under MiFID I. The goal of this is to improve the level playing field between the two trading venues.[21] Regulated markets and MTFs are therefore subject to almost the same organizational requirements. However, some differences between the two can be summarized as follows:

As anticipated, regulated markets cannot be managed by investment firms. Consequently, no 'proportionate approach' applies to regulated markets, as is the case for investment firms;[22] and

Under MiFID II, regulated markets are subject to stricter rules concerning the admission of financial instruments to trading; the Directive sets out (a) specific requirements for the financial instruments that can be admitted to trading on the regulated market; and (b) arrangements to verify that issuers of transferable securities comply with their obligation under EU law.

2. DLT-Based Trading Venues

With the introduction of the 'DLT market infrastructures', the DLT Regulation aims at supporting the trading of DLT financial instruments under the assumption that

[20] ibid 14.

[21] ibid 14 'The MTF requirements were almost the same as for RMs, albeit that the regime for RMs was stricter. MiFID II retains the MiFID I organizational requirements for MTFs. At the same time, MiFID II changes two things. First, MiFID II extends the MiFID I organizational requirements for MTFs to OTFs. This is not surprising, given that the OTF is a new trading venue under MiFID II. Second, MiFID II tightens the MiFID I requirements for MTFs by introducing new requirements. The new requirements include, among other things, more specific rules on conflicts of interest and technical operations of the MTF (and OTF). The new and stricter MiFID II regime intends to enhance the level playing field between RMs and MTFs compared to MiFID I. OTFs are subject to similar rules as RMs and MTFs given their shared status as a trading venue'.

[22] Art 16(1) and Art 18(1) MiFID II.

> 'without a secondary market able to provide liquidity and to enable investors to buy and sell such assets, the primary market for crypto-assets that qualify as financial instruments will never expand sustainably'.

The legal and regulatory regime covering crypto assets' primary markets – this is, the space where crypto assets are issued, stored, and transferred – is therefore strictly interconnected with the one regulating secondary markets and, therefore, trading venues.

A significant question to consider is whether the only solution to the limited use of DLT in financial services is indeed the introduction of an *ad-hoc* 'DLT-based secondary market' or whether traditional trading venues could have served this purpose.

Before opting for the Pilot Regime, the European legislator posed the same question, concluding that despite the number of amendments to existing legislation being relatively limited and targeted to well-defined areas, the creation of a DLT market infrastructure would indeed be more effective.[23] From this perspective, it is not surprising that the DLT Regulation itself acknowledges that the Pilot Regime does not follow the principle of technological neutrality.[24]

However, this is justified by the circumstance that 'the existing financial services legislation was not designed with DLT and crypto-assets in mind' and that 'there is presently not sufficient evidence to support more significant and wide-ranging permanent changes to the existing financial services framework in an effort to allow for the use of DLT'.

In this context, it is essential to identify the provisions in the existing financial service legislation representing a potential limit to the use of DLT, a task that the DLT Regulation otherwise leaves to national authorities and legislators.

3. Obstacles to the Application of Existing Financial Law to DLT Trading Venues?

At present, traditional MTFs are allowed to admit as members or participants only investment firms, credit institutions, and other entities that have a sufficient level of trading ability and competence and who maintain adequate organizational arrangements and resources. By contrast, many platforms for trading crypto-assets offer disintermediated access and provide direct access for retail investors.

[23] According to the first version of the DLT Regulation 'Under Option 2 ("Targeted amendments to the EU framework on financial services', the number of amendments to existing legislation would be relatively limited. As DLT and financial instruments in crypto-asset form are in nascent stages, it is difficult to identify all regulatory obstacles that would require immediate legislative action'.

[24] According to the Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law [2020] OJ SWD/2020/380 final 'The targeted amendments would strive to maintain the technology-neutral approach taken by the current financial services legislation'.

Accordingly, one potential regulatory obstacle to the development of multilateral trading facilities for DLT financial instruments could be the obligation of intermediation.

In particular, under the DLT Regulation, a DLT MTF is allowed to request a temporary derogation to such an obligation of intermediation and to grant access to retail investors, provided that adequate safeguards for investor protection would be in place and that such retail investors are fit and proper for anti-money laundering and combating the financing of terrorism purpose.[25]

Regarding MiFIR, potential gaps have been identified in the data reporting requirements and pre-and post-trade transparency requirements,[26] which, according to the DLT Regulation, are not well adapted to financial instruments issued on a distributed ledger technology.

The DLT Regulation includes a recital requiring ESMA to assess whether the regulatory technical standards (RTS) developed under MiFIR, in connection with pre-and post-trade transparency and data reporting requirements, need amendments in order to be effectively applied to financial instruments issued, traded, and recorded on DLT as well.

In this regard, ESMA conducted a call for evidence from 4 January 2022, to March 4th, 2022, to seek feedback on the need to amend the RTS to comply with transparency and data reporting requirements. In addition, ESMA organized a workshop on March 31st to discuss feedback received from the call for evidence. As a result, on September 27th, 2022, ESMA published a report presenting the findings (the 'Report').[27]

Considering the Report, it should be noted that, although DLT MTFs can be exempted from pre-and post-trade transparency and data reporting requirements (assuming that they are not compatible with the DLT), most of the feedback received noted that the rules applicable to conventional MTFs and DLT MTFs

[25] According to Art 4 DLT Regulation 'In addition to the persons specified in Art 53(3) of MiFID II, if requested by an operator of a DLT MTF, the competent authority may permit that operator to admit natural and legal persons to deal on own account as members or participants, provided that such persons fulfil the following requirements: (a) they are of sufficient good repute; (b) they have a sufficient level of trading ability, competence and experience, including knowledge of the functioning of distributed ledger technology; (c) they are not market makers on the DLT MTF; (d) they do not use a high-frequency algorithmic trading technique on the DLT MTF; (e) they do not provide other persons with direct electronic access to the DLT MTF; (f) they do not deal on their own account when executing client orders on the DLT market infrastructure; and (g) they have given informed consent to trading on the DLT MTF as members or participants and have been informed by the DLT MTF of the potential risks of using its systems to trade DLT financial instruments. Where the competent authority grants the exemption referred to in the first subparagraph of this paragraph, it may require additional measures for the protection of natural persons admitted to the DLT MTF as members or participants. Such measures shall be proportionate to the risk profile of those members or participants'.

[26] Regulated Markets, MTFs, and OTFs are subject to common equity and non-equity pre- and post-trade transparency rules. For further reference, see D. Busch and H. Gulyas, n 22 above, 19.

[27] ESMA, 'Report on the DLT Pilot Regime on the Call for Evidence on the DLT Pilot Regime and compensatory measures on supervisory data', 27 September 2022 (ESMA70-460-111).

should indeed be the same.[28]

The Report showed that there are no key differences between DLT and standard instruments and thus DLT financial instruments should fall under the same transparency regime as all other financial instruments. As a result, respondents did not see the need to change the existing requirements.

Given that MiFID II and MiFIR are fully applicable to DLT MTFs, except for only *two* provisions, it is reasonable to conclude that most of the MiFID II and MiFIR framework are largely compatible with the use of DLT.

This is also supported by the amendment that the DLT Regulation has operated on the definition of 'financial instruments' contained in MiFID II. Art 18 of the DLT Regulation has, in fact, changed the wording of Art 4(1), point (15), of MIFID II and replaced it with the following: '(15) 'financial instrument' means those instruments specified in Section C of Annex I, including such instruments issued by means of distributed ledger technology'.

In this regard, it is worth mentioning that Article 1 of the DLT Regulation clearly states that

> 'This Regulation lays down requirements on DLT market infrastructures, which are granted with specific permissions to operate in accordance with this Regulation'.

Such a provision seems to be aimed at clarifying that the perimeter of the DLT Regulation is not extended to all the market infrastructures using DLT, but only to those falling within the scope of the DLT Regulation.

Therefore, 'DLT financial instruments' can be defined as a subset of the more generic category of MiFID II 'financial instruments'. The result of this is that where a financial instrument does not meet the requirements provided by Art 3 of the DLT Regulation (ie it is not a bond, share, or unit of a UCITS fund, it does not meet the thresholds provided by Art 3 of the DLT Regulation, etc), it will be covered by the already existing MiFID II framework as we all know it. From this perspective, DLTs should be considered merely as a technological tool for issuing financial instruments, and MiFID II 'financial instruments' should continue being regulated under the MiFID II framework, even if they are issued through DLT technology. This conclusion seems to be supported by ESMA as the Report

[28] In particular, according to *Deutsche Börse Group* (*DBG*) 'We share ESMA's view that the existing RTSs are designed in a 'technology neutral' manner and that the introduction of new technologies should not lead to significant changes. Amendments to existing RTSs on reporting should be limited and need to ensure that the data/information regarding traditional financial instruments is comparable to those of their 'tokenized' equivalents. Additionally, significant changes to the RTSs should be prevented in order to secure the 'same business, same risk, same rules' principle. It should not matter whether a financial instrument is issued 'traditionally' or on a DLT. We believe that this is important for all asset classes, regardless of whether they are already in scope of the DLT Pilot Regime or whether they would potentially be included in the future (eg, derivatives)'.

demonstrated that most stakeholders called for interoperability across DLT market infrastructures, and between DLT market infrastructures and traditional financial market infrastructures, with some stakeholders positing that there is a low likelihood that securities could be issued, traded, and settled exclusively in a DLT environment in the short term. As stated by ESMA, the extent to which this will be possible will depend on the national frameworks in place and, in particular, whether these will allow the issuing, trading, and settlement of the same instrument both on DLT market infrastructure and trading markets infrastructures.

4. The CSDR as the Real Challenge to the DLT Regulation

Once it is clarified that DLT is largely compatible with MiFID II, attention should be drawn to a different - but related - question, namely, whether the same conclusion applies to the CSDR.

According to the CSDR regime, where a transferable security is admitted to trading on a trading venue in the European Union, it is to be recorded in book-entry form with an authorized CSD on or before the intended settlement date.

However, Recital 11 of the CSDR clarifies that the Regulation should not impose one particular method for the initial book-entry form recording which should be able to take the form of immobilization or of immediate dematerialization.

This measure is aimed at increasing the efficiency of settlement, facilitating the shortening of settlement periods, and ensuring the integrity of a securities issue by allowing for easier reconciliation of securities holdings. Further, it would notably reduce settlement risk, since book-entry securities are much easier to deliver than paper-based securities, and it would facilitate the reduction of the settlement period.

As drawn from the CSDR, the core functions of the CSDs are: (i) 'notary' function, which is the entering of securities into book-entry. It ascertains the existence of the securities when they are brought for reimbursement upon maturity; (ii) the 'settlement' function, which is the operation of a securities settlement system, through which securities are initially delivered to investors or are subsequently exchanged between buyers and sellers (via participants to the securities settlement system); and (iii) the 'central safekeeping' function, which regards the maintenance of 'top tier' accounts in a book entry system.[29]

[29] The functioning of CSD systems for securities settlement is analyzed in D.A. Zetzsche and J. Woxholth, n 10 above, 4 'A CSD, as a centralized ledger provider, holds a master copy of the ledger of all transactions in a given security and performs the process of clearing, settlement, and recording. Then, intermediaries with access to the CSD hold an account with that CSD; those accounts constitute a copy of the master copy. Intermediaries with CSD access then function as a centralized ledger for other sub-level intermediaries: this situation has been likened to a hub-and-spoke system, with the CSD as the hub, and the intermediaries as the spokes. Once a transaction takes place it must be reconciled on all ledgers concerned, at the level of sub-level custodians, that of top-level custodians with CSD access and, if the overall number of shares a top-level custodian holds changes due to the transaction, the CSD as well. This typically happens

In more general terms, CSDs, together with central counterparties,[30] largely contribute to maintaining post-trade infrastructures (so-called post-trading), protecting financial markets and ensuring market participants that transactions are always executed correctly and timely during clearing and settlement.[31]

With respect to the interconnection with the DLT Regulation, it should be noted that the notion of DLT SS relies on the definition of securities settlement system ('SSSs') contained precisely in the CSDR. This means that a CSD operating a DLT SS shall, therefore, be subject to *all* the requirements that apply to a CSD operating a securities settlement system under the CSDR.

However, as for DLT MTFs, at the request of a CSD operating a DLT SS, the competent authority may exempt that CSD from Art 2(1), points (4),[32] (9)[33] or

after transactions are settled individually on each ledger, for instance daily at the close of business. If financial securities are 'purchased' (ie, exchanged for fiat currency), clearing and settlement takes place through a security leg and a payment leg. The CSD first verifies that the seller holds a title in the securities being sold. Then, the CSD registers the name of the new owner (the buyer) in the ledger. Thereafter, the transaction price is taken from the buyer's bank account and added to that of the seller. If the buyer and seller do not have custodial accounts at the same institution, the ledger held in the name of each of the custodians directly or indirectly (through intermediaries with CSD access) at the CSD will be updated to reflect that the custodian of the seller now has a claim on the custodian of the buyer. This process typically takes 1-3 days. In the meantime, both securities and money are often held as collateral and are rendered unavailable for other economic purposes'.

[30] With regard to clearing, see R. Priem, 'A European DLT Pilot Regime for Market Infrastructures: Finding a Balance Between Innovation, Investor Protection, and Financial Stability', 8 (2021), available at https://tinyurl.com/568c694j (last visited 20 September 2023). 'Although the proposal considers MTFs as market infrastructures, central counterparties are not taken into consideration. That is, central clearing is not considered by the European Commission as they are of the view that DLT can lead to the almost instantaneous trading and post-trading of securities. Counterparty risk is thus nearly absent, making central clearing no longer necessary for eg, equities and bonds. The view that CCPs might still be beneficial to market liquidity because of their multilateral netting services is thus not taken into consideration'.

[31] Post-trading services are clearing and settlement. For more information about clearing and settlement, see L. Goldberg et al, 'Securities Trading and Settlement in Europe: Issues and Outlook' 8 *Current Issues in Economics and Finance*, 1 (2002), available at https://tinyurl.com/2s4za83m (last visited 20 September 2023). 'The post-trade clearing process facilitates proper completion of a transaction. The first step is trade comparison, or trade matching, which confirms that the buyer and seller have agreed on the price, quantity, and other details of the transaction. Next, the buyer and seller identify the accounts to which the security and payment should be delivered. In some markets, large broker-dealers that frequently trade with each other use central counterparties (CCPs) to minimize the risks of failure. A CCP 'stands between' interdealer trades, becoming the buyer to all sellers and the seller to all buyers. The CCP lowers the risks to dealers by offsetting, or 'netting,' buy and sell trades. In addition, it reduces the number and size of securities and money movements at settlement. Settlement represents the exchange of a security and its payment. In most developed financial markets, few participants actually hold physical certificates for the publicly traded securities they own. Rather, ownership is tracked electronically through a book-entry system maintained by a central securities depository (CSD). At the depository, ownership transfer at settlement occurs on the system's records'.

[32] Dematerialized form.

[33] Transfer order.

(28),[34] or Art 3,[35] Art 37,[36] Art 38,[37] Art 40[38] of CSDR, provided that the CSD complies with the requirements set by the DLT Regulation.[39]

The CSD can be also exempted from Art 6,[40] Art 7,[41] Art 19,[42] Art 33,[43] Art 34[44] or 35,[45] Art 39,[46] Art 40,[47] Art 50,[48] 51,[49] and 53[50] of CSDR, subject to the fulfillment of the conditions provided by the DLT Regulation.

According to such exemptions, the rules of the CSDR which refer to the terms 'dematerialized form', 'securities account,' or 'transfer orders' would not apply to CSDs operating a DLT SS.

Concerning the term 'securities account', the exemption would cover the rules on the recording of securities, the integrity of issues, and the segregation of accounts.[51]

[34] Securities account.

[35] Book-entry form 'Without prejudice to para 2, any issuer established in the Union that issues or has issued transferable securities which are admitted to trading or traded on trading venues, shall arrange for such securities to be represented in book-entry form as immobilization or subsequent to a direct issuance in dematerialized form. Where a transaction in transferable securities takes place on a trading venue the relevant securities shall be recorded in book-entry form in a CSD on or before the intended settlement date, unless they have already been so recorded (…)'.

Art 3 has been identified as one of the main existing legislative obstacles to the development of DLT market infrastructures in P. Carrière et al, 'Tokenizzazione di azioni e azioni tokens' in Consob *Quaderni Giuridici,* (2023), available at https://tinyurl.com/4ksfz449 (last visited 20 September 2023).

[36] Integrity of the issue.

[37] Protection of securities of participants and those of their clients.

[38] Cash settlement.

[39] The CSD should: (a) demonstrate that the use of a 'securities account' as defined in Art 2(1), point (28), of that Regulation or the use of the book-entry form as provided for in Art 3 of that Regulation is incompatible with the use of the particular distributed ledger technology; (b) propose compensatory measures to meet the objectives of the provisions in respect of which an exemption has been requested, and ensures at a minimum that: (i) the DLT financial instruments are recorded on the distributed ledger; (ii) the number of DLT financial instruments in an issue or in part of an issue recorded by the CSD operating the DLT SS is equal to the total number of DLT financial instruments making up such issue or part of an issue that are recorded on the distributed ledger at any given time; (iii) it keeps records that enable the CSD operating the DLT SS at any given time to segregate the DLT financial instruments of a member, participant, issuer or client from those of any other member, participant, issuer or client without delay; and (iv) it does not allow securities overdrafts, debit balances or the improper creation or deletion of securities.

[40] Measures to prevent settlement fails.

[41] Measures to address settlement fails.

[42] Extension and outsourcing of activities and services.

[43] Requirements for participation.

[44] Transparency.

[45] Communication procedures with participants and other market infrastructures.

[46] Settlement finality.

[47] Cash settlement.

[48] Standard link access.

[49] Customized link access.

[50] Access between a CSD and another market infrastructure.

[51] However, a CSD operating a DLT SS should still ensure the integrity of the DLT financial

In this regard, whereas CSDs operate securities settlement systems, double-entry or multiple-entry bookkeeping securities accounts might not always be feasible in a DLT SS. This justifies the fact that a CSD operating a DLT SS is exempted from the CSDR rules referring to the term 'book-entry form', where such an exemption is necessary to allow for the recording of DLT financial instruments on a distributed ledger.

Ultimately, competent authorities may also exempt DLT SSs from Art 40 of the CSDR, provided that the settlement occurs based on delivery versus payment.

In this context, the settlement of payments shall be carried out through central bank money, including tokenized form, where practical and available or, where not practical and available, through commercial bank money, including tokenized form, or 'e-money tokens'.

In any case, where a CSD requests an exemption, it shall demonstrate that the exemption requested is: (a) proportionate to, and justified by, the use of distributed ledger technology; and (b) limited to the DLT SS and does not extend to a securities settlement system that is operated by the same CSD.

The potential trading and settlement[52] benefits of distributed ledger technology justify the establishment of a dedicated DLT market infrastructure by the DLT Regulation, namely, the DLT trading and settlement systems (DLT TSS), which amalgamates the activities usually performed by multilateral trading facilities and securities settlement systems.

Operators of DLT TSSs should be able to request similar exemptions as those available to operators of DLT MTFs and of DLT SS.

Under the DLT Regulation, there is a shift of roles from CSDs to the DLT TSSs. Once exempted from the book-entry requirement and the recording with a CSD, a DLT TSSs takes over the functions of recording the crypto-assets on its distributed ledger, ensuring the integrity of the issues on the distributed ledger, establishing and maintaining procedures to ensure the safekeeping of the DLT transferable securities, completing the settlement of transactions, and preventing settlement failures.

In this perspective, DLT MTFs would be allowed to also provide settlement services, which, according to CSDR, would otherwise be reserved to CSDs. Hence, under the DLT Regulation, the requirement that trading and settlement must be

instruments issued on the distributed ledger and the segregation of the DLT financial instruments belonging to the various participants.

[52] Bank of International Settlements, 'Distributed ledger technology in payment, clearing and settlement an analytical framework', February 2017, available at https://tinyurl.com/26pwjs4m (last visited 20 September 2023) 'DLT may radically change how assets are maintained and stored, obligations are discharged, contracts are enforced, and risks are managed. Proponents of the technology highlight its ability to transform financial services and markets by (i) reducing complexity; (ii) improving end-to-end processing speed and thus the availability of assets and funds; (iii) decreasing the need for reconciliation across multiple record-keeping infrastructures; (iv) increasing transparency and immutability in transaction record keeping; (v) improving network resilience through distributed data management; and (vi) reducing operational and financial risks'.

executed by two different entities is no longer imposed.[53]

As mentioned before, the exemptions provided by the DLT Regulation concern many of the fundamental CSDR requirements standing at the core of the CSDR, with the result that CSDs, although still considered by the DLT Regulation, in practice, appear to be deprived of their role.

Removing the rules which refer, for instance, to the terms 'dematerialized form', 'securities account', 'transfer orders', and 'book-entry form' from the CSDR calls into question if CSDs still have a function in a DLT context, or if the CSDR should be considered as the real and effective obstacle of the existing legislation to the development of a DLT market infrastructure, rather than MiFID or MIFIR.

Indeed, for financial instruments not covered by the CSDR (eg, derivatives), market operators could already set up a DLT-enabled trading and settlement platform that would rest outside the scope of the CSDR. Such financial instruments can already be freely traded on MiFID II trading venues, thereby also using DLT. Yet, their scope of activities would be limited to the trading and settlement of transactions in securities that fall outside of CSDR, ie, it would not cover the settlement of transactions in transferable securities admitted to trading on EU trading venues.

On the contrary, and as indicated above, where a transaction in transferable securities takes place in a trading venue, the relevant securities shall be recorded in book-entry form in a CSD and subject to the requirements set by the CSDR.[54]

However, it is not clear which role the DLT Regulation has reserved for CSDs. The large number of fundamental derogations from the CSDR and the possibility to provide settlement services granted to the DLT MTFs, make it difficult to frame the CSDs in the ecosystem built by the DLT Regulation.

The choice made by the DLT Regulation in this matter seems contradictory: on one hand, providing all the exemptions to the CSDR seems to imply an absolute incompatibility of the CSDR with DLTs. However, on the other hand, it maintains the role - though largely limited - of CSDs.

Such an approach also seems to suggest that the main concern in applying the CSDR rules to a DLT ecosystem does not actually originate from the current regulatory framework itself but are technology-specific and inherent in the nature of CSDs as centralized entities, in contrast with the DLT as a de-centralized technology.[55]

[53] R. Priem, n 33 above, 8.

[54] For a critical analysis about the relationship between CSDs and DLT, see S. Green and F. Snagg, 'Intermediated Securities and Distributed Ledger Technology', in L. Gullifer and J. Payne eds, *Intermediation and Beyond* (Oxford: Hart Publishing, 2019).

[55] According to Clerstream Banking AG, as a respondent to the European Commission's targeted consultation document on the review of regulation on improving securities settlement in the European Union and on central securities depositories that took place from December 8th, 2020, to February 2nd, 2021, most concerns in applying the current rules in a DLT environment do not originate from the current regulatory framework itself but are technology-specific and inherent. In particular, 'Definition of CSD: Definition is technologically neutral. DLT provides for a number of governance models and can be applied in the context of a CSD. However, a CSD is by

The real effort that could have been made by the DLT Regulation is actually feasible. First to assess whether it is still meaningful to consider the CSDs as part of a DLT-environment and, subsequently, to verify whether the DLT can assume the functions reserved to CSDs, while ensuring the same standard of investors protection and financial stability granted by the CSDR.[56]

In this hypothesis, technological neutrality would be maintained as the regulatory landscape provided by the DLT Regulation would not treat securities settled on a DLT market infrastructure in a more or less advantageous manner

definition a legal entity. This allows the designation of liability for the operation of the DLT platform and compliance with the applicable rules (eg, capital requirements). A platform does not as such qualify as a CSD because it is not (necessarily) a legal person. The private permissioned version of DLT with a centralized validation model, allows for combining the benefits of DLT such as Peer to Peer transaction, same version of truth, resilience and availability with the benefits of centralized governance such as clear accountability, legal certainty, performance, privacy, integrity and security'; 'Definition of 'book entry form': confirmation needed that the data recorded to a DLT ledger would be capable of constituting a 'book-entry' within the meaning of the CSDR'; 'Proposal: Clarification of Recital 11 that data recorded to a blockchain can be considered as a 'book-entry' within the meaning of CSDR'; 'Definition of 'dematerialized form': Confirmation needed that token recorded to a DLT ledger (assuming such tokens constitute 'financial instruments' within the meaning of the MiFID) are capable of being construed as financial instruments in 'dematerialized form' within the meaning of the CSDR'; 'Proposal: Tokens that exist purely in digital form on the DLT platform should be no different to the concept of 'dematerialized securities' that are issued straight to screen in the context of existing systems. Tokens on a DLT platform are capable of being structured differently, but the DLT platform in this context is envisaged to have the same elements/features as existing dematerialized securities, with the difference simply being that they are issued on a distributed system rather than a centralized one'; 'Definition of 'settlement': When a transaction is 'validated' on a DLT platform, data is recorded to the transferor's and the transferee's DLT addresses that results in a 'transfer' of the token'; Proposal: Provided the underlying terms and conditions of the tokens and the contractual arrangement between the members on the DLT platform set out clearly that their obligations to each other would be discharged by this method of transfer, the token transfer mechanism should be capable of resulting in 'settlement' within the meaning of the CSDR (subject to any national law requirements in relation to how title can be transferred on an electronic platform or register maintained by a third-party operator)'.

[56] As pointed-out by ABI - Associazione Bancaria Italiana, one of the respondents to the Call for Evidence on the DLT Pilot Regime promoted by ESMA 'In particular, DLT's distinguishing feature of being a decentralized ledger could reduce the need for reconciliation and confirmation of transaction details, as part of the post-trading processes, which in traditional systems are held by the CSD and the various intermediaries involved in the intermediary chain. This is because each time a transaction is written on the ledger, either directly by counterparties or by authorized parties acting on their behalf (this depends on how the infrastructure is configured), such transaction is validated by the technology's own mechanisms. In this way, the register represents the only source of information on the transactions themselves (the so-called 'golden source') available in real time to all participants in the infrastructure. This could lead to greater efficiency in trading and post-trading processes and a general reduction in settlement cycle times. The ultimate automation in the management of the processes in a DLT through the use of smart contracts would even allow a 'zeroing' of the time of the settlement cycle, especially if all the assets involved in the transaction (the security tokens and the tokens representing the money) were registered in the same DLT environment. In this case, a smart contract could be used to provide a so-called atomic settlement of the transaction, allowing the securities and the money to be simultaneously and instantaneously delivered to the counterparties and achieving an atomic DVP.'

than traditional securities settled according to the CSDR.

As a result, the problem of technological neutrality could have been addressed not only by simply keeping CSDs in a DLT ecosystem but also by re-assessing their role following the introduction of the DLT, in a way that, even if considered redundant, the DLT could have ensured continuity in terms of fundamental standards and principles granted by the CSDR for traditional securities.

IV. Final Remarks

This paper aimed to test the assumption that 'in principle, there could be provisions in the existing EU framework that could preclude or limit the use of DLTs in the issuance, trading, and settlement of crypto-assets qualifying as financial instruments.' This assumption has been tested by examining the main legislative measures regulating financial services in the European Union.

In light of the analysis carried out, it is reasonable to conclude that, while MiFID II and MiFIR rules seem to be fully compatible with the use of DLT, the same cannot be said for the CSDR.

Based on the limited number of exemptions from MiFID II and MiFIR which DLT MTFs can benefit from, it is quite clear that both MiFID II and MiFIR are *per se* not an obstacle to the development of DLTs.

This means that, per the principle of technological neutrality, even without the DLT Regulation, securities could already be freely traded on MiFID II trading venues, even where operationalized through DLT infrastructures.

Nonetheless, as discussed, the scope of activities of MTFs would be limited to the trading of transactions of securities falling outside of the CSDR, ie, it would not cover the settlement of transactions in transferable securities admitted to trading on EU trading venues.

Regarding the relationship between the DLT Regulation and the CSDR, many questions remain unsolved.

The first concerns the role of the CSDs and how to frame them as centralized entities in the intrinsically decentralized environment of DLTs.

The DLT Regulation, while maintaining the CSDs role as originally conceived by the CSDR, has also - without actually clarifying the rationale behind the legislative choice - provided exemptions to many relevant provisions of the CSDR.

The decision made by the DLT Regulation to run CSD services in a DLT environment should have required a re-assessment of the role of the CSDs – as intended by the CSDR in a context where DLT was not contemplated – and this could have led, for instance, to a change in their role from centrally running all securities on their own books to operating a network and ensuring its integrity in a legal, technical, and operational sense.[57]

[57] European Commission, 'Summary report of the targeted consultation document on the

Therefore, considering the numerous derogations from the CSDR (also compared to MiFID II and MiFIR) and the possibility granted to DLT MTFs to provide settlement services, as well as the issue of the structural compatibility of a centralized body in a decentralized environment, it seems reasonable to conclude that the CSDR can indeed be seen as precluding or limiting the use of DLTs.

However, this conclusion is not clearly stated by the DLT Regulation, as it is rather the result of an attempt to interpret the choices made by the European legislator in this area.

As a general remark, the coordination between the DLT Regulation and the existing European legislation on this point - most notably under the CSDR framework - seems contradictory.

On the one hand, the DLT Regulation states that the absence of a DLT-based secondary market limits the efficiency gains and the sustainable development of a primary market for financial instruments in crypto-asset form. On the other hand, however, it does not implement a real *ad-hoc* (Pilot) regime, simply derogating those rules that result as providing limitations to the scope of financial innovation.

The challenge to identify the applicable legal obstacles under the CSDR could also have presented a unique opportunity for the European legislator to rationalize the current legislative framework and re-assess the role of their main players, which were conceived in a pre-DLT world.

That is why, in our opinion, the DLT Regulation should not only identify immediate legal obstacles and provide for exemptions, but also consider the long-term implications of blockchain technologies and crypto-assets in meeting the objectives set out by financial regulations - with a particular focus on the CSDR - as to adapt and rationalize the existing rules permanently and efficiently.

review of regulation on improving securities settlement in the European Union and on central securities depositories 8 December 2020 - 2 February 2021'.

Towards an Italian Style of Fashion Law

Vittoria Barsotti*

The articles in this Symposium critically examine specific instances of the relationship between law and fashion in an Italian perspective. Entitled 'Fashion Law, Italian Style' in English, in Italian we might translate the Symposium to '*Il diritto della moda, uno stile italiano*'. The importance of an Italian Style to legal disciplines of course is not new: more than fifty years ago, John Henry Merryman introduced the successful idea of an 'Italian Style' to comparative law in general.[1] As a word in English, fashion derives from the Latin *faction-, factio*, denoting an act of making, and from *facere*, to make.[2] In Italian, however, *moda* derives from another Latin word, *mŏdu*(*m*) meaning '*modo*, *maniera*', a way, a manner.[3] Today fashion and *moda* are equated with each other in our contemporary lexicon. They are defined similarly as 'the make or form of something; a distinctive or peculiar and often habitual manner or way; a prevailing custom, usage, or style'[4] and 'a custom which, becoming the prevailing taste, imposes itself on habits, ways of living, and forms of dress',[5] respectively. But the etymological differences between the roots of fashion in an Anglo-American setting and the roots of *moda* in an Italian setting highlight the added value which a uniquely Italian perspective can provide for the

* Full Professor of Comparative Law, University of Florence. Special thanks to all the authors who have contributed to this Symposium and, by extension, to the endeavor of identifying an Italian style of the field of Fashion Law: Barbara Pozzo, Elena Varese, Carolina Battistella, Valentina Mazza, Lucrezia Palandri, Felicia Caponigri and Jake Landreth. In addition, the author wishes to extend particular thanks to her junior colleague Felicia Caponigri for sharing her exploration of comparative Italo American Fashion Law topics in her PhD dissertation to facilitate the dialogue present in this Symposium.

[1] J.H. Merryman, 'The Italian Style I: Doctrine' 18 *Stanford Law Review*, 39 (1965); Id, 'The Italian Style II: Law' 18 *Stanford Law Review*, 396 (1966); Id, 'The Italian Style III: Interpretation' 18 *Stanford Law Review*, 583 (1966). The articles can also be found in M. Cappelletti et al, *The Italian Legal System: An Introduction* (Stanford: Stanford University Press, 1967).

[2] 'Fashion' *The Merriam-Webster Dictionary,* available at https://tinyurl.com/yz1135 (last visited 20 September 2023).

[3] 'Moda' *Garzanti Linguistica*, available at https://tinyurl.com/yz5686 (last visited 20 September 2023).

[4] n 2 above.

[5] n 3 above.

relationship between fashion and the law. As a concept related to specific manners that would become societal codes and, later, encoded in laws, moda reveals an Italian identity of fashion rooted in an intimate connection between ways of dressing and societal roles and rules. As Eugenia Paulicelli has written,

> 'Italy is the place where the first attempts are made to codify dress and habits (…) the tensional relationship that emerges with the convergence of *la moda* and *il modo* in early modern Italy creates the condition for the formation of fashion as a social institution of modernity'.[6]

In today's economy of Made in Italy,[7] we might even say that following the laws of fashion, innovating them, or even contesting them in certain cases, is a definitive part of the Italian identity. Examples of Italian designers and brands which have been and continue to be at the forefront of creativity in fashion while creating marketable products that meet functional needs and the aesthetic preferences of consumers support this. As just one example, the Italian fashion designer Alessandro Michele, Gucci's former Creative Director, challenged our conception of self and individual identity with his *Twinsburg* show while incorporating Gucci house codes into shoes, bags, and clothing.[8] With Italian innovation in fashion, and the brand and cultural codes it creates, comes the question of the role of law. How should law best support Italian innovation in the fashion industry? How should Italian law recognize the links between craftsmanship, tradition, and contemporary production in Italy? Is there a difference between craftsmanship and commerce as applied to fashion? If there is, should different standards of rules apply when fashion uses the images of Italian cultural property in its collections or as part of advertising campaigns? What happens when the Italian notion of family shapes the Italian fashion industry? How do we understand Italian fashion heritage between family history, brand heritage, and cultural heritage? Is cultural heritage in fashion related to sustainability policies or are there already unique Made in Italy practices that indicate sustainable practices embedded in fashion produced on the Italian territory? Are there uniquely Italian answers to these questions, or can we find common functions and issues across legal systems?

This last question brings the importance of comparative law to the fore when thinking of Italian fashion in the context of fashion as a global industry. As a comparative legal scholar myself, the benefits of entering into dialogue with other legal systems beyond the Italian one are readily apparent.[9] As a comparative

[6] E. Paulicelli, *Writing Fashion in Early Modern Italy: From Sprezzatura to Satire* (Farnham: Ashgate, 2014), 4-6.

[7] E. Paulicelli, 'Fashion: The Cultural Economy of *Made in Italy*' 6(2) *Fashion Practice*, 155 (2015).

[8] T. Blanks, 'A Twinly Tour-de-Force at Gucci' *The Business of Fashion*, available at https://tinyurl.com/cy9855 (last visited 20 September 2023).

[9] See, for example, V. Barsotti and V. Varano, *La tradizione giuridica occidentale: Testo e*

constitutional law scholar I have observed how the Italian Constitution's answers to particular questions differ from answers in other jurisdictions, reflecting specific cultural mores and values.[10] And this reflection of cultural mores and values naturally leads to a consideration of culture proper - including art and fashion - as part of Italy's constitutional identity. According to Art 9 of the Italian Constitution,

> '(t)he Republic promotes the development of culture and of scientific and technical research. It safeguards natural landscape and the historical and artistic heritage of the Nation'.[11]

Without a corollary in the United States Constitution, these public obligations and duties beg the question of how to promote the development of culture while safeguarding it at the same time. Contemporary cases in which Italian museums contest fashion designers' and fashion brands' use of Italian cultural properties reveal the timeliness of such a tension, and the difficulty of American law to, at times, even conceive of the issue at hand.[12] Gathering experts and students to entertain the specific Italianness of Fashion Law in these, and other similar, circumstances, has been a hallmark of the *corso di perfezionamento* which I direct at the University of Florence.[13] And it is here that we return to the purpose of this Symposium, and its added value for an academic community of Italian legal scholars, and beyond.

Founded by Susan Scafidi at Fordham Law School in New York City in the early 21st century[14], the field of Fashion Law encompasses intellectual property,

materiali per un confronto civil law common law (Torino: Giappichelli, 7th ed, 2021).

[10] V. Barsotti et al, *Italian Constitutional Justice in Global Context* (Oxford: Oxford University Press, 2015).

[11] Costituzione della Repubblica Italiana, trans. Senato della Repubblica, available at https://tinyurl.com/26s4evfn.

[12] As one example, 'Gli Uffizi fanno causa a Jean Paul Gaultier per l'immagine della Venere sui vestiti' *Finistre sull'Arte*, available at https://tinyurl.com/ty6576 (last visited 20 September 2023).

[13] 'Fashion Law. Diritto e cultura nella filiera della moda' *Università degli Studi di Firenze*, available at https://tinyurl.com/rs3454 (last visited 20 September 2023).

[14] See S. Scafidi, 'Intellectual Property and Fashion Design', in P.K. Yu ed, *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* (Westport: Praeger Publishers, 2007), I, 116-117; S. Scafidi, 'Fiat Fashion Law! The Launch of a Label – And a New Branch of Law', in M. Silvanic ed, *Navigating Fashion Law: Leading Lawyers on Exploring the Trends, Cases, and Strategies of Fashion Law* (Boston: Aspatore, 2012), 8 ('As long as there have been fashion houses- and almost as long as there have been people making clothes- there have been occasions to consult lawyers'). Often cited concurrently to Scafidi's work is that of Guillermo Jiménez, who, with Barbara Kolsun, published the first edition of *Fashion Law: A Guide for Designers, Fashion Executives, and Attorneys* (New York: Fairchild Books, 2010). At the same time as Fashion Law was founded and took up the fight for increased copyright protection for American fashion designers, other legal scholarship explored the paradoxical benefit of copying to the American fashion industry, adding to the richness of an American style of Fashion Law. See K. Raustiala and C. Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' 92 *Virginia Law Review*, 1687 (2006).

business and finance, international trade and government regulation, and consumer culture and civil rights.[15] In her early conceptions of the field, Scafidi defined the discipline as 'the field that embraces the legal substance of style, including the issues that may arise throughout the life of a garment, starting with the designer's original idea and continuing all the way to the consumer's closet'.[16] Translated onto the Italian territory, the field of Fashion Law has inspired publications contemporaneous to Scafidi's early work[17] and more recent publications, such as Silvia Segnalini's *Le leggi della moda,* Angelo Maietta's *Il diritto della moda*,[18] and Barbara Pozzo's edited volume *Fashion Law: Le problematiche giuridiche della filiera della moda*[19] as well as educational offerings[20] beyond the University of Florence. Within the spirit of this translation, a deeper consideration of what Italian identity can bring to Fashion Law is also needed. The Italian territory presents a historical appreciation for the relationship between manners and dress, society, and the law. It also presents a unique context for the business of fashion today: with a rich history of artisanship and a vast cultural heritage, dispersed capitals of fashion, and a strong tradition of small, medium enterprises, laws applicable to fashion in Italy naturally take account of aspects unique to the Italian identity. These aspects may include the need to facilitate the running of a small business that makes fashion design objects; the need to support and provide incentives to train artisans; and the recognition of the importance of empowering local organizations and governments to capitalize on the strengths of regional expertise. Italian fashion is also entering into dialogue with Italy's rich cultural heritage in a way that is, perhaps, unprecedented, especially thanks to digitization and the role of technology. Italian law, we might go so far as to say, can provide as yet undervalued legal tools for Fashion Law to answer the present and future needs and initiatives of designers, brands, consumers, and communities.

[15] See S. Scafidi, 'Fiat Fashion Law!' n 14 above; M.K. Brewer, 'Fashion Law: More than Wigs, Gowns, and Intellectual Property' 54 *San Diego Law Review*, 739, 742 (2017); 'M.S.L. in Fashion Law' *Fordham University School of Law*, available at https://tinyurl.com/fl8787 (last visited 20 September 2023).

[16] 'So What Is Fashion Law?' *Counterfeit Chic*, available at https://tinyurl.com/cr88j42e.

[17] M.G. Antoci and A. Orciani, Il diritto e la moda: Aspetti legali essenziali per operatori del settore (Milano: FrancoAngeli, 2006).

[18] S. Segnalini, Le leggi della moda: Guida al diritto per il mondo della moda (Milano: Skira, 2012); A. Maietta, Il diritto della moda (Torino: Giappichelli, 2018).

[19] B. Pozzo and V. Jacometti, *Fashion Law: Le problematiche giuridiche della filiera della moda* (Milano: Giuffrè, 2017). See also B. Pozzo, ' "Bello e Ben Fatto" —The Protection of Fashion "Made in Italy" ' 14 *Florida International University Law Review*, 545 (2021).

[20] Fashion Law courses are currently offered at Università degli Studi dell'Insubria, the Università Statale di Milano, and most recently Libera Università Internazionale degli Studi Sociali (LUISS) in Rome has begun a Masters in Fashion Law. The course at the *Università degli Studi dell'Insubria* is also mentioned in M.K. Brewer, n 15 above, 747, fn 55. See also 'Corso di perfezionamento in Fashion Law - Le problematiche giuridiche della filiera della moda' *Università degli Studi dell'Insubria*, available at https://tinyurl.com/bdfy2fza (last visited 20 September 2023); 'The new master's program in Fashion Law' *LUISS*, available at https://tinyurl.com/349prbyd (last visited 20 September 2023).

In this Symposium, the authors modestly take up the challenge of identifying the 'Italian Style' of Fashion Law by exploring three areas in which Italian law might add the most value to Fashion Law as a field: sustainability practices that build on connections to historic textile practices in Italy; the Italian tradition of running fashion business as family businesses; the Italian penchant for founding extensive archives of fashion design objects that extend between a brand and the aforementioned fashion families; and how fashion designs' uses of images of Italian cultural properties exist in a uniquely Italian space between copyright and cultural heritage law.

In *Sustainable Fashion…Italian Style!* Barbara Pozzo begins the Symposium by addressing a hot topic in the fashion industry: sustainability. Acknowledging the work that has been done to incentivize sustainable development at the supranational level, Pozzo presents the European Union (EU) framework for sustainable development and the relevant EU legislation for the textile and fashion industries. Highlighting registration and labeling norms, Pozzo also highlights the ethical codes of conducts that have been implemented by brands, luxury conglomerates, and industry associations, including the *Camera Nazionale della Moda*. Despite the laws currently in place and other encouraging steps, Pozzo highlights the continued prevalence of greenwashing and the importance of viewing sustainability policies from a three hundred and sixty degree angle, emphasizing how aspects from the design of a product to its presentation in marketing campaigns should be infused with independently variable information. Sustainable and circular textiles that are regulated provide an opportunity to put sustainability goals into practice, including through Ecodesign. With a history of creating textiles through processes that are closely linked to historic practices, traditions, and the environmental benefits of a specific territory, Italian fashion brands are offering, as Pozzo presents, innovative sustainable initiatives that can benefit the global fashion industry. Pozzo details a recent Italian draft decree that will require, in part, individual and collective management systems to manage recycling and recovery of waste from textile products and a national textile waste collection network, in addition to designing products that can be reused and repaired. The city of Como in Italy already embodies many of the best practices of sustainability, and Pozzo points out how, in the context of the continued importance of the traditional silk production model in the city's economy, the fashion brands in Como have instituted a number of important initiatives and collaborations, from giving silk a second life to using yarn made from plastic bottles. Pozzo's analysis concludes by offering an overview of a new draft law that valorizes, promotes, and protects *Made in Italy* products as part of a tradition of natural beauty, cultural heritage, and Italy's cultural roots. And it is perhaps this last point that is most inspiring for the future of *Made in Italy* and an Italian style of Fashion Law: embracing the legacy of traditions and historic craftsmanship and building on it to meet the current environmental impact of the fashion

industry and our communities' wider environmental needs is perhaps the most sustainable, and inspiring, Italian style after all.

Just as Pozzo's contribution highlights the pressing need to address what sustainability truly means in the fashion industry (offering an inspiring Italian answer in the process) so *The Reproduction of Cultural Heritage and Artworks in Fashion* by Elena Varese, Carolina Battistella, and Valentina Mazza addresses a pressing issue at the frontier of Italian fashion's inclusion in Italy's cultural heritage: the relationship between the intangible facets of Italy's celebrated cultural properties and intangible fashion designs. In their article, Varese et al present a uniquely Italian answer to the prevalence of images of Italian cultural properties as part of fashion design inspiration, fashion designs themselves, and fashion advertising campaigns: the regulation of these images for reasons of public interest beyond the expiration of copyright law. Outlining the nuances of Italian copyright law and Italian cultural heritage law, and the places where these two legal regimes overlap and at times seem to replace each other, Varese et al present the Italian style of protecting cultural properties, from movable works of art to immovable buildings, and outline the difficulties of interpretation it poses, especially for identifying the scope of commercial purposes. Expanding on recent cases involving Michelangelo's David and Da Vinci's Vitruvian Man, Varese et al also explore adjacent rights to Italian copyright law and Italian cultural heritage law that can put a proverbial stick in the wheel of the promotion of fashion products, from tangible property rights to unfair competition and publicity rights. Animating Varese et al's analysis is the question of who owns Italian cultural heritage, including fashion. The commercial exploitation of cultural goods in Italy can quickly become complicated when the Italian State, brands, and the public compete for control over cultural messages, meanings, and their accompanying market share. While the example of laws regulating the reproductions of Italian cultural property that would otherwise be in the public domain is perhaps an unsatisfying Italian style, these laws also provide unique insight into the multitude of stakeholders that care about fashion when it cross-pollinates with cultural heritage and, as a result, offer future food for thought for Fashion Law, United States (US) style. The authors do end on an uplifting note by outlining how digital strategies and a potential embrace of non-fungible tokens (NFTs) and other digital cultural heritage by the Italian State may still provide a uniquely Italian style answer for fashion brands engaged in digital strategies and for fashion initiatives that include art and cultural heritage.

Varese et al's contribution brings us to the cultural heritage and fashion path uniquely present in the Italian fashion landscape, and the last two contributions of the Symposium embrace this path with Italian gusto. In *Heritage-Mashing and the Activated Archive: A Case Study of the Emilio Pucci Heritage Hub under Cultural Property Law and Copyright* Lucrezia Palandri and Felicia Caponigri take the notion of the cultural value of Italian fashion and its links with the law to

a logical conclusion: the creation of a fashion archive and its use beyond a fashion business setting. A common asset for an Italian heritage brand, the archive is typically either fully owned by a company as a business asset or contained within a separate foundation with not-for-profit and educational ends. At the same time, the legal status of the archive may be more complex, existing in the middle of this ownership spectrum. Family fashion firms are sold, and family members may distance themselves from fashion as a commercial product, coming to terms with their fashion heritage as a patrimony beyond the fashion industry. Coining a new term, 'activated archive', Palandri and Caponigri use the Pucci Archive and its re-invention as the Emilio Pucci Heritage Hub by Laudomia Pucci as a case study. Defining the 'activated archive' as a fashion heritage institute outside of a fashion business and outside of museum-like confines, Palandri and Caponigri explore how such an archive fits within Italian cultural property law. In doing so, they explore the benefits and drawbacks of the Italian cultural property law regime as applied to fashion archives. Ultimately, they conclude that an 'activated archive' is a poor fit for archives of cultural interest under the traditional terms of Italian cultural property law. The authors therefore explore other ways to recognize the cultural interest in an 'activated fashion archive' without compromising the space of de-regulation in which it may thrive on the Italian territory. Along with 'activated archive', Palandri and Caponigri also propose the term 'heritage-mashing'. While 'activated archive' refers to the archive as a container, 'heritage-mashing' refers to the archive's contents. The authors define 'heritage-mashing' as an 'inspirational (process of) creation' in which 'older intellectual property rights and relatively newer intellectual property rights interact over time'. For activated archives and the brands to which they are connected, 'heritage-mashing' indicates a struggle to meet contemporary audiences' and consumers' desires for contemporary fashions while staying true to original meaning and aesthetics that are preserved and valorized in an archive.

Palandri and Caponigri's contribution implies a uniquely Italian struggle between family and fashion in the business context. Whereas *Heritage-Mashing and the Activated Archive* explores this tension after a separation between family members and their family fashion brand, *Fashion Law and the Family Fashion Firm: Transatlantic Lessons from Multinational Italian Brands* by Jake Landreth and Felicia Caponigri explores this struggle during a family fashion firm's heyday of business operations. Spotlighting 'the unique ecosystem of multinational family fashion brands in Italy and the role that the law plays in preserving, frustrating, enabling and, at times, breaking the ecosystem where these brands operate as firms', Landreth and Caponigri set up a triangle of family, fashion, and business grounded by brand and cultural heritage. The authors observe how the business activities of a family fashion firm can be tied to the needs of a specific family and the trends and styles of the fashion industry. While the links between family, fashion, and business often present added value for businesses, these same links

may also present challenges. Landreth and Caponigri detail how at the same time as family members produce new designs, maintain a firm's connection to its founder, and offer loyal stewardship, family members might put themselves in competition with the firm, and founder's descendants might fundamentally disagree with design directions. Comparing US and Italian business law, Landreth and Caponigri explore how considering the best interests of a corporation under the US duty of care allows fiduciaries in closely held firms to prioritize what is best for their business. In Italy, however, the authors argue that a more express consideration of directors' expertise and the actions of similarly situated companies leave room for directors to compare their knowledge to that of other directors of companies in the same business sector. Similarly, the Italian duty of loyalty's requirement that directors share their reasoning offers a foundation for increased considerations of indirect conflicts and the wider interests in a family fashion firm ecosystem. In contexts like the Italian one where culture and industry have historically been strongly connected, the authors identify an Italian style of fiduciary law within Fashion Law which might particularly benefit the family fashion firm. Using the examples of Ferragamo, Gucci, the luxury fabric producer Ratti, and Prada as case studies interspersed in their analysis, Landreth and Caponigri also explore the creative Italian exits available to family members reluctant to work in the family fashion firm, including foundations and benefit corporations.

Fashion Law, Italian Style - Symposium

Fashion Law and the Family Fashion Firm: Transatlantic Lessons from Multinational Italian Brands

Felicia Caponigri and Jake Landreth*

Abstract

The business of fashion on the Italian territory is tied to a specific triangular ecosystem: fashion, family, and business form the three main points of firms' activities in Italy, with brand heritage and cultural heritage at their center. These points of activity raise tensions between family and fashion, family and business, business and fashion or family. What is the best role for law within an ecosystem of family, fashion, and business grounded by brand and cultural heritage? What legal rules might uniquely allow this ecosystem to thrive? Exploring comparatively how Italian law defines the duty of care and the duty of loyalty, and the institutions which work with corporations to promote fashion firms and family narratives as cultural heritage, the authors make some observations regarding how legal rules that apply to corporations and the duties of their directors, members, and shareholders seem to weigh one part of the family/fashion/ business triangle over another. They propose that the Italian duty of care rule leaves room for parallel activities, like fashion archiving and cultural engagement, that prioritize the family and fashion corners of a firm, and a family fashion firm's brand heritage as part of a wider cultural heritage. A broader understanding of loyalty might allow family fashion firms to consider unexpected fashion industry collaborations and new initiatives within the family that may at first seem adverse, supporting compelling firm futures instead of infighting or family drama. Lastly, the authors showcase the important role foundations play for Italian family fashion firms alongside more traditional corporate activities, offering an inspiring model for exiting fashion family firms and future uses of fashion heritage connected to family business narratives for a transatlantic audience.

I. Introduction

Fashion brands in Italy have sparked the American imagination since Italian fashion took its place on the world stage from the Sala Bianca in Florence after World War II.[1] Early editorials spotlighting Italian accessories presented these

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[1] 'The "Birth" of Italian Fashion at the Sala Bianca in Florence', in V. Steele, *Fashion, Italian Style* (New Haven: Yale University Press, 2003), 17; L. Settembrini, 'From Haute Couture to Prêt-à- Porter' in G. Celant ed, *The Italian Metamorphosis, 1943- 1968* (New York: Solomon R.

post-war products in the context of Italian craftsmanship and heritage.[2] Far from only an American perception, founders and managers of fashion brands in Italy have grounded their work within a continuous tradition, at the same time as they embrace innovation.[3] The foundation of Italian craftsmanship and know-how on which the success of Italian fashion brands is based often joins another Italian cultural phenomenon: the family. The industry of Italian fashion is characterized by the presence of mid-sized manufacturing companies closely connected to specific geographic areas on the Italian territory.[4] Today, with the passage of time, these mid-sized manufacturing companies and the small, medium enterprises or closely held corporations into which they have often evolved are managed by family members and even by second and/or third generations.[5] The business of fashion

Guggenheim Museum, 1994), 485; G. Vergani, *La Renaissance de la Mode Italienne, Florence, La Sala Bianca, 1952- 1973* (Florence: Electa, 1993).

[2] 'The Italian School' 108 *Vogue* 9, November 15, 166-167 (1946). The text accompanying photographs of a Gucci bag and Ferragamo in front of the Ponte Vecchio noted 'This is what Italy makes, and what it has made for centuries: shoes, bags, perfections in leather. Interrupted by war, Italian leather makers have returned to their craft- and from the celebrated school of shoemaking that gave us the wedge sole, the thong-sandal, come these handmade leather accessories.'

[3] Salvatore Ferragamo describes his reliance on Italian artisans when explaining his revised vision for 'Ferragamo Originals' upon his return to Italy in 1927 after experimenting with industrial manufacturers in the US. S. Ferragamo, *Il Calzolaio dei Sogni* (Milan: Skira, 3rd ed, 2010), 94-98. Guccio Gucci's early luggage designs built on the leatherwork and skill of Florentine craftsmen. S.G. Forden, *House of Gucci* (New York: Harper Collins, 2001), 11, 14. An official publication of the Gucci corporation while under the creative direction of Frida Giannini noted, '[Guccio Gucci's] idea was simple: to create a business founded on the unsurpassed artisanal skills of Florentine workshops and the elegance and refinement of Britain associated at the time.' See '1921', in 'Forever Now', in F. Giannini et al eds, *Gucci: The Making Of* (New York: Rizzoli, 2010), 10. In some ways this association with tradition is part of an even longer Italian tradition outside of fashion proper. As Luca Cottini has described, the complementary relationship between industrial objects and traditional craftsmanship and art in Italy has been present since the 1880s when objects began to be newly aestheticized by authors such as Serao and d'Annunzio and as products came to represent Italian style at Universal Expositions. L. Cottini, *The Art of Objects* (Toronto: University of Toronto Press, 2018), 14, 18-24.

[4] E. Corbellini and S. Saviolo, *Managing Fashion and Luxury Companies* (Milano: Rizzoli, 2009), 49-55.

[5] Salvatore Ferragmo's son Leonardo Ferragamo is currently Chairman of the Salvatore Ferragamo SpA Board, while his grandson, James Ferragamo, is a Director. See 'Board of Directors' available at https://tinyurl.com/mr3kfpnb (last visited 20 September 2023). Prada, in which Prada Holding SpA holds 81% ownership, has the founder Mario Prada's granddaughter, Miuccia Prada Bianchi, her husband Patrizio Bertelli and their son, Lorenzo Bertelli as Executive Directors as of this writing. R. Williams, 'Patrizio Bertelli on Prada's Next Chapter' *The Business of Fashion,* November 18, (2021), available at https://tinyurl.com/3fadz482 (last visited 20 September 2023). See 'Corporate Governance, Board of Directors' available at https://tinyurl.com/3p2a3dvw (last visited 20 September 2023). While Gianni Versace srl is as of this writing a subsidiary of Capri Holdings Ltd, with the Versace family owning a portion of shares in Capri Holdings Ltd, Donatella Versace, Gianni Versace's sister, is still Versace's Artistic Director. See Capri Holdings Ltd, 'SEC FORM 10-K', available at https://tinyurl.com/b7mp9jnm (last visited 20 September 2023); 'Company Profile' *Versace*, https://tinyurl.com/mryw584t (last visited 20 September 2023); Capri Holdings Limited Completes Acquisition of Versace, 'Press Release', *Capri Holdings Ltd.,* December 31, 2018, https://tinyurl.com/2p8pe3ws (last visited 20 September 2023). Giorgio

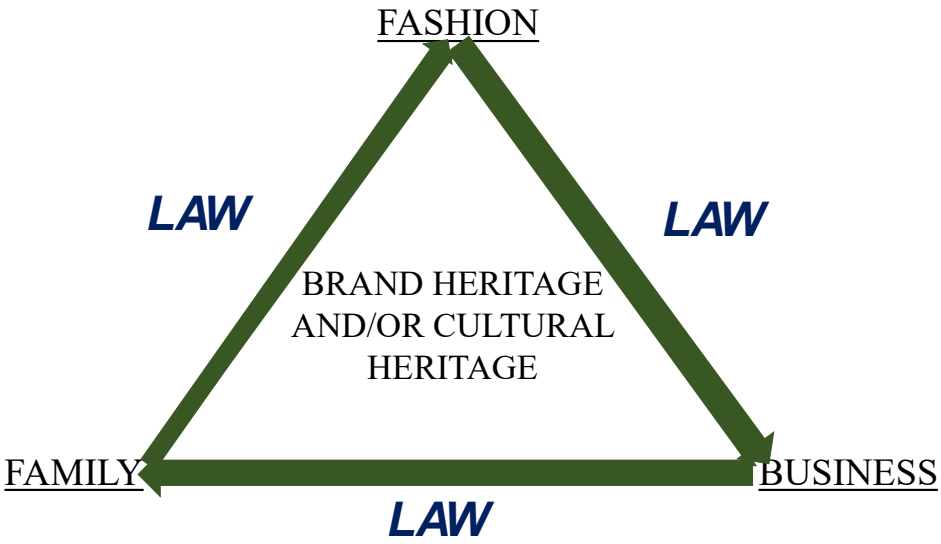
on the Italian territory seems tied to a specific triangular ecosystem.

Figure 1

Fashion, family, and business form the three main points of these firms' activities in Italy, with brand heritage and cultural heritage at their center. Legal rules and standards help to balance the equilibrium in this ecosystem. At the same time, these same legal rules and standards can also weigh in favor of one angle over another: family over fashion, family over business, fashion over family, business over fashion or family. The law also supports the brand heritage and cultural heritage at the heart of family, fashion and business. The law, and those who use the rights and obligations under it, can also lean on brand heritage and cultural heritage to fundamentally break the triangle of family, fashion, and business and the family fashion firm ecosystem.

Armani is still reported as the main shareholder of Armani SpA. The first non-family member to join the Board, Federico Marchetti, only did so in 2020 and was recently reappointed. L. Zargani, 'Federico Marchetti Reappointed to Giorgio Armani's Board' *Women's Wear Daily*, July 11, (2022), available at https://tinyurl.com/yfmdy34y (last visited 20 September 2023). F. Rotondi, 'Giorgio Armani Says Company's Independence Is Essential: MFF' *Bloomberg*, September 18, 2021, https://tinyurl.com/ytmkv3je (last visited 20 September 2023). Missoni is yet another example, with Ottavio and Rosita Missoni's daughter Angela Missoni having played a large role in the closely held company's product design and management until 2021. T. O'Connor, 'Missoni Sells Minority Stake to Private Equity Firm in €70 Million Deal' *The Business of Fashion*, June 15, 2018, https://tinyurl.com/4e56xvp3 (last visited 20 September 2023). T. Blanks, 'Angela Missoni Exits Creative Director Role' *The Business of Fashion*, May 19, 2021, https://tinyurl.com/4yuhdc3e (last visited 20 September 2023).

Figure 2



As part of this Symposium on *Fashion Law, Italian Style*, our essay explores the unique ecosystem of multinational family fashion brands in Italy and the role that the law plays in preserving, frustrating, enabling and, at times, breaking the ecosystem where these brands operate as firms. In the process, we also wonder, what is the best role for law within an ecosystem of family, fashion, and business grounded by brand and cultural heritage? What legal rules might uniquely allow this ecosystem to thrive? Providing at least initial answers to these questions is timely. Ostensibly founded in New York at the turn of the 21st century,[6] the field of Fashion Law began, despite the existence of laws applicable to fashion for centuries,[7] with what might be characterized as a uniquely American perspective. Born at a

[6] S. Scafidi, 'Fiat Fashion Law! The launch of a label – and a new branch of law', in A. Behr et al, *Navigating Fashion Law: Leading Lawyers on Exploring the Trends Cases, and Strategies of Fashion Law* (Boston: Thomson Reuters/Aspatore, 2012); G.C. Jimenez and B. Kolsun eds, *Fashion Law: A Guide for Designers, Fashion Executives, and Attorneys* (London: Fairchild Books, 2010); M.K. Brewer, 'Fashion Law: More than Wigs, Gowns, and Intellectual Property' 54 *San Diego Law Review*, 739, 742 (2017); J. Buchalska, 'Fashion Law: A New Approach' 7 *Queen Mary Law Journal,* Special Conference Issue 13- 26, 14-15 (Autumn 2016); S. Scafidi, 'Towards a Jurisprudence of Fashion' 29(2) *Fordham Intellectual Property Media & Entertainment Law Journal*, 429 (2019). In her work Scafidi also notes the importance of the French foray into Fashion Law before her own. J. Belhumeur, *Droit International de la Mode* (Treviso: Canova, 2000) (exploring the legal protections afforded to fashion from a comparative intellectual property perspective between France, Italy and supranational and international law with reference to fashion history, aesthetics and art; the work is an evolution of Belhumeur's PhD dissertation at the University of Geneva).

[7] Sumptuary laws are just one example. See C. Koveski Killerby, *Sumptuary Law in Italy 1200-1500* (Oxford: Clarendon Press, 2002).

time when increased copyright protection for American fashion designers was at issue, US legal scholars have shaped Fashion Law into a field that is fundamentally defined by intellectual property questions, casting the legal rules applicable to the American fashion industry as inferior to their European counterparts[8] or as part of a different tradition of rules for fashion altogether.[9] We might say that the *Star Athletica* case, in all its problematic complexity, as well as the now widely recognized role of intellectual property law's negative space, are the unique contributions of the American style of Fashion Law. While Italian fashion may have had its own experiences with the evolution of the separability test[10] and fashion design protection under the law, the importance of brand heritage and cultural heritage to the fashion industry in Italy seems to offer Italy's unique contribution to the field of Fashion Law.[11] This is especially so as fashion firms in Italy continue to leverage their brand heritage in unique ways and partner with cultural institutions in Italy in dynamic initiatives, from museums to archives, restorations and other funding models. As fashion firms in the US evaluate their connections to founders and founding families,[12] decide to use their brand heritage

[8] As evidenced primarily by the work of Susan Scafidi and the testimony of American designers to Congress. See S. Scafidi, 'Intellectual Property and Fashion Design', in P.K. Yu ed, *Intellectual Property and Information Wealth* (Westport: Praeger, 2007); G.C. Jimenez and B. Kolsun, *Fashion Law: Cases and Materials* (Durham: Carolina Academic Press, 2016), 345-355. See also C.S. Hemphill and J. Suk Gersen, 'The Law, Culture, and Economics of Fashion' 61 *Stanford Law Review*, 1147 (2009).

[9] As evidenced by the work of Chris Sprigman and Kal Raustiala in their trio of *Piracy Paradox* articles. See C. Sprigman and K. Raustala, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' 92 *Virginia Law Review*, 1687 (2006); C. Sprigman and K. Raustala, 'The Piracy Paradox Revisted' 61(5) *Stanford Law Review*, 1201, 1204, (2009); K. Raustiala and C.J. Sprigman, 'Faster Fashion: The Piracy Paradox and its Perils' 39(2) *Cardozo Arts and Entertainment Law Journal*, 535 (2021).

[10] See J.H. Reichman, 'Design Protection after the Copyright Act of 1976: A Comparative View of the Emerging Interim Models' 31 *Journal Copyright Society* USA, 267 (1984) and F. Morri, 'Le Opere dell'Industrial Design tra Diritto d'Autore e Tutela come Modelli Industriali: Deve Cambiare Tutto Perché (quasi) nulla cambi?' *Rivista di Diritto Industriale*, 177 (2013).

[11] We do note that the French fashion industry seems to have had a lengthy relationship with fashion's heritage value. An exhibition of historic dress was staged at the 1900 Universal Exhibition. See G. Cain et al, *Exposition universelle internationale de 1900 - Musée rétrospectif des classes 85 & 86 Le Costume et ses Accessoires* (Saint-Cloud : Imprimerie Belin Frères, circa 1900). The French state also collects examples of fashion for their state collections. See J. Diderich, 'French Government to Buy Five Designer Items Every Season' *Women's Wear Daily*, April 28, (2017), available at https://tinyurl.com/296yth3a (last visited 20 September 2023). The first museum exhibit officially announcing fashion as part of heritage was also dedicated to Yves Saint Laurent, although held at the Metropolitan Museum of Art in 1983. S. Menkes, 'Gone Global: Fashion as Art?' *New York Times*, July 4, (2011), available at https://tinyurl.com/3ayasmvy (last visited 20 September 2023). At the same time as these examples show fashion heritage's relevance in France and in the US, we feel Italy's heritage contribution to the fashion industry has been undervalued and understudied, especially outside of Italy.

[12] Eileen Fisher of the eponymous US brand, has recently shared her plans to exit her company, and is contemplating her legacy as part of this move. E. Paton, 'The Queen of Slow Fashion on the Art of a Slow Exit' *New York Times*, August 13, (2022), available at https://tinyurl.com/4denpn62 (last visited 20 September 2023). See also E. Clark, 'Will there be another Ralph, Calvin, or Donna?'

as part of their value propositions,[13] and engage with cultural heritage sites and public administrations,[14] Italian case studies may provide helpful guidance.

The essay proceeds in three parts. First, we share some context regarding our conception of closely held corporations, and how the family fashion firms we spotlight map on to what we identify as a closely held spectrum. In the second section we explore duties for family members working within the family fashion firm ecosystem and exit strategies from the family fashion firm for these same players. We compare legal rules and standards in the US and in Italy, mainly because the Italian family fashion firms we spotlight are multinational companies with a strong presence in the United States. We apply the rules to different historic and contemporary examples of the activities of family fashion firms in Italy. As part of the application, we make some observations regarding how legal rules seem to weigh one part of the family/fashion/business triangle over another, and what the legal rules' practical application might mean for the present and future family fashion firm ecosystem founded on brand heritage and cultural heritage.

II. Law and the Ecosystem of the Family Fashion Firm Between Italy and the US

Family and fashion exert unique pressures on business activities. Just as the talents of individual family members can provide ready sources of talent in-house, family dynamics can add friction to otherwise less problematic management decisions. Similarly, as an industry built on a combination of intangible, symbolic value, and the frantic production of tangible products,[15] operating a business in

Women's Wear Daily, August 15, (2022), available at https://tinyurl.com/mwfarkjk (last visited 20 September 2023). Outside of the fashion industry proper some American cities are seeing the next generation take over the family business. A. Kreuger, 'Saving the Family Business in a Beach Town Where Money Talks' *New York Times*, August 12, (2022), available at https://tinyurl.com/57xfu2kt (last visited 20 September 2023).

[13] For example, Marc Jacobs has recently launched handbags designed from iconic archival examples (the M-Archives). See https://tinyurl.com/bdfhv9k5 (last visited 20 September 2023).

[14] The most quintessential American example may be The Metropolitan Museum's continuous relationships with fashion brands as part of the Costume Institute's exhibitions. For the most recent see 'In America: A Lexicon of Fashion', available at https://tinyurl.com/4zyayjpc (last visited 20 September 2023). Chanel also staged a fashion show in front of the Temple of Dendur: V. Friedman, 'Chanel Has Its Own Met Gala, in a Way' *New York Times*, December 5, (2018), available at https://tinyurl.com/ydh2ay5a (last visited 20 September 2023). The debacle with Kim Kardashian wearing Marilyn Monroe's dress has raised the issue of how to safeguard American fashion as part of cultural heritage in museum and conservator terms. See D. Vankin, 'Conservators 'speechless' that Kim Kardashian wore Marilyn Monroe's dress to Met Gala' *Los Angeles Times,* May 3 2022, available at https://tinyurl.com/ycuzs2f9 (last visited 20 September 2023).

[15] TFL, 'There's More to the Resurgence of Logomania than Meets the Eye' *The Fashion Law*, January 19, (2018), available at https://tinyurl.com/mnc9y5n5 (last visited 20 September 2023); B. Beebe, 'The Semiotic Analysis of Trademark Law' 51 *UCLA Law Review*, 621 (2004); O. Ahmed, 'As Branding Evolves, What's a Logo Worth?' *The Business of Fashion*, 29 July 2017, available at https://tinyurl.com/yckun6d2 (last visited 20 September 2023) (explaining the fluidity of

the fashion industry requires responding to specific business pressures. The need to create timely trends while also being sustainable can create both profit-generating opportunities and risky ventures. While fashion firms might certainly be considered like firms in other industries, the fashion industry exists in a space between function and form, between necessity and pure luxury. While firms in the fashion industry certainly market products that serve a function (to clothe the body, hold personal possessions, keep warm, and other reasons) fashion firms are just as tied to symbolic value, to traditional knowledge, and to unique corporate universes and storytelling. Fashion firms are called to succeed by producing a hybrid product, if you will, one that is functional and yet tells a story, one that fulfills some necessary characteristics and yet is prized for its quality, its form, and other qualities over and above necessity. At the same time, they are increasingly called to provide benefits to a community beyond their own consumers, benefits that are practical (reduced carbon emissions) but also social (diversity and inclusion, support of culture and communities) and to incorporate these benefits into their very products (using different raw materials, designing for a spectrum of body shapes, and/or supporting cultural initiatives). The production of a car, the sale of bonds, or the sale of a work of art might exhibit some of these similar tensions but not, we would argue, to the extent that the entirety of these unique tensions would affect both production, management decisions and firms' day to day activities to such a holistic extent as for fashion firms.

The law already offers legal personalities for firms to enable business activity: options from the partnership to the limited liability company and the corporation. These legal personalities come with obligations and duties for those working with and for the firm as owners, managers, shareholders, and directors. The law also offers intellectual property rights and other contractual agreements as partners to business structures. Depending on the balance a founder or founder(s) wish to strike between family, fashion, and business, some legal personalities might be better than others. The involvement of various family members, attention to a specific market segment, and the role that brand heritage and cultural heritage will play in a fashion brand's value proposition also shape the handling of intellectual property and other related rights.

Family fashion firms often begin as limited liability companies with pass-through taxation and member or quota-holder management.[16] Central to the

brand codes and logos, which is even more relevant today as fashion confronts the metaverse). Some designers have combatted the fast pace of fashion by looking to their archives for pieces to resell. C. DeLong, 'Are Designers Ready for the Supply Circle?' *L'Officiel USA*, 13 November 2020, available at https://tinyurl.com/bdhf2xeu (last visited 20 September 2023). One example of a designer who has sold reissued pieces from his archive is Raf Simons. E. Brain, 'Raf Simons Archive Redux Brings Back 25 Years Worth of Grails' *Hypebeast,* 22 January 2021, available at https://tinyurl.com/mr2m2m59 (last visited 20 September 2023).

[16] For an overview of recommended business structures for fashion brands and retail concepts, see D. Hand and B. Kolsun, *The Business and Law of Fashion and Retail* (Durham: Carolina Academic Press, 2020), 43: (noting 'the number of founders, for example, will help determine

concept of an LLC is flexibility (along with the defining feature of limited liability for multiple members). LLCs have greater freedom to define the roles of quota-holders or members, and the relationship between members and managers.[17] A board of directors, in an LLC, is optional.[18] LLCs can be member managed or manager managed. This flexibility can also mean that the ownership of intellectual property rights associated with the fashion the company produces and the intellectual property generated by members of a founding family can be structured flexibly. Trademark rights might, for example, be owned by the company, but copyrights might be assigned or licensed. Design service agreements as well as collaboration and influencer agreements might provide opportunities to spread the wealth and creativity of a family fashion firm without involving all family members in an LLC as members or quota-holders.[19] One LLC might even enter a joint venture with another LLC, perhaps valorizing a family member's unique talents in the fashion industry outside the original company's structure.[20] Of course, when LLCs wish to go public or when greater formalities become more attractive, an LLC can transform into a corporation in Inc or SpA form. In the Inc and SpA model, shareholders 'own' the corporation and do not usually participate directly in the management of the corporation, as members or quota-holders may do in an LLC or srl. Rather, shareholders elect directors as both the primary agents of the corporation and of shareholders. These directors are responsible for long-term strategy of the corporation and corporate governance.[21] In Italy shareholders usually follow the Latin model and elect both a Board of Statutory Auditors and a Board of Directors.[22] Family members of a fashion firm with an Inc or SpA form

whether the business should be structured as a sole proprietorship, a partnership, a limited liability company ("LLC"), or a corporation'.). Owners of LLCs are referred to as members in the US, as opposed to shareholders (ibid 47). In Italy, the term quota-holder is used in English and the term '*socio*' in Italian. For a description of '*soci*' and quota-holders in Italy see 'Società a responsabilità limitata' *Enciclopedia Treccani,* available at https://tinyurl.com/38tj4pz8 (last visited 20 September 2023); A. De Nicola and M. Carone, *Italian Company Law 1. Companies Limited By Shares* (Milano: Egea, 2014), 25, 27-28.

[17] A. De Nicola and M. Carone, 'Società a responsabilità limitata' n 16 above. See D. Hand and B. Kolsun, n 16 above at 47 (describing the operating agreement and the flexibility it offers in an LLC).

[18] D. Hand and B. Kolsun, n 16 above, 16, 45-46, 47 (describing the different formalities between a corporation and an LLC). Under Italian law, see Art 2479 Codice Civile.

[19] For a description of the nuances of licensing agreements in fashion, a breakdown of the elements of a licensing agreement (from granting the right to use to including a prescribed time period), and an outline of design service and influencer and collaboration agreements, see D. Hand and B. Kolsun, n 16 above, 585- 590.

[20] ibid 80-83 (describing the links between licensing and joint ventures).

[21] ibid 45.

[22] For a description of the differences between the one-tier Anglo-Saxon governance model, the two-tier German model, and the traditional Latin model as types of corporate governance models see M. Ventoruzzo et al, *Comparative Corporate Governance* (St. Paul: West Academic Publishing, 2015), 250-252. Salvatore Ferragamo, for example, has both a Board of Directors and a statutory Board of Auditors. See 'Corporate Governance, Salvatore Ferragamo, SpA', available at https://tinyurl.com/ytmbt932 (last visited 20 September 2023).

may sit on the Board of Directors, be officers of the company appointed by the Board for day-to-day management or shareholders alone.

Today, 'around 85%-90% of all enterprises [in Italy] are family firms'.[23] In addition, scholars have noted how theoretical separation between ownership and control in these enterprises is often blurred as Italian companies are characterized by strong ownership structures. Ownership of impactful percentages of the stock, including of up to 50%, can be concentrated in the hands of a few, whether as individuals or as a holding company with 'faithful' managers facilitating these shareholders' control.[24] The concept of 'closely-held' when speaking of Italian enterprises, and of family firms, can therefore be thought of on a spectrum. At their most narrow, close corporations are defined as corporations which do not usually exceed some 'statutory defined number of shareholders and are not public corporations'.[25] Some scholars have defined family-owned corporations narrowly as a subset of close corporations 'owned by not more than four individuals or families, of whom a qualified majority want ownership to remain', taking their definitions from statutory language.[26] At its most broad, closely-held corporation can mean a publicly held corporation with a majority of the stock concentrated in the hands of one shareholder or, for family firms, a holding company in which the family is the sole shareholder or in which members of the same family act with the same interests. The actions of these 'closely-held' corporations, understood on a spectrum, can also be shaped by family dynamics and the nature of fashion production; by family legacy; by a brand's heritage, and family members; and by a brand's proximity to cultural heritage.

The combination of business and family relationships leads to certain organizational characteristics and dynamics.[27] Key components that contribute to high performance of a traditional non-family owned business include specification of target customers and markets, geographic domain, identification of principle products or services, identification of core technologies, and other

[23] P. Agstner, 'Designing Generation Change in Family Firms: Lessons from Italy' 32 *European Business Law Review*, 419 (2021).

[24] L. Stanghellini, 'Corporate Governance in Italy: Strong Owners, Faithful Managers. An Assessment and a Proposal for Reform' 6(1) *Indiana International & Comparative Law Review*, 91, 135- 140 (1995).

[25] Cornell Law School, 'Close Corporation' *Legal Information Institute*, July 2022, available at https://tinyurl.com/2sc4vbnw (last visited 20 September 2023) ('This number depends on the state's business laws, but the number is usually 35 shareholders').

[26] L. Sund and P. Bjuggren, 'Family-owned, limited closed corporations and protection of ownership' *European Journal of Law & Economics*, 275 (2007). Sund and Biuggren define a family as 'spouses or cohabitees, their descendants (including adopted children and officially recognized stepchildren) and siblings, as well as nephews and nieces. Ownership can be spread among many individuals in each family and the firm can still meet the definition of a family firm, as long as there are not more than four owner-families').

[27] J. Cater III and A. Schwab, 'Turnaround Strategies in Established Small Family Firms' 11(1) *Family Business Review*, 31-50 (2008).

specifications of key elements in the company philosophy.[28] However these components have been shown to be different for family-owned businesses because often family-owned businesses are inflexible or more constrained in their definition of mission due to their 'loyalty to the products or markets invented by previous generations of relatives'.[29] For fashion firms with a strong brand heritage and brand codes, constraints to keep historically successful products are especially relevant. Consider Salvatore Ferragamo's F heel or Gucci's green-red-green stripe. Not only might these designs have acquired secondary meaning on the market, making them financially relevant intellectual properties for the firm, but second and third generations may see these designs as imbued with the creativity and expertise of their grandfathers or fathers, making decisions to break with the use of these designs in current collections fraught with financial and emotional impact. New models are more likely to come from outsiders, but family businesses usually seem to prefer inside succession, and emphasize organizational loyalty. Family business successors typically have little experience outside the company and, since new models also are more likely to come from those who have had a broad variety of personal experience, family business may or may not exhibit the innovation that characterizes high performance.[30] At the same time, new generations of family members can bring life into a company, pushing for new designs and making a corporation more relevant with a broader group of consumers.[31] The presence of a 'specific family founder, spirit, family tradition, family vision, goals, and values'[32] can cut both ways. Fiamma Ferragamo's design of the Vara shoe is a primary example, creating a product which has generated derivative designs and is still a financially viable model for Ferragamo.[33] Fashion trends and consumer wants can lead to new business activities and proposals which family members on boards of directors or as member managers will need

[28] J. Pearce and F. David, 'Corporate Mission Statements: The Bottom Line' 1(2) *Academy of Management Executive*, 109-116 (1987).

[29] E. Vizenetz, *Exploring the role of purpose as part of organizational identity in a family firm* (Masters Thesis - Innsbruck: Leopold-Franzens-Universität, 2021), 161. Martinelli Luce, a design company producing lamps, is a good example of this. As their Director of Merchandising noted, the company can make business decisions not based on profit but, rather, on legacy because they are still run by the daughter of the founder. This would be almost unheard of in a non-family setting. Visit to and Tour of Martinelli Luce with Dott. Lorenzo Calabrese, June 2022.

[30] J.A. Barker, *Discovering the Future: The Business of Paradigms* (Lake Elmo MN: ILI Press, 1985) (Research on paradigms suggests that paradigm flexibility is more possible under certain conditions that are potentially very problematic for family-owned businesses.). This, for example, has been a critique of Ferragamo, which has seemed loathe to turn over control to outside designers and give up control of the brand until now.

[31] C.R. White, 'Fiamma Ferragamo', 57, Dies; Shoe Designer for the Elegant' *The New York Times*, 30 September 1998, available at https://tinyurl.com/yjpcdw6a (last visited 20 September 2023).

[32] F. Canterino et al, 'Leading transformation in a family-owned business: insights from an Italian company' 17:1-3 *International Journal of Entrepreneurship and Innovation Management*, 54-83 (2013).

[33] ibid

to vote on in the context of family dynamics. Consider the importance of resale in fashion today and the questions it raises for current business practices, the preservation of brand heritage, and the connection of that brand heritage to a family's heritage and a country's wider cultural heritage. Gucci VAULT provides an example. VAULT is a resale platform created by Gucci, now fully owned by the French luxury conglomerate Kering, to sell archival pieces and vintage products sourced from second-hand shops and collectors.[34] VAULT offers pieces to the public that reflect Gucci's historic codes (older trademarks, past designs) and the Gucci family's legacy (design aesthetics agreed upon when Gucci family members were designing, products reflective of familial business decisions). Vintage Gucci pieces may also include accessories by non-living authors which are over seventy years old, placing them in the definition of cultural property.[35] Directors approving Gucci Vault as a business activity would consider the benefits of such a project for Gucci's bottom line. Directors who are family members might also consider whether they want precious family heirlooms placed on the market. The perspective of the State towards these items as cultural property might also be a factor in directors' decisions. So might a family member/director's desire to have their family history acknowledged as part of a national cultural heritage. The corporation itself might already have supported cultural initiatives led by the State. Where do we draw the lines between these different interests? How should fashion firms, and the directors and members who manage them, understand their duties towards entities with such symbiotic relationships between family, fashion, and business? How should fashion firms, and the directors and members who manage fashion firms, conceptualize of their products and know-how as part of a Nation's cultural heritage, as a first matter? How should fashion firms, and the directors and members who manage them, weigh the role of brand heritage and cultural heritage in their business decisions? Does business law already provide standards with which to answer these questions?

Directors of corporations generally owe fiduciary duties - a duty of care[36] and a duty of loyalty[37] - to the corporation, shareholders, and creditors. Corporations may, according to enabling statutes, waive liability for the breach of the duty of care.[38] In the LLC context, operating agreements can contain obligations and language which courts can interpret as imposing fiduciary duties on members.[39] In the exemplary United States' jurisdiction of Delaware, Section 18-1101 of the Delaware Limited Liability Company Act does allow members to restrict fiduciary duties, with

[34] 'VAULT Gucci' available at https://vault.gucci.com/en-US (last visited 20 September 2023).

[35] See Art 10 Italian Code of Cultural Property, Decreto Legge no 42/2004.

[36] *Smith* v *Van Gorkom*, 480 A.2d 858. In Italy, see Art 2392 Codice Civile. See also A. De Nicola and M. Carone, n 16 above, 112.

[37] Arts 2390 and 2391 Codice Civile. See M. Ventoruzzo et al, n 22 above, 316-319.

[38] 8 Del. C. 1953, § 102 (b)(7).

[39] See, for example, *Gatz Properties, LLC* v *Auriga*, C.A. No. 4390 (Del. Nov. 7, 2012) 13-14 (PDF pagination).

the exception of acts in bad faith.[40] However, Section 18-1104 provides a catch-all provision applying 'the rules of law and equity relating to fiduciary duties' to circumstances not outlined in the Act.[41] In the srl context, managers, and members when managing,[42] have a duty of care and a duty of loyalty towards the corporation as do members which authorize managers' decisions or who approve acts contrary to the duty of care and the duty of loyalty.[43] The business judgment rule and procedural presentations already provide additional safeguards for directors to follow the duty of care and the duty of loyalty, respectively, both in Italy and in the US.[44]

Closely held corporations, whether in Inc or LLC form, raise questions for the application of fiduciary duties. In closely held corporations relationships between shareholders, directors, and members can exhibit power imbalances. Shareholders and members may be tied to the corporation in ways that are more like a partnership, which requires heightened fiduciary duties more definitive of strict agency law.[45] Family dynamics and fashion make these questions even more pressing. When a corporation is closely held, with a controlling shareholder

[40] 68 Del. Laws, c 434, §§ 18-1101 (providing in the following sections, '(b) It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements. (c) To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement, the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing. (d) Unless otherwise provided in a limited liability company agreement, a member or manager or other person shall not be liable to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement for breach of fiduciary duty for the member's or manager's or other person's good faith reliance on the provisions of the limited liability company agreement. (e) A limited liability company agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a member, manager or other person to a limited liability company or to another member or manager or to another person that is a party to or is otherwise bound by a limited liability company agreement; provided, that a limited liability company agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing').

[41] 68 Del. Laws, c 434, paras 18-1104 ('In any case not provided for in this chapter, the rules of law and equity, including the rules of law and equity relating to fiduciary duties and the law merchant, shall govern').

[42] Art 2475 Codice Civile (noting that, unless otherwise provided for in the operating agreement (or founding document) an srl is administered by one or more members).

[43] Arts 2476 and 2475 Codice Civile (describing conflicts of interest).

[44] Described further in sections 1 and 2 below.

[45] Restatement (Second) of Agency § 379, 'Duty of Care and Skill' ('(1) Unless otherwise agreed, a paid agent is subject to a duty to the principle to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has.'). ibid § 387, 'Duty of Loyalty' ('Unless otherwise agreed, an agent is subject to a duty to his principle to act solely for the benefit of the principle in all matters connected with his agency.').

who is also a family member, what standard of fiduciary duty should apply? Should operating agreements be able to restrict the duty of care when an LLC is member-managed by family members who are in a parental relationship with other members? Should standards of fiduciary duty law take specific aspects of the fashion industry into account when evaluating directors' and members' actions, especially business decisions that exist at the nexus of family, brand, and cultural heritage, like the use of designs of a founder held in a corporate archive or museum? In the United States, some jurisdictions already hold members and shareholders in closely held corporations to the different, what may seem like higher standards of fiduciaries under agency law, requiring that these duties apply to members' interactions with each other and not just towards the corporation. There is some disagreement as to whether this different standard is applicable in every circumstance no matter the operations of the company in practice. This leads in some sense to different schools of thought regarding fiduciary duties for closely held corporations.[46] While US corporate law has recognized heightened fiduciary duties for shareholders, officers and directors in close corporations in light of different variables, the law does not distinguish between fiduciary duties applicable to a family owned business and fiduciary duties applicable to any other business.[47] US corporate law also does not specifically take the unique ecosystem of fashion, family, and business into account.[48] In Italy, directors in corporations are already

[46] See *Donahue* v *Rodd Electrotype Co*., 328 N.E.2d 505, 587 (Mass. 1975) ('Many close corporations are really partnerships between two or three people who contribute their capital, skills, experience and labor. Just as in a partnership, the relationship among the stockholders must be one of trust, confidence and absolute loyalty if the enterprise is to succeed. All participants rely on the fidelity and abilities of those stockholders who hold office.'). But see *Powers Steel & Wire Products*, Inc. v *Vinton Steel, LLC*, Ariz: Court of Appeals, 1 Div. 2021, applying a control test as opposed to a blanket higher standard of fiduciary duty ('In the absence of persuasive Arizona authority, Powers Steel cites out-of-state cases for the proposition that shareholders in closely held corporations always owe each other fiduciary duties. See *Donahue* v *Rodd Electrotype Co. of New England, 328 N.E.2d 505, 515 (Mass. 1975)*. But the Donahue rule is not universal. See *Nixon* v *Blackwel*l, 626 A.2d 1366, 1380-81 (Del. 1993) (refusing to create special rules applicable to closely held corporations); *Hoggett* v *Brown*, 971 S.W.2d 472, 488 (Tex. App. 1997) ('[A] co-shareholder in a closely held corporation does not as a matter of law owe a fiduciary duty to his co-shareholder.'); *Carson Cheng* v *AIM Sports, Inc*., CV-10-3814-PSG-PLAX, 2012 WL 12953239, *3 (C.D. Cal. May 11, 2012) (holding that under California law a minority shareholder in a closely held corporation 'did not owe a fiduciary duty to other shareholders); *Bagdon* v *Bridgestone/ Firestone*, Inc., 916 F.2d 379, 384 (7th Cir. 1990) ('Corporations are not partnerships. Whether to incorporate entails a choice of many formalities…So it is understandable that not all states have joined the parade.'); see also D.K. Moll, 'Of Donahue and Fiduciary Duty: Much Ado About ...?' 33 *West New England Law Review*, 471, 485 (2011) ('[I]t is simply inaccurate to read *Donahue* for the proposition that partnership law applies in its entirety to closely held corporation disputes.') … Arizona law imposes a fiduciary duty on shareholders who can exercise control over the corporation … We decline Powers Steel's invitation to expand the fiduciary duties of shareholders in Arizona and see no reason why the same focus on control should not apply if the corporation is closely held by several shareholders.')

[47] A.W. Steen, 'Fiduciary Duties in a Family Owned Business' *Davis Wright Tremaine LLP*, 14 May 2014, available at https://tinyurl.com/y779y4dt (last visited 20 September 2023).

[48] Although some commentators note that special legislations requiring specific disclosures

often held to a different, what seems to be a higher standard of a fiduciary under the duty of care in agency law, whether they are in a closely held corporation or not. Directors are required

> 'to carry out the management of the company in accordance with the law and the articles of association with the care that is required in relation to their office and their professional skills.'[49]

Managers and managing members in srls are held to the same standard.[50] These standards already allow important variables to be evaluated in a more express way for the benefit of the corporation. Under the duty of loyalty in Italian law, directors cannot engage in competing business activities without the permission of the Board.[51] In srls contracts concluded by manager or members as managers for the business which exhibit a conflict of interest can be annulled.[52] Particular cases and facts in Italian family fashion firms can show how family dynamics and the particular needs of the fashion industry make the application of these rules in specific contexts supportive of or problematic for family fashion firm's unique ecosystems.

III. The Duty of Care: Factoring in Family, and Brand and Cultural Heritage, Beyond Business for a Family Fashion Firm's Ecosystem

The substance of the duty of care rule requires a director to manage a corporation according to the standard of a prudent director in like circumstances, pursuing the corporation's interests with reasonable diligence and prudence.[53] When a more detailed standard of care with consideration of specific circumstances is required, especially in the application of the standard, as in some jurisdictions for closely held corporations in the US and for corporations and srls in Italy, directors are also held to a level of standard care plus that of any special skill the agent has. To put this in the context of the fashion industry, a designer sitting as a director on a board in a closely held fashion corporation or a designer who is a member managing an LLC has a standard duty of care to make decisions for the company that are both generally informed and in line with his or her special skills as a designer. Under one school of thought in the US, a designer who holds a

might fill this gap, especially in the Italian context. See De Nicola and Carone, n 16 above, 111.

[49] Art 2392 Codice Civile. See also A. De Nicola and M. Carone, n. 16 above, 112. For more on the notion of diligence under the concept of a '*buon padre di famiglia*' see G. Campana, 'La responsabilità civile degli amministratori delle società di capitali' *Nuova giurisprudenza civile commentata*, 2015 (2000).

[50] Art 2476 Codice Civile.

[51] Art 2390 Codice Civile.

[52] Art 2475-*ter* Codice Civile.

[53] Cornell Law School, 'Duty of Care' *Legal Information Institute*, available at https://tinyurl.com/4ex6885a (last visited 20 September 2023).

majority of shares in a closely held corporation and exerts power over minority shareholders might also owe such a duty of care to minority shareholders in the company.

In practice, the business judgment rule, a rebuttable presumption used to evaluate directors' actions and whether there has been a breach of the duty of care, often helps to provide more substance to what diligence and prudence mean in specific circumstances. The purposes of the business judgment rule are grounded in the knowledge that directors must inherently take some risks in managing a corporation, and that courts, judges, and even, for that matter, shareholders,[54] should not second-guess the decisions of directors in circumstances where they have decided in the correct way. These circumstances include obtaining advice from experts, taking the time to make their decisions and even, perhaps, making honest mistakes in the process.[55] The rule requires that

> 'in making a business decision, the directors of a corporation ac[t] on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company'.[56]

So, in the classic extreme *Smith* v *Van Gorkom* case, directors were not safeguarded by the business judgment rule where the board did not consult management on the price per share for a leveraged buyout; did not consult an outside source; and made the decision in a short 3-day period, without documents or added documentation regarding the intrinsic value of the company.[57]

The Italian version of the business judgment rule holds that directors are not liable for

> 'erroneous and/or unfortunate business choices… provided that such choices are part of the range of choices that, in the specific case, could be by a person having the standard of care and knowledge which could be expected from the director of a company operating in the same business sector.'[58]

At a general level, in contrast to US law, Italian law usually places increased duties on directors under the duty of care, requiring actions that reflect directors'

[54] *Gagliardi* v *Trifoods International Inc.,* 683 A.2d 1049 (Del. 1996). ('Shareholders don't want (or shouldn't rationally want) directors to be risk adverse. Shareholders' investment interests, across the full range of their diversifiable equity investments, will be maximized if corporate directors and managers honestly assess risk and reward and accept for the corporation the highest risk adjusted returns available that are above the firm's cost of capital. But directors will tend to deviate from this rational acceptance of corporate risk if in authorizing the corporation to undertake a risky investment, the directors must assume some degree of personal risk relating to ex post facto claims of derivative liability for any resulting corporate loss').

[55] M. Ventoruzzo et al, n 22 above, 296.

[56] *Smith* v *Van Gorkom*, 480 A.2d 858 (Del. 1985).

[57] ibid.

[58] A. De Nicola and M. Carone, n 16 above, 112.

professional skills, as noted above.[59] Like US law, Italian law places an emphasis on being well-informed and seeking expert opinions to cure a director's lack of knowledge and make a relatively well-calculated risk.[60] While, as in the United States, the evaluation of whether a director has exercised their duty of care is mostly procedural in nature, Italian courts may also evaluate gross negligence, reckless disregard, and a director's 'actual awareness that [their] decision would cause prejudice to the company.'[61] Although still a procedural check, we might say that Italian courts inspect the 'reasonableness' of directors' choices to some extent and may consider, for example, whether the directors' *ex ante* decision was grounded, considering the information they had available at the time.[62] In comparing the US and Italian standards for the duty of care with family fashion firms in mind, however, the more express relevance of the type of business or business activities in the Italian context stands out. The devil, as they say, seems to be in the details of the application of the standard.

The knowledge gleaned from similar decisions by directors of companies in the same business sector can make a difference for the scope of the duty of care in a family fashion firm. Directors and managers in family fashion firms can find themselves having to approve officers' and members' plans to support activities outside a family fashion firm's core business model.[63] Parallel activities can include funding the restoration of an artwork, collaborating with a cultural institution to sponsor or organize a museum exhibition, or even supporting academic conferences. The general, and not heightened, US duty of care might already provide directors with room to approve these parallel activities. Directors of a US corporation could ask for the opinion of experts on the benefits of these activities. They could take time to research and evaluate the proposed activities and the officers' reasoning with supporting documentation, and could, in good faith, approve the activity. However, by not evaluating directors' decisions based on the knowledge of directors in the same business sector and instead privileging a knowledge based in the *best interests of a specific company* alone, the US rule may allow a director or manager in an LLC to disregard beneficial trends in the fashion industry which would support an approval of these parallel activities. Of

[59] M. Ventoruzzo et al, n 22 above, 297.

[60] G. Campana, n 49 above, 20215. 'Ciò che da lui è lecito pretendere, ai fini di una condotta diligente, è che al momento del compimento delle scelte direttive sia ben informato e che, dinanzi alle inevitabili lacune delle proprie conoscenze tecniche, si avvalga di validi collaboratori, di modo che le sue scelte siano espressione di decisioni ponderate e frutto di un rischio calcolato': Trib. Milano, 2 March 1995, *Giurisprudenza italiana*, 706 (1995).

[61] A. De Nicola and M. Carone, n 16 above, 112.

[62] ibid 112-113.

[63] A. Saca, *Fashionable Sponsorship: Fashion Corporations and Cultural Institutions* (Masters Thesis - South Orange, NJ: Seton Hall University, 2013), available at https://tinyurl.com/yc29s8wn (last visited 20 September 2023) (discussing 'the Tod's Corporation funding the restoration of the Colosseum in Rome, the Ferragamo Corporation's donation to the restoration of the Leonardo da Vinci's Saint Anne, and the Ralph Lauren Corporation funding the restoration of the Star-Spangled Banner in the National Museum of American History').

course, at the same time, the US rule gives directors and managing members the latitude to act *above* trends in the fashion industry if their specific company is a first mover in supporting restorations of artworks, sponsoring cultural activities, and other similar parallel activities. Individual by-laws of a corporation can put a proverbial thumb on the scale for comparisons with other directors in the same business sector, supporting a broader interest of the corporation. The tensions between the best interests of a corporation and business activities and actions of a wider business sector, and how that tension is included in the notion of what is in the best interests of the corporation, can support or undermine the unique ecosystem of family fashion firms by privileging business over family or by negating the importance of certain links between brand heritage and cultural heritage for the family fashion firm. Evaluating the facets of Salvatore Ferragamo SpA's decision to fund the restoration of the Fountain of Neptune in Piazza Signoria can make this tension and the benefits of one application of the standard of duty of care over another more evident.

Salvatore Ferragamo SpA is currently a public corporation in which Ferragamo Finanziaria SpA is a controlling shareholder.[64] Ferragamo's links to Florence are a key part of the brand's business proposition and the family's history.[65] Florentine artisanship and the support of initiatives on the Florentine and Tuscan territory have also been central to the development of Ferragamo's fashion product with materials, traditional craftsmanship, and know-how grown from Florentine knowledge and tradition.[66] Indeed, the connection to Florence reveals the

[64] Salvatore Ferragamo Group Corporate Governance Report 2021, available at https://tinyurl.com/bdcrvcz9 (last visited 20 September 2023).

[65] 'Arrival in Florence', *Timeline, Ferragamo*, https://tinyurl.com/mwfdjevw (noting, with regards to Salvatore Ferragamo's decision to set up his business in 1927 in Florence, despite being from a small town outside of Naples and having worked in the United States, 'After a tour of Italy and a stay in Naples, where Salvatore had received his training, in the summer of 1927 he arrived in Florence, which he chose for its historic reputation as a city of art, culture and business. Ferragamo was charmed by the beauty of the Tuscan capital and he filmed the city with the camera he had purchased in America, capturing the Uffizi Gallery, the Lungarno (the streets along the Arno River), Piazzale Michelangelo and the hill in Fiesole where he would soon make his home. Florence had recently become the burgeoning hub of the Fascist government's nation-wide strategy to relaunch Italian artisanship and tourism. However, Ferragamo's meetings with master shoemakers left him disappointed. Many were skeptical about his new techniques for crafting shoes and measuring feet. Only younger artisans showed curiosity and interest in his plan. So Salvatore opened a factory that would serve as a training ground for 75 apprentices under his supervision. He salvaged the city's artisanal heritage and melded it with the production system of American factories, breaking down the process into step'). Throughout Wanda Ferragamo's life in Florence she was active in many Florentine activities and societies. As recognition of her support, Wanda Ferragamo was made an Honorary Officer of the British Empire (OBE) for her support of the British Institute of Florence and, in 1996, was awarded the 'Fiorino d'oro' for entrepreneurship by the Mayor of Florence 'for her steady and intelligent commitment to creating and promoting an exemplary business of world renown, thereby providing a significant service to the city of Florence' 'Wanda Miletti Ferragamo' *Museo Salvatore Ferragamo*, https://tinyurl.com/24rxsrat (last visited 20 September 2023).

[66] As early as 1926 Ferragamo spoke of training young Florentine artisans to implement his

interconnectedness of family, fashion, and business for Salvatore Ferragamo SpA. A decision, for example, to spotlight artisans working on Ferragamo luxury products can easily include a spotlight on the history of the shoe's production, Italian artisanship more generally, and Salvatore Ferragamo's vision as the founder of this luxury brand. Such a spotlight could certainly be in the best interests of Salvatore Ferragamo as a company. The spotlight emphasizes the luxury nature of its product and a strong connection to *Made in Italy*.[67] At the same time, an emphasis on Salvatore Ferragamo's vision as a founder is also in the best interests of the Ferragamo family, reflecting well on their family's heritage. The reverse can also be true: a desire by the Ferragamo family to give back to the city of Florence, as evidenced by Wanda Ferragamo's many activities, certainly reflects well on the Ferragamo family, but also gives cultural cachet to the brand, especially in contemporary times where consumers increasingly prize sustainability and brand engagement in cultural projects.[68] In addition, a financial contribution to restore the Fountain of Neptune can also be of benefit to the corporation, in a traditional sense. Thanks to the Art Bonus legislation, sponsoring the restoration through a financial contribution allows Salvatore Ferragamo SpA to benefit from a tax break.[69] Were directors to strictly interpret 'in the best interests of the corporation' under the US standard of the duty of care, they might be excused for only approving such a parallel activity if the sponsorship was of financial benefit to the corporation. Prior to the Art Bonus legislation, for example, the benefit of cultural cachet and increased visibility for the brand might not have been thought enough to justify the approval of a restoration sponsored by the corporation.

At the same time, Ferragamo's directors could be first movers in considering cultural activities in the best interest of the corporation. The Ferragamo Museum founded as a corporate museum by the Ferragamo family in 1995 is an example.[70] Applying an increased standard of the duty of care may be valuable to members of the Ferragamo family acting in their capacity as Board members and shareholders in this closely held corporation. Applying the actual standard of diligence might be read to require directors or controlling shareholders to parse interests of family, fashion, and business more closely as fiduciaries. In addition, where applicable, special skills that family directors or member managers may have- including

innovative vision for shoe designs. See S. Ferragamo, n 3 above.

[67] An important factor for the company's bottom line, given that the luxury design industry consortium *Altagamma* estimates that creative and cultural sectors account for 6.85% of Italy's GDP, or 115 billion euro. See 'L'Alta Industria Culturale e Creativa: Un Patrimonio Europeo', July 2020, available at https://tinyurl.com/yc2rrvdx (last visited 20 September 2023).

[68] C. Anderson, 'For Big Businesses, Sustainability is Starting to Pay Off' *The Fashion Law*, 21 December 2021, available at https://tinyurl.com/2m87eaje (last visited 20 September 2023).

[69] For a more extensive discussion of the drafting of ArtBonus and the 60% tax break it affords contributors over a period of three years see L. Casini, *Ereditare il Futuro* (Bologna: il Mulino, 2014).

[70] 'Museum History' *Museo Salvatore Ferragamo*, https://tinyurl.com/md4njm7m (last visited 20 September 2023).

knowledge of family heritage and a founder's vision- might be beneficial.

When decisions are made holistically and flexibly, taking the best interests of all three corners of the ecosystem of the family fashion firm into account, an impactful balance can be achieved. More narrow conceptions of business interest based only in financial benefit to the corporation put emphasis on the business area of the ecosystem alone. Such a narrow conception risks undermining other parts of the family fashion firm which make it uniquely successful. These include the family's perspective, family heritage, and the cycle of fashion that contrasts the timeliness of trends with the timelessness of styles and craftsmanship.[71] All of these perspectives beyond business proper can lead to compelling parallel activities that enable profit for the firm in direct or indirect ways.

A narrow conception of business interest within the duty of care also undermines the links between brand heritage and cultural heritage which can make a brand a national cultural force. When announcing the completion of the restoration of the Fountain of Neptune financed by Salvatore Ferragamo SpA, Ferruccio Ferragamo, Salvatore and Wanda Ferragamo's son and, at the time, the Chairman of the Salvatore Ferragamo Group Board noted

> 'It has been a privilege for our company to support this important restoration project and see this work of art restored in its full splendour to Florence, its residents and the many travellers from around the world who visit the Tuscan capital every year. This is the result of a virtuous partnership between the public and private sectors and it is our family's way of thanking the city and upholding the close relationship that my mother and father forged with it. This project is a tangible expression of our gratitude to Florence'.[72]

The partnership Ferruccio Ferragamo describes is also the fruit of a bond between the brand's heritage and Italy's cultural heritage. The partnership fuses fashion design and family heritage, Ferragamo brand's presence and business practices with connections to craftsmanship as intangible cultural heritage, and the tangible Fountain of Neptune as cultural property. Far from just an expression of gratitude separate from a bottom line, the partnership and project also provided a compelling background to Ferragamo's fashion show in Piazza della Signoria in Florence a few months after the restoration's completion.[73] When seen in the greater context of the family fashion firm ecosystem, cultural projects such as Ferragamo's restoration of the Fountain of Neptune provide a reasonable and logical foundation for future brand projects, from impactful runway shows with media impact to profitable sales. The duty of care in the US provides flexibility to directors and member-managers, with possibly higher standards when the

[71] E. Corbellini and S. Saviolo, n 4 above and J. Suk Gersen, n 8 above.

[72] 'Fountain of Neptune Restoration' - Press Release *Salvatore Ferragamo*, 25 March 2019.

[73] 'Ferragamo, la sfilata da sogno in piazza della Signoria' *La Nazione*, 11 June 2019, available at https://tinyurl.com/26yhmd7e (last visited 20 September 2023).

boundaries between shareholders, members, and directors are blurred in a closely held corporation. At the same time, this flexibility might benefit from a deeper and more express understanding of what is actually in the best interests of a family fashion firm given the unique relationship between family, fashion, business, and the use of brand and cultural heritage to its activities.

By more expressly incorporating considerations of what knowledge directors in a similar business sector may have in the actual standard of diligence, the Italian duty of care opens the door for such specificity. Italian business has throughout history seen business activities as closely connected to cultural activities.[74] Considering therefore how other directors in family fashion firms have facilitated parallel activities like restorations gives life to a broader understanding of what is in the best interests of the corporation in Italy. At the same time, there may be a limit to a broader interpretation of what is in the best interests of a family fashion firm. Measuring one family fashion firm's judgments against another's may not be logical: not all family fashion firms are in fact created equal. The recent rise in resale platforms and upselling[75] in the fashion industry provides an example. This now popular fashion practice might run counter to the best interests of a family fashion firm by too closely marrying brand heritage with cultural heritage for specific family fashion firms' ecosystems. Resale extends the life of fashion products and is effectively the contemporary version of vintage dressing or buying goods secondhand. Similarly, upcycling involves taking an old product and using it as raw material for a new product.[76] Resale ventures are still evolving through profitable partnerships with third party platforms or in independent resale initiatives managed by firms themselves.[77] These ventures consistently allow fashion brands to 'drive customer acquisition and loyalty'.[78] Reselling is also, however, a mirror image of collecting: previous fashion designs of a brand are often collected to learn more about a founder's vision and previous production lines. While the end goal of resale platforms' like 'TheRealReal' may be

> 'extending the life of luxury goods and enable[ing] more people to own and appreciate them while giving their original owners the opportunity to maximize the value of their investments',[79]

[74] One example is Antonio Ratti, the founder of the silk manufacturing firm Antonio Ratti, SpA. See *infra* Section 3.

[75] C. Chen, 'Can Fashion Resale Ever Be a Profitable Business?' *The Business of Fashion*, 4 April 2022, available at https://tinyurl.com/3tfnpzad (last visited 20 September 2023).

[76] J. Harvey, 'The Rise Of Deadstock Dressing: Designers Approach Upcycling Clothes The Chic Way' *Elle*, 15 June 2021, available at https://tinyurl.com/yn2jjttx (last visited 20 September 2023).

[77] As in the case of Gucci's Vault.

[78] J. Kennedy, 'Why Brands Are Racing Into Resale - in Five Charts' *The Business of Fashion*, 11 May 2022, available at https://tinyurl.com/bddu3ypa (last visited 20 September 2023).

[79] *About Us, Extend the life cycle of luxury, TheRealReal*, https://tinyurl.com/4rebcx52 (last visited 20 September 2023).

fashion brands' resale platforms are a vision into a brand's past.[80] This act of collecting and knowledge-building can both support the communication of brand heritage to consumers while uncovering examples of fashion that are relevant to a wider public beyond the brand's consumer base.[81] Under Italian cultural property law the collective and individual treasures found by brands prior to their resale may be eligible to be cultural property. This would in part depend on where their cultural interest lies, how 'vintage' they are, and how the law conceives of the relationship between a brand and an author.[82] The presence of this cultural interest, however, risks imposing obligations of preservation on fashion brands that may wish, instead, to resell the vintage products for profit. Directors and member-managers in family fashion firms may be caught between a proverbial rock and a hard place. This tension can animate approvals of resale initiatives. A declaration that vintage products in their possession are cultural property, could lead to impediments on the use of a firm's private property, effectively making it like a public archive or museum collection. On the other hand, resale initiatives and upcycling might benefit a family fashion firm's bottom line and increase their goodwill with their consumers, especially in light of sustainability's increasing value on the market. In these cases, the flexibility of the best interests of the company in the US duty of care rule may come in handy. The Italian rule which considers knowledge by directors in similar positions puts a weight on one option over the other. Directors and member-managers might not approve resale initiatives considering cultural property concerns. On the other hand, they might give a green light for the expansion of business activities to the preservation of fashion as cultural heritage.

The Italian duty of care rule also risks frustration for family fashion firms that are first movers. While collecting and opening corporate archives and museums that also emphasize family history might seem logical to the directors and member-managers of today's family fashion firms, it was not always so evident. In this sense, the recent express addition of public benefit to business purposes which may be completed by amendment to a company's by-laws, and the increase in certification agencies to communicate a brand's dedication to sustainability and the public good[83] may more expressly allow first movers in the fashion industry

[80] *Gucci Vault*, https://tinyurl.com/m8p5exzc (presenting the site as 'Gucci Vintage Treasures' 'Vault presents a highly curated assortment of rare finds from Gucci's past, each the one and only of its kind').

[81] For an exploration of such differences between brand heritage and cultural heritage in fashion see F. Caponigri, 'Fashion's Brand Heritage, Cultural Heritage, and "The Piracy Paradox" ' 39(2) *Cardozo Arts and Entertainment Law Journal*, 558 (2021), available at https://tinyurl.com/bdejv6n5 (last visited 20 September 2023).

[82] For more about the challenges of classifying fashion design objects as cultural property under Italian law see F. Caponigri, 'Problematizing Fashion's Legal Categorization as Cultural Property' 2 *Aedon* (2017), https://tinyurl.com/2ybxj7pa (last visited 20 September 2023).

[83] 'About B Lab' *B Corporation*, https://tinyurl.com/ynkzthxe ('B Lab became known for certifying B Corporations, which are companies that meet high standards of social and environmental

when other firms do not yet see themselves in this way. At the same time, an expansion of corporate purpose that results in vague notions of prosperity has been met with skepticism given the latitude allowed to fiduciaries already.[84] The Italian rule and the application of the actual standard of diligence may enable some tensions for directors' and member-managers' decisions while also leaving potentially greater room than the US standard for the corners of the family fashion firm ecosystem.

IV. The Duty of Loyalty: Narrow Indirect Conflicts with a Broad Conception of Loyalty to Preserve a Family Fashion Firm's Ecosystem

The duty of loyalty is essentially a conflict-of-interest provision: directors, member managers, and shareholders, when they owe a fiduciary duty, should not gain where the corporation would lose. The corporation's interests are paramount.[85] While at times conflicts of interests or business opportunities may seem to benefit a director, member, manager, or shareholder in a closely-held corporation over the firm in question, indirect conflicts of interest provide more nuanced cases. Suppose, for example, that 'the [corporate] conflict is with a close family member of the director or with a corporation owned or managed by the director.'[86] Family fashion firms provide fertile ground for such indirect conflicts. A close family member of the director could also be a family member already connected to the family fashion firm. A close association with a family member of the founding family who designs outside the firm could benefit a firm as much as undermine its business, depending on how one identifies the parties and the benefits at issue.

performance, accountability, and transparency… B Lab creates standards, policies, tools, and programs that shift the behavior, culture, and structural underpinnings of capitalism.'); L. Zargani, 'Salvatore Ferragamo Obtains Sustainability SI Rating Silver Certificate' *Women's Wear Daily*, 10 August 2020, available at https://tinyurl.com/r6jfsk3n (last visited 20 September 2023).

[84] M. Ventoruzzo, 'Brief remarks on "Prosperity" by Colin Mayer and the often misunderstood notion of corporate purpose' *Bocconi Legal Studies Research Paper No 3546139,* 28 February 2020, 5, available at https://tinyurl.com/4hxz7evs (last visited 20 September 2023) ('The very doctrine of fiduciary duties, with its flexibility and ambiguities, developed – and it is necessary – in light of an agency relationship that defies strict and specific instructions defined ex ante… Directors' power is, essentially and first of all, exactly the power to balance different interests of different constituencies, in the context of incomplete contracts. Directors and managers need the free space granted by the business judgment rule to operate and implement their decisions, within reasonable limits. Virtually any corporate action implies a choice between short-term gains and long-term growth, between creditors' protection and shareholders' profitability, between clients' satisfaction and workers' welfare, between providers' interests and environmental integrity. To think that listing different and often conflicting goals in a piece of paper, even if in principle binding, might resolve or even ease the conundrums that corporate leaders face at each and every turn, or clarify the standards of care and loyalty to which they are held, is naïve at best').

[85] M. Ventoruzzo et al, n 22 above, 316-317.

[86] ibid 316.

A benefit to a director might be an indirect benefit to the firm. To make matters more complicated, opportunities for the family firm may hinge on a specific director's knowledge or even their place in the founding family. A founder's archive controlled by a director/son might offer the best designs for a new collection, for example.

While these conflicts may be present in family firms outside the fashion industry, fashion's connection to identity magnifies conflicts. A director/son controlling a founder's archive may see the fashion created by his founder/ father as uniquely tied to a fashion identity that is not necessarily the same as that produced by the current family firm. The need to constantly update fashion designs, while staying true to a brand's heritage, makes the question of identity even more pressing. Consumers must still recognize a fashion design as from a family fashion firm, for example, but be captured by a newness, a relevance in the contemporary fashion space. Family members are often intimately connected to a firm's fashion identity in ways that may be incomparable to a family firm in another industry because of these links between creating, managing, identity and fashion's communicative value. Battles over fashion identity, and who decides what is 'Gucci', as will be discussed further below, may set family members on opposite financially beneficial paths.

A usual way of combatting conflicts of interests is to delegate the decision to a different director without the conflict or to require a director to present the business opportunity to the board for a full vote, disclosing the conflict to make sure the transaction is fair.[87] Section 144 of the Delaware General Corporation Law lays out options for what has been termed a 'safe harbor'[88] for directors: the approval of a transaction with a conflict of interest between a director and the corporation. A majority of disinterested directors voting to approve the transaction with a knowledge of the material facts may activate this safe harbor. So may approval by disinterested shareholders who know of the material facts. These two safe harbors trigger a review of the transaction under the business judgment rule if it is challenged following its approval.[89] As a third option, the transaction, if not approved by disinterested directors or shareholders, may not be a conflict if it is fair to the corporation at the time it is authorized or approved by interested directors or shareholders.[90] Fair is understood as fair dealing and fair price.[91] Italian law has a similar rule in Art 2391 of the Italian Civil Code.[92] Interested directors must notify the other directors and the board of all of their and other interests in a transaction, and interested directors should not vote on the

[87] ibid 317.

[88] *Toedtman* v *Turnpoint Medical Devices, Inc,* C.A. No. N17C- 08- 210-RRC, January 23, 2019, Superior Court of the State of Delaware, 14, available at https://tinyurl.com/mrytvtn3 (last visited 20 September 2023).

[89] ibid 14-15.

[90] ibid

[91] M. Ventoruzzo et al, n 22 above, 318.

[92] Art 2391 Codice Civile.

transaction.[93] This is a broader provision than in the srl context, where contracts entered into by an interested member for the company can be voided if the conflict was known or could be known to the third party.[94] The voiding of contracts because of a member's conflict of interest in Art 2475-*ter*, which follows the rule in agency law,[95] recognizes that, in an srl context, a member/manager might have more discretion and, therefore, all contractual obligations might not be put in front of a committee or board.[96]

Italian doctrine has characterized the conflicts in the srl context as more narrow than those in the SpA and by extension, more focused on the company itself: effective, and not potential, harms to a company because of a manager's interest matter more in the srl context, and members themselves do not have a right to challenge harms outside of those to the company that may result from an approval of the transaction.[97] In this sense, shareholders have relatively more power in the SpA context than members do in a member-managed srl context. A narrower evaluation of harm to the company and actual impact the company's own best interests seems more paramount in the srl. At the same time, there is also more flexibility to evaluate conflicts in the srl context, as there are few to no statutorily required procedural aspects to frame the consideration of the conflict. In the SpA context, by contrast, if the board approves the transaction it must share its reasoning and outline advantages for the corporation.[98] If these procedural processes are not followed, or if an interested director's vote is determinative for an approval, a board's approval can be challenged and voided within a specific period of time if there is damage to the corporation by the approval.[99] An srl does also allow for the voiding of a transaction approved by managers when a manager has an interest which is objectively in conflict with the company.[100] The concern

[93] ibid

[94] Art 2475-*ter*, Codice Civile.

[95] Art 1394, Codice Civile.

[96] Codice Civile commentato, Art 2475-*ter* - Conflitto di interessi, edited by Ilaria Capelli, updated by Lucia De Angelis, available at https://www.leggiditaliaprofessionale.it/.

[97] ibid ('L'Art 2475-*ter* - a differenza del vigente Art 2391 che, per le società per azioni, si limita a chiedere il riscontro di un interesse personale dell'amministratore (anche non antitetico) e la prospettiva meramente 'potenziale' del correlativo danno alla società - sanziona le fattispecie ove siano preliminarmente dimostrate tre condizioni: esse sono date dalla contemporanea esistenza di un conflitto di interessi 'effettivo' in capo all'amministratore; di un suo voto 'determinante' ai fini dell'approvazione della contestata delibera consiliare e, infine, di un danno 'reale' cagionato alla società con tale decisione. Tale norma si occupa del pregiudizio subito dalla società - anziché dai suoi soci - da ciò consegue che la legittimazione attiva sia attribuita ai soli amministratori ed ai sindaci. In altri termini, per le Srl manca una disposizione esplicita corrispondente a quella - viceversa prevista dall'Art 2388, para 4 - che, nelle Spa autorizza i soci ad impugnare 'in proprio' le delibere dei Cda, ove riconosciute 'lesive dei loro diritti', applicandosi, in tal caso, in quanto compatibili, gli Artt 2377 e 2378 (Tribunale di Bologna 20 October 2006 no 2412)').

[98] ibid (English translation in *Comparative Corporate Law*, n 22 above, 319). Art 2391, Italian Civil Code.

[99] ibid Art 2475-*ter*, Italian Civil Code.

[100] Art 2475-*ter*, Italian Civil Code and Codice Civile commentato, Art 2475-*ter* - Conflitto

for conflicting interests in both corporate contexts is mirrored in provisions in the Italian Civil Code which forbid directors from being shareholders without limited liability in competing firms and from exercising competing business activities on their own or with third parties.[101] The Italian Civil Code also has a general unfair competition provision which has been read to apply to members in the srl context,[102] although not necessarily to members who no longer have shares in the company.[103]

In closely held family fashion firms, procedural safeguards, especially the Italian requirement that those approving the transaction share their reasoning and outline advantages for the corporation, might provide a foundation for deeper considerations of indirect conflicts for the success of family fashion firms' ecosystems. These deeper considerations might especially have impact if they are expressly extended to member-managers in an srl context.[104]

The Paolo Gucci case provides an example where greater communication and identification of specific advantages unique to the fashion industry might have avoided gridlock and unnecessary family drama. In this case, refocusing the consideration of a conflict on the synergies between business, fashion and family, and not on family alone, might have benefited Gucci as a fashion family firm. Founded in Florence by Guccio Gucci in 1921[105] what began as a leather luggage store on Via della Vigna Nuova and soon evolved into a global luxury leather accessories was, at its heart, a dysfunctional family business until the early 1990s. In Italy, the company began as Guccio Gucci, srl, a limited liability company. In 1953 upon Guccio Gucci's death, his three sons Aldo, Rodolfo, and Vasco took over Guccio Gucci, srl, as members and managers. In the United States Gucci operated

di interessi, edited by Ilaria Capelli, updated by Lucia De Angelis, Leggi d'Italia. ('La norma contenuta nell'Art 2475-*ter*, para 2, trova applicazione nell'ipotesi in cui un amministratore sia portatore di un interesse obiettivamente in conflitto con quello della società; diversamente, in materia di Spa per l'applicabilità della disciplina contenuta nell' Art 2391 è sufficiente la sussistenza nell'operazione di un interesse (anche non in conflitto) dell'amministratore (N. Abriani et al, 'Decisioni dei soci. Amministrazione e controlli', in Diritto delle società. Manuale breve (Milano: Giuffrè, 2008), 318).')

[101] Art 2390, Italian Civil Code.

[102] Art 2598, Italian Civil Code.

[103] Tribunale di Bologna 21 January 2019 no 172 ('in effetti il socio uscente non era soggetto ad un divieto di concorrenza, cui la società abbia irrazionalmente rinunciato: la disciplina delle società di capitali non prevede, (diversamente dalla disciplina della società in nome collettivo v. Art 2301 c.c.), un generale divieto di concorrenza per il socio uscente, e nel caso in esame tale divieto non è contenuto neppure nello statuto sociale o nell'atto di cessione della quota').

[104] I. Capelli, 'Codice Civile commentato, Art 2475-ter - Conflitto di interessi' *Leggi d'Italia*. ('Diversamente da quanto accade in tema di Spa, non sono prescritti dall'Art 2475 ter doveri di informazione preventiva, di astensione in capo all'amministratore delegato e di adeguata motivazione della deliberazione (cfr. Art 2391, 1° e 2° co.). Tuttavia gli amministratori di Srl in conflitto di interessi sono tenuti al dovere di informazione nei confronti degli altri amministratori in forza delle clausole generali di correttezza e buona fede)'.

[105] *Gucci: The Making Of* n 3 above.

through Gucci Shops, Inc. incorporated in 1953,[106] later Gucci America, Inc.[107] In 1983 Guccio Gucci srl was transformed into an SpA. A central part of the Guccio Gucci srl's by-laws was the Art 7 provision that

> '…the status of quota-holder entails an absolute prohibition to use the 'Gucci' family name in connection with the exercise of any other future industrial, commercial and artisan activity even if additions or changes were made to such name for the purpose of avoiding confusion with the Company's denomination … [S]uch prohibition shall continue throughout the life of the company, i.e. until 31st December 2075 or until such later date which may be agreed upon at a future time and shall apply also to a quota-holder who may have lost such status for whatsoever reason.'[108]

When the srl was transformed into Guccio Gucci, SpA in 1982[109] this Art 7 was replaced by an Art 12 in the new by-laws:

> 'Without prejudice to Art 2390 of the Civil Code,[110] it is also prohibited to the Shareholders to initiate or to perform particularly under the patronym 'Gucci' any activity which either directly or indirectly competes with the Company and with the activities which constitute the purposes of the Company, unless expressly authorized by the Board of Directors'.[111]

Central to the formation of the Gucci company, then, was the notion that shareholders or members would not compete with the company by using the 'Gucci' name, even if it was their own family name. In some sense if you were a Gucci, the only way of embracing your family heritage as a shareholder in the company was to become active in the family business. Along with Guccio Gucci's sons, a number of grandsons did just that. They embraced day-to-day management of the business in addition to their role as directors and shareholders. Chief among them were Paolo Gucci, one of Aldo's sons, and Maurizio Gucci, Rodolfo's only son.[112] Paolo Gucci first became a shareholder in 1972 when Aldo gifted him shares in exchange for his signing of a 1972 shareholders' agreement which mirrored

[106] *Gucci* v *Gucci Shops, Inc.,* 688 F.Supp 916 (SDNY 1988).

[107] ibid

[108] ibid

[109] ibid; See also descriptions of the firm Gucci as an SpA in Corte di Cassazione 14 July 1993 no 7768.

[110] Art 2390 is essentially a prohibition on director's competition with the company ('Gli amministratori non possono assumere la qualità di soci illimitatamente responsabili in società concorrenti, né esercitare un'attività concorrente per conto proprio o di terzi, né essere amministratori o direttori generali in società concorrenti, salvo autorizzazione dell'assemblea. Per l'inosservanza di tale divieto l'amministratore può essere revocato dall'ufficio e risponde dei danni').

[111] *Gucci* v *Gucci Shops, Inc.*, 688 F.Supp 916 (SDNY 1988).

[112] ibid (for a description of family lineage).

Art 7 in the srl by-laws.[113] Before then, and continuously until 1978, Paolo had been hired in various roles at Guccio Gucci srl from 1952 to 1978,[114] including as a designer of Gucci products. But just as family lineage required a sacrifice of one's name to the company alongside ownership, family lineage also dictated the many tensions in control and ownership of the Gucci companies on both sides of the Atlantic. And it is here that the story of an indirect conflict between Paolo Gucci, Guccio Gucci srl (later SpA), and other members of the Gucci family ripens.

Paolo clashed greatly with his uncle, Rodolfo, who ran the Italian operation, so much so that a handbag being thrown out of a window in Florence in the late 1970s was deemed 'business as usual.'[115] Tensions also extended to meetings of the boards of directors and even to shareholder meetings. Paolo regularly used his shareholder rights to try to take his father, Aldo Gucci, his uncle, Rodolfo, and Maurizio Gucci, his cousin[116] to task for what he deemed their improper management of Gucci. To a certain extent Paolo's concerns as a shareholder were well-placed. Aldo Gucci had, in fact, decided to produce less than luxury items under a subsidiary of Gucci in the late 1970s.[117] The 'Gucci Accessories Collection' included

> 'cosmetic cases, tote bags, and similar items made out of a treated canvas printed with the double G monogram and trimmed with Gucci's signature pigskin in brown or dark blue, with coordinating striped webbing.'[118]

With a lower manufacturing cost and a lower price point, Sarah Gay Forden observed in her history of Gucci that the line was

> 'an apparently well-intentioned and well-thought-out move that seemed in step with the times when introduced in 1979 … [but] ultimately turned into a destabilizing force'

that compromised Gucci's control over the quality of its product.[119] A central concern for trademark law, a lack of control over the quality of goods can be seen

[113] The agreement in its relevant portion read, "…Messrs. Gucci jointly and severally promise one another on behalf of themselves, their heirs and successors, to refrain, and they do from this time forward refrain, from the use of the family name of "GUCCI" for the exercise of any further industrial, commercial, or artisan activity, even if additions or changes were to be made to said name with a view to avoiding confusion with the name of the companies…" *Gucci* v *Gucci Shops, Inc.* n 111 above; At the time, Rodolfo, Aldo, and Vasco were also shareholders, having owned and managed the company since their father's death in 1953, and Paolo's brothers, Roberto and Giorgio, were also listed as shareholders. Ibid.

[114] *Gucci* v *Gucci Shops, Inc.* n 111 above.

[115] *House Of Gucci* n 3 above, 74.

[116] Maurizio inherited his father's 50% of Gucci Shops upon Rodolfo's death in 1983. *Gucci* v *Gucci Shops, Inc.* n 111 above.

[117] *House Of Gucci* n 3 above, 69-70.

[118] ibid 70.

[119] ibid

as one factor that could weigh against the enforcement of trademark rights.[120] Vasco Gucci and Rodolfo Gucci originally approved the activities of Gucci Parfums, the subsidiary producing the Gucci Accessories Collection, in 1972 following Aldo Gucci's presentation of fragrance as 'the new frontier of the luxury goods market.'[121] Gucci Parfums, SpA was disproportionately in the hands of Aldo Gucci and his sons, rendering greater profits to one side of the Gucci family over another.[122] This hunger for increased recognition, power, and money soon seemed to spill over into Paolo's own activities. As Paolo's treatment by his father and uncles during his work for the Gucci brand became more hostile[123] he slowly began speaking with suppliers and designing his own line.[124] Fired by the Board of Directors in 1980, Paolo began a litigation war against his family both in Italian and US courts. Paolo fought for the right to use his own name in commerce, as a trademark, to sell his designs. The litigation proceeded in fits and starts due to the Gucci family's attempts to manage Paolo's design plans in house. In January 1982 Aldo and Rodolfo presented Paolo with the opportunity to become vice-chairman of Guccio Gucci SpA and the director of a new division Gucci Plus,

[120] The likelihood of confusion test includes the factor 'the quality of the junior user's product.' A dip in quality of the senior user's product might compromise an argument by the senior mark owner that the use of a similar mark on a similar product by a junior mark owner undermines the senior mark's ability to signal quality to its consumers, thereby leading to a likelihood of confusion. So, for example, if a Gucci consumer sees a real Gucci mark on a less than luxurious product, then consumers may no longer associate Gucci with high quality products or with a specific high-end product. This leads to less confusion when a false Gucci mark is on a similar low quality good. In other words, Gucci, when producing many different diffusion lines, may or may not be able to enforce their trademark rights as strongly as when they only produced a luxury line. A lower quality product by the senior mark may also compromise the goodwill of the senior mark. A lack of high-quality Gucci goods might additionally raise the argument that Gucci has less interest in protecting its mark. Diffusion lines such as the Gucci Accessories Collection also risk undermining the strength of a mark. On the other hand, they also might counterintuitively strengthen the senior mark by allowing a fashion firm to expand across different product categories. This would also depend on the management of the diffusion lines and the relationship with other luxury lines produced by the parent Gucci company. For a discussion of the likelihood of confusion test see *Lois Sportswear, USA, Inc.* v *Levi Strauss & Co.*, 799 F.2d. 867 (2d Cir. 1986).

[121] *House Of Gucci* n 3 above, 67.

[122] ibid 69 (noting that ownership of Gucci Parfums SpA in 1975 was divided between Rodolfo (20%) and Aldo and his three sons, who each had 20%, giving them more ownership combined than Rodolfo.) ibid at 79-80 (reporting that '… [by the 1980s] Aldo and Rodolfo clashed over the growing importance of Gucci Parfums. Although Rodolfo acknowledged that he had been able to love the life that he had thanks in large measure to Aldo, at the same time he was envious of his older brother's confidence and power and wanted to be everything that he was. He was no match for Aldo's genius, yet he resisted and resented the control Aldo had over the business. Rodolfo was also concerned about the lack of power Maurizio, his sole heir, had in the company … [Rodolfo] had figured out Aldo's strategy to shift the lion's share of Gucci's revenues over to the Gucci Parfums subsidiary, in which [Rodolfo] only had 20% and Maurizio had nothing').

[123] Paolo not only worked for Rodolfo in Italy, but also for his father in New York. See *House Of Gucci* n 3 above, 76-77 (describing Aldo's berating of his son, unhappiness with his ideas for Gucci's marketing, etc).

[124] *House Of Gucci* n 3 above; *Gucci* v *Gucci Shops*, Inc. n 111 above.

under which he could bring his own licensing deals and design.[125] A condition of the offer was that the Board of Directors, of which Paolo was a member, would have to approve all of Paolo's designs, as would, by extension, his uncle Rodolfo in his role as Chairman of the Board.[126] The next board meeting in March went disastrously according to accounts. The Board did not approve any of Paolo's designs, reasoning that 'the whole concept of the cheaper product lines was 'contrary to the interests of the company.'[127] Paolo eventually recommenced his lawsuits, again fighting for the right to use his own name on his designs.[128] As part of the litigation in the US, Paolo also accused Maurizio Gucci, in his capacity as the President and a Director of Guccio Gucci, SpA and as the Chairman of the Board of Gucci Shops, Inc, as well as Domenico de Sole, as President and a Director of Gucci Shops, Inc. of violating antitrust laws to prevent him from using 'PAOLO GUCCI' as a mark for his line.[129]

In the available opinion rendered by the Southern District of New York, the court held that Paolo Gucci could use his name on his designs if Paolo Gucci used his name only to identify himself as the designer of the products. In such a case, there would not be a likelihood of confusion with the 'GUCCI' mark. Evaluating survey evidence, including facts that purchasers of 'PAOLO GUCCI' products had brought those products to the actual 'GUCCI' store to be repaired and the United States Patent and Trademark Office's refusal to register 'PAOLO GUCCI' as a trademark due to the strength of the 'GUCCI' mark,[130] the court noted that there would be a likelihood of confusion if 'PAOLO GUCCI' was used as a mark. However, the ability of Paolo Gucci to identify himself as, essentially, himself, as part of this fashion family, was an ability the court was not willing to halt.

Courts have long recognized that

> 'to prohibit an individual from using his true family surname is to `take away his identity: without it he cannot make known who he is to those who may wish to deal with him; and that is so grievous an injury that courts will avoid imposing it, if they possibly can.'…

This is especially so where the second comer has spent his entire mature life working in the relevant business and, as a result, possesses extraordinary

[125] *House Of Gucci* n 3 above, 83.

[126] ibid 84.

[127] ibid

[128] Although it's unclear at what precise date Paolo sold his shares, at the time the Southern District of New York rendered its decision in 1988 the remaining 50% of Gucci Shops was reported as divided between Aldo, his sons, and a third party to whom Paolo Gucci had sold his shares. In 1988, Paolo Gucci no longer had any ownership stake in the US corporation. *Gucci* v *Gucci Shops, Inc.* n 111 above. Around the same year Italian courts noted the fractured nature of ownership in the Italian company, with Roberto Gucci owning less than his brother, Paolo. Corte di Cassazione 25 February 1987 no 1984; Corte di Cassazione 28 December 1988 no 7075.

[129] *Gucci* v *Gucci Shops, Inc.,* 651 F. Supp. 194 - Dist. Court, SD New York 1986.

[130] *Gucci* v *Gucci Shops, Inc.* n 111 above.

experience, skill and a desire to work in his field. Under those circumstances it cannot be said that the individual is entering the particular field

> 'for no apparent reason other than to use a conveniently confusing surname to his advantage. … it is evident that Paolo Gucci is entitled to identify himself as the designer of products so long as he does so in a manner which will not lead an appreciable number of consumers to believe that his products are 'Gucci' products'.[131]

On the antitrust claims, the court reasoned that Maurizio Gucci and Domenico de Sole had not violated antitrust laws under an 'intraenterprise conspiracy doctrine'.[132] Sister corporations and commonly-owned corporations have a 'unity of corporate interest' and a 'common consciousness'.[133] The companies were not capable of violating antitrust laws as a matter of law: Guccio Gucci, SpA and Gucci Shops, Inc were 'under common ownership' since 'all of the shareholders of Guccio Gucci are beneficial owners of all of the shares of Gucci Shops'. Moreover, 'Maurizio Gucci effectively control[ed] the business of both companies'.[134] In addition, 'collaborative action between a corporation and its employees, or among employees within a corporation, is not regarded as joint action' for the purposes of collaboration or conspiracy under antitrust laws.[135] Hence, Maurizio Gucci and Domenico de Sole were found not liable. When two corporations or employees of commonly owned companies agree, there is no danger of antitrust action: new economic power is not brought together.[136]

While the Southern District's opinion has been discussed in US Fashion Law circles as an exemplary trademark case, it also has impact for evaluations of indirect conflicts under the duty of loyalty in family fashion firms.[137] Paolo sought a way to bring his own vision for Gucci to light outside the corporation's framework by using his own name as a trademark. He explored this possibility while still with the company[138] and began designing under his own line soon after his firing from

[131] Ibid. Although designers may in some cases extensively contract away this right in parts. See *JA Apparel Corp.* v *Abboud*, 682 F. Supp. 2d 294 (SDNY 2010).

[132] *Gucci* v *Gucci Shops, Inc.,* 651 F. Supp. 194 - Dist. Court, SD New York 1986.

[133] ibid

[134] ibid

[135] ibid

[136] ibid

[137] The Gucci Board's refusal to approve Paolo Gucci's designs at the March 1982 meeting also raises questions under the duty of care for Aldo and Rodolfo Gucci in their capacity as directors. A Board decision to reject Paolo's designs made on the grounds that they were 'cheap' might, especially in light of a previous approval of the Gucci Accessories Collection initiative, be seen as a proxy for silencing Paolo, putting family dynamics above the best interests of the corporation. On the other hand, learning from the lessons of the Gucci Accessories Collection, the Board might have felt it prudent to not endorse another aesthetic of lower quality or a second diffusion line. For the purposes of this section, we prioritize as an evaluation of the duty of loyalty.

[138] *Gucci* v *Gucci Shops, Inc.* n 111 above ('Gucci Shops contends that Paolo was discharged for the additional reason of his alleged organization and participation in several companies in

Gucci, while still a shareholder of the company.[139] After his firing, Paolo was not at risk in the classic sense of violating his duty of loyalty; he was no longer a director. As a minority shareholder, Paolo may or may not have owed a fiduciary duty to the company or to his father and uncle. He may not have exerted enough control or approval over Gucci operations for such fiduciary duties to apply. But under the by-laws of the company and a strict application of the duty of loyalty Paolo Gucci should not have pursued a fashion line of his own using the 'GUCCI' name as a mark at all, either as a shareholder or as an officer of the company. At the same time, after selling his shares and no longer being affiliated with the company, Paolo was still actively prohibited from using his name as a mark. Paolo's very identity and professional skills seemed to put him in an untenable position with respect to the family fashion firm. At the same time as Paolo continued to be a member of the Gucci family in practice, he was treated like a counterfeiter or competitor unaffiliated with the family at all.

To effectively see Paolo's use of his own family name on any product he designs as an inherent gain or disloyal act which creates a loss to the corporation seems too reductive. In the fashion sphere brand extensions by family members can often increase the cachet and recognition of a mark.[140] The use of a family name in whole or in part as a mark by a member of that same family, even if on similar products, might not be competition in the strict sense of the term in the fashion industry. If it is understood as competition, such a definition factors out both the familial component and family dynamics, as well as the connection between brand heritage and family heritage in the fashion context. Prohibitions such as those enshrined in the by-laws of Guccio Gucci srl and Guccio Gucci SpA could be understood as strict prohibitions based on use of 'GUCCI' as a mark in a competing business. But when they are understood as such they become blanket prohibitions on the use of any personally identifying mark that might contain or be similar to 'GUCCI' in all cases by a family member. If we see fashion families as potentially producing talented or inspired individuals, and fashion families as central to brand heritage, we might interpret the sphere of conflicts for a family fashion firm in a narrower way. By extension, we might extend the sphere of to whom a duty of loyalty is owed in a family fashion firm. It is not only the company in a financial sense, but the company in its familial and financial sense. Requiring reasoning and the parsing of advantages in these circumstances may lead managers in an srl context to reframe conflicts for the benefit of their unique family fashion firm ecosystem.

Directors like Aldo and Rodolfo Gucci might be called to factor in family

Haiti making handbags allegedly in competition with Gucci. Paolo maintains that this production was undertaken merely to assure a supply of high-quality merchandise for Gucci Shops').

[139] *Gucci* v *Gucci Shops, Inc.* n 111 above; *House Of Gucci* n 3 above.

[140] T. O'Connor, 'Missoni Sells Minority Stake to Private Equity Firm in €70 Million Deal' *The Business Of Fashion,* 15 June 2018, available at https://tinyurl.com/5n6m7fym (last visited 20 September 2023); 'Un Archivio sul filo di lana', *Missoni*, https://tinyurl.com/yk2hw3sk (last visited 20 September 2023) (describing the history of the Missoni brand).

relationships and related effects on brand heritage as part of their review of Paolo's 1982 proposal to the Board. Indirect conflicts in family fashion firms might be recast as conflicts which cannot really be prohibited. Interests are so overlapping and complex when family, fashion, and business collide. Innovation and development for a fashion brand can be based on contributions of individual family members and family stories. To see any action by a family member that is like the fashion firm's activities as a conflict may mean effectively undermining the development and heart of a family fashion business. In some senses, this mirrors the reasoning of the Southern District of New York in holding that Maurizio Gucci and Domenico de Sole had not violated antitrust laws under an 'intraenterprise conspiracy doctrine'.[141] We might think of family fashion firms as entities which have an expansive economic power with different strands and lines of activities represented by individuals in the family. Each line, whether similar to or different from a fashion firm's activities, are part of the ecosystem and enterprise.

Of course, there are logical counterarguments to this reasoning. Unlike sister corporations or umbrella corporations and their wholly owned subsidiaries, families may not be 'in agreement', as required for the holding of the Southern District. Moreover, some activities may inevitably tarnish the family fashion firm. This is evident in the Gucci case. Paolo Gucci and Aldo, Rodolfo, Maurizio, and Domenico de Sole, were not in agreement about his plans to design his own line. Paolo's activities may have indeed tarnished Gucci as a brand in its directors' eyes. Moreover, who counts as part of a 'family' for the purposes of this expansive interpretation of the duty of loyalty? Would ex-husbands and ex-boyfriends count? The example of the American designer Tory Burch's ex-husband opening competing stores and even the business operations of Riccardo Pozzoli, the co-founder of Chiara Ferragni's 'The Blonde Salad' and her ex-boyfriend, are examples of how important it may indeed be to define family, and explore interests in extreme cases, for these purposes.[142]

But if directors, member-managers and other fiduciaries were to read similar prohibitions as those for the mark 'GUCCI' as narrow when evaluating whether a conflict exists in a family fashion firm, we might find some common ground for agreement. Conflicts might not just be defined in terms of financial benefit but in terms of end results for family dynamics and rapports, and brand heritage which has been created in a family context. We could recast what is truly a loss to a family fashion firm, and what is truly a conflict even beyond definitions of family. In doing so we might recast the role of the Board in approving transactions. Board members in a family firm with close, family relationships to each other would not be required to make 'Sophie's Choice' like decisions between a corporation and a family member. They would not be required to potentially sacrifice parts of their brand heritage for

[141] *Gucci* v *Gucci Shops, Inc.,* 651 F. Supp. 194 - Dist. Court, SD New York 1986.

[142] L. Sund and P. Bjuggren, 'Family-owned, limited closed corporations and protection of ownership' *European Journal of Law & Economics*, 275 (2007).

a current bottom line. Boards would not need to see gain in strict financial terms. The need for family members to identify themselves and express themselves creatively given their upbringing or connection to family and fashion might be taken into account. A decision to approve a transaction would not require delving into family dynamics and evaluating any use of the family name in commerce. Rather, a narrow reading of a conflict and a broad understanding of the duty of loyalty might require a Board to consider gains to the family fashion firm, and future effects for brand heritage. Instead of collaborating on a tragic retelling of the House of Gucci's fall,[143] with these considerations Gucci might, today, be celebrating the continuing involvement of the Gucci family in the company in a parallel universe. Long term effects of family business ventures for the company might mean indirect or direct conflicts are no longer conflicts. For controlling shareholders who also owe a duty of loyalty to their fellow shareholders in addition to the corporation, reading identity related uses of a family name in fashion as outside the conflict zone would also help shareholders' rapports by supporting shareholders' own family relationships alongside business ones. Such a broad understanding of to whom loyalty is due would in turn support a family's evolution and, by extension, the brand heritage that is connected to a family's heritage. Italy's requirement that directors share their reasoning and outline advantages for the corporation might offer a first step to such a re-reading of the scope of the duty of loyalty for family fashion firms. At the very least, directors and managers would need to outline how they are conceiving of a conflict, who the parties on opposite sides of the transaction are, and how gain and loss are conceptualized.

V. Foundations Instead of Transfer Restrictions and Shareholder Agreements: Identifying Creative Exit Strategies to Safeguard a Family Fashion Firm's Ecosystem

Despite our proposals for nuanced interpretations and applications of heightened duties in cases involving closely held family fashion firms, some shareholders in these situations may still see an inevitable need to exit. Transfer restrictions and buy-out provisions are options. In a publicly held corporation, shareholders generally have the right to freely sell their shares at any point in time.[144] A family-owned company, however, has the ability to 'shield' fellow shareholders from freely transferring their shares of the company through transfer restrictions and buy-out provisions.[145] There are a number of different types of

[143] C. Lang, 'How House of Gucci's Costumes Help Tell Its Story' *Time*, 24 November 2021 ('Later, the brand even offered access to the Gucci archives, which resulted in two archival looks (a pantsuit emblazoned with Gucci's iconic double G logo and a silk blouse in the same print, paired with a leather skirt) being used in the film').

[144] With the exception of blackout periods during an IPO and insider trading rules.

[145] F.H. O'Neal, 'Restrictions on Transfer of Stock in Closely Held Corporations: Planning and Drafting' 65 *Harvard Law Review*, 773 (1952) (The company will be held to the laws of the

restrictions shareholders in close corporations may put in place to control the destiny of the shares of their company. These include absolute prohibitions against the transfer of shares, consent restraints and first option provisions and more express provisions limiting transfers to specified classes of persons, such as family members, and 'buy and sell' arrangements after death.[146] In Italy a central question for transfer restrictions is in which document they are included- the bylaws of a closely held corporation, which are binding on third parties, or in a separate agreement, which may have its own limitations.[147] Transfer restrictions can, however, be limited in time. In the SpA context transfer restrictions are only valid for five years from the incorporation of the firm or from the time they are introduced.[148] In the srl context transfer restrictions cannot have a term longer than two years from the incorporation of the firm or from the time the member obtained their shares.[149]

Similar to transfer restrictions, buy-out provisions can be used to help protect shareholder in a closely held corporation. Shareholders in close corporations are usually key managers and day-to-day decision makers for the corporation's business. Therefore, a change of share ownership, such as the death of a shareholder, can have massive effects on the management of the corporation.[150] In order to protect the shareholder a close corporation may put an agreement in its bylaws that includes a list of events that would trigger a buyout, including who can purchase the shares, and how to determine the buyout price and payment terms.[151] The buyout agreement will often include a shareholder's death as triggering termination of the shareholder's ownership in the corporation and could also include situations such as divorce.[152] When one of these events is triggered, the buyout agreement will control how the shareholder's shares in the corporation are purchased and who has the right to purchase the shares.[153]

state of incorporation, which determines the validity of restrictions on the transferability of stock); *see also* Model Bus. Corp. Act § 6.27 (Restriction on Transfer of Shares).

[146] For an overview see F. H.O'Neal, n 145 above, 773, 777 .

[147] *Comparative Corporate Law* n 22 above, 441-444. The Southern District of New York's discussion of the Italian 1972 shareholder agreement between Gucci family members is illuminative for a discussion of transfer restrictions. In holding that Paolo Gucci was no longer bound by the 1972 Shareholders Agreement, the court noted that Gucci family members had 'consciously and purposefully adopted a revised company by-law which prohibited use of the Gucci name only by shareholders of the company.' *Gucci* v *Gucci Shops, Inc.* n 111 above. Having sold his shares, Paolo Gucci was no longer a party nor bound to the agreement; had he not sold his shared, he still would have been. The same would apply to a provision restricting the transfer of shares: announcements in the bylaws would bind the person to whom Paolo Gucci sold his shares, whereas a separate agreement outside the bylaws may not.

[148] Art 2469, Italian Civil Code.

[149] Art 2355-*bis*, Italian Civil Code.

[150] J. Stone, 'Shareholder Buyout Agreement' *Small Business Chronicles*, available at https://tinyurl.com/p4v89sd8 (last visited 20 September 2023).

[151] ibid

[152] ibid

[153] ibid

One US case which effectively illustrates the benefits of transfer restrictions in a family-owned close corporation comes from the Supreme Court of Indiana, *FBI Farms Inc* v *Moore*.[154] The close corporation in this case was formed and initially wholly owned by Ivan and Thelma Burger, their children Linda and Freddy, and the children's spouses.[155] FBI's board, which included Linda's husband Birchell Moore adopted several stock transfer restrictions.[156] The restrictions prohibited any stock transfers without board approval, and granted right of first refusal for any stock purchases first to the corporation, then to any shareholders, and finally to any blood member of the family.[157] Linda and Moore divorced in 1982. As part of the settlement, Linda acquired all of Moore's FBI shares, and Moore acquired a monetary judgment of over $150,000 secured by a lien on Linda's stock.[158] Moore successfully executed on the lien and brought the stock to sheriff's sale, where he purchased it, and following this FBI attempted to cancel Moore's stock arguing that the restrictions were violated.[159] Moore then filed suit against FBI, seeking a declaratory judgment that the attempted cancellation was invalid, and that Moore owned the shares rightfully and free of the transfer restrictions.[160] The court ruled that in the context of family-owned close corporations, transfer restrictions

[154] 798 N.E.2d 440 (Ind. 2003) ('Indiana, like virtually all jurisdictions, allows corporations and their shareholders to impose restrictions on transfers of shares. The basic theory of these statutes is to permit owners of a corporation to control its ownership and management and prevent outsiders from inserting themselves into the operations of the corporation').

[155] ibid 442. 1.

[156] ibid 444 ('Indiana Code section 23-1-26-8 essentially mirrors Model Business Corporation Act § 6.27, which authorizes restrictions on the transfer of shares. The Indiana statute reads as follows: (a) The articles of incorporation, bylaws, an agreement among shareholders, or an agreement between shareholders and the corporation may impose restrictions on the transfer or registration of transfer of shares of any class or series of shares of the corporation. A restriction does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction. (b) A restriction on the transfer or registration of transfer of shares is valid and enforceable against the holder or a transferee of the holder if the restriction is authorized by this section and its existence is noted conspicuously on the front or back of the certificate or is contained in the information statement required by section 7(b) [26-7 26-7 Ind. Code 23-1- 26-7(b)] of this chapter. Unless so noted, a restriction is not enforceable against a person without knowledge of the restriction. (c) A restriction on the transfer or registration of transfer of shares is authorized: (1) to maintain the corporation's status when it is dependent on the number or identity of its shareholders; (2) to preserve exemptions under federal or state securities law; or (3) for any other reasonable purpose. (d) A restriction on the transfer or registration of transfer of shares may, among other things: (1) obligate the shareholder first to offer the corporation or other persons (separately, consecutively, or simultaneously) an opportunity to acquire the restricted shares; (2) obligate the corporation or other persons (separately, consecutively, or simultaneously) to acquire the restricted shares; (3) require the corporation, the holders of any class of its shares, or another person to approve the transfer of the restricted shares, if the requirement is not manifestly unreasonable; or (4) prohibit the transfer of the restricted shares to designated persons or classes of persons, if the prohibition is not manifestly unreasonable ...').

[157] ibid 443.

[158] ibid

[159] ibid

[160] ibid 443, 444.

requiring board approval of all sales and granting rights of first refusal to family members are both reasonable and enforceable.[161] The court recognized that family-run close corporations have a strong interest in preventing unwanted outsiders from gaining a stake in the business. As a result these corporations should be granted wide latitude to impose stock transfer restrictions.[162] Thus, the right of first refusal given to the corporation is generally valid, and the corporation is permitted to give preference to family members.[163] While this reasoning shows how a close corporation created and owned by a small family group can be given wide latitude in crafting restrictions to protect itself from outsiders owning its company stock, it also raises issues for line-drawing. Family-specific transfer restrictions potentially undermine a narrow reading of a conflict and a broader reading of the duty of loyalty. A family member who is not an ex-husband or part of the family by marriage may sell their shares back to the corporation and no longer be a shareholder, as in Paolo Gucci's case. If transfer restrictions influence how the sphere of family is defined in a family fashion firm, any family member who is no longer a shareholder in a corporation may be defined as having interests that always run counter to the family fashion firms. At the same time as transfer restrictions and buy-out provisions may offer family members in a family fashion firm an exit strategy, they may also draw permanent enemy lines that compromise the family fashion firm ecosystem.

For this reason, more creative exit strategies may be beneficial. One such creative exit strategy is the formation of a foundation or not for profit corporation that is affiliated with the company but has an independent existence. In the United States, not for profit corporations are creatures of state statutes and are defined by the non-distribution principle. Trusts in the United States may often play a similar role, safeguarding assets for specific benefits beyond those ties to a corporate activity. Individuals who exercise control over a not-for-profit are not entitled to earnings from the not-for-profit's activities.[164] In Italy, most foundations are governed by

[161] 798 N.E.2d 447 ('Several factors are relevant in determining the reasonableness of any transfer restriction, including the size of the corporation, the degree of restraint upon alienation; the time the restriction was to continue in effect, the method to be used in determining the transfer price of shares, the likelihood of the restriction's contributing to the attainment of corporate objectives, the possibility that a hostile stockholder might injure the corporation, and the probability of the restriction's promoting the best interests of the corporation').

[162] ibid 446.

[163] ibid 449 (Court held that if a restriction is valid, it applies to both voluntary and involuntary transfers, and continues to apply even if family circumstances deteriorate after they are imposed).

[164] L.H. Mayor, 'Fiduciary Principles in Charities and Other Nonprofits', in E. Criddle et al eds, *The Oxford Handbook Of Fiduciary Law*, 103 (2019) ('State laws provide a variety of nonprofit legal forms: nonprofit corporations, charitable trusts, unincorporated nonprofit associations ('associations'), and, in some states, limited liability companies (LLCs). 1 These forms share what Henry Hansmann labeled the 'nondistribution constraint', a prohibition on distributing net earnings to the individuals who exercise control over the organization. 2 This restriction means that nonprofits do not have owners with a right to profits, distinguishing them from for-profit entities. This restriction also distinguishes nonprofits from "hybrid" legal forms designed for social enterprises that have both profit-seeking and social benefit purposes').

the Civil Code and the Code for the Third Sector and are also defined by their nonprofit purposes.[165] There is also the requirement to pursue ends of a social benefit.[166] Included in these social ends are cultural or artistic ones, including the valorization of cultural heritage, which is considered an activity in the general interests of the public.[167] For family fashion firms the decision to found or be affiliated with a foundation may be organic or strategic. The foundation may be closely affiliated with a brand's heritage or dedicate itself to other cultural and social activities. In addition, foundations born from a family fashion firm's brand heritage may signal that the firm's fashion and associated family narratives have evolved into cultural heritage.[168]

The *Fondazione Ferragamo* provides, perhaps, the best example of a foundation closely connected to a family fashion firm's family and brand heritage. The foundation has a strategic, although institutionally separate, role in the Ferragamo family's management of Ferragamo SpA. Founded in 2013, the *Fondazione*

> 'promote[s] and enhance[s] craftsmanship and made in Italy, through the exclusive performance of education and training activities for those who intend to operate in the world of fashion and design, and of the highest and most artistic forms of Italian craftsmanship, in line with the values, and the stylistic canons expressed in the work of Salvatore Ferragamo'.[169]

Founding members of the Fondazione included Wanda Miletti Ferragamo, who was instrumental in conceiving the Fondazione before her death, Salvatore Ferragamo's children, Salvatore Ferragamo SpA, and the holding company with a majority of shares in Salvatore Ferragamo SpA, Ferragamo Finanziaria SpA.[170]

A central part of the Fondazione's assets, or patrimony, is the historical archive

[165] The exception are bank foundations which are not governed by the Code for the Third Sector. For an overview of the foundation as a legal entity in Italian law see M. Ferrari, 'Le fondazioni: la guida completa' *Altalex*, 17 May 2021, available at https://tinyurl.com/mtw2e26y (last visited 20 September 2023).

[166] ibid

[167] ibid (citing to Art 5 of the Third Sector).

[168] For a discussion of how fashion corporation in Italy have used fashion curation as part of their firms' social ends and have used corporate institutions, including museums, to present their brand heritage as part of wider culture see M. Augello, *Curating Italian Fashion: Heritage, Industry, Institutions* (London: Bloomsbury, 2022) (analyzing this from a fashion studies perspective alone, although mentioning some pertinent parts of Italy's cultural heritage law while not analyzing how fashion donated by fashion companies to public institutions may already be cultural heritage under the law). For an analysis of fashion as cultural property under Italian law, including a comparison of Ferragamo objects in a private archive and those in the public Museo della Moda e del Costume in Florence see F. Caponigri, 'Problematizing' n 82 above.

[169] Fondazione Ferragamo Statute, 'Art 2 - Purpose' *Fondazione Ferragamo*, https://tinyurl.com/48577rxs (last visited 20 September 2023); see also 'Mission' *Fondazione Ferragamo*, https://tinyurl.com/cnyskkux (last visited 20 September 2023).

[170] Fondazione Ferragamo Statute, 'Art 8 - Founders, Promoters and Founders' *Fondazione Ferragamo*, https://tinyurl.com/48577rxs (last visited 20 September 2023).

of Salvatore Ferragamo himself. The historical archive, as a cultural property,[171] is preserved and enhanced, or valorized, by the Fondazione.[172] As a not for profit entity, the foundation involves members of the Ferragamo family who are members of Salvatore Ferragamo SpA as officers, directors and shareholders, and those who may not be.[173] As such, the Foundation offers an avenue for family members who wish to participate in Salvatore Ferragamo's legacy without necessarily engaging in the family fashion firm's business activities. This offers an opportunity to preserve the family fashion firm ecosystem. Rather than allow individual family members' to weigh one angle of the family/fashion/firm triangle over another or be in deadlock as they seek a balance, the not-for-profit foundation provides an avenue to maintain equilibrium in business decisions. The foundation also allows the brand's heritage to be presented as cultural heritage and preserved as such under the law without weighing the company down with unnecessary preservation or valorization obligations which would compromise or unnecessarily extend its business activities.

The Fondazione Prada provides another model for creative exit strategies from a family fashion firm. With a distinct focus on contemporary art, the Fondazione's end is to valorize and promote culture, art and design in Italy and abroad, including through public exhibitions, museum activities, publications, and support of contemporary artists.[174] The foundation is chaired by Miuccia Prada, the granddaughter of Prada's founder, and Prada's current CEO and an Executive Director on the Prada SpA's board.[175] While the Prada Group maintains an extensive historical archive,[176] the archive is, unlike in the Ferragamo case, not part nor affiliated at all with the Fondazione Prada. Indeed, the Fondazione Prada's emphasis on contemporary art, photography, and design beyond fashion provides a distinct exit from Prada's business for any member of the Prada family. There may, of

[171] Art 10(1), *Decreto Legge* n. 42/2004. See also the article on fashion archives in this Symposium by F. Caponigri and L. Palandri.

[172] 'Mission' n 169 above ('Established in Florence on 15 March 2013, the Fondazione Ferragamo intends to promote art and craftsmanship through the memory of Salvatore Ferragamo's work and personality, encouraging public appreciation for his artistic qualities around the world and the crucial role he played in the history of not only twentieth century shoes, but international fashion as well. To achieve these aims, it is essential to protect and enhance Salvatore Ferragamo's historical archive, which contains various items including documents, patents and products that tell the story of his entire professional career. The Fondazione Ferragamo is at the forefront in managing and protecting its archive, which is made up of heterogeneous funds that are implemented each day. The Archive allows to protect and promote the Salvatore Ferragamo Group's historical-artistic heritage, which represents the memory of an entire industrial and social culture').

[173] Compare 'Fondazione Ferragamo's Structure' *Fondazione Ferragamo*, https://tinyurl.com/b75hbsaz (last visited 20 September 2023) with 'Corporate Governance' *Salvatore Ferragamo, SPA,* https://tinyurl.com/29pk2a3t (last visited 20 September 2023).

[174] 'Art 2 - Scopi' *Fondazione Prada Statute,* https://tinyurl.com/4msddht3 (last visited 20 September 2023).

[175] 'Corporate Governance' *Prada Group*, https://tinyurl.com/mjezuvdv (last visited 20 September 2023).

[176] *Historical Archive* PRADA Group, https://tinyurl.com/45eteb5f (last visited 20 September 2023).

course, still be some cross-pollination between exhibits at Fondazione Prada and the activities of the business in light of current events and family relationships. In the same breath as Miuccia Prada has, for example, expressed her dedication to 'understanding the new digital frontier', industry publications have observed exhibitions on NFTs at the Fondazione Prada and the inclusion of NFTs in collaborations spearheaded by Miuccia's son and the current Head of Marketing & Communications for Prada, Lorenzo Bertelli.[177] At the same time, the Fondazione Prada's art exhibitions need not intersect with the design activities or value proposition of Prada SpA. Consider the Fondazione's 2018 exhibit *Post Zang Tumb Tuuum. Art Life Politics: Italia 1918–1943* which critically examined the art system in Italy between the First and Second World Wars and engaged directly with Italy's Fascist legacy.[178] In this case, the needs of the contemporary fashion industry may not be connected to a foundation's and a family member's activities. Engaging in a cultural sector separate from fashion through a foundation might provide two avenues of creative exit for the benefit of the family fashion ecosystem. First, like the Fondazione Ferragamo, it would allow a family member to exit Prada SpA and follow their own interests without changing the firm's value proposition or extending its business activities. It might even provide a compelling retirement avenue.[179] Second, it would allow the fashion angle of the family/fashion/business triangle to support the family fashion firm. By allowing an archive to serve the ends of the company and not the ends of a foundation a family fashion firm might more easily use a founder's archive for business ends, changing and reinterpreting according to the whims of fashion trends, without a concern for cultural relevance or legacy.

At the same time as foundations can provide ways to preserve a family fashion firm's unique ecosystem and the balance between family, fashion, and business, a foundation can also fundamentally change a family fashion firm. This might especially happen when a founder's legacy is uniquely tied up with both a company and a foundation. This seems to have been the case with Ratti SpA and the Fondazione Ratti. Founded by textile designer Antonio Ratti as a manufacturing company of silk ties and accessories that was both 'creative and commercial',[180] Ratti SpA united Ratti's conception of design and production with his collecting of historic textile

[177] T. Blanks, 'Miuccia, Raf and the Future of Prada' *The Business of Fashion,* 24 February 2022, available at https://tinyurl.com/yw8fs7ax (last visited 20 September 2023); 'Lorenzo Bertelli, BoF 500' *The Business of Fashion,* https://tinyurl.com/3rdpws56 (last visited 20 September 2023). See also Augello's discussion of the links between fashion's 'ratification' and the Fondazione Prada in M. Augello, n 168 above, 22-23.

[178] 'Post Zang Tumb Tuuum. Art Life Politics: Italia 1918-1943' *Fondazione Prada*, https://tinyurl.com/mvf256xe (last visited 20 September 2023).

[179] K. Chitrakorn, 'Prada to name former Luxottica chief as group CEO' *Vogue Business*, 6 December 2022, https://tinyurl.com/a3bsc5tt (last visited 20 September 2023).

[180] C. Colavita, 'Antonio Ratti, Silk Innovator, Dead at 86' *Women's Wear Daily,* 15 February 2022, available at https://tinyurl.com/v4v7w8vp (last visited 20 September 2023)

fragments[181] and his constant engagement with art and culture.[182] For Ratti the company as well as Ratti the founder, the historic textile archive continuously played a crucial role in contemporary designs for clients.[183] Employees conducted their work in a 'humanistic' atmosphere,[184] and were apprised of cultural movements and attended theatrical performances.[185] Scholars of creative industries and business have characterized Ratti's legacy as an example of a close relationship between entrepreneurship and humanism that suggests a fundamentally ethical relationship between corporate culture and art. In these circumstances, the 'relationship between industry and culture' is mirrored in a relationship 'between attention and freedom'.[186] Today Ratti, SpA is a publicly traded company with a minority stake owned by the Marzotto Group.[187] Its CEO and Board Chairwoman is Donatella Ratti. At the same time the Fondazione Ratti which Antonio Ratti founded in 1985 is still in operation, preserving the historic textile archive and supporting contemporary art initiatives.[188] The Foundation is chaired by Antonio Ratti's other daughter Annie Ratti.[189] With the advent of benefit corporations in Italy in 2016 Ratti SpA changed its status to a benefit company in 2022.[190] The press release announcing this change noted the company's history of 'constant enhancement of the craftsmanship of its professionals' and included an express future commitment, as a benefit corporation, to

> '(p)romote social and cultural initiatives, also through collaboration with businesses, communities, institutions and associations on topics of mutual interest in the field of innovation and research.'[191]

The corporate purposes of benefit corporations may seem uniquely attractive to family fashion firms like Ratti SpA that have historically seen culture and industry as fused. In this sense, foundations can also provide creative exit strategies for family fashion firms themselves. This may also reflect the history of the Italian

[181] Today Ratti's historic textile collection is managed by the separate Ratti Foundation and parts of it have been declared cultural property by the Superintendency within the Ministry of Culture. L. Benedetti, *Textile as Art: Antonio Ratti entrepreneur and patron* (Ghent: MER. Paper Kunsthalle, 2017), 19-22. See also Fondazione Antonio Ratti, 'About', available at https://tinyurl.com/mpr4azxs (last visited 20 September 2023).

[182] L. Benedetti, n 181 above. During his lifetime Antonio Ratti also funded the Ratti Textile Center at the Metropolitan Museum of Art.

[183] ibid 21.

[184] S.B. Curioni, 'Homer Faber-Homer Poeticus' in L. Benedetti ed, n 181 above, 24.

[185] L. Benedetti, n 181 above, 20; S.B. Curioni, n 184 above, 24 (comparing Ratti's role in an increased association between culture and business to Adriano Olivetti).

[186] S.B. Curioni, n 184 above, 25.

[187] 'Group Structure' *Marzotto SPA,* https://www.marzottogroup.it/struttura-del-gruppo.

[188] 'About' n 181 above.

[189] Fondazione Antonio Ratti, 'Who we are', https://tinyurl.com/ykkmdvcm (last visited 20 September 2023).

[190] 'Ratti assumed the status of a Benefit Company' *Ratti,* May 30, 2022, https://tinyurl.com/4yczf5xm (last visited 20 September 2023).

[191] ibid

business context and recent legal changes. The Italian Corporate Governance Code, containing recommended rules for all companies listed on the Italian Stock Exchange, includes the standard that company directors pursue 'sustainable success' or the 'creation of value in the long term to the benefit of shareholders, keeping into account the interests of the other stakeholders relevant for the corporation'.[192]

VI. Conclusion

Family fashion firms operate in a unique ecosystem. The legacy and history of a family impact fashion designs, the production of fashion goods, and a brand's promotional strategies. As a result, the business activities of a family fashion firm are tied to the needs of a specific family and the trends and styles of the fashion industry. A brand's heritage builds on a family's heritage while embracing its own fashion codes and symbols. The links between family, fashion, and business often present added value for business: family members can produce new designs, maintain a firm's connection to its founder, and offer loyal stewardship. At the same time, the links between family, fashion, and business may present challenges for family fashion firms' business activities. Family members might seem to put themselves in competition with the firm, second and third generations might wish to exit business activities, and founder's descendants might fundamentally disagree with design directions, compromising a firm's ability to stay relevant in the fashion industry. At the same time, a firm's successful business strategy might make the firm and its fashion relevant to the public. In these cases, brand heritage can become cultural heritage. Partnerships between brands and the State can support current business strategies, like fashion shows in treasured cultural spaces. At the same time, cultural value in brand archives risks a company's assets being declared cultural property. This may bring increased transaction costs and an expansion of business activities as duties of preservation and valorization are imposed on firms who own these assets beyond an individual family.

The law already offers flexible standards which enable fiduciaries in family fashion firms to consider these opportunities and concerns. Considering the best interests of a corporation under the US duty of care allows fiduciaries in closely held firms to prioritize what is best for their business. What is best may include parallel activities that prioritize the family and fashion corners of a firm. At the same time, some directors may define best interests in strict financial terms. The Italian duty of care rule leaves room for directors to compare their knowledge to that of other directors of companies in the same business sector. For some fiduciaries who are reluctant to be first movers or define best interests beyond financial gains, this comparative evaluation might open the door for the approval

[192] M. Ventoruzzo, *Brief remarks* n 84 above, 2; for the full Corporate Governance Code see Italian Corporate Governance Code 2020, https://tinyurl.com/bdnmrcuv (last visited 20 September 2023), as published on the European Corporate Governance Institute website.

of beneficial business activities, including resale and upcycling connected to heritage. In contexts like the Italian one where culture and industry have historically been strongly connected, considering the needs of a business sector as part of an expansive understanding of what is in the best interests of the corporation seems to uniquely benefit the family fashion firm. Skeptical fiduciaries might lean on industry practice while best interests are understood as including parallel activities that benefit family narratives, build on fashion industry trends, connect to the brand heritage, and even link to a wider cultural heritage.

The most problematic facets of a family fashion firm often come from the family angle of the ecosystem. Family members of a fashion firm can be caught between a rock and a hard place tied to a firm because of the family connection but cast outside of it because of family dynamics. While a narrow scope of loyalty requires seeing conflicts in strict gain and loss terms to the company, redrawing the lines in conflicts involving fiduciaries and family members, especially in indirect conflicts, can support the family fashion firm's ecosystem. Fiduciaries who see loyalty to a firm's wider family, social and cultural context, and not just to a bottom line, can support reasoning and decision-making that privileges a long-term business sustainability grounded in family relationships and the fashion market. Outlining reasoning and parsing advantages can only help to redraw these lines. While a broader understanding of loyalty might raise problematic questions for who counts as family, it can also open doors for compelling firm futures. In these futures, family members are not the subject of ridicule or tragedy but may continue to support the dignity of a family fashion firm and its business ventures. In this sense, the Italian duty of loyalty's requirement that directors share their reasoning offers a foundation for increased considerations of indirect conflicts and the wider interests in a family fashion firm ecosystem.

Despite our proposals for revised interpretations of the duty of care and the duty of loyalty based on heightened fiduciary duty rules, the nature of a closely held family fashion firm, and additional requirements in Italian fiduciary duties, some family members and firms may need to go in a different direction. This different direction may require exiting the business or, in some cases, changing the business. Transfer restrictions and buy out provisions provide tried and true opportunities for firms to buy back shares, allowing family members to pursue other ventures without fiduciary duties to the original, family-owned, corporation. Foundations, on the other hand, present a potentially new avenue to develop a brand's heritage and cultural heritage ventures alongside a firm's core business. Some Creative Directors and founders' descendants already take advantage of foundations to give life to their own hobbies, set the stage for a second chapter, or stay involved in a family fashion firm without necessarily embracing the business of fashion. Firms can also change the nature of their business, reincorporating as benefit corporations. The Italian context, again, provides impactful examples for firms considering their future. The prevalence of fashion foundations and their

embrace of sustainability in the context of the Italian fashion industry's cultural relevance offers a potential blueprint.

Fashion Law, American Style, began the 21st century analysis of how fashion and law influence each other. American style has provided answers for the negative spaces of intellectual property law and offered us a counter-narrative to the importance of intellectual property rights for fashion. It is, however, as yet unable to answer how family, fashion, and business might best work together under the law for the benefit of a family fashion firm ecosystem that is also grounded in brand and cultural heritage. Fashion Law, Italian Style seems to us to provide an answer. With heightened fiduciary duties applied to a landscape of closely held family firms producing fashion design objects, Italian rules offer ways to consider parallel activities in a wider cultural setting and reconceptualize indirect conflicts. In addition, fashion's increased acceptance as part of Italian cultural heritage and family fashion firms' close ties to cultural heritage through their own brand heritage is unparalleled in the United States. As a result, Italian fiduciary standards are inevitably applied to contexts where brand heritage meets cultural heritage. In these circumstances fiduciaries are called to evaluate facts, initiatives, and eventualities, like the declaration of a brand archive as cultural property, that are as yet unforeseen under the law in the United States. As family fashion firms continue to evolve around the world, especially in the United States, and as Fashion Law, American Style, addresses American fashion's cultural value, the Italian style of fiduciary duties in Fashion Law might prove illuminating.

Fashion Law, Italian Style - Symposium

Heritage-Shaking in an Activated Archive: The Emilio Pucci Heritage Hub and the *Vivara* Print Between Copyright and Cultural Property Law

Felicia Caponigri and Lucrezia Palandri*

Abstract

In this essay, we explore fashion brands' archives and how, relatedly, copying from a brand's past contained in these archives is paradoxically good for fashion and, by extension, for Fashion Law as a field. Using the Pucci Archive and the Pucci Heritage Hub as our case study, we look to Italian law to explore how we might deal with our cultural interest in fashion through fashion archives. Arguing that *Fashion Law, American Style* has been relatively unable to parse the cultural meaning of fashion outside of the legal language of copyright as a legal discipline, we emphasize that *Fashion Law, Italian Style* gives us the important additional tool of Italian cultural heritage law. In applying Italian cultural heritage law to the Pucci Archive we coin a new term: activated archive. An activated archive, as we term it, is always acting in a way which defies traditional notions of gathering, inventorying, and conserving. An activated archive may have the characteristics of authenticity, reliability, integrity, and usability, but it does not preserve fashion as a document in the traditional sense. Rather, it uses the fashion it preserves in unexpected and dynamic ways that can add to the history of the fashion it preserves and the story of the brand. Activated archives, we argue, can play an important role in our applications of originality, artistic value, and creative character to fashion designs under both US and Italian copyright law. Activated archives can help to set up a comparison between past and present works. Activated archives can help to define the meaning ascribed to each design, and what weight to assign such meanings in a comparison. We call this process in which activated archives engage and which creatives

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deploy to create their designs 'heritage-shaking'. Heritage-shaking is a process in which a design in the contents of an activated archive is revisited and blended together with contemporary creativity to produce designs of the present, notwithstanding their reference to the past. We suggest that courts might more fully work with activated archives and recognize this heritage-shaking process as part of infringement tests within copyright law.

I. Setting the Pucci Stage: Fashion Between Heritage and Creativity

In 1965 Emilio Pucci, the Florentine aristocrat known for his ready to wear designs in vibrant prints marrying an 'Italian sensibility…with American sportswear'[1] launched a perfume, Vivara.[2] Inspired by the eponymously named island off the coast of Naples, the launch of the perfume was accompanied by the launch of an original print motif, also called Vivara.[3] Abstract in a blue palette, the print

> 'represent(ed) the Mediterranean island….as seen from above. The shape at the center of the motif represent (ed) the island, the waves at its left, and on the right the rising moon (above) and the setting sun (below)'.[4]

Since its creation by Emilio Pucci in 1965, the Vivara print has been 'reproduced and reworked' in 'more than ninety variations' by various creative directors who worked for the brand after Emilio Pucci's passing.[5]

Figure 1 *- The original 'Vivara' motif from 1965, preserved as part of the Emilio Pucci Heritage Hub*

The reproduction and reworking of the Vivara print raises questions about the boundary between a brand's heritage and its contemporary creativity. In other words, the Vivara case highlights a process of creation that is frequently used by brands' creative directors and creative teams. These creative directors and creative teams create new designs and new collections by taking inspiration. Often these new designs and new collections are perceived as copying outright from their brands', or another brands', past designs. These new designs that rely on the brand's heritage might be considered as creative and original as new designs created independently. On the other hand, they raise questions about what is creative and what is original. At the moment, creative designers and creative teams do not have clear guidance

[1] V. Friedman, 'Aristocratic Design', in Id et al eds, *Pucci* (Köln: Taschen, 2021), 22.
[2] Vivara slides, Emilio Pucci Heritage Hub (on file with the authors).
[3] ibid 22.
[4] ibid
[5] ibid

about how to effectively use a brand's heritage as an asset while still producing original and innovative designs. In a greater context of naming and shaming from consumers, fashion commentary, and even legal standards producing different results in application, the level of creativity and originality required of designs inspired by heritage is unclear. Designs inspired by heritage raise the question of how to use a brands' heritage as an asset while still producing innovative and original designs.

Fashion journalist Angelo Flaccavento has commented on what he perceives as a current imbalance between using a brand's past and creating original designs.

> '…the industry has entered the age of the imposture: designers who feel entitled to blatantly steal – pieces, tropes, collections, entire identities – from other designers and houses and claim everything as their own without the slightest shame. Of course, the creative process often begins with a reference. But it's the inability to push these starting points forward that's offensive…'.[6]

Flaccavento's critique in fact identifies a well-discussed paradox in fashion:[7] that copying is part of the creative process and, yet, that contemporary creativity requires some new addition. The creative process can use the past but that same creative process still needs to move that past forward for the present. The requirement of a new addition which Flaccavento calls out from a fashion point of view is also legally relevant. Originality under copyright law, for example, is defined by changes. A copyright requires new additions, a spark of originality under the law[8] or even artistic components. Originality and artistry are often evaluated by identifying personal contributions of a creative or by identifying new interpretations of a work.

We might call such contemporary fashion that references the past but adds something of the moment, succeeding in its originality, to be a 'parallel creation'. In other words, a fashion which does not negate the past, does not embody the past, but translates or interprets the past with new additions for the present moment. Past and history cannot be repeated in fashion, no matter how much we would like to dress similar bodies in similar clothing or copy past designs to re-embody historic moments.[9] Rather, referencing the past, is still seen with eyes from the present

[6] A. Flaccavento, 'In Paris, Creators and Imposters' *The Business of Fashion*, available at https://tinyurl.com/yndafdma (last visited 20 September 2023).

[7] For a discussion of the paradox that copying is good for fashion see: C.B. Sprigman and K. Raustiala, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' 92(8) *Virginia Law Review,* 1687 (2006).

[8] 17 USC §102; Art 2(10), legge 22 April 1941 no 633.

[9] F. Caponigri, 'Fashion's Brand Heritage, Cultural Heritage, and the Piracy Paradox' 39(2) *Cardozo Arts & Entertainment Law Journal*, 557, 568 (2021), arguing 'Because brand heritage links individual fashion designs to a brand's past and history, the reproduction of the heritage embodied in these designs is hard-pressed to be copied, no matter the segment of the fashion industry at issue'. Arguments in fashion that outline the importance of imitation might be seen as contrary to this statement, especially since they highlight how people from different social classes can approximate each other's social identity through dress. See, for example, G. Simmel, 'Fashion'

moment: the past affects the present as much as the present affects the past.

Because of the nature of the fashion zeitgeist[10] – the collective process from which fashion emerges – we may not be able to predict with certainty ex ante when heritage is interpreted or translated with success. We may not be able to predict when a reference is, in fact, pushed forward to meet modernity and our contemporary times until, in fact, it meets those times, and its consumers. But notwithstanding the *x* factor nature of fashion, heritage, the complex of facets of the past which we recognize for their cultural value,[11] is, in fact, always crucial to the success of fashion. A brand's own heritage is the lynchpin of the dialogue between past and present that takes place within fashion. Pucci's Vivara example represents this. Reproductions and reworkings of the print in later collections use a design of the past which is of significance within the story of Pucci. These designs change the print, shake it up, and interpret it for the present. Given the fact that a brand's heritage cannot be negated[12] or ignored, how are we to find an effective equilibrium between fashion's past and present? This is, effectively, our overarching, macro research question in this essay.

As we are legal scholars, and not fashion historians or ethicists, we primarily look to the law to answer our research question. The law that applies to fashion's past – cultural heritage law – and the law that applies to fashion's present – copyright law – are our primary tools and instruments. Our methodology is also influenced by the field of Fashion Law itself and the goals of this Symposium. Our essay squarely addresses the fact that Fashion Law, in its predominantly American style, has been uniquely informed by discussions of how fashion is copyrightable subject matter. Our essay also sees, however, that Fashion Law, American Style has been relatively unable to parse the cultural meaning of fashion outside of the legal language of copyright as a legal discipline.[13] We see Italian law as offering a

62(6) *The American Journal of Sociology*, 541, 542 (1957) (reprinted from the *International Quarterly*, October 1904). At the same time, even Simmel notes that imitation cannot completely reproduce the factors that brought about the original in the first place ('(Imitation) affords the pregnant possibility of continually extending the greatest creations of the human spirit, without the aid of the forces which were originally the very condition of their birth'). Although discussing change in fashion from a social distinction perspective, Simmel seems to admit that the change inherent in the contents of fashion always gives it 'an individual stamp as opposed to that of yesterday and of tomorrow', notwithstanding its existence at the heart of the tension between imitation and differentiation. ibid 543-544. Other work also seems to emphasize the inability of repeated fashion to be the same as the past design it uses by emphasizing the importance of the 'material turn' for Fashion Studies. See I. Maldini and L. Manz Ragna, 'From "Things of Imitation" to "Devices of Differentiation": Uncovering a Paradoxical History of Clothing (1950–2015)' 22(1) *Fashion Theory*, 69 (2018) (citing to Woodward and Fisher and also exploring Borgmann's philosophy of technology).

[10] C. Scott Hemphill and J. Suk Gersen, 'The Law, Culture, and Economics of Fashion' 61(5) *Stanford Law Review*, 1147, 1157-1159 (2010).

[11] We might generally abstract this macro definition from the definition of cultural property in the Italian Cultural Property Code. Art 10(1), decreto legislativo 22 January 2004 no 42.

[12] F. Caponigri, 'Fashion's Brand Heritage' n 9 above at 568.

[13] Fashion as cultural communication and fashion as a cultural product have been hallmarks of arguments for increased protection of American fashion under US intellectual property law since

solution. This Italian turn, if you will, is not surprising, as the United States has overwhelmingly resisted regulating the movement, circulation, and exchange of movable properties representative of 'American history' beyond real property rights extended to private persons or to public entities.[14] Properties of cultural interest, including fashion, are, in the United States, classified as part of the container in which they are located- most often museum collections. Fashion's legal cultural interest, therefore, is most often discussed in terms of museum exhibitions, and museum ethics and guidelines in addition to any *sui generis* laws.[15] By contrast,

Fashion Law's advent. S. Scafidi, 'F.I.T.: Fashion as Information Technology' 59 *Syracuse Law Review*, 69 (2008); Id, 'Intellectual Property and Cultural Products' 81(4) *Boston University Law Review*, 793 (2001). See also Id, *Who owns Culture?: Appropriation and authenticity in American law* (New Brunswick, N.J.: Rutgers University Press: 2005). But scholars working within the field of Fashion Law in the United States have only recently begun to expressly consider fashion as part of cultural heritage, and cultural property, often thanks to a comparative perspective. See the work of Felicia Caponigri, *supra* in addition to F. Caponigri, 'Problematizing Fashion's Legal Categorization as Cultural Property' *Giornale dell'Arte e del Diritto Online* (2017). At times cultural appropriation explores how fashion itself is part of cultural heritage, although most literature explores how fashion brands *infringe* on culture. For the latter see F. Caponigri, 'An Italian Style of Cultural Appropriation?' *Notre Dame Journal of International & Comparative Law's Online Symposium Continuing the Conversation: The Law and Ethics of Cultural Appropriation*, (2021). See also J. Janewa Osei-Tutu, 'Protecting Culturally Identifiable Fashion: What Role for GIs?' 14(3) *Florida International University Law Review*, 571 (2021) (which explores how culturally identifiable fashion may be protected under the law, building on fashion as cultural heritage and on the cultural appropriation of traditional craftmanship which may be classified as part of fashion). On the other hand, cultural property scholars and those working in the cultural space have also recently begun to consider fashion as an express part of cultural heritage. Consider D. Calanca, 'Italian Fashion History and Cultural Heritage: Data for a Tourist Guide' *Almatourism: Journal of tourism, culture and territorial development*, 29 (2012) (proposing Italian fashion as an Italian cultural heritage that can be promoted for tourism with an excellent overview of the fashion museums and archives in Italy and contextualizing the proposal with reference to the 2003 Convention for the Safeguarding of Intangible Cultural Heritage); R.M Andrade et al, 'Fashion and Cultural Heritage Perspective: 1st Seminar on History and Historiography of Fashion and Dress University of São Paulo (USP)/Federal University of Goiàs (UFG) June 2013' *Almatourism: Journal of tourism, culture and territorial development*, 157 (2013) (also discussing the contribution of Daniela Calanca at the University of Bologna to the presentation of fashion as of historical significance and therefore as cultural heritage); A.S. Hjemdahl, 'Fashion Time: Enacting Fashion as Cultural Heritage and as an Industry at the Museum of Decorative Arts and Design in Oslo' 8(1) Fashion Practice, 98 (2016) (a historical analysis of how the fashion industry and fashion museums developed their relationships, 'help(ing) to legitimize each other', using the case study of a 1933 'dress event at the Museum of Decorative Arts and Design in Oslo').

[14] Gerstenblith casts this uniqueness of US historic preservation law and cultural property protections, which were relatively late to protect objects belonging to indigenous communities, as related to the colonists 'almost exclusive (focus) on their Mediterranean and European cultural ancestry and on the question of whether a legitimate North American but European-derived culture with its own style of art, architecture and literature could develop'. P. Gerstenblith, 'Identity and Cultural Property: The Protection of Cultural Property in the United States' 75 *Boston University Law Review*, 559 (1995).

[15] Such as, in addition to Native American Graves and Protection Act, a recent law requiring museums to disclose when objects in their collection were looted by Nazis. See N. O'Donnell, 'New Law Requires Museums in New York to Display Information About Nazi Art Looting, May be More Complicated than it Looks' The Art Law Report (2022), available at https://tinyurl.com/bdh4uuj8 (last visited 20 September 2023). The Museum at FIT's exemplary work to present the cultural

Italy has a complex and historic body of statutory law regulating objects even outside of cultural institutions under a specific legal notion: cultural property.

In this essay, we find an effective equilibrium between fashion's past and present in the activities of brand archives. More specifically, we see a brand's heritage and its present iterations as relevant to the boundaries drawn between the contents of an archive as cultural property and the contents of an archive as part of copyrightable works under the law. We argue that cultural property law has a role in enabling parallel creations in contemporary fashion. But we observe that the role of archives in the contemporary creative process of fashion design depends on how a fashion archive and its contents are identified, and how past and present within an archive is parsed. Making our argument requires two steps. First, we need to examine how cultural property law applies to some fashion archives and not to others. Second, we need to examine how copyright law, and its findings of originality and the comparison of works in infringement cases, already include references to fashion archives or to the brand heritage which fashion archives are meant to preserve and communicate. Central to our analysis is understanding how an archive supports recognitions and translations of the cultural value of fashion designs and what impact that support can have on the identification and parsing of later reworkings or reproductions of fashion designs.

Part II of the essay is devoted to setting the Pucci stage. We trace a dual *fil rouge* of references to heritage and instances of contemporary creativity within Emilio Pucci's own designs, beginning in the 1950s. We continue to see this *fil rouge* in designs created after Emilio Pucci's death. More specifically, we identify heritage and contemporary creativity in the cataloging of Pucci's legacy by his daughter, Laudomia Pucci, the organization of the Pucci Archive, and the founding of the Heritage Hub. In essence, Part II sets out the facts to be analyzed under the two different legal regimes – cultural heritage law and copyright law – which we respectively discuss in Part III and Part IV. Part II also identifies the tension produced between a strong brand heritage and the creativity within contemporary fashion design. This tension shows that contemporary fashion design both requires the past embodied in brand heritage and yet needs something original that is of the present.

Part III of the essay is dedicated to the first prong of our analysis: cultural heritage law and the fashion archive. In this section, we outline how classifying a fashion archive as cultural property requires documenting what is in a fashion archive, identifying a historic nucleus, and linking it to the cultural interests (historic, artistic, to name just a few) that are relevant under cultural property law. For the Pucci Archive, this requires identifying its contents, its historic nucleus, and the cultural relevance of the Pucci Archive. In applying cultural property law to the Pucci Archive in this section, it soon becomes clear that we need to consider the dynamic role which the more recently founded Emilio Pucci Heritage Hub has in

heritage aspects of fashion is also worth noting here. See *The Museum at FIT*, available at https://tinyurl.com/44szfvft (last visited 20 September 2023).

the archive's contents, historic nucleus, and cultural relevance. Indeed, as we outline, dynamic classifications and uses of a fashion archive might frustrate a fashion archive's classification as cultural property under the law. And this, as we see it, is not necessarily a bad thing. Cultural property law might more appropriately apply to some fashion archives, and not others. This lack of protection under cultural property law, in our view, does not necessarily compromise the heritage that is contained within the Pucci Archive. Indeed, we propose a new term for these fashion archives that preserve brand heritage, operate as mediators between fashion's past and present, and provide a procedural equilibrium for the creation of fashion designs that are properly parallel creations. This term is 'activated archive'. An activated archive, as we term it, is always acting in a way which defies traditional notions of gathering, inventorying, and conserving. An activated archive may have the characteristics of authenticity, reliability, integrity, and usability,[16] but it does not preserve fashion as a document in the traditional sense. Rather, it uses the fashion it preserves in unexpected and dynamic ways that can add to the history of the fashion it preserves and the story of the brand. These uses and additive functions, however, do not mean that an activated archive serves the purely commercial ends of an active fashion brand. Indeed, an active fashion brand that seeks to use an activated fashion archive might find itself needing to follow more stringent procedures and more historically-oriented considerations than it would in other settings. These procedures and considerations might be at odds with the goals, objectives, and needs of a current Creative Director and a brand's bottom line. Essentially, we see activated archives in a negative space of cultural property law. But we see this negative space[17] outside of the law and other forms of regulation as offering great opportunities and possibilities for brand heritage and our collective recognition of fashion as part of cultural heritage.

In Part IV we turn to the second prong of our analysis: copyright law. We take what we have observed to be the dynamic nature of an activated archive and ask how it might be relevant to current challenges in copyright infringement cases. The stealing or copying that Angelo Flaccavento identifies from a fashion commentator's perspective is often litigated in copyright infringement cases. There are different standards for fashion designs to be copyrightable subject matter under US copyright law (originality and independent creation, idea/expression doctrine) and Italian copyright law (creative character and artistic value). Notwithstanding this, however, we observe how, in both the US and in Italy, infringement tests (substantial similarity in the US and other freer form tests in Italy) might benefit from considering heritage as seen through the eyes of an archive. Depending on how copyright law identifies past designs in present creations, contemporary fashion

[16] Characteristics of an archive that are emphasized by the International Council of Archives: see 'What are archives?', available at https://tinyurl.com/yze6hsnp (last visited 20 September 2023).

[17] This phrase is borrowed from intellectual property legal scholarship which explores a low IP regime applied to fashion and copyright's negative spaces as applied to fashion. See C.B. Sprigman and K. Raustiala, n 7 above.

may be more or less a parallel creation, more or less copyrightable. Activated archives can help to set up a comparison between past and present works. Activated archives can help to define the meaning ascribed to each design, and what weight to assign such meanings in a comparison. We call this process in which activated archives engage 'heritage-shaking'. Heritage-shaking is a process in which a design in the contents of an activated archive is revisited and blended together with contemporary creativity to produce designs of the present, notwithstanding their reference to the past. We suggest that courts might more fully work with activated archives and recognize this heritage-shaking process as part of infringement tests within copyright law. Our Vivara example is helpful here. Depending on how we recognize or identify parts of the 1965 Vivara print in later reworkings or reproductions of the Vivara, we may be more apt to identify later reworkings or reproductions as copyrightable, and, by extension, as parallel creations. Understanding how an activated archive supports recognitions and translations of the form and cultural value of fashion designs can have an impact on the identification and parsing of later reworkings or reproductions.

In Part V we call for a greater consideration of these terms, activated archive and heritage-shaking, in Fashion Law as a field, both in the US and in Italy. We also emphasize that this essay is just the beginning of greater work on the relationship between cultural heritage law and copyright law and look forward to further opportunities to outline the initial ideas presented in this essay.

II. Emilio Pucci: Highlights of a Brand, Its Archive, and the Links Between Heritage and Creativity

1. The Beginnings of Pucci Between Florentine Heritage and Creativity

Born in 1914 in Naples, the Marchese Emilio Pucci di Barsento was an Italian aristocrat whose early life exhibited close links with the American lifestyle that would later inform his modern collections.[18] A skier with the Italian Olympic team during the 1932 Winter Olympics in Lake Placid and a participant in the Berlin Olympics, the Marchese Pucci received a Masters' degree in Social Science from Reed College in Oregon before World War II. While at Reed College, he was Captain of the Ski Team and designed the team's uniforms.[19] The same manufacturer who produced Emilio Pucci's designs for the ski team would later produce his first ski designs for Lord & Taylor in 1948.[20] He served in the Italian Air Force beginning in 1938 and, following World War II, spent a period of time

[18] The majority of the following biographical notes and timeline are taken from 'Timeline' *Emilio Pucci Heritage Hub*, available at https://tinyurl.com/fucvupze (last visited 20 September 2023).

[19] V. Friedman et al eds, *Pucci* n 1 above, 8.

[20] ibid 8.

in Switzerland.[21] Wanting a grey ski outfit inspired by his military outfit, he designed custom ski uniforms for himself and a friend as they took to the slopes in Zermatt. Photographed by a US photographer, the images ended up on Diana Vreeland's desk and in Harper's Bazaar. In response to requests from American manufacturers for the ski suit he sported, the Marchese, sensing an opportunity, decided to enter himself into the ready to wear ski clothing market, which was nonexistent at that time.[22] Made in vibrant iterations of blue, pink, orange, yellow, green, purple, and still more shades, Pucci's looks were immediately recognizable.[23] The Marchese designed with a vision. In the words of his daughter Laudomia Pucci

> '(The magic of the Pucci brand) is rooted in my fathers' uncompromising – and unprecedented – view of elegance, femininity, and chic. He was a minimalist before minimalism; a jet-setter before jets were flying; a scientist before fabric technology became a discipline; provocative in his modernity and sartorial daring. For him, prints were rhythm and movement, and in prints he expressed a message of contagious happiness'.[24]

Pucci's foray into the American market began with a collection for Lord & Taylor in 1948.[25] Embracing a sport aesthetic which was characteristic of American fashion, this collection 'included his skiwear designs and featured wool knits that were hand woven in Capri'.[26] As Andrew Bolton has observed of the importance of Pucci's contribution to fashion, 'The genius of the clothes…was rooted in the fact that Emilio Pucci married an Italian sensibility… to an American philosophy of sportswear'.[27] An inventor as much as a designer, Pucci followed this with the development of a synthetic jersey fabric, named Emilioform.[28] The ease of the jersey fabric and its fit reflected future changes to womens' lifestyles which allowed for 'a life of freedom where you didn't have to travel with a maid to iron your clothes every night'.[29] While Emilio Pucci's start in fashion began in the mountains, his first boutique opened by the sea. In 1950, his boutique in Capri started what soon became a trend amongst the international jet set throughout the 1950s and in the early 1960s.[30] Showing his collection at the first Italian fashion show, organized by

[21] B. Morris, 'Emilio Pucci, Designer of Bright Prints, Dies at 78' *The New York Times*, available at https://tinyurl.com/mrku8x2t (last visited 20 September 2023).

[22] ibid and 'Timeline' n 18 above.

[23] This use of vibrant colors, in fact, later inspired Laudomia Pucci's own choices of turquoise and fuchsia for the rooms of the Palazzo Pucci and the Heritage Hub. Interview with Laudomia Pucci, 14 February 2023.

[24] L. Pucci, 'Foreword', in V. Friedman et al eds, *Pucci* n 1 above, 7.

[25] 'Evening Dress 1966 Emilio Pucci' *The Metropolitan Museum of Art*, available at https://tinyurl.com/pyvsn8z3 (last visited 20 September 2023).

[26] ibid

[27] V. Friedman, 'Aristocratic Design' n 1 above, 22.

[28] n 25 above.

[29] V. Friedman, 'Aristocratic Design' n 1 above at at 26.

[30] ibid 26; 'Emilio Pucci' *FIDM Museum*, available at https://tinyurl.com/2p86c2d9 (last

Giovanni Battista Giorgini at his mansion in Florences' *Oltrarno*, *Villa Torrigiani*, in 1951, Pucci soon became part of the birth of Italian fashion. In July 1952, Giorgini decided to relocate the shows to the famed *Sala Bianca* of *Palazzo Pitti*. Pucci would be a constant presence at the prestigious Florentine event until 1967, when he preferred to continue to present his works in his own Sala Bianca in his headquarters on *Via de' Pucci*. Fashion scholars who discuss the famed Sala Bianca fashion shows at Palazzo Pitti touch on how the fashion at the shows exhibited a continuity with the Italian past and complex relationships between Italian craftsmanship and Italian fashion, in addition to Giorgini's implementation of a new presentation model primarily for American buyers.

Central to the presentation of Italian fashion to American buyers, and Italian fashion's ability to compete with Paris in the minds of American consumers, was Italian culture.[31] As fashion's past has been increasingly analyzed by academics, the importance of these early links between Italian history, especially the Renaissance, and Italian culture has been cast as a *fil rouge* that still informs Italian fashion brands' activities today.[32] Literal references to Italian culture in early Italian fashions have even been cast as having a 'souvenir effect', connecting the Italian fashion a consumer bought with memories of Italy itself.[33] Matteo Augello in his recent book on *Curating Italian Fashion*, has pointed to Pucci as an example of an Italian fashion designer who made formal references to Italy's artistic and cultural heritage and, by extension, gained recognition on the market, while participating in the Italian fashion industry's attempts to define Italian fashion at that time.[34] The DNA of the Pucci brand is, in fact, founded on a combination of Italian cultural heritage and Pucci's own creativity. Emilio Pucci's success derived in great part from his production of patterns 'with the help of craftsmen from Capri'[35] in addition to his development of new materials like Emilioform and the creativity with which he interpreted historic parts of Italian heritage in new colors and compositions. Pucci regularly drew inspiration from what we now term intangible cultural heritage under the law,[36] and from what Italian cultural property law defines as tangible

visited 20 September 2023).

[31] N. White, *Reconstructing Italian Fashion: America and the Development of the Italian Fashion Industry* (Oxford: Berg Publishing, 2000); V. Steele, *Fashion: Italian Style* (New York: Fashion Institute of Technology, 2003).

[32] M. Augello, *Curating Italian Fashion: Heritage, Industry, Institutions* (London: Bloomsbury, 2022), 15.

[33] ibid 14.

[34] ibid 13-14.

[35] L. Settembrini, 'From Haute Couture to Prêt-à-Porter', in G. Celant ed, *The Italian Metamorphosis 1943- 1968* (New York: Guggenheim Museum, 1994), 486-487. For a more in-depth analysis of the history of Italian fashion by an author who has separately written on fashion as part of cultural heritage from a fashion studies perspective see D. Calanca, *La storia sociale della moda contemporanea* (Bologna: Bononia University Press, 2014).

[36] Art 2(1) United Nations' Convention for the Safeguarding of the Intangible Cultural Heritage (2003), October 17, 2003, 2368 U.N.T.S. 42671.

cultural properties.[37] In 1955 the *La Siciliana* collection drew inspiration from mosaics; in 1957 the *Palio* collection drew inspiration from that Sienese horserace amongst the competing neighborhoods in the city; in 1959 works by the Renaissance painter Sandro Botticelli; and in 1964 the Santa Maria del Fiore dome by Filippo Brunelleschi.[38]

Figure 2 *- Palio di Siena Scarf from 1960s in* Pucci

Figure 3 *– Renaissance inspired outfit from 1957/1958 collections in* Pucci

Figure 4 *- Strapless dress from the Palio Collection Spring/Sumer 1957 in* Pucci

As Pucci created, he also archived. Emilio Pucci conserved, in an unsystematic way, thousands of drawings, designs, scarves, clothing, textiles, press releases, and other ephemera during his time at the helm of Pucci.[39] While balancing Italys' cultural heritage within his own creativity to create contemporary fashion, Pucci also preserved the heritage of his own brand. In 1992, after his death, these collected items became part of a structured heritage project. Laudomia Pucci, Emilio Pucci's daughter and in turn the former CEO, Image Director, and, later, Vice President and Deputy Chairman of Emilio Pucci,[40] recounts finding piles and piles of fabric and other ephemera in closets around the Palazzo Pucci.[41] The privately-owned Palazzo Pucci, the historic home of the Pucci family in Florence dating back to the 16th century,[42] was, in fact, the headquarters of the Pucci brand and contained its

[37] Art 10, decreto legislativo 22 January 2004 no 42.

[38] 'Of Country and Culture' and 'Timeline' n 18 above. See also V. Friedman et al, 'Pucci' n 1 above.

[39] Interview with Laudomia Pucci and Dylan Colussi, 18 October 2022.

[40] When, at the time, LVMH owned sixty-seven per cent of Pucci. See M. Socha and L. Zargani, 'LVMH Takes Full Control of Emilio Pucci' *Women's Wear Daily*, available at https://tinyurl.com/3cx587ct (last visited 20 September 2023).

[41] Interview with Laudomia Pucci and Dylan Colussi, 18 October 2022.

[42] For a historical vignette about how Pandolfo de' Pucci in 1559 plotted a failed assassination attempt of Cosimo I, resulting in a bricked in wall still visible on the Palazzo today, see 'Città di Firenze' *Facebook*, available at https://tinyurl.com/2bb6d7u5 (last visited 20 September 2023).

showroom, as well as living quarters. Over the years, the Marquise Cristina Pucci, Emilio Pucci's widow, and Laudomia Pucci restored the building.[43] Alongside striking frescoes as well as adorned ceilings dating to the 17th century, today the Palazzo Pucci contains the rich archive of past designs and ephemera from past Pucci collections. These past designs originate both from collections designed by Emilio Pucci during his lifetime and are more recent clothing from Pucci collections designed under the direction of other designers. In this sense, the heritage within the archive is stratified. Individual items within the archive include examples of Emilio Pucci's colorful designs on mannequins; an organized and accessible, upon request, archive of Pucci scarves, accessories, and fabrics; as well as books and *sui generis* Pucci products, including houseware.[44] As the former atelier and showroom of the Emilio Pucci brand, and as the historic family home of the Pucci family, the link between the movable objects in the archive and the immovable historic property is keenly felt. The second floor contains a renovated version of the historic Pucci boutique, with the fitting rooms' original mirrors.[45]

2. Pucci's Past and Present Between Family, Brand, Archive, and Heritage Hub

While the archive has had a permanent home in the Palazzo Pucci since 2000, Laudomia Pucci founded the Emilio Pucci Heritage Hub more recently in 2018.[46] Described as 'a site dedicated to nurturing brand culture and history by celebrating the Pucci brand and its iconic heritage',[47] the Emilio Pucci Heritage Hub at Palazzo Pucci embraces the link between the past lived in the building and the past preserved in displays and cabinets. The link between the past lived in the building and the present has often permeated Pucci events as well. As Vanessa Friedman noted while observing the party celebrating the 60th anniversary of the brand in the Palazzo, 'It was a night when the past melded seamlessly into the present and the present snuggled up to the future, and they all relaxed together and had a drink'.[48] This collapse of and playfulness with time is carried on in other parts of the building. The Hubs' atmosphere provides 'a memorable experience where the archive space becomes an expression of the brand codes through the creative lenses of

[43] J. Giovannini, 'Emilio Pucci's Widow Refreshes Their Ancestral Home in Florence' *Architectural Digest*, available at https://tinyurl.com/23b369bs (last visited 20 September 2023).

[44] Observations in this contribution are the result of a private tour generously given to the authors by Laudomia Pucci, Cristina Fasone, and other members of the Heritage Hub in September 2022.

[45] Tour of the Emilio Pucci Heritage Hub, 13 September 2022.

[46] *Emilio Pucci Heritage Hub Palazzo Pucci N6 Handout* (on file with the authors). It was in 2016, when LVMH decided to transfer Emilio Pucci headquarters and all employees from Florence to Milan, that Laudomia Pucci started to envision a different role for the *Palazzo*.

[47] 'Palazzo Pucci' *Emilio Pucci Heritage Hub*, available at https://tinyurl.com/fucvupze (last visited 20 September 2023).

[48] V. Friedman, 'Aristocratic Design' n 1 above at 11.

Laudomia Pucci and her past and present collaborations'.[49] Innovative uses of the archive were, in fact, a key piece of Pucci's activities as LVMH increased its share in the brand. In 2011 Laudomia Pucci founded a private museum at the *Villa di Granaiolo*, another historic property of the Pucci family in the Florentine countryside.[50] Villa di Granaiolo has hosted exhibitions featuring objects from the Pucci archive, and also houses a Talent Center where fashion students have worked with pieces from the archive as Flaccavento's so-named reference points.[51] In these exhibits, and in other activities inspired by the archives' contents, the curation of the Pucci story followed the increasing importance of heritage marketing in fashion. Heritage marketing presented a constructivist approach to a fashion brand's history, one characterized by interpretation, creating value on the market and emphasizing the wider role which fashion brands play in culture.[52] These new practices of presenting fashion brands' heritage were embraced from the start in the Pucci archive, which sought to strike a balance between

> 'historical-documentary and conservation … critical and cultural readings of the "visual", iconic, stylistic, and creative registers and those of the strategic use of artifacts'.[53]

On the private/public spectrum of fashion brand archives, the Emilio Pucci Heritage Hub presents a hybrid format in the spectrum's middle. At the two opposite ends of the spectrum of fashion and luxury archives we might think of the Fondazione Ferragamo and the Gucci Archive.[54] The *Fondazione Ferragamo* is on the 'public' end of the spectrum. As a not-for-profit legal institution with members of the Ferragamo family on its board, the Fondazione is legally separate from the Ferragamo brand and corporation. It pursues a distinct public mission and purpose with a museum and accompanying public programming.[55] While

[49] Emilio Pucci Handout at 1 (on file with authors).

[50] *Emilio Pucci Heritage Hub,* available at https://tinyurl.com/fucvupze (last visited 20 September 2023); L. Zargani, 'World of Pucci on Display' *Women's Wear Daily*, available at https://tinyurl.com/2euzyk37 (last visited 30 September 2023).

[51] 'Polimoda at Les Journées Particulières LVMH', available at https://tinyurl.com/2p9cyfe7 (last visited 20 September 2023). It is also worth mentioning that fashion schools are playing an increased role in the Pucci Heritage Hub's activities. In March 2023 it was announced that IED Firenze would take up residence in the Palazzo. Elisa Pervinca Bellini, 'Anche l'aula è una musa' *Vogue Italia*, 136 (2023).

[52] M. Augello, n 32 above, 20-21 (also mentioning how Maria Luisa Frisa's approach to fashion curation embodies this constructivist approach). Maria Luisa Frisa curated Pucci's 2016 exhibit at Pucci's Villa di Granaiolo as part of LVMH's *Les Journees Particulieres*. See A. Masetti, 'Les Journées Particulières 2016: l'Archivio Emilio Pucci a Granaiolo' *The Fashion Commentator*, available at https://tinyurl.com/ycx5u4mv (last visited 20 September 2023).

[53] M. Augello, n 32 above, 47 (citing to comments made by Alessandra Arezzi Boza, who formerly helped to manage the Fondazione Archivio Pucci).

[54] See ibid 15 for a recent publication on fashion archives in Italy from a fashion studies perspective, spotlighting the Fondazione Ferragamo and Gucci.

[55] The Museum is, in fact, a member of the International Council of Museums. See 'Museum

collaboration consistently happens between the Fondazione and the brand, and while the collections of both may even be housed and created at the same place,[56] the *Fondazione* and the brand are linked by family members in both entities, but technically separate from a legal point of view. The Gucci Archive,[57] by contrast, is on the 'private' end of the spectrum. The contents of the Gucci Archive and access to it are fully controlled by Guccio Gucci, SpA as a company. There is no public programming associated with the archive nor is there public access. Indeed, the Gucci Archive is seen as a precursor to commercial activities like Gucci Vault,[58] which sells drops of archival fashion to the public online. The Emilio Pucci Heritage Hub, with its archive, sits between these two poles. The Hub is characterized by management by members of a family who were active in and are the descendants of the fashion brands' founders, but the management of the archive itself is firmly outside the brand. The Emilio Pucci brand, currently fully owned and controlled by LVMH,[59] is a separate entity from the archive and the Emilio Pucci Heritage Hub. The Hub has served as a reference for current designers at the Pucci brand.[60] At the same time, with full control of the archive under the direction of Laudomia Pucci and with Laudomia Pucci's full private ownership of individual objects in the archive, access to the archive is mediated, at the very least, through Laudomia Pucci's management. Access is also contextualized within the Hub's mission and evolution. This mission and evolution seek to move away from the traditional role of a brand archive as a 'well of research for future collections, as well as a storytelling vehicle for the marketing and communications of the collections'.[61] Control and access, and decisions about how to display and use the tangible ephemera, are characterized as outside of brand communications and strategy. At the same time, the Hub is not meant to be a museum space nor to live in 'museum-like confines'.[62] It is not a space for the general public; it is not a cultural space *per se*. 'There are 69 museums in Florence, there is no need for 70', explained Laudomia Pucci in an interview for the opening of the Hub,

> 'I toyed with the idea of a museum, but then I felt we should translate all the richness of the Palazzo and our history into something that will be attractive, drawing young people in … a space for young professional(s) to

History', available at https://tinyurl.com/2p8ua8p6 (last visited 20 September 2023).

[56] The Fondazione Ferragamo and Salvatore Ferragamo SpA's current designs are both created at the Osmannoro location outside of the center of Florence.

[57] 'A New Home for the Gucci Archive', available at https://tinyurl.com/bdbpburt (last visited 20 September 2023).

[58] 'Vault Gucci', available at https://tinyurl.com/mr259nz3 (last visited 20 September 2023).

[59] M. Socha and L. Zargani, 'LVMH Takes Full Control' n 40 above.

[60] 'Emilio Pucci embarks on a new journey in Capri' *LVMH*, available at https://tinyurl.com/5ysu2u6f (last visited 20 September 2023).

[61] Emilio Pucci Handout at 1 (on file with authors).

[62] ibid

prosper and grow'.[63]

Even though the Hub still displays a connection to the fashion brand from which it is separate and has historic connections to public fashion museums in Florence[64] (unlike other luxury and fashion initiatives, such as the Fondazione Prada)[65] the Hub is neither in the model of the Fondazione Ferragamo or the Gucci Archive.

When a current designer of the Pucci brand consults the archive, therefore, contemporary creativity is mediated by brand heritage that is contained in a new type of space. At the moment, the Pucci brand and its Creative Director Camille Miceli continue to take inspiration from the origins and the past of Pucci, staging, for example, the brand's 'new journey' with a focus on resort in Capri in May 2022.[66] At the moment, these references may not yet include reworkings of the Vivara print, but the new goals of the Hub, and its placement outside of Pucci's current corporate structure, raise questions. How does the Hub, with its preservation of the Vivara print, inspire impactful parallel creations? Does cultural property law in its current form enable a cross-pollination between heritage and contemporary design for parallel creations? How should we apply cultural property law to the Pucci Heritage Hub, and to the fashion archive within it, to preserve the dynamic nature of heritage and creativity? Does the Pucci Heritage Hub offer an innovative procedure outside of cultural property law which uniquely enables parallel creations, bypassing Flaccavento's critiques?

III. The Pucci Fashion Archive as an Activated Archive Outside of Cultural Property

1. Some Background on Archives as Cultural Property Under the Law

In the current fashion industry, brand heritage is most often managed through an archive. At its most broad, we might understand an archive as

> ' "a complex of documents produced or acquired by a subject in the course of the development of its own activities" and as "an institution in

[63] L. Zargani, 'Palazzo Pucci's New Chapter Highlights History' *Women's Wear Daily*, available at https://tinyurl.com/3tjkf6cy (last visited 20 September 2023). Laudomia Pucci has worked on putting together the Heritage team, young professionals scouted from partnerships with Central Saint Martins and Polimoda, to turn Palazzo Pucci into a center capable of revitalizing the history of the Pucci brand and Made in Italy itself. See also comments from current Archive Manager Dylan Colussi, hired in 2018, Interview with Laudomia Pucci and Dylan Colussi, 18 October 2022.

[64] Emilio Pucci Handout at 1 (noting the archive's donation of Pucci pieces to the Museum of Fashion and Costume of Palazzo Pitti in 1992) (on file with authors).

[65] Which concentrates its collecting and display activities on contemporary art and not fashion. See *Fondazione Prada* available at https://tinyurl.com/2uepv8dp (last visited 20 September 2023).

[66] 'Emilio Pucci embarks on a new journey in Capri' n 60 above.

which archives of various provenance are gathered" '.[67]

This word, archive, is traditionally thought of as a dusty repository of old documents and books. These documents and books may or may not be of interest to the present at all. They are primarily kept for their testamentary and reference value, or what might be termed their historic and educational value. Indeed, this need for preservation is the fundamentally animating reason for a whole legal system – cultural property law.[68]

The current Code of Cultural Property in Italy was enacted into law at the beginning of the 21st century but is an inheritance from its earliest codifications in the early 20th century. Cultural property[69] is generally defined in Art 2 as

> '*… le cose immobili e mobili che, ai sensi degli articoli 10 e 11, presentano interesse artistico, storico, archeologico, etnoantropologico, archivistico e bibliografico e le altre cose individuate dalla legge o in base alla legge quali testimonianze aventi valore di civiltà*'.[70] (Translated: of immovable and movable things which, pursuant to articles 10 and 11, present artistic, historical, archaeological, ethnoanthropological, archival and bibliographical interest, and of any other thing identified by law or in accordance with the law as testifying to the values of civilisation')

Art 10 names specific categories of cultural property by operation of law or by a declaration of the State.[71] Art 11 includes specific regulations for certain categories of these cultural properties which take specific facets of their existence in the wider cultural context into account.[72] Public archives are mentioned in Art 10(2)(b). Under this article, archives owned by the State, by regions and by other public entities are cultural property by operation of law.[73] Similarly, under Art

[67] G. Sciullo, 'Gli archivi come elementi costitutivi del patrimonio culturale: missione e organizzazione giuridica' *Giornale dell'arte e del diritto online* (2020), noting the presence of these definitions in articles 10(2)(b) and 101(2)(c) of the Italian Code of Cultural Property.

[68] For an overview of the preservation ethos in various cultural property laws throughout history see A. Emiliani, *Leggi, bandi e provvedimenti per la tutela dei beni artistici e culturali negli antichi stati italiani 1571- 1869* (Bologna: Nuova Alfa Editoriale, 1996); L. Casini, *Ereditare il Futuro* (Bologna: il Mulino, 2014), 27; T. Alibrandi and P.G. Ferri, *I beni culturali e ambientali* (Milano: Giuffré, 2001).

[69] Cultural objects are, in this sense, defined more based on their function ('beni di fruizione') than on their status of possession or ownership ('beni di appartenenza'), M.S. Giannini, 'I beni culturali' *Rivista trimestrale diriritto pubblico*, I, 3 (1976); see also A. Sandulli, 'Beni pubblici' *Enciclopedia del Diritto* (Milano: Giuffrè, 1959), V, 277; S. Cassese, *I beni pubblici. Circolazione e tutela* (Milano: Giuffrè, 1969).

[70] Art 2 decreto legislativo 22 January 2004 no 42.

[71] Art 10 decreto legislativo 22 January 2004 no 42.

[72] Art 11 decreto legislativo 22 January 2004 no 42.

[73] Art 10(2)(b) decreto legislativo 22 January 2004 no 42. Cultural property that is so by operation of law only needs a simple cultural interest. This simple cultural interest is presumed, and is evaluated *ex post* in the rare circumstances when a cultural property is removed from the complex of cultural heritage under a separate administrative procedure, known as a 'verifica'. Art 12 decreto

10(2)(a), public museum collections are also cultural property, and the objects within them are therefore presumed to be cultural property by operation of law.[74] This is important: many fashion brands have donated products they have designed and offered on the market to public museums.[75] At times, this leads to a legal fiction: Pucci objects, for example, that are donated to the *Museo della Moda e del Costume* across the Arno,[76] are presumed to be of historical interest and to be cultural property, while the objects preserved in the Pucci Archive in the Palazzo Pucci itself, are not so presumed. The historic interest that is at once recognized in one cultural institution – a public museum – does not automatically translate, under the law, to another place – the private archive. Private archives fall under Art 10(3)(b), allowing privately owned properties of a particularly important historic interest to be declared cultural property in an administrative procedure begun by the Superintendency and adopted by the Italian Ministry of Culture.[77] Art 10(3)(a) and Art 10(3)(e) allow individual properties or collections or series of objects in private hands, respectively, to be declared cultural property when they are of particularly important cultural interest or of exceptional cultural interest. Art 10(3)(d) goes even further, allowing for the declaration of cultural properties, whether in public or private hands, that exhibit

> …a particularly important interest because of their reference to political, military, literary, artistic, scientific, technical, industrial or general history…. (or even) an identifying or civic link of exceptional distinctive significance….

In practice, these civic links have included the history of a city, such as Florence. The stakes of such a declaration are high for the management of a private archive. This is so even for private archives which simply contain individual objects declared to be cultural property. As a result of the procedure of declaration of cultural interest of a certain object, the Superintendent's Office issues a special protective measure that is called '*vincolo*', literally 'constraint.' This constraint places restrictions on how the protected object can be used or modified, bringing the object declared to be

legislativo 22 January 2004 no 42. A US audience might compare this to deaccessioning. Museums in Italy, however, are not allowed to deaccession *per se*, and the process of declaring a cultural property by operation of law to be without cultural interest is an exceptional, if not almost completely unforeseen, circumstance. For a deeper comparison of deaccessioning in the US in the Italian context see S. Settis, *Italia, SpA* (Turin: Einaudi, 2007).

[74] Art 10(2)(a) decreto legislativo 22 January 2004 no 42.

[75] The legal relevance of the fact that some fashion objects are in public museum collections is an aspect which is overlooked by Augello in his otherwise excellent study of private archiving, which also touches on fashion in private hands as cultural property. Analyzing the fact that fashion in private hands requires particularly important or exceptional interests soon brings home the legal fiction of cultural interests in different fashion objects, based on who possesses or owns them. It is points to how modes of *fruizione* are still shaped by property rights. M. Augello, n 32 above.

[76] 'Galleria del costume di Palazzo Pitti. Abiti e accessori' *Sistema Informativo Unificato per le Soprintendenze Archivistiche,* available at https://tinyurl.com/jtavpv6r (last visited 20 September 2023); S. Ricci, *La Donazione Emilio Pucci: colore e fantasia* (Firenze: Centro Di, 1992).

[77] Arts 13 and 14 decreto legislativo 22 January 2004 no 42.

cultural property under the protection of cultural property law on a permanent basis. The cultural property regime requires private owners and possessors of declared cultural property to preserve their cultural property.[78] The acts of preservation required by law may include conservation plans. Cultural properties cannot be

> 'destroyed, allowed to deteriorate, damaged or designated for uses that are not compatible with their historic or artistic character, or for uses that would be of detriment to their conservation'.[79]

Moreover, Art 21(d) requires that documents in private archives may not be discarded without the Ministry's permission.[80] A declaration of cultural property would provide administrative roadblocks to any reorganization of a private archive that would require, in comparative American terms, acts of deaccessioning.[81] Similarly, the broad prohibition on 'uses that are not compatible with (an archive's) historic or artistic character'[82] begs the question of what is compatible.[83] This notion of compatibility would be directly connected to the nature of a private archive's particularly important historic interest.

How a private fashion archive, and its contents, exhibit the necessary degree of historic interest is a crucial question, especially for the officers of each Superintendency who are responsible for gathering the evidence and explaining 'why' its preservation requires an intervention by cultural property law.[84]

2. The Material Consistency and Historic Nucleus of an Archive

The nature of drawing these lines has become even more crucial as Italian cultural property law has incorporated intangible cultural heritage into its Code.

[78] See 'Capo 3, Protezione e Conservazione' decreto legislativo 22 January 2004 no 42.

[79] Art 20(1) decreto legislativo, 22 January 2004, no 42.

[80] Art 21(d) decreto legislativo, 22 January 2004, no 42.

[81] Deaccessioning refers to an internal administrative process by which American museums decide to remove objects from their collection, prior to selling those objects. Reasons for deaccessioning can include an object being a multiple, no longer of relevance to a museum's collecting mission. For a discussion of deaccessioning in US case law see *Rockwell* v *Trs. of the Berkshire Museum* 1176 US 00253 (2017). Similarly, collections and series of objects, recognized under a different clause of Art 10, are declared to be cultural property because they are of exceptional interest and are not to be separated without the permission of the Ministry. Art 21(c) decreto legislativo 22 January 2004 no 42.

[82] Art 20(1) decreto legislativo 22 January 2004 no 42.

[83] This provision, even if it is vague and undetermined, might be justified for concessions of the use of originals. But consider the debate on reproductions of cultural property in which the wide and ambiguous notion of *decoro* guides decisions about the appropriateness of a cultural property's reuses. Cultural institutions which own an object of cultural property deploy 'decoro' to effectively regulate reproductions, whether the object is in public domain in copyright terms or not. The idea of an elite group of gatekeepers managing and controlling cultural property remains a peculiar trait of the Italian legal system of cultural heritage protection, despite recent trends towards a more open notion of access to culture, starting from the Faro Convention at EU level and the Art Bonus legislation at the national level.

[84] Interview with Jennifer Celani, 10 November 2022.

In Art 7-*bis*, the Italian Code incorporates Italy's implementation of the Convention for the Safeguarding of Intangible Cultural Heritage:

> The expressions of the collective cultural identity contemplated by the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage and by the (Convention) for the Protection and Promotion of the Diversity of Cultural Expressions...are subject to the rules of this Code when they are represented by tangible testaments and when the requirements and conditions for the application of art 10 are present.

Material consistency – that is, physical objects, including the number of objects – is crucial to read Art 7-*bis* into Art 10. That is, tangible objects are needed to identify historic importance, as a first matter, but they are even more necessary when the law seeks to identify and preserve intangible traditions, like artisanship or traditional craftsmanship.[85] Identifying the relationship between a tangible object and a cultural interest requires evidence, and the material consistency of an archive, meaning the presence of tangible objects as well as the identification of how many and what exactly they are (documents, textile, finished product, design sketch), is crucial. Identifying a historic nucleus is also important when multiple objects are present in an archive. This historic nucleus is understood as the fundamental group of objects that link to the history the objects embody. Cultural property law's time thresholds are extremely relevant here. Indeed, while archives do not necessarily need to be of a specific age under cultural property law, age ('*vetustà*') is relevant in practice. Moreover, properties under Arts 10(3)(a) and 10(3)(e), those solely in private hands, cannot be declared to be cultural property, even if they are of cultural interest, unless they are older than seventy years old and by non-living authors.[86] Art 10(3)(d), applying to objects that reference to political, military, literary, artistic, scientific, technical, industrial or general history or have a civic link, contains no such age requirement. An example to elucidate the differences between these various categories of cultural property, especially for how they relate to Pucci, may be helpful.

Currently, the Superintendency of Florence is cataloguing the costumes used in Florences' '*calcio storico*' or, historic soccer, which also includes a procession on the feast of Saint John the Baptist.[87] The result of a tripartite agreement between the Superintendency, the University of Florence, and the municipality of Florence, this gathering of evidence includes creating an inventory of the paper documents, audiovisual evidence, events, the game plays, and the costumes that have all been

[85] Art 2 United Nations' Convention for the Safeguarding of the Intangible Cultural Heritage (2003), 17 October 2003, 2368 U.N.T.S..

[86] Art 10(5) decreto legislativo 22 January 2004 no 42.

[87] 'Calcio storico fiorentino' *Wikipedia,* available at https://tinyurl.com/5btddvfe (last visited 20 September 2023); Comune di Firenze, 'Calcio storico fiorentino', available at https://tinyurl.com/ymvpv5ed (last visited 20 September 2023).

associated with this traditional hybrid soccer/rugby game over the years.[88] '*Calcio storico*' is seen as part a local Florentine tradition, and the cataloguing and inventorying process is part of the building of evidence and information-gathering necessary to document *calcio storico's* particularly important cultural interest.[89] While the inventory contains costumes, or uniforms worn in the game of *calcio storico* and not fashion, Emilio Pucci himself was very active in *calcio storico*.[90] A portrait painted in 1993 by André Durand shows the Marquis in his full Renaissance-era costume, with a breastplate, voluminously sleeved coat, and a hat, astride his horse in the procession.[91] Emilio Pucci's *calcio storico* uniform is, in fact, connected to the history of this tradition in Florence. Pucci's uniform is, therefore, part of the inventorying of this tradition, an inventorying which is meant to show the cultural links which will ground a declaration that the physical objects used over time as part of *calcio storico* are cultural property. Pucci's *calcio storico* uniform has been described as part of the proverbial reliquary that is representative of collective identity, as a costume that embodies this collective identity. It is also within the date range to which the Superintendency has limited its study: 1930 to 1970. In many ways, creating an inventory and cataloguing is a way to gather facts, to craft a narrative that will objectively show *calcio storico's* historic value and connection to the history of the city of Florence. Lawyers are familiar with this fact-gathering, as is any historian. But just as lawyers and historians are familiar with the process, and follow specific procedures when presenting facts, so questions naturally arise about this process. Do we weigh place as most important, or actual wearing of the costumes? Does the presence of a costume in a portrait present sufficient evidence to include it as part of a group of physical objects embodying collective identity? In the cultural heritage sphere, questions about how one links a tangible property to an intangible cultural interest are charged with the practical implications of such a connection. This includes how to connect objects to the story of a place, like Florence, or even to a practice, like traditional craftsmanship. For fashion, these questions of '*how*' one links physical objects, or a repository, like an archive, to cultural interest are crucial. Fashion archives often serve business purposes, informing the creation of the parallel creations Flaccavento mentions. Fashion archives also contain many if not more of the intangibles mentioned in the calcio storico example. Fashion design itself, as we've seen in Flaccavento's comments, travels. Fashion is a reference that is at once time-locked and time-free; timely and timeless. How can we link the tangible dresses and scarves to such a changeable, intangible activity? Is such a changeable, intangible activity, even as presented in the Pucci Archive, sufficiently linked to Florentine history? Moreover, if we did,

[88] Comune di Firenze, 'Il Corteo Storico del Calcio storico diventa "patrimonio di Firenze" ', available at https://tinyurl.com/4ab4zzj9 (last visited 20 September 2023).

[89] ibid

[90] Interview with Jennifer Celani, 10 November 2022.

[91] 'The portrait commemorates Emilio Pucci's twenty-five years of participation in the Calcio Storico' *Alamy*, available at https://tinyurl.com/2kva82ap (last visited 20 September 2023).

who would be responsible for the continued preservation and valorization of the Pucci Archive, especially under new constraints?

The nature of the declaration of a particularly important historic interest for a private archive might help us answer these questions. The declaration, which is the counterpart to the presumption for public archives or museum collections, is the springboard for the application of the concept of cultural property to a private archive. The purpose of this declaration is grounded in the protection of cultural property which is enshrined in the Italian Constitution.[92] The increased level of cultural interest that is needed for private archives to be declared cultural property is rooted in the need for a limit, to respect the rights of private property owners to enjoy their property.[93] There has been some discussion in Italian doctrine about the legal nature of this declaration – whether the declaration is required for the very existence of an archive's cultural interest or whether this declaration is a triggering recognition that gives legal relevance to a cultural interest that was always there.[94] Currently, case law in Italy has recognized the latter.[95] A declaration effectively means that an archive may be of cultural interest to us and yet simply not have gone through the administrative process to make that cultural interest so particularly important to trigger a legally relevant definition and associated protection. In other words, a privately-owned fashion archive can be of cultural interest, fashion itself can be of cultural interest, without necessarily being a cultural property, without a legal intervention. This recognition of a cultural interest that is outside of a legally relevant one is important. It implies that, at certain moments, fashion's cultural interest can exist (and successfully inspire and operate) outside of the cultural property regime, in a negative space of it.[96]

3. Fashion Archives as Cultural Property: From Brioni to Balestra

Of course, not all private fashion archives need be in this negative space of cultural property law. There are two examples of the Italian public administration declaring a fashion archive to be of particularly important historic interest.[97] In 2009

[92] V. Cazzato, 'Disegno di legge: "Tutela delle cose d'interesse artistico e storico" (n. 154), La normativa, La legge sulla tutela delle cose di interesse artistico e storico', in Id ed, *Istituzioni e politiche culturali in italia negli anni trenta* (Roma: Istituto Poligrafico e Zecca dello Stato, 2001) I, 334, 408-409. Art 42 costituzione italiana (noting in part 'Private property is recognized and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all. In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest').

[93] G. Famiglietti et al, *Codice dei beni culturali ragionato* (Molfetta: Nel Diritto Editore, 2018), 133.

[94] ibid

[95] ibid, citing to Consiglio di Stato 11 March 2015 no 1257; Tribunale Amministrativo Regionale Puglia 4 May 2017 no 476; Consiglio di Stato 8 February 2000 no 4667.

[96] We borrow this phrase from intellectual property legal scholarship which explores copyright's negative spaces as applied to fashion. See C.B. Sprigman and K. Raustiala, n 7 above.

[97] For an overview of the description of the Brioni archive see 'Brioni, s.p.a.' *Sistema Informativo Unificato per le Soprintendenze Archivistiche,* available at https://tinyurl.com/cj8zpwmn

the *Brioni* Archive was declared to be a cultural property by the Superintendency of the Lazio Region. Its collection includes clothing, recordings of runway shows, corporate ephemera, promotional materials, and designs. In 1952 *Brioni* participated in the fashion show in *Palazzo Pitti's Sala Bianca*,[98] and this is mentioned in the description of the archive's importance. Brioni is also a global fashion brand prized for the quality of its clothing and its innovative communications strategy.[99] The description of the archive on the website of the Superintendency for Archives notes that the company which owns the archive is still active. The description also places emphasis on the 50th anniversary of Brioni's operations and an exhibition that accompanied this anniversary, effectively historicizing the facts. The description notes the end date of objects in the archive as 2006. Similarly, in 2019, ten years after the declaration of Brioni's archive as cultural property, Renato Balestra's archive, which has been the foundation of the recent relaunch of his brand by his grand-daughter, Sofia Bertolli Balestra, was also declared of historical interest and a cultural property.[100] The explanatory statement issued by the Superintendency identifies the Balestra archive as a paramount resource that catalogues and chronicles the history of the brand, but that also catalogues the history of Italian costume and Made in Italy.

> 'The archive, in its consistency and heterogeneity, has a great historical interest for the knowledge and detailed study of the style and creativity of the designer Renato Balestra, a historic label of Italy's Alta Moda. But (the archive is also of great historical interest) for the history of costume and Made in Italy, a mixture of technical tradition and artisanship, in which the sartorial construction of the suits is married with the wise use of textiles and embroidery'.[101]

The key factor that supports and gives strong evidence of the historical importance of the Balestra archive is definitely the tradition of craftsmanship combined with the technically skillful use of fabrics and embroidery which have characterized Balestra's work. The collection, spanning from the early 1950s to the first decade of

(last visited 20 September 2023).

[98] ibid

[99] ibid

[100] 'Balestra. Re_Launching an Icon' *Brand Oasi,* available at https://tinyurl.com/46y9dxhz (last visited 20 September 2023); L. Zargani, 'Balestra to Present New Brand Course' *Women's Wear Daily*, available at https://tinyurl.com/2s3swm22 (last visited 20 September 2023); L. Zargani, 'Couturier Renato Balestra dies at 98' *Women's Wear Daily*, available at https://tinyurl.com/2p8ppjtr (last visited 20 September 2023); Redazione Ansa, 'Archivio Balestra di interesse storico' *Ansa*, April 5, 2019, available at https://tinyurl.com/3rk7tf27 (last visited 20 September 2023).

[101] ibid 'L'archivio, nella sua unitarietà ed eterogeneità, riveste un grande interesse storico per la conoscenza e l'approfondimento dello stile e della creatività dello stilista Renato Balestra, firma storica dell'Alta moda italiana. Ma anche della storia del costume e del made in Italy, mistura di tradizione tecnica ed artigianale, in cui la costruzione sartoriale degli abiti si sposa con il sapiente uso dei tessuti e dei ricami'.

the 2000s, features over forty-thousand sketches and drawings, including drawings of uniforms designed for Alitalia, Agip Petroli, Philippine Airlines, Avianca Airlines, Compagnie Internationale des Wagon-Lits, sketches of dresses commissioned by clients, drawings for operas and ballets, such as Swan Lake, Cinderella, Turandot, paper patterns, embroidery and fabric samples. It also includes ten iconic dresses made between the 1960s and the 2000s, and the two wedding dresses expressly made for the daughter of the former president of the Philippines, Imelda Marcos. The archive includes photographs and videos of Haute Couture shows, Italian and foreign publications, prestigious awards, and prizes received by the designer. Following the death of its founder last November 2022, the archive remains privately owned by Fabiana and Federica Balestra, Renato's daughters, as well as Sofia, his granddaughter. The family is also managing the relaunched fashion house, for which Fabiana Balestra serves as CEO.

This leads us back to the Pucci Archive. Can we identify a relevant historic nucleus, with accompanying material testaments, as in the Brioni example? Can we think of the Pucci Archive as like *calcio storico*, as intangible cultural heritage linked to the history of the city of Florence with sufficient material consistency? Or as an intangible cultural heritage related to craftsmanship? Or, conversely, can we *not* sufficiently identify the nature and material consistency of the Pucci Archive, and a historical nucleus, to ground the declaration of it as cultural property? Is the Pucci Archive of cultural interest, but not of a sufficiently particularly important cultural interest? Or, does it not fulfill the requirements of cultural property law for specific reasons related to its dynamic role in the Heritage Hub?

4. The Pucci Archive as an Activated Fashion Archive of Cultural Interest

There are a number of motifs present throughout the Pucci Archive, the *Palazzo Pucci*, and the Heritage Hub. These motifs are contained within its collection of dresses, textiles, Pucci-designed housewares and ephemera, including sketches. These motifs showcase the intangibility of what might particularly matter to us about the Pucci heritage. In this sense, identifying a historic nucleus, or even linking the Pucci Archive to other histories, might be more fraught than first expected. The very references Flaccavento describes in his fashion report are present throughout the Pucci Archive. The Pucci Archive might fit broad conceptions of an archive by preserving thousands of drawings, designs, scarves, clothing, textiles, press releases, and other ephemera during Emilio Pucci's lifetime and after it. However, the Pucci Archive also fails a more specific definition of archives under the cultural property legal system, one that seeks to preserve archives for their public cultural interest. This is so because of the very specific role of the Pucci Archive in acting as the facilitator of the comparison between past and present at the heart of fashion, thereby eliding conceptions of time and history. The Pucci Archive is not just a container from which to be drawn, nor is it a tool for marketing ends. The

fundamental idea behind the Pucci brand has been described as both general and specific: 'general enough (engaged with the liberty of the body and soul) to evolve over time' and specific as it is 'composed of certain immutable values (ease, color, lifestyle references)'.[102] This general and specific nature has had an effect on the timelessness and timeliness of Pucci's designs, which 'is ever-present in (women's) quotidian life just as much as it is in their memories of the past'.[103] At other times Pucci has been described as 'an emotional and social idea: one that can be reinterpreted and refined as necessary, and that can be seen through multiple imaginations'.[104] This makes the Pucci Archive an activated space that facilitates access to a permeable heritage.

For example, the Pucci Heritage Hub's decoration references Pucci's characteristic colors. The 2018 remodeling project designed by Laudomia Pucci and implemented by architect Piero Lissoni opts for colors that are all from Emilio Pucci's own original numbered and trademarked hues, and makes deliberate use of them throughout the building, even beyond the display of Pucci ephemera and clothing present in the archive.[105] The choice to include Pucci colors as part of the Heritage Hub also embodies how familial ties can positively complement the historicization and memory of creative choices.[106] At the same time these choices are also circumscribed by administrative burdens. The Palazzo Pucci's status as an immovable cultural property already imposes administrative burdens on the Heritage Hub under cultural property law. Throughout the first floor, a bright pink carpet covers the floors of rooms where Emilio Pucci had his office and where the brand's showroom welcomed guests and customers. On the '*piano nobile*', where the Pucci boutique used to be and where Laudomia Pucci's offices are now, a bright blue carpet lines the hallways. The privately-owned Palazzo Pucci, the historic home of the Pucci family in Florence, dating back to the 16th century, has been declared a cultural property by the Italian government.[107] It contains striking frescoes as well as adorned ceilings dating to the 17th century. A laying of the pink carpet that would affect the floors would likely be an addition needing approval of

[102] V. Friedman, 'Aristocratic Design' n 1 above at 15.

[103] ibid

[104] ibid 16.

[105] The dual role of color as indicative of a trend and as indicative of a brand is also an important theme in Fashion Law. It is one which we are not addressing here, but which one of us addresses in future work. See F. Caponigri, *Valentino Pink PP: Culture, Law, and Creativity in Color* (manuscript on file with the author). As Laudomia Pucci has noted, Emilio Pucci's use of vibrant colors beginning in the 1950s preceded the Valentino Pink PP collection and the use of turquoise, for example, in Balenciaga's boutiques. For the purposes of this paper, we do not address the nuanced issue of trademarks in certain colors as applied to fashion items and the limited monopolies associated therein.

[106] Indeed, just as Laudomia Pucci's experiential knowledge of her father's creative process and choices has enabled the Pucci Heritage Hub's take on Pucci heritage and the organization of the Pucci Archive, so fashion families in other contexts can also uniquely support the management of fashion firms. For more on this, see Caponigri and Landreth's article in this Symposium.

[107] Interview with Laudomia Pucci, Tour of the Emilio Pucci Heritage Hub, 13 September 2022.

the Superintendency. Questions as part of the evaluation may include whether the pink carpet would tangibly alter or affect a part of the building and, therefore, the historic interest for which it is recognized. The frescoes themselves might also have their own complementary artistic interest. Even simple acts such as laying a hot pink carpet as part of the activities of the Heritage Hub are relevant to the administrative functions of conservation and preservation at the heart of Italian cultural property law, providing some bureaucratic burdens on the Heritage Hubs' activities already. At the same time, decorating the Palazzo with a carpet in these Pucci hues is not an activity that can be divorced from the expansive nature of Emilio Pucci's creativity. In 1969 in fact, Emilio Pucci collaborated with the Argentinian company *Dandolo y Primi* in Buenos Aires on a series of rugs with his Vivara print.[108] Today, one of the rugs, first displayed in the *Museo Nacional de Arte Decorativo* in Buenos Aires, is on the '*piano nobile*' of the Palazzo, in a room where it dialogues with other Pucci objects, including the installation 'Bonaveri, a Fan of Pucci'. Running throughout Pitti Uomo 2018 to celebrate the opening of the Hub, the Bonaveri mannequin was created after Emilio Pucci's death but inspired by the *Birth of Venus* and Pucci's pearl bikinis and Pucci prints.[109] These creative links alone, which are showcased within the Palazzo and are relevant to the Palazzo's historical relevance as Pucci's atelier and showroom show the practical challenges of harnessing, for traditional preservation ends, the use and invention behind the objects imagined by Pucci the designer and, later, by Pucci the brand. An object in the Pucci Archive such as the rug or a dress could easily be presented as integral to a collective historic interest in the Palazzo, as much as it is of interest to a contemporary fashion public.

Figure 5 *- A 2018 image of a room on the first floor of the Palazzo Pucci, now staged as part of the Heritage Hub. Image from Blue Studio Trading.*

[108] 'Art for Home', in 'Timeline' n 18 above.
[109] 'A Venus in Pucci Virtual Tour' *Emilio Pucci Heritage Hub* n 50 above.

As an activated space, the archive falls between conceptions of interests traditionally associated with the archive under cultural property law. As part of its purpose to facilitate access to a permeable heritage, the Pucci Archive is the opposite of a space with a fixed heritage. It is not a historic nucleus that is engaged in absolute truth-telling or cultural testimony.[110] In a complex societal structure where 'old' fashion becomes new again in its tangible as well as intangible iterations, fashion archives like the Pucci Archive can increasingly become divorced from a clear boundary between past and present. The Pucci Archive embodies all these contradictions. Laudomia Pucci, Emilio Pucci's daughter, feels connected to the Pucci Archive not as a closed past but as a living, breathing memory of her father and his creativity.[111]

> 'All the codes and elements of the brand are there, presented in a playful and ironic way. It's unexpected and it may seem strange, but when you look at it, you understand my father's inspiration',

she explains.[112] The Pucci Archive, while separate from the Pucci brand as it is owned and operated by LVMH now,[113] is not a corporate archive in the traditional sense. Nor, however, is it easily a private archive testifying to a past activity, like the Brioni Archive. Rather, the Pucci Archive contains prints, such as the 1965 Vivara print that are embodied across tangible objects, in dresses, clothing, and in Rosenthal ceramics and rugs.[114] The Vivara print lives on as inspiration for

[110] These conceptions stem from the traditional approach of cultural property scholarship that assigns an absolute value to cultural property rather than a relational value, see M. Modolo, 'La riproduzione del bene culturale pubblico tra norme di tutela, diritto d'autore e diritto al patrimonio' *Aedon* (2021), available at https://tinyurl.com/3s5wuvcu (last visited 20 September 2023); P. Petraroia, 'Valorization as a relational dimension of protection', in G. Negri-Clementi and S. Stabile eds, *Il diritto dell'arte. The protection of artistic heritage* (Milano: Skira, 2014), 41-49. A key concept underlying fashion archives is a relationship that is beyond the relationship between the public and individual objects in archives under cultural property law. Fashion archives are a permeable heritage that builds relationships between different kinds of contents, between past, present and future, between different interpretations of the same object.

[111] Interview with Laudomia Pucci n 107 above.

[112] L. Zargani, 'Palazzo Pucci's New Chapter Highlights History' n 63 above.

[113] The information regarding the ownership of the Pucci Archive is taken from interviews with Laudomia Pucci and her staff. The statements in the interviews are substantiated by other statements Laudomia Pucci has made in the press. K. Chitrakorn, 'The fight for the fashion archive: Brands, collectors and Gen Z face off' *VOGUE Business,* available at https://tinyurl.com/3bem96ea (last visited 20 September 2023) ('For Laudomia Pucci, the founders' daughter and president of the Emilio Pucci Heritage Hub, archives play a bigger role beyond marketing. While the LVMH group assumed full ownership of the Emilio Pucci brand in June 2021, the archive has always and will continue to belong to the family, Pucci says via a call from the Tuscan countryside at the Villa Granaiolo, where she decided to transfer a part of the brand's archives, creating a private museum in 2011'.) While our analysis mentions examples of Pucci design objects from as late as 2016, we do not delve into any possible arrangements or agreements between Emilio Pucci, srl, the Creative Directors hired after Emilio Pucci, and Laudomia Pucci with regards to the display of these design objects created after Emilio Pucci's death in the Pucci Archive or Heritage Hub.

[114] 'Object Voices/Emilio Pucci's 'Vivara' *European Fashion Heritage Association*, available at

current designers who visit the Pucci archives to consult the archives. As one of Marchese Pucci's most famous prints, the Vivara has also been given a dedicated space within the Palazzo which features a wallpaper installation.[115] Certainly the Vivara print is historically relevant. We might say the same about Pucci's other designs that represent intangible cultural heritage (like Siena's Palio) and tangible cultural properties (including Florence's Baptistry, reimagined in a Pucci universe). These designs, even more than the Vivara, reference intangible cultural heritage and might be seen as linked to their modern iterations through the representation on the scarf. But these designs are intangible objects. We might say that, in their first tangible forms, any of these objects are a testament to Emilio Pucci's creativity. And that, by extension, there is a link between the objects that are catalogued and stored following archival guidelines in the Pucci Archive and the evolution of creativity in fashion in the 1960s in Florence. But is this enough of a historically relevant cultural interest? Is this even a sufficient link to the city of Florence or intangible cultural heritage for a recognition that the design is part of intangible cultural heritage? The constant evolution and change at the heart of the Pucci Archive, the emphasis on colors, design tropes, and even creativity itself, seem to undermine the identification of a fixed historic nucleus and links to a specific historical moment or even place. Notwithstanding the importance of Pucci in Italian fashion history, the importance of Emilio Pucci as a designer, and even the strong links between the city of Florence, Emilio Pucci, and Pucci's designs, the items in the Pucci Archive are open and communicate a cross-cutting narrative. What is of cultural interest to us is also, relatedly, therefore too intangible to ground an application of the notion of cultural property to the archive itself.

5. The Impact of an Activated Archive Outside the Boundary of Cultural Property Law

The Pucci Archive allows itself to be activated by both research and fashion production, and still more outside stakeholders. It is not a passive institution nor is it a commercial instrument or tool. Indeed, as part of a Heritage Hub in search of new opportunities and partnerships, it is in perhaps unchartered archival territory. Students have participated in valorization activities that use the Pucci Archive as a starting point for projects, but that constantly re-interpret and read anew the archive's primary contents. These include virtual reality and digital tours.[116]

https://tinyurl.com/3cwsxp26 (last visited 20 September 2023)

[115] 'Emilio Pucci Virtual Tour', available at https://tinyurl.com/525xh9t4 (last visited 20 September 2023) (showcasing wallpaper inspired by the *Vivara* print on the *piano nobile*). We do not make any statements or observations in this article about agreements between Emilio Pucci International, BV, Emilio Pucci, srl and Laudomia Pucci about the continued display or reproduction of the *Vivara* print, given Emilio Pucci International, BV's ownership of the copyright. See n 196 below.

[116] 'Emilio Pucci Virtual Tour' n 115 above. The Talent Center at Granaiolo Villa has been already mentioned. Another example of the variety of projects undertaken regards the skateboard

Indeed, the archives' very organization supports such creativity and research, beyond a strict horizontal timeline. The Pucci Archive, both in its contents as an institution, collapses time beyond commercial needs and historical facts with its collection. While old, the pieces are also modern, both in their links to current fashion trends and in their modernity. The management of the Pucci Archive builds on this time capsule. Objects are not presented, nor preserved, with explanatory text captions or commentary meant to freeze the meaning of Emilio Pucci's designs and objects, or even of the more recent items from Pucci collections dating to as late as 2016. Rather, objects and ephemera from the archive are recontextualized next to each other in spaces in which the objects are meant to be in dialogue with each other and with the room itself, considering Pucci's work within it. In other words, the Pucci Archive has an evergreen aspect,[117] a characteristic that is linked to sportswear, to Italian inspiration, and to artistic inspiration, but one that is not necessarily defined by any one of the themes. The recontextualization and innovative displays organized by the Pucci Archive's managers within the Heritage Hub collapse time and build on codes like color, prints, and other categories, beyond a strict timeline. In videos showcasing parts of the Heritage Hub displaying dresses within the Pucci Archive, Laudomia Pucci herself emphasizes tropes and design choices that are used and incorporated over the course of Emilio Pucci's designs, and within the designs of various Guest Creatives or Creative Directors of the brand after Emilio Pucci's death.[118] Fringe, for example, is present in 1960s designs and in early 21st century looks.[119] This macro reading of Pucci emphasizes Pucci's modern and evergreen nature as a first matter. If the function of declaring private archives cultural property under Italian law is to assure their preservation, why declare the Pucci Archive a cultural property if there is nothing to preserve in the traditional sense? The current notion of cultural interest which triggers preservation, and the traditional notion of preservation itself under Italian cultural property law, seems at cross purposes with the Pucci Archive. The Pucci Archive is without fixed

collection and the virtual reality experience called Pianeta Pucci, both developed by students from University of Art and Design of Lausanne (Ecal), inspired by a week-long workshop to study Pucci Archive prints. Interview with Laudomia. See also LVMH, 'Pucci collabora con Nowness e lancia la prima collezione di skateboard' *LVMH*, available at https://tinyurl.com/2p88cavw (last visited 20 September 2023); 'Pianeta Pucci' *Écal,* available at https://tinyurl.com/2p9468ss (last visited 20 September 2023).

[117] Interview with Laudomia Pucci, Tour of the Emilio Pucci Heritage Hub, 18 October 2022.

[118] After changing different Creative Directors since the death of its founder, in 2020 the Pucci brand decided to implement a new strategy, engaging guest collaborators rather than a full-time Creative Director. Starting with Christelle Kocher, whose Fall 2020 sportswear collection opened the iconic 1956 Palio designs to new interpretations, many creatives were invited to enter the rich Pucci Archive and produce new creations inspired by Pucci designs, prints and styles. Interview with Laudomia Pucci and Dylan Colussi, 18 October 2022. See also M. Socha, 'Emilio Pucci Switches Creative Gears' *Women's Wear Daily*, available at https://tinyurl.com/3z29ubxa (last visited 20 September 2023).

[119] 'Emilio Pucci Virtual Tour' n 115 above (in which Laudomia Pucci presents gowns in the great room of the piano nobile).

meanings, a mediator between the past and present, and a space where the Pucci story continues to evolve. As a mediator, it fulfills the important function of continuing to give life to the Pucci story both for and outside of the Pucci brand. The administrative burdens that would accompany the declaration of the Pucci Archive as cultural property could frustrate the very interests of diverse stakeholders who participate in the Pucci Archive's activities and function.

The time element of declaring an archive to be cultural property is also an important issue in the Pucci case. Recall that for individual objects or series or collections in private collections to be declared cultural property, objects need to be by non-living authors. While archives do not have this cut-off time or a strict time threshold, in practice a most relevant timeframe is applied to evaluate an archive's cultural interest. We might be able to identify Emilio Pucci as the one designer whose life should serve as the measure for objects in the Pucci Archive. Consider, however, that many clothing items are created by more than one individual designer and may have the traces of a workshop. Depending on whether we interpret the notion of an author narrowly or broadly, items in the Heritage Hub may be more, or less, eligible as cultural property today. The concept of age may also be relative for fashion in the Heritage Hub. Paintings and other similar cultural properties are dated according to their tangible completion. But fashion is often created as a design and then made concrete in individual objects. Because cultural property is a real property regime that operates on a tangible object, it might be most reasonable to consider the date of the creation of tangible iterations of designs as part of cultural property law's time threshold. But Emilio Pucci began his brand after World War II, making only the earliest of the Pucci fashion items, from the early 1950s, eligible to be declared cultural property, even as a series of objects or as a collection. Does it make sense to place an arbitrary timeframe on the Pucci Archive to evaluate its historic significance, its links to the history of the Italian fashion industry, even a link of distinctive significance to the city of Florence, if Pucci, as a creative and as a brand, is still evolving? Archives that preserve collections on a frontier of fashion where past and present collapse, and where ideas are not seen as finite, might be best left outside the cultural property regime.

A devil's advocate argument might say that these instances in which Pucci designs seem to travel across tangible objects, is just an example of valorization. That it is possible to preserve a nucleus of Pucci-designed objects designed by Emilio Pucci himself as cultural property because the instances of reproduction we see are just ways to promote one, fixed cultural interest present in a *Vivara* scarf, for example. But consider that the Pucci Archive does not fit the definition of an archive for the purpose of valorization under Italian cultural property law. Art 101 defines an archive for the purposes of the use of cultural properties as

> 'a permanent structure which gathers, inventories, and conserves original documents of historic interest and which assures their consultation for the

purposes of study and research'.[120]

Valorization is defined as

> 'the exercise of functions and activities meant to promote the knowledge of cultural heritage and to assure the best conditions for the public use and fruition of that heritage, in order to support the development of culture'.[121]

While the legal notion of valorization of cultural properties is an open notion, there is a fundamental tension identified in treatments of it in legal scholarship. While valorization is meant to promote and disseminate the cultural values inherent to cultural property, it is not meant to change these same cultural values or the interest of the relevant publics.[122] Some might argue that the Pucci Archive meets an atypical definition of valorization. But the Pucci Archive's role in allowing the meanings of its works to be in constant evolution, even as it respects the connections to Emilio Pucci's life and his legacy, defies even the rule that valorization is not meant to amplify cultural interests, in addition to frustrating a recognition of a particularly important historic interest.

A further example of how the Pucci Archive is activated by multiple stakeholders and facilitates comparison between the past and present through Emilio Pucci's evergreen themes is evidenced by the example of the wrapping of Florence's Baptistry in an Emilio Pucci print in 2014. Billed as 'Monumental Pucci', this art installation saw Florence's Baptistry, a publicly owned cultural property decidedly in the *demanio pubblico,*[123] wrapped in a 1957 print created by Emilio Pucci that rendered the Baptistry 'in vibrant colors of the Mediterranean landscapes: lemon yellow, orange, fuchsia and the emblematic Emilio pink'.[124] The wrapping of the Baptistry with the 1957 print, itself titled 'Battistero', was described in the following way:

> The apse side of the Baptistery is clad in the original 'Battistero' print, reproduced in its entirety, while the remaining seven sides of the octagonal building are covered in almost 2,000 sq mt of printed canvas depicting a

[120] See Art 101(c) decreto legislativo 22 January 2004 no 42.

[121] L. Casini, 'Beni Culturali' *Enciclopedia giuridica del Sole 24* Ore (Milano: Il Sole 24 Ore, 2007) (citing to Art 6, comma 1 decreto legislativo 22 January 2004 no 42)

[122] ibid ('La valorizzazione dei beni culturali, quindi, non consiste nell'accrescere i valori di cui i beni sono testimonianza (valori che sono una realtà indipendente e preesistente alle forme di governo dei beni stessi) … Le difficoltà che spesso si hanno nel dare un contenuto preciso alla valorizzazione discendono, allora, dalle caratteristiche stesse di questa funzione, la cui nozione è aperta, perché comprensiva di ogni possibile iniziativa diretta ad incrementare la fruizione dei beni culturali, e dinamica, in quanto espressione di un processo di trasformazione delle modalità di godimento dei valori di cui i beni stessi sono portatori'.)

[123] See Art 53 decreto legislativo 22 January 2004 no 42 (defining the demanio pubblico).

[124] 'Monumental Pucci: dressing the Battistero' *LVMH*, available at https://tinyurl.com/yc7bxjyz (last visited 20 September 2023).

close-up of the 'Battistero' design, blown up to life size, faithfully following the building's contours.[125]

Figure 6 *- An image of Pucci's Battistero print wrapping the Baptistry in Florence in 2014*

The wrapping was a public/private partnership between the city of Florence, the Italian Ministry for Economic Development, the Italian Trade Agency, the French luxury conglomerate LVMH and Laudomia Pucci, as shareholders and managers of the Pucci brand, and the Pucci Archive which contained the Battistero print. The art installation raised unique questions related to the preservation of the Baptistry and the purpose and role of adding Pucci's own Florentine legacy to it. Under the Italian Code of Cultural Property, offices of the Ministry are called to evaluate the appropriateness of commercial and other activities that use an immovable cultural property.[126] The purposes of these evaluations, which are also part of the contractual stipulation of sponsorships of the restoration of cultural properties,[127] is to assure cultural properties' *decoro*. *Decoro* is understood as integrity or authenticity[128] – in other words, these cultural properties' ability to continuously embody and fulfill the historical interests of the collective. Wrapping the Baptistry in the *Battistero* print needed to be determined to be an act that did

[125] ibid

[126] Art 52 (1-ter) decreto legislativo 22 January 2004 no 42.

[127] L. Casini, 'Valorizzazione e gestione', in C. Barbati et al eds, *Diritto del Patrimonio culturale* (Bologna: il Mulino, 2020), 243.

[128] ibid 197-198. (discussing tutela del decoro); M.S. Giannini, 'Review of Mario Grisolia's La tutela delle cose d'arte' *Rivista trimestrale di diritto pubblico*, 171-172 (1953) (describing the vagueness of decoro, 'Il massimo di potere dispositivo che la legge riconosce allo Stato è il divieto, che può imporsi, di utilizzare il bene in modi incompatibili con 'il carattere' storico o artistico: divieto, peraltro, di rilievo marginale, e di contenuto piuttosto confuso e incerto').

not compromise the preservation of the Baptistry nor its historic nature. The Pucci Archive played a critical role in the positive outcome of that determination by placing the *Battistero* print in a broader context of Emilio Pucci's familial and inspirational connection to the city of Florence. Moreover, by strategically matching parts of the print with the parts of the Baptistry from which it was inspired, the Pucci Archive, as an institution, seemed to visually translate the Baptistry into the Pucci lexicon and into a contemporary fashion narrative that was still grounded in heritage. In this case, the Pucci Archive was activated both by the history of the city of Florence and its cultural property, the marketing and commercial goals of Pucci as a contemporary fashion brand, and by the archive's own contents and links to a cultural property, a creative industry, and an individual designer. Far from the actions of a traditional archive, the Pucci Archive's actions indicate a dynamic institution whose contents are still evolving. As a result, the Pucci Archive seems hard-pressed to meet the requirements to declare it a cultural property under Italian law. The archive's continuously evolving cultural interest exists between the past and the present, the cultural and the commercial.

The Pucci Archive might best be considered an activated archive. An activated archive pushes traditional notions of cultural property and yet it also does not purely serve the commercial or even brand heritage ends of a fashion company. An activated archive, as we term it, meets the public's cultural interest in its objects halfway and yet is always acting in a way which defies traditional notions of gathering, inventorying, and conserving. The Pucci Archive is an activated archive that falls outside of the legal notion of a private archive of sufficient particularly important historic interest to be declared cultural property. The Pucci Archive's actions seem to make it more than a preserver of the past and even more than a promoter of specific cultural interest contained in certain heritage. As an 'activated archive' it seems to fall outside or, at the very least, on a frontier, of the definition of an archive as a cultural property. Its relationship with the Heritage Hub makes its use beyond museum-like confines even more susceptible to being perceived outside the definition of cultural property.

6. Activated Archives in a Negative Space of Cultural Property Law

Activated archives do not seem to match current definitions of archives under cultural property law. Why, might we ask? Why does cultural property law have certain boundaries around it, and what can that tell us as fashion increasingly enters the heritage universe, in Italy and even, perhaps, in the United States?

The positive implications of allowing a negative space of cultural property to exist have been in the minds of Italian scholars, legislators,[129] and even judges,[130]

[129] V. Cazzato, 'Disegno di legge' n 92 above, 408-409 (exploring the need for time thresholds for cultural property).

[130] Consiglio di Stato 14 June 2017 no 2920, available at www.dejure.it (exploring why Cinema America should not have been classified as a cultural property under Art 10, clause 3(d)).

albeit in words other than 'negative space', throughout time. Massimo Severo Giannini perhaps said it best when exploring various iterations of Petrarch's Sonnets.

> *Approfondendo e spiegando: le 'Rime' di Petrarca appartengono al patrimonio culturale letterario del mondo; le tante edizioni di libri che di esse sono state fatte le riproducono e ne permettono la conoscenza diffusa, ossia sono moltiplicatori di circolazione materiale. A meno che non presentino particolari caratteri, quando al soggetto o all'oggetto, per cui possano divenire beni librari, i libri delle 'Rime' sono cose costituenti supporto di beni patrimoniali, le 'Rime' bene immateriale letterario: tra essi non vi è relazione diretta, ma solo la relazione indiretta che sorge allorché si ha una vicenda qualsiasi di riproduzione documentale. I manoscritti delle 'Rime' sono invece una cosa contenente gli enunciati immediati della creazione letteraria, e per essere testimonianza materiale avente valore di civiltà, sono bene culturale (non importa come classificato o classificabile), ma in quanto cosa sono altresì supporto di un bene patrimoniale, oltretutto di presumibile elevatissimo valore. Se non esistessero, il patrimonio culturale sarebbe privo del manoscritto di un'opera letteraria eccelsa; ciò sarebbe un impoverimento ma non una mancanza irreparabile, poiché di tante grandi creazioni letterarie mancano i manoscritti. Peraltro, esistendo, sono un bene immateriale a sé e in più; bene che – si rilevi – è distinto dal bene immateriale letterario "Rime." …gli ordinamenti positivi [pubblici] si occupino solo di alcune, di quelle cioè per le quali si pongono ragioni pratiche di tutela pubblica…Per i beni delle altre specie può non porsi alcun problema di tutela (non è necessario, p. es. tutelare l'Iliade o le Partite di J.S. Bach), oppure possono porsi problemi di tutela privata o interprivata (ed è in questo il caput delle normazioni sulla proprietà letteraria, artistica, scientifica). È chiaro che il giorno in cui si ponessero, per volgersi di eventi della nostra società, problemi di tutela pubblica di altre specie di beni culturali oltre quelle per le quali già vi è una normazione apposita, occorrerebbe provvedere.*[131]

Cultural property law, at its heart, serves a practical preservation purpose. There is no reason to impose a duty of preservation when the cultural value is not in danger. This danger exists when, as Giannini says for manuscripts, there might be a loss. There might be a loss if the Pucci Archive were destroyed by a fire, perhaps, but it might not be an irreparable loss to merit the archive's declaration as cultural property.[132] Especially when the archive itself is in constant evolution and facilitates the ever-evolving meaning of its contents.

[131] M.S. Giannini, 'Beni Culturali' n 69 above, 33-34.

[132] Interview with Jennifer Celani, 10 November 2022. Administrative agencies should look at objects to be declared cultural property with the eye of the historian who detects a cultural interest: that is, with the understanding that without that object Italian knowledge would be impoverished.

IV. Heritage-Shaking the *Vivara* Print: Copyright Lessons for Parallel Creations

The Italian cultural property law scholar Giannini in the excerpt above, notes that copyright, in comparison to the public cultural property regime, serves a purpose of 'private' or 'inter-private' protection. That is, copyright serves the purpose of an author to 'protect' (in a broad, even economic, sense) their own literary, artistic, or scientific works. This could, of course, encompass moral rights,[133] which in Italy consist of a vast array of perpetual and unwaivable rights, including the right of attribution and the right of integrity of the work, in contrast with the United States where moral rights are far less extensive, in a number of ways.[134] At the same time, Giannini's examples of texts, which are theoretically reproducible no matter where they are placed, like many fashion designs, point to the regulation of copies in copyright law. Is there a reason for copyright law to 'protect' a Pucci print, like the Vivara, to regulate its reproductions and reworkings, its parallel creations, in Flaccaventos' words? Is this reason supported or nuanced in light of the Pucci Archives' status as an activated archive, one with a cultural meaning that seems to still be evolving, that is meeting the public halfway to create new moments and forms of heritage? Can copyright help us to parse the differences between the 1965 Vivara print, and other reworkings? Can copyright help us identify the parallel creations which Flaccavento hopes exist, designs that move initial references from a brands' heritage forward?

Both US and Italian copyright law would likely answer these questions with a classic 'it depends'. This is because, while copyright can apply to fashion designs like the *Vivara*, copyright protection for such prints is not all encompassing. As a first matter, copyright is meant to facilitate authors' (or their assignees') regulation of the copies of their works. The reasons for this regulation are primarily economic,[135] although some moral undertones related to an author's inherent right to control their work are present, especially in the Italian regime. As a second matter, copyright law, to extend a right to control copies, answers the question – what constitutes a

[133] In Italy moral rights law include, besides the right of attribution (Art 20, Legge 22 April 1941 no 633) and the right of integrity (Art 20, Legge 22 April 1941 no 633), the right of withdrawal (Art 142, Legge 22 April 1941 no 633 and Art 2582, Italian Civil Code), and the right of disclosure (implied in Art 142, Legge 22 April 1941 no 633). For the purposes of this article, we do not delve into whether Laudomia Pucci has inherited moral rights in the designs created by her father, Emilio Pucci, and what effects those moral rights, if any, may have on the use of the *Vivara* print by Emilio Pucci International, BV and Emilio Pucci, s.r.l.

[134] In the US, after the relatively recent ratification of the Berne Convention in 1989, explicitly moral rights are attributed 'only to the author of a work of visual art' (VARA, 17 USC § 106A(b)) and excluded for the category of applied art (17 USC §101: 'A work of visual art does not include—(A)(i) […] applied art'.).

[135] Especially in the US, where the reason for copyright lies almost entirely in its utilitarian function. See also the Copyright Clause, US Constitution, art I, § 8, cl 8. For a comment against the dominance of the utilitarian, economic incentive-driven model for copyright protection, see A. Adler, 'Why Art Does Not Need Copyright' 86 (2) *The George Washington Law Review*, 313 (2018).

copy? In other words, copyright law takes Flaccavento's critiques about designers' 'theft' from other designers and makes it legally relevant. However, the contours of 'theft' under copyright can be thinly drawn. Central to the question of whether a 'theft', in Flaccavento's terms, has occurred is an evaluation of the two works in question: a comparison of the, at the best of times, parallel creations. This comparison requires a slicing of what is past heritage, and what are newer creative additions. It also requires an evaluation of whether these additions matter, whether they, in Flaccavento's terms 'move the starting point forward'.[136] Laudomia Pucci has analogized the process of creation to a blender (*frullatore*).[137] The process is made of specific ingredients: the time one takes to consult the archive, the number of objects one looks at, the care with which one examines past and present contexts, and even authorization from the copyright holder, if the work is not in the public domain.[138] We term this process heritage-shaking: a process in which a design in the contents of an activated archive, used by many different stakeholders and collapsing past and present, is revisited and blended together with contemporary creativity to produce designs of the present, notwithstanding their reference to the past. Heritage-shaking is a process which should tell stakeholders, including courts comparing these designs, 'where to look',[139] to help them identify what is heritage, and what is added-on creativity. At times, heritage-shaking might emphasize the need to seek permission from the creator of the reference. At other times it might support a more free, unrestricted process of creation. In both instances, however, heritage-shaking promotes acknowledgement: an acknowledgment of the brand, or wider cultural, heritage that a designer is taking.

1. Lessons for Heritage-Shaking from the United States

In the United States, copyright infringement is defined by the 'substantial similarity' test. Under this test, courts in different jurisdictions will look at a work and analyze it, identifying in the newer creation the creative additions with respect to what we might call the reference. In doing so the court will evaluate whether there is enough creativity, enough difference, to remove some or all control from the author of the reference. In essence, the substantial similarity test questions, without aesthetic judgment,[140] whether the creation using the reference 'moves the

[136] A. Flaccavento, 'In Paris, Creators and Imposters' n 6 above.

[137] Interview with Laudomia Pucci and Dylan Colussi, 18 October 2022.

[138] L. Pucci, for example, points to some designs which would not be proper to use as inspiration and place into commerce today in light of our current sensibility towards cultural appropriation. Interview with Laudomia Pucci, 13 September 2022.

[139] V. Friedman et al, 'Pucci' n 1 above, 39.

[140] But see G. Cheng, 'The Aesthetic of Copyright Adjudication' 19(1) *UCLA Entertainment Law Rev*iew, 113 (2012); A.C. Yen, 'Copyright Opinions and Aesthetic Theory' 71 *Southern California Law Review,* 247 (1998). See also, on the approach towards aesthetic judgment in US courts dealing with cases involving art-related issues, L. Palandri, *Giudicare l'arte. Le corti degli Stati Uniti e la libertà di espressione artistica* (Firenze: Firenze University Press, 2016).

reference forward'. Central to applying this test is the notion that only expressions, and not ideas, are copyrightable. That even references themselves have built on previous ideas but that the references' expression is what was (or still is) original.[141] There is only so much, under US copyright law, that a second creation can take from that expression. An allowed taking can be classified as permissible under the fair use test, a test which recognizes that there are certain uses of references which their author would never allow.[142] By contrast, if the reference is still in the term limits of copyright and the taking is deemed a step too far, and not even a fair use, the parallel creation might need to receive a license to use the reference.[143] This, in essence, undermines the theft Flaccavento identifies. The layered copyright infringement test supports some sort of recognition that what we are looking at is a parallel creation. This recognition is most often gained through licensed collaborations and even the awareness-raising facets of copyright infringement cases.

Identification, however, is one of the challenges with applying the substantial similarity test. Complicating matters further is how much copyright law leaves on the proverbial cutting room floor in the fashion industry for fashion's very continuation and survival. Many styles are left in the public domain and are classified as uncopyrightable as any other idea.[144] This may also be the case for historic designs made long ago, which have aged out of copyright, if they could ever access it. How are judges to, in fact, draw lines between idea and expression in a specific work of fashion? How are they to identify differences between a reference and a later creation which is inspired by or reworks the reference? How are judges to compare any similarities between fashion expressions, and similarities outside of the differences?

Under US copyright law, the identification part of the test has been categorized into different components in the Second Circuit and in the Ninth Circuit, respectively. In the Second Circuit a court first engages in abstraction, identifying the ideas and expression and then defining the work's (in this case we can consider a print's) structure. The court then applies filtration, a 'filtering method'[145] which is meant to, building on the levels of abstraction the court has decided upon, factor out non-copyrightable subject matter, including ideas, stock or standard tropes which are needed for any print of its kind, and public domain works, including those that have aged out of copyright's term.[146] In the Ninth Circuit, abstraction and filtration are called by different names: extrinsic and intrinsic analysis. Often using experts,

[141] *Leibovitz* v *Paramount Pictures Corp*, 137 F.3d 109 (2d Cir 1998).

[142] As of this writing the scope of this test is currently under review at the US Supreme Court. See *Andy Warhol Found for the Visual Arts, Inc.* v *Goldsmith*, 992 F.3d 99 (2d Cir 2021), and holding modified by *Andy Warhol Found for Visual Arts, Inc* v *Goldsmith*, 11 F.4th 26 (2d Cir. 2021).

[143] ibid. As was the case in the Warhol case, which used an artist's reference and not a public domain work.

[144] *Star Athletica, L.L.C.* v *Varsity Brands*, Inc, 580 U.S. 405 (2017).

[145] *Computer Associates International* v *Altai, Inc* 982 F.2d 693 (2d Cir. 1992).

[146] 17 USC §302 (life of the author and 70 years thereafter, or longer for a work for hire).

a court will identify 'objective manifestations of expression'.[147] This is a way to objectively identify the ideas versus expressions in the work. After this, the judges explore, subjectively, the 'total look and feel'[148] of the two works, asking whether ordinary and even more relevant observers would identify the works, in their expressive qualities, as similar.[149]

Central to what remains after this filtration in both circuits is a work's ability to also be 'original'- the *sine qua non* of copyright. Works as a whole must be

> 'independently created by (their) author…not copied from pre-existing works, and a work that comes from the exercise of the creative powers of the author's mind, in other words, 'the fruits of (the author's) intellectual labor'.[150]

In some sense, through originality, copyright law is seeking a proxy for the intellectual honesty which Flaccavento desires: a forward movement of the conversation.[151]

Courts finally, after these abstraction/filtration and extrinsic/intrinsic tests then engage in a comparison of the 'reference' and the later work. Central to Flaccavento's critique is that he *knows* todays' designers are stealing from past collections and designers. Courts often do not have evidence of actual copying. What this means is that courts often do not have evidence that an author downloaded a work, sat in front of it to copy, or otherwise copied in fact. As a result, comparison often leads to the assumption that the author of the second work *must have* looked at the reference.[152] This emphasizes the importance that we often place on our own eyes, on our knowledge of the connections between works. Just as Flaccavento *knows* that designers are taking and using references from other fashion designers, whether they tell him or not, so copyright law seems to *know* that we will *know* copying took place when we see similar works. As Laudomia

[147] J.C. Fromer and C.J. Sprigman, *Copyright Law: Cases and Materials* (2022), 251 (with excerpts from *Wanda A. Cavalier* v *Random House, Inc* 297 F.3d 815 (9th Cir. 2002)).

[148] ibid 244.

[149] ibid 244 et 251.

[150] *Boisson* v *Banian*, Ltd, 273 F.3d 262, 268 (2d Cir 2001).

[151] It is worth noting that originality and the public domain have been thought of as two sides of the same coin, given what might be termed a 'legal fiction' of originality. Jessica Litman has argued that originality is 'inherently unascertainable, and it is not the battleground on which infringement suits are in fact decided. Because authors necessarily reshape the prior works of others, a vision of authorship as original creation from nothing – and of authors as casting up truly new creations from their innermost being – is both flawed and misleading'. J. Litman, 'The Public Domain' 39 *Emory Law Journal*, 968-969 (1990). In some ways we agree with Litman, recognizing that identifying originality is unascertainable given the practice of using references and copying in the fashion industry. Our process of 'heritage-shaking' seeks to find a balance between the necessary partners of the public domain and originality which Litman identifies, and the manner in which we now resort to the public domain to support the fiction of originality.

[152] C.J. Buccafusco, 'There's No Such Thing as Independent Creation, and It's a Good Thing, Too' *William & Mary Law Review,* 2022.

Pucci has even said, 'All fashion design is some sort of theft'.[153] At least one example might help to elucidate how a US court in the Second Circuit would apply the substantial similarity test to a print like the one we find in the Pucci Archive, and why the process of 'heritage-shaking' may help.

In *Boisson* v *Banian, Ltd*, Judi Boisson, who created and designed quilts through her company, sued another quilt manufacturer for illegally copying quilt designs which Boisson had registered at the Copyright Office. Much like the Vivara print and unlike more simpler fashion prints,[154] Boissons' quilt design was a patchwork of color, shapes, and strategically placed repeating patterns. Boisson had, in fact, begun her business by reselling 'antique American quilts – in particular, Amish quilts – she purchased in various states throughout the country'.[155] When Boisson could no longer find antique quilts, she began designing and making her own for sale,

> 'work(ing) on these quilts at home where she drew the letters by hand, decid(ing) on their placement in the quilts, pick[ing] out the color combinations and cho(osing) the quilting patterns'. [156]

This Boisson did for the two quilts she alleged were infringed, 'School Days I' and 'School Days II',[157] which consisted

> of square blocks containing the capital letters of the alphabet, displayed in order. The blocks are set in horizontal rows and vertical columns, with the last row filled by blocks containing various pictures or icons. The letters and blocks are made up of different colors, set off by a white border and colored edging.[158]

The allegedly infringing quilt designs, which were imported from India,[159] were described as having capital letters, icons, with

> '(a)ll three quilts us(ing) a combination of contrasting solid color fabrics or a combination of solid and polka-dotted fabrics to represent the blocks

[153] Interview with Laudomia Pucci and Dylan Colussi, 18 October 2022.

[154] The Vivara print is, in fact, very different from the chevrons, stripes, and zig zags that were at issues in the *Star Athletica L.L.C.* v *Varsity Brands Inc,* 580 US 405 (2017). Compare images of Vivara in L. Pucci et al, *Unexpected Pucci* (New York: Rizzoli, 2019), 10-11, 24- 29 with images of the cheerleading uniforms in *Star Athletica, L.L.C.* v *Varsity Brands Inc*., 580 US 405 (2017).

[155] *Boisson* v *Banian Ltd*, 273 F.3d 262, 266 (2d Cir 2001).

[156] ibid

[157] ibid

[158] ibid

[159] 'Defendant Vijay Rao is the president and sole shareholder of defendant Banian Ltd., incorporated in November 1991. Rao is an electrical engineer in the telecommunications industry who became interested in selling quilts in February 1992. To that end, he imported from India each of the three alphabet quilts at issue in this case. He sold them through boutique stores and catalog companies.' *Boisson* v Banian, Ltd, 273 F.3d 262, 266 (2d Cir. 2001).

and letters'.[160]

At the District Court level, the court had found no copyright infringement. The Court of Appeals in the Second Circuit, however, reversed, expanding what was covered by copyright in Boisson's quilt and expanding the application of the substantial similarity test, emphasizing the importance of the 'total look and feel' of Boisson's quilt design. As part of its reasoning, the Court, although addressing quilts and not fashion *per se*, observed that

> 'Copying the creative works of others is an old story, one often accomplished by the copyist changing or disfiguring the copied work to pass it off as his own. Stealing the particular expression of another's ideas is rightly condemned in the law because pirating the expression of the author's creative ideas risks diminishing the author's exclusive rights to her work, or as a poet said, taking all that she may be or all that she has been'.[161]

But central to the application of the court's identification of a theft of a particular expression was parsing what was Boisson's expression, especially given the public domain[162] and the tradition of quilt-making.[163] The court also had to identify what was infringing about Bannian's quilts by comparison. While the Second Circuit agreed with the district court that the alphabet, and 'familiar symbols or designs' or 'mere variations of ... lettering'[164] are in the public domain, it emphasized the copyrightability of Boisson's layout because the

> 'alphabetical arrangement of the letters in the five-by-six block format required some minimum degree of creativity, which is all that is required for copyrightability'.[165]

Similarly, while the court recognized that color itself is not copyrightable, '(a)n original combination or arrangement of colors should be regarded as an artistic

[160] ibid

[161] ibid

[162] Some material is unprotectible because it is in the public domain, which means that it 'is free for the taking and cannot be appropriated by a single author even though it is included in a copyrighted work'. *Computer Assocs. *269 Int'l, Inc.* v *Altai Inc*, 982 F.2d 693, 710 (2d Cir 1992). *Boisson* v *Banian, Ltd*, 273 F.3d 262, 268–69 (2d Cir 2001).

[163] 'To support its finding that the layouts of plaintiffs' quilts were not protected by copyright, the district court relied upon evidence submitted by defendants showing that alphabet quilts have been in existence for over a century, suggesting that such layouts were also in the public domain. One circa 1900 quilt displayed letters and icons in blocks arranged in the same format used in 'School Days I'. From this evidence the court reasoned that such formation belonged to the public domain. Although it made specific findings only as to the block formation in 'School Days I', we presume for purposes of our discussion that, in the absence of a specific finding as to the 'School Days II' format, the trial court intended its findings on unprotectibility to extend to the layouts of both of plaintiffs' quilts'. *Boisson* v *Banian Ltd*, 273 F.3d 262, 269 (2d Cir 2001).

[164] *Boisson* v *Banian Ltd*, 273 F.3d 262, 269 (2d Cir 2001).

[165] n 56 above.

creation capable of copyright protection'.[166] The court put emphasis on the fact that alphabet quilts were not present in the historic examples of quilts which Boisson had previously collected, or in proffered publications about quilts.[167] The court noted that there was also disagreement in scholarship as to how much weight circumstantial access to the public domain should have in the parsing of protectable elements.[168] With this reasoning, the Second Circuit parsed the heritage in the public domain to which Boisson had access from her quilt designs. The court recognized that the layout of Boisson's quilt was original expression sufficient to form the basis of a comparison to find whether Bannian's quilts had copied Boisson's layout.

At the same time as this parsing might have been in Boisson's favor, it is also a far cry from a detailed identification of the stratified layers of heritage within a quilt design. Compared to other cases, like *Leibovitz* v *Paramount Pictures Corp*, where the Second Circuit parsed the scope of Leibovitzs' copyright with reference to the work of previous painters and sculptors and the recognition of the form as the

[166] ibid

[167] 'Defendants proffered no evidence that Boisson owned an alphabet quilt prior to designing 'School Days I' or 'School Days II'. Instead they point to Boisson's affirmative answer when asked at her deposition whether she had "seen an alphabet design in any other quilts'. Boisson was not asked what these quilts looked like or when she saw them relative to designing her own quilts, or whether they bore any resemblance to her own designs. Moreover, having seen an alphabet design would not conclusively establish that Boisson saw one from which she copied the arrangement of letters for her 'School Days' quilts. As defendants' own proof reveals, alphabet quilts are not limited to the formations found in either the 1900 quilt or plaintiffs' quilts. Some quilts display letters out of order; some display three letters in the first and last rows with five letters in each of the middle rows; one has six letters in rows with icons placed in the border; another has varying numbers of letters in each row with icons or quilting designs in the remaining blocks; while still others have five rows of five letters with the 'Z' by itself in a corner or followed by numbers representing the year the quilt was made. Nor are all letters of the alphabet always displayed or even displayed with each letter in its own block. Defendants also failed to show that quilts with layouts similar to the 'School Days' quilts were so widely disseminated or known as to infer that Boisson reasonably would have seen one before designing her own works. In particular, bearing in mind that Boisson testified as to her specialty in Amish quilts, among the books submitted by defendants into evidence for purposes of showing copying on the part of plaintiffs, only two pertained specifically to Amish designs – Rachel & Kenneth Pellman, The World of Amish Quilts (1998) and Rachel & Kenneth Pellman, A Treasury of Amish Quilts (1998). Neither book, however, contains an alphabet quilt, although they do contain photographs of other quilts owned by Boisson. Further, Boisson testified at her deposition that she was unaware of any Amish alphabet quilts and had never seen one. Absent evidence of copying, an author is entitled to copyright protection for an independently produced original work despite its identical nature to a prior work, because it is independent creation, and not novelty that is required'. *Boisson* v *Banian Ltd*, 273 F.3d 262, 270 (2d Cir 2001).

[168] 'Scholars disagree as to whether a defendant may also rely upon circumstantial evidence to show that a plaintiff copied from the public domain. Compare J. Litman, *The Public Domain* 39 *Emory Law Journal* 965, 1002–1003 (1990) (explaining that a defendant is not entitled to any inference that a plaintiff copied from the public domain simply by showing access and substantial similarity to the public domain work), with R. VerSteeg, 'Rethinking Originality' 34 *William & Mary Law Review*, 801, 874–875 (1993) (permitting a defendant to show copying on the part of the plaintiff through circumstantial evidence that the plaintiff had access and created a work substantially similar to a public domain work). Assuming arguendo that an inference is allowable, defendants in the case at hand nevertheless fall short of proving Boisson copied from the public domain'. *Boisson* v *Banian Ltd*, 273 F.3d 262, 269-270 (2d Cir 2001).

'Venus Pudica',[169] the Second Circuit's identification of protectable and unprotectable elements is less detailed, and, we might say, even less informed by the knowledge surrounding quilts. It begs the question of what role an archive dedicated to an American quilt, or what role an archive affiliated with Boisson or even with Bannian's company, might have had in the determination.

The lack of a more detailed stratification of Boisson's quilts carried over into the comparison between Boisson and Bannian's quilts and the application of the substantial similarity test. In this sense, parsing the references and stratifying the heritage elements of an author's work has a direct effect on what we identify as infringing, or as an unsuccessful parallel creation, without its own originality. Works that have both protectable and unprotectable elements, because they draw from the public domain, or what we might term part of the heritage space,[170] require, as the Second Circuit noted, a 'more discerning observer' test,[171] a test that is still guided by the 'total concept and feel' of the works at issue.[172] To follow this test, the Second

[169] 'Even though the basic pose of a nude, pregnant body and the position of the hands, if ever protectable, were placed into the public domain by painters and sculptors long before Botticelli, Leibovitz is entitled to protection for such artistic elements as the particular lighting, the resulting skin tone of the subject, and the camera angle that she selected'. *Leibovitz* v *Paramount Pictures Corp*, 137 F.3d 109, 111 (2d Cir 1998). As discussed in F. Caponigri ed, *Images of "Italian" Cultural Properties: Some Thoughts on the Italian Code of Cultural Heritage Law's Articles 107 and 108 for an American Audience* (forthcoming, Conference Proceedings for The Italian Law of Cultural Heritage: A Dialogue with the United States).

[170] If we differentiate between cultural heritage and brand heritage, recognizing that brand heritage may not yet be cultural heritage. See n 9 above.

[171] '…part of the plaintiff's fabric was not original and therefore not protectible. We articulated the need for an ordinary observer to be 'more discerning' in such circumstances. [T]he ordinary observer would compare the finished product that the fabric designs were intended to grace (women's dresses), and would be inclined to view the entire dress – consisting of protectible and unprotectible elements – as one whole. Here, since only some of the design enjoys copyright protection, the observer's inspection must be more discerning. ibid 765-766. Shortly after Folio Impressions was decided, we reiterated that a 'more refined analysis' is required where a plaintiff's work is not 'wholly original', but rather incorporates elements from the public domain. *Key Publ'ns Inc* v *Chinatown Today Publ'g Enters Inc*, 945 F.2d 509, 514 (2d Cir 1991). In these instances, '[w]hat must be shown is substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed compilation'. In contrast, where the plaintiff's work contains no material imported from the public domain, the 'more discerning' test is unnecessary. *Hamil Am Inc* v *GFI,* 193 F.3d 92, 101-102 (2d Cir 1999), cert denied, 528 US 1160, 120 S Ct 1171, 145 L.Ed.2d 1080 (2000). In the case at hand, because the alphabet was taken from the public domain, we must apply the 'more discerning' ordinary observer test'. *Boisson* v *Banian Ltd*, 273 F.3d 262, 272 (2d Cir 2001).

[172] 'Although the 'more discerning' test has not always been identified by name in our case law, we have nevertheless always recognized that the test is guided by comparing the 'total concept and feel' of the contested works. Knitwaves, 71 F.3d at 1003. For example, in Streetwise Maps, 159 F.3d at 748, we found no infringement – not because the plaintiff's map consisted of public domain facts such as street locations, landmasses, bodies of water and landmarks, as well as color – but rather 'because the total concept and overall feel created by the two works may not be said to be substantially similar'. In Nihon *273 Keizai Shimbun, 166 F.3d, 70-71, we conducted a side-by-side comparison of the articles and abstracts at issue to determine whether a copyright infringement had occurred. Looking beyond the unprotected facts, we analyzed how alike or different the abstracts were in their structure and organization of the facts. Id 71'. *Boisson* v *Banian,* Ltd,

Circuit compared

> 'the arrangement and shapes of the letters, the colors chosen to represent the letters and other parts of the quilts, the quilting patterns, the particular icons chosen and their placement'[173]

in their 'total concept and feel', 'as instructed by 'common sense' '.[174] The court went on, however, to call out similarities between specific letters and their backgrounds, different icons, and both of their arrangement in the quilt design.[175] Because of 'this enormous amount of sameness'[176] including 'the overwhelming similarities in color choices',[177] Banian's 'ABC Green' Versions were found to infringe Boisson's 'School Days I'.[178] On the other hand, however, the court declined to find infringement for other quilts by Banian that did not share Boisson's color combinations,[179] or similar combinations of letters or icons,[180] and even implemented a 'zig-zag' design instead of a 'wavy' design.[181]

273 F.3d 262, 272–73 (2d Cir 2001).

[173] n 156 above.

[174] ibid 'Our analysis of the 'total concept and feel' of these works should be instructed by common sense. Cf *Hamil Am*, 193 F.3d at 102 (noting that the ordinary observer test involves an examination of 'total concept and feel', which in turn can be guided by 'good eyes and common sense').

[175] 'A' is dark blue on a light blue background; 'B' is red on a white background; 'D' is made of polka-dot fabric on a light blue background; 'F' on plaintiffs' 'School Days I' is white on a pink background, while the 'F' on defendants' 'ABC Green' versions is pink on a white background; 'G' has a green background; 'H' and 'L' are each a shade of blue on a white background; 'M' in each quilt is a shade of yellow on a *274 white background. 'N' is green on a white background; 'O' is blue on a polka-dot background; 'P' is polka-dot fabric on a yellow background; 'Q' is brown on a light background; 'R' is pink on a gray/purple background. 'S' is white on a red background; 'T' is blue on a white background; 'U' is gray on a white background; 'V' is white on a gray background; 'W' is pink on a white background; 'X' is purple in all quilts, albeit in different shades, on a light background; 'Y' is a shade of yellow on the same light background; and 'Z' is navy blue or black, in all the quilts'. *Boisson* v *Banian, Ltd*, 273 F.3d 262, 273–74 (2d Cir 2001).

[176] *Boisson* v *Banian Ltd,* 273 F.3d 262, 274 (2d Cir 2001).

[177] ibid

[178] ibid. Others were also found infringing based on similar comparisons.

[179] ibid 275 'ABC Navy' quilt does not share the same color combinations as 'School Days I'. Defendants' quilt is therefore different from 'School Days II' in this regard as well. Combined with the varying number of rows and blocks, the placement of icons, the different use and color of rectangular borders around the blocks and the choice of quilting patterns, we agree with the district court that defendants have committed no copyright infringement in their design of 'ABC Navy' when compared to plaintiffs' 'School Days II'. The similarity in letter design and the use of a blue edge are so trivial in the overall look of the two quilts that defendants did not infringe on plaintiffs' copyright'.

[180] 'While both quilts utilize an arrangement of six horizontal rows of five blocks each, 'ABC Navy' does not have its four icons in the last row. Rather, the teddy bear with the flag vest is placed after the 'A' in the first row, the cow jumping over the moon is placed after the 'L' in the third row, the star is placed after the 'S' in the fifth row, and the sailboat is placed after the 'Z' in the last row'. n 174 above.

[181] ibid 'The quilting pattern in the plain white border is changed to a 'zig-zag' in 'ABC Navy', as opposed to plaintiffs' 'wavy' design. Finally, although defendants use a binding around the edge of their quilt, in this instance it is blue instead of green').

Scholars have criticized the application of total look (or concept) and feel as undermining the idea/expression distinction in US copyright law.[182] This rule embodies the notion that ideas are not copyrightable (ie the idea of an abstract blue scarf) but that expressions (ie the specific expression of the *Vivara* print, utilizing blue and specific forms) are. Total concept and feel, in these arguments, seems in fact to extend protection to style-infused elements and even to other parts of works that should be in a negative space of copyright law.[183] And these same scholars see the *Boisson* case as diminishing the weight of the idea/expression doctrine by eliding the total concept and feel test with the more discerning observer test.[184] In these cases, turning towards an institution which holds the public domain work, or even the work that is supposedly infringed, might help to further focus the difference between the total concept and feel and a more discerning observer. Consider the Vivara print and its reworkings - while a court might, as with the aforementioned quilts, factor out the color blue from the Vivara print, it might consider the blue color combination background in the 2020 reworking as reflecting a similar 'total concept and feel', or it might not. A fashion archive like the Pucci Archive, which is separate from the copyright holder or claimant, could effectively act as a guide for the courts' common sense in this circumstance, highlighting aspects of the Vivara print in its collection that carry over into the 2020 reworking and those that do not. Effectively, an archive like the Pucci Archive could act as a more discerning observer, and partner, to the court.

***Figure 7** - From L to R: The 1965 Vivara; Spring 2020 reworking of Vivara*

2. Lessons for Heritage-Shaking from Italy

While the US substantial similarity test is by no means perfect, it does give us some sort of framework with which to compare a reference and its later work, to identify parallel creations. Italian copyright law, by contrast, has no specific framework that it applies across copyright infringement cases. The Moon Boots case can provide us with an example.[185] The IP specialized section of the Milan Court, first in 2016 and then in 2021, addressed two cases of alleged copyright infringement brought by Tecnica group, the company producing Moon Boots, the popular après-ski designed in 1970 by Giancarlo Zanatta.[186] Prior to determining

[182] C.J. Sprigman with S. Fink Hedrick, 'The Filtration Problem in Copyright's 'Substantial Similarity' Infringement Test' 23 *Lewis & Clark Law Review*, 571, 582-584 (2019).

[183] ibid 581 ('For example, a painting's 'look' might be determined in part by the work's genre; many abstract geometric works look at least somewhat alike').

[184] ibid 584.

[185] L. Palandri, 'Fashion as Art: Rights and Remedies in the Age of Social Media', in B. Pozzo, R. Cerchia eds, *The new frontiers of fashion law. Special Issue* (MDPI, 2020).

[186] *Tecnica group spa* v *Anniel group spa*, Tribunale di Milano 12 July 2016 no 8628,

copyright infringement, the Court had to first decide for the copyrightability of Zanatta's design. Italian copyright law explicitly accords copyright protection to industrial design objects when the two requirements of a creative character and inherent artistic value are met.[187] Since this case, Italian courts have been playing a crucial role in trying to define the broad criterion of 'artistic value'. In order to maintain a high threshold of protection and prevent industrial design objects of daily use from obtaining an indiscriminate access to the strong monopolistic protection afforded by copyright, 'artistic value per se' has been conceived to reserve the special copyright protection for the most valuable, high-end designs.[188] In order for a design to be recognized as above-average, courts have set out an objective standard, to be measured by several indicators. Among others, these indicators include the display in contemporary art or design museums' collections, the reproduction of the work in art or design publications, experts' opinions, technical consultants' reports, the achievement of designs' awards, the authors' fame, the affiliation to a well-known artistic movement, but also commercial success, willingness of consumers to pay high prices for the work, and exclusive distribution channels.[189] Inspired by the Apollo 11 moon landing in 1969 and very much in vogue at that time, prior to resurfacing as a fashion trend in the early 2000s, the Moon Boot is considered an 'icon of the Italian design and a symbol of its capacity to guide the taste of an era as far as daily use objects are concerned.'[190] Published in numerous important specialized reviews, chosen 'as one of the newest symbols of 20th century design by the Louvre Museum', the Court decided in 2016 that the Moon Boot can be protected under copyright law. While the 'creative character' condition is easily interpreted as 'any expression of the authors' personality,' the identification of artistic value requires a particularly rigorous assessment to be made on a case-by-case basis.[191] The 2021 case,[192] which was brought against a number of shoe manufacturers who produced boots in the style of Moon Boots, including manufacturers working for the Chiara Ferragni brand, took up exactly the same

available at *www.dejure.it*.

[187] Art 2(10) legge 22 April 1941 no 633, as amended.

[188] For a discussion of the evolution of this test, and various cases, see F. Morri, 'Le Opere dell'Industrial Design tra Diritto d'Autore e Tutela come Modelli Industriali: Deve Cambiare Tutto Perché (quasi) nulla cambi?' *Rivista di diritto industriale*, 177 (2013).

[189] Immediately after the decision on the subject-matter by the IP Milan Court, the Court of Cassation confirmed the same reasoning and identified the same objective criteria for interpreting the requirement of artistic value, see *Thun spa v Egan srl*, Corte di Cassazione 23 March 2017 no 7477, available at www.dejure.it.

[190] *Tecnica group spa* v *Diana srl, Mofra Shoes srl, Serendipity srl*, Tribunale di Milano 25 January 2021 no 493, available at www.dejure.it.

[191] But see C- 683/17 *Cofemel–Sociedade de Vestuario sa* v *G-Star Raw cv*, Judgement of 12 September 2019, available at https://curia.europa.eu/, establishing that copyright may be granted to 'any original subject matter constituting the expression of its author's own intellectual creation'. No extra requirement must be fulfilled. However, as of this writing, this decision has had no impact so far on subsequent decisions in Italy.

[192] *Tecnica group spa* v *Diana srl* n 190 above.

arguments of its predecessor. Citing its 2016 opinion as precedent, the court in 2021 summarized the general rule that, to be copyrightable, the perception of the design in question must have been consolidated among the community, in particular in cultural spheres.[193] In that case, the judges expressly noted that the appreciation of the design has to be contextualized within the historic and cultural moment in which it was created. Such contextualization serves to assess whether the design has assumed an iconic value, which requires some sort of critical and cultural setting.

Following the recognition that the Moon Boots were a work to be protected under copyright law, the Court compared the Moon Boot design to the allegedly infringing design to determine infringement. Unlike in the United States, there is no clear test. Infringement determinations are simply

> '(t)he visual comparison between these models (that) plainly confirms the substantial identity of the forms – including in the details highlighted above[194] –, which is in no way compromised by the fact that the contested products have a particular coloring (glitter)'.

The Court defined copyright infringement as

> 'the substantial reproduction of the original work, with minor differences, that are not the result of a creative effort, but rather of the attempt to disguise an infringement'…'What matters, therefore, is (…) the unlawful reproduction of an original work, albeit disguised in such a way not to be immediately recognizable'.[195]

This leads us back to our heritage-shaking process. As fashion brands compare past and present designs in their archives as parallel creations, it seems to us that US and Italian copyright law regimes might, together, teach brands two useful lessons. Our premise is that copying is an essential part of the creative process. Better yet, taking inspiration rather than blatantly stealing an original work is fundamental. Referencing in the fashion industry, then, should be allowed when, first, the later work is 'independently created…, and comes' … 'from the exercise

[193] The Court only added further subsequent recognitions, such as the inclusion of Moon Boots in the Triennale Design Museum in Milan as well as in the permanent collection of the Museum of Modern Art in New York in 2018.

[194] In the 2016 case, the Court described the peculiar aspects of Moon Boots having 'massive' forms: '*il modello Moon Boots è contraddistinto sostanzialmente da una suola ambidestra a cui è raccordata, senza cuciture a vista, una tomaia che presenta un fascione di elevata altezza avvolgente la zona della punta e quella laterale del piede sino circa in corrispondenza della zona antistante i malleoli, in tale zona essendovi un raccordo con un contrafforte che si sviluppa maggiormente in altezza ad avvolgere parte dell'estremità posteriore del piede. Sono inoltre presenti dei lacci risvoltati su tre coppie di occhielli associate, due in corrispondenza del bordo superiore del fascione ed una del contrafforte; inferiormente la suola presenta una forma ambidestra*'.

[195] *Tecnica group spa* v *Diana srl* n 192 above. To an American audience, this might inappropriately smack of trademark law in its references to recognition.

of a creative effort of the author's mind' (combining the phrasing of the Second Circuit and the Milan Court judges). Parallel creations require some new addition, a moving forward of the past for the present. This does not mean that independent creation requires *not* consulting the archive, but it does mean that an independent process of creation should be more akin to recalling a work of heritage in the public domain as part of an act of creation than copying the work of heritage in person line by line. Second: copying is accepted when there is transparency and intellectual honesty. The fashion brand should be explicit in its recourse to materials from the archive. Indeed, these materials should be used as a strength to enhance the brands' history and generate affection in the public. Consumers love storytelling and appreciate the feeling of being part of a wider, long-standing endeavor. In no consumer category is the price for violating consumer trust so high as in the fashion and luxury sector, where the brands' elevated value lies primarily in its reputation. 'The age of imposture', to quote Flaccavento, with its 'attempts to disguise infringements', is over. Certain factors, such as reputation and recognition, and the potential loss of trust and loyalty of consumers, play a decisive role in the fashion industry. In practice, the norms of reputation and authenticity,[196] which underlie the market, should make the application of copyright law unnecessary. At the same time, comparison tests within copyright law that draw on archival sources can further inform comparisons across instances of copying in the fashion industry, acting as a partner to reputation and authenticity for brands when copying occurs.

3. Heritage-Shaking and Acknowledgement

At the outset of our article we asked, what is a balanced way to engage with heritage and create in the present? The heritage-shaking process may provide an extra-legal solution, outside of cultural property law and of copyright law, to answer this question. As legal scholars, we also feel that heritage-shaking can be an extra-legal reference for judges themselves as they decide 'where to look' in copyright infringement cases. Essentially, through the heritage-shaking process we are calling for a greater role for visual provenance in copyright infringement cases. Heritage-shaking might also be useful beyond copyright infringement cases, for evaluations of cultural interest of individual fashion designs and objects.

The first *Vivara* print created by Emilio Pucci in 1965 is still subject to copyright law and its copyright is owned by Emilio Pucci srl.[197] While the copyright is owned

[196] A. Adler, n 135 above.

[197] A search in the records of the US Copyright Office indicates that 'Emilio Pucci, S.R.L. of Italy' was listed as the author of the visual work *Vivara*, an 'art reproduction' in a 2004 filing. The listed date of publication of the art reproduction matches the Heritage Hub's dating of the creation of the *Vivara* – 1965. See US Copyright Office, Registration Number VA0001261496, Date of registration: 2004-07-02, 'Copyright Catalog (1978 to present)', available at https://tinyurl.com/3k7tr8m9 (last visited 20 September 2023). Notwithstanding the author, the copyright claimant – the current owner of the work- is listed as Emilio Pucci International, BV. Special thanks to Pierluigi Roncaglia for calling the authors' attention to nuances of ownership in the *Vivara* copyright.

by companies controlling the Pucci brand, examples of the copyright's first uses in designs are included in the collections of the Emilio Pucci Heritage Hub.[198] The 'colorful, alluring' design may be seen as 'figurative…a readable abstract'.[199]

Figure 8 *- From L to R: The 1965 Vivara; Fall 2022 reworking of Vivara; Spring 2020 reworking of Vivara*

At the same time as the Pucci Archive offers us a model of an activated archive, it also has something to contribute in response to calls for 'a culture of acknowledgment' in fashion.[200] What is crucial in the creation of these parallel creations is not control – of the copyright or other intellectual property rights, specific meanings,[201] or determined results, but process and procedure. The ability to read the archives' contents in multiple ways and the opportunity and openness to new connections and links between objects allows for the creation of new designs that are parallel creations. But how much time one spends in the archive, how much time one spends engaging with Pucci's history and the richness of Emilio Pucci's modern designs from another century may determine the success of a parallel creation. No matter who owns the copyright, looking at first instances of

[198] Email from Dylan Colussi, 22 December 2022 (on file with the authors).

[199] V. Friedman, 'Aristocratic Design' n 1 above at 29.

[200] V. Friedman 'The Curious Case of the Alexander McQueen Graffiti Skirt', *The New York Times,* available at https://tinyurl.com/mry2m6yu (last visited 20 September 2023) ('Consumers love to know the story behind a product', said Dirk Standen, the dean of the School of Fashion at SCAD Ms Scafidi agreed. 'We need to develop a culture of acknowledgment', she said. 'It would be good for the brand and good for the source and good for the consumer').

[201] Which would follow a traditional idea of tracing and respecting an author's original meaning and message. This is, in many ways, out-of-date, and not the purpose of fashion at all. See interview with L. Pucci, 18 October 2022. A Creative Director re-uses the original message for the very reason that it tells something of its own viewpoint and can also be translated to today's world. In activated archives, meaning as such is never fixed once and for all, but is something that occurs as re-enactment, re-interpretations, re-use, and re-editions are activated by different stakeholders. Each activation leaves fingerprints that are attributes to the archive's infinite meaning in an endless process of stratification.

a work's use on tangible fabric and finding nuances in the design over time can play a crucial role in identifying original additions, derivative works, and the related scope of a copyright. This is where 'heritage-shaking' comes in. 'Heritage-shaking', as a process, can help to call courts' attention to pieces of heritage used in a current design, it can help the courts identify parallel creations. 'Heritage-shaking' can also, when heritage is interpreted almost beyond recognition or is firmly in the public domain, help to create a culture of attribution within the important tradition of referencing in the fashion industry.

V. Conclusion: Activated Archives and Heritage-Shaking in Fashion Law

The Pucci Archive embodies a model of a dynamic institution, whose contents are ever-evolving in an ongoing process of heritage-shaking. The Pucci Archive cannot be properly defined as a corporate archive to be exploited for commercial and heritage marketing purposes, nor as a self-celebratory museum-like space that preserves an immutable historic nucleus of particularly important interest under cultural property law. The archive, rather, even as a privately owned entity, represents a living heritage. The archive is continuously integrated in the production and design process, thus contributing to construct and strengthen the brand history and identity.[202] Such an activated archive, as we term it, acts in a way which defies traditional notions of cultural interest, cultural property, preservation, and valorization. As a result, such archives, we argue, best operate in a negative space of cultural property law, where they can define their own guidelines, operations, and partnerships.

Activated archives safeguard objects and stories, but they do so as open spaces, able to welcome and involve different stakeholders that can constantly transform them and be inspired by their contents. Activated archives allow for the weaving of many other possible narratives and help to produce new impactful parallel creations. Heritage needs to constantly regenerate itself. The narrative of the past should be filtered through the lenses of the present and, at the same time, be placed in a larger value system. New connections with new stakeholders must be created, but in the bed of a river that has been flowing underneath these connections for decades. Cultural property law serves the public purpose of preserving our common heritage. Copyright law serves the private interest of protecting our own work. While at first opposite, there is an opportunity to refine and expand the traditional notions of preservation and protection in examples and case studies like the Pucci Archive. But how should we craft a set of rules that strikes the proper balance between the conflicting interests of preservation and protection for innovation?

[202] P. Bertola et al, 'The Cultural Dimension of Design Driven Innovation. A Perspective from the Fashion Industry' 19 *The Design Journal*, 237-251 (2016); M. Augello, n 32 above.

Parallel creations should be able to move the reference forward, thus creating innovation in continuity with the past. A re-enacted product is the result of a complex process of stratification, of multiple reinterpretations starting from an original creation that serves as an anchor from which to leap towards the future. Fashion consumers are still driven by a desire for distinction, and brand value is realized through authenticity and originality.

The Pucci Archive's ways of cataloguing and displaying its brand heritage follow house codes and evergreen aspects featuring the DNA of the brand. These codes and evergreen aspects are strengthened by constantly confronting archival materials in order to revise them, re-examine them, and re-work them through contemporary sensibility and changing fashion scenarios. The Vivara print is a unique work, part of our shared cultural history, with an aura that persists even in this age of mechanical reproduction.[203] The standard rationale would be to preserve such an iconic work, and its related works, in order to protect their value. But parallel creations are what, in fact, today contribute to building, strengthening, and disseminating such an iconic value. Preservation mechanisms which would undercut or frustrate this continued evolution and recognition of a design's iconic nature should be, in our opinion, thoughtfully applied and, if necessary, revisited.

Our article has also sought, in its analysis, to contribute to the academic debate on the proliferation of re-issues/re-editions, to add an academic legal voice to the contemporary practice of referencing archives among fashion brands. In this article we have termed these re-issues, re-editions, and referencing parallel creations. While other scholarship has developed critiques or theories of parallel creations in the field of curatorial studies and fashion studies,[204] our aim has been to help fill a

[203] W. Benjamin, 'The Work of Art in the Age of Mechanical Reproduction', in Hanna Arendt ed, *Illuminations* (New York: Schocken Books, 1969).

[204] M.L. Frisa deems many of her fashion displays, in both museum-like and store settings as 'reenactments.' See M. Augello, n 32 above. In the exhibition 2020 'Memos' Judith Clark explored 'a series of reflections on contemporary fashion, its qualities and its attributes, taking as its starting point Italo Calvino's Six Memos for the Next Millennium'. 'MEMOS. On fashion in this millenium' *UAL*, available at https://tinyurl.com/3xwvu6kx (last visited 20 September 2023). See also N. Borriaud, *Postproduction Culture as Screenplay: how Art Reprograms the World* (Santa Monica: Ram Publications & Dist, 2005) ('discuss (ing) how, since the early nineties, an ever increasing number of artworks have been created on the basis of preexisting works; more and more artists interpret, reproduce, re-exhibit, or use works made by others or available cultural products'). P. Bertola et al, n 202 above (exploring innovation as reappropriation and tracing back to the origins, and as an 'inverse process'); M. Montemaggi and F. Severino, *Heritage marketing. La storia dell'impresa italiana come vantaggio competitivo* (Milano: FrancoAngeli, 2007) (exploring the concept of 'temporal reversability'). These analyses challenge the notions of nowness and newness that are traditionally used to define the intrinsic nature of fashion. Nowness and newness are not synonyms of now and new in a narrow sense. They are, rather, associated with change and transformation, and this can often take the form of reconstruction of the past. On the relationships between fashion and time, see W. Benjamin, *The Arcades Project* (Cambridge: Belknap Press, 2002). But also C. Evans and A. Vaccari, *Il tempo della moda* (Sesto San Giovanni: Mimesis, 2019) (presenting business archives, especially in fashion, as dynamic entities, through which objects re-emerge from the past to be continuously re-edited in the present design practice and projected towards the future). Vaccari and Evans identify the categories of industrial time (which pertains

doctrinal gap by providing the legal perspective on this subject matter.

Copying is at the foundation of the fashion industry (and human knowledge). Fashion Law as both an academic and professional field has traditionally focused the most on intellectual property laws and scholarship to protect originals from infringement. Its main concern has been the regulation of copies. But copying is, at the same time, paradoxically good for fashion and, by extension, for Fashion Law as a field.[205] The heritage-shaking process can profoundly affect the way in which we think of and deal with copyright infringement in the fashion industry from now on. Heritage-shaking can be of help to all stakeholders as it tells us 'where to look':[206] it is open and honest about the past reference, whether in copyright or not, and no matter who holds the copyright. Heritage-shaking builds relationships. It cares for attribution. Heritage-shaking is an ongoing process that reflects the need for awareness, engagement, transparency in the fashion industry. Activated archives and the process of heritage shaking can work together. Activated archives can establish procedures and deadlines that make attribution more obvious, or that support greater intellectual honesty in the fashion industry. To use the archive as a reference should not be a license to engage in superficial heritage-shaking. And, as a partner, activated archives outside the traditional bounds of cultural property law can only support deeper, more thoughtful engagement with references of the past to move fashion forward.

We see this essay as an initial exploration of a broader analysis. As such, the ideas we propose here are meant to support further dialogue and conversations around the procedures which brands and their associated archives might put into place, both in Italy and in the United States, to better frame the referencing at the heart of fashion creation. And on this note, we look forward to continuing *Fashion Law, Italian Style*.

to the time of production), antilinear time (which subverts the linearity of time and in which fashion design becomes a process of citation and reconstruction, in which nostalgia and revival are at play, exemplified by postmodernism and fashion) and uchronic time (the fashion imaginary, prone to the construction of myths, a kind of 'alternative history', as is the case with fashion brand histories, subjected to continuous rewriting, mythologizing the founders or reinventing traditions). According to this reading, fashion can concern both antilinear and uchronic time: antilinear because it revives past designs through forms of revivalism and recycling; uchronic since it inevitably involves processes of reinvention and reconstruction of the past.

[205] C.B. Sprigman and K. Raustiala, n 7 above.

[206] V. Friedman et al, 'Pucci' n 1 above, 39.

Fashion Law, Italian Style - Symposium

Sustainable Fashion… Italian Style!

Barbara Pozzo*

Abstract

In *Sustainable Fashion…Italian Style!* Barbara Pozzo begins the Symposium by addressing a hot topic in the fashion industry: sustainability. Acknowledging the work that has been done to incentivize sustainable development at the supranational level, Pozzo presents the EU framework for sustainable development and the relevant EU legislation for the textile and fashion industries. Highlighting registration and labeling norms, Pozzo also highlights the ethical codes of conduct that have been implemented by brands, luxury conglomerates, and industry associations, including the *Camera Nazionale della Moda*. Despite the laws currently in place and other encouraging steps, Pozzo highlights the continued prevalence of greenwashing and the importance of viewing sustainability policies from a 360-degree angle. With a history of creating textiles through processes that are closely linked to historic practices, traditions, and the environmental benefits of a specific territory, Italian fashion brands are offering, as Pozzo presents, innovative sustainable initiatives that can benefit the global fashion industry. The city of Como in Italy already embodies many of the best practices of sustainability, and Pozzo points out how the fashion brands in Como have instituted a number of important initiatives and collaborations.

I. Introduction

Fashion and Sustainability seem – at first sight – opposing concepts. Fashion is ephemeral and recalls the idea that once the season is gone, the dress should be set aside to make room for new models. As Coco Chanel said, 'Fashion is made to become unfashionable'.

On the other hand, fashion is the end-product of a heavily impactful industry. The textile industry contributes to consistent pollution of the planet and is not much different from a steel mill as far as environmental impacts are concerned. Further, through its rapid production methods that supply the latest catwalk styles almost instantaneously to the high street, the fast fashion model has revolutionized the fashion industry, while generating a significant carbon footprint and a host of social concerns.[1]

If we look to recent data, the picture emerges in all its drama: 150/180 billion garments are produced each year worldwide, of which only 1% is recycled as

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[1] K. Fletcher, *Sustainable Fashion and Textiles* (New York: Routledge, 2nd ed, 2014); S.S. Muthu, *Assessing the Environmental Impact of Textiles and the Clothing Supply Chain* (Cambridge: Elsevier, 2014), 40-55.

clothing. In Europe the consumption per year and per capita amounts to 26 kg. Among the most thought-provoking data there is the fact that 30% of the total textile production does not reach the consumer (10% as production rejects, 20% as unsold garments).[2]

Sustainable fashion is a part of a new growing philosophy, the goal of which is to create a supply chain that becomes bearable in terms of environmental *impacts* and in terms of *social responsibility*. Different sectors can be involved in this transition to a more sustainable fashion. Areas that can be affected concern for example the choice of materials with a more limited environmental impact, or that could be produced out of environmental-friendly raw materials or materials derived from traceable cultivations that have a lower environmental impact. The choice of materials could be also connected to the use of recycled materials; or the use of fibers and materials certified according to recognized international standards.

Other areas where it would be possible to have an impact with a dedicated policy on sustainability are the reduction of waste and rejects, and the control of energy consumption and of natural resources, for example by installing plants to produce energy from renewable sources. The control could be extended to dangerous substances used, minimizing the emission of pollutants in the atmosphere and in water bodies.

New strategies can also be developed at the distribution stage, for example encouraging rational and efficient ways of shipping goods by preferring carriers that are committed to reducing environmental impacts.

In a context where consumers become more important day by day, information plays a role of utmost importance by providing the data that is useful for making informed choices from a sustainability point of view. That is why it is possible to also intervene with specific labelling policies and advertising policies, to neutralize greenwashing strategies.

Finally, as history teaches us, we cannot forget how it is especially important in the fashion supply chain to pay special attention to the basic rights of workers, in order not to expose them to situations that might be hazardous to their health and safety.

With this in mind, we can understand why Ambassador Inga Rhonda King, President of the UN Economic and Social Council, introduced the Sustainable Fashion Summit, Friday, 1 February 2019 by stating that 'Sustainable fashion is key to the achievement of the 2030 Agenda'.[3]

[2] 'Sustainable Fashion 2023: A Look at the Industry's Impactful Statistics', May 12, 2023, available at https://tinyurl.com/2p9ambkm (last visited 20 September 2023).

[3] H.E. Ambassador Inga Rhonda King, 'Remarks' *Sustainable Fashion Summit ECOSOC Chamber*, 1 February 2019, available at https://tinyurl.com/2x35b3h8 (last visited 20 September 2023).

II. The EU Legal Framework for Sustainable Development

The debate on sustainable fashion in Italy must be contextualized in a regulatory framework that has evolved at the EU level over time, recognizing an increasingly prominent role for the principle of sustainability.[4]

Initially, the Treaty establishing the European Economic Community in 1957 did not provide for any specific Community competence in the environmental field; this competence was, instead, introduced only in 1987 with the Single European Act.

With the Maastricht Treaty in 1992 the principle of sustainable development was introduced in Art 2:

> 'The Community has the task of promoting, ..., a harmonious and balanced development of economic activities throughout the Community, sustainable, non-inflationary and environmentally friendly growth ...'

Nowadays the Treaty on European Union features the *principle of sustainable development* in various provisions, as well as in the Preamble. In particular, the principle of sustainable development is established in Art 3, where it is put in connection with the establishment of the internal market

> ('The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment'),

but also with the role that Europe wants to play at the international level in order to promote sustainable development worldwide

> ('In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter').

Art 21 further foresees that sustainable development will have a guiding role in the Union's external action. In particular, the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in

[4] B. Pozzo, 'Sustainable Development', in S. Baldin and S. De Vido eds, *Environmental Sustainability in the European Union: Socio-Legal Perspectives* (Trieste: Edizioni Università di Trieste, 2020), 11-38.

all fields of international relations,

> 'foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'[5] and

> 'help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'.[6]

The principle of sustainable development is further recalled in Art 37 of the Charter of Fundamental Rights dedicated to the environment, which states that

> 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

The idea encapsulated within the principle of sustainable development – in theory – appears to be simple: it is to leave future generations at least the same level of opportunity as we ourselves have had. As the Brundtland Report stated:

> 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[7]

On the other hand, it is more difficult – from a practical point of view – to determine what legislative measures should be adopted, and what the right mix of legal instruments (between public law and private law) is to achieve this magical point of equilibrium between the needs of today and those of tomorrow.[8]

Sustainable development as a concept has remained relatively open-ended, providing 'a space for dissension and socio-political struggle where competing discourses of the economic and environmental paradigms are joined'.[9] Others have suggested that the concept of sustainability has a more long-term function, claiming that it falls within the classification of 'ideas that make a difference'.[10]

[5] Art 21 d), Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

[6] Art 21 f), Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

[7] Brundtland Commission, *Our Common Future* (Oxford: Oxford University Press, 1987).

[8] E. Brown-Weiss, *In Fairness to Future Generation: International Law, Common Patrimony and Intergenerational Equity* (New York: United Nations University, 1988); A.S. Manne, *Intergenerational Altruism, Discounting and the Greenhouse Debate* (Manuscript Stanford: Department of Operations Research, Stanford, 1996); D.A. Farber and P.A. Hemmersbaugh, 'The Shadow of the Future: Discount Rates, Later Generations, and the Environment' 46 *Vanderbilt Law Review*, 267-304 (1993).

[9] M.A. Hajer, *The Politics of Environmental Discourse: Ecological Modernisation and the Policy Process* (Oxford: Clarendon, 1997).

[10] D. McNeill, 'The Concept of Sustainable Development', in K. Lee et al eds, *Global Sustainable Development in the 21st Century* (Edinburgh: Edinburgh University Press, 2000).

In order to give consistency to the principle, sustainable development has been mainstreamed into EU policies and legislation, implementing a specific *EU Sustainable Development Strategy* of 2001,[11] where the Commission states that economic growth, social cohesion and environmental protection must go hand in hand, calling for a better coordination among the wide range of policies to address the economic, environmental and social dimensions of sustainability and launching the global role of the EU in this field.

With the Fifth Environmental Action Program adopted by the Commission in 1992 entitled 'Towards Sustainability',[12] consideration was given to broadening the range of environmental policy instruments.

To drive change in the approach to environmental issues and with the idea of fostering a spirit of 'shared responsibility', the Commission was advocating the need to propose a broader range of instruments that would make business part of a process of raising awareness and consciousness of environmental issues.

Alongside the traditional environmental policy instruments, those based on the command-control model, came so-called market-based instruments, which include taxes, charges, specific environmental incentives, permit exchange systems, eco-labeling and environmental budgeting schemes, the regulation of liability for damage caused to the environment and, finally, environmental agreements.[13]

Subsequently, with the Sixth Environmental Action Program,[14] which launched the strategies for 2002-2010, the Commission clearly indicated that one of the aims of environmental policy should be to induce the market to work for the environment through better cooperation with the business community, introducing reward programs for companies with the best environmental performance, promoting a move toward greener products and processes, and encouraging the adoption of eco-labels that would enable consumers to compare similar products on the basis of environmental performance.

In the most recent Seventh Union Environment Action Programme, entitled 'Living well, within the limits of our planet',[15] the Commission sets out the guidelines

[11] Communication from the Commission of the European Communities 'A sustainable Europe for a Better World: A European Union Strategy for Sustainable Development', [2001] Brussels 15.5. 2001 COM 264 final, available at https://tinyurl.com/2nxnxnnj (last visited 20 September 2023).

[12] 'Towards Sustainability', [1993] OJEC C 138/5, available at https://tinyurl.com/msjazmjb (last visited 20 September 2023).

[13] Communication from the Commission of the European Communities 'Europe's environment: what directions for the future? The global assessment of the European Community programme of policy and action in relation to the environment and sustainable development', [1999] COM (99) 543 final, available at https://tinyurl.com/5n99cv73 (last visited 20 September 2023).

[14] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Sixth Environment Action Programme of the European Community 'Environment 2010: Our future, Our choice - The Sixth Environment Action Programme', [2010] COM/2001/31 final, available at https://tinyurl.com/547jy97c (last visited 20 September 2023).

[15] European Parliament and of the Council Decision 1386/2013/EU of 20 November 2013 on a General Union Environment Action Programme to 2020 [2013] OJ L 354/171, available at

through to 2020, bringing together – as part of a revised conception of well-being in which economic prosperity and the well-being of the Union are closely related to its natural capital-environmental concerns and market dynamics.[16]

The Seventh Action Programme reflects the Union's commitment to transform itself into an inclusive green economy that can guarantee growth and development, protect human health and welfare, create decent jobs, reduce inequalities, and invest in biodiversity.[17]

To achieve these ambitious goals, the Commission stresses that there is a need for 'an appropriate mix of policy instruments'[18] to enable businesses and consumers to improve their understanding of the impact of their activities on the environment and to manage that impact. These political instruments crystallise in a broad examination of legal instruments, public and private law, including economic incentives, market instruments, information requirements, and in voluntary measures and instruments which commit stakeholders on various levels, as supplements to legislative frameworks.[19]

Sustainability has further become 'one of the founding principles of consumer law'.[20] The EU Consumer Policy strategy 2007–2013[21] highlighted the importance of correct and reliable information given to consumers:

> 'Empowered and informed consumers can more easily make changes in lifestyle and consumption patterns contributing to the improvement of their health, more sustainable lifestyles and a low carbon economy'.

In the new Circular Economy Action Plan of 2020,[22] the Commission proposes a revision of EU consumer law to ensure that consumers receive trustworthy and relevant information on products at the point of sale, including on their lifespan and on the availability of repair services, spare parts, and repair manuals. The Commission is also considering further strengthening consumer protection against green washing and premature obsolescence, setting minimum requirements

https://tinyurl.com/yz6pd3uc (last visited 20 September 2023).

[16] ibid recital 17.

[17] ibid recital 10.

[18] ibid recital 33.

[19] ibid

[20] H. W. Micklitz, 'Squaring the Circle? Reconciling Consumer Law and the Circular Economy', in B. Keirsbilck and E. Terryn eds, *Consumer Protection in a Circular Economy* (Cambridge - Antwerp-Chicago: Intersentia, 2019) 323-345.

[21] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, 'EU Consumer Policy strategy 2007-2013 - Empowering consumers, enhancing their welfare, effectively protecting them', Brussels [2007] COM (2007) 99 final, available at https://tinyurl.com/mr35fvh6 (last visited 20 September 2023).

[22] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A new circular economy action plan for a cleaner and more competitive Europe', Brussels [2020] COM (2020) 98 final, available at https://tinyurl.com/5x7t84v5 (last visited 20 September 2023).

for sustainability labels/logos and for information tools.[23] In the same direction, the EU Parliament Resolution of 25 November 2020, *Towards a more sustainable single market for business and consumers*,[24] focuses on consumer rights and the reduction of planned obsolescence, facilitating repair and reuse.

III. The Relevant EU Legislation for Textile and Fashion Industries

Against the backdrop of this framework that emphasizes the role of sustainability and – at the same time – the need for the market to cooperate, the EU has issued a set of laws that have regulated businesses' behaviors and incentivized consumers' information.

The Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regulation,[25] which came into force on 1 June 2007, constitutes an important step towards the objectives of health and environmental protection. In particular, the regulation makes the registration of chemicals mandatory, requiring companies to prepare dossiers containing the full chemical, toxicological and environmental profile of products, and restricting professional use to chemicals registered for that particular use. This obligation also has significant repercussions on the importation of chemical products, which will have to be registered to enter the European market.

For these reasons it is important to develop and support a system of controls over imported items. In Italy for example, the Associazione Tessile e Salute supports the Health Ministry and the competent authorities in ensuring that the REACH requirements are also adopted by foreign manufacturing companies to avoid a substance that is banned in Europe being present in imported products and causing harm to consumers' health.[26] Altogether the REACH regulation represents a major compliance challenge for the textile and clothing industry, with relevant strategic business implications that could promote transparency in the use of chemicals and stimulate the adoption of more sustainable alternatives.[27] Furthermore, in this context it should be noted that the pressure of humanitarian and environmentalist movements creates a kind of domino effect in the fashion industry's dynamics: brands urge their suppliers to act sustainably, and these suppliers in turn put

[23] ibid 5.

[24] European Parliament Resolution 'Towards a more sustainable single market for business and consumers', 25 November 2020, [2020] OJ C 435/11, available at https://tinyurl.com/yc7n7mh6 (last visited 20 September 2023).

[25] European Parliament and Council Regulation (EC) 1907/2006 of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) [2006] OJ L 396/1, available at https://tinyurl.com/2xtbe7n9 (last visited 20 September 2023).

[26] 'Associazione Tessile e Salute Website', available at https://tinyurl.com/3tmh9tb9.

[27] For a detailed discussion see V. Jacometti, 'Sustainable consciousness and consumer identity: Legal tools and rules', in E. Mora and M. Pedroni eds, *Fashion Tales, Feeding the Imaginary* (Bern: Peter Lang, 2017), 247, 259.

pressure on their own suppliers, often adopting highly detailed contractual specifications requiring compliance with REACH requirements.

Another area in which the EU has developed an important role concerns the labelling and marking of textile products. In 2011 the EU adopted a Regulation establishing harmonized provisions on the labelling and marking of textile products in order to eliminate barriers to the internal market in the textile sector and to guarantee consumers adequate information.[28] All products containing at least 80% by weight of textile fibers, including raw, semi-worked, worked, semi-manufactured, semi-made, and made-up products are covered by the regulation.

The Regulation makes labelling or marking of the fiber composition compulsory to ensure that correct and uniform information is made available to all consumers in the Union, to enable them to make informed choices.[29]

In order to place a textile product on the market its fiber composition shall be indicated in a label or mark; such label or mark shall be durable, easily legible, visible, accessible and, in the case of a label, securely attached and the information must be accurate, not misleading, easily understandable and provided in the official language or languages of the Member State where the product is offered to the consumer.

In Italy, Legislative Decree no 190 of 15 November 2017,[30] provides for specific sanctions for violations of EU labelling regulations, with the aim to guarantee the consumer correct information on product composition. Legislative Decree no 190/2017 therefore represents a fundamental step both to strengthen the protection of the consumer, who is increasingly exposed to the risks of the globalized and low-cost market and lacks effective protection regarding the technical characteristics of the product, and to protect entrepreneurs with a view to strengthening 'Made in Italy' productions anchored to the enhancement and transparency of the production characteristics and materials used.

The Italian Decree of 2017 has stiffened the fines on manufacturers, suppliers and distributors and introduced the possibility of immediate seizure of goods. The measure assigns direct responsibility and accompanying heavy penalties (up to 20,000 euros) on those who actually label products (footwear and textiles), ie the

[28] European Parliament and Council Regulation (EU) 1007/2011 of 27 September 2011 on textile fibre names and related labelling and marking of the fibre composition of textile products and repealing Council Directive 73/44/EEC and Directives 96/73/EC and 2008/121/EC of the European Parliament and of the Council, [2011] OJ L 272, 1–64, available at https://tinyurl.com/mryjf6tr (last visited 20 September 2023).

[29] ibid 10.

[30] Decreto legislativo 15 novembre 2017 no 190 'Disciplina sanzionatoria per la violazione delle disposizioni di cui alla direttiva 94/11/CE, concernente l'etichettatura dei materiali usati nei principali componenti delle calzature destinate alla vendita al consumatore, ed al regolamento (UE) n. 1007/ 2011 del Parlamento europeo e del consiglio del 27 settembre 2011, relativo alle denominazioni delle fibre tessili e all'etichettatura e al contrassegno della composizione fibrosa dei prodotti tessili'.

manufacturer, the importer and the distributor, in a misleading way.[31]

IV. The Rise of Sustainable Fashion in Italy and the 'Manifesto for Sustainability in Italian Fashion'

Besides the mandatory European norms that have been implemented in Italy, the topic of sustainability in fashion has come to the attention of an ever-widening public.

This phenomenon finds its basis in the framework just outlined in the context of the European Union, but also finds its lifeblood in movements that emphasize sustainability and the rights of future generations, such as *Fridays for future*.

This has also had far-reaching consequences in the textile and fashion industry, where the social and environmental impacts of this supply chain have become increasingly evident. Just to cite two examples in this field, it is important to recall the Greenpeace Detox Campaign, that was launched in 2011 to highlight the links between global clothing brands, their suppliers and toxic water pollution around the world. Greenpeace is underlying that for decades, companies have used nature, and in particular rivers and oceans, as a dumping ground for hazardous chemicals. Communities living near textile manufacturing facilities had to face water pollution as a daily reality, evidencing how regulations have not always prevented the release of toxic chemicals into the environment, particularly in the Global South. That's why the NGO is calling on companies to commit to end the release of chemicals and to stop tarnishing rivers, lakes, lands, oceans, and people. Since its launch, Greenpeace has challenged some of the world's most popular clothing brands to eliminate all releases of hazardous chemicals from their supply chains and products.[32] The campaign launched by Greenpeace was so successful in Italy that a consortium (the *Consorzio italiano implementazione* DETOX) was founded for this purpose with the adoption of a special code of ethics.[33]

Also of importance to remember, not only for its mediatic impact, is the *Clean*

[31] Art 3.7 of the Decree further introduces the assignment by the Supervisory Authority (CCIAA, Customs and Monopolies Agency) of a peremptory deadline of sixty days in which the manufacturer or its representative or the person responsible for first placing footwear or textile products on the national market must regularize the labelling or withdraw the products from the market. Persons who fail to comply within the allotted time limit shall be subject to an administrative fine ranging from €3,000 to €20,000. It is also important to know that the measure provides that - unless the act constitutes a criminal offence, a manufacturer, importer or distributor who fails to provide, when making a textile product available on the market, in catalogues, brochures or websites, the indications relating to the fibre composition in accordance with Regulation (EU) no 1007/2011 shall be subject to a pecuniary administrative sanction ranging from EUR 1,500 to EUR 20,000 - the distributor who makes footwear available on the market without having correctly informed the final consumer, of the meaning of the symbols adopted on the label, shall be subject to a fine of EUR 1,500 to EUR 20,000.

[32] Greenpeace, 'Detox my Fashion', available at https://tinyurl.com/bdrsn83a (last visited 20 September 2023).

[33] Consorzio Italiano Implementazione Detox, 'Codice Etico di CID', available at https://tinyurl.com/2s3wxyxc (last visited 20 September 2023).

Clothes Campaign, an alliance of various organizations, including trade unions and NGOs, in sixteen European countries, dedicated to improving working conditions in the global garment and sportswear industries,[34] which drew and is constantly drawing the attention of public opinion to the disaster which occurred at the Rana Plaza building in Dhaka, in Bangladesh, in 2013, which housed several shops, a bank and five garment factories. In the collapse of the building, at least 1,138 people were killed and thousands more suffered life-changing injuries. The *Clean Clothes campaign*, that in Italy was named *Abiti puliti*,[35] has highlighted the contribution of Italian brands such as Benetton to the exploitation of workers and aims to raise consumer awareness of these issues.

In 2012, the *Camera Nazionale della Moda Italiana* promoted *The Manifesto for the sustainability in Italian Fashion*, which aims at designing an Italian path to a responsible and sustainable fashion as well as fostering the adoption of models of responsible management throughout the fashion value chain for the benefit of the economic system of the whole country.

The *Manifesto* applies first to the businesses that are members of *Camera Nazionale della Moda Italiana*, but also has the ambition of establishing a model and of setting guidelines for other companies that could contribute with their know-how to the excellence of Italian products in the world.

Furthermore, item 10 of the *Manifesto* provides for specific actions to be undertaken by *Camera Nazionale della Moda Italiana* to achieve the largest circulation and greatest effectiveness of this tool.

The *Manifesto* interprets the global challenges of sustainability by defining concrete and distinctive actions to be taken by Italian businesses. It is a tool designed to show Italian companies how to take advantage of the opportunities offered by the greater attention given to environmental and social aspects and, at the same time, help them to manage reputational and operational risks in the best way.

The *Manifesto* is organized according to the stages of the value chain and includes some horizontal principles as well. It contains some specifications that businesses can utilize as a handbook as well as a benchmark for strategic and operative choices; a few tags, identified for each theme, can be used as references to investigate the most significant issues.

Other important initiatives are the *Greenitaly Report*[36] and the *Sustainable Fabrics and Accessories Catalogue,*[37] that regularly take stock of the development of sustainable production in Italy in the fashion and accessories sector.

[34] 'Clean Clothes Campaign', available at www.cleanclothes.org.

[35] Benetton, 'Abiti Puliti', available at https://tinyurl.com/2n7v8tdk (last visited 20 September 2023).

[36] Symbola, 'GreenItaly 2022', available at https://tinyurl.com/2p9bzed3 (last visited 20 September 2023).

[37] Sustainability Lab, 'Catalogo dei tessuti sostenibili P/E2015 SS/2015', available at https://tinyurl.com/yhcsc647 (last visited 20 September 2023).

V. Ethical Codes

Many important brands[38] have implemented *Codes of Ethics*, that should guarantee for the future a better control on safety measures, minimal wages, and environmental impact.

Among the reasons fashion brands have adopted codes of ethics is to address various problems that might be connected to labor standards, corruption, or sustainability issues.

From a legal perspective, a code of ethics constitutes a contract between a company and its addressees, tending to oblige third parties to adhere to the code's principles.

In a recent analysis[39] that has taken into consideration the codes of ethics of important fashion brands, the companies surveyed explicitly state their codes of ethics are legally binding for all employees, collaborators, and suppliers, while some firms have expressly linked their codes of ethics to their primary supplier-buyer agreement.[40] This means that a violation of the ethical code constitutes a breach of the main contract (for services or procurement of goods). In this case suppliers will be incentivized to behave ethically, because of the threat of termination due to breach.

Some brands have also adopted specific principles in the area of sustainability. Gucci for example has adopted a specific document on sustainability,[41] that states that

> 'Gucci and Kering Group are committed to:
> - ensure human rights, welfare and fair working conditions;
> - ensure a basic living wage for all workers;
> - avoid use of child and forced labour;
> - use natural resources conscientiously and increase efficiency in the use of materials and resources;
> - conserve and protect biodiversity and maintain ecosystem function;
> - use water responsibly;

[38] Like Gucci (Kering, 'Code of Ethics', available at https://tinyurl.com/2fcj2w9h), Prada (Prada Group, 'Code of Ethics', available at https://tinyurl.com/ehhhhfsz) and Armani (Armani/ Values, 'People, Planet, Prosperity', available at https://tinyurl.com/4bsprbfd).

[39] R.E. Cerchia and K. Piccolo, 'The Ethical Consumer and Codes of Ethics in the Fashion Industry' 8(4) *Laws*, 23 (2019), available at https://tinyurl.com/49fzxm3f (last visited 20 September 2023).

[40] ibid ('Armani requires all Suppliers Armani contractually engages in business with to adhere to the following standards and requirements. The Supplier Code of Conduct is referenced in Armani's Terms and Conditions so as to hold Suppliers legally accountable to this Code' (citing to Armani, 2017, at 1)). See also Cerchia and Piccolo's discussion of Ralph Lauren referencing separate Fair Employment Practice Policy and Anti-Harassment Policy contained in employee handbook; and Ralph Lauren, 'Doing the Right Thing: Our Code of Business Conduct and Ethics', available at https://tinyurl.com/5n8mhra3 (last visited 20 September 2023).

[41] Gucci, 'Sustainability Principles', available at https://tinyurl.com/5n7pcnnx (last visited 20 September 2023).

- optimise waste management and minimise waste production;
- promote resilience and mitigation of climate change;
- create positive impact within local communities;
- respect animal welfare, and ensure a minimal impact on the environment;
- support sustainable sourcing of production material and packaging.

These sustainability principles are in support of that commitment'.

The document further adds that 'Gucci suppliers commit to comply with Sustainability Principles by signing and dating this document', thus also managing to impose these principles on their suppliers.

However, the existence of a code of ethics does not guarantee compliance with the principles contained therein. In 2008 Benetton published its code of ethics, which stated:

> 'safety, health and working conditions: the physical and moral integrity of the Recipients is considered a primary value of the Group. Safety is safeguarded, [as is] hygiene and health in the workplace and it is considered fundamental and a priority, in the performance of its activities, [to have] full respect for the health, physical integrity and rights of workers and full compliance with current legislation on safety, hygiene and health at work'.

Nevertheless, at the time of the collapse of Rana Plaza where the safety conditions of those working inside were deplorable, Benetton at first denied being involved in the activities conducted there. Later, when Benetton branded goods were found under the rubble, the company was forced to admit its involvement.[42]

It should be emphasized that although the rules contained in the codes of ethics are not binding, a company's non-compliance with the rules contained therein can mean an enormous loss of reputation on the market. Particularly in the fashion sector, where consumer awareness of issues such as the protection of workers and the environment is increasingly on the rise, failure to comply with the pact concluded with the code of ethics could result in a very negative backlash for the company.

VI. Environmental and Sustainability Labels, Certifications, and Standards

Another phenomenon that must be considered when studying sustainable fashion concerns the proliferation of labels and certifications aimed at introducing an independent monitoring by a third-party.[43]

[42] United Colors of Benetton, 'La tragedia del Rana Plaza: I fatti e l'impegno di Benetton', available at https://tinyurl.com/3a68m2hv (last visited 20 September 2023).

[43] M. Urminsky, 'Self-Regulation in the Workplace: Codes of Conduct, Social Labelling and Socially Responsible Investment' 1 *Management and Corporate Citizenship Working Paper*,

Among these we find *labels and certifications of general application*. The *International Organization for Standardization* (*ISO*) plays an important role in this regard: the best-known standard is the *ISO 14001*, which sets out the requirements for an environmental management system.[44] In the European context we further have to recall the *European Eco-Management and Audit Scheme* (*EMAS*) and the *EU Ecolabel*. EMAS[45] is a voluntary scheme with the objective of promoting improvements in the environmental performance of public and private organizations in all economic sectors. The *EMAS* environmental management system requirements are very similar to those of *ISO 14001*. The *EU Ecolabel*[46] is a voluntary label applicable to products with a low environmental impact throughout their life cycle, from the extraction of raw material through to production, use and disposal.

But in the fashion and textile industry, special certifications have also developed. Among these we recall the *Global Organic Textile Standard* (GOTS)[47] that certifies that textiles are made from organic fibres, and that takes into consideration ecological and social criteria, backed up by independent certification of the entire textile supply chain. GOTS certified final products may include fiber products, yarns, fabrics, clothes, home textiles, mattresses, but also personal hygiene products, as well as food contact textiles and more. Only textile products that contain at least 70% of organically grown fibers can be certified GOTS.

In the same field, the *Organic Content Standard* is the certification for organic textiles promoted by *Textile Exchange*.[48] It involves the verification of the presence and amount of organic material in a final product, and it tracks the whole of the supply chain from the source to the end product. The process is certified by an accredited third party. It does not deal with the use of chemicals

Another set of standards relate to recycled materials. *Recycled Content Certification*[49] for example assesses products made from pre- consumer or post-consumer material diverted from the waste cycle, while the *Global Recycle Standard* (GRS), applies to companies that are making and/or selling intermediate

(Geneva: ILO, 2001), 38 ss; O. Khuik, 'Fair Trade and Ethical Labeling in the Clothing, Textile and Footwear Sector: The Case of Blue Jeans' 11(3) *ILSA Journal of International and Comparative Law*, (2005), 619–635.

44 International Organization for Standardization, 'ISO 14001 and related standards: Environmental management', available at https://tinyurl.com/32tze452 (last visited 20 September 2023).

45 European Commission, 'Eco-Management and Audit Scheme (EMAS)', available at https://tinyurl.com/amw3en8r (last visited 20 September 2023).

46 European Commission, 'EU Ecolabel', available at https://tinyurl.com/4s8bk975 (last visited 20 September 2023).

47 Global Organic Textile Standard, 'Ecology and Social Responsibility', available at https://global-standard.org/.

48 Textile Exchange, 'Organic Content Standard', available at https://tinyurl.com/mr2c922a (last visited 20 September 2023).

49 Textile Exchange, 'Recycled Claim Standard (RCS) and Global Recycled Standard (GRS)', available at https://tinyurl.com/yc48kr4j (last visited 20 September 2023).

or end products with recycled content.[50]

There are finally multi- criteria labels specific to the textile and clothing sector. Among these, it is noteworthy to recall *Seri.co*,[51] that refers to a set of rules developed in the Como silk district. *Seri.co* is a product and process certification system based on a *Disciplinary*, the application of which is intended to provide the highest guarantees to the production process in accordance with the principles of quality, environment, health and safety, sustainability, social responsibility, and chemical risk management; on the textile product, both for technological and performance properties and for eco toxicological properties.

VII. Greenwashing and the Challenge to Sustainability

Despite the undoubtable steps taken in the direction of making fashion more sustainable, recent studies of the industry show that, in reality, the presence of certifications and labels that should inform consumers about product qualities have not actually changed the way fashion is produced.

A recent Report published in March 2022 by Changing Markets Foundation entitled 'Licence to Greenwash - How Certification Schemes and Voluntary Initiatives are Fuelling Fossil Fashion'[52] highlights that the existence of such schemes serves a dual purpose for the brands. On the one hand, these schemes consist in a genuine attempt to move towards sustainability in the absence of environmental legislation. On the other, nevertheless, they also enable the proliferation of 'greenwashing' on a remarkable scale.

According to the Report,

> 'whether it is the use of certification labels on individual products – assuring customers that they can shop guilt free by putting their money where their values lie – or brands proudly communicating their membership of various fashion-related voluntary initiatives, the existence of these schemes and the inherent lack of accountability within them are a key part of the greenwashing machinery of the modern fashion industry'.[53]

The Report provides a qualitative analysis of the best-known initiatives with a focus on those that claim to address issues of circularity, overproduction and the rise of fast fashion, end-of-life management, and the elimination of toxic chemicals from production or manufacturing. In particular, of the ten initiatives analysed, some

[50] See V. Jacometti, n 27 above, 257.

[51] Further information on Seri.co may be found at Centro Tessile Serico Sostenibile, 'About Seri.co', available at https://www.textilecomo.com/en/about-seri.co.

[52] Changing Markets Foundation, 'License to Greenwash: How Certification Schemes and Voluntary Initiatives are Fuelling Fossil Fashion', available at https://tinyurl.com/y433nj39 (last visited 20 September 2023).

[53] ibid 9.

are certification labels (bluesign®, Cradle to Cradle (C2C), EU Ecolabel, OEKO-TEX® and Textile Exchange's Global Recycled Standard and Recycled Claim Standard), others are multi-stakeholder initiatives (the Ellen MacArthur Foundation (EMF), The Microfibre Consortium (TMC) and (ZDHC) and others provide a set of self-assessment tools (the Higg Index and WRAP) for the industry to measure their sustainability.

The investigation sought to establish the robustness of these schemes and to assess whether they can claim credit for creating any transformational change.

In particular, the Report stresses that many schemes merely provide a smokescreen for companies that want to appear to be taking steps towards sustainability. According to this investigation, the majority of them do not set strict requirements and timelines for their members to progressively raise their ambition.

Among the critical aspects that the Report has shed light on are that most initiatives focus on only a few aspects of a seemingly arbitrary selection of the product's life cycle stages. This way of proceeding enables schemes to shape a certain vision of sustainability that may not reflect the reality. Further, most schemes are also not comprehensive, that is to say, they do not cover the full life cycle of textile production. Thus, a brand will often need to use several labels and be signatories to several initiatives to cover the various social and environmental impacts of their products across the supply chain.

The Report finally indicates a lack of accountability, independence and transparency across initiatives that offer labelling or certification, with no evidence of enforcement or consequences for those who commit to targets but fail to meet them. Most of the schemes are vulnerable to high levels of influence through the brands that fund the schemes or are otherwise involved in governance structures. Accountability is also severely compromised in this way, with little incentive for schemes to call out a lack of compliance from paying members and brands. As far as transparency is concerned, the Report points out these schemes are operating as a black box, with no external scrutiny. Transparency is not just about bombarding the public with information but is about presenting this information in such a way that information can be easily found and understood, and if necessary, challenged.

In order to counter such trends that undermine the credibility of environmental claims even by those companies that are serious about their commitment to sustainability and – at the same time – provide misleading information to consumers, several initiatives have been taken in recent years.[54]

In 2016, the new edition of ISO 14021:2016 'Environmental labels and declarations - Self-declared environmental claims (Type II environmental labelling)'[55]

[54] B. Pozzo, 'I green claims, l'economia circolare e il ruolo dei consumatori nella protezione dell'ambiente: le nuove iniziative della Commissione UE' *Rivista Giuridica dell'Ambiente*, 707-748 (2020).

[55] The rules are available at https://tinyurl.com/nhbe2pu6 (last visited 20 September 2023).

was published. It covers self-declared environmental assertions made by companies for their products, made by manufacturers, importers, distributors and retailers without independent third-party certification. Often placed on products and/or their packaging, self-declared claims are not limited to labelling but also include environmental claims disseminated through advertising, publications, the internet or in business relationships.

In particular, the new rules stipulate that vague or non-specific claims, which merely state that a product is beneficial for the environment, must not be used. Environmental claims such as *'environmentally friendly', 'earth friendly', 'non-polluting', 'green', 'nature friendly', 'ozone friendly'* should therefore not be used.

ISO 14021:2016 also stipulates that an environmental claim professing to be *'X-free'* or '*without substance X'* or *'free of substance X'* may only be used if the level of the specified substance is no higher than what would be recognized as a trace contaminant or background level.

Finally, regarding claims of the sustainability of a certain product, the 2016 ISO rules emphasize that the notions referring to sustainability are very complex and are still being studied. At this point in time, there is no definitive method to measure sustainability. Therefore, claims regarding the achievement of sustainability should also be avoided.

A further step that has been taken concerns advertising. In almost all European countries there are private self-regulation rules, administered by independent private authorities, organized in turn into a network at the European level by the European Advertising Standards Alliance (EASA).[56] The first and common source of inspiration for European self-regulatory codes originated in the context of the Paris International Chamber of Commerce (ICC) in 1937 with the '*Code de Pratiques Loyales en matière de publicité'*, which defined certain deontological rules that advertisers were obliged to respect '*on an ethical basis*', as well as establishing a first '*jury'*.[57]

The International Chamber of Commerce in Paris has revised its self-regulatory code several times, the latest version of which dates to 2018.[58] It should be emphasized that already in July 2011, the ICC had published a specific guide on responsible commercial communication on environmental issues,[59] and already in the 2011 version of the Code, there were specific guidelines in this regard.[60]

[56] V. Guggino et al, 'La natura, l'organizzazione dello IAP e il procedimento autodisciplinare', in C. Alvisi and V. Guggino eds, *Autodisciplina Pubblicitaria. La soft law della pubblicità italiana* (Torino: Giappichelli, 2020), 85.

[57] ibid 58.

[58] International Chamber of Commerce, *Consolidated ICC Code of Advertising and Marketing Communication Practice,* available at https://tinyurl.com/nhzb7sea (last visited 20 September 2023).

[59] International Chamber of Commerce Commission on Marketing and Advertising, *Framework for Responsible Environmental Marketing Communications,* ICC Document N° 240-46/665 – July 2011, available at https://tinyurl.com/eaydjzx2 (last visited 20 September 2023).

[60] With the introduction of a new chapter dedicated to environmental declarations in the

The 2018 Consolidated ICC Code of Advertising and Marketing Communication Practice reformulates the principles on green claims in a separate chapter.[61] In particular, the ICC Code recommends that marketing communication should be structured in such a way that it does not abuse consumers' concern for the environment or exploit their possible lack of environmental knowledge. Furthermore, marketing communications should not contain any statements or visual treatments that could mislead consumers about environmental aspects, or the benefits attributed to products.[62]

Vague or non-specific statements of environmental benefit, which may convey a range of meanings to consumers, should only be made if they are valid, without qualification, in all reasonably foreseeable circumstances. In this sense, claims such as 'environmentally friendly', 'ecologically safe', 'green', 'sustainable', 'environmentally friendly' or any other claim implying that a product or activity has no impact - or only a positive impact - on the environment, should not be used without qualification unless a very high standard of proof is available. Furthermore, since there are no definitive and generally accepted methods for measuring sustainability, it is recommended to avoid using statements where sustainability is claimed to have been achieved.

In Italy, Art 12 introduced in the *Code of Marketing Communication Self-Regulation Italy* in 2014,[63] foresees that

> 'Advertising, claiming or suggesting environmental or ecological benefits must be based on truthful, pertinent and scientifically verifiable evidence.
>
> Such advertising must ensure a clear understanding of which aspect of the product or activity the claimed benefits refer to'.

The purpose of Art 12 of this Code is to protect the public from the deception that green claims might convey by being ambiguous or too general. The application of Art 12 regarding commercial communication that focuses on environmental claims implies a necessary balancing act between the need for a high level of protection of consumers, made vulnerable by their sensitivity to environmental issues, and the freedom of the company to communicate to the market its investments in environmental protection.

However, so far, there have been no convictions against members of the fashion industry based on this article, not least because the fashion world has so far stayed away from the world of advertising self-regulation.

2011 version of the Code: *Chapter E: Environmental Claims in Marketing Communications,* 36. A 2011 version of the Code is available at https://icc-portugal.com.

[61] 'Chapter D: Environmental Claims in Marketing Communications', in *Consolidated ICC Code* n 60 above, 39 ss (2018 version).

[62] Art D1, n 60 above.

[63] Istituto dell'Autodisciplina Pubblicitaria, *Code of Marketing Communication Self-Regulation Italy,* 2021, available at https://tinyurl.com/nhaumy43 (last visited 20 September 2023).

In August 2020, the Commission launched a new initiative on green claims to make them more reliable, but above all to create a common methodology on which to base them. The initiative, called 'substantiating green claims', assumes that the provision of reliable, comparable, and verifiable information on the actual environmental impact of different products, services and organizations is essential for actively involving consumers in European environmental policies.[64]

Regardless of the good results that have been achieved so far with the application of public and private mechanisms to assess the sincerity of green claims, it must be remembered that there are currently 457 different voluntary environmental certifications, obtained on the basis of disparate criteria, as there are currently no precise positive standards to measure their validity.

Finally, in March 2023 the Commission presented a new 'Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims' (Green Claims Directive),[65] that underlines how consumers are faced with the practice of making unclear or not well-substantiated environmental claims and with the use of sustainability labels that are not always transparent and credible. This has resulted in companies that offer truly sustainable products being disadvantaged on the market, when compared to those companies that do not offer such truly sustainable products.

According to Art 3 of the proposed Directive, 'Member States shall ensure that traders carry out an assessment to substantiate explicit environmental claims'. Art 10 further establishes that Member States shall set up procedures for verifying the substantiation and communication of explicit environmental claims while Art 11 states that the verifier shall be a third-party conformity assessment body accredited in accordance with Regulation (EC) No 765/2008.[66]

With this initiative, the Commission intends to tighten controls on greenwashing, imposing greater control on states over the reliability of green claims and goes hand in hand with the Strategy on sustainable and circular textiles.

VIII. The New EU Strategy on Sustainable and Circular Textiles and the Italian Initiatives

In March 2022, the Commission launched the *European Strategy for Sustainable and Circular Textiles*,[67] that foresees specific actions to address key

[64] European Commission, 'Green Claims', available at https://tinyurl.com/ymw8t625.

[65] 'European Parliament and Council Proposal for a Directive on substantiation and communication of explicit environmental claims' (Green Claims Directive), [2023] COM/2023/166 final, available at https://tinyurl.com/eap9f27n (last visited 20 September 2023).

[66] European Parliament and Council Regulation (EC) No 765/2008 of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 [2008] OJ L 218/31, 30, available at https://tinyurl.com/mr98wkn5 (last visited 20 September 2023).

[67] Communication from the Commission to the European Parliament, the Council, the

issues of this sector. It first aims to ensure that by 2030, textile products placed on the EU market are recyclable and long-lasting, made as much as possible from recycled fibres, free of hazardous substances and produced with respect for social and environmental rights. It further promotes reuse and repair to avoid the production of textile waste and microplastics, introducing extended producer responsibility.

In more detail the Strategy foresees the introduction of mandatory Ecodesign requirements, as extending the life of textile products is the most effective way of significantly reducing their impact on the climate and the environment. To achieve this, product design has a key role. Failures in quality such as color fastness, tear strength or the quality of zippers and seams are among the main reasons for consumers to discard textiles. Increased durability will enable consumers to use clothing for longer and at the same time support circular business models such as reuse, renting and repair, take-back services, and second-hand retail, in a way that creates cost-saving opportunities to citizens.[68]

The Strategy further declares that the Commission will also introduce bans on the destruction of unsold products, including as appropriate, unsold, or returned textiles.[69] In addition, the Commission will take initiative to address the unintentional release of microplastics in the environment.[70]

Another initiative envisaged by the strategy that appears to be very interesting and relates what has just been said about greenwashing, the Commission will introduce a Digital Product Passport for textiles based on mandatory information requirements on circularity and other key environmental aspects. To ensure consistency with this new piece of legislation, the Commission will also review the Textile Labelling Regulation, which requires textiles sold on the EU market to carry a label clearly identifying the fibre composition and indicating any non-textile parts of animal origin. As part of this review and subject to an impact assessment, the Commission will introduce mandatory disclosure of other types of information, such as sustainability and circularity parameters, products' size and, where applicable, the country where manufacturing processes take place ('*made in*').[71]

New EU rules will be introduced to ensure that consumers are provided with information at the point of sale about a commercial guarantee of durability as well as information relevant to repair, including a reparability score, whenever this is available. General environmental claims, such as '*green*', '*eco-friendly*', '*good for the environment*', will be allowed only if underpinned by recognized excellence in environmental performance, notably based on the EU Ecolabel, type I ecolabels, or

European Economic and Social Committee and the Committee of the Regions: 'EU Strategy for Sustainable and Circular Textiles' [hereinafter Strategy], [2022] Brussels, COM (2022) 141 final, available at https://tinyurl.com/ynzrrr3w (last visited 20 September 2023).

[68] ibid 3.

[69] ibid 4.

[70] ibid 5.

[71] ibid 5.

specific EU legislation relevant to the claim. As foreseen in the Proposal of the Green Claims Directive, voluntary sustainability labels covering environmental or social aspects must rely on a third party verification or be established by public authorities. Moreover, there will be conditions for making green claims related to future environmental performance, such as '*climate neutral by 2030*', and for comparing to other products.[72] The Commission will also review the *EU Ecolabel criteria for textiles and footwear*[73] to support its uptake among producers and offer consumers an easily recognizable and reliable way to choose eco-friendly textile products.

Finally, the Strategy foresees the introduction of harmonized EU extended producer responsibility rules for textiles with eco-modulation of fees. The key objective will be to create an economy for collection, sorting, reuse, preparation for reuse and recycling, as well as incentives for producers and brands to ensure that their products are designed in respect of circularity principles.

In Italy, as provided for by decreto legislative 3 September 2020 no 116,[74] the obligation of separate collection of textile waste has been triggered since January 1, 2022, anticipating the European legislation that provides for the activation of separate collection of this type of waste as of 2025. The regulation addresses municipalities but not companies. The municipalities that do not have separate collection for the textile fraction will therefore have to organize themselves by setting up the facilities and any agreements necessary to carry out the service.

The Ministry of Environment and Energy Security (MASE) and the Ministry of Business and Made in Italy (MIMIT) have prepared a Draft decree that introduces important novelties for textile manufacturers, introducing extended producer responsibility (EPR). According to what has recently been communicated by the MASE, the main novelties announced for producers in the textile supply chain can be summarized as follows. First, producers will have to take responsibility for 'financing and organising the collection, preparation for re-use, recycling and recovery of waste from textile products', including through collective or individual management systems; appropriate financial and organizational means will also have to be put in place in order to set up, through management systems and in agreement with the relevant bodies, a nationwide textile waste collection network as well as 'selective collection systems to increase the quality of textile fractions'. The Draft Decree further envisages the payment of an environmental contribution, which, however, shall not exceed the costs necessary to provide the waste management service and shall 'encourage innovation oriented towards circular economy models'. As regards the design phase of textile products, manufacturers will have to ensure that they develop, produce and market products 'suitable for

[72] ibid 6.

[73] European Commission, 'EU Ecolabel', available at https://tinyurl.com/4s8bk975 (last visited 20 September 2023).

[74] Decreto legislativo 3 September 2020 no 116, available at https://tinyurl.com/3k878wfp (last visited 20 September 2023).

reuse and repair, containing recycled materials, technically durable and easily repairable'.

In particular, the specific eco-design measures are identified, such as (i) the use of biocompatible textile fibres and natural materials, (ii) the elimination of hazardous components and substances also with reference to microplastics released into the environment, (iii) the reduction of product quality defects that lead consumers to discard them (iv) the use of fibre and fabric blending techniques that favour adaptability to various uses and reparability.

Finally, the Decree will also introduce specific provisions on the research, development, and use of advanced technologies for sorting fibers from waste treatment and for recycling, introducing a 'digital labelling' system to describe the characteristics and fibrous composition of textiles as well to highlight the possible presence of non-textile parts of animal origin.

In order to supervise the new system, the Draft Decree foresees a *Coordination Centre for Textile Recycling* (CORIT), composed of the individual and collective management systems recognized by the Ministry.

Meanwhile, a new Consortium has been launched by *Sistema Moda Italia* and *Fondazione del Tessile Italiano*: RETEX.GREEN.[75] The consortium's objective is to anticipate the legislation on the recovery and recycling of fashion production waste, which will soon be implemented in Italy. In fact, it is a voluntary system of Extended Producer Responsibility (EPR) involving production companies of the Fashion System associated with *Sistema Moda Italia*. The consortium aims to become a hub to network all players in the fashion industry involved in the collection, sorting, reuse and recycling phases, through the coordination of a general contractor for waste management. In addition, the network will only admit companies that operate according to ethics and legality, in every step of their value chain.

IX. The Como District

An interesting example on how sustainable fashion is developing in Italy concerns the town of Como. Como is the leading city of the Italian Textile Valley, a territorial district historically devoted to the textile tradition that includes the two provinces of Como and Lecco.

Already under the Sforza, the family that reigned on the Duchy of Milan after 1447, silk production developed in the Como area, mainly thanks to Duke Ludovico Sforza who imposed mulberry tree cultivation to the farmers.[76] More than this, the Duke went down in history as Ludovico il Moro, which comes from the name of the mulberry plant, which in Latin is 'bombix mori' and in Como's dialect 'murun'. In this region, the farmers already produced silk in springtime to improve

[75] See for further information *Retex Green,* available at https://retex.green/.

[76] B. Pozzo, ' "*Bello e Ben Fatto*" - The Protection of Fashion "Made in Italy" ' 14 *Florida International University Law Review*, 545-570 (2021).

their low incomes, and women and children oversaw gathering and cutting mulberry leaves to feed the tiny worms. Since this moment onwards, the town of Como has been characterized by the transformation of silk into a fabric, which is still today one of the main features of the area.[77]

Even now, the art of silk plays a fundamental role, also with reference to the traditional production model: silkworm breeding and mulberry tree cultivation. Indeed, still today 70% of European silk is produced in the Como textile district, which boasts 1,376 companies (1,424 in 2019) and 15,515 employees.

Recently, the Italian town known for being the 'city of silk' applied and succeeded in winning UNESCO Creative City status with a project on fashion sustainability.[78]

The UNESCO recognition of Como as a city of sustainable fashion has generated a series of important initiatives and collaborations, including with the university and other research centres. It must be said that even before the recognition, local companies had been very dedicated to the topic of sustainability.

Just to quote a few examples, CANEPA[79] was the first textile company in the world to join in 2013 the *'Detox Solution Commitment',* the Greenpeace program that aims to rid fashion of toxic substances. In particular, the company launched an initiative that aims to study and realize new formulations for sizing superfine yarns of valuable fibres of animal origin such as cashmere, merino wool, yak, camel, silk, and possibly also of vegetable, artificial and synthetic origin. The technology developed by Canepa involves the use of chitosan, a substance of natural origin obtained from the chitin contained in the exoskeleton of crustaceans. Chitosan, widely available on the market at a low cost, is non-toxic, biocompatible and biodegradable. It thus replaces polyvinyl alcohol, a synthetic material used today with a considerable environmental impact because it is non-recoverable and used with practically the same weight as the valuable fibre. With the use of chitosan, the whole process becomes much more sustainable and the fibres even more beautiful.

Another initiative put in place is the one developed by Mantero[80] that since 1902 has been producing and distributing silk and fine fabrics to several recognized fashion brands. Based in Como, Mantero has recently patented a new process to give silk waste a second life: RESILK®. The idea came out of the fact that while there is no complete comprehensive data around the amount of silk waste generated by the Como production district, it is reasonable to assume that every year more than 100 tons of dyed or printed silk become waste. For luxury segment productions, this waste is often destroyed or even burned in incinerators which have a clear environmental impact. The RESILK® Project was specially created to support objective no 12 in the 2030 Agenda for Sustainable Development: *Responsible Consumption and Production*. The idea was to recover the large amount of waste

[77] C.M. Belfanti, *Storia culturale del Made in Italy* (Bologna: il Mulino, 2019), 54.

[78] See for further information 'Como City of Crafts and Folk Art', *Como Creative City*, available at https://comocreativecity.com/.

[79] More information at *Canepa Como,* available at https://www.canepa.it/.

[80] More information at Mantero, 'ReSilk', available at,https://tinyurl.com/4ejb6vuj.

generated by the silk production processes, second-class fabrics and the surplus production, and transform it into a new material. At the end the result was particularly successful: RESILK® as a regenerated silk fabric made from silk production waste, resembles cashmere in its final form.

Tessitura TABORELLI,[81] on its turn, was among the first to make industrial use of Newlife yarn (made from plastic bottles) and is now experimenting with Orange Fiber, which makes yarn from orange peel. The company further invested in saving energy by using solar panels (400'000 kWh) self-produced and consumed almost entirely by the plants near Como. Introducing equipment with LED lighting it was possible to save other 350'000 kWh. It finally recovered the heat produced by the looms in the plant in Romania to heat over 1000 sq of warehouses.

X. The Future of *Made in Italy*

The recent discussion on 'Made in Italy' has highlighted lights and shadows in the Italian fashion context.

On the one hand, since the second half of the nineties Italian firms are experiencing a growing process of relocation of production activities abroad. This process mainly applies to firms operating in the so-called 'Made in Italy' sectors.[82]

Two factors have rendered relocation more convenient than in the past: the progressive fall of barriers to international trade and the technological progress. In particular, new digital technologies allow an easier, quick and economic coordination of the various phases of the production process, even when these are located in various countries of the world.

In a recent inquiry, 'Made in Italy, The Dark side of Fashion',[83] Iorio sheds light on the investments made by famous Made in Italy brands in countries like Transnistria (officially the *'Pridnestrovian Moldavian Republic'*), a breakaway state in the narrow strip of land between the river Dniester and the Ukrainian border, internationally recognized as part of Moldova. Transnistria has been recognised only by three other mostly non-recognised states: Abkhazia, Artsakh, and South Ossetia. Workers have no rights, and their income is very low. The 2019 'Freedom in the World' Report, published by 'Freedom House', describes Transnistria as a 'not free' country.[84]

Beside the relocation phenomenon, there is also a strong problem related to the employment of immigrants in the textile sector. It is now evident that workshops that organize foreign workers have become very common in Italy. They offer a cheap

[81] More information at Tessitura Taborelli, https://www.tessituratoborelli.it/.

[82] F. Prota and G. Viesti, 'La delocalizzazione internazionale del made in Italy' *L'industria* 409-440, (2007).

[83] G. Iorio, *Made in Italy. Il lato oscuro della moda* (Roma: Castelvecchi, 2018).

[84] https://freedomhouse.org/countries/freedom-world/scores

solution to all those businesses that are incompatible with a relocation process.[85]

However, it is not only a problem of costs, but also a question of lack of skilled Italian workers, as it becomes difficult to keep the Italian artisanship tradition alive.

Alongside the various initiatives developed by individual Italian designers as, eg: Della Valle,[86] Brunello Cucinelli[87] and Kiton[88] to prevent the loss of Italian know-how accumulated over the centuries, there are also recent initiatives by the Italian government.

On 31 May 2023, the Italian government published the so-called *Organic Provisions for the valorisation, promotion and protection of 'Made in Italy',* which are expected to be included in a future bill.

The new *Provisions* intervene to support the development of national productions of excellence and promote the protection and knowledge of natural beauty, cultural heritage and national cultural roots, in Italy and abroad, and the valorisation of trades and the support of young people.

In more detail, the *Provisions* foresee at the educational level, the establishment already in 2024/2025 of a specific *made-in-Italy curriculum* beginning in high school (*Liceo del Made in Italy*). This curriculum will provide skills suitable for the promotion and enhancement of national production sectors and the specific vocations of territories. To promote integration into the labor market, the Government will establish a specific Foundation called '*Imprese e Competenze per il Made in Italy*' (*Enterprises and skills for the Made in Italy*).

To encourage the transfer of skills and knowledge between generations, the *Provisions* foresee the establishment of a *Generational Skills Transfer Programme* - for private enterprises with no more than 15 employees - which provides for the mentoring of young employees (under the age of 30) by retired workers.

The Provisions further establish the creation of a *National Made in Italy Strategic Fund,* with an initial endowment of one billion and the objective of stimulating the growth and consolidation of strategic national supply chains, including for the procurement of critical raw materials. In particular, ten million Euros have been allocated for the strengthening of self-entrepreneurship and female entrepreneurship initiatives.

For the protection of Made in Italy products, the creation of an official mark of Italian origin is planned to promote the intellectual and commercial property of goods.

[85] B. Pozzo, n 78 above, 566.

[86] L. Zargani, 'Diego Della Valle Speaks Up on Ensuring Future of Made in Italy Craftsmanship' *Women's Wear Daily,* June 19, 2023.

[87] M.R. Napolitano et al, 'La creazione di valore condiviso nell'impresa umanistica' *Micro & Macro Marketing,* 335-360 (2019); D. LaRocca 'Brunello Cucinelli: A Humanistic Approach to Luxury, Philanthropy, and Stewardship' 3 *Journal of Religion and Business Ethics*, Article 9 (2014), available at: https://via.library.depaul.edu/jrbe/vol3/iss1/9

[88] Kiton and its visionary founder Ciro Paone inaugurated in 2000 a revolutionary project to safeguard traditions and ensure the continuity of tailoring in the world, investing in training of a new generation of highly qualified tailors. See at https://it.kiton.com/pages/tailoring-school.

The *Provisions* deal with the use of new technologies and in particular the use of Blockchain for the certification of supply chains and the creation of a national catalogue for a census of the solutions that foster compliance with the regulations in force for the traceability of supply chains and to support and promote the development and use of distributed ledger technology (DLT).

Finally, the Provisions envisage the introduction of new sanctions on counterfeiting in the code of criminal procedure.

Of note is that the *Provisions* foresee that the promotion and incentive measures will have to be consistent with the *principle of environmental sustainability of production,* with the transition of production processes towards digitalization within a wider context of the safeguarding of craft peculiarities, with social inclusion and the valorization of female and youth work, and with the principle of non-discrimination between enterprises.

We could conclude that the future of *Made in Italy* lies in the challenge of sustainability. If sustainability is understood in a real sense and not as mere declarations, while implying an effective compliance cost, it also becomes a great opportunity for Italian fashion.

Fashion Law, Italian Style - Symposium

The Reproduction of Cultural Heritage and Artworks in Fashion

Elena Varese,[*] Valentina Mazza[**] and Carolina Battistella[***]

Abstract

The fashion industry has traditionally drawn from the world of art and culture by incorporating elements of cultural heritage and works of art into its design. Indeed, it is quite common for fashion brands to display renowned works of art and cultural heritage on catwalks, magazines and billboards. However, using such elements, whether cultural heritage or works of art, raises significant legal issues. For instance, intellectual property laws which protect the creators of works of art from unauthorized use of their creations require permission from the author and the paying of licensing fees. Also, Italy has a restrictive legislation protecting cultural heritage, which severely limits the possibility of the reproduction of cultural heritage, especially for commercial purposes, and even if the good is located on a public road.

I. Introduction

The fashion industry has traditionally drawn from the world of art and culture by incorporating elements of cultural heritage and works of art into its design. Indeed, it is quite common for fashion brands to display renowned works of art and cultural heritage on catwalks, magazines and billboards. Sometimes, they even choose some historic monuments as the backdrop for their advertising campaigns or fashion shows, such as Fendi with the Trevi Fountain in Rome or Yves Saint Laurent with the Tour Eiffel in Paris. However, using such elements, whether cultural heritage or works of art, raises significant legal issues.

First, intellectual property laws protect the creators of works of art from unauthorized use of their creations. Therefore, if a fashion designer wants to use a particular copyrighted piece of art in his/her collection or campaigns, he/she will need to obtain the proper permission from the author of the artistic work and probably pay licensing fees. Nonetheless, several designers have been criticized for reproducing renowned works of art without proper authorization or without giving proper credit to the original authors. For example, last year the unauthorized use of some works of the famous street artist Bansky in the windows of Guess' clothing

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stores made headlines and very recently Louis Vuitton has been sued by the Joan Mitchell Foundation for using images of its paintings in the last campaign after being denied permission.

In addition, most countries have adopted specific regulations on the reproduction of cultural heritage on a product or in an advertisement. This is especially true in Italy, where the legislation protecting cultural heritage is quite restrictive, severely limiting the possibility of its reproduction, especially for commercial purposes, and even if the good is located on a public road.

In addition to the two legal frameworks mentioned above, many others come to light when discussing the reproduction of things for commercial purposes, as might be in the case of a t-shirt reproducing a famous art photograph depicting a celebrity or someone's home. In such instance, for example, the right to the image of the person portrayed, as well as the photographer's copyright, would also come into play, and, in the second case, the property right of the owner of the building. Moreover, additional issues might be other personality rights, including the right to privacy, or the rights of a company against its competitors when it is harmed by a conduct constituting an act of unfair competition.

II. The Protection of a Work of Art in Italy

In Italy, the national historical and artistic heritage protection is a fundamental right enshrined in Art 9 of the Constitution.[1] Such a principle is then implemented by two different sets of rules that protect works of art that are also cultural heritage from different perspectives: the decreto legislativo 22 gennaio 2004 no 42 (ICHC) – which poses a discipline to protect the artistic heritage from an objective perspective – and legge 22 April 1941 no 633 (ICL) – which, from a subjective perspective, protects the author of the work of art.

As to the latter, ICL protects

> 'intellectual works of a creative nature belonging to literature, music, figurative arts, architecture, theater and cinematography, whatever the mode or form of expression (...)'.[2]

In order to be protected, the intellectual work must possess the character of creativity, which is traced in general terms to the concept of originality – intended as the result of a non-trivial activity of human ingenuity: the work is original insofar as it represents the result of an intellectual elaboration that reveals the author's personality.

Where works do not meet the necessary protection requirements to fall under

[1] 'The Republic promotes the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the Nation.'

[2] ICL, Art 1.

copyright protection, obtaining prior consent from the rights holder to reproduce them will not be necessary.

ICL identifies the content and duration of the author's rights, divided into moral rights and economic rights on the work created. The formers pertain to the sphere of personality rights. Therefore, they are inalienable, nonwaivable, imprescriptible, and independent of patrimonial rights. An important difference with other legal systems in fact is that in Italy moral rights cannot be assigned to third parties or waived by the author and a contractual clause providing that will be deemed invalid. The moral rights of the author include the right to claim authorship of the work and to object to any deformation, modification or act to the detriment of the work itself, such as to prejudice the honor and reputation of the author, as well as the right of first publication, and the right to withdraw the work from commerce where serious moral reasons concur.

In contrast, the rights of economic use of the work, or patrimonial rights, are renounceable and assignable to third parties and they expire when seventy years have elapsed from the author's death. These include the right to publish the work, the right to reproduce the work in multiple copies, the right to transcribe the work orally, the right to perform, play or recite the work in public, the right to communicate the work to the public, the right of distribution, the right to elaborate, translate and publish works in collections, and the right to rent and lend.

When it comes to photographs, the above applies to artistic photographs whereas specific rules on related rights regulate the right of reproduction of simple photographs (Arts 87-92 ICL).[3] A simple photograph is a mere reproduction of reality, devoid of any expressive content, including reproductions of works of the figurative arts. In particular, Art 88 ICL recognizes some exclusive rights of economic use to the author of a simple photograph: the exclusive right of reproduction and the exclusive right to distribute and sell the photograph, except as provided for portraits and without prejudice to copyrights on the reproduced work when it concerns photographs reproducing works of figurative art. According to Art 92 ICL, the duration of the exclusive rights accruing to the photographer is twenty years from the creation of the photograph. Therefore, regardless of the nature of the asset photographed – whether it is a work of figurative art still protected by copyright or a cultural property in the public domain – Art 88 ICL introduces a limitation on the possibility of using images of properties qualified as cultural heritage and assigned to the care of museums, archives, and libraries, as well as properties located on the public road. Reusing such photographs is subject

[3] Mere photographs are distinguished from photographs endowed with creative character, which are protectable as the subject of copyright. Indeed, the photographic work finds protection in Art 2, para 7, ICL 'the photographic works and those expressed by a process similar to photography as long as they are not mere photographs (...).' In order to qualify as an artistic photograph, a photograph must meet the requirement of creativity and thus represents the result of the author's intellectual creation. This means that the photographer must have conveyed in the shot his/her own imagination, personal taste, sensitivity, and interpretation of reality.

to the constraints deriving from the exclusive rights still granted by the related right on images under Arts 87-88 of ICL. It will be discussed below that similar restrictions are present in the ICHC.

Some provisions of the ICL provide exceptions and limitations to the author's exclusive rights over his/her own artwork. Specifically, relevant exceptions include those pertaining to the reproduction, communication, and making the work available to the public.

The most relevant exception for our purposes is that provided by Art 70 ICL, which introduces some restrictions to the general rule that the reproduction of a copyrighted work always requires the permission of its author or his/her descendants. Para 1 states that

> 'The summary, quotation or reproduction of songs or parts of works and their communication to the public are free if carried out for the use of criticism or discussion, within limits justified by these purposes and provided that they do not constitute competition with the economical use of the work; if carried out for teaching or scientific research purposes, the use must also be for illustrative purposes and non-commercial purposes'.

Para 1 *bis* then goes on to provide that

> 'The free publication through the Internet, free of charge, of low-resolution or degraded images and music for educational or scientific use, is permitted, and only if such use is not for profit'.

In light of this provision, in principle, anyone is free to reproduce images of works of art and public buildings unless they are used for commercial purposes or outside the limits of Art 70 of ICL. Apart from these situations, the user will necessarily have to obtain the prior consent of the rights holder to reproduce protected works and exploit their reproductions for commercial purposes, regardless of whether or not they are placed in public places. Some scholars have adopted a narrower interpretation of the notion of profit than that of commercial use – which is understood as the use of a work that competes with that of the original work.[4] Therefore, according to such interpretation the applicability of para 1 *bis* of Art 70 should not necessarily be considered excluded in a commercial context per se. However, the opposite interpretation opting for a broader meaning of commercial purpose still prevails.

At first glance, Art 70 ICL seems to allow the publication of images of copyrighted works placed in public places when such communication takes place on the web. Indeed, Art 70 allows the publication via the internet only of low-resolution images for educational or scientific purposes and only in cases where such use is

[4] C. Sappa, 'Art. 70 l.d.a.', in L.C. Ubertazzi ed, *Commentario breve alle leggi sulla proprietà intellettuale e concorrenza* (Padova: CEDAM, 2016), 1730-1732.

not for profit. However, the limitation of low-resolution reproduction turns out to be problematic since modern technologies easily allow for the reproduction and publication of high-resolution images; one need only think of cell phone cameras, which are constantly being developed to allow for high-quality photography.

Para 1 *bis* further provides that reproduction may be made for educational or scientific uses only where such uses are not for profit. However, taking photos of works and posting them on the internet, such as on social media, correspond to educational or scientific uses only in some cases. Indeed, it is not easy to discern between commercial and non-commercial use when this is done on the internet.

The general rule remains that if a brand intends to use the image of a work of art in the outfits or advertisements of its collection, it will first have to check whether the author of the artwork is still alive and take care to track down him/her or his/her descendants in order to request authorization for the reproduction and to negotiate the fee for a such license of use.

III. The Protection of Cultural Heritage in Italy

Italy is an open-air museum synonymous with art, history, and culture. Given the high concentration of cultural and landscape heritage in its territory, Italy has the most considerable historical and artistic heritage in the world. This makes it, to date, the country that holds the most significant number of sites included in the United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage List.[5]

It should thus be considered that such cultural heritage has a social function and an economic value to be fostered. Therefore, in legal and economic terms, an effort is necessary to ensure an efficient management, enhancement, and promotion of cultural heritage and its widest dissemination and knowledge. To this end, the ICHC imposes a series of obligations and restrictions on the protected properties to satisfy the public interest in enhancing and protecting cultural heritage.[6]

The current legal definition of cultural property is contained in Art 2 of the ICHC, which provides that:

> 'immovable or movable things which, according to Articles 10 and 11, are of artistic, historical, archaeological, ethno-anthropological, archival and bibliographical interest, and other things identified by or under the law as evidence having value for civilization, are defined as cultural property.'

In turn, Arts 10 and 11 of the ICHC qualify as cultural heritage the categories of

[5] Unesco, 'Patrimonio mondiale', available at https://tinyurl.com/ymxraevr (last visited 20 September 2023).

[6] B. Veronese, 'La protezione del patrimonio culturale, for the project Marchi e Disegni Comunitari 2019', available at https://tinyurl.com/4xhxa6kw (last visited 20 September 2023).

things, movable and immovable, public or private, listed therein. Art 10 of the ICHC provides which goods are excluded from its rules. Namely works of a living author or created no more than fifty years before, but limited to things, to whomever they belong, which are of exceptional artistic, historical, archaeological or ethno-anthropological interest for the integrity and wholeness of the Italian cultural heritage. While the limit has been raised to works created no more than seventy years before for i) immovable and movable things belonging to the State, the regions, other public territorial bodies, as well as to any other public body and institute and private non-profit legal persons, including civilly recognized ecclesiastical bodies, which are of artistic, historical, archaeological or ethno-anthropological interest, or, if the things are particularly important, even when they belong to different entities, and ii) collections or series of objects, to whomever they belong, which are not included among those indicated in para 2 of Art 10 ICHC and which, because of tradition, reputation, and special environmental characteristics, or because of artistic, historical, archaeological, numismatic, or ethno-anthropological significance, are of exceptional interest as a whole. In order to identify the cases in which a public work of art carries the interest mentioned above, according to Art 12 of the ICHC, it is necessary to carry out a verification of cultural interest, which concerns goods 'that are the work of an author who is no longer living and whose execution dates back more than seventy years.' Whereas, for private goods, Art 13 of the ICHC requires for a declaration to ascertain the existence of a cultural interest in the good.

In light of the different duration of the protection provided for artworks by the ICL and cultural goods under the ICHC, it appears that not all works protected by copyright fall within the scope of the ICHC, and vice versa.[7] In fact, there may be works of art that are not subject to the rules of the ICHC because they were created by a living author not more than fifty or seventy years before. Also, there may be works whose creation dates back more than fifty or seventy years, which however are still protected by copyright.[8] In this last case, such works would constitute the exclusive property of the author or his/her descendants, but at the same time will be subject to the restrictions on circulation provided for in the ICHC. Therefore, in addition to taking into account any copyright issues, a user who intends to reproduce a public artistic works falling within the scope of the ICHC will also need to pay attention to the provisions of Arts 107 and 108 of the ICHC, on the reproduction of public cultural property.

In general, in order to make a reproduction of a cultural heritage good in compliance with and within the scope of the ICHC, it will be necessary to contact the

[7] A. Pojaghi, 'Beni culturali e diritto d'autore' *Il Diritto di autore*, 149-157 (2014).

[8] Indeed, in Italy copyright protection expires when seventy years have elapsed from the author's death. Therefore, if a work has been created, for instance, 80 years ago, such good would be eligible for protection under the ICHC, if it presents the cultural interest. However, if the author of the work died 30 years ago, then such work would still be protected also by ICL and would continue to be protected under ICL for another 40 years.

Ministry of Culture (MiC) or the individual superintendencies entities scattered throughout the country in order to understand if and how to use the images of the cultural property in question for commercial purposes, namely beyond mere personal exploitation.

In more detail, according to Art 107 of the ICHC,

> 'The Ministry, the regions and other territorial public bodies may allow the reproduction as well as the instrumental and precarious use of the cultural goods they have in their care, subject to the provisions of paragraph 2 and those on copyright. Reproduction of cultural property that consists in making casts, by contact, from the originals of sculptures and relief works in general, of whatever material such property is made, is generally prohibited. Such reproduction is permitted only exceptionally and following the procedures established by special ministerial decree. On the other hand, casts from copies of existing originals and those obtained by techniques that exclude direct contact with the original are permitted, subject to the superintendent's authorization.'

The rule stipulates that reproductions of cultural heritage property must be made with the authorization of the administration to whose care the cultural property has been committed, and if the reproductions are made by contact through casts they have to be made in such a way as not to damage the originals.

Art 108 of the ICHC, on the other hand, establishes the criteria to determine the concession fees to be paid for the reproduction of cultural property. In fact, there are no pre-established fees publicly available, but the amount of such concession fees is decided by the authority in charge of the property being reproduced on a case-by-case basis, also taking into account the criteria set forth in para 1 of Art 108 of the ICHC, ie

> '(a) the character of the activities to which the concessions of use refer; (b) the means and manner of performing the reproductions; (c) the type and time of use of the spaces and property; (d) the use and purpose of the reproductions, as well as the economic benefits derived by the applicant.'

In this respect, some guidelines for the concession fees for each type of use are set in the Tariff for the Determination of Fees, Charges, and Modalities for Concessions Relating to the Instrumental and Precarious Use of Assets in the Ministry's Care, but the individual authorities or other administrative bodies remain free to determine their own ones.[9] Therefore, there is not a fixed fee to be

[9] Some local administrations have adopted regulations that provide forms of compensation for reproductions within the municipality's land carried out for profit. See, for instance, the tariffs provided by the Municipality of Rome for cine-television and photographic filming, available at https://tinyurl.com/47u2rcub (last visited 20 September 2023).

paid but, rather, is determined by each entity depending on the kind of use to be made, usually after a negotiation with the lawyers of the brand seeking permission.

In this scenario, with respect to fashion shows, the use of cultural heritage by the fashion house hosting the catwalk is undoubtedly made for commercial purposes. It thus requires it to identify the competent authority for such property and to seek its authorization upon payment of the relevant fees. The same applies to tv spots, press campaigns, social media content, and any other commercial use made by the maison of historical monuments, artistic and architectural works, buildings, and, generally, all works bearing a cultural value.

Similarly to the provisions of the ICL, para 3 of Art 108 ICHC provides for some cases of fair use:

> 'No fee is due for reproductions requested or carried out by private individuals for personal use or study purposes, or by public or private entities for the purpose of enhancement, provided that they are implemented on a non-profit basis. [...].'

Para 3 thus makes reproductions for personal use, study, or enhancement purposes free of charge and subject only to the administration's authorization, given the absence of any profit-making purpose.

Para 3 *bis* of Art 108 ICHC also stipulates that

> 'The following activities, carried out on a non-profit basis, for purposes of study, research, free expression of thought or creative expression, promotion of knowledge of cultural heritage, are in any case free: 1) the reproduction of cultural property other than archival property subject to restrictions on accessibility under Chapter III of this title, carried out in compliance with the provisions protecting copyright and in a manner that does not involve any physical contact with the property, nor the exposure of the same to light sources, nor, within cultural institutions, the use of stands or tripods; 2) the dissemination by any means of images of cultural property, legitimately acquired, so that they cannot be further reproduced for profit.'

According to the provisions of para 3-*bis*, therefore, for example, a social network user could upload an image of a cultural property to it. However, another user could not appropriate the image of the property and disseminate it in turn for commercial purposes without having first obtained the permission of the administration having the property in its possession.

The relationship between cultural goods and copyright is thus established by Arts 107 and 108 of the ICHC, which are without prejudice to the rules governing copyright protection. In fact, when it comes to cultural heritage a double track of protection is established between the private law, individualistic protection provided for intellectual works by the ICL, and the public protection of cultural property

under the ICHC, which responds to a collective interest.[10] The fundamental matrix of such protection is grounded in Art 9 of the Constitution, which establishes the duty of the Italian Republic to promote the development of culture and to protect the Nation's historical and artistic heritage. The functions of promotion and protection find expression, respectively, in the legislation on copyright and the legislation placed to protect cultural property.[11]

However, it should be noted that some concepts found in Art 108 ICHC generate particular difficulties of interpretation, especially in cases where reproduction of the protected good occurs online. In particular, it is difficult to exclude the 'for-profit purpose' when publishing, and thus reproducing, an image online.

The obligation to limit further reproductions for profit of already disclosed images of cultural property is also difficult to apply in the digital context. Indeed, whether a digital image can be further reproduced and for what purposes depends solely on the technologies available at the time, a factor that the user cannot control at the time he or she takes or publishes the photo of the cultural property. This raises the issue of the so-called 'nth user' of a reproduction and the impact this has on the first user, namely the one who takes the photo of the asset. For example, on Facebook or Google Photos, which offer terms of use that provide exclusive copyrights, individual users may not pursue commercial purposes. However, the platform as a whole will only have for-profit purposes.

Finally, difficulties also arise in identifying which modalities are appropriate to pursue the enhancement and the promotion of cultural heritage. Photographing cultural heritage and publishing the photos under a free license, as well as expanding and illustrating Wikipedia entries, might prove to be effective ways of enhancing and promoting cultural heritage. However, the Italian legislation does not seem to agree with this position.

IV. Additional Rights Involved in the Promotion of Fashion Products

On the subject of reproduction of things for commercial purposes, in addition to copyright and the discipline provided by the ICHC, additional and different rights may also be relevant, namely the property over the good (or more precisely, its image), unfair competition, and personality rights.

1. Right of Ownership

In addition to the regulations designed to protect cultural heritage and works of art, there is another legal basis abstractly capable of founding a general power of

[10] A. Pojaghi, n 7 above.

[11] G. Calabi and A. Buticchi, 'Inserzioni tra diritto d'autore e beni culturali nelle istituzioni: una possibile convivenza?' *Diritto Industriale*, 194-199 (2021).

prohibition with respect to the reproduction of cultural heritage for commercial purposes, namely, the property right of the owner. This assumption concerns only the reproduction of the image of goods on which no intellectual property right insists.

Scholars and case-law are divided on whether there is an exclusive right to reproduce the image of a good based on the property right over the thing itself. If the rights to dispose of and enjoy the thing extend to all the utilities that can be derived from it, should the control of the circulation of the image of the good be included among the owner's prerogatives?

Indeed, the image of things, defined as an 'intangible good', is contested between its qualification as the object of exclusive rights, in the wake of the privatization of intangible goods, and its qualification as a common good, in that it is characterized by non-excludability and non-rivalry in consumption.[12] In particular, critical issues arise from the interpretation of Art 832 of the Italian Civil Code (ICC), which provides that

> 'The owner has the right to enjoy and dispose of things fully and exclusively, within the limits of and subject to the obligations established by the legal system.'

Some scholars believe that no normative basis can be found for the owner's power of opposing to the use made by third parties of the image of the things owned, as they interpret Art 832 of the ICC as providing for limitations to the faculties of enjoyment and disposition included in the property right over the things that are the subject matter of the right, without including the related incorporeal projections. Unlike the thing effigy, the image represents a non-rivalrous good: multiple people can enjoy the image without the good itself being spoiled. Therefore, creating upstream a perpetual right, even in the absence of a creative activity to be incentivized comparable to that underlying copyright protection, has the sole effect of restricting competition downstream, giving to the owner of the thing unjustified monopolistic revenues. For such goods, therefore, upon a comparative assessment of the social costs and benefits of recognizing a new atypical exclusive right over the image of things, a similar interpretation of Art 832 of the ICC should be rejected.[13] As a result, for intangible goods – such as the

[12] C.E. Mayr, 'I diritti del proprietario sull'immagine della cosa' *Annali italiani del diritto d'autore*, 603 (2010) according to whom the image of the thing is itself a good, independent of the 'tangible medium' and, therefore, excludes that the right claimed by the owner over the tangible good automatically extends to it. According to the author, the commercial value of the image should not be understood as a utility derived from the good, but rather as a utility derived from the image itself, which is independent of the good. Therefore, he believes it is possible to identify limits to the right of ownership, especially in the case where it concerns the image of a good. Indeed, the content of this right should be determined by considering both the legally protected interest of the owner and the interests of the community and the owners of other assets.

[13] G. Resta, 'Chi è proprietario delle piramidi? L'immagine dei beni tra property e commons'

image of cultural property – the logic of privatization loses its meaning, since being non-rivalrous goods in consumption, several parties can simultaneously enjoy the same good without the enjoyment itself being impeded or limited in any way.

Another part of scholars and case-law takes a contrary view, holding that the *dominus*' rights extend to the image of the property, which represents a utility due to the rights holder. Thus, particular emphasis is given to the economic value of the image, deeming it appropriate that this should benefit the right holder, especially when the image of the thing is reproduced in the context of commercial communication and for promotional purposes.[14] Hence they claim that the right to the image of the thing can be regarded as an attribute of property, or more precisely, that ownership of a thing, in addition to the thing itself in its bodily integrity, also extends to its image. Therefore, they hold that if the *dominus*' complete and absolute rights extend not only to the thing but also to its image, the *dominus* will then have the exclusive power to reproduce and disseminate it and, accordingly, the power to inhibit third parties from doing so. The rights holder's powers include the power to choose whether to offer the thing to the public view or to keep it concealed, reserving its view against the payment of a fee. In the second hypothesis, the owner can take action against the unauthorized use of the relevant images for advertising purposes. In contrast, this will not be allowed to him when, by their nature or by the destination given to them by the *dominus* himself, the things are already permanently or temporarily exposed to public view. However, even when the thing is visible to the public, its reproduction in the context of promotional messages could be deemed unlawful since it should be considered permissible only if it is done consistently with the destination for public view given to it by the owner.[15]

As to the reproduction of the image of cultural heritage goods, scholars supporting the proprietary model justify the exclusivity granted to the owner by emphasizing the benefits that could accrue to the community. By allowing reproduction against payment of a fee, the public administration could derive economic income to invest in the restoration and preservation of the asset, benefiting the community at large. Moreover, according to scholars supporting the proprietary model, allowing free reproduction of the image of the cultural asset for commercial purposes would result in an appropriation of the public asset, benefiting only one private party. Therefore, paying the fee for the reproduction of the asset would represent compensation for the community and allow for a balancing of interests.

On the other side, scholars who argue against the proprietary model present numerous arguments supporting their thesis.[16] First and foremost, it is argued

Politica del diritto, 595 (2009).

[14] M. Fusi, 'Sulla riproduzione non autorizzata di cose altrui nella pubblicità' *Rivista di diritto industriale*, 97 (2006).

[15] ibid 102-103.

[16] G. Resta, 'L'immagine dei beni culturali e la libertà di panorama', available at

that the expenses of preserving cultural property are already financed through general taxation and that, in any case, the profits that can be earned are insignificant compared to the burdens of managing public ownership. In the case of public property exposed to public view, the freedom of expression and access to culture and the general freedom to 'enrich oneself' through knowledge of the common cultural heritage would be significantly impaired. Second, the monopoly profits can only find justification as an incentive to produce new works. However, it is not necessary for already existing assets that have enjoyed private protection in the past and are now in the public domain, such as the Colosseum. Against the reputational argument raised by scholars in favor of the proprietary model, the opposers hold that the reputational value of the cultural property can always be protected even through measures other than those of intellectual property laws and the right granted by the protection of cultural property. According to this position, with regard to public assets, the applicability of an exclusive regime on the image of such assets based on Art 832 of the ICC shall be excluded. This is especially true given the peculiar functional connotation of such goods, which are aimed at the free enjoyment by the community.

2. Unfair Competition

Promoting fashion products that include the reproduction of things, given the underlying commercial purpose, may also result in violating the rules repressing unfair competition.

A first hypothesis is that the good reproduced is an element that distinguishes or characterizes the activity or products of an undertaking. In this case, the application of Art 2598, no 1 of ICC forbidding slavish imitation seems to be conceivable if the two undertakings are competitors and, from the use of the image of the thing, a risk of confusion for the public may arise. This is especially true if the thing depicted is already present in the competitor's trademark (in such an eventuality, it may even constitute trademark infringement) but also in the case in which the latter had previously made use of it in its advertising, thus giving rise to unfair competition conduct. In practice, this happens when things belonging to competitors or things that are identical or resemble those constituting distinctive elements of the competing products or business activity are used in advertising. Another conduct integrating unfair competition occurs when a company includes in an advertisement a competitor's product in such a way as to making it refer to the latter thus misappropriating its values. In this case, there is a conduct of unfair competition by misappropriation of values under Art 2598, no 2 of the ICC.[17]

In addition to those already mentioned, where the depiction of goods occurs in

https://tinyurl.com/ym6chtdy (last visited 20 September 2023).

[17] M. Fusi, n 14 above, 107-108.

the context of comparative advertising, the provisions of the decreto legislativo 6 September 2005 no 206 which prohibit both confusing comparisons and those that exploit the reputation of others, are also relevant. Moreover, in such cases, it is also possible to incur a violation of Art 13 of the Italian Advertising Self-Regulation Code, which prohibits the imitation of other's advertising even outside of a competitive relationship and regardless of the danger of confusion, and, in any case, prohibits any undue attachment to the prestige or the reputation of third parties.

3. Personality Rights

Personality rights are also relevant in the context of advertising using the reproduction of people and things. It should be premised that the concept of personality rights now includes various rights referring to the human person in its various forms, such as those to image and name, honor, decorum and reputation, confidentiality and personal identity, that is, the right not to be made the subject of representations that differ from one's way of being.

There is a tendency to extend the protection of personality characteristics to elements of recognition secondary to the main ones, such as portrait, name, or pseudonym. Hence, their unauthorized use outside of a cause of justification is to be considered unlawful. Indeed, these causes of justification can hardly be envisaged when it comes to advertising: in fact the exemptions of the notoriety of the person portrayed, the public nature of the event, the purposes of justice, security, and culture – which under Art 97 of ICL make the consent of the person portrayed unnecessary – are difficult to reconcile with the use of the image for advertising purposes, which is made for commercial purposes.[18]

In this scenario, it has been argued that the various elements of identification of a person sometimes include simple objects that are so distinctive that they immediately recall to the public the person using them. In this respect, there is some relevant case-law affirming such principle. For example, in a decision held on 18 April 1984, the Court of Rome held that the unauthorized use in an advertising campaign of objects considered distinctive elements of the famous songwriter Lucio Dalla (*ie*, a knitted woolen hat and a pair of binoculars), led consumers to immediately think of his person and thus constitutes an infringement of the singer's image rights. The Court held that a prejudice to the singer-songwriter's image could result from such use, raising the risk of negatively affecting his character since he was presented as a product marketer.[19] In 2015 the Court of Milan confirmed the same principles, ordering a company to pay the damages suffered by the heirs of famous actress Audrey Hepburn, for the unlawful use of her image in an advertising campaign. Indeed, the advertisement depicted a model with the same hairstyle, black dress, long black gloves, jewelry, and glasses of the famous actress, namely

[18] ibid 111.
[19] Pretura di Roma 18 April 1984, *Giurisprudenza italiana*, I, II, 544 (1984).

elements inextricably linked to the iconic image of Audrey Hepburn.[20] However, in order for the mere sight of the thing to immediately recall in the recipients of the advertisement the person concerned, it is necessary that the use of the object by the person in question has been protracted and established by customs, and that the object represents a characteristic of that person, since it is inconceivable that an object of generalized use, which everyone wears or uses, could identify only one person.

V. Freedom of Panorama

Being able to look at the world around us is a faculty taken for granted, so much so that it has never been questioned. In experiencing public spaces, individuals encounter various copyrighted works, for example, public sculptures, murals, images and text on billboards, and street art. It is expected that what is freely visible is also freely reproducible. This situation is known in the legal world by the concept of 'panorama freedom' (from the German word '*Panoramafreiheit*'), according to which everyone would be free to reproduce public spaces and use reproductions of them for personal and commercial purposes.

Freedom of panorama is an exception to copyright law found in the copyright laws of various jurisdictions and consists of the possibility to reproduce and communicate to the public artistic works (eg, sculptures, paintings, buildings, monuments, etc) protected by copyright and placed in public spaces, without infringing the rights of their respective owners. The impact of technological and digital developments on the regulation of reproductions in public space has not been limited to the field of intellectual property, also extending to the area of privacy and cultural heritage law.

At the European level, the freedom of panorama was introduced by the European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167 (InfoSoc Directive), whose Art 5(3)(h) leaves it to the discretion of the EU Member States to introduce the exception – to the rights of reproduction, communication and making available to the public – in their national legislation when using works, 'such as works of architecture or sculpture, *made to be located permanently in public places*.' The core of the exception to the author's exclusivity is thus the permanent placement of the work in public places.

However, Italy has not implemented Art 5(3)(h) of the Infosoc Directive into its national law. Unfortunately, Italian legislation does not appear to be aligned with the regulatory requirements imposed by technological and cultural development, pushing toward the free enjoyment of copyrighted works in public places. Therefore, the onus falls on the interpreter to track the applicable provisions and determine

[20] Tribunale di Milano 21 January 2015, available at www.onelegale.wolterskluwer.it/.

their scope and extent.

In addition to the provisions contained in the ICL, in addressing the issue of freedom of panorama in Italy, one must also take into consideration what is established by the ICHC, which provides that the reproduction of cultural property requires the prior authorization of the public authority having the reproduced property in its possession and, in some cases, also the payment of a fee.

The regulatory framework previously examined – which sees the ICL and the ICHC as the main protagonists in the field of freedom of panorama in Italy – can be more clearly analyzed by taking into account the dichotomy of the regime, on the one hand, between goods exposed to public view and goods not visible from the outside and, on the other hand, between goods in the public domain and goods protected by copyright.

As previously mentioned, sometimes the two protections may overlap (so-called dual track) and in such cases it will be necessary to obtain two different authorizations for those who intend to reproduce an artistic work that is also a cultural asset. The first authorization is to be obtained from the public administration to whose care the property is committed, while the second is to be obtained from the owner of the copyright on the work until the work has fallen into the public domain, and unless such reproduction falls under the exceptions provided for in the copyright law – which is to be excluded if the reproduction of the work is done at high resolution and for commercial purposes.

1. Goods in the Public Domain Placed in Enclosed Spaces

The debate surrounding the applicable regime for the reproductions of public domain goods located in enclosed spaces is centered on the role of museums as guardians of culture. Museums engage in various activities that rely on the image of the artworks exhibited, such as virtual exhibitions, enabled by technological advancements or collection books. Virtual museums are a valuable tool that expand access to artworks and broaden public knowledge, but they also give rise to a system based on exclusive rights to photographic reproductions that restricts access and use.

Although the images, as well as the artworks they depict, may not be protected by copyright law, many museums still require permission and impose fees for their use through licensing policies. This practice of licensing creates complexities in obtaining permission to use images and may conflict with the primary mission of cultural institutions to disseminate their collections to a wide audience.

The legal situation surrounding goods in the public domain depicted in images is uncertain. Although the reproduction of the work is free from a copyright perspective, museums may still require permission for both the creation and use of images. The trend of museums asserting exclusive rights over images of public domain artworks is based on the property right over the reproduced object. The imposition of terms and conditions for the use of images continues to raise

questions about the balance between protecting the interests of museums and promoting access to cultural heritage for the public.[21]

2. Goods Not in the Public Domain Placed in Enclosed Spaces

What was mentioned in the previous paragraph can also be adapted to the case of reproduction of goods not in the public domain located in enclosed spaces, such as paintings by living or deceased authors whose death occurred less than seventy years ago that are kept in a museum. These works are still protected by copyright law and the author or other owner can claim rights to their commercial exploitation. Unauthorized commercial exploitation of such works can result in compensatory remedies, injunctive relief, and, where possible, the restitution of profits made.

In addition to works protected by copyright law, cultural heritage goods protected by the ICHC may also not be in the public domain and be located in enclosed spaces. In this case, in order to take photos or videos for commercial purposes that capture cultural goods that have not fallen into the public domain, it will be necessary to contact the entity to whose care the cultural properties are committed in order to assess the existence of any licensing agreements between the author of the work and the entity to whose care the property is committed. If the rights of economic exploitation of the work have been assigned to the entity to whose care the property is committed, royalties should be paid to this entity and not the author of the work.[22]

If the cultural property being reproduced is still protected by copyright and no licensing agreement has been established, entity holding the copyright needs to be identified and permission to reproduce it according to Arts 107 and 108 of the ICHC needs to be obtained. The rules on exceptions and limitations to ICL will apply if the conditions exist. For example, according to Art 70, para 1-*bis* ICL, it is possible to freely publish a low-resolution image of a copyrighted work on a website for educational or scientific use if there is no profit motive.

However, complications arise when the photograph has a creative character and is protected by copyright. In this case, permission for the commercial exploitation of the original photograph must be obtained not only from the author of the work photographed but also from the author of the photograph.

Case-law has consistently interpreted the notions of personal use and non-profit use in a restrictive way. For example, in the case of a photograph intended for a free calendar, although there was no direct economic return for the author of the publication, the purpose of profit could not be excluded since the author of

[21] P. Magnani, 'Musei e valorizzazione delle collezioni: questioni aperte in tema di sfruttamento dei diritti di proprietà intellettuale sulle immagini delle opere' *Rivista di Diritto Industriale*, 211 (2016).

[22] A.A. Cardarelli, A. Pisani, A. Signorelli, 'La libertà di panorama: stato dell'arte e prospettive di riforma' available at https://tinyurl.com/mmzsku44 (last visited 20 September 2023).

the calendar could still advertise its own activity or host advertisements within the calendar. The same applies to educational purposes: publishing a photo of a work protected by the ICHC or ICL within a scholarly text does not exempt the payment of statutory fees and royalties.[23]

3. Goods in the Public Domain Placed on the Public Street

The issue of reproducing goods that are in the public domain and exposed to public view, such as the Trevi Fountain and the Colosseum, presents a significant legislative gap under Italian law.

Despite being publicly accessible, if these goods are protected by the ICHC, their reproduction will still require authorization from the entity to whose care the cultural property is committed, as well as the payment of a fee. Indeed, the provisions outlined in Arts 107 and 108 of the ICHC do not make a distinction between goods kept in restricted access areas and those that are freely visible, instead relying on the cultural significance of the goods.

4. Goods Not in the Public Domain Placed on the Public Street

The last scenario concerns works protected by copyright and freely visible from public areas, such as public installations created by living artists, or deceased less than seventy years ago, such as the 'L.O.V.E.' sculpture by Maurizio Cattelan or the new Ara Pacis building designed by Richard Meier.

These works are still protected by copyright, making their reproduction for commercial purposes subject to the prior authorization of the author or the owner of the exclusive rights. Italian copyright law does not provide any exception for photographs of works in public places. However, it does provide certain exceptions, such as photographic reproductions made for the purpose of criticism or discussion, within limits justified by those purposes and provided they do not compete with the commercial use of the work. Additionally, low-resolution images of works can be freely published on the internet for educational or scientific purposes, as long as they are not for profit.

Given this complex regulatory landscape, legislative intervention is required to introduce a new exception to copyright law. The goal is to strike a balance between the public's right to enjoy works that are openly visible and the author's right to earn remuneration. Protecting the economic rights of the owners should not limit the public's access to these works, and copyright laws should promote creativity rather than hinder the dissemination of culture.[24]

[23] G.M. Riccio 'Libertà di panorama. Cos'è e perché serve una legge' available at https://tinyurl.com/yc3hucs7 (last visited 20 September 2023).

[24] A.A. Cardarelli, A. Pisani and A. Signorelli, n 22 above.

VI. Relevant Case-Law on the Commercial Exploitation of Cultural Goods

In recent years, several decisions prohibited the commercial exploitation of the image of cultural heritage, without first obtaining the authorization from the administration and, therefore, without paying the concession fee. In these precedents, the courts have identified the rules to be followed when using photographs that reproduce the cultural heritage protected under the ICHC, without distinguishing between the case where the artwork is located within a museum – and is therefore accessible only after purchasing an admission ticket – and the case where the artwork is part of the urban landscape – and it is therefore freely visible to anyone without restrictions.

1. The Reproduction of the Altamura Man

In its decision of 23 April 2013 no 9757, the Italian Supreme Court addressed for the first time the question of what can be understood as a reproduction under Art 107 of the ICHC.[25] In particular, although the provision in question expressly and ordinarily prohibits the reproduction of cultural goods by means of casts, it does not provide a clear definition of what constitutes a reproduction, opening interesting interpretative issues.

In the case at hand, the MiC sued a company that had offered for sale reproductions of state archaeological property consisting of the paleoanthropological deposit of the Grotta di Lamalunga in Altamura. Since no concession had been issued for the reproduction of the concerned cultural property, the Ministry requested that the defendant be ordered to cease the marketing of the reproductions and pay damages.

In particular, the Supreme Court observed that 'it is indeed possible to refer to the provision of copyright law that defines the concept of reproduction', namely Art 13 of the ICL according to which

> 'the exclusive right of reproduction concerns the multiplication of copies of the work in all or in part, either direct or indirect, temporary or permanent, by any means or in any form, such as copying by hand, printing, lithography, engraving, photography, phonography, cinematography, and any other process of reproduction.'

However, the Supreme Court ruled that there was no reproduction in that specific case since the replica was created not by copying the actual shape of the skull (which was mostly embedded in a cave and thus not visible), but instead by creating a 'hypothetical reconstruction' based on scientific findings and reconstructive hypothesis of how the entire cranial structure could have looked like. Therefore,

[25] Corte di Cassazione 23 April 2013 no 9757, available at www.onelegale.wolterskluwer.it.

the Supreme Court held that this resulted in a 'new work', that is instead protected under copyright law.

This decision from the Supreme Court can be interpreted as meaning that when a cultural heritage asset is recreated or re-elaborated in a new creative work without being exactly copied, it does not qualify as a reproduction under the ICHC. Indeed, some scholars noted that the difference between a reproduction and a new work lies in the method of creation. Namely, the copies made through molding of the original piece are considered reproductions, while those created through sculpting or shaping are closer to independent artistic actions rather than a copying act. Similarly, digital 3D models can either be the result of reproducing an existing object through laser scanning or photogrammetry, or the result of creating the model from scratch.[26]

2. The Countless Unauthorized Reproductions of Michelangelo's David

Michelangelo's David is one of the most famous sculptures from the Italian Renaissance period, created in the early 1500s. It is widely considered as one of the most emblematic works of Italian art and is displayed at the Accademia Gallery in Florence since 1873. Like most icons, the David has often been used for advertising by various companies.

For instance, in March 2014, the American weapons company ArmaLite Inc used the image of Michelangelo's David in an 'armed' version for advertising purposes. MiC, deeming the juxtaposition of the David with firearms offensive and unfair, reacted to that use with firm opposition, resulting in the American company's spontaneous withdrawal of the advertising campaign.

Again, on 25 October 2017 the Court of Florence issued and order in favor of the Accademia Gallery, which sued a travel agency that promoted its higher-priced guided tours made by unlicensed guides in Italian museums, including the Accademia Gallery, using a photo of Michelangelo's David on their promotional materials such as brochures, pamphlets, and website.[27] The Court accepted the Accademia's arguments on the unauthorized use of the cultural property and banned the travel agency from using Michelangelo's David image for commercial purposes without permission and payment of reproduction rights, in breach of Arts 107 and 108 of the ICHC. As a result, the agency had to immediately remove all advertising materials and black out the image of David on its website. The Court also mandated the agency to publish the text of the order in various newspapers and periodicals selected by the Accademia, as well as on their website. The agency was also fined two thousand euro for each day of non-compliance. The injunction granted to the Accademia Gallery was not limited to Italy but applied throughout Europe.

[26] F. Remondino and S. Campana, *3D Recording and Modelling in Archaeology and Cultural Heritage. Theory and best practices* (Oxford: Archaeopress, 2014).

[27] Tribunale di Firenze 26 October 2017, *Foro Italiano*, II, 682 (2018).

More recently, the Michelangelo's David has been involved in another unauthorized reproduction, this time by Brioni, a prestigious Italian menswear couture brand. In 2018 Brioni launched an advertising campaign featuring a full-scale marble replica of Michelangelo's David statue, dressed in a Brioni suit. The replica was created by an Italian sculpture workshop in 2002 and had been used for various projects before being loaned to Brioni for the advertising campaign. MiC initiated legal proceedings against both Brioni and the workshop, seeking an injunction to prevent the use of David's image for commercial purposes. The advertising campaign was promptly withdrawn, and the sculpture workshop agreed not to use the replica without the Ministry's authorization. The Court of Florence then rejected the request for an interim injunction on the grounds of lack of urgency, but noted that the case raised questions about the definition of 'reproduction' and whether the use of the David statue constituted a 'creative re-elaboration' under the ICL.[28] In its defense, Brioni argued that the advertising campaign did not reproduce the original David statue, but rather a different creation made by the sculpture workshop and a tailor. The Court did not provide a definitive answer to these questions, but the very fact that the Court felt the need to mention them indicates that the answer was far from clear.

Finally, in April 2022, the reproduction of the Michelangelo's David has been used – again, without the authorization of the Accademia Gallery – in an advertising campaign by a Tuscan sculptor training center.[29] The Court considered

> 'the use of the image of David on the website of a commercial company (...) capable of degrading the image of the cultural good by making it a distinctive element of the quality of the company that, through its use, promotes its image, with an indisputably commercial use, which could lead third parties to believe that such free use is lawful or tolerate'.

Therefore, the Court found the existence of a good prima facie case and of the danger in delay requirements due to

> 'the vulgarization of the work of art and culture and the reproduction without prior examination by the competent authorities of the compatibility between the use and the cultural value of the work, which creates the risk of an irreversible damage for all those uses that the competent authority should judge incompatible'. The Court further considered that 'the protection of a non-patrimonial aspect related to the reproduction of the cultural asset (...) can only be configured as the right to the image of the cultural asset'.

[28] Tribunale di Firenze 2 January 2019, available at https://tinyurl.com/4rf8crk8 (last visited 20 September 2023).

[29] Tribunale di Firenze 11 April 2022, available at www.dejure.it.

3. The Reproduction of Teatro Massimo's Image for Advertising Purposes

Another relevant decision involves the Teatro Massimo in Palermo, which is Italy's largest opera house known for its unique architecture and acoustics, designed by Giovan Battista Filippo Basile in the late 19th century.

The court of Palermo supported the Teatro Massimo Foundation, which holds the rights to use the theater, in the lawsuit against the Banca Popolare del Mezzogiorno.[30] The bank used an image of the theater's facade in its advertising campaign, in breach of Arts 107 and 108 of the ICHC. The bank challenged any violation of the ICHC, claiming that no rights can be claimed on reproductions of the exterior architecture of a cultural asset, which is part of the city's landscape and visible to the public and must be considered in the public domain. However, this argument was not accepted by the court, given the lack of freedom to panorama in Italy.

The decision seems also to address the issue concerning the right of publicity of the cultural heritage, which shall be assessed on a case-by case basis by the authorities in charge of the relevant monuments. The court confirmed the protectability of the right of publicity also for legal entities by providing for the possibility to obtain compensation when the reproduction of the good leads to a decrease in the consideration of the entity, both in terms of the negative impact that such a decrease entails in the entity's actions, and in terms of the decrease in consideration by the general public. However, in the present case, the court found that the manner of reproduction used by the bank was neither disparaging nor detrimental to the historical and artistic value of the theater, thus rejecting this argument.

4. *Uffizi* v *Jean Paul Gaultier*: The Reproduction of the Botticelli's Venus

At the end of 2022, the Uffizi Museum in Florence took legal action against the fashion designer Jean Paul Gaultier for using the well-known painting, Birth of Venus by Sandro Botticelli, in his spring/summer 2022 *Le Musée* capsule collection without being authorized to do so. The collection was meant to celebrate art and features reproductions of masterpieces, including Botticelli's. Despite the noble intention, the Uffizi Museum was not pleased with this homage. Indeed, after sending a warning letter, the Uffizi Museum decided to take legal action grounding its arguments on the violation of the ICHC.

The Uffizi Museum has relied several times on the ICHC to act against unauthorized reproductions of the cultural artworks it collects, including against Pornhub for its 'Classic Nudes' series featuring paintings from the museum's

[30] Tribunale di Palermo 21 September 2017, available at https://tinyurl.com/bddas54j (last visited 20 September 2023).

collection. Again, the dispute is not about copyright, as the ICHC governs the use of cultural heritage regardless of its copyright status.

5. The Puzzle with the Image of Leonardo da Vinci's *Uomo Vitruviano*

The Uomo Vitruviano is a pen and ink drawing on paper made by Leonardo da Vinci, a symbol of Renaissance art, and is kept in the Gallerie dell'Accademia in Venice.

Since 2009, Ravensburger, the Europe's leading puzzle company, has been making a puzzle reproducing the image of the *Uomo Vitruviano*, for which the Gallerie dell'Accademia was demanding royalty payments equal to 10% of earnings since 2019. Initially, the Venetian museum tried to reach an agreement with the German company to define the fees due for the use of such image. However, when faced with refusal, it decided to take legal action.

With the order dated 17 November 2022, the Court of Venice ruled that the Italian and German branches of the toy company Ravensburger needed to be authorized by the *Gallerie dell'Accademia* and pay royalties to it, in order to produce and distribute puzzles with the image of Leonardo da Vinci's *Uomo Vitruviano* on them.

This is the first decision to expressly address the issue of the applicability of the reproduction of cultural heritage regulation dictated by the ICHC to activities that took place outside of Italy.

VII. The Regulatory Gap in the Code of Cultural Heritage: Reproduction Versus Reworking

The ICHC provides limitations to reproduction of cultural properties for profit, subordinating it to the previous authorization of the administration to whose care the cultural property is committed, and the payment of the concession fee determined on the basis of the criteria set forth in Art 108. Also, except in cases expressly provided for by the law, Art 107 prohibits to reproduce cultural property by making casts, by contact, from the originals of sculptures. Therefore, from a combined reading of Arts 107 and 108, it is not clear whether the re-elaboration of a good part of the cultural heritage made for commercial purposes, without prior authorization and payment of the fee to the relevant entity, may constitute a breach of the ICHC. In fact, ICHC does not expressly prohibit the re-elaboration of a cultural property, as a form of reproduction.

There is a division in both doctrine and case-law regarding the interpretation of Arts 107 and 108 of the ICHC. Some scholars and the majority of case-law (see, for instance, the numerous decisions concerning the Michelangelo's David) gave a broad definition of the term 'reproduction'. As a result, the supporters of this interpretation, deem necessary to obtain authorization from the entity in charge

of the heritage property before reproducing its appearance for commercial purposes, including any possible reworking thereof. The main reasons for this approach lie not only in the need to protect the integrity of the cultural heritage, but also to prevent any free-riding from its reputation or any use in any unappropriated contexts.[31] Scholars that adhere to this broad definition, found the legal basis for this theory in the proprietary model, thus considering that the administrative entities to whose care the cultural property is committed may exercise the standard prerogatives of the owner, including the right to prohibit any unauthorized display of its property.[32] And this regardless of the technique used for the reproduction, of whether the final – possibly – re-elaborated result is objectively different from the original work, not representing its 'spitting image', or of where the cultural property is located – whether inside a museum or outside, on the public street, freely visible for all to see.

On the other side, a minority of scholars and case-law (see, for example, the decision of the Italian Supreme Court concerning the Altamura Man) gave a more restrictive interpretation of the term 'reproduction', thereby allowing for the re-elaboration of the protected cultural heritage, also for commercial purposes, without the need to obtain prior authorization or to pay the concession fees to the entity in charge. This approach objects to a broader interpretation of the concept of 'reproduction' under the ICHC, as this might have the practical effect to revive an expired copyright over the cultural heritage and ultimately jeopardize the freedom of expression granted by Art 21 of the Italian Constitution. Following this interpretation, reworkings of cultural properties for commercial purposes are allowed, as the re-elaboration of cultural heritage represents a form of creative expression, allowing for the reinterpretation and revival of the cultural heritage.[33]

This approach is based on the fact that the rights relating to the use of the image of the Italian cultural heritage are exhausted in the special regulations contained in ICHC, which expressly exempt the provisions governing copyright, but do not mention those on unfair competition or image rights. As a consequence, while copyright might theoretically coexist with the protection afforded by ICHC (if its term has not expired), unfair competition and image rights do not apply to cultural heritage. This is because, except in exceptional cases, there is no competitive relationship between the authority in charge of the cultural heritage and those exploiting its reworking for commercial purposes. Secondly, right of publicity and image rights provided by Arts 10 ICC and 96 ff ICL, as personality rights, concern only physical persons and not also things.

[31] On the concept of value as applied to cultural heritage see P. Petraroia, 'La valorizzazione come dimensione relazionale della tutela, in G. Negri-Clementi and S. Stabile eds, *Il diritto dell'arte: la protezione del patrimonio artistico* (Milano: Skira, 2014), 41-49. See also M. Montella, 'La Convenzione di Faro e la tradizione culturale italiana' *Il capitale culturale*, 13-36 (2016).

[32] M. Fusi, n 14 above, 98-99.

[33] M. Modolo, 'Riuso dell'immagine digitale del bene culturale pubblico: problemi e prospettive', available at https://tinyurl.com/mrxkejuw (last visited 20 September 2023).

Given the lack of clarity on the interpretation of Arts 107 and 108 of the ICHC, if the monument is creatively reworked, re-elaborated and modified, there could be room to evaluate, on a case-by-case basis, whether the authorization from the administration to whose care the cultural property is committed, can be bypassed. In order to reach a positive conclusion, and avoid the requirements provided for in the ICHC, substantial modifications must be made to the reproduction of a cultural property. However, the ultimate result of this process is uncertain and contingent on various factors, including the degree of resemblance between the original monument and the one resulted from the re-elaboration, the level of detail visible to the individual, the monument's significance within the frame, and so on.

In light of the above, it is therefore evident that there are still many questions without an answer. For instance, can the authority responsible for a cultural property exploit its reputation to the point of limiting to third parties the possibility to perform any reinterpretation of it? If this is the case, can this prerogative of the authority be based on the property right to the image of the good? Can things have a reputation? Furthermore, what are the limits on reproduction for commercial purposes? Is it possible to give a restrictive interpretation of the word 'reproduction' in order to make the re-elaboration of cultural properties for commercial purposes lawful? Would a negative answer not be in conflict with the constitutional principle of freedom of expression? Would such a limitation have a negative impact on the development and spread of culture? If the cultural property is displayed in public, would the provision of a limitation on its reproduction not be in conflict with the community's right to enjoy the works of the Nation's historical and artistic heritage?

Therefore, the relationship between reproduction and re-elaboration of cultural heritage is influenced by a complex balance of factors that include the preservation and enhancement of cultural heritage, the restrictions set by the ICHC, and the freedom of expression provided for in the Constitution. This balance requires careful consideration and a reasonable assessment of the interests of all parties involved, to ensure that cultural heritage is protected and enhanced, and that at the same time everybody is free to express themselves and create artistic works without restrictions.

VIII. Conclusive Remarks and Future Perspectives

The Italian regulatory framework concerning the reproduction for commercial purposes of things is complex and often subject to controversy, especially when the thing being reproduced belongs to the cultural heritage or is an artwork still protected by copyright. This complexity is due to the difficult balance between the different public and private interests at stake. On the one hand, the interest of the administration to whose care the cultural property is committed to be able to control the reproduction of the property as well as to be able to profit from its reproduction, or the interest of the author to make profit from the reproduction

of his/her work of art. On the other hand, the interest of the public to enjoy the cultural and artistic heritage of the Nation, as well as to freely make reproductions and re-elaborations of such goods. The balancing of these interests is often difficult to achieve also because of the interpretative and coordination limits among the several laws and provisions governing the matter.

The outdated Italian legal framework regulating the reproduction of cultural heritage and copyrighted works remained the same even after the enter into force of the European Parliament and of the Council Directive 2019/790 of 17 april 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130, whose Art 14 provides that

> 'when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.'

Indeed, notwithstanding the clear intent of the European legislator to promote open access to the use of data in general, in implementing the Directive (EU) 2019/790 the Italian legislator introduced Art 32-*quarter* into the ICL. The new Art 32-*quater* provides that

> 'upon the expiration of the protection period of a work of visual art, any material resulting from a reproduction of such work is not subject to copyright or related rights, unless it constitutes an original work. The provisions regarding the reproduction of cultural heritage assets in the Code of Cultural Heritage remain in force.'

Therefore, nothing changed: by leaving the protection of cultural heritage intact, administrative authorities still retain control over for-profit reproductions, irrespective of their copyright status. Hence the interpretative and coordination difficulties persist.

The obsolescence of the Italian legal framework on this matter is even more evident in light of the rapid and unstoppable development of technology, which offers new digital reproduction techniques every day. With the spread of increasingly sophisticated means of reproduction and the possibility of instantly sharing information, it is becoming more frequent for everyone to incur violations of the ICHC or the ICL due to unlawful reproductions of cultural properties or works of art protected by copyright. Indeed, the ability to reproduce works quickly and precisely without losing quality has made it more difficult to identify situations in which reproduction is allowed and where it constitutes a violation of the law. Although the digital context has clearly evolved, the law has not yet adapted, and continues to provide limits on the possibility of reproducing and distributing reproductions and creative reworkings of such goods, even when they are located on public roads

and therefore freely visible. This thus prevents the free enjoyment and valorization of such goods, as well as severely limits general creativity.

However, it seems that now there is an intention to take a step forward. In 2021, Italy approved the National Recovery and Resilience Plan (PNRR) to boost the economy after the COVID-19 pandemic in order to enable the country's green and digital development. The revitalization of Italy outlined by the PNRR is built around three strategic axes shared at the EU level: digitization and innovation, ecological transition and social inclusion. In pursuit of these goals, investments are planned for the digitization of cultural heritage, thus fostering accessibility and development of new services by the cultural/creative sector. In this regard, interventions on 'physical' heritage will be accompanied by digitization operations of what is kept in museums, archives, libraries and cultural venues, so as to enable citizens and professionals to explore new forms of enjoyment of cultural heritage.

There is thus awareness that digital represents a great opportunity to create an ecosystem of culture capable of increasing potential demand and expanding accessibility for different audience segments, reaching generational and geographic targets that are difficult to engage, and weaving new relationships between cultural heritage and people. The path of digital transformation of heritage and cultural institutions pursues specific goals, including expanding the forms of access to digital heritage to improve cultural inclusion as well as cultural heritage digitization practices. Indeed, a wider use of digital content is encouraged in order to improve and strengthen the user experience in presence and on site but also for non-presence users, by experimenting with immersive, interactive and multi-user experience contexts such as the Metaverse.

If the digitization of public cultural heritage will be accompanied by increased opportunities for reusing digital reproductions of cultural heritage, then it will be able to support creativity, cultural entrepreneurship, publishing, and tourism. Moreover, allowing free reuse of images, also for commercial purposes, can revive these industries.

Recently, cultural heritage institutions have started using non-fungible tokens (NFTs) to digitally preserve cultural assets – although many continue express strong disapproval towards NFTs that purport to convert historical artworks into tokens secured by blockchain technology. For instance, the Uffizi Museum in Florence has been one of the first to test the potential of NFTs in 2021, certifying the authenticity of the digital work corresponding to the reproduction of the Tondo Doni. A digital copy of the work was created, protected with a technology that prevents its reproduction, thus guaranteeing its uniqueness; in addition, a kind of digital hardware frame was produced as a support for the work. The Uffizi Museum certifies the authenticity of the reproduction, certifies the transfer of ownership with the NFT, and delivers all the material to the new owner. The NFT of the Tondo Doni – namely, the reproduction of the work on digital media – was then sold at a value of 240.000 Euro. After the sale took place, the reaction of the

Ministry of Culture was not long in coming: it prohibited entering into contracts with Cinello, the technical partner who made the NFT, for the digitization of museum works, which constitute heritage belonging to the public. In particular, the Ministry objected that, in addition to the failure to go through a public procedure, such a transaction raises a risk related to the transfer of intellectual property rights over the property. However, according to the ICHC, the entity to whose care the cultural property is committed can allow the reproduction for commercial purposes of the cultural property in return for a fee. In this regard, the Ministry has announced that it is in the process of drafting guidelines regarding NFTs and digital reproductions.

The great advantage of NFTs is that they contribute to preserve memory. Indeed, NFTs are permanently stored on the blockchain, and are therefore impossible to lose, and can be accessed from anywhere and at any time. In addition, NFTs can also represent 3D monuments or artworks, thus allowing them to be seen from any angle. The NFT of the Tondo Doni does not represent an isolated case of connection between culture and technology. The crypto art project Monuverse merges blockchain technologies with 3D digital art, pushing cultural heritage to the next level, aiming at enhancing the world's most iconic monuments with the aid of art and technology, connecting communities to local institutions around the world to create a new way to experience the human legacy.

Another interesting example of interaction between art and new technologies took place in February 2022, when the Unit Gallery in London, in collaboration with four Italian cultural institutions (the Pinacoteca di Brera, the Complesso Monumentale della Pilotta in Parma, the Veneranda Biblioteca Ambrosiana, and the Uffizi Museum) and the technical partner Cinello, organized the exhibition 'Eternalising Art History'. In the exhibition, digital reproductions with NFTs of six masterpieces belonging the aforementioned institutions were displayed. In addition to making these artworks accessible to a wider audience, the exhibition also aimed at selling limited-edition digital works. However, in Italy, these masterpieces born analog and subsequently digitized by the legitimate rights holders and/or owners of the physical asset must face the complex regulatory framework which sees – among others – the provisions and the related limitations of the ICL coexisting with the ones of the ICHC.

At this point it remains to be seen what policies cultural institutions will adopt with regard to the digitization of their heritage. Namely whether, in a profit-optimizing perspective and on the basis of partnerships with private individuals who provide the necessary technological support, they will aim for more control of digitization by creating unique (or limited edition) and authentic digital reproductions of greater economic value because of their uniqueness. Or, whether in a view of accessibility to cultural heritage, they will make reproductions free, making use of creative commons licenses, for example.

Similarly, video games are also becoming an increasingly important means

for the enjoyment of art and culture, especially among younger generations. Indeed, video games can provide an interactive and engaging form of storytelling in which history and culture are conveyed in an unconventional but effective way. Game designers aim to create a sense of immersion for players by replicating physical locations of particular cities. In doing so, designers may recreate notable landmarks, including buildings and artworks relevant in terms of arts and culture. For example, a video game was developed in 2022 to promote Sicily's cultural heritage. The game is called Augustus and is an immersive journey through some of the island's most beautiful archaeological sites. The idea is to promote the beauty of the island through a new, interactive and engaging tool, capable of bringing to the enjoyment of archaeological sites and monuments a young audience, often left on the margins of traditional initiatives aimed at promoting cultural heritage.

However, when Italian cultural heritage is being in any way included in the videogame, game designer should deal with the ICHC and investigate to which administration the cultural property belongs, and which fee are required for its reproduction. If the monument belonging to the Italian cultural heritage is reproduced with no modification whatsoever, authorization is absolutely mandatory. However, as previously mentioned, given the lack of clarity on the interpretation of the provisions of the ICHC, if the cultural property is creatively reworked and modified by the game designer, there is room to evaluate, on a case-by-case basis, whether the authorization from the entity to whose care the cultural property is committed, can be bypassed. In order to reach a positive conclusion, the modifications made usually shall have a substantial impact on the final representation of the monument in the videogame. However, the outcome of this analysis is uncertain, and depends on a number of different factors, such as the level of similarity between the original monument and the one depicted in the videogame, the way in which the monument is represented, the level of detail that the user can perceive, its role in the story, and so on. Furthermore, for a positive outcome, it is important not to mislead the public in suggesting that the videogame is somehow sponsored or associated with the cultural heritage property depicted or the relevant authority to whose care the property is committed, as this could give rise to claims of false endorsement and unfair competition.

To conclude, the current Italian legal framework regarding the reproduction for commercial purposes of cultural heritage properties and artworks protected by copyright represents a significant limitation not only for the fashion industry, but for society as a whole. The need to pay for reproduction discourages the use of images of cultural goods and works of art, thus limiting their dissemination around the world. Additionally, the interpretative uncertainty regarding the possibility to re-elaborate the image of such goods severely limits the creativity and freedom of expression of the public. In this situation, no one seems to benefit: neither the public entities to whose care the cultural property is committed, nor the authors holding the intellectual property rights to the works, nor the people, businesses, and

professionals who wish to showcase the beauties of our country to the world. This is a lose-lose situation, where the creativity of artists is limited, the public's ability to freely enjoy works is limited, and the ability of administrative entities to promote themselves and their works is limited.

It is therefore necessary to promote a legal framework that fosters creativity, freedom of expression, and the dissemination of art and cultural goods, without compromising the rights of authors and intellectual property owners. It is to be hoped that the Italian legislator will quickly intervene to correct the strong regulatory inconsistencies that currently characterize the national legal framework by providing a clear and broad interpretation of the concept of reproduction and introducing the freedom of panorama exception, extending it to commercial uses as well.

Covid-19 Pandemic and Medical Liability in Italy: How to Balance the Protection of Healthcare Professionals and Patients

Serena Cafarelli*

Abstract

The paper analyzes the impact of the Covid-19 pandemic on the medical liability regime in the Italian legal system. Italy has been one of the most impacted countries by the pandemic. Considering the huge number of infected patients and deaths, it is likely that the 'sanitary pandemic' will be followed by a 'judiciary pandemic'. In reality, the emergency may expose healthcare practitioners to several claims of culpability based on negligence anytime a medical error is judged directly related to the patient's injury, as in the event of misdiagnosis, poor treatment, or the death of Covid-19 positive people. The greatest risk is the underestimation of the complexities linked to the anomalous and unpredictable context within which the healthcare personnel have operated. The healthcare personnel faced challenges due to resource constraints and a lack of familiarity with the virus and its pathophysiology. In the absence of specific regulations to protect physicians' accountability, it is necessary to establish the definition of medical liability within the civil law domain by utilizing existing standards, including those outlined in the Italian civil code and the 'legge Gelli-Bianco'.

I. Introduction

Worldwide, Italy has been one of the countries most severely affected by the SARS-CoV-2 pandemic, with a remarkably high number of infected patients and an equally high number of related deaths upon contracting Covid-19.[1]

The huge disproportion between the increased clinical needs and the available resources resulted in a dramatic turn out of the situation. Indeed, due to the exponential increase of cases, the hospital-driven healthcare system had to provide its services to a growing number of patients despite the insufficient resources and the limited number of qualified personnel. Furthermore, due to the conspicuous cuts made to the public financing of the Italian healthcare system in recent years, the medical class was forced to face the pandemic in critical conditions.[2]

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[1] As reported on https://tinyurl.com/3dmewrzw (last visited 20 September 2023), in Italy, from 3 January 2020 to 5:35 pm CET, to 10 February 2023, there have been 25.488.166 confirmed cases of Covid-19 with 187.272 deaths, reported to World Health Organization (WHO).

[2] See Rapporto Osservasalute 2019, available at https://tinyurl.com/26w26mhp (last visited 20 September 2023).

The healthcare system in Italy exhibited inadequate preparedness to effectively manage the current emergency. The medical community has exerted substantial endeavors in tackling the pandemic, wherein hospitals, particularly intensive care units, have been strained to their maximum capacity. Healthcare professionals have also experienced arduous work schedules.[3]

Regrettably, given the significant number of infected individuals and associated fatalities, it is probable that the current 'sanitary pandemic' will be succeeded by a subsequent 'judiciary pandemic'. The emergency situation can potentially subject healthcare providers to liability claims for negligence. Medical errors, such as misdiagnosis, inadequate treatment, or the death of Covid-19 positive patients, can lead to potential legal disputes against healthcare professionals when a causal link is established between the error and the harm caused to the patient.[4]

In the coming years, the most pressing issue will be the potential underestimation of the complex obstacles posed by the unusual and unpredictable conditions in which healthcare professionals have operated.

Undoubtedly, it is imperative to consider all factors pertaining to this emergency. Several factors contribute to the challenges faced in managing the Covid-19 pandemic. These factors encompass the absence of comprehensive guidelines and a scientific comprehension of the virus and its associated pathology, the assignment of healthcare providers to Covid wards without sufficient expertise or specialization, and the conversion of abandoned hospitals into functional units to address the urgent healthcare needs arising from the pandemic. The entire Italian healthcare system has been forced to reshape itself, to master the crisis caused by the pandemic.

In recognition of the valuable role played by healthcare personnel, some countries have provided liability shields for doctors who have worked in the emergency context. These shields aim to balance conflicting interests: on one hand the social concept of the right to health, and therefore the need to protect patients affected by the virus, on the other, the need to protect doctors and, more generally, the healthcare professionals who had to deal with an unpredictable emergency scenario.[5]

For example, in the US many States provided immunity for the civil liability deriving from injury or death occurred to patients due to medical treatments provided by the State in response to the Covid-19 pandemic, and some States granted protection from criminal liability too.[6]

[3] G. Ricci, G. Pallotta et al, 'Consequences of Covid-19 Outbreak in Italy: Medical Responsibilities and Governmental Measures' *Frontiers in public health*, 8 (2020).

[4] G. Ponzanelli, 'La responsabilità sanitaria e i possibili contenziosi da Covid' *Giustiziacivile.com* (2020).

[5] A. Cioffi and R. Rinaldi, 'Covid-19 and medical liability: A delicate balance' *Medico-Legal Journal*, 88, 187-188 (2020).

[6] V. Gutmann Koch, 'Crisis Standards of Care and State Liability Shields' *San Diego Law Review*, 975 (2020).

Granting this protection should not be interpreted as a means to ease their criminal responsibility. It is indeed necessary to distinguish the damage that occurred due to the emergency situation, from the damage that occurred during the emergency, and therefore to distinguish the material causality from the mere temporal occasionality.[7] In fact, the state of emergency cannot represent a screen behind which to hide any imprudence or negligence committed by the doctors or the hospitals during the emergency.

In order to limit the criminal liability of physicians in the event of death or injury caused in an emergency situation, a criminal shield has been implemented in Italy, limiting the liability to egregious negligence.[8] The present regulation also provides specific indices to exclude gross negligence.[9]

On the other hand, such shield has not been provided for civil liability. As a matter of fact, during the conversion of the so-called Law Decree 'Cura Italia'[10] into Law, the introduction of specific rules to limit the civil liability of doctors and hospitals[11] was proposed, but the amendments suggested, were withdrawn before the discussion reached the Senate. According to these amendments, the healthcare workers would have been held liable only if the damage caused to the patient was due to misconduct or gross negligence. More specifically, the gross negligence in this case, implies an unjustified violation of the *leges artis* ie, the basic principles governing the medical profession.

In the civil law field, a provision that grants protection to the healthcare personnel called to deal with the Covid-19 emergency, seems to be amiss.[12]

Therefore, it is necessary to assess whether the in-force rules provided by the Italian legal system in this field limit, somehow, the healthcare workers' responsibility.

[7] G. Comandè, 'La responsabilità sanitaria al tempo del coronavirus … e dopo' *Danno e responsabilità*, 301 (2020).

[8] Art 3 *bis* of decreto legge 1 April 2021 no 44 - as converted with modification by Legge 28 May 2021 no 76 - states that 'the facts referred to in Arts 589 and 590 of the Italian Criminal Code, committed in the exercise of a health profession and which are caused by an emergency situation, are punishable only in case of gross negligence'.

[9] Art 3 *bis*, para 2 of decreto legge 1 April 2021 no 44 states that the judge, in order to assess the degree of negligence, may take into account 'the limited scientific knowledge on the diseases caused by SARS-Cov- 2 and on the appropriate therapies attainable at the time, as well as the lack of human and material resources available in relation to the number of cases to be treated simultaneously, as well as the lower degree of experience and technical knowledge possessed by non-specialized personnel employed to deal with the emergency'.

[10] Decreto legge 17 March 2020 no 18.

[11] See M. Capecchi, 'Coronavirus e responsabilità sanitaria: quali prospettive di riforma' *Rivista responsabilità medica* (2020).

[12] G. Facci, 'Covid 19, medicina delle catastrofi e responsabilità sanitaria' *Giustiziacivile.com* (2020).

II. The Rules of Medical Liability in Italy: The Double Compensation Track Outlined by the 'Legge Gelli-Bianco'

In the Italian legal system, medical liability is thoroughly disciplined by the so-called 'legge Gelli-Bianco'.[13]

The innovations introduced by this Law specifically focus on the prevention of health risk and on patient safety.[14]

The provision of safe treatments, which do not cause harm to the patient, in accordance with the doctor's code of ethics, is the foundation of what is considered 'good health care'.

Art 1 of the legge Gelli-Bianco defines the concept of safe treatment as a 'constitutive part of the right to health, pursued in the interest of the individual and of the community'. In the light of this definition, the right to health – a pillar of our constitutional system – is not a mere claim to psycho-physical integrity but rather, it must be considered as an aspiration to well-being in a global sense, and it is based on both concepts of freedom of cure and right to access safe health care services.[15]

The abovementioned Law means to address and solve some of the most relevant problems, such as the high number of disputes for 'medical malpractice', the exponential increase of the 'costs of compensation' as well as the widespread of 'defensive medical practices'.[16] It also aims to rebalance the relationship between the doctor and the patient.

Indeed, the legge Gelli-Bianco aims to reconcile conflicting interests: on the one hand there's the need to guarantee a better quality, efficiency, and safety of the cures to all patients, as well as a full protection for any damages caused by medical malpractice; on the other hand, it needs to guarantee the serenity of action of the health care providers.[17]

The aforementioned goals are pursued through a series of provisions that can be summed up as follows: the channeling of responsibility towards healthcare

[13] Legge 8 March 2017 no 24 'Disposizioni in materia di sicurezza delle cure e della persona assistita, nonché in materia di responsabilità professionale degli esercenti le professioni sanitarie'.

[14] According to definition by Charles Vincent, the patient safety consists in avoiding, preventing, and mitigating adverse events or damages caused by the health care itself, see C. Vincent, *Patient safety* (London: Blackwell Publishing Ltd, 2nd ed, 2010), 31.

[15] C. Coppola, 'Il nuovo sistema della responsabilità civile sanitaria' *Responsabilità civile e previdenza*, 1449 (2018).

[16] For 'defensive medicine' we refer to the set of actions and behaviors put in place by the healthcare professional in order to avoid the risk of compensation actions by patients. The prescription of diagnostic tests, procedures and visits that are not strictly necessary are known as practices of 'positive defensive medicine'. Instead, we refer to 'negative defensive medicine' in all those cases in which the doctor avoids performing certain procedures or even taking charge of the patient to protect himself from the risk of legal disputes. A clear illustration of the problems related to the defensive medicine phenomenon is given by C. Granelli, 'Il fenomeno della medicina difensiva e la legge di riforma della responsabilità sanitaria' *Responsabilità civile e previdenza* (2018).

[17] A. Astone, 'Profili civilistici della responsabilità sanitaria (Riflessioni a margine della l. 8 marzo 2017, n. 24)' *Nuova giurisprudenza civile commentata*, 1115 (2017).

facilities, which are assigned contractual liability pursuant to Arts 1218 and 1228 of the Italian Civil Code; the assignment of tort liability to healthcare professionals pursuant to Art 2043 of the Italian Civil Code; and the exclusion of criminal liability for healthcare professionals who have complied with the guidelines;[18] the application of the criteria established by the Arts 138 and 139 of the Italian Insurance Code, for the compensation for damages from medical malpractice, the provision of an insurance obligation to be paid by the hospital and the doctor, as well as regulating the direct action of the injured party against the insurance company[19]

Undoubtedly, the fulcrum of the reform of the legge Gelli-Bianco is represented by Art 7, entitled 'Professional liability of the healthcare personnel'. The Law in question makes a clear distinction between the responsibility of the healthcare facility - whether public or private - and the personal responsibility of the doctor, outlining the so-called 'double compensation track'.

In particular, the Art 7, para 1, legge no 24/2017, provides that the responsibility of the medical facility – public or private – called to provide healthcare-hospital assistance, has a contractual nature.

As a matter of fact, the aforementioned regulation, does not represent a novelty:[20] the Italian Case Law had already stated that upon accepting a patient, the hospital finalizes what is known as a healthcare assistance contract. [21]

This unconventional agreement encompasses a variety of services, including diagnostic procedures, standards for welfare and assistance, and therapeutic

[18] The guidelines are directives addressed to healthcare professionals, recommendations of clinical behavior, necessary to help doctors and patients decide on the most appropriate therapeutic approach for the specific case. In the absence of guidelines, the doctor is required to follow good clinical care practices, as expressive indications of the leges artis, even if not formalized. According to the provision of Art 7, para 3, of the legge Gelli-Bianco, the judge in formulating the liability charge to the doctor must consider the observance of guidelines and best practices, and he has to decrease the amount of the due compensation. About the role and the relevance of guidelines in the attribution of civil liability see M. Franzoni, 'Colpa e linee guida nella nuova legge' *Danno e responsabilità*, 271 (2017).

[19] G. Ponzanelli, 'Medical malpractice: la legge Bianco Gelli' C*ontratto e Impresa*, 356, 358 (2017).

[20] R. La Russa et al, 'La riforma della responsabilità sanitaria nel diritto civile: l'istituzione del «doppio binario» ed il nuovo regime assicurativo, tra obbligo di copertura e possibilità di autotutela' *Responsabilità civile e previdenza*, 352 (2019).

[21] Corte di Cassazione 26 January 2006 no 1698, available at www.dejure.it, according to which the relationship established between the patient and the healthcare structure has its source in an atypical contract, with corresponding services, from which, against the patient's obligation to pay the consideration, arises for the nursing home, a series of obligations: in fact, alongside those the board and lodging, there is also an obligation of making available the auxiliary medical and paramedical personnel, as well as the obligation to provide all the necessary medical equipment, also in view of any potential complication or emergency. Therefore, the responsibility of the healthcare facility towards the patient has a contractual nature and can arise from the non-fulfilment of the obligations directly attributed to the structure, pursuant to Art 1218 of the Civil Code, or it can arise – pursuant to Art 1228 of the Civil Code – from the negligent behavior of the healthcare professionals who operate within the structure, even in the absence of a subordinate employment relationship.

guidelines. Additionally, it imposes organizational responsibilities on the healthcare facility, mandating that treatments be administered within a suitable structural framework.[22] Therefore, the healthcare facility is required to provide a complex service, which is not limited to the administration of medical care, but includes further obligations, such supplying medical and paramedical personnel, medicines, and all the necessary technical equipment.[23]

Furthermore, the healthcare facility's contractual liability can be either a direct or an indirect one. The former is related to the non-fulfillment of structural requirements, pursuant to Art 1218 of the civil code. In this case the responsibility is a consequence of the so-called organizational deficit of the structure. The latter is, instead, related to the behavior of healthcare professionals, pursuant to Art 1228 of the Italian Civil Code. This provision states that if the debtor, in fulfilling the obligation, uses the work of third parties, he is also liable for the willful or negligent behavior of the latter. In these cases, the healthcare structure may file a claim against the professionals pursuant to Art 9 of legge no 24/2017.[24]

Consequently, the hospital, or healthcare facility, bears contractual responsibility for any harm inflicted upon the patient as a result of breaching the obligations outlined in the healthcare assistance agreement, up to the extent that the provision of services becomes impossible due to an unforeseeable circumstance.

As far as the doctor's position is concerned, Art 7 para 3 of the abovementioned legge Gelli-Bianco, qualifies the related responsibility as a tort.[25]

The current provision states that employed doctors, and more generally all those who for several reasons carry out their activity within a healthcare facility or under an agreement with the National Healthcare Service, are liable, pursuant to Art 2043 of the Italian Civil Code.

Of course, as the abovementioned Law itself specifies, the tort law does not apply to the doctor who, although operating within a healthcare facility, has acted on the basis of a fiduciary contractual relationship with the patient. In that case the doctor will be liable for the damages caused pursuant to Art 1218 of the Italian Civil Code,[26] and his qualified diligence will be parameterized to the nature of the activity performed, according to the provision of Art 1176 para 2 of the Italian Civil Code. Qualifying the doctor's responsibility as a tort, means overcoming the theory of 'qualified social contact'.

In fact, before the introduction of the legge Gelli-Bianco, the Italian Supreme Court of Cassation considered the liability of the healthcare professional as liability

[22] M. Faccioli, *La responsabilità civile per difetto di organizzazione delle strutture sanitarie* (Pisa: Pacini editore, 2018), 135.

[23] A. Astone, n 17 above, 1117.

[24] M. Hazan, 'Alla vigilia di un cambiamento profondo: la riforma della responsabilità medica e della sua assicurazione (DDL Gelli)' *Danno e responsabilità*, 75, 82 (2017).

[25] A. Palmieri, 'La riforma della responsabilità medica. La responsabilità del medico' *Questione Giustizia,* 163 (2018).

[26] ibid

for non-fulfillment through the application of the 'social contact' theory.[27]

In other words, it was believed that between the doctor and the patient there was a legally relevant relationship, which implied protective and informative obligations on the doctor's behalf.[28]

The violation of these obligations gave rise to liability for non-fulfillment, according to the Arts 1218 *et seq* of the Italian Civil Code.

The primary objective of the 'social contact' theory was to provide advantageous conditions for the claimant by shifting the burden of proof and facilitating the compensation process. Indeed, given the burden of proof framework established for contractual liability, it was comparatively more feasible for the afflicted patient to secure recompense. As per the regulations delineated by the Supreme Court of Cassation,[29] the creditor, in this case the damaged patient, only needed to prove the contract (or social contact) with the doctor and the worsening of the pre-existing pathology or the onset of a new pathology; while the doctor, as a debtor, had to prove either the correct fulfillment of his obligations or the unattributable cause. This regime ended up placing excessive burden on the healthcare professional.[30]

In the realm of medical liability, the 'social contact theory' can be deemed obsolete, as the legge Gelli-Bianco explicitly stipulates in Art 7, para 3, that a doctor, in cases where no contractual agreement exists with the patient, can be held accountable for damages inflicted upon the patient in a non-contractual manner, in accordance with Art 2043 of the Italian Civil Code.

Basically, the previous law concerning medical responsibility[31] already contained a reference to Art 2043 of the Italian Civil Code, however, it was a non-technical one and raised many doubts concerning its interpretation. The Art 7 of the legge Gelli-Bianco intended to clarify, once and for all, the doubts arisen on the nature of the healthcare professional's liability. The reform can therefore be read as an

[27] The theory of 'qualified social contact' was elaborated by the German doctrine in the 1940s and subsequently implemented by Italian doctrine. It implies the liability due to the violation of pre-existing protection and collaboration duties. These obligations descend from the qualified social contact between the involved parties, such as the relationship between the doctor and the patient. So, the source of the liability is neither the violation of the principle of *neminem laedere* nor breach of a contract, but instead the infringement of independent protection obligations. Extensively illustrated by C. Castronovo, *Tra contratto e torto. L'obbligazione senza prestazione*, *La nuova responsabilità civile* (Milano: Giuffrè, 2006), 443.

[28] Among the most important judgements on this topic, we indicate Corte di Cassazione 22 January 1999 no 589, *Corriere giuridico*, 441 (1999), which specifies that the absence of a contract certainly cannot make the doctor's professionalism fail. The doctor has behavioral obligations towards those who have relied on this professionalism by coming into contact with him. Therefore, his liability cannot be traced back to Art 2043 of the Italian Civil Code.

[29] Corte di Cassazione-Sezioni unite 11 January 2008 no 577, *Danno e respo*nsabilità, 788 (2008), commented by G. Vinciguerra, 'Nuovi (ma provvisori) assetti della responsabilità medica'.

[30] G. Alpa, 'Un bilancio quinquennale della riforma della legge n. 24 del 2017 sulla sicurezza delle cure e la responsabilità professionale degli esercenti le professioni sanitarie' *Responsabilità medica,* 167, 171 (2022).

[31] Decreto legge 13 September 2012 no 158, converted into legge 8 November 2012 no 189 (the so-called Legge Balduzzi).

expression of the legislator's will to recover the non-contractual nature of the doctor's liability.[32]

This definition holds particular relevance. In fact, in accordance with the regime of non-contractual liability, the process of obtaining compensation for the injured patient becomes more intricate. In the context of non-contractual liability, it is important to note that the burden of proof is reversed. Consequently, the onus falls upon the party that has suffered harm to establish all the necessary elements of the case. These elements include demonstrating the existence of damage, establishing a causal connection, proving imputability, and providing evidence of willful misconduct or negligence. Moreover, the entitlement to receive reparation for non-contractual harm becomes time-barred after a period of five years, as opposed to the customary ten-year timeframe applicable to contractual liability.[33]

On the other hand, considering that to the healthcare facility in itself is attributed a contractual liability, makes it easier for the injured patient to obtain a compensation from the structure in case of medical malpractice.

Therefore, the goal pursued by the legislator, through the double compensation system, seems to be that of funneling the judicial initiatives against the healthcare structures, rather than against the individual healthcare providers. The model of responsibility outlined by the legge Gelli-Bianco reform seems to be focused on the healthcare facilities, considering them as a subject capable of preventing and managing the risks that result from the provision of healthcare services.[34]

Considered that this is, in summary, the framework of the current in-force rules in the Italian Legal System on medical liability, we deem it necessary to assess the impact of the Covid-19 pandemic. In fact, in the absence of *ad hoc* provisions, it is necessary to set the current rules against the emergency scenario to understand which responsibilities can be ascribed to the doctors and which, instead, can be referred to the healthcare facilities called to operate in the delicate and unpredictable context of the pandemic.

III. The Civil Liability of the Doctors in the Covid-19 Emergency

In the context of the Covid-19 pandemic, three distinct forms of individual responsibility can be discerned and ascribed to medical professionals.

A first type of responsibility concerns the cases of misdiagnosis. A contractual or non-contractual liability can be attributed to the doctors for having omitted or having delayed the diagnosis, and therefore for not having promptly recognized the presence of the virus if the symptoms of the disease worsened due to the

[32] See C. Castronovo, 'Swinging malpractice. Il pendolo della responsabilità medica' *Europa e diritto privato*, 847, 853 (2020).

[33] R. La Russa et al, n 20 above, 358.

[34] M. Hazan, n 24 above, 82.

doctor's error.[35]

Actually, in this specific case, granting a liability protection to the doctor, doesn't seem necessary: in fact, even during the first wave of the health emergency, the Covid-19 symptoms were known and easily identifiable, and the infection was ascertainable with research methodologies considered reliable by the scientific community.[36] Therefore, it is deemed unnecessary and inappropriate to limit or exclude the doctor's responsibility for the case of misdiagnosis.

The second form of responsibility which may concern the doctors relates to the therapeutic error. This refers to the cases in which the doctor has provided an inadequate treatment to the patient affected by Covid-19, causing a damage consisting in the intensifying of the conditions, or even, in the worst-case scenario, in the patient's death. In this case, it seems necessary to delimit the doctor's responsibility.

Indeed, the health emergency was characterized since the very beginning by the novelty of the virus – as well as the novelty of the related pathology – and by its high infectivity, as well as for the absence of guidelines and best practice rules regarding the treatments to be provided to the infected patients.[37]

This said, civil responsibility cannot be attributed to the health personnel without considering all these factors. It is therefore necessary to identify the behavior required by the doctor in this delicate and unpredictable context.

As a matter of fact, in the absence of what we may refer to as a 'civil shield' introduced by the emergency legislator, the most suitable regulation fit to delimit the doctor's individual responsibility, appears to be Art 2236 of the Italian Civil Code.[38]

This Art provides a limitation of liability particularly relevant for the doctors.[39] It generally limits the responsibility of the worker to cases of gross negligence, whenever the worker is called to solve technical problems of special difficulty. The abovementioned Art is applicable not only to the contractual liability, but to

[35] M. Faccioli, 'Covid-19 e responsabilità civile sanitaria' *Risarcimento danno e responsabilità* (2021), available at https://tinyurl.com/57xex8x7 (last visited 20 September 2023).

[36] M. Faccioli, 'Il ruolo dell'art. 2236 c.c. nella responsabilità sanitaria per danni da Covid 19' *Responsabilità medica*, 2 (2020).

[37] I. Sardella, 'La responsabilità sanitaria ad un anno dalla pandemia: quali limitazioni per sanitario e la struttura?' *Danno e responsabilità*, 542 (2021).

[38] On the applicability of Art 2236 of the Italian Civil Code to define the liability of doctors in the Covid-19 emergency context see M. Franzoni, 'La responsabilità sanitaria ai tempi della pandemia' *Jus*, 91, 98, (2021).

[39] The 'Report to the Italian civil code' available at https://tinyurl.com/yhc4wz4e (last visited 20 September 2023), states at no 917 that the Art 2236 aims to reconcile 'two opposing needs, that of not mortifying the professional's initiative with the fear of unfair reprisals by the client in case of failure, and the reverse need of not indulging towards unthinking decisions or reprehensible inertia of the professional. The code found the equilibrium point in the application of the normal liability provisions, establishing, only for those cases in which technical problems of special difficulty occur, that the professional may be exempted from liability for slight negligence'.

tort liability too.[40] Therefore, this provision is useful for the doctor whether or not he or she has a contractual relationship with the patient.

The application of the present provision in Italian Case Law is predominantly observed in exceptional and extraordinary circumstances, particularly in cases that have not received sufficient analysis from the scientific community.[41]

Hence, it can be argued that this regulation is well-suited to address the exigencies of the emergency situation. In fact, one of the main characteristics of the health emergency by Covid-19, as said, has been the lack of knowledge by the scientific community of the virus – and of the related pathology – at the least as far as the first wave is concerned.

However, the Supreme Court of Cassation limits the application field of this rule to the doctor's inexperience, leaving out from its provision, what relates to the doctor's imprudence and negligence.[42]

In any case, this restrictive interpretation does not preclude the applicability of the present regulation to cases of therapeutic error committed in the context of the Covid-19 emergency. Therefore, in order to limit the doctor's liability for inadequate treatment of the patient, within the pandemic context, a civil liability shield is not necessary, as the in-force regulations – and in particular, the aforementioned Art 2236 of the Italian Civil Code – seems to be sufficient.[43]

However, it is imperative to differentiate between the initial wave of the health crisis and the subsequent stages. The latter were undeniably marked by an enhanced understanding of the virus, the pathology of Covid-19, and the appropriate treatment protocols. The determination of the doctor's liability in the subsequent phases, specifically in cases of therapeutic error, necessitates a thorough assessment by a judge.

A third and final hypothesis of individual responsibility concerns cases in which the doctor's negligent or imprudent behavior has determined the diffusion of the virus within the hospital (or the healthcare facility).

The problem here concerns the probative plan: the difficulty in these cases lies in proving the causal link between the doctor's conduct and the infection of other patients admitted to the hospital.[44] Indeed, this specific hypothesis of liability appears to be more directly attributable to the healthcare facilities.[45]

IV. The Position of the Healthcare Facilities Within the Pandemic Scenario

[40] See Corte di Cassazione 6 May 1971 no 1282, *Foro Italiano*, 1476 (1971).

[41] Corte di Cassazione 2 February 2005 no 2042, *Sanità pubblica e privata*, 68 (2005).

[42] Corte di Cassazione 16 February 2001 no 2335, *Responsabilità civile e previdenza*, 580 (2001).

[43] G. Ponzanelli, n 4 above.

[44] M. Faccioli, n 35 above.

[45] ibid

In relation to the healthcare facilities' position in the pandemic context, there are different types of responsibilities which can be attributed to them. A first form of liability concerns the so-called 'nosocomial damage'. Nosocomial infections are defined as infections contracted by patients due to their presence on the hospital's premises.[46]

In order to reduce the occurrence of these infections, healthcare facilities are required to constantly monitor the pathogens circulating inside the most hazardous wards. In addition to this, they are required to carry out operations such as the sanitization and disinfection of the environments, and, obviously, of all the instruments.

Since healthcare facilities are attributed a contractual liability, the regime outlined by the Art 1218 of the Italian Civil Code, is applied also in the case of the so called 'nosocomial infections'.[47]

This is reflected in the division of the burden of proof: the patient, who wants to obtain a compensation for the 'nosocomial damage', is required to prove the contract with the healthcare facility and the onset of the infection, as well as the causal link with the active/passive conduct of the staff working within the structure. The healthcare facility, as a debtor, must demonstrate that the professional service was performed diligently, or that the non-performance or delay was caused by an unforeseen circumstance that made performance impossible.[48]

In the light of these indications, the responsibility of the healthcare facility for 'nosocomial infection' from Covid-19 must be interpreted on a case-by-case basis.

For example, we shall analyze the case of those patients admitted to healthcare

[46] A. Bonelli, 'Responsabilità professionale ed organizzativa in materia di infezioni ospedaliere' *Rivista Italiana Di Medicina Legale*, 471 (2012).

[47] L. Cannata, L. Molinari and G. Tomei, 'La responsabilità per infezioni nosocomiali' *Danno e responsabilità*, 547, 549 (2021).

[48] In this respect, according to Corte di Cassazione 11 November 2019 no 28991, 'where the contractual liability of the medical practitioner is deduced in case of the non-fulfilment of his professional diligence, damaging the right to health, it is on the injured party to prove, also by means of presumptions, the existence of a causal link between the aggravation of the pathological situation (or the onset of new pathologies) and the conduct of the medical practitioner, while it is the burden of the debtor to prove, if the creditor has discharged its burden of proof, the unforeseeable and unavoidable cause of the impossibility of the exact performance of the service', commented by C. Scognamiglio, 'La Cassazione mette a punto e consolida il proprio orientamento in materia di onere della prova sul nesso di causa nella responsabilità contrattuale del sanitario' *Corriere giuridico*, 307 (2020).

Recalling the aforementioned principle of law, and applying it to the subject of nosocomial infections, Corte di Cassazione 22 February 2023 no 5490, ruled that 'it is on the injured party to prove the direct causal link between the infection and the healthcare service; once the burden of proof concerning the causal link has been discharged by the patient, even by means of presumptions, it is up to the healthcare facility, in order to free itself from any liability for the damages suffered by the patient, to provide proof of the specific unforeseeable and unavoidable cause of the impossibility of the exact performance of the service, the latter not being reductively understood as a mere abstract provision of medical devices potentially capable of averting the risk of nosocomial infections for patients, but as the impossibility of the exact performance of the protective service directly and immediately referable to the individual patient concerned'.

facilities for other diseases, who, during the hospitalization, have contracted the SARS-Cov-2 infection. In these cases, the liability attributable to the structures is based on the failure on their side, to take all the necessary measures to avoid the spreading of the virus within the hospital.

Undoubtedly, within the emergency context, it is imperative to consider various factors, including the disparity between patient volume and resource availability, as well as the novelty of the disease and the lack of established protocols aimed at preventing viral transmission within healthcare facilities. However, according to the Italian Case Law, the sterilization of all instruments, as well as the sanitisation and disinfection of all environments, and the isolation of the sick patients, are ordinary procedures and must be always guaranteed by any healthcare facility.[49]

Therefore, it seems difficult to outline an *a priori* exclusion of responsibility for cases of infection from Covid-19 in a hospital setting.

In any case, although there is no legal shield that can limit this liability, the healthcare facilities can always free themselves from any liability by proving that they have followed all the *leges artis* protocols regarding sanitisation and disinfection, and proving, therefore, they have adopted all the precautionary measures to avoid the spreading of the virus. Alternately, they may escape further liability by proving that the failure to fulfil any statutory obligations was caused by an obstruction that was objectively unforeseeable and inescapable.[50]

On the other hand, there can also be a responsibility for organizational shortcomings attributable to the healthcare facility as a whole, for the activities of diagnosis and treatment administration to the patients affected by Covid-19.

For instance, we can take the example of all those patients who have suffered a damage due to the lateness of the hospitalization, because of the overcrowding of the intensive care wards. In these cases, the attribution of the responsibility requires to verify if the risk related to the health emergency, was a predictable one.

In fact, the organizational problems connected to the emergency must necessarily be taken into account. In particular, the following elements must be considered: the limited number of beds in the intensive care wards, the lack of ventilators, the overcrowding of all hospital units, the reduced availability of Covid-19 test kits (swabs).[51]

It, therefore, seems difficult to impute the responsibility for an organizational shortcoming, given that the healthcare facilities – at least in the first wave of the emergency – were completely unprepared to cope with an extraordinary event such as the Covid-19 pandemic.[52]

Therefore, in the absence of specific rules, an exclusion of contractual liability can be provided through the concept of the unattributable cause.

[49] M. Faccioli, n 35 above.
[50] M. Faccioli, n 36 above.
[51] G. Ponzanelli, n 4 above.
[52] M. Faccioli, n 35 above.

Factors such as the exceptional nature of the pathology and the absence of specialized departments, along with the objective shortage of both the equipment and the number of beds in the intensive care wards, complete the reasoning behind the release of the proof necessary to exclude the healthcare facilities' liability in cases of organizational shortcomings.

However, it is worth asking whether these considerations can be applied to all the phases of the health emergency, or whether it is more correct to imagine an informal distinction between the first wave of the health emergency and the subsequent phases.[53]

V. Doctor's Liability for Anti-Covid Vaccine Damage

Another relevant issue connected to the medical responsibility related to the Covid-19 emergency concerns the doctor's liability for the damage caused by the administration of the vaccine.[54]

The efficacy of the Covid-19 vaccination has been demonstrated as a preventive measure, effectively mitigating the spread of infection, diminishing the incidence of hospitalizations, and reducing mortality rates.[55]

Of course, as any other medical treatment, it is not free from adverse reactions. Luckily, most of the reported cases present mild symptoms[56] but, the rare cases which have presented serious negative effects, could expose the healthcare providers, who administered the vaccination, to legal action. It must be noted that during the first period of the pandemic, healthcare personnel had to work under conditions of extreme scientific uncertainty in relation to the Covid-19 vaccinations.[57]

In order to support and reassure the health workers involved in the vaccination campaign, the legislator has introduced a criminal shield for them.[58]

In particular, Art 3 of the Decreto Legge 1 April 2021 no 44[59] states that responsibility for the crimes of manslaughter and culpable personal injury, as referred to in Arts 589 and 590 of the Italian Criminal Code, occurring as a result of the administration of a Covid-19 vaccine is excluded when the use of the

[53] I. Sardella, n 37 above, 545.

[54] As reported by the World Health Organization on https://tinyurl.com/3dmewrzw as of 22 January 2023, a total of 150.074.539 vaccine doses have been administered in Italy.

[55] P. Frati et al, *No-Fault Compensation and Anti-Covid-19 Compulsory Vaccination: The Italian Context in a Broad View*, 2022, available at https://tinyurl.com/sj5cdfuv (last visited 20 September 2023).

[56] As reported by Consiglio di Stato 20 October 2021 no 7045, available at www.dejure.it, the damages resulting from the administration of the vaccine for SARS-Cov-2 must be considered, given the extreme rarity of the occurrence of serious and correlated events, to be complying with a criterion of statistical normality.

[57] F. Beccia et al, 'Covid-19 Vaccination and Medical Liability: An International Perspective in 18 Countries' *Vaccines*, 10, 1275 (2022).

[58] E. Minervini, 'Vaccinazione ed epidemia da Covid-19' *Danno e responsabilità*, 600-601 (2021).

[59] Converted with amendments into Legge 28 May 2021 no 76.

vaccine complies with the indications contained in the marketing authorizations issued by the Ministry of Health.[60]

On the other hand, indemnity plans have been introduced in order to protect people harmed by the Covid-19 vaccination.

Indeed, para 1-*bis* of Art 20 of Decreto Legislativo 27 January 2022 no 4,[61] added to the Art 1 of the Law no 210/1992,[62] states that:

> 'The indemnity referred to in paragraph 1 is due, under the conditions and in the manner established by this law, also to those who have suffered injuries or infirmities, from which a permanent psycho-physical impairment has resulted, due to the anti-SARS Cov-2 vaccination, recommended by the Italian Health Authority'.

The aforementioned Law no 210/1992 provides an indemnity to people who have been harmed by the compulsory vaccination; however, over time the Italian Case Law has extended the application of this law also to subjects who have suffered injuries and/or infirmities due to the administration of non-mandatory but recommended vaccines.[63]

There is no discernible distinction between mandatory vaccines and strongly recommended vaccines: the indemnity, in essence, serves to recompense the individual sacrifice incurred in light of the benefits accrued by the community. Hence, the entitlement to compensation arises from the provisions outlined in Arts 2 and 32 of the Italian Constitution, which state respectively the principles of the 'social solidarity' and the 'protection of health as a collective interest'.[64]

As known, the vaccines against SARS-Cov-2 were initially mandatory only for the healthcare providers, while they were only strongly recommended for the rest of the population. The massive vaccination campaign, and the introduction of the so-called 'enhanced green pass', necessary for the exercise of constitutionally guaranteed rights only by vaccinated subjects, has convinced a large part of the population to be vaccinated.[65]

Given the uncertainty related to the side effects of the anti-Covid vaccines and to the potential adverse reactions, the individuals who were vaccinated have put their health at risk for the protection of a collective interest. In fact, all the

[60] About the criminal shield against vaccination damage see A. Massaro, 'Responsabilità penale per morte o lesioni derivanti dalla somministrazione del vaccino anti SARS-Cov-2: gli "anticorpi" dei principi generali in materia di colpa penale' *Rivista italiana di medicina legale,* 683-703 (2021).

[61] Converted into Legge 28 March 2022 no 25.

[62] Legge 25 February 1992 no 210 recognizes compensation to subjects irreversibly damaged by vaccinations, transfusions, and administration of infected blood products.

[63] According to Corte costituzionale 26 April 2012 no 107, available at www.dejure.it, the reason that determines the right to the indemnity in favor of subjects damaged by transfusions or compulsory vaccinations, is the collective interest in health and not the obligatory nature of the treatment, which is just a tool to pursue the aforementioned interest.

[64] Corte costituzionale 16 October 2000 no 423, *Danno e responsabilità*, 490 (2001).

[65] Minervini, n 58 above, 601.

vaccinated people, contributed to control the infection, and as a consequence, to lighten the burden of the National Healthcare System. The indemnity, therefore, aims to compensate these people for their individual sacrifice that has determined a collective advantage.[66]

Those who have suffered a permanent psycho-physical impairment as a result of the SARS-Cov-2 vaccination (whether it was required or merely recommended by the Italian Health Authority) have the right to an indemnity that is not to be considered compensatory, as it is not intended to repair an unjust damage related to a liability case, but rather has a character of social solidarity.[67]

The right to obtain the indemnity is recognized only where there is a causal link between the administration of the vaccine and the damage suffered by the person receiving the medical treatment.[68]

It is sufficient to establish the causal relationship between the injury sustained and the vaccination treatment under Art 1 of Law no 210 of 1992, despite the fact that, under Art 2043 of the Italian Civil Code, the injured party must demonstrate either the illegal act, the unjust damage, the willful misconduct, or the negligence and the causal link between the offence and the suffered damage. However, even if the indemnity is offered regardless of whether any fault exists, it does not fully restore the damage that was sustained.[69]

Anyway, nothing excludes that the injured party can also exercise a compensation action pursuant to Art 2043 of the Italian Civil Code. This can happen in the event that the patient is able to prove the subjective requisites of willful misconduct or negligence and the causal link existing between the unlawful conduct (even in the form of an omission), and the unfair damage.[70]

VI. Conclusions: How to Define Medical Responsibility in the Absence of a 'Civil Shield'

From the considerations above we can state that in the Italian legal system does not lack rules to define the civil responsibility of doctors and health facilities in the context of the Covid-19 emergency.

The individual liability of the doctors who operated in this difficult situation

[66] V. Restuccia, 'Danno da vaccino e responsabilità' *Diritto di famiglia e delle persone*, 1122, 1140 (2022).

[67] S. Foà, 'I danni da vaccino SARS-Cov-2 tra obblighi, raccomandazioni e «solidarietà irrinunciabile»' *Responsabilità civile e previdenza*, 1070, 1080 (2022).

[68] According to Corte di Cassazione 27 June 2022 no 20539, available at www.dejure.it, the injured party must only prove that he has suffered injuries or infirmities of such intensity as to have caused a permanent psycho-physical impairment, and that the damage suffered is a consequence of the vaccination.

[69] A. Iuliani, 'La fisionomia del danno e l'ampiezza del risarcimento nelle due specie di responsabilità' *Europa e diritto privato*, 137 (2016).

[70] Corte costituzionale 26 February 1998 no 27, *Foro italiano*, 1370 (1998).

could be defined through the application of the Art 2236 of the Italian Civil Code: in fact, the cases of damage caused to the patient by an inadequate treatment due to the doctor's incompetence, could be qualified as a case of special difficulty of the service provided in the emergency context, and therefore, the individual liability could be bound to a case of gross negligence.[71]

The healthcare facility, on the other hand, could be exempted from liability by proving one of the following: either that the professional obligations have been regularly fulfilled, or by providing proof of the non-attributable cause, pursuant the Art 1218 of the Italian Civile Code. The evidence of the latter can be provided in the light of the peculiar and anomalous characteristics of the health emergency.[72]

Therefore, it does not seem necessary to introduce further rules to protect healthcare professionals and healthcare structures who operated within the pandemic context.

However, it is still necessary to grant a full protection to the damaged patients and their heirs. The recommended solution to reconcile both the conflicting interest of the damaged patients and the healthcare providers, seems to be the introduction of an indemnity plan.[73]

Providing an indemnity plan means shifting the potential future claims from the level of responsibility to the level of social solidarity.[74]

The indemnity does not consist in a full reparation of the harm sustained, but it still offers an adequate consolation. Following all, the Italian Constitutional Court had previously determined that an exemption to the rule of full compensation for personal injury may be made if it is necessary to safeguard super-individual interests.[75]

Furthermore, as mentioned, the Italian legal system already has an indemnity plan in the sanitary field: the indemnity in favor of those irreversibly damaged by vaccinations, transfusions, and administration of infected blood products, provided by Legge 25 February 1992 no 210, which now also refers to the cases of damages caused by anti-Covid-19 vaccines.[76]

The implementation of a pandemic-specific indemnity scheme within the Italian legal system would contribute to achieving a balance between safeguarding the interests of medical practitioners and ensuring the well-being of patients. This scheme would provide appropriate financial compensation to affected parties, thereby avoiding undue detriment to the efforts of doctors and healthcare institutions

[71] M. Faccioli, n 36 above.

[72] G. Ponzanelli, n 4 above.

[73] B. Guidi, 'Una survey medico legale sulla responsabilità civile al tempo del Covid-19' *Danno e responsabilità*, 555, 558, (2021).

[74] G. Facci 'La medicina delle catastrofi e la responsabilità civile' *Responsabilità civile e previdenza*, 706, 722, 3 (2020).

[75] See Corte Costituzionale 16 October 2014 no 235, *Nuova giurisprudenza civile commentata*, 424 (2015).

[76] Legge 25 February 1992 no 210.

tasked with managing a worldwide crisis.[77]

The primary objective of this particular policy is to guarantee that healthcare providers are fully dedicated to patient care, without being burdened by concerns regarding potential legal actions in the future.

In light of the aforementioned circumstances, it is imperative to recognize that the entitlement to receive medical treatment should not impose an obligation of flawless performance on healthcare practitioners.

[77] The following have commented on the possibility of introducing compensation plans linked to the health emergency: G. Ponzanelli, 'Il fascino irresistibile dei piani no-fault' *Jus*, 125, 128 (2021); C. Scognamiglio, 'La pandemia Covid-19 tra funzioni della responsabilità civile e modelli indennitari' *Jus*, 132, 141 (2021).

Insights & Analyses

Credit Agreements for Consumers in the Event of Early Repayment

Carla Failla*

Abstract

Consistent interpretation is one of the main obligations related to the interpretation of national law in accordance with the acquis communitaire of the European Union. The main aspects of the principle of consistent interpretation will be highlighted in this article in order to analyze its application and its impact in a specific field, namely in the field of consumer credit. After examining the institution of consumer credit, with particular reference to early repayment, the Author analyses the challenges and difficulties in the application of the aforementioned principle in this matter. There will be some focus on the implementation of the Directive on credit agreements for consumers,[1] with particular reference to the Italian legal system – taking into account the so called Lexitor case[2] – which constitutes an interesting illustration of the necessarily binding effect of Court of Justice's interpretation upon national courts.

I. Introduction

Individual complaints before the Court of Justice of the European Union (ECJ), and its preliminary rulings in particular, are a fundamental instrument for defining new interpretations of the European law. However, its case law often promotes a reflection on more classical issues. The recent and well-known Lexitor case decided by the Court of Justice produced an unexpected and disruptive interpretation of Art 16, para 1 of the Directive on credit agreements for consumers,[3] raising questions regarding the duty of consistent interpretation imposed on domestic courts. This seems to be particularly true for the Italian legal system, as following the European Court ruling there has been a significant increase of different judicial and doctrinal interpretations, followed by a – misguided – intervention of the legislator, on which the Constitutional Court has finally intervened to resolve any

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[1] European Parliament and Council Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers [2008] OJ L133/66.

[2] Case 383/18 *Lexitor sp. z o.o.* v *Spółdzielcza Kasa Oszczędnościowo – Kredytowa im. Franciszka Stefczyka, Santander Consumer Bank S.A., mBank S.A.* [2019] ECR 702.

[3] Art 16 'Early repayment' of the European Parliament and Council Directive 2008/48/EC: '1. The consumer shall be entitled at any time to discharge fully or partially his obligations under a credit agreement. In such cases, he shall be entitled to a reduction in the total cost of the credit, such reduction consisting of the interest and the costs for the remaining duration of the contract. […]'.

possible controversial issues.[4]

In order to ensure consistent interpretation of the relevant legislation, adaptation of national law requires a particular caution in transposing European directives. Generally, European legal texts which are not directly applicable in the domestic legal system must be transposed into national law, having themselves only an 'indirect effect' on the internal legal system.

To this lack of direct effect is added – almost to complicate the process of European integration – a well-established line of case law of the Court of Justice, which actively uses its doctrine of indirect effect to promote the notion of creating an ever-closer Union.[5]

Although the above-mentioned Directive provides for maximum harmonisation, it has actually been – in part – a catalyst for different interpretations of the scope of a given rule in various national legal systems. As a result, the Court of Justice has been often called on to intervene and resolve interpretative doubts about its scope.

In particular, reference is made to Art 16, para 1 of the Directive which gives the consumer the right to discharge at any time fully or partially his obligations under a credit agreement. The amount of reimbursement due to the consumer that results from his right to early repayment raises questions concerning the possible interpretation to be given to the measure of the total cost of the credit and costs for the remaining duration of the contract. These parameters are identified by the reference standard in order to quantify the refund due to the consumer.

As will be seen in the rest of this paper, the Court of Justice – in a preliminary ruling – clarified the meaning of Art 16, para 1, holding that the right of the consumer to a reduction in the total cost of the credit in the event of early repayment includes all the costs imposed on the consumer. The final and binding decision of the Court of Justice has overturned the established practice in Italy, whereby reimbursement in case of early repayment was calculated with reference only to the costs linked solely to the duration of the contract, and not the fixed costs related to obligations prior to granting of the loan.

However, interpretation of the European Directive – although clarified by a judgment of the Court of Justice – does not always follow a course that is in line with the intention of the European legislator (as it should be). As will be more fully described in the second part of the article, the holding of the Court of Justice has not been fully incorporated into the Italian legal system, since the legislator even intervened with a provision partly in contrast with the Court's decision. That means the judgment was not properly upheld in the Italian legal order in breach of the binding effect of the Court's rulings. Despite this, the Italian Constitutional Court has recently intervened to resolve any possible doubt, imposing an interpretation of the rule in accordance with the Lexitor case. Thus, the Constitutional Court held

[4] Corte Costituzionale 22 December 2022 no 263.

[5] T.M.J. Möllers, 'The Principle of Directive-Compliant Development of the Law and the Contra Legem Limit' 16 *European Review of Contract Law*, 465 (2020).

that the legislature, by introducing a rule which differed from the content of the judgment of the Court of Justice – and thereby undermining a consistent interpretation of European Union law – had failed to fulfill its obligations under the Community legal order.

In particular, as will be seen in the following sections, the Italian legislator introduced a differentiated framework for contracts concluded before the entry into force of a rule adopting the interpretation provided by the European Court, thus violating the principle of retroactivity of the Court of Justice's preliminary rulings.

The first part of this paper is dedicated to the principle of consistent interpretation, and highlights that, although it could seem to be an inherent characteristic of the doctrine of consistent interpretation, legal uncertainty is easily overcome. The next section focuses on the evolution of the law in the event of early repayment in Italy after the Court of Justice's judgment and the consequent breach of the obligations arising from the Community legal order by the Italian legislature, which led to the declaration of constitutional illegitimacy of the domestic rule.

II. The Principle of Consistent Interpretation

Before examining early repayment and the interpretation process that led to the submission of the question of constitutional legitimacy of the domestic rule before the Italian Constitutional Court, it is necessary to briefly analyze the principle of consistent interpretation, which would in itself have provided the solution to the controversial interpretation.

The harmonization process of national law in light of the European integration project requires a teleological approach to adapting the traditional categories of domestic law to supranational law. The use of the large-scale judicial instrument by the ECJ has always had the aim of establishing principles not codified within the European system that might eventually enjoy full and effective implementation.

The concept and effective application of a doctrine of consistent interpretation within the wider framework of alignment of the various national regulatory systems for an increasingly uniform European law, reflects its fundamental importance as a way of progressing to a form of a full harmonization.[6] For this reason, the so-called gap in horizontal third-party effect – since only a Member State is obliged to implement the Directive – is limited by the introduction of the obligation of national authorities to interpret the law in a manner consistent with the Directive.[7]

The principle of consistent interpretation[8] is an unwritten rule of conduct,

[6] G. Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty' 22 *Oxford Journal of Legal Studies*, 397 (2002).

[7] T.M.J. Möllers, 'The Principle of Directive-Compliant Development' n 5 above.

[8] According to T.M.J. Möllers, the terms commonly used are 'principle of indirect effect' (P. Craig and G. de Búrca, 'EU Law' 6 *Oxford University Press*, 209 (2015)); L. Woods, P. Watson and M. Costa, 'Steiner & Woods EU Law' 13 *Oxford University Press*, 137 (2017), 'principle of harmonious interpretation' (P. Craig and G. de Búrca, 'EU Law' above) or 'principle of consistent interpretation'

primarily addressed to the national courts, aimed at resolving regulatory ordinary conflicts in a legal context characterized by heterogeneity of sources.[9] It creates both case law and an indirect form of primacy based on a direct dialogue between judges, where the national courts are subject to a systemic limitation,[10] whereby their autonomy in the interpretation of national law is inevitably influenced by the *acquis communitaire*.[11] Finally, it is an instrumental argumentative technique to ensure the effectiveness of the Union law, including – where appropriate – the fundamental rights protected by it, given that in this way domestic law, jointly and correctly interpreted, overcomes the aporia with that of the Union, by complying with it.

This obligation (to interpret national law in accordance with that of the Union) proceeds from the same proper functioning of the Union and – according to the Art 197 of the Treaty on the Functioning of the European Union (TFEU)[12] – is a matter of common interest. This is why national bodies – that is, national courts – cannot avoid this obligation; or better they can only avoid it by invoking the extreme hypothesis of 'counter-limits'.[13]

This obligation is also the result of a well-established line of case law promulgated by the European Court of Justice in its preliminary rulings:[14] on the one hand it

(L. Woods, P. Watson and M. Costa, 'Steiner & Woods EU Law' above); G. Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty' 22 *Oxford Journal of Legal Studies*, 397 (2002) – see T. M.J. Möllers, 'The Principle of Directive-Compliant Development' n 5 above. Anyway, 'directive-compliant interpretation' seems to be the best term because it is close to the definition used by the ECJ. See F. Rossi Dal Pozzo, 'Obbligo d'interpretazione conforme al diritto dell'Unione europea e principi generali a tutela del contribuente: alla ricerca di un difficile equilibrio fra interessi (talora) contrapposti' *Rivista italiana di diritto pubblico comunitario*, 847 (2013); G. Conway, 'The Limits of Legal Reasoning and the European Court of Justice' 22 *Cambridge University Press*, 86 (2012); L. Woods, P. Watson and M. Costa, 'Steiner & Woods EU Law' above; G. Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty' 22 *Oxford Journal of Legal Studies*, 397 (2002).

[9] T.M.J. Möllers, 'The Principle of Directive-Compliant Development' n 5 above.

[10] See P. Otranto, 'Note minime sulla riscrittura del rapporto libertà-autorità nel dialogo tra le corti' *Rivista italiana di diritto pubblico comunitario*, 719 (2013).

[11] Case 106/89 *Marleasing SA* v *La Comerical Internacional de Alimentaction SA* [1990] ECR 395; Case 91/92 *Faccini Dori* v *Recreb Srl* [1994] ECR 292.

[12] Art 197 of Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47: '1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest. 2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.

3. This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union'.

[13] Case 212/04 *Adeneler* v *Ellinikos Organismos Galaktos* [2006] ECR 443; Case 441/14 *Dansk Industri* v *Nachlass des Karsten Eigil Rasmussen* [2016] ECR 278.

[14] See Art 267 of Consolidated Version of the Treaty on the Functioning of the European

proceeds directly from the Treaties[15] and, on the other hand, it is essentially identified with the judicial process of the Court of Justice. National authorities, within certain limits and conditions, are required to apply the letter and purpose of the Union rule – taking into account the system of values and principles from which the matter originates – as necessary benchmarks for defining the content of national law.

The Court has often moved towards a form of self-integration in the construction of new rules or in clarifying the content of certain rules characterised by indeterminacy. It is a well-known mechanism that if the system is lacking in precise normative declarations, jurisprudential activity takes over, specifying the duties imposed by the legal system and making concrete some elements of unwritten law.

At first glance, the examination of how this principle is applied at the European level may reveal some similarities with the general technique of consistent interpretation in national systems, where a conflict between the Constitution and another lower ranking norm is solved by construing the latter consistently with the former. In Italy, although there has recently been a recentralization of constitutional justice, consistent interpretation has always aimed at involving the Constitution in the legal system and has resulted in making the judiciary emerge as a third party alongside the legislative and executive power to fulfil the scope of application of the technique of consistent interpretation.[16] Indeed, the need to fill regulatory gaps is inherent in any legal system: and the Court of Justice thus, in the process of European integration, embodies a strictly constitutional concept of the legal system,[17] whose right becomes effective because it is legitimized by the respect of the norms of competence and strengthened by a set of elements and values that the same Court constructs.[18]

But on closer examination in the Union legal system the principle of consistent

Union [2012] OJ C326/47: 'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.'

[15] Reference is made to the of Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 and the Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

[16] See G. Pitruzzella, 'L'interpretazione conforme e i limiti alla discrezionalità del giudice nell'interpretazione della legge' *federalismi.it*, 160 (2021).

[17] See P. Otranto, 'Note minime' n 10 above.

[18] See G. Betlem, 'The Doctrine of Consistent Interpretation' n 8 above.

interpretation has an additional peculiar *telos*: that is, tending to strengthen the Union's regulatory domain.[19] The reason for the very existence of this principle is to model national law on Union law; that is, in a manner of speaking, to 'communitarize' it. The national interpreter applies his own methods of interpretation,[20] which can sometimes be supplemented by methodological guidelines suggested by the Court, in an operation which essentially postulates two parameters: (i) the national provision, that – note well - must always be contextualized in its original legal order; and (ii) the rule of the Union, as specified and interpreted by the Court.

The complex interrelationships between the European Union and its Member States always required a pluralistic approach to understand the relationships between different regulatory systems: the principle of consistent interpretation in accordance with the *acquis communitaire* is one of the most significant expressions of the Court's efforts to do so. However, this is a line of case law that has attracted less attention than the classical principles of 'direct effect'[21] and 'primacy'.[22] To this end, it is enough to mention that direct effect and consistent interpretation are mutually exclusive approaches:[23] in the first, the supranational provision produces direct effects on the national system; in the second one, the internal norm must be applied correctly in the light of consistent interpretation. If the supranational provision is not able to directly affect the subjective legal sphere of the addressees, attention is shifted to the internal norm; consistent interpretation takes the role of complement to overcome the divergence.[24]

There are many rules that can benefit from application of the principle of consistent interpretation, but it is appropriate to say that this approach in particular calls for the implementation of 'directives'.[25] Indeed, such acts, as primarily intended for States, are structurally unsuitable – if not implemented or not properly

[19] See R. Baratta, 'L'interpretazione conforme all'acquis dell'Unione' *Rivista di diritto internazionale*, 28-48 (2015).

[20] C. Baldus and R. Becker, 'Haustürgeschäfte und richtlinienkonforme Auslegung – Probleme bei der Anwendung angeglichenen europäischen Privatrechts' *Zeitschrift für Europäisches Privatrecht*, 874, 882 (1997).

[21] Case 26/62 *Van Gend & Loos* v *Netherlands Inland Revenue Administration* [1963] ECR; in detail, L. Woods, P. Watson and M. Costa, n 8 above. See D. Gallo 'Effetto diretto del diritto dell'Unione europea e disapplicazione, oggi' *Osservatorio sulle fonti*, 1 (2019).

[22] W.H. Roth, 'Die richtlinienkonforme Auslegung' *Europäisches Wirtschafts- und Steuerrecht*, 385-386 (2005).

[23] See D. Gallo, 'Effetto diretto del diritto dell'Unione europea' n 21 above.

[24] See M. Castellaneta, 'All'assenza di effetti orizzontali della direttiva supplisce il rimedio dell'interpretazione conforme' *Guida al diritto*, 115 (2004).

[25] Art 288 of Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47: 'To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force'.

implemented – to affect (negatively) the legal sphere of individuals in a horizontal and vertical sense. The application of consistent interpretation has often been demanded essentially as a means of overcoming this gap in the production of direct vertical and horizontal effects.[26]

However, such a rule of structure is not intended to assume a substantial character, as it is not protective in itself of a fundamental value. This essential characteristic explains the existence of some limits of the obligation to interpret national law in accordance with Union law. The Court of Justice itself has accepted that there are basically two types of restriction:[27] first, the duty of consistent interpretation is subject to the condition that national law confers on the authority a margin of discretion in the interpretation of national law: in particular, its interpretation cannot lead to a '*contra legem*'[28] result. Second, it cannot lead to a violation of the general principles of the Union, such as legal certainty and the non-retroactivity of legal rules (which has a particular relevance in criminal matters).[29]

In this regard – now partially crystallized in the Art 19 TEU – national courts play a decisive role in the protection of individual rights arising from the *acquis communitaire*.[30] The Court of Justice needs national courts in the event of interpretative doubts, so that a question is referred from a national court to the European Court of Justice for a preliminary ruling; and consequently, this ruling is applied according to the rule of consistent interpretation.[31]

III. Credit Agreements for Consumers

Before focusing on the intervention of the Court of Justice through a preliminary ruling on the interpretation of the right to early repayment, it is important to consider the context in which this rule operates. A credit agreement for

[26] Case 152/84 *Marshall I* v *Southhampton and South-West Hampshire Area Health Authority* [1986] ECR84; see G. Giacalone, 'Sull'efficacia "verticale" ed "orizzontale" delle direttive comunitarie' *Giustzia civile*, I, 1980 (1998).

[27] Case C-212/04 *Adeneler* v *Ellinikos Organismos Galaktos* [2006] ECR 443. See, also, P. Craig and G. de Búrca, 'EU Law' n 8 above: 'It would be very difficult to predict the outcome of any litigation, since the duty of harmonious interpretation demands that national courts consider all national law in deciding whether compatibility with the provisions of the directive can be attained'.

[28] C. Baldus and R. Becker, 'Haustürgeschäfte' n 20 above; C. Höpfner, 'Voraussetzungen und Grenzen richtlinienkonformer Auslegung und Rechtsfortbildung' *Jahrbuch Junger Zivilrechtswissenschaftler*, 73 (2009).

[29] T.M.J. Möllers, 'The Principle of Directive-Compliant Development' n 5 above.

[30] See M. Ruvolo, 'Interpretazione conforme e situazioni giuridiche soggettive' *Europa e diritto privato*, 1407 (2006).

[31] Art 267 of Consolidated Version of the Treaty on the Functioning of the European Union provides that the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning both the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

consumers[32] is a financing instrument – in such form as a deferred payment or a loan or other financial facility – for people acting for purposes unrelated to entrepreneurial or professional activities (consumers), whereby a creditor grants or promises to grant to a consumer credit, and the consumer pays for such services or goods for the duration of their provision by means of instalments. Born in the shadow of the ancient scheme of sale in instalments, consumer credit has taken on an identifying connotation of its own, obtained by adding to the contract of sale a special contract made between lender and buyer.

There are risks involved in the operation: the risk of pushing consumers to make purchases that are not conducive to their economic situation. There is also the risk of consumers accepting – perhaps without even realizing it – unfair financial conditions, meaning the cost of products may end up excessively high. This explains the European choice to regulate consumer credit transactions with rules protecting consumer interests. The lender is required to provide prior information on the contractual conditions, which allows the consumer to make a rational choice from the various offers on the market. The lender is also obliged to verify the creditworthiness of the consumer, to assess whether the credit claim is sustainable on the basis of their financial situation. The regulation of credit agreements for consumers is a set of rules which – starting from the identification of what is meant by consumer credit – aims to create a uniform legislation for the matter under consideration, specifying, for example, pre-contractual obligations, advertising obligations, the characteristics of the contract, and the consumer's right of withdrawal.

The European legislative choice to intervene in the matter reflects the wider Community objective of creating a single market and achieving a level playing field for consumer credits across the EU, in particular enabling the free movement of credit providers and users of financial services in an increasingly digitalized cross-border credit market. For its part, the Consumer Credit Directive provided the harmonization of measures which guarantee a reference standard on consumer credit. On one hand, national law should not exceed the terms of the Directive in the aspects regulated and Member States may not extend the scope of incompatible provisions in domestic law. On the other hand, some of the provisions[33] have been

[32] According to Art 3 of the European Parliament and Council Directive 2008/48/EC: '[…] (c) 'credit agreement' means an agreement whereby a creditor grants or promises to grant to a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments; […]'.

[33] See recital no 9 of the European Parliament and Council Directive 2008/48/EC which provides a full harmonization in order to ensure that all consumers in the Community enjoy a high and equivalent level of protection of their interests and to create a genuine internal market, but also states: '[…] Where no such harmonized provisions exist, Member States should remain free to maintain or introduce national legislation. Accordingly, Member States may, for instance, maintain or introduce national provisions on joint and several liability of the seller or the service provider and

left optional. This legislative choice has led in some respects to different transposition of the directive in the individual Member States, which certainly may affect the goals of the Directive to create an efficient internal market.

However, a common thread in the texture of the entire piece of legislation governing consumer credit, to be found both in the wording of the Consumer Credit Directive and in its supporting structure in EU law, is the high level of political attention to consumer protection, which must be considered in a broader view of the whole of European law. Consumer protection is – in this area as in all areas of private regulatory law – one of the ultimate goals of transnational policies, but it is also the means of achieving the best in European interests and the proper functioning of the market.

Generally, the EU's decision to give Member States free choice on how to implement the Directive can – if this implementation is not done properly – have a negative impact on the efficacy of the Directive and, in particular, on the achievement of the objectives set by the European legislator, which in this case are the proper functioning of the market but also of consumer protection; the latter perhaps also serving as a means to achieve the former.

Consumer protection – a way of making the European internal market work effectively – becomes central to the regulation of credit agreements for consumers. In conjunction with this goal, competition is an additional central element in the regulation of consumer credit, in particular through the rule of early repayment. In particular, the rules on reducing the total cost of credit owed in the event of early repayment – as laid down in the Directive and subsequently interpreted by the Court of Justice – reveal the propensity of the European legislator to protect consumers' interests in advance repayments in the form of costs closely related to long-term credit and interest for the remaining duration of the contract.[34] In balancing the opposing interests, the priority of consumer protection against possible circumvention by credit institutions involves the choice of including – in the amount reimbursed to the customer in case of early repayment – all the costs that would have been incurred by the customer. Also, while the objective of consumer protection is a cornerstone for the proper functioning of the market, in the field of consumer credit, the right to early repayment constitutes – almost mainly – a means for consumers to change products in order to find the one which best meets their needs at any given time,[35] thus constituting a fundamental element of the

the creditor. Another example of this possibility for Member States could be the maintenance or introduction of national provisions on the cancellation of a contract for the sale of goods or supply of services if the consumer exercises his right of withdrawal from the credit agreement. In this respect Member States, in the case of open-end credit agreements, should be allowed to fix a minimum period needing to elapse between the time when the creditor asks for reimbursement and the day on which the credit has to be reimbursed'.

[34] According to Art 16 the consumer shall be entitled at any time to discharge fully or partially his obligations under a credit agreement, being entitled to a reduction in the total cost of the credit which consists of the interest and the costs for the remaining duration of the contract.

[35] See the Opinion of Advocate General Campos Sánchez-Bordona delivered on 29 September

enhancement of competition.

1. The Event of Early Repayment

The rules governing early repayment of loans have emerged gradually in EU legislation over the last few years. Now the consumer who makes an early repayment is entitled to be reimbursed for some of the costs of the loan.[36] The act of early repayment[37] has been regulated in order to help create a well-functioning internal market in consumer credit: the right to repay loans fully or partially at any time – with a high level of consumer protection – is certainly part of the goal of establishing a well-functioning market.

The rules allowing for the early repayment of loans are there primarily to protect consumers. Indeed, the asymmetry that characterizes credit agreements requires that certain guarantees are given to the consumer. The Directive on credit agreements for consumers provides mainly informative regulation,[38] which seeks to contain the risks of misleading information from credit institutions. The fact that the consumer may not be perfectly informed has led to the provision of a rule allowing the early repayment of loans as a binding requirement by the legal

2022, case 555/21 (*Unicredit Bank Austria Ag* v *Verein Für Konsumenteninformation*): '65. In that context, the right to early repayment pursues a specific objective, which recital 66 of Directive 2014/17 describes by reference to promoting competition, the free movement of citizens and financial stability. The advantages to consumers are treated as merely secondary and are described in terms of enabling consumers to change products in order to find the one which best meets their needs at any given time'.

[36] Whereas no 39 of the European Parliament and Council Directive 2008/48/EC provides: 'The consumer should have the right to discharge his obligations before the date agreed in the credit agreement. In the case of early repayment, either in part or in full, the creditor should be entitled to compensation for the costs directly linked to the early repayment, taking into account also any savings thereby made by the creditor. However, in order to determine the method of calculating the compensation, it is important to respect several principles. The calculation of the compensation due to the creditor should be transparent and comprehensible to consumers already at the pre-contractual stage and in any case during the performance of the credit agreement. In addition, the calculation method should be easy for creditors to apply, and supervisory control of the compensation by the responsible authorities should be facilitated. Therefore, and due to the fact that consumer credit is, given its duration and volume, not financed by long-term funding mechanisms, the ceiling for the compensation should be fixed in terms of a flat-rate amount. This approach reflects the special nature of credits for consumers and should not prejudice the possibly different approach in respect of other products which are financed by long-term funding mechanisms, such as fixed-rate mortgage loans'.

[37] See, for example, F. Mezzanotte, 'Il rimborso anticipato nei contratti di credito immobiliare ai consumatori' *Nuove leggi civili commentate*, 65 (2020); E. Battelli and F.S. Porcelli, 'Il diritto alla riduzione del costo totale del credito in caso di rimborso anticipato' *Giurisprudenza italiana*, 1597 (2020); G. De Cristofaro, 'Estinzione anticipata del debito e quantificazione della "riduzione del costo totale del credito" spettante al consumatore: considerazioni critiche sulla sentenza "Lexitor" ' *Nuova giurisprudenza civile commentata*, 287 (2020).

[38] See, for example, M. Maugeri, 'Omissione di informazioni e rimedi nel credito al consumo. La decisione della CGE 42/15 e la proporzionalità dell'apparato rimediale italiano' *Banca, borsa titoli di credito*, 134 (2018); A. Minto, 'Il nuovo documento denominato «informazioni europee di base» nell'ambito del rinnovato regime informativo dei contratti di *credito* ai consumatori' *Banca, borsa titoli di credito*, 98 (2012).

system.[39]

Despite this provision having – among others – the clear objective of protecting the interests of the consumer, the European implementation of this Directive in the individual Member States has led to significant interpretative uncertainties. Indeed, the refund of the total cost of the credit involves two conflicting interests: credit institutions tend to prefer a minimum reimbursement, unilaterally determining the different costs that the customer must bear in order to influence any future refund in the event of early repayment; the consumer, instead, has an interest in the total recovery of costs, where 'total' means the proportional reduction of all costs imposed on them.

The European intervention opted for a balance of these conflicting interests that favours the consumer, in line with the consumer protection policy of European law when considered as a whole. Notwithstanding the possible objections to the choice of full reimbursement of credit costs, a policy that favours consumer protection has been the rule since the first Consumer Credit Directive.[40] With the update to the Directive in 2008, the general concept of fair reduction is changed to the more precise one of reduction of the total cost of the credit: the aim is to ensure the consumer is not exploited when signing credit contracts.[41]

On the other hand, however, the existence of substantial differences between national principles and conditions under which consumers have the ability to repay their credit and the conditions under which early repayment is made may constitute an obstacle to the promotion of competition. As mentioned above, a consumer's capacity to repay the loan prior to the expiry of the credit agreement may play an important role in enhancing competition in the internal market. For this reason, a standardized approach to early repayment of credit is of fundamental importance at the Union level in order to ensure that consumers have the opportunity to fulfill their obligations in advance and to compare offers to find the best products to meet their needs.

2. The Lexitor Case: The Context and Reasons for a European Intervention

The application of a principle, as explained before, would seem not to leave scope for decisional autonomy to national courts. However, there are a number of different limits to the entry – thus conceived – of European legislation in national laws. This is explified by the approach to the Directive on credit agreements for consumers in the Italian legal system.

In September 2019 the European Court of Justice ruled on a preliminary request concerning the interpretation of Art 16, para 1 of the Directive in the so-

[39] E. Baffi and F. Parisi, n 39 above.

[40] European Parliament and Council Directive 87/102/EEC.

[41] G. Liace, 'Il diritto dei consumatori alla riduzione del costo totale del credito nel caso di estinzione anticipata del finanziamento: il caso Lexitor' *Giurisprudenza commerciale*, 1003 (2020).

called 'Lexitor case'.[42] Art 16 states that the consumer shall be entitled at any time to discharge fully or partially his obligations under a credit agreement. In such cases, the consumer shall be entitled to a reduction in the total cost of the credit,[43] such reduction consisting of the interest and the costs for the remaining duration of the contract.

The previous legislation[44] already gave the consumer the right to discharge in advance the obligations arising from his credit agreement, thereby providing for a fair reduction in the total cost of the credit. The rule under consideration has introduced important innovations providing that the consumer is entitled at any time to fully or partially discharge his debts, and that the reduction granted to him should include, more precisely, the interest and costs due for the remaining duration of the contract. This seems to be justified by the desire to prevent the quantification of the reduction in the total cost of the credit to be the result of the pure discretion of national legislators and courts and to base it, rather, on a harmonized and fundamentally objective basis.

Given the non-unique scope of the provision in question, the Court – on a basis not only of literal interpretation, but also in light of the goal of ensuring a high level of consumer protection (andusing a teleological argument)[45] – stated the following principle:

> 'Article 16(1) of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC must be interpreted as meaning that the right of the consumer to a reduction in the total cost of the credit in the event of early repayment of the credit includes all the costs imposed on

[42] For an effective comment on the subject see A. Tina, 'Il diritto del consumatore alla riduzione del costo totale del credito in caso di rimborso anticipato del finanziamento ex art. 125 *sexies*, primo comma, t.u.b. Prime riflessioni a margine della sentenza della Corte di Giustizia dell'Unione europea' *Rivista di diritto bancario*, 155 (2019); A. Zoppini, 'Gli effetti della sentenza Lexitor nell'ordinamento italiano' *Banca, borsa titoli di credito*, 1 (2020); R. Santagata, 'Rimborso anticipato del credito e diritto del consumatore alla restituzione della quota parte dei costi indipendenti dalla durata del contratto (cd. *up-front*)' *Banca, borsa titoli di credito*, 18 (2020); G. Liace, 'Il diritto dei consumatori' n 41 above; De Cristofaro, 'Estinzione anticipata del debito' n 37 above, 287; M. Natale, 'Estinzione anticipata del credito ai consumatori, retrocedibilità dei costi e logica in apnea' *Giustizia civile*, 669 (2021); R. Santagata, 'Prime note sulla nuova disciplina del rimborso anticipato del credito ai consumatori (e del credito immobiliare)' *Banca, borsa titoli di credito*, 179 (2022); F. Gigliotti, 'Rimborso anticipato del finanziamento e riduzione dei costi del credito. Variazioni ermeneutiche sull'art. 125-*sexies* T.U.B. (tra sentenza "lexitor" e decreto sostegni *bis*)' *Banca, borsa, titoli di credito*, 198 (2022); A. Ricciardi, 'Il principio sancito dalla Corte di Giustizia nell'ambito del caso Lexitor e Decreto sostegni *bis*: problematiche applicative passate, presenti e future' *Banca, borsa titoli di credito*, 289 (2022).

[43] See G. Giordano, 'Brevi note in tema di costo totale del credito' *Giurisprudenza commerciale*, 1196-1206 (2021).

[44] Art 8 of the European Parliament and Council Directive 87/102/EEC.

[45] See T.M.J. Möllers, *Legal Methods* (München: Bloomsbury Academic, 1st ed, 2020).

the consumer'.[46]

Such an interpretation means that in the calculation of the reduction due to the consumer in the event of early repayment, all the costs previously charged must be included: the recurring costs (gradually accruing over the duration of the contract: for example, amounts paid as cover for credit risks, charges for managing collections, etc) and the up-front costs (fixed costs related to obligations prior to the granting of the loan, and therefore independent of the duration of the financing relationship).[47] This distinction, although it has been of fundamental importance in the event of early repayment (especially in Italy), loses its meaning since it is left to the simple choice of the bank.

The Court explained that

> 'the effectiveness of the right of the consumer to a reduction in the total cost of the credit would be reduced if the reduction of the credit could be limited to the taking into account of only those costs presented by the creditor as dependent on the duration of the contract, given that, as was noted by the Advocate General in point 54 of his Opinion, the costs and the breakdown thereof are determined unilaterally by the bank and the charging of fees may include a certain profit margin (...) In addition, as is emphasized by the referring court, limiting the possibility of reducing the total cost of the credit solely to costs expressly connected with the duration of the contract would entail the risk that the consumer would be required to make a higher one-off payment when concluding the credit agreement since the creditor could be tempted to reduce the costs depending on the duration of the contract to a minimum (...) Furthermore, as was emphasized by the Advocate General in points 53 and 55 of his Opinion, the degree of flexibility available to credit institutions in terms of invoicing and internal organization makes it very difficult in practice for a consumer or a court to determine which costs are objectively linked to the duration of the contract'.[48]

Thus the decision is based on a precise assumption: the distinction between fixed costs (up-front) and costs dependent on the duration of the contract (recurring) is determined unilaterally by the bank, and this can clearly affect the interests of the consumer. Furthermore, the charging of fees may include a certain profit margin and, therefore, it is difficult in practice for a consumer or a court to determine which costs are objectively linked to the duration of the contract.

[46] See Lexitor para 2 above.

[47] Recurring costs are the costs incurred by the lender while the loan is in progress. In other words, they are the costs that 'depend objectively on the duration of the contract' (Case C-383/18 para 24).

[48] Lexitor para 2 above.

3. Duties and Limits of the Principle of Consistent Interpretation: The Italian Reference Framework

The Italian reference framework is somewhat peculiar. The Directive was implemented in 2010[49] and, in particular, Art 16 was transposed with the (now old, after a recent reform)[50] formulation of Art 125-*sexies* TUB (Testo Unico Bancario),[51] that is the Consolidated Law on Banking. The (old) implementing provision stated that in the case of an early repayment, the consumer was entitled to a reduction of the total cost of the credit equal to the amount of interest and costs due for the remaining life of the contract.[52] On the basis of a literal analysis of the domestic provision, the transposition of the Directive was not a textual reproduction. Indeed, the domestic provision articulates a rule of reduction of the cost of the credit referring not – as Art 16 (1) of the Directive provides – to a sum that 'includes' some costs but, instead, a reduction equal to the amount of interest and costs due for the remaining life of the contract.

Starting from this point, the interpretation of the domestic provision until the *Lexitor* case was based – in a substantially uncontroversial way[53] – on the distinction between up-front costs, not subject to repayment, and recurring costs subject to the reduction of the total cost of credit.[54] Indeed, it was considered that the *prorata temporis* refund criteria could be allocated only to the costs referring to services capable of attributing utility to the customer, proportional to the duration of the contractual relationship; consequently, it was not possible to provide a refund for those complaints relating to services already expired at the time the contract was concluded. This understanding was shared in doctrine, ordinary jurisprudence and in the Alternative Dispute Resolution body of the Bank of Italy: Arbitro Bancario e Finanziario (ABF). What is most important, especially considering the recent reform of the national legislation, is that this interpretation has been substantially confirmed and endorsed by secondary legislation of the Bank of Italy, in accordance with the primary provision of Art 125-*sexies* TUB,

[49] Decreto legislativo no 141/2010.

[50] Legge 23 July 2021 no 106. Conversion into Law, with amendments, of Decreto legge of 25 May 2021 no 73, containing urgent measures related to the emergency by COVID-19, for businesses, work, youth, health and territorial services.

[51] Before this intervention the discipline was included both in the Decreto legislativo no 385/1993 and in the Decreto legislativo no 206/2005 (Codice del consumo). About the different system after the Decreto legislativo no 141/2010 see, for example, R. Giaquinto 'Il credito al consumo tra snodi teorici ed evoluzione della prassi: le nuove prospettive aperte a tutela del consumatore' *camminodiritto.it*, 2020.

[52] See the previous formulation of the Art 125-*sexies* of the Testo Unico Bancario (before the 2021 reform) which provided that the consumer may repay in advance at any time, in whole or in part, the amount due to the lender and in that case the consumer is entitled to a reduction in the total cost of the credit, equal to the amount of interest and costs due for the remaining life of the contract.

[53] See F. Gigliotti, 'Rimborso anticipato del finanziamento' n 42 above, 198.

[54] See Collegio ABF Napoli, 7 March 2017 no 2211; Collegio ABF Bari, 2 May 2017 no 4561. Also, Collegio di Coordinamento ABF 22 September 2014 no 6167.

namely the 'Disposizioni di Trasparenza dei Servizi bancari e finanziari' and 'Orientamenti di vigilanza. Operazioni di finanziamento contro cessione del quinto dello stipendio o della pensione'.[55]

On the basis of the above considerations concerning the principle of consistent interpretation, it must be considered that – since the EU Courts' judgments are fully binding on the national courts and constitute a rule of law which goes beyond the limits of the reference judgment, thus applicable by the national court in every state and grade of the judgment, even with retroactive effect56 – the interpretation of the domestic provision from before the Lexitor case must be reversed. Indeed, on the one hand, after the Lexitor case, the Bank of Italy – with its communication of 2019 – provided new guidelines in the event of early repayment suggesting that the domestic provision was not significantly different from that deriving from the interpretation of the Court of Justice. Consequently, the ABF provided for application of the rule under *Lexitor* to pending cases for which the customer had already requested are fund of up-front costs.[57] Accordingly, although the new guidelines did not address the retroactivity of the principle under Lexitor, the ABF extended its holding to pending cases. Of course, appeals that had already been decided (on pain of infringing the *ne bis in idem* principle), and those that had been prescribed, were therefore excluded from the application of the principle expressed in the *Lexitor* case. The ABF has also clarified the calculation criteria to be used for the reduction of the total cost of credit, which have not been specified by the ECJ: that is, the *prorata temporis* criteria should be used with regard to the recurring costs. As regards up-front costs, instead, it may be for the various parties to establish adequate calculation criteria (easily understood by the consumer) or, in the absence of agreement, it will be up to the court to integrate the contractual regulation in application of the criteria of supplementary equity[58] stipulated by Art 1374 code civil.

Despite the fact that Member States had an obligation to comply with directives,[59] including in proceedings before courts – part of the literature[60] invoked several arguments hoping to limit the implementation of the Court of Justice's dictum. These arguments included that, even if the directives could produce direct effects in vertical relationships, they could not affect horizontal ones.[61] According

[55] See Gazzetta Ufficiale, no 38, 16 February 2011 Supplemento Ordinario no 40.

[56] Case 231/96 *Edilizia Industriale Siderurgica Srl (Edis)* v *Ministero delle Finanze* [1998] ECR 401; Case 61/79 *Amministrazione delle finanze dello Stato* v *Denkavit italiana Srl* [1980] ECR 100; Corte di Cassazione – Sezione VI 11 September 2015 no 17994.

[57] See, in particular, Collegio ABF no 26525/2019.

[58] See R. Santagata, 'Rimborso anticipato del credito' n 42 above, 18-38.

[59] According to Art 288(3) Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, directives are binding upon each Member State: see Case 129/96 *Inter-Environnement Wallonie* v *Région Wallonnie* ECR 628.

[60] See A. Zoppini, 42 above.

[61] Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 133; Case 148/78 *Public Prosecutor* v *Ratti* [1979] ECR 110; Case 8/81 *Ursula Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR

to this principle, *Lexitor* would be irrelevant in domestic proceedings based on the application of Art 125-*sexies* TUB, without prejudice to the eventual liability of the State for non-compliance with the Community obligation[62] – although in Italy the Directive 2008 has been formally transposed in the national system, so that a problem of non-compliance of the State cannot be said to be posed. At most, the incompatibility between the national legal order and the Directive allows the injured party to take action for the civil liability of the State for breach of obligations, which means for incorrect implementation of the Directive. From this point of view, it is interesting to consider whether or not it is possible to censor the conduct of banks which might adversely affect the individual and collective interests of consumers with regard to transparency and fairness, and to denounce – in this case – unfair commercial practices in relation to the preparation and use of clauses limiting the reduction of the cost of credit in the event of early repayment only to certain costs and commissions in proportion to the remaining duration of the contract. A second argument suggested that, if it is true that the duty of consistent interpretation applies to Directives governing relations between individuals, it is equally true that the national court should fulfil that obligation with the limit of not giving rise to an application of the rule *contra legem*:[63] part of the doctrine considered that a close reading on the wording of Art 125-*sexies* TUB should have led to the non-applicability of the principle set out above.[64] Namely, the domestic provision required that the reduction in the total cost of credit due to the consumer who has fulfilled it in advance should be quantified in an amount that is equal to (and not higher than) interest and costs due for the remaining life of the contract.

4. The Pragmatic Choice of the European Judge

Among several interpretations on the scope and subsequent application of the *Lexitor* holding in the Italian system, it is necessary to start from a single premise: it is certain that the interpretation given in the Court's judgment is of general scope[65] and it is binding in nature because it integrates the content of the European rule of law.[66] However, some have suggested that this assumption should not be confused with the issue of the domestic effect of the judgment, which should be evaluated on the basis of the specificities of the referenced system.[67]

7; M. Zöckler, 'Probleme der richtlinienkonformen Auslegung des nationalen Zivilrechts' *Jahrbuch Junger Zivilrechtswissenschaftler*, 141, 157 (1992).

[62] Case 6/90 *Francovich* v *Italian Republic* [1991] ECR 428; see F.M. Di Majo, 'Efficacia diretta delle direttive inattuate: dall'interpretazione conforme del diritto interno alla responsabilità dello Stato per la mancata attuazione delle direttive' *Rivista di diritto europeo*, 501 (1994).

[63] See A. Zoppini, 42 above.

[64] ibid

[65] See Case 53/76 *Benedetti* v *Munari F.lli sas* [1977] ECR 17; Case 126/81 *Wünsche Handelgesellschaft GmbH&Co.* v *Federal German Court*. About the general scope of the Court's judgments [1982] see R. Santagata, 'Rimborso anticipato del credito' n 42 above, 18-38.

[66] See Case 129/96 Inter-Environnement Wallonie v Région Wallonnie [1997] ECR 628.

[67] See A. Zoppini, 42 above; F. Gigliotti, 'Rimborso anticipato' n 42 avove, 198.

The Advocate General's Conclusions[68] suggest that at the European level the calculation criteria in the case of early repayment have not been harmonized and that the Member States may (but do not need to) provide for conditions that guarantee the refund of costs not dependent on the duration of the contract. Art 16 of the Directive may be interpreted as requiring the repayment of an appropriate part of all costs directly or indirectly linked to the duration of the credit agreement.[69] Such interpretation would also be confirmed by the Observations of the EU Commission.[70] According to this interpretation it would follow that the judgment is not automatically applicable and, in this sense, there can be doubt as to what kind of harmonisation the European legislator wanted to pursue through the Directive.[71]

It is true that necessary attention to the specificities of individual Member States also seems to be evident from the consolidation in different systems of different interpretative solutions in primary legislation:[72] it has in part been considered that the judgment does not produce binding effects, for example in the Italian system, because it is based on legal conditions (like those of the Polish system) that are not specific to a system that guarantees high consumer protection and that – through strict obligations of prior information – does not leave the determination of credit costs to the arbitrary professional.[73] So, when interpreting the rule, the domestic provision must be contextualized in its original legal order. Moreover, given the many doubts that arise both in relation to applying the judgment and to the relevant procedures, it would also be possible to suggest a new reference for a preliminary ruling before the ECJ.[74]

However, it seems clear that the European judge wanted to opt for a pragmatic choice.[75] Namely, only allowing for the reimbursement of recurring costs would

[68] Conclusions of the Advocate General Gerard Hogan, 23 May 2019.

[69] See A. Zoppini, 42 above.

[70] EU Commission, 'Observations Écrites (G. Goddin, C. Valero, A. Szmytkowska)', Case 383/18.

[71] R. Santagata, 'Rimborso anticipato del credito' n 42 above, 18-38.

[72] For example, in Germany the interpretative solution has even been consolidated in civil code: BGB's rules on consumer credit were amended, again providing for a reduction of *recurring* costs only. Reference is made to the Art 501§ BGB, now modified by the *FinDLRAnpG* (2021). See, also, F. Ferretti and B. Bertarini, 'Consumer Credit Advertising in the United Kingdom and Italy: The Shortcomings of the Consumer Credit Directive and Scope for Review' 31 *European Business Law Review* 2, 243-264 (2020).

[73] A. Zoppini, 42 above.

[74] ibid

[75] E. Baffi and F. Parisi, n 39 above. Also, the Advocate General in his Opinion (Op AG, Case 383/18, Lexitor, paras 53, 55) stated that the rule establishing that up-front costs are not reimbursable while costs dependent on the duration of the loan are reimbursable may 'appear [...] at first sight to be relatively simple and therefore interesting, (but) its practical application will probably give rise to considerable difficulties of a practical nature. Indeed, as highlighted by the referring court in its request, credit institutions rarely specify which of the costs they incur are covered by the costs charged to consumers and, even when this occurs, the consumer would be entitled to dispute the accuracy of such specification. […] In the event of a dispute over the amount of the reduction to which the consumer is entitled in the event of early repayment, national courts (would) have to call on the services of accounting experts, even if, by their nature, the costs in question are relatively modest'. See, also, R. Santagata, 'Rimborso anticipato del credito' n 42 above, 18-38.

(or could) give rise to evasive behaviour by credit institutions, especially in a context of information asymmetries,[76] where the consumer may not be well-informed. Thus, the choice to grant consumers the right to early repayment can be said to be efficient in ensuring their protection. But it is also true that this choice could produce many inefficiencies. The consumer could be forced to pay more for the loan – by increasing, for example, the borrowing rate – and would probably not want to acquire it. Thus, the credit market would shrink.[77] There could also be an over-consumption of long-term credit, with the intent of the consumer to terminate the contractual relationship in advance and obtain a full reimbursement of costs.[78]

Given the arguments set out above, the Court stressed the desirability and necessity of going beyond the literal criterion, using the systematic and the teleological one, in accordance with an interpretative practice widely established in its case law. As regards the systematic criterion, the Court does indeed seem to be failing to carry out an internal assessment of the Directive and of the overall framework for early repayment arising from credit agreements;[79] but more confusion arises especially in the application of the teleological criterion. Indeed, the Court states that the Directive 'aims to ensure a high level of consumer protection', because the consumer is a weak part of the contractual relationship both in terms of negotiation power and level of information.[80] It is true that recital no 9 of the Directive states the need for a full – and not merely minimal – harmonization of national legislation on credit agreements, which guarantees all consumers a high and equivalent level of protection of their interests; but it is also true that this statement must be included in a much broader and more complex framework that justifies the intervention of the European legislator.[81]

The European legislator considers that a full and complete harmonization of national legislation on certain aspects of consumer credit agreements is fundamental to ensure a high and equivalent level of consumer protection in order to facilitate the establishment of an efficient internal market in consumer credit, but at the same time, to create a genuine internal market.[82] Therefore, the choice to identify mainly the effectiveness of protection of consumer rights as the justification for a hermeneutical option does not seem to be justified. Moreover, it has been stressed that the EU legislator's instruments for preventing the risk of circumvention are quite different from the hermeneutical parameters to be adopted to solve

[76] See M. Chiarella, *Contrattazione asimmetrica. Segmenti normativi e costruzione unitaria* (Milano: Giuffrè, 2016); A.M. Benedetti, 'Contratto asimmetrico' *Enciclopedia del diritto* (Milano: Giuffrè, 2012), V, 370.

[77] E. Baffi and F. Parisi, n 39 above.

[78] ibid 239.

[79] See G. De Cristofaro, 'Estinzione anticipata del debito' n 37 above, 284.

[80] Explicit reference is made to the judgment of Case 58/18 *Schyns* v *Belfius Banque SA* and the judgment of Case 377/14 *Radlinger and Radlingerova* v *Finway a.s.*

[81] See G. De Cristofaro, 'Estinzione anticipata del debito' n 37 above, 285.

[82] See whereas no 6-9 of the European Parliament and Council Directive 2008/48/EC.

interpretative doubts raised by the wording of EU provisions.[83] These include, among others: the principle that all clauses in contracts concluded by consumers with professionals must be formulated in a clear and comprehensible manner; the criterion of objective interpretation of the contract under which, in case of doubt, should be given the most favorable meaning to the consumer; the principle according to which clauses concerning economic aspects of the contractual transaction are subject to the control and assessment of abuse if they are not formulated in clear and comprehensible terms;[84] and the requirement that consumers may not waive the rights conferred on them by the national provisions transposing the Directive.

In this perspective, it is interesting to note that a preliminary ruling regarding the interpretation of Art 25, para 1 of the Directive 2014/17[85] (equivalent to Art 16 of the Directive 2008/48/EC) has recently been the subject of a ruling by the Court of Justice.[86] In that case the request concerned the use of a standard clause (inserted in a mortgage-backed credit agreement by the bank) which states that, in the event of early repayment of the credit by the consumer, 'the processing costs that are not dependent on the duration of the agreement will not be reimbursed (even proportionally)'. It should be stressed that the Directive at issue here has the same legal basis as the Directive on Consumer Credit, while being characterized by a different development and discipline. The Advocate General, in his Opinion,[87] already appeared to be very critical of the reasoning behind the Lexitor judgment, or at least did not consider it to be an essential element for the resolution of the present ruling. Indeed, in this case, the key point seems to be represented by the literal interpretation of the relevant Directive, a method that was not followed in the Lexitor case. That is, a literal interpretation is proposed first and then – possibly – the teleological-systematic criterion is applied. Although the teleological argument must be considered in the interpretation of the provision, on the subject of consumer protection it is necessary to assess the possibility of introducing certain limits by balancing different interests in order to enhance the internal credit market. The Advocate General, gave a different meaning to the 'remaining duration of the contract' – an essential and crucial issue – from that proposed in the *Lexitor* case, with the consequence that only overdue interests and costs related to the time element, represented by the remaining life of the contract, could be refunded. The decision, therefore, confirmed these latter considerations. Contrary to the holding of the *Lexitor* case, it outlined that Art 25, para 1 must be interpreted as

[83] See G. De Cristofaro, 'Estinzione anticipata del debito' n 37 above, 286.

[84] See European Parliament and Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in consumer contracts.

[85] European Parliament and Council Directive 2014/17/EU of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010.

[86] Case 555/21 *UniCredit Bank Austria AG* v *Verein für Konsumenteninformation* [2023] ECR 78.

[87] Opinion of Advocate General Campos Sánchez-Bordona delivered on 29 September 2022, case 555/21 (*Unicredit Bank Austria Ag* v *Verein Für Konsumenteninformation*).

not precluding national legislation which provides that the consumer's right to a reduction in the total cost of the credit in the event of early repayment of that credit includes only interest and costs which are dependent on the duration of the contract. The decision stressed that the credit intermediary is required to provide the consumer with accurate pre-contractual information concerning the breakdown of charges payable by the consumer. This requirement significantly reduces the risk of abusive conduct on the part of the creditor and makes it possible for the consumer and the national court to ascertain whether a type of fee is objectively linked to the duration of the contract. Moreover, the decision provides an interpretation with a possible strong impact for the present case. That is, the possible risk of abusive conduct cannot justify costs that are independent of the duration of the agreement being included in the right to reduction in the total cost of the credit.

5. The National Legislator's Interpretation

Despite all the difficulties of interpretation encountered by doctrine and jurisprudence, the Italian legislator intervened to provide a solution, which possibly creates more complications. In July 2021, the rules laid down in Art 125-*sexies* TUB were amended by Art 11-*octies* of the law 106/2021, which substantially transposed the principle contained in the *Lexitor* judgment, stating that credit agreements should clearly include the criteria for the repayment of both recurring and up-front costs.[88] However, Art 11-*octies* also provided the introduction of a dual legal regime:[89] it was foreseen that the old regime, as clarified by secondary legislation (that means the Bank of Italy guidelines prior to the *Lexitor* case) would apply to early repayments relating to contracts signed before July 2021.

Thus the matter was complicated by issues arising from the different ways it was applied regionally, and also from the interpretation given to the old provision which, according to what the legislator said, must follow the old guidelines of the Bank of Italy and not be interpreted in the light of *Lexitor*.[90]

In this legislative chaos, the ABF determined that, considering the new legislative text, it could not comply with the duty of consistent interpretation because of a clear and unambiguous rule such as the one just described, nor could it disregard the domestic law since the 2008 Directive was not a self-executing

[88] Art 11-*octies* of the legge no 106/2021 provided that Art 125-*sexies* TUB should have been replaced by a new formulation which provides that the consumer may refund in advance at any time, in whole or in part, the amount due to the financier and, in that case, is entitled to the reduction in proportion to the remaining life of the contract, interest and all costs included in the total cost of the loan, excluding taxes.

[89] Art 11-*octies* of the legge no 106/2021 provided that Art 125-*sexies* TUB, as replaced by para 1, letter c) of the same article, applies to contracts signed after the date of entry into force of the conversion law of that decree. The provisions of Art 125-*sexies* continue to apply to early termination of contracts signed before the date of entry into force of the law of conversion of that decree with the secondary rules contained in the provisions of transparency and supervision of the Bank of Italy in force on the date of signing the contracts.

[90] See F. Gigliotti, 'Rimborso anticipato del finanziamento' n 42 above, 198.

one.[91] Therefore, the ABF reverted to differentiating between recurring and up-front costs in the event of early termination of contracts concluded before July 2021. Further, this interpretation was supported by a communication[92] from the Bank of Italy dated December 2021.

On the other hand, the Court of Turin declared relevant and not manifestly unfounded the question of the constitutional legitimacy[93] of Art 11-*octies* by contrast with Arts 3, 11 and 117 of the Constitution, thus transmitting the proceedings of the trial to the Constitutional Court. In particular, the Tribunal of Turin stressed that the decisions of the European Court of Justice referred for a preliminary ruling have (generally) a retroactive effect (unless the Court itself dictates *ex nunc* effect):[94] in the present case, the Court has not limited the effectiveness over time of the principles set out in that judgment.

The crucial question is the claimed impossibility to practice a consistent interpretation in the current legal framework,[95] given the univocal meaning of the new rule. If, therefore, prior to the 2021 reform, the duty of consistent interpretation – although with some doubts raised in parts of the doctrine – could be respected, thus applying the European law as interpreted by the Court of Justice, after the recent legislative intervention this road no longer seemed viable. Despite this, the ABF[96] – recalling an ordinary Court ruling[97] – considered it necessary to also interpret Art 11-*octies* in a manner consistent with the *Lexitor* case. Indeed, the non-retroactivity of the new rule and its formulation were designed so that it was impracticable to adopt a different interpretation without falling into the disapplication of the norm. The necessarily binding effect of the Court of Justice's interpretation upon national courts implies that the principle of non-retroactivity enshrined in Art 11-*octies* could only refer to the calculation criteria[98]

[91] Among all, see Collegio di Coordinamento ABF 15 October 2021, no 21676.

[92] Banca d'Italia, Dipartimento tutela della clientela ed educazione finanziaria servizio vigilanza sul comportamento degli intermediari (967) divisione vigilanza di tutela (003), no 1710613/21, 1 December 2021.

[93] Tribunale di Torino – Sezione I, Ordinanza 2 November 2021 available at dirittobancario.it. See U. Malvagna, 'La nuova disciplina dell'estinzione anticipata dei contratti di credito ai consumatori: tra legge, Abf e Corte Costituzionale' *Banca, borsa titoli di credito*, 1, 49-87 (2022).

[94] See also A. Zoppini, n 42 above which refers to the Conclusions of the Advocate General Tizzano in the case 292/04, *Meilicke e a.* v *Finanzamt Bonn-Innenstadt*, 41-63 and the Conclusions of the Advocate General Jacobs in the case 475/03, *Banca di Cremona* v *Agenzia Entrate Ufficio Cremona*, 75-88, to admit that the Court of Justice may limit the temporal effectiveness of an interpretation of EU law also by means of a judgment subsequent to the one previously rendered in relation to the relevant EU law.

[95] U. Malvagna, 'La nuova disciplina' n 93 avove, 49-87; A. Zoppini, n 42 above.

[96] Collegio di Coordinamento ABF 15 October 2021, no 21676. See U. Malvagna, n 93 above.

[97] Tribunale di Savona 09 March 2021 no 180, available at dirittobancario.it.

[98] According to paras 2 and 3 of the Art 125-*sexies* Testo Unico Bancario, credit agreements shall clearly indicate the criteria for the proportionate reduction of interest and other costs, indicating analytically whether the linear proportionality criterion or the amortized cost criterion is applied. Unless otherwise stated, amortized cost applies. Unless otherwise agreed between the lender and the credit intermediary, the lender shall have a right of recourse against the credit intermediary for the

outlined in paras 2 and 3 of Art 125-*sexies* TUB Accordingly, the principle mentioned cannot concern the interpretation of the event of early repayment, or the interpretation would be in conflict with European legislation.

IV. Final Reflections in the Light of the Judgments of the Courts

In order to enable consumers to make decisions in full knowledge of the facts, they should be provided with adequate information, which they can examine before the conclusion of the credit agreement.[99] The conditions, the cost of credit and the obligations which originate from the agreement should be provided to the consumer as clearly as possible to ensure the fullest transparency and comparability of offers. The latter condition for the conclusion of a credit agreement that respects the fundamental principles of clarity and transparency towards the consumer – the weak party to the agreement – is the premise of the protectionist choices of the European legislator towards the customer who decides to terminate the contractual relationship in advance. Provided that the credit institution is required to give adequate information and Member States must take appropriate measures to promote responsible practices at all stages of the credit relationship,[100]

proportion of the amount reimbursed to the consumer relating to the compensation for the credit intermediation activity.

[99] Whereas no 19 of the European Parliament and Council Directive 2008/48/EC provides: 'In order to enable consumers to make their decisions in full knowledge of the facts, they should receive adequate information, which the consumer may take away and consider, prior to the conclusion of the credit agreement, on the conditions and cost of the credit and on their obligations. To ensure the fullest possible transparency and comparability of offers, such information should, in particular, include the annual percentage rate of charge applicable to the credit, determined in the same way throughout the Community. As the annual percentage rate of charge can at this stage be indicated only through an example, such example should be representative. Therefore, it should correspond, for instance, to the average duration and total amount of credit granted for the type of credit agreement under consideration and, if applicable, to the goods purchased. When determining the representative example, the frequency of certain types of credit agreement in a specific market should also be taken into account. As regards the borrowing rate, the frequency of instalments and the capitalisation of interest, creditors should use their conventional method of calculation for the consumer credit concerned'.

[100] Such measures may include, for example, consumer information and education and also warnings about the risks of non-payment or over-indebtedness. In an expanding credit market, in particular, it is important that creditors do not grant loans irresponsibly or do not issue loans without prior credit assessment. See whereas no 26 of the European Parliament and Council Directive 2008/48/EC: 'Member States should take appropriate measures to promote responsible practices during all phases of the credit relationship, taking into account the specific features of their credit market. Those measures may include, for instance, the provision of information to, and the education of, consumers, including warnings about the risks attaching to default on payment and to over-indebtedness. In the expanding credit market, in particular, it is important that creditors should not engage in irresponsible lending or give out credit without prior assessment of creditworthiness, and the Member States should carry out the necessary supervision to avoid such behaviour and should determine the necessary means to sanction creditors in the event of their doing so. Without prejudice to the credit risk provisions of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit

taking into account the specificities of their credit markets, since the relationship is intrinsically characterized by an asymmetry of information, the European legislator is necessarily led to consider the possibility of a contractual imbalance and, consequently, to protect the interest of the weaker party. For this reason, as has been repeatedly pointed out, the reimbursement of all the costs imposed on the consumer, in the event of early repayment, reflects a pragmatic decision that – rather than considering several economic inefficiencies – values the practicality of identifying eligible costs and the pre-eminence of consumer interest.

Therefore, although it can be argued that this choice could ultimately hurt the consumer,[101] it cannot be disregarded that an interpretation consistent with the European legal order, a duty which derives from the same proper adherence to the supranational order itself, implies that the Member States are required to establish prior information obligations and adequate levels of consumer protection (charges which do not include the refund of the total cost of the credit in the event of early repayment being requested as a priority) and to adapt national legislation in the light of the Court of Justice's judgment. The different interpretative arguments which consider that the European derivative decision is not applicable in domestic law – which exploit the less incisive nature of the principle of consistent interpretation as compared to the more penetrating horizontal direct effect – seem to disregard that, even if the ECJ has negated the horizontal direct effect of Directives, it developed an obligation to interpret national law in a Directive-compliant manner both according to the requirements of such Directives and in particular with the preliminary ruling concerning – according to the Art 267 of TFUE – its interpretation.

The provision of certain extreme limits to the obligation of consistent interpretation – such as the *contra legem* result and the general principles of the Union – reveals the exceptional nature of the non-application of the principle, generally to be considered as a source of supranational legislation. Further, even if it was considered impossible to apply the principle of consistent interpretation for the reasons set out above, the opposition of the domestic provision to the European Directive, devoid of direct effect, opens up the way to initiatives aimed at verifying its legitimacy. Indeed, where there is domestic law in conflict with a Directive which is not directly applicable, it is always possible to check its compliance with 'Community law'.

The Constitutional Court therefore intervened to settle the issue: the recently published decision provides a conclusive (and absolutely predictable) interpretation.

institutions (1), creditors should bear the responsibility of checking individually the creditworthiness of the consumer. To that end, they should be allowed to use information provided by the consumer not only during the preparation of the credit agreement in question, but also during a long- standing commercial relationship. The Member States' authorities could also give appropriate instructions and guidelines to creditors. Consumers should also act with prudence and respect their contractual obligations'.

[101] E. Baffi and F. Parisi, n 39 above.

It articulates the constitutional illegitimacy of Art 11-*octies*, para 2, limited to the part in which it recalls the secondary legislation of the Bank of Italy. As expected, the Court stressed – in accordance with Arts 11 and 117, para 1 of the Constitution (therefore excluding the reference to the contrast with Art 3 Costitution proposed by the Tribunal of Turin) – that its capacity as guardian of compliance with those obligations requires a declaration of constitutional illegitimacy of a rule which conflicts with the content of a Directive, as interpreted by the Court of Justice in its reference for a preliminary ruling, with a judgment having retroactive effects. The contrast with constitutional principles lies in the connection with the specific secondary legislation evoked by Art 11-octies, para 2, since the previous formulation of Art 125-*sexies*, para 1 – applicable to contracts concluded before its entry into force in accordance to the 2021 reform – can only be interpreted in a way consistent with the *Lexitor* judgment.[102]

It has been rightly pointed out that the interpretation of a Community rule given by the Court of Justice can and must also be applied by the domestic court to legal relationships which arose and were constituted before the interpretive judgment, since the potential different temporal effects can be modulated only by the Court itself in its preliminary rulings.[103] Although the provision has been partially found to be contrary to European law, the intervention of the Constitutional Court is not necessarily conclusive, especially considering that a new Proposal for a Directive on consumer credit is under consideration by the European legislator.[104] The latter, part of the wider EU project to adapt EU legislation to the digitalization process, which has profoundly changed the decision-making process and the habits of consumers in general (the lending sector progressively getting digitalized, the new market players which offer credit agreements in different forms, new products, such as short-term high-cost credit, new ways of disclosing information) contains a clearer wording of the article on the event of early repayment which considers the *Lexitor* guidelines.[105]

[102] See also Tribunale di Monza – Sezione I, 4 January 2023 no 20 available at dirittobancario.it.

[103] See also Tribunale di Nocera Inferiore – Sezione I, Ordinanza 5 January 2023 available at dirittobancario.it.

[104] Proposal for a Directive of the European Parliament and of the Council on consumer credits COM (2021) 347 final. See F. Ferretti and B. Bertarini, n 72 above.

[105] See, in particular, Art 29 of COM (2021) 347 about the early repayment: '1. Member States shall ensure that the consumer is at any time entitled to early repayment. In such cases, the consumer shall be entitled to a reduction in the total cost of the credit, consisting of the interest and the costs for the remaining duration of the contract. When calculating that reduction, all the costs imposed on the consumer by the creditor shall be taken into consideration. 2. Member States shall ensure that the creditor, in the event of early repayment, is entitled to fair and objectively justified compensation for possible costs directly linked to the early repayment, provided that the early repayment falls within a period for which the borrowing rate is fixed. The compensation referred to in the first subparagraph may not exceed 1 % of the amount of credit subject to early repayment where the period of time between the early repayment and the agreed termination of the credit agreement exceeds one year. Where that period does not exceed one year, the compensation shall not exceed 0,5% of the amount of credit subject to early repayment. 3. Member States shall ensure that the

Accepting the clear will of the European legislator – as clarified in the letter of the decision just considered – it is unequivocal that the interpretation must refer to the rule governing the reduction in the total cost of the credit in the event of early repayment. In the light of the above considerations and, even more, of the preparatory revision of the Consumer Credit Directive, Member States are required to adopt an interpretation of the internal provision consistent with the European legal order.

In conclusion, on the one hand this is a dispute whose solution has been partially supplied: the Constitutional Court decision stressed that the Italian legislator, providing for a rule which crystallizes the regulatory content of the original wording of the Art 125-*sexies*, para 1, TUB, has integrated a breach of obligations arising from the Community legal order. The connection between the mentioned Art and the secondary legislation identified by the censored provision was groundbreaking, preventing the interpretation of the previous Art 125-*sexies*, para 1 (applicable to contracts concluded prior to the entry into force of the reform) in accordance with the *Lexitor* case and in conformity with the domestic case law which, after the Court of Justice's judgment, had adopted that interpretation. On the other hand, two variables at stake are still under development. The preliminary ruling of the Court of Justice on the interpretation of the event of early repayment of credit agreements for consumers relating to residential immovable property overturned the principles set out in the *Lexitor* case. The issue – if it is not identical – at least is based on the same logic and, therefore, a legal principle diametrically opposed from that established by the same Court could reopen the debate on early repayment of loans. Moreover, in accordance with the principle of legal certainty, the Union legal framework in the area of credit agreements – even if relating to residential immovable property and consumer credit agreements – should be consistent with and complementary one to the other. Finally, the

creditor is not entitled to the compensation referred to in paragraph 2 where one of the following conditions is fulfilled: (a) the repayment has been made under an insurance contract intended to provide a credit repayment guarantee; (b) the credit is granted in the form of an overdraft facility; (c) the repayment falls within a period for which the borrowing rate is not fixed. 4. By way of derogation from paragraph 2, Member States may provide that: (a) the creditor is only entitled to the compensation referred to in paragraph 2 on the condition that the amount of the early repayment exceeds the threshold set out in national law, which shall not exceed EUR 10 000 within any period of 12 months; (b) the creditor may exceptionally claim higher compensation if the creditor can prove that the loss suffered due to early repayment exceeds the amount determined in accordance with paragraph 2. 5. Where the compensation claimed by the creditor exceeds the loss actually suffered due to the early repayment, the consumer shall be entitled to a corresponding reduction. For the purposes of the first subparagraph, the loss shall consist of the difference between the initially agreed interest rate and the interest rate at which the creditor can lend out the amount subject to early repayment on the market at the time of that repayment, and shall take into account the impact of the early repayment on the administrative costs. 6. The compensation referred to in paragraph 2 shall not in any case exceed the amount of interest that the consumer would have paid during the period between the early repayment and the agreed date of termination of the credit agreement'.

forthcoming revision of the Consumer Credit Directive although its wording is not yet certain, will help to finalize or not the principles established by the Court of Justice.

Insights & Analyses

Non-Fungible Tokens: An Italian Private Law Perspective

Giorgia Vulpiani*

Abstract

Recently, non-fungible tokens have been attracting enormous interest. The legal regulations surrounding non-fungible tokens in Italy and the European Union suffer from insufficient and disjointed framework. As a result, several legal issues emerge from these new digital assets, such as their legal status, their mortis causa transmissibility, and the liability associated with their use. In the context of the creative sector, another relevant issue regards copyright and trademark protection, as examined in the July 2022 Court of Rome judgment.

I. Introduction

Recently, the potential of blockchain technology has attracted enormous interest. Blockchain is a distributed database that is shared among a computer network's nodes. Blockchain guarantees the fidelity and security of a data record without needing a trusted third party. Much of the attraction of this technology stems from blockchain's seemingly unbreakable security, immutability, and unparalleled transparency.

The most well-known application of blockchain is within the financial sector where it is used with cryptocurrencies like Bitcoin. Furthermore, blockchain enables storage and protection of smart contracts, which are programs that run when predetermined conditions are met, following the logic 'if this, then that'.

Blockchain and smart contracts are involved also when we talk about non-fungible tokens, which are becoming increasingly relevant.

In March 2021, Christie's sold Beeple's non-fungible token (NFT), *Everydays: The First 5000 days*, for the staggering sum of $69.3 million, causing sensation in the art market.[1]

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[1] See, A. Alpini, 'NFT and NFTed artworks between property and copyrightability', to be published in *Persona e Mercato* (2023), read by courtesy of the author.

This sale was followed by a frenzy of NFT trading,[2] which has involved not only the art world, but also fashion, cinema, sport and music and has inevitably awakened the interest of jurists.[3]

Non-fungible tokens, therefore, play an increasingly important role in the art and fashion industries (crypto art and crypto fashion) and are also connected with the metaverse. One of NFT's biggest appeals is their unique and niche market status.

A token[4] is a series of encrypted data registered on a blockchain or another distributed ledger that can be fungible or non-fungible.

Fungible tokens are interchangeable units that hold equal value. An important fungible token is Bitcoin, which, like physical money, can be traded or exchanged for another bitcoin.[5] The protocol associated with fungible tokens is ERC20 –

[2] A. Lennart, 'The non-fungible token (NFT) market and its relationship with Bitcoin and Ethereum' *Blockchain Researching Lab Working Paper Series* no 20, 6 June 2021.

[3] On nfts, art, fashion and blockchain, see G. Magri, 'La blockchain può rendere più sicuro il mercato dell'arte?' 2 *Aedon* (2019); G. Frezza, 'Blockchain, autenticazioni e arte contemporanea' *Il Diritto di Famiglia e delle Persone*, 489 (2020); R. Moro Visconti, 'La valutazione dell'arte digitale' *Diritto industriale,* 472 (2021); G. Nava, 'I non fungible token' in R. Giordano et al eds, *Il diritto nell'era digitale* (Milano: Giuffrè, 2022), 237-282; G. Trovatore, 'L'opera d'arte e il suo valore nell'epoca della blockchain' *Arte e Diritto*, 81-94 (2022), 81; E. Damiani, 'Cripto-arte e non fungible tokens: i problemi del civilista' *Rassegna di diritto della moda e delle arti*, 352-364 (2022); G. Vulpiani, 'NFTs e cryptofashion: profili giuridici' *Rassegna di diritto della moda e delle arti,* 47-67 (2022); C. Iorio, 'Artwork circulation and blockchain: a legal overview' *Diritto mercato e tecnologia*, 1-22 (2022); P. Liberanome, 'Criptoarte e nuove sfide alla tutela dei diritti autorali' *Contratti*, 93-100 (2022); N. Muciaccia, 'Prime riflessioni sul rapporto tra NFT e proprietà intellettuale' Il *diritto informazione e informatica*, 893-944 (2022); A. Alpini, n 1 above; Id, 'Dalla 'platform economy' alla ' clout economy'. La discussa natura giuridica degli NFTs' Rassegna *di diritto della moda e delle arti*, 365-374 (2022); A. Caloni, 'Blockchain e mercato dell'arte: spunti di diritto privato' *Arte e diritto*, 183-207 (2022) See also, Frye and Brian L., 'NFTs & the Death of Art', 19 April 2021, available at https://tinyurl.com/mry5erfj (last visited 20 September 2023); L.J. Trautman, 'Virtual Art and Non fungible tokens' *Hofstra Law Review*, 362-426 (2022); A. Guaccero and G. Sandrelli, 'Non-fungible tokens (NFTs)' *Banca, borsa, titoli di credito*, I, 834, 824-867 (2022); R. Moro Visconti, 'La valutazione dei marchi nella moda: dal Fashion Tech al Digital Clothing' *Diritto industriale,* 255-268 (2022). B. Bodo et al, 'The Rise of NFTs: These Aren't the Droids You're Looking For' *European Intellectual Property Review*, 44, 5, 265-282 (2022).

[4] On tokens in general, P. Hacker and C. Thomale, 'Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law' *European Company and Financial Law Review*, 645-696 (2018); F. Annunziata, 'Speak if you can: what are you? An alternative approach to the initial coin offerings' *Bocconi Legal Studies Research Papers Series*, 11 February 2019, 1-50; E. Rulli, 'Incorporazione senza res e dematerializzazione senza accentratore: appunti sui token' *Orizzonti del diritto commerciale*, 121-150 (2019); M. Giuliano, 'Le risorse digitali nel paradigma dell'art. 810 cod. civ. ai tempi della blockchain. Parte prima' *Nuova giurisprudenza civile commentata*, I, 1214-1226 (2021) and Id, 'Le risorse digitali nel paradigma dell'art. 810 cod. civ. ai tempi della blockchain. Parte seconda' *Nuova giurisprudenza civile commentata,* I, 1456-1466 (2021).

[5] On this topic, see N. Vardi, ' "Criptovalute" e dintorni: alcune considerazioni sulla natura giuridica dei bitcoin' *Il diritto dell'informazione e dell'informatica*, III, 448-449 (2015); F. Carrière, 'Le "criptovalute" sotto la luce delle nostrane categorie giuridiche di "strumenti finanziari", "valori mobiliari" e "prodotti finanziari": tra tradizione e innovazione' *Rivista di diritto bancario*, I, 135-136, (2019); M. Mancini, 'Valute virtuali e Bitcoin' *Analisi giuridica dell'economia*, 117-138 (2015); A. Caloni, ' "Bitcoin": profili civilistici e tutela dell'investitore' *Rivista di diritto civile*, 169 -182 (2019);

CLASS OF IDENTICAL TOKENS.

On the other hand, an NFT is a unique cryptographic token registered on a blockchain, certifying the ownership, authenticity and scarcity of the linked asset.[6] Each NFT has a digital signature that makes it impossible for it to exchange it for another NFT, making NFTs non-fungible in nature. The protocol for non-fungible tokens is ERC-721 on Ethereum– CLASS OF UNIQUE TOKENS.

The key concept of NFTs is represented by their uniqueness, as it is the scarcity of these goods that determines their value and therefore creates a niche market.

Cryptocurrencies are used to purchase NFTs, and NFT transaction records are kept on a public blockchain ledger which allows open access to NFT ownership verification. Blockchains, as we will examine later in this essay, are appealing because they use a series of complex mathematical equations to process a transaction, making it an extremely secure form of asset management.

NFTs are created through minting, which is the process of creating a code that contains unique identification and ownership details for a digital asset on a blockchain network.

Once NFTs are minted, the NFT creators can sell their work through the NFT market, which links to the user's blockchain account to keep track of transactions and ownership. NFTs function as codes that locate and authenticate a digital image. The NFT code is 'on chain', located within blockchain, while the image, such as a digital artwork, is 'off chain' and located in a wallet.

In order to mint and transfer an NFT, smart contracts are of fundamental importance. Once the conditions of a smart contract are met, the smart contract code will mint an NFT, transfer an NFT, or pay royalties to the NFT's creator.[7]

Every digital asset, including images, videos, music, and tweets, can be minted

M. Cian, 'La criptovaluta – alle radici dell'idea giuridica di denaro attraverso la tecnologia: spunti preliminari' *Banca, borsa e titoli di credito*, I, 331-332 (2019); E. Girino, 'Criptovalute: un problema di legalità funzionale' Rivista di diritto bancario, I, 733-769, (2019); A. Rahmatian, 'Electronic Money and Cryptocurrencies (Bitcoin): Suggestions for Definitions' *Journal of International Banking Law and Regulation*, 115-121 (2019); G. Rinaldi, 'Approcci normativi e qualificazione giuridica delle criptomonete' *Contratto e impresa*, 257-296 (2019); E. Calzolaio, 'La qualificazione del bitcoin: appunti di comparazione giuridica' *Danno e responsabilità*, 188-197 (2021); M. Giuliano, 'Le risorse digitali [...]. Parte prima' n 4 above, and Id, 'Le risorse digitali [...]. Parte seconda' n 4 above, 1456; U. Malvagna and F. Sartori, 'Cryptocurrencies as 'Fungible Digital Assets' Within the Italian Legal System: Regulatory and Private Law Issues' *The Italian Law Journal*, 481-502 (2022); M. Guastadisegni, 'Criptovaluta e prodotto finanziario' *Danno e responsabilità,* 492-509 (2022). In the Italian jurisprudence, see Corte di Cassazione-Sezione penale 26 October 2022 no 44378, *ilpenalista.it*, 16 February 2023, annotated by R. Razzante, 'Le crypto attività come prodotti finanziari'.

[6] Qin Wang et al, 'Non-Fungible Token (NFT): Overview, Evaluation, Opportunities and Challenges' *Cornell University*, 25 October 2021, 1-20, arXiv:2105.07447.

[7] K.E. Busch, 'Non-Fungible Tokens (NFTs)' *Congressional Research Service*, 1-21, 20 July 2022; A. Stazi, 'Smart contracts, NFT trading and weaker party protection', 11, 1-18 (1 February 2023), forthcoming in F. Di Porto and O. Pollicino eds, *NFTs and Metaverses versus Law* (Springer, 2023), available at https://tinyurl.com/3ua6427x (last visited 20 September 2023); Qin Wang et al, n 6 above, 4.

as an NFT. Although a jpeg file. can be duplicated, non-fungible tokens are not duplicative because the NFT's code is unique and inimitable.

Each non-fungible token is associated with a smart contract containing information on the authorship of the work, payment of royalties to the creator, the methods of disposal and use of the work.

An NFT's creator can easily prove the existence and ownership of a digital asset in the form of video, image, event ticket, or other applicable medium.

Many legal issues arise regarding NFTs, such as their legal status or potential copyright violations. Counterfeit NFTs linked to the unauthorized use of artworks and trademarks, and fraudulent accounts selling them, may result in allegations of trademark or copyright infringement. NFT marketplaces do not provide a system to authenticate users and verify that they have secured the proper rights before selling the digital asset. NFTs can guarantee ownership, but not authenticity because if the information originally entered is false or in error from the start, the NFTs will confirm and perpetuate that falsehood in all their future sales. Thus, we need to investigate the legal implications of smart contracts.

II. NFTs: Lack of Legislation

There is no legislation specific to non-fungible tokens; therefore, NFTs give rise to several legal questions, including the nature of this good and their *mortis causa* transmissibility. There is also the problem of the protecting intellectual property, especially in the artistic and creative sectors. Consider, for example, the creation and sale of an NFT reproducing the painting of a well-known artist who did not consent to reproducing his work or, selling a fashion item in the metaverse that reproduces the products or logos of well-known designers. In these cases, we must ask whether the types of protection suitable in the 'physical' world are applicable to the metaverse. A further issue concerns civil liability linked to the creation and circulation of non-fungible tokens.[8]

As mentioned above, non-fungible tokens are inseparably linked to blockchain and smart contracts.[9] Even with regard to these technologies, national and

[8] L. Buonanno, 'La responsabilità civile nell'era delle nuove tecnologie: l'influenza della blockchain' *Responsabilità civile e previdenza*, 1618-1627 (2020).

[9] Regarding the Italian doctrine on the topic, see P. Cuccuru, 'Blockchain ed automazione contrattuale. Riflessione sugli smart contract' *Nuova giurisprudenza civile commentata*, 107-119 (2017); D. Di Sabato, 'Gli smart contracts: robot che gestiscono il rischio contrattuale' *Contratto e impresa*, 378-402 (2017); D. Restuccia, 'Il notaio nel terzo millennio, tra sharing economy e blockchain' *Notariato*, 53-56 (2017); G. Finocchiaro, 'Il contratto nell'era dell'intelligenza artificiale' *Rivista trimestrale di diritto e procedura civile*, 441-460 (2018); L. Parola et al, 'Blockchain e smart contract: questioni giuridiche aperte' *Contratti*, 681-688 (2018); A. Razzini, 'Blockchain e protezione dei dati personali alla luce del nuovo regolamento europeo GDPR' *Ciberspazio e diritto*, 197-210 (2018); E. Giorgini, 'Algorithms and Law' *The Italian Law Journal*, 131-149 (2019); R. Moro Visconti, 'La valutazione delle blockchain: Internet of value, network digitali e smart transaction' *Diritto ind*ustriale, 301-311 (2019); R. Pardolesi and A. Davola, '«Smart contract»: lusinghe ed equivoci

European legislation is very meagre and can highlight several instances of friction between the technologies themselves and some fundamental rights of the person, such as protection of personal data and privacy.[10]

dell'innovazione purchessia' *Foro italiano*, V, 195-207 (2019); F. Di Ciommo, 'Smart contract e non diritto' *Nuovo diritto civile*, 257-295 (2019); F. Delfini, 'Blockchain, smart contracts e innovazione tecnologica: l'informatica e il diritto dei contratti' *Rivista del diritto privato*, 167-178 (2019); R. Battaglini and M.T. Giordano eds, *Blockchain e smart contract* (Milano: Giuffrè, 2019). M. Giaccaglia, 'Considerazioni su blockchain e smart contract (oltre le criptovalute)' *Contratto e impresa*, 941-970 (2019); Id, '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*, 113-169 (2021); Id, 'Questioni (ir)risolte in tema di smart contract. Per un ritorno al passato' *Tecnologie e diritto*, 333-366 (2022); A. Stazi, *Automazione contrattuale e contratti intelligenti. Gli smart contracts nel diritto comparato* (Torino: Giappichelli, 2019), 99, 1-208; F. Scutiero, 'Smart contract e sistema di diritto, un connubio tutto da definire' *Foro napoletano*, 113-134 (2019); E. Battelli, 'Le nuove frontiere dell'automatizzazione contrattuale tra codici algoritmici e big data: gli smart contracts in ambito assicurativo, bancario e finanziario' *Giustizia civile,* 681-711 (2020); C. Pernice, 'Smart contract e automazione contrattuale, potenzialità dei rischi della negoziazione algoritmica nell'era digitale' *Diritto del mercato assicurativo e finanziario*, 117-137 (2019); Ead, 'Distributed ledger technology blockchain e smart contracts: prime regolazioni' *Tecnologie e diritto*, 490-505 (2020); R. De Caria, 'Blockchain and Smart Contracts: Legal Issues and Regulatory Responses between Private and Economic Law' *The Italian Law Journal*, 363-379 (2020); F. Faini, 'Blockchain e diritto: la catena del valore tra documenti informatici, smart contracts e data protection' *Responsabilità civile e previdenza*, 297-316 (2020); I. Ferlito, '«Smart Contract». Automazione contrattuale ed etica dell'algoritmo' *Comparazione e diritto civile*, 661-703 (2020); V. Bellomia, 'Il contratto intelligente: questioni di diritto civile' *Judicium*, 1-28 (2020); C. Amato, 'La computerizzazione del contratto (Smart, data oriented, computable e self-driving contracts. Una panoramica)' *Europa e diritto privato*, 1259-1306 (2020); M. Maugeri, *Smart contracts e disciplina dei contratti* (Bologna: il Mulino, 2021), 1-184; Ead, 'Smart contracts' *Enciclopedia del diritto* (Milano: Giuffrè, 2021) 1132-1149; Ead, 'Smart contracts, Consumer protection, and Competing European Narrativesof Private Law' *German Law Journal*, 900-909 (2022); F. Gambino, 'Blockchain, smart contract e diritto sradicato' *Tecnologie e diritto*, 28-37 (2021); C. Iorio, 'Blockchain e diritto dei contratti: criticità e prospettive' *Actualidad Juridica Iberomericana*, 654-689 (2022); M. Proto, 'Questioni in tema di intelligenza artificiale e disciplina del contratto' in R. Giordano et al eds, *Il diritto nell'era digitale* (Milano: Giuffrè, 2022), 175-189; P. Matera and A. Benincampi, 'Blockchain' *Digesto, discipline privatistiche, sez. comm.*, (Torino: UTET, 2022), 23-51; I. Martone, *Smart contracts. Fenomenologia e funzioni*, (Napoli: Edizioni Scientifiche Italiane, 2022), 13; L. Di Nella, 'Smart contract, Blockchain e interpretazione dei contratti' *Rassegna di diritto civile*, 48-91 (2022); M. Chierici, 'Contratto di Blockchain as a Service: fondamenti teorici di una nuova prassi commerciali' *Contratti*, 197-219 (2022).

[10] On privacy in general, see: P. Perlingieri, *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2018), 198; Id, 'Privacy digitale e protezione dei dati personali tra persona e mercato' *Foro napoletano*, 481-496 (2018) and Id, *Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti* (Napoli: Edizioni Scientifiche Italianei, 2020), III, 107. See also S. Rodotà, *Tecnologie e diritti*, (Bologna: il Mulino, 1995); Id: 'Riservatezza', *Enciclopedia italiana Treccani*, (Roma: Treccani, 2007) VII App, (now also on Roma: Treccani Libri, 2020); Id, 'Una costituzione per internet?' *Politica del diritto*, 342, 337-351 (2010). The issues on privacy and data protection arise in particular regarding social networks; on this topic, see, C. Perlingieri, *Profili civilistici dei social network* (Napoli: Edizioni Scientifiche Italiane, 2014), 66. Regarding the issues on privacy, social networks and minors, see C. Perlingieri, 'La tutela dei minori di età nei social networks' *Rassegna di diritto civile*, 1324-1340 (2016); E. Andreola, *Minori e incapaci in Internet* (Napoli: Edizioni Scientifiche Italiane, 2019) 107; A. Astone, 'L'accesso dei minori d'età ai servizi della c.d. Società dell'informazione: l'art. 8 del Reg. (UE) 2016/679 e i suoi riflessi sul Codice per la protezione dei dati personali' *Contratto e impresa*, 614-648 (2019); G. Vulpiani,

Moreover, questions arise regarding civil liability. Currently, the only intervention carried out by the Italian legislator on the subject is Legge 12 of February, 11 2019, Conversion Law of decreto legge no 135 of December 14, 2018, that inserted Art 8-*ter* on technologies based on distributed registers and smart contracts.[11] According to this law, distributed register technologies are computer technologies and protocols that

> 'use a shared, distributed, replicable, simultaneously accessible, architecturally decentralized register on a cryptographic basis, to allow the registration, validation, updating and storage of data both unencrypted and further protected by encryption, verifiable by each participant. These data are non-alterable and non-modifiable'.[12]

The technologies allow the execution of the contract: the code is read, validated, and stored on a plurality of distributed registers. It follows the logic of 'if this, then that'. The law does not, therefore, speak of blockchain, but, more generally, of distributed registers superimposing the two figures.[13] Whereas the smart contract is defined by Art 8-*ter* legge 12/2019 as a computer protocol that operates on technologies based on distributed registers and whose execution automatically binds two or more parts based on predefined effects from the same.

Further, there is a lack of EU regulation on blockchain and smart contracts, even in the face of various initiatives such as the establishment of the EU Blockchain Observatory and Forum, of the International Association for Trusts Blockchain Applications, and the Interoperable Standards for DLT and Blockchains.

Of particular relevance is the 2018 European Parliament Resolution on distributed register and blockchain technologies: creating trust through disintermediation.[14] The resolution analyses the implications of digital ledger technologies, and proposed regulation, developed by the European Commission on the markets for crypto assets (MiCAR),[15] to which is linked another relating to a

'L'utente minore online: tutela della privacy e attività negoziale' *Tecnologie e diritto*, 103-122 (2021).

[11] On this topic, see G. Remotti, 'Blockchain smart contract: primo inquadramento e prospettive d'indagine (commento all'art. 8 ter D.L. 14 dicembre 2018, n. 135)' *Osservatorio del diritto civile e commerciale*, 189-228 (2020); C. Pernice, n 11 above, 490; M. Maugeri, n 9 above, 1139-1140; S. Rigazio, 'Smart contracts e tecnologie basate su registri distribuiti nella L. 12/2019' *Diritto dell'informazione e dell'informatica*, 369-395 (2021). See also, C. Poncibò, *Il diritto comparato e la blockchain* (Napoli: Edizioni Scientifiche Italiane, 2020), 154-158.

[12] Author's translation. Art 8-*ter*, Legge 12/2019 states that 'Si definiscono "tecnologie basate su registri distribuiti" le tecnologie e i protocolli informatici che usano un registro condiviso, distribuito, replicabile, accessibile simultaneamente, architetturalmente decentralizzato su basi crittografiche, tali da consentire la registrazione, la convalida, l'aggiornamento e l'archiviazione di dati sia in chiaro che ulteriormente protetti da crittografia verificabili da ciascun partecipante, non alterabili e non modificabili'.

[13] On this topic, S. Rigazio, n 11 above, 369.

[14] European Parliament resolution 3 October 2018 on distributed ledger technologies and blockchains: building trust with disintermediation (2017/2772(RSP)).

[15] Proposal for a Regulation of the European Parliament and of the Council on Markets in

pilot scheme for market infrastructures based on distributed ledger technologies (DLT).[16]

The MiCAR, approved on May 31 2023,[17] qualifies crypto assets as one of the main applications of distributed ledger technology and defines them as 'digital representations of value or rights that could bring significant benefits to market participants, including retail holders of crypto-assets'.

This definition does not include the non-fungible tokens, as also highlighted by Report no 7/2021 of the European observatory on blockchain;[18] in fact it is expressly stated that the regulation

> 'shall not apply to crypto-assets that are unique and not fungible with other crypto-assets, including digital art and collectibles. The value of such unique and non-fungible crypto-assets is attributable to each crypto-asset's unique characteristics and the utility it gives to the holder of the token. Nor should this Regulation apply to crypto-assets representing services or physical assets that are unique and non-fungible, such as product guarantees or real estate'.

III. The Blockchain: Definitions and Legal Issues

Blockchain is a type of technology aimed at managing transactions through the creation of a distributed database among users of a network.[19] Blockchain is a shared and immutable distributed ledger (DLT), which facilitates the process of recording and managing transactions and tracking assets within a defined network.

The concept of database management distribution rejects the traditional logic of centralized data management through the control of a single central authority.

Crypto-assets, and amending Directive (EU) 2019/1937, COM(2020) 593 final 24th September 2020. Cf F. Annunziata, 'Verso una disciplina europea delle crypto-attività- Riflessioni a margine della recente proposta della commissione UE' *dirittobancario.it*, 15 October 2020.

[16] Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology, COM(2020)594 final 24 September 2020.

[17] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L150/40.

[18] EU Blockchain Observatory and Forum, NFT-Legal token classification, available at https://tinyurl.com/3pnn3r2s (last visited 20 September 2023).

[19] A.T. Aras and V. Kulkarni, 'Blockchain and its applications – a detailed survey' *International Journal of Computer Applications*, 180, 29-35 (2017); Q.F. Zhang et al, 'Blockchain: Architecture and research progress' *Chinese Journal of Computers*, 041(005), 969–988 (2018); M.N.M. Bhutta et al, 'A Survey on Blockchain Technology: Evolution, Architecture and Security' *IEEE Access*, 61048-61073 (2021); Shashank Mohan Jain, *A Brief Introduction to Web3: Decentralized Web Fundamentals for App Development* (New York: Apress, 2023), 13.

In the DLTs, all users operate at the same level, on a peer to peer network, and may act only with the consent of the majority of nodes.

The distributed ledger is structured in blocks linked to each other through an immutable encryption system and is thus able to reliably maintain the recorded information. Each transaction on the block network is validated by the network itself, removing the need for a central authority to monitor or for intermediaries to intervene. More specifically, the validation mechanism of the block and all transactions contained in it require the resolution of a complex cryptographic puzzle (mining). The recorded data are time stamped by means of asymmetric key cryptographic techniques – where every user has a private and a public key – in the chain of blocks and, once recorded, cannot be modified or tampered with without the consent of the majority of the involved nodes, which is highly complex. This allows substantial inalterability and traceability of the information entered. The characteristics of the blockchain are, therefore, decentralization, verifiability and immutability; characteristics that guarantee the authenticity, integrity and reliability of the recorded information.[20]

Blockchain technology ensures the validity of datasets by spreading data over many nodes which must agree to confirm data validity via the previously determined consensus mechanism. So, blockchain can ensure that data are not manipulated while stored and that the party making a transfer is entitled to transfer the asset on the ledger and is not able to transfer it twice to separate buyers.

However, beyond these inbuilt protection mechanisms, blockchain does not make inaccurate data accurate. Inaccurate data remains, in fact, inaccurate and the 'garbage in, garbage out' dilemma holds.

Moreover, while the standardization and automatization that form part of blockchain mitigate operational risk, in principle, an error once implemented in the code may easily spread over the whole system affecting a greater number of nodes and individuals than would occur in a concentrated ledger.

There is a distinction between two types of blockchain: permissionless blockchains and permissioned blockchains. The differences concern mainly the identification of the subjects participating in it, the method of selection of nodes, the size of the network, the mechanism of shared consensus and the transparency of the content of the blocks.

In fact, in a permissionless blockchain, anyone can enter the network and act

[20] On blockchain and notary activity, M. Manente, 'Blockchain: la pretesa di sostituire il notaio' *Notariato*, 211-219 (2016); D. Restuccia, 'Il notaio nel terzo millennio, tra sharing economy e blockchain' *Notariato*, 53-56 (2017); M. Nastri, 'Registri sussidiari, blockchain #notaio oltre la lezione di Carnelutti?' *Notariato*, 369-371 (2017); M. Krogh, 'Transazioni in valute virtuali e rischi di riciclaggio. Il ruolo del notaio' *Notariato*, 155-169 (2018); C. Licini, 'Il notaio nell'era digitale: riflessioni gius-economiche' *Notariato*, 142-150 (2018); U. Bechini, *Il notaio digitale. Dalla firma alla blockchain* (Milano: Giuffrè, 2019), 153. On the notarchain, see E. Damiani, 'Blockchain Application in General Private Law: the Notarchain Case', in A. Caligiuri ed, *Legal Technology Transformation. A Practical Assessment* (Napoli: Editoriale Scientifica, 2021), 229-236.

as a node, keeping their identity confidential, which makes it a highly complex procedure to alter this type of blockchain because it would require a very high computational skill, in addition to the consensus of more than fifty percent of nodes.

Permissioned blockchains, on the other hand, are characterized by greater centralization, because a central entity can determine who can access them by identification.

There is also a distinction between public and private blockchains. The difference between these two types of blockchain is that the former is not managed by anyone, while the latter refers to a single entity or group.

It is the financial sector that has witnessed the birth and diffusion of the technology under consideration, where the blockchain is used as the 'engine' of the bitcoin cryptocurrency conceived by Satoshi Nakamoto.[21]

Bitcoin is not a currency issued by a central bank, but a peer-to-peer electronic cash system, it is therefore a technology that allows you to send value between parts of a network without an intermediary.[22]

A particularly interesting application in the legal field can be found in France, where the Blockchain Order no 2017/1674 was issued, with which the use of the BTC for the 'représentation et la transmission de titres financiers' was authorized. Ordonnance no 2017/1674 follows Ord no 2016/520 of April 28, 2016 that allows the sale of certain types of financial products on the blockchain.

Due to the specific structure of the blockchain, legal criticalities emerge in relation to the connection between this technology and EU Regulation 2016/679 (GDPR)[23] and decreto legislativo no 196/2003, as amended by decreto legislativo no 101/2018, with reference to the identification of the data controller and the right to be forgotten.[24]

[21] See S. Nakamoto, Bitcoin: a Peer-to-Peer Electronic Cash System, in www.bitcoin.org.

[22] M. Giuliano, 'Le risorse digitali […]. Parte seconda' n 4 above, 1456. See also, N. Vardi, n 5 above, 448; F. Carrière, n 5 above, 135; M. Mancini, n 5 above, 117; A. Caloni, ' "Bitcoin": profili civilistici e tutela dell'investitore' Rivista di diritto civile, 169 -182 (2019); M. Cian, n 5 above, 331; E. Girino, n 5 above, 733; A. Rahmatian, n 5 above, 115; G. Rinaldi, n 5 above, 257; E. Calzolaio, n 5 above, 188; U. Malvagna and F. Sartori, n 5 above, 485; M. Guastadisegni, n 5 above, 492.

[23] On Reg. (UE) n. 679/2016, see P. Perlingieri, 'Privacy digitale' n 10 above, 481; A. De Franceschi, *La circolazione dei dati personali tra privacy e contratto* (Napoli: Edizioni Scientifiche Italiane, 2018), 3; I.A. Caggiano, 'Privacy e minori nell'era digitale. Il consenso al trattamento dei dati dei minori all'indomani del Regolamento UE 2016/679, tra diritto e tecno-regolazione' *Familia*, 3-23 (2018); E. Lucchini Guastalla, 'Il nuovo regolamento europeo sul trattamento dei dati personali: i princìpi ispiratori' *Contratto e impresa*, 2018, 106-125; A. Mantelero and D. Poletti eds, *Regolare la tecnologia: il Reg. UE 2016/679 e la protezione dei dati personali. Un dialogo tra Italia e Spagna* (Pisa: University Press, 2018), 9; V. Cuffaro, 'Il diritto europeo sul trattamento dei dati personali' *Contratto e impresa,* 1098-1119 (2018). See also F. Piraino, 'Il regolamento generale sulla protezione dei dati personali e i diritti dell'interessato' *Nuove leggi civili commentate*, 369-409 (2017) and A. Gentili, 'La volontà nel contesto digitale: interessi del mercato e diritti delle persone' *Rivista trimestrale di diritto e procedura civile* 701-716 (2022).

[24] On the right to be forgotten, see M. Mezzanotte, *Il diritto all'oblio*. Contributo allo studio *della privacy storica*, (Napoli: Edizioni Scientifiche Italiane, 2009), 81; S. Rodotà, *Il diritto di avere*

Many practitioners and academics have pointed out that blockchain is incompatible with privacy laws. For instance, in a permissionless public blockchain system, no single party takes responsibility for the availability or security of a particular blockchain network, and all users of the system may have access to the data on the network.

Another issue concerns negligent performance. For instance, in the financial sector, a certain security and processing standard for market participants are required - what if the blockchain fails to meet these standards? Further, what if the user sends virtual currency to the wrong address? Is there anyone to whom the user can turn for redress?

IV. Smart Contracts: Definition and Legal Issues

A smart contract can be stored on the blockchain. This is a computerised transaction protocol that executes the terms of a contract at the fulfilment of pre-set conditions.[25] Through the blockchain, the unchangeability and automatic

diritti, (Bari-Roma: Laterza, 2012) 404; F. Di Ciommo, 'Quel che il diritto non dice. Diritto e oblio' *Danno e responsabilità*, 1101-1113 (2014); S. Morelli, 'Oblio (diritto all')' *Enciclopedia del* diritto, (Milano: Giuffrè, 2002), agg. VI, 848; Id, 'Fondamento costituzionale e tecniche di tutela dei diritti della personalità di nuova emersione (a proposito del cd 'diritto all'oblio')' *Giustizia civile*, 515-524 (1997); L. Rattin, 'Il diritto all'oblio' *Archivio. civile*, 1069-1074 (2000); E. Gabrielli eds, *Il diritto all'oblio (Atti del convegno di studi del 17 maggio 1997)* (Napoli: Edizioni Scientifiche Italiane, 1999); P. Laghezza, 'Il diritto all'oblio esiste (e si vede)' *Foro italiano*, I, 1835-1838 (1998). On the right to be forgotten in the GDPR, see F. Di Ciommo, 'Il diritto all'oblio (oblito) nel regolamento Ue 2016/679 sul trattamento dei dati personali' *Foro italiano*, V, 306-315 (2017); Id, 'Il diritto all'oblio nel Regolamento (UE) 2016/679. Ovvero, di un 'tratto di penna del legislatore' che non manda al macero alcunché' *Corriere giuridico*, 16-31 (2018); Id, 'Privacy in Europe After Regulation (EU) No 2016/679: What Will Remain of the Right to Be Forgotten?' *The Italian Law Journal*, 623-646 (2017); S. Bonavita and R. Pardolesi, 'GDPR e diritto alla cancellazione (oblio)' *Danno e responsabilità*, 269-281 (2018).

[25] For a technical point of view, see Lin Shi-Yi, Lei Zhang et al, 'A survey of application research based on blockchain smart contract' *Wireless Networks*, 28, 635-690 (2022). On the legal issues, see A. Wright and P. De Filippi, 'Decentralized Blockchain Technology and the Rise of Lex Cryptographia', 1-58, (March 10, 2015), available at https://tinyurl.com/bdhymrbb (last visisted 20 September 2023); A. Savelyev, 'Contract law 2.0: 'Smart contracts as the beginning of the end of classic contract law' *Higher School of Economics Research Paper no WP BRP 71/LAW/2016*, 3-24 (2016); E. Mik, 'Smart contracts: Terminology, technical limitations and real world complexity' *Law, Innovation and Technology, Research Collection School Of Law*, 9, (2), 269-300, (2017); M. Raskin, 'The Law and Legality of Smart Contracts' 1 *Georgetown Law Technology Review* 305-341 (2017); R. O'Shields, 'Smart contracts: legal agreements for the blockchain' *North Carolina Banking Institute*, 177-194 (2017); L.W. Cong and Z. He, 'Blockchain disruption and Smart Contracts' *The Review of Financial Studies*, 1754-1797 (2019); P. Sanz Bayón, 'Key Legal Issues Surrounding Smart Contract Applications' KLRI *Journal of Law and Legislation*, 63-91 (2019); M. Durovic and A. Janssen, 'The Formation of Blockchain-based Smart Contracts in the Light of Contract Law' *European Review of Private Law* 6, 753–772 (2019); M. Durovic and F. Lech, 'The Enforceability of Smart Contracts' *The Italian Law Journal*, 493-511 (2019). In the Italian literature, see P. Cuccuru, 'Beyond bitcoins: an early overview on smart contracts' *International Journal of Law and Information Technology,* 179–195 (2017); Id, 'Blockchain' n 9 above, 107; D. Di Sabato, n 9

execution of the computer code of the smart contract is guaranteed.

The term smart contract was coined by Nick Szabo. According to Szabo, 'a smart contract is a computerized transaction protocol that executes the terms of a contract'. The general objectives of smart contract design are to satisfy common contractual conditions (such as payment terms, liens, confidentiality, and even enforcement), minimize exceptions both malicious and accidental, and minimize the need for trusted intermediaries. Related economic goals include lowering fraud loss, arbitration and enforcement costs, and other transaction costs.[26] According to Szabo, POS terminals and cards, EDI, and agoric allocation of public network bandwidth are examples of smart contracts. The strength of the smart contract lies in the fact that the cooperation of the parts is not necessary for its execution; for them to run automatically, it is sufficient that the predetermined conditions are met, following the logic of the 'if, then that'.

The impulse that determines the execution of the smart contract can then depend either on elements internal to the code or external elements, such as the fluctuations of an interest rate.

If you need to access information off-chain, you will need the intervention of an element placed outside the blockchain: the Oracle, which sends information to the chain of blocks in relation to circumstances deduced in the code of the smart contract that constitute the conditions of execution.[27]

above, 378; G. Finocchiaro, n 9 above, 441; L. Parola, P. Merati and G. Gavotti, n 9 above, 681; R. Pardolesi and A. Davola, n 9 above, 195; F. Di Ciommo, 'Smart contract e non diritto' n 9 above 257-295; F. Delfini, n 9 above, 167; R. de Caria, 'The Legal Meaning of Smart Contracts' 26(6) *European Review of Private Law*, 731, 745-750 (2018); Id, 'Definitions of Smart Contracts. Between Law and Code', in M. Cannarsa et al eds, The Cambridge *Handbook of Smart Contracts, Blockchain Technology and Digital Platforms* (Cambridge: Cambridge University Press, 2019); G. Lemme, 'Gli smart contracts e le tre leggi della robotica' *Analisi giuridica dell'economia*, 133, 129-152 (2019); M. Giaccaglia, n 9 above, 333; F. Scutiero, n 9 above, 113 ff; E. Battelli, n 9 above, 681; I. Ferlito, n 9 above, 661; V. Bellomia, n 9 above; C. Amato, n 9 above, 1259; M. Maugeri, n 9 above; A. Palladino, 'Dall'homo loquens all'homo smart: la contrattualistica del terzo millennio' *De Iustitia*, 90-103 (2020); G. Rinaldi, 'Smart contract: meccanizzazione del contratto nel paradigma della blockchain' in G. Alpa ed, *Diritto ed* intelligenza artificiale (Pisa: Pacini giuridica, 2020), 343; F. Gambino, n 9, above, 28; S. Orlando, 'Profili definitori degli "smart contracts" ' in R. Clarizia ed, *Internet. Contratto e persona, Quale futuro?* (Pisa: Pacini editore, 2021), 48; A. Stazi, *Smart Contracts and Comparative Law - A Western Perspective* (Berlin: Springer, 2021), 105; A. Cinque, 'Gli "smart contract" nell'ambito del "FinTech" e dell'"InsurTech" ' *Jus Civile*, 187-204, (2021); V. Zeno-Zencovich, ' "Smart contracts", "granular norms" and "non-discrimination" ', in C. Busch and A. De Franceschi eds, *Algorithmic Regulation and Personalized Law* (Munich: Beck, 2021), 264-278; M. Proto, n 9 above, 179; E.W. Di Mauro, 'Smart Contracts Operating on Blockchain: Advantages and Disadvantages' *The Italian Law Journal*, 109-130 (2022); C. Iorio, 'Blockchain e diritto dei contratti' n 9 above, 659; I. Martone, n 9 above, 13; L. Di Nella, n 9 above, 48.

[26] N. Szabo, 'Smart contracts: building blocks for digital markets' *EXTROPY: The Journal of Transhumanist Thought*, 1996, 16, 18.

[27] Lin Shi-Yi, Lei Zhang et al, n 25 above, 660: 'As a closed system environment with deterministic, blockchain is separated from the real world. The blockchain can only obtain the data in the chain but not out of the chain, which the main reason is that smart contract can only passively accept but cannot actively obtain the data out of the chain. In addition, it is mostly used for the transaction processing of digital assets when blockchain is applied to finance, and the required

Here the first problem already becomes apparent regarding the correctness of information from outside and the liability in the case of erroneous data transmission.

One of the central issues smart contracts raise concerns the traceability of the same to the classical concept of a contract.

The subject of the automated execution of the contract was already present in legal doctrine well before the advent of smart contracts and electronic contracts. As early as 1901, in *Gli automi del diritto privato* Cicu questioned the problems related to the conclusion of the contract with the help of automatons.[28] At the center of his reflection was the so-called 'automatic contract; in which the automaton is the mechanism by which a performance is made by an act to be performed by the person who wants the service itself and which usually consists in the introduction of a currency.

More specifically, the doctrine in question saw a legal transaction in the inserting of the coin, which constitutes the act that makes clear the subject's desire to acquire the good or the service advertised by the machine. In his analysis, Cicu identified the beginning of the automatic legal transaction as when the owner placed the automaton in a public place.

There have been three different theories: the first identified an invitation to offer, the second qualified it as a promise to the public and the third saw in it a proper contractual offer.

The latter was the thesis accepted by Cicu, who spoke more precisely of offering to the public. In this case, the offeree although undetermined at the time of setting up the machine, would be determined at the time of the insertion of the coin. Most of the reflections made by Cicu have been taken into consideration in the most recent doctrine for the examination of the regulation applicable to the conclusion of the telematic contract[29] to which the general legislation contained

data comes from within the chain. However, non-financial applications such as supply-chain and IoT need to obtain off-chain data (that is, the data of the real world) when carrying out, and smart contracts do not support external requests. Therefore, Blockchain Oracle came into being. Blockchain Oracle is the link of data exchange between blockchain and the real world, and essentially is the interface and the only way for smart contract to interact with the external world'.

[28] A. Cicu, 'Gli automi nel diritto privato' *Filangieri*, 561-597 (1901) now in *Scritti minori di Antonio Cicu*, (Milano Giuffrè, 1965), II, 287-323; see also A. Galizia, 'I contratti automatici e la loro interpretazione' (Città di Castello, Lapi, 1910), 3-21. On this topic, see N. Irti, 'Scambi senza accordo' *Rivista trimestrale di diritto e procedura civile*, 347-364 (1998) and G. Oppo, 'Disumanizzazione del contratto?' *Rivista di diritto civile*, 525-533 (1998), and also N. Irti, '«È vero ma...» (replica a Giorgio Oppo)' *Rivista di diritto civile*, 273-278 (1999); see also Id: 'Lo scambio di foulard (replica semiseria al Prof. Bianca)' *Rivista trimestrale di diritto e procedura civile*, 601-604, (2000) and C.M. Bianca, 'Acontrattualità dei contratti di massa?' *Vita notarile*, 1120-1128 (2001) and F. Gazzoni, 'Contatto reale e contatto fisico (ovverosia l'accordo contrattuale sui trampoli)' *Rivista del diritto commerciale e del diritto generale delle obbligazioni*, 655-668 (2002), and in *Studi in onore di C.M. Bianca* (Milano: Giuffré 2006), III, 313. See also, C.M. Bianca, *Diritto civile. 3.3 Il contratto* (Milano: Giuffrè, 2019), 43.

[29] E. Damiani, 'Note in tema di conclusione del contratto mediante sistemi automatici (spunti per una rilettura delle tesi di Antonio Cicu)' *Rassegna di diritto civile*, 749-761 (2020). On this

in the Italian Civil Code is considered applicable, albeit with some divergence in doctrine with reference to some norms.[30]

According to one legal theory, smart contracts cannot be considered legal contracts because they are more similar to channels of the management of agreements than agreements themselves.[31] In this sense, the smart contract does not relate to the phase of the formation of the agreement, but to that of fulfilment; so, consequently, it cannot integrate a case of atypical agreement *ex* Art 1322 Civil Code.[32]

Consider, for instance, the case of a smart contract connected to an air ticket which, in case of delay or cancellation of the flight, automatically gives the passenger the monetary compensation referred to in Regulation (EC) no 261/2004.[33] Another example could be a protocol linked to an insurance contract which, when the conditions indicated in the contract itself are met, proceeds automatically to the payment of a sum to the insured person.[34]

However, another thesis states that there is no reason to exclude the ordinary regulation established by contract law from applying to smart contracts, noting the need to confront the various issues that arise regarding the particularity of this technology, such as the imputation of the will, the right of withdrawal, the acquisition of the consumer's express consent and the remedies.[35] With regard to the latter, it should be noted that the rigidity of the smart contract makes it

topic, see also, V. Franceschelli, *Computer e diritto* (Rimini: Maggioli Editore, 1989), 165; E. Giannantonio, *Manuale di diritto dell'informatica* (Padova: CEDAM, 1994), 219; A.M. Gambino, *L'accordo telematico* (Giuffrè: Milano, 1997), 14; A. Gentili, 'L'inefficacia del contratto telematico' *Rivista di diritto civile*, 747-773 (2000); C. Camardi, 'Contratto e rapporto nelle reti telematiche. Un nuovo modello di scambio' *Contratto e impresa*, 557-570 (2001); G. Finocchiaro, 'Lex mercatoria e commercio elettronico. Il diritto applicabile ai contratti conclusi su internet' *Contratto e impresa*, 571-610 (2001); S. Giova, *La conclusione del contratto via Internet* (Napoli: Edizioni Scientifiche Italiane, 2000), 9; F. Delfini, *Contratto telematico e commercio elettronico* (Milano: Giuffrè, 2002); M. Pennasilico: 'La conclusione dei contratti online tra continuità ed innovazione' *Diritto dell'informazione e dell'informatica*, 805-834 (2004); L. Follieri, *Il contratto concluso in Internet* (Napoli: Edizioni Scientifiche Italiane, 2005), 85; A.C. Nazzaro, 'Riflessioni sulla conclusione del contratto telematico' *Informatica e diritto*, 7-32 (2010); G. Perlingieri, 'Il contratto telematico' in D. Valentino ed, *Manuale di diritto dell'informatica* (Napoli: Edizioni Scientifiche Italiane, 2010), 274; E. Battelli, 'Riflessioni sui procedimenti di formazione dei contratti telematici e sulla sottoscrizione on line delle clausole vessatorie' *Rassegna di diritto civile*, 1035-1081 (2014); G. Conte, *La formazione del contratto,* in P. Schlesinger and F.D. Busnelli eds, *Il codice civile. Commentario* (Milano: Giuffrè, 2018), 282.

[30] C. Scognamiglio, 'La conclusione e l'esecuzione del contratto telematico' in S. Sica ed, *Commercio elettronico e categorie civilistiche* (Milano: Giuffrè, 2002), 73. See also, F. Delfini, 'Il D.Lgs., 70/2003, di attuazione della direttiva 2000/31/CE sul commercio elettronico. Commento' *Contratti*, 607-619 (2003).

[31] P. Cuccuru, 'Blockchain ed automazione contrattuale' n 9 above, 111.

[32] L. Parola, P. Merati and G. Gavotti, n 9 above, 685.

[33] A.U. Janssen and F.P. Patti, 'Demistificare gli smart contracts' *Osservatorio del diritto civile e commerciale*, 31 (2020).

[34] E. Battelli, n 9 above, 681.

[35] M. Maugeri, n 9 above, 1142.

extremely difficult to envisage a temporary remedy,[36] for example, in the case of an illicit contract, unless a self-destruct function of the smart contract has been included from the beginning.

This issue also affects liability profiles. In this regard, some legal theories have, in fact, observed how the characteristics of blockchain and smart contracts make it impossible to control illegal activities carried out by users of the network, as the manager of a blockchain cannot intervene to remove an illicit contract from the nodes.[37]

It is also necessary to ask ourselves what the possible safeguards are in the case of errors in data entry, which according to the garbage-in, garbage-out mechanism are repeated in all the network nodes. These errors cannot be altered, and identifying the responsible party would be difficult. Some theorists have noted that regarding blockchain technology, reference should be made to a regulation based on the objective nature of the responsibility of the creator-operator of the platform, in order to have a more reasonable and efficient approach to risk-taking, as well as to boost user confidence in the target market.[38] According to this argument, the fact that the operator does not have control of the transactions carried out on the platform would exclude rules based on culpability. Consequently, the operator of the platform will then be responsible for the damages caused to users.

However, it should be noted that this can easily be envisaged in the case of private permissioned blockchain, where it is possible to identify the entity that exercises a control function. Whereas the public permissionless blockchain is an autonomous system, without an entity in charge of the control, and it would be difficult to identify the responsible subject. This topic is linked to another important issue, relating to the friction between the structure of BLT, especially of the permissionless public blockchain, with the protection of personal data and privacy. This type of technology does not, in fact, allow the identification of the data controller to whom the user would be able to turn for the removal of data.[39]

V. Non-Fungible Tokens: Juridical Nature

Now that the essential characteristics and major legal issues of blockchain and smart contracts have been examined, we must focus on the legal issues around

[36] On smart contracts' rigidity, J.M. Sklaroff, 'Smart Contracts and the Cost of Inflexibility' 166 *University of Pennsylvania Law Review*, 279, 263-603 (2017); M. Giancaspro, 'Is a 'Smart Contract' Really a Smart Idea?' *Computer Law & Security Review*, 1-23, (2017).

[37] L. Buonanno, 'La responsabilità civile nell'era delle nuove tecnologie: l'influenza della blockchain' *Responsabilità civile e previdenza*, 1418-1627 (2020).

[38] ibid

[39] On this topic, A.M. Gambino and C. Bomprezzi, 'Blockchain e protezione dei dati personali' *Il diritto dell'informazione e dell'informatica*, 619 -646 (2019); R. Belen-Saglam et al, 'A systematic literature review of the tension between the GDPR and public blockchain systems' *Blockchain: Research and Applications*, 1-64 (10 January 2023).

non-fungible tokens.

As already mentioned, an NFT is a series of encrypted data recorded on a blockchain associated with a certificate of authenticity.[40]

Different types of NFTs have been identified, such as asset tokens, which confer a specific right on a tangible or intangible asset; utility tokens, which guarantee an exclusive right of access to goods or services on a given blockchain platform; security tokens, which represent the ownership of a group of assets and give holders rights comparable to those of financial instruments.[41] There are, therefore, different types of tokens that perform various functions.

Non-fungible tokens guarantee the media file's authenticity, which would otherwise be endlessly playable. In the case of digital artwork, a unique value identification code, which is associated with a smart contract, is registered on the blockchain and contains information on the authorship of the work and the payment of royalties to the author.

Due to the characteristics of this technology already examined, the circulation of a non-fungible token on the blockchain takes place transparently and therefore leaves a trace of any change of ownership.

Non-fungible tokens have created a new market in the digital world, which has led to several reflections from a legal point of view.

There are many legal issues related to this type of asset, and they primarily concern identifying of their juridical nature.[42] US legal doctrine qualifies the NFT as digital personal property,[43] affirming the need to treat the non-fungible tokens as items of actual personal property, with the subsequent applicability of the regulation of the sale of personal property, in such a way as to clearly distinguish the legal situation relating to NFTs from that relating to licenses on intellectual property. In fact, according to this theory, property regulation is better suited to how non-fungible tokens are used, as the owner can enjoy and dispose of them without any external interference. This would conflict with the online intellectual property license model, where the owner of a work's intellectual property rights can decide how the copyright can be used or sold.

This approach is shared, for example, by the High Court of the United Kingdom in *Osbourne* v *Persons Unknown and Ozone Inc.* (Opensea), which ruled that non-fungible tokens 'are to be treated as property as a matter of English law'.[44]

[40] Q. Wang et al, n 6 above.

[41] *EuBlockchain Observatory and forum* Report, 2021, 2, *eublockchainforum.eu*; F. Annunziata, 'Speak if you can: what are you?' n 4 above.

[42] P. Carrière, n 5 above; G. Nava, n 3 above, 267; E. Damiani, 'Cripto-arte' n 3 above, 356; A. Alpini, 'NFT and NFTed artworks' n 1 above; Ead, 'Dalla 'platform economy' alla 'clout economy' n 3 above. G. Vulpiani, 'NFTs e cryptofashion' n 3 above, 54; C. Iorio, 'Artwork circulation' n 3 above, 13; A. Guaccero and G. Sandrelli, n 3 above, 841.

[43] S. Reis, 'Toward a Digital transfer doctrine? The first sale doctrine in the digital era' 109 Northwestern University Law Review, 173-207 (2015); M.J. Fairfield, 'The law of non-fungible tokens and unique digital property' 97 *Indiana Law Journal*, 1261 (2022).

[44] *Osbourne* v *Persons Unknown & Anor* [2022] EWHC 1021 (Comm), available at

Osbourne arises from the theft of two NFTs from the applicant's crypto wallet, which therefore required the judge to 'freeze' the crypto-assets stolen and to order the platform operated by Ozone Network, ie Opensea – a well-known NFT trading platform – to provide information to identify the accounts that controlled the wallets to which the stolen NFTs had been transferred.[45]

Consistent with other cases concerning cryptocurrency fraud, the Court found that the non-fungible tokens were localized near the owner's domicile, and therefore in England, because NFTs can be considered 'as property' It is also interesting to note that the Court ruled that compensation for damage would not have been an appropriate remedy, given the particular nature of the non-fungible tokens, 'which have a particular, personal and unique value to the claimant which extends beyond their mere Fiat currency value'. It is, therefore, appropriate to grant the injunction, to avoid the risk that crypto-assets are transferred

> 'through multiple different accounts at great speed, and in a way which will make it practically either very difficult or possibly even impossible, for the claimant to trace and retrieve her assets'.

However, some Italian legal theory has drawn attention to the fact that the classification of non-fungible tokens as assets *ex* Art 810 Civil Code[46] would, in any case, leave the question of the definition of the situation of ownership unaffected, as the discipline of dual alienation and possession of property is inapplicable.[47]

According to a different theory, non-fungible tokens could be classified as atypical debt securities, attributable to the documents of legitimation used to identify

https://tinyurl.com/2s3k5r9c (last visited 20 September 2023). See also Supreme Court of Singapore, *Janesh s/o Rajkumar* v *Unknown Person* [2022] SGHC 264. On this judgment, see P. Mezei, Hop up the Roller Coaster- New Hopes for digital Exaustion? *GRUR International*, 71(11), 1017–1018, (2022),

[45] The judgement says that 'Ozone has no presence in the English jurisdiction, and therefore the ability of the Court to enforce any order it makes against Ozone is, by definition, a limited one, and the Court will decline to make orders which are, by their nature, futile'.

[46] On this topic, P. Perlingieri, *Introduzione alla problematica della proprietà* (Napoli: Edizioni Scientifiche Italiane, 1971), 37; V. Zeno Zencovich, 'Cosa' *Digesto Discipline privatistiche, sez. civ*. (Torino, UTET, 1989), IV, 438; G. De Nova et al , *Dalle res alle new properties* (Milano: Giuffrè, 1991); A. Zoppini, 'Le "nuove proprietà" nella trasmissione ereditaria della ricchezza (note a margine della teoria dei beni)' *Rivista di diritto civile*, 185-248 (2000); O. Clarizia, 'Il diritto di proprietà dal codice civile alle nuove forme di appartenenza' in S. Pagliantini et al eds, *Scritti in onore di Marco Comporti*, (Milano: Giuffrè, 2008), 787; U. Mattei, 'Proprietà (nuove forme di)' *Enciclopedia del diritto*, Annali (Milano: Giuffrè, 2012), V, 1118; G. Resta, *Nuovi beni immateriali e numerus clausus dei diritti esclusivi* (Torino: UTET, 2010); F. Piraino, 'Sulla nozione di bene giuridico in diritto privato' *Rivista critica del diritto privato*, 459-494 (2012). See also C. Camardi, 'Proprietà, appartenenza e processo di oggettivazione dei beni. Suggestioni a partire dalla «Introduzione alla problematica della proprietà» di Pietro Perlingieri' in G. Carapezza Figlia, G. Frezza and P. Virgadamo eds, *A 50 anni dalla «Introduzione alla problematica della proprietà* (Napoli: Edizioni Scientifiche Italiane, 2021), 63.

[47] E. Damiani, 'Cripto-arte' n 3 above, 359.

the person entitled to the service since the contract is formed in a separate act.[48] According to this reconstruction, an NFT does not incorporate the digital content transferred between the parties. Still, it represents only a computer sequence subjected to a hashing process and some algorithmic properties of the token. This certificate is then uniquely connected via a link to an off-chain site where the digital product, an object of the transaction, is stored. Additionally, the smart contract is limited to executing the contractual provisions governed by the parties in separate natural language contracts. Therefore, the NFT would not incorporate any rights, but would result in an enabling title allowing access to digital content. This approach leads the NFT to a 'digital key' that allows access, for instance, to the 'hotel room booked on the basis of a natural language contract with the manager of the accommodation facility', allowing those identified as entitled to benefit from the digital content.

Another approach defines the non-fungible tokens as financial products, with the consequent applicability of the regulation contained in decreto legislativo no 58/1998 (TUF).[49]

Given the possibility of identifying different types of tokens that perform different functions, identifying the legal nature of non-fungible tokens is not a simple matter. It requires a case-by-case approach, as suggested by the European Union, to identify the most suitable discipline for protecting the interests involved. Although for some types of NFTs, their qualification as digital properties seem simple, other NFTs make this classification more problematic. Take, for example, the use of NFTs for the service of judicial documents, recently permitted by some courts in the United States and the United Kingdom.

VI. NFTs and Succession Law

The issue of the juridical nature of NFTs also becomes relevant regarding the *mortis causa* transmissibility of these assets.

In general, the mortis causa succession of digital heritage is a complex issue,[50]

[48] G. Nava, n 3 above, 269.

[49] P. Carrière, n 5 above.

[50] A. Zoppini, n 46 above, 185; M. Martino, 'Le «nuove proprietà', in G. Bonilini ed, *Trattato* delle successioni e donazioni (Milano: Giuffrè, 2009), 355; D. Corapi, 'La trasmissione ereditaria delle c.d. «nuove proprietà»' *Famiglia, Persone e Successioni*, 379-383 (2011); M. Cinque, 'La successione nel «patrimonio digitale»: prime considerazioni' *Nuova giurisprudenza civile commentata*, I, 645-655 (2012); Ead, 'L'«eredità digitale» alla prova delle riforme' *Rivista di diritto civile,* 72-100 (2020); V. Zeno-Zencovich, 'La successione nei dati personali e nei beni digitali' *Rivista giuridica sarda*, 448-453 (2014); G. Resta, 'La «morte digitale»' in Id, *Dignità, persone, mercati* (Torino: Giappichelli, 2014), 375; Id: 'La successione nei rapporti digitali e la tutela post-mortale dei dati personali' *Contratti e impresa*, 85-105 (2019); L. Lorenzo, 'Il legato di password' *Notariato*, 147-151 (2014); Id, 'L'eredità digitale' *Notariato*, 138-153 (2021); A. Magnani, 'L'eredità digitale' *Notariato*, 519-532 (2014) and Id: 'Il patrimonio digitale e la sua devoluzione ereditaria' *Vita notarile*, 1281-1307 (2019); S. De Plano, 'La successione a causa di morte nel patrimonio

which brings with it the need to coordinate the traditional provisions on succession not only with the particular nature of certain digital assets, which include a plurality of very different situations united by the characteristic of immateriality, but also with the protection of personal data and privacy of the *de cuius*.[51]

A preliminary reflection on the content of the will is necessary, setting aside the idea that it must be an act with exclusively patrimonial content and that the atypical content can only be that which is legally established;[52] this would be ill-suited to the current value system of the legal order and the implementation of the interests of the person. There is, therefore, no doubt that in the will a subject can provide for the succession in his digital heritage, whether or not the content is patrimonial; the problem concerns the concrete modalities of transmission of such a heritage.

Some legal theories consider it appropriate to distinguish between personal digital goods,[53] which assume a moral, affective value, such as emails or

digitale'. in C. Perlingieri and L. Ruggieri eds, *Internet e diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 427; C. Camardi, 'L'eredità digitale. Tra reale e virtuale' Il *diritto dell'informazione e dell'informatica*, 65-93 (2018); D. Marino, 'La successione digitale' *Osservatorio deldiritto civile e commerciale*, 165-202 (2018); S. Nardi, 'Volontà oltre la morte e rapporto contrattuale' (Napoli: Edizioni Scientifiche Italiane, 2019), 77; Id, 'Successione digitale e successione nel patrimonio digitale', in E. del Prato ed, *Le successioni* (Bologna, Zanichelli, 2020), 592; F.P. Patti and F. Bartolini, 'Digital Inheritance and Post Mortem Data Protection: The Italian Reform' *European Review of Private Law*, 1181-1193 (2019); F. Mastroberardino, *Il patrimonio digitale* (Napoli: Edizioni Scientifiche Italiane, 2019), 169; I. Maspes, 'Successione digitale, trasmissione dell'account e condizioni generali di contratto predisposte dagli Internet Services Providers' *Contratti*, 583-590 (2020); Ead, 'Morte digitale e persistenza dei diritti oltre la vita della persona fisica' *Giurisprudenza italiana*, 1601-1609 (2021); Ead, 'Digital Inheritance, Right of the Heirs to Access to the Deceased User's Account, Non-Transferability Clauses: An Overview in the Light of Two Judgments Issued by Italian Courts' *The Italian Law Journal,* 408-423 (2022); A. Spatuzzi, 'Patrimoni digitali e vicenda successoria' *Notariato*, 402-409 (2020); A. Vesto, *Successione digitale e circolazione dei beni online. Note in tema di eredità digitale* (Napoli: Edizioni Scientifiche Italiane, 2020); A. D'Arminio Manforte, *La successione nel patrimonio digitale* (Pisa: Pacini editore, 2020); R.E. De Rosa, 'Trasmissibilità mortis causa del patrimonio digitale' *Notariato*, 495-510 (2021); F. Pinto, 'Sulla trasmissibilità mortis causa delle situazioni giuridiche soggettive digitali' *Rivista del notariato*, 701-718 (2021); V. Confortini, 'L'eredità digitale (Appunti per uno studio)' *Rivista di diritto civile*, 1187-1200 (2021); A. Spangaro, 'La successione digitale: la permanenza *post mortem* di aspetti della personalità' *Giurisprudenza italiana*, 1365-1370 (2022). See also U. Bechini, 'Password, credenziali e successione *mortis causa'* - Studio del Consiglio Nazionale del Notariato n. 6-2007/IG, available at https://tinyurl.com/ywc82r6c (last visited 20 September 2023).

[51] F. Trolli, 'La successione *mortis causa* nei dati personali del defunto e i limiti al loro trattamento' *Jus civile*, 313-342 (2019); A.A. Mollo, 'Il diritto alla protezione dei dati personali quale limite alla successione mortis causa' *Jus civile*, 430-454 (2020).

[52] On this topic, G. Giampiccolo, *Il contenuto atipico del testamento* (Milano: Giuffrè, 1954), 12; A. Cicu, *Il testamento* (Milano: Giuffrè, 1942), 13; L. Barassi, *Le successioni per causa di morte* (Milano: Giuffrè, 1947), 303; C. Gangi, *La successione testamentaria nel vigente diritto italiano* (Milano: Giuffrè, 1962), I, 27; V. Cuffaro, 'sub art. 587', in Id and F. Delfini eds, *Delle successioni*, in E. Gabrielli ed, *Commentario del codice civile*, II (Torino: UTET, 2010), 168; V. Barba, 'Interessi post mortem tra testamento e altri atti di ultima volontà' *Rivista di diritto civile*, 340-349 (2017); E. Damiani, 'Il contenuto atipico del testamento', in E. del Prato ed, *Le successioni* (Bologna: Zanichelli, 2020), 339.

[53] F. Mastroberardino, n 50 above, 126; A. Spatuzzi, n 50 above, 402.

photographs, annotations of personal ideas and thoughts, and digital assets, characterized by their economic value, such as, for example, a bitcoin wallet or a work of crypto-art NFT or a crypto-fashion item. Other authors consider this distinction only possible in the abstract, since, in practice, a digital good can fall into both categories simultaneously.[54]

It is also possible to distinguish between online digital goods, existing only in the network, and offline goods, those stored on physical media (a hard disk, a flash drive). The latter do not pose particular problems since the content of the media can be freely transmitted *mortis causa*. More complex, however, is the issue of the transmission of digital assets online, whether it is personal assets, cryptocurrencies, or NFTs.

In these cases, service contracts with providers (social networks, other platforms) are also involved, as well as issues related to the protection of personal data. For example, in a well-known case heard by the Probate Court of Oakland County of Michigan, the Court ordered Yahoo, a service provider, to disclose the electronic correspondence of Marine who disappeared in Iraq to the Marine's parents. This occurred despite the general conditions of use established by Yahoo in the event of owner's death, namely the cancellation of the email account, and deletion of its content. The platforms have tried to contain the problem by providing in the contractual clauses the possibility for the holder to decide what will happen to his account after his death. Facebook, for instance, allows the user to decide whether to have the account permanently deleted or to appoint a legacy contact to manage the account in commemorative mode.[55] In the latter case, the legacy contact, to whom Facebook provides credentials other than the original ones for accessing the memorial account, can only perform a series of actions (write a post, update the profile image) but cannot access the original account or the messenger conversations of the deceased subject. In this regard, there are two interesting jurisprudential cases, one dealt with in Germany in July 2018,[56] and the other decided by the Court of Milan in 2021.[57]

[54] G. Resta, 'La successione nei rapporti digitali' n 50 above, 85.

[55] On this topic, V. Barba, n 52 above, 341. S. Nardi, 'Successione digitale' n 50 above, 597.

[56] 'Bundesgerichtshof, 12 July 2018, III ZR 183/17' *Nuova giurisprudenza civile commentata*, 691-708 (2019), annotated by R. Mattera, 'La successione nell'account digitale. Il caso tedesco'. On this topic S. Delle Monache, 'Successione mortis causa e patrimonio digitale' *Nuova giurisprudenza civile commentata*, I, 461-468 (2020).

[57] Tribunale di Milano 10 February 2021 *Famiglia e diritto*, 622 (2021), annotated by F. Mastroberardino, 'L'accesso agli account informatici degli utenti defunti: una prima, parziale, tutela. See also V. Putortì, 'Patrimonio digitale e successione mortis causa' *Giustizia civile*, 163-193 (2021); A. Vigorito, 'La 'persistenza' postmortale dei diritti sui dati personali: il caso Apple' *Il diritto dell'informazione e dell'informatica*, 27-47 (2021); S. Bonetti, 'Dati personali e tutela post mortem nel novellato codice privacy: prime applicazioni' *Nuova giurisprudenza civile commentata*, I, 557-565 (2021); G. Resta, 'L'accesso *post mortem* ai dati personali: il caso Apple' *Nuova giurisprudenza civile commentata*, 678-680 (2021); A. Maniaci and A. D'Arminio Monforte, 'La prima decisione italiana in tema di 'eredità digitale': quale tutela *post mortem* dei dati personali?' *Corriere giuridico*, 658-670 (2021); I. Maspes, 'Morte "digitale" ' n 50 above, 1601.

The first case concerned the request by parents to access their daughter's Facebook account after their daughter died in a tragic accident in the Berlin subway. At the time of the request, the account was already turned into a commemorative mode and, according to Facebook, no longer accessible. Facebook also asserted the non-transmissibility *mortis causa* of the account, in addition to the non-disclosure to third parties of the data stored in the user's profile according to the legislation on processing personal data. The request by the girl's parents was granted in the court of first instance and denied on appeal. The judgment was again overturned by the German Federal Court of Justice which ruled that the heirs of the account holder are entitled to access the account itself, as they automatically assume the position of the deceased subject in all aspects related to it, including, the contract entered into by the deceased with the social network; a contract that cannot be defined strictly personal. According to the last Court, moreover, the chosen solution would not even conflict with the EU Regulation no 2016/679 (General Data Protection Regulation).

This perspective could be considered applicable if the deceased has decided nothing in concerning the fate of their digital assets.

The case dealt with by the Court of Milan concerned an appeal against Apple. The parents of a deceased young chef requested access to his iPhone data to recover photos, videos, personal notes and recipes to create a collection in memory of their son. Apple denied their request, and to establish legitimate consent to access the cloud, as defined by US law (the Electronica Communications Privacy Act), Apple requested a court order specifying that the deceased owned all accounts associated with the Apple ID and that the family members were administrators or legal representatives of the *de cuius*. Now, it is necessary to clarify that in our legal system, the question of the succession of digital heritage is dealt with at a regulatory level, only within the Decreto Legislativo no 196/2003 Art 2-*terdecies* on the protection of personal data of deceased persons, added by Decreto Legislativo August 10, 2018, no 101,[58] which adapts national legislation to the provisions of the GDPR. The article provides that the rights referred to in Arts 15-22 of the Regulation, referring to personal data concerning deceased persons, may be exercised by those with a personal interest or act to protect the data subject as his agent or for family reasons worthy of protection. However, the exercise of these rights may be expressly prohibited by a revocable written declaration by data subject submitted to the data controller. In the present case, the Court of Milan, referring both to the GDPR and to Art 2-*terdecies*, upheld the appeal, stating that in the absence of any legally expressed opposition by the son, the parents' request to access their son's photos, videos, and recipes for the purpose of creating a collection that keeps

See also Tribunale di Bologna 25 November 2021, *Famiglia e diritto*, 710-721 (2021), annotated by A. Vignotto, 'La successione digitale alla luce delle prime pronunce giurisprudenziali italiane'.

[58] On this topic, V. Cuffaro, 'Quel che resta di un codice: il d.lgs. 10 agosto 2018, n. 101 detta le disposizioni di adeguamento del codice della privacy al regolamento sulla protezione dei dati' *Corriere giuridico*, 1181-1185 (2018).

his memory alive, is a legitimate interested protected by Italian law. According to Italian law, this allows the surviving members access to the personal data of the deceased. Moreover, the Court of Milan stated that a family reason worthy of protection cannot be made subject to requirements, such as those required by Apple, which introduce conditions other than those indicated by the Italian legislature and which refer to institutions of a legal order other than the legal system before which the right is being exercised.

As for the transmissibility of cryptocurrencies and NFTs, it should be noted that even in this case, the credentials of access to the wallet are essential. The account, however, implies a contractual relationship between the online service provider and the user, by which the latter can enjoy a service and a virtual environment, the use of which is governed by the contract with the user. Access credentials are, therefore, essential, as they how digital goods are accessed. With regard to NFTs, let us consider the case in which a subject does not plan the delivery of access keys to works of crypto art or property in the metaverse to their heirs. In this instance, the heir could not access these assets. But we must ask ourselves how in practice, a subject can plan the succession *mortis causa* of an NFT or Bitcoin wallet considering the necessary permanence of the secrecy of access keys. In general, some legal theory holds that the provision by which a subject has the credentials of a digital account to transmit its content is qualifiable as a 'legato di specie' (legatum) to atypical content: the so-called 'legato di password'.[59]

While the mere provision of credentials for one's account management would create a postmortem mandate which requires the designated person to perform certain acts, the special provision concerning access credentials does not regard any enrichment of the beneficiary, but only access to an account for the management of certain data. But, this is not the case, for example, with an account that generates profits. In that case, as in the case of the Bitcoin wallet, profits or the asset linked to the account are attributed to the entity. In this case, there could be a provision by way of *legatum* in which the legacy consists of an immediate object (the password) and a mediated object (the content to which the password gives access).[60] This type *legatum* can be considered as a case of *relatio*, constituting the credentials only as a criterion for the identification of the *legatum*'s object. One could speculate that anyone who wants to transfer an NFT to their heir will include this provision in their will, indicating access credentials in a separate document sealed and guarded by another person in charge, who will be obliged to hand them over to the heir indicated in the estate certificate. We also need to ask ourselves what would happen if an individual programmed a smart contract stating that a certain NFT would be automatically transferred to others at the time of his death. In such a case, if it were necessary to recover the asset, all the

[59] L. Di Lorenzo, n 50 above, 144; S. Delle Monache, 56 above, 461. See also U. Bechini, 'Password, credenziali e successione *mortis causa*' n 50 above.

[60] L. Di Lorenzo, n 50 above, 144.

problems already highlighted relating to the rigidity of smart contracts and the blockchain technology's characteristics manifest.

VII. NFTs, Copyright and Trademarks

Although in circulation since 2014, it is from 2021 that non-fungible tokens have established themselves on the market, giving new life to the artistic-creative sector. Among the various questions raised by NFTs, one of the most interesting concerns the possible safeguards in case of copyright infringement.[61]

Let us consider the hypothesis of the minting of an unauthorized work.[62] In this regard, *Quentin Tarantino* v *Miramax* and *Hermès* v *Metabirkin* represent some interesting examples.

The first case arises from a well-known Tarantino's sale of a series of NFTs with cut scenes and exclusive content from the film Pulp Fiction.[63] As a result, the production company of the film, Miramax, sued Tarantino before the United States District Court - Central District of California for breach of contract, copyright infringement, trademark infringement, and unfair competition.[64]

According to Miramax, Tarantino, having sold the film rights to Miramax, could not create and sell NFTs.

According to Tarantino, the sale of non-fungible tokens was a legitimate right under the same contract, in which he retained the possibility of creating internal publications. In response, Miramax dismissed the possibility that NFTs fell under the concept of 'screenplay publications' and argued that they were outside the director's 'reserved rights'. The case resulted in a settlement between the two parties.

[61] On nfts and copyright, P. Liberanome, n 3 above, 93; N. Muciaccian, n 3 above, 839. See also P. Caglayan Aksoy and Z. Ozkan Under, 'NFT e copyright: challenges and opportunities' 16:10 *Journal of Intellectual Property Law & Practice*, 1115-1126 (2021); M.R. Garcia Teruel and H. Simon-Moreno, 'The digital tokenization of property rights. A comparative perspective' *Computer Law and Security Review*, 41, 1-21 (2021); M.D. Murray, 'NFT Ownership and Copyrights' (July 2, 2022), available at https://tinyurl.com/2u6jmtbk (last visited 20 September 2023); A. Alpini, 'NFT and NFTed artworks' n 1 above; A. Guadamuz, 'The treachery of images: non-fungible tokens and copyright The treachery of images: non-fungible tokens and copyright' 16(12*) Journal of Intellectual Property Law & Practice*, 1-19, (2021); B. Bodo et al, n 3 above, 282.

[62] On intellectual property in general, T. Ascarelli, *Lezioni di diritto commerciale. Introduzione* (Milano: Giuffrè 1954), 206; Id, 'Teoria della concorrenza e interesse del consumatore' in *Saggi di diritto commerciale* (Milano: Giuffrè, 1955), 35; G. Oppo, 'Creazione ed esclusiva nel diritto industriale' *Studi in memoria di Tullio Ascarelli* (Milano: Giuffrè, 1969), III, 1419; G. Ferri, 'Creazioni intellettuali e beni immateriali' *Studi in memoria di Tullio Ascarelli* (Milano: Giuffrè, 1969), 288. More recently, E. Fusar Poli, 'Forme giuridiche dell'immateriale. Creazioni dell'intelletto e vis poietica del diritto', in A. Sciumé ed, *Il diritto come forza. La forza del diritto* (Torino: Giappichelli, 2012), 111; M. Stella Richter Jr, 'Tullio Ascarelli e i beni immateriali', in A. Sciumé and E. Fusar Poli eds, *'Afferrare...l'inafferrabile'. I giuristi e il diritto della nuova economia industriale fra Otto e Novecento* (Milano: Giuffrè, 2013), 53.

[63] E. Dieli, 'Tarantino v. Miramax: The rise of NFTS and their copyright implications' *Boston College Intellectual Property & Technology Forum*, 27th June 2022.

[64] *Complaint Miramax, LLC* v *Tarantino*, Case no 2:21-cv-08979 2021 (16th November 2021).

The second case concerns the sale of the Metabirkin, inspired by the Hermès Birkin model, created by Mason Rothschild and sold as NFTs.[65] The famous fashion house Hermès brought Rothschild, the creator of Metabirkin, before the District Court in New York for trademark infringement, although on Rothschild's site there is a disclaimer stating that 'in no way are Metabirkin associated with Hermès'.[66]

In a motion to dismiss, Rothschild argued that he could use the term 'Metabirkin' pursuant to the 1989 *Rogers* v *Grimaldi* case.[67] More specifically, he argued that using the name of a famous trademark connected to a work of art does not constitute an infringement of the trademark, according to the First Amendment, if the name does not mislead with regard to the association with the mark itself. According to Rothschild, the Metabirkin is an autonomous work of art, comparable to the paintings of Andy Warhol's Campbell soups, and their association with the Birkin brand could not mislead anyone. The District Court denied his motion.

Hermès won the lawsuit against Rothschild.[68] The District Court found that Rothschild's NFTs were not protected speech under the First Amendment and ordered Rothschild to pay damages to Hermès for trademark infringement, trademark dilution, and cybersquatting.[69]

At European the level, in the matter of NFTs,[70] the Court of Rome issued its first decision on trademark protection on July 20, 2022.

In this case, Juventus Football Club owned 'JUVE', 'JUVENTUS' and the team's trademark, and requested that the Court prohibit the unauthorized production and marketing by another company of NFT cards depicting a photograph of a former player wearing the Juventus jersey. The main issue concerns the extension to NFTs of the classic brand protection.

The Court of Rome pointed out that the registration of trademarks also pertains

[65] *Hermès International et al* v *Mason Rothschild*, 1:22-cv-00384 (SDNY).

[66] On Rothschild's site there is the following disclaimer: 'We are not affiliated, associated, authorized, endorsed by, or in any way officially connected with the HERMES, or any of its subsidiaries or its affiliates. The official HERMES website can be found at https://www.hermes.com/'.

[67] *Ginger Rogers* v *Alberto Grimaldi*, *Mgm/ua Entertainment Co., and Pea Produzioni Europee Associate, S.R.L.*, 875 F.2d 994 (2d Cir. 1989), United States Court of Appeals, Second Circuit, 5th of May 1989.

[68] *Hermes International et al* v *Rothschild*, Case 1:22-cv-00384-JSR (United States District Court Southern District of New York) Document 144 Filed 8 February 2023, available at https://tinyurl.com/y363u6pa (last visited 20 September 2023).

[69] The jury found the defendant Mason Rothschild liable for trademark infringement, trademark dilution and cybersquatting and awarded Hermès with $110.000 for trademark infringement and trademark dilution and with $23.000 for cybersquatting.

[70] Tribunale di Roma, 20 July 2022, *Diritto & giustizia,* 197 (2022), annotated by V. IAIA, 'La tutela del marchio Juventus si spinge nel metaverso'; *Diritto industriale*, 487-502 (2022), annotated by A. Rainone, 'Uso illecito del marchio altrui sulla blockchain: il principio di neutralità tecnologica e la rivoluzione mancata dei registri distribuiti'; Giustiziacivile.com 16 January 2023, annotated by L. Pandolfelli, 'La tutela del marchio nella creazione e commercializzazione di non-fungible token (NFT)'. On this topic, see also G. Facci, 'Il diritto d'immagine dei calciatori al tempo degli NFT (Non-fungible token)' *Responsabilitò civile e previdenza*, 179-196 (2023).

to 'downloadable electronic publications' and that the Juventus football club itself is active in the field of crypto games and non-fungible tokens. As a result, the creation and marketing of the cards leads to the counterfeiting of Juventus Football Club's brands, concretizing the risk of confusion caused by the identity of the signs used. According to the Court, as the football club operates in the NFT sector, the marketing of NFT cards constitutes a hypothesis of unfair competition as a result of the unauthorized use of other people's trademarks and the appropriation of the merits related to the trademarks used. There is also a danger of damage related to the possible vulgarisation of the trademark and in relation to the infringement of the rights of exploitation of the trademark itself.

It, therefore, seems appropriate to affirm the extension of trademark and intellectual property protection to non-fungible tokens, as an artist who sees their work reproduced in NFT without authorization could sue the person who carried out the unauthorized minting. More complex, however, is the question which also emerges from the Metabirkin case concerning protecting the non-fungible token as an autonomous work of art.

VIII. NFTs: Liability Issues

There can also by many liability issues regarding NFTs which are difficult to solve. For instance, we must reflect upon what would happen in the case of a subject that purchases a work of crypto art, but in reality, after payment, receives only a jpeg file not linked to an NFT or an NFT different from the one they intended to buy.

Now, we are in the field of contractual liability, so, in applying the sales rules, the purchaser could invoke the termination of the contract and the return of the price for the sale of *aliud pro alio,* in addition to compensation for the damage. The difficulty may lie, in identifying the alienating subject, given the pseudonym of the blockchain. Here, we find the issues related blockchain accountability, as examined above.

At that point, the buyer could sue the platform where the NFTs were put on sale, asking for the seller's identification, as happened in the case of the stolen NFTs examined by the United Kingdom Supreme Court.

Another issue could be the following: in theory, given the characteristics of the blockchain outlined above, NFTs could overcome the traditional problems concerning the certification of the authenticity and origin of the work. However, this would be reliable only if the initial information recorded on blockchain were true, as these technologies are limited to recording what is entered, not certifying its veracity.

However, it must be pointed out that NFTs could also be used to enhancement the cultural heritage, for example, by selling fractions of NFTs reproducing a work of art.

Given the success they are experiencing, the NFT phenomenon, although

considered by some as an ephemeral bubble, represents a turning point in the creative market, but as discussed in this article there are many juridical issues that must be taken into account.

In this regard, in the absence of specific legislation, jurists can only rely on a case-by-case interpretation to protect the interests of individuals. Of course, it is the legislator who can find a uniform solution, and we can only hope for an intervention that balances interests between the need for rapid adaptation of laws to technological evolution and their fundamental certainty and stability.

LGBTQI+ Persons, Fundamental Rights, and Criminal Justice

Book Review: M. Pelissero and A. Vercellone, *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2022), 1-353.

Adriano Martufi*

I. Introduction

The volume edited by Marco Pelissero and Antonio Vercellone, is the most extensive companion on law and LGBTQI+[1] persons in Italy to date. The book offers a comprehensive oversight on the debate in this field, drawing on contributions from legal scholars, practitioners and LGBTQI+ activists alike.2 The contributions in the volume touch upon different branches and segments of the legal system which intersect the recognition of LGBTQI+ persons as rights-holders. The chapters devoted to private and family law issues raised by the growing recognition of LGBTQI+ rights are investigated in a separate book review, authored by Nausica Palazzo, published within this issue. The present review delves into the most pressing issues regarding criminal justice discussed by the authors in the volume. Such issues feature prominently in the second part of the book, in pages from 211 to 322. With a different extent of completeness contributors address topics as diverse as the gradual decriminalization of same sex relationships, the criteria underpinning the (proposed) adoption of provisions establishing new criminal offences to address hate speech and queer discrimination, the practice of conversion therapies and their prohibition (265-296), and (last but not least) the delicate issues surrounding the incarceration of transgender (297-314) and LGBTQI+ persons in general (315-334) as vulnerable groups within prison population.

The question of criminal law enforcement of LGBTQI+ rights cuts across several chapters in the book, well beyond the second part of the volume (211-322), as it lingers in the background in many contributions. This is greatly due to the powerful symbolic nature of criminal law as well as to the communicative and value-enhancing function of punishment. It is submitted, however, that the centrality

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[1] The present review adopts the acronym chosen by the editors, 'LGBTQI+'.

[2] See G. Malaroda, 'Un po' di storia, tante storie', in M. Pellissero and A. Vercellone ed, Diritto *e persone LGBTQI+* (Torino: Giappichelli, 2022), 15.

of criminal justice in the debate around the role of resulting from the recognition of fundamental rights to homosexual, transgender and queer individuals, increasingly regarded as members of vulnerable groups.

After all, fundamental rights lay bare the constitutive duplicity of criminal law. Individual human rights are, at the same time, sword and shield vis-à-vis state interference into the sphere of personal freedoms.3 Fundamental rights, and among them, LGBTQI+ rights are believed to foster a response that may take different shapes, depending on how such rights are relied on to build up state reaction through the criminal justice system. Once heavily criminalized and dealt with by criminologists and criminal justice officials merely as sex offenders,4 queer and homosexual individuals are now increasingly regarded as victims. Yet one may run the risk of oversimplification, as the law's 'flat understanding' of LGBTI+ persons as perpetrators is increasingly replaced by an equally flat narrative of such individuals as victims.5

II. 'Queer' Individuals, Criminology and Punishment: The Case of Italy

To cope with this risk, criminologists have successfully sought to emphasize the insights offered by the lived experience of 'queer folks' within the criminal justice system, as well as the 'unique pathways to offending that in many ways relate specifically to their sexual orientation and/or gender identity'.6 In recent years, queer criminology – often described as an attempt to cast light on the multiple facets of LGBTQI+ people's experience with criminal justice – has grown to become a central and promising field of criminological studies.7 The authors belonging to this subfield challenge a simplistic understanding of the place LGBTI+ persons occupy within the legal system. In order to capture nuances and depict a comprehensive portrait of queer and homosexual identities in their relation to criminal law and criminal justice institutions, queer criminology commits to an all-encompassing view of LGBTQI+ population in their different capacity as victims, offenders, and professionals (judges, attorney, etc) within the criminal justice system.

Similarly, the volume by Pelissero and Vercellone draws heavily on a nuanced approach to criminal justice vis-à-vis LGBTI+ people. The stance taken by the authors rejects a simplistic and unifying view of the status of LGBTQI+ individuals in the

3 F. Tulkens 'The Paradoxical Relationship between Criminal Law and Human Rights' 9 *Journal of International Criminal Justice*, 577–595 (2011).

4 J. Blair Woods, 'LGBT Identity and Crime' 75 *California Law Review*, 688-733 (2017).

5 ibid 716.

6 C.L. Buist and E. Lenning, *Queer criminology* (Abingdon-New York: Routledge, 2016), 8.

7 C.L. Buist, E. Lenning and M. Ball, 'Queer criminology', in S. De Keseredy and M. Dragiewicz eds, Routledge Handbook of Critical Criminology (Abingdon-New York: Routledge, 2018), 96-106; J. Blair Woods, ' "Queering criminology": Overview of the state of the field', in D. Peterson and V.R. Panfil, *Handbook of LGBT Communities, Crime, and Justice* (New York-Heidelberg: Springer, 2013), 15-41.

criminal justice domain. While doing so, the chapters devoted to studying the position of queer and lesbian/gay identities vis-à-vis criminal law, provide an important contribution to the scholarly debate in that they offer unique insights into the legal and societal developments of a continental jurisdiction belonging to the 'civil law' tradition. This provides an important addition to the mostly English-speaking and common law-inspired literature on these topics. As a matter of fact, the Italian legal system provides an interesting case study to reflect on the role of criminal law vis-à-vis gender identities and sexual orientations. Such an interesting point of view reflects the characteristics of the Italian legal system as a jurisdiction with the Constitution explicitly including anti-discrimination clauses and bound to respect the principles enshrined in the European Convention on Human Rights.

Accordingly, in this book review, I will go through the most salient aspects of the criminal law-related chapters of the volume, highlighting how the insights into the relevant Italian legislation confirm broader criminal policy trends highlighted by the international (mostly, English-speaking) literature. At the same time, the chapters discussed in this review allow to single out the uniqueness of the Italian approach to the 'criminal law dilemma' while debating the protection of vulnerable minorities and addressing the phenomenon of 'hate crime victimization'. Admittedly, when compared to the 'legal experience' of jurisdictions in the Anglosphere, questions that trouble Italian criminal lawyers might come across as rather peculiar. Still, such issues are reflective of particularities which, as comparative criminal criminologists warn,[8] inform the legal debate of each jurisdiction and, by extension, speak to the core elements of their legal culture.

The book's overview on 'criminal justice' in Italy highlights the long-standing failure to reform criminal laws in such a way as to secure a self-standing protection of queer and lesbian/gay identities against hate speech and other discriminating behaviors. Such a failure reflects the criminal policy agenda of recent Italian governments and the broader penal climate in the country. On the other hand, when discussing the distinct facet of LGBTQI+ people as vulnerable individuals held in custody, authors in the reviewed volume effectively highlight the central role played by the notion of 'social reintegration' as a guiding principle of the post-sentencing phase. Such a feature illustrates the potential of penological principles to address specific forms of vulnerability.

III. LGBTQI+ Rights and Crime Control under Italian Law

In Italy, sodomy laws incriminating same-sex relationships were contemplated in some pre-unitarian codes, eg in the Criminal Code of Lombardy and Veneto and in the Criminal Code of the Kingdom of Sardinia. However, the first codified texts in the newly unified Kingdom of Italy (the 'liberal' code 'Zanardelli' from

[8] D. Nelken, *Comparative Criminal Justice: Making Sense of Difference* (London: Sage, 2010).

1889 and the more 'authoritatian' code 'Rocco', adopted by the fascists regimes in 1930) remarkably fell short of criminal provisions targeting homosexuality.[9] By contrast, the collapse of the fascist regime and the end of World War II ushered in an era of tolerance. The new approach by the legislatures of the time was greatly inspired by the anti-authoritarian ideals of equality and human dignity, which laid the groundwork for the establishment of progressive and modern anti-discrimination laws. In comparison with other western jurisdictions, the approach to homosexuality has historically been lenient, revealing the tendency of Italian institutions to deal with the 'sodomy' by means other than criminal law.

The demise of a crime control approach did not lead to the recognition of LGBTQI+ as vulnerable victims. The 'pendulum effect' which one can notice in other jurisdictions was simply absent in Italy. In sum, giving up on the criminalization of LGBT as deviants, or even sex offenders, did lead to what Jordan Blair Woods has referred to as a 'new visibility' for LGBT people.[10] This, in spite of a set of criminal law provisions aimed at securing the enforcement of prohibitions against a wide (and gradually expanding) array of discriminatory behaviors. In this respect, an essential feature of the Italian debate on LGBT matters and criminal justice is the question of whether existing hate crime laws may apply to acts or words discriminating on grounds of sexual orientation or gender identity.

In this connection, the chapters by Goisis and Pelissero retrace the historical development of the criminal justice apparatus underpinned by the principle of non-discrimination. Such laws date back to the entry into force of post-war Italian Constitution. More specifically, laws outlawing racist propaganda are grounded in the general principles of equality and dignity enshrined in Arts 2 and 3 of the Italian Constitution. Such provisions have a tight connection with the prohibition to re-organize the disbanded Fascists Party, established by the final provisions annexed to the Constitution and incorporated by the Act of 20 June 1952, no 645 by among others establishing a political formation based on racist propaganda. The prohibition to circulate 'ideas based on racial superiority', along with a ban on the incitement to commit acts of discrimination and other acts of hate violence was originally included within the Act of 13 October 1973, no 654.

Interestingly, both authors delve into the history and the current scope of application of criminal laws targeting discrimination, which – they observe – have witnessed a gradual expansion to incorporate all forms of discriminatory behaviour on grounds of race or ethnicity. In this respect a major step forward was the adoption of the so-called *Legge Mancino* (Act 25 June 1993, no 205). Besides tweaking the scope of application of existing criminal offences, the statute introduced a wide-ranging aggravating circumstance applicable to all criminal

[9] E. Dolcini, 'Omosessualità, omofobia, diritto penale. Riflessioni a margine del volume di M. Winkler e G. Strazio, L'abominevole diritto. Gay e lesbiche, giudici e legislatori' *Stato, Chiese e pluralismo confessionale*, 1-10 (2012).

[10] J. Blair Woods, 'LGBT Identity and Crime' n 4 above, 696.

offences motivated by reasons discrimination or hate 'on ethnic, national, racial and religious' grounds. Significantly, such antidiscrimination laws do not fall short of criminalizing non-physical expressions and may also target verbal utterances of a discriminatory thought (eg racist propaganda). These are quintessentially 'hate crime laws' which however did not include sexual orientation or gender identity among the grounds for discrimination. Unsurprisingly, such lacuna has been the subject of several critiques.

As Pelissero explains in his chapter,[11] a recent attempt to pass a bill (so-called *ddl Zan*) reforming the existing antidiscrimination apparatus (including its criminal provisions) has encountered stark political resistance. The bill would have expanded the grounds for discrimination provided for by existing criminal provisions – Arts 604-bis and 604-ter of the Criminal Code, which currently penalize, inter alia, racist propaganda and the act of abetting racist discrimination or violence, along with the acts of discrimination and discriminatory violence – to include further 'factors' such as a person's 'gender', 'gender identity', 'sexual orientation' and 'disability'. The lack of an *ad hoc* hate crime legislation tackling anti-LGBT discrimination is fiercely criticized by Goisis and Pelissero, which develop a robust response to the critics of a renewed legal framework introducing homo- and transphobic hate crimes.

IV. New Provisions on Homophobic and Transphobic Hate Crimes?

The book deserves praise for its attempt to provide a fairly objective overview of the (rather heated debate) around the adoption of new provisions on homophobic and transphobic hate crimes. In doing so, the book gives an account of both sides of the debate, while taking a firm stance in favor of a stronger criminal response which would require extending the scope of application of the relevant provisions on hate crimes. This position (which runs through several chapters in the second part of the book) is however far from apodictical. The debate around the so-called *ddl Zan* is illustrative of some characterizing features of Italian legal culture and offers an important snapshot of the legal narratives underpinning the proposed establishment of new hate crimes.

The choice of criminalizing gender-based discrimination and other forms of bias based on sexual orientation and gender identity problematically lies at the intersection between the protection of fundamental rights (often expressed by means of positive obligations to prosecute and punish human rights infringements)[12] and the freedom of expression. As Pelissero astutely argues in his chapter, the

[11] M. Pelissero, 'Il disegno di legge Zan: una riflessione sul percorso complesso tra diritto penale e discriminazione', in M. Pellissero and A. Vercellone ed, n 2 above, 256.

[12] L. Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?', in J. Roberts and L. Zedner eds, *Principled Approaches to Criminal Law and Criminal Justice: Essays In Honour of Professor Andrew Ashworth* (Oxford: Oxford University Press, 2012), 135-157.

prohibition to express and divulge discriminatory ideas has suffered some sort of relativization as the question of compressing freedom of thought through the criminal law has gradually come to the fore in western societies. This development might have been favored by the idea that discrimination (including that based on racial bias) shall not be taken as an expression of biological/anthropological superiority, but rather as a cultural phenomenon which shifts its focus from the inherent (and physical/psychological) characters of some individuals or social groups to their 'actions'.[13]

In Italy, as much as in other western countries, this 'new' approach had the effect of watering down the moral condemnation against 'racism' and other heinous forms of hate crime. As if the 'right' to express views (provided that they can be regarded as cultural manifestations within a pluralistic society) could be weighed against the right to identity of those targeted by those views. This claim may easily be rebutted by arguing – as Etienne Balibar put it – that 'racism' (similarly to other forms identity-based discrimination) has always been in essence a 'total social phenomenon'.[14] Be that as it may, the legislative and policy choices made by national governments in this context shall not be read in isolation.

Remarkably, in her chapter, Caielli[15] turns her eye to standards set by supranational bodies, such as the Council of Europe. The author reminds that recommendations are univocal in suggesting that national authorities shall tackle hate crimes and, in particular, hate speech targeting LGBTQI+ individuals. In addition, both Caielli and Goisis[16] remind that, in the view of the European Court of Human Rights, restrictions on the freedom of expression aimed at tackling hate crimes are legitimate under the Convention, even when they are carried out through criminal provisions. As the Court itself held in *Identoba* v *Georgia*, 'sexual orientation' and 'gender identity' are not to be seen as mere elements of one's private life. Rather, they have a social dimension which warrants a robust protection by antidiscrimination law, as a corollary of the right not be discriminated enshrined in Art 14 ECHR.

Beyond the arguments based on the right to free speech (and other rights, eg the right to religious freedom, as the criminal law protection of 'gender identity' understood as free individual choice would endanger the belief of a well-defined partition between genders descending from 'divine revelation'),[17] skepticism has been expressed against the criminalisation of homophobic hate speech on grounds

[13] M. Pelissero, n 11 above, 249.

[14] E. Balibar, 'Is there a neo-racism?', in T. De Gupta et al eds, *Race and Racialization: Essential Readings* (Toronto: Canadian Scholar Press, 2007), 83.

[15] M. Caielli, 'Tutelare l'identità di genere attraverso la repressione dell'hate speech', in M. Pellissero and A. Vercellone eds, n 2 above, 220.

[16] L. Goisis, 'Crimini d'odio omofobico, diritto penale e scelte politico-criminali', in M. Pellissero and A. Vercellone eds, n 2 above, 233.

[17] These are among the doubts expressed by the Secretary of State of the Holy See, as reminded by M. Caielli, n 15 above, 218.

pertaining to some foundational principles of criminal law theory. The authors in the reviewed volume, pick up on some of these arguments to argue in favour of an *ad hoc* legal framework for hate crimes motivated by such attitudes as homophobia and transphobia. Interestingly, in the Italian debate, one of the criticisms raised against the new criminal legislation is the fact thar certain definitions included in the bill would not comply with the principle of *lex caerta*. Notions such as 'sexual orientation' and 'gender identity' – critics argue – are too vague and would thus allow for an unbridled application of the proposed criminal laws by courts.

However, as Caielli, Goisis and Pelissero contend, definitions and normative elements narrowing down the scope of such concepts may be found in supranational legal texts (see the Resolutions of European Parliament, adopted in 2006 and 2012)[18] which have consistently defined the term 'homophobia'; at the same time, the very concept of 'gender identity' is mentioned in a number of national legal texts, including the Italian prison act, which forbids discriminations based on a prisoner's 'gender identity'. Meanings of such concepts can be fleshed out also by reference to the case law of the European Court of Human Rights. When it comes to 'gender identity' the Court unmistakably rejects the idea that this concept could be based only on biological terms (eg requiring surgery). Rather, states must acknowledge and give protection to the one's identity as it emerges from 'physical appearance' and 'social identity', even before a gender reassignment surgery is completed.[19]

In sum, arguments based on the lack of 'clarity' of the proposed legislation don't seem to have much 'bite' – especially when compared with the law and practice of other jurisdictions. Yet a broader critique endorsed by several Italian scholars has called into question the very legitimacy of using criminal law as a tool against discrimination. It has been argued that criminal law intervention should target exclusively harms inflicted on individual legal interests (or *rechtsguten*). According to the critics, discrimination through hate speech does not affect directly personal interests but relates – almost, by definition – to a collective and social dimension; one that criminal law would not be fit to address in light of the principle of *extrema ratio*.[20]

Similarly, a large component of Italian legal scholarship has been arguing that

[18] Homophobia is regarded as 'the irrational fear of, and aversion to, male and female homosexuality and lesbian, gay, bisexual and transgender (LGBT) people based on prejudice, and is similar to racism, xenophobia, anti-Semitism and sexism, and whereas it manifests itself in the private and public spheres in different forms, such as hate speech and incitement to discrimination, ridicule and verbal, psychological and physical violence, persecution and murder, discrimination in violation of the principle of equality and unjustified and unreasonable limitations of rights, which are often hidden behind justifications based on public order, religious freedom and the right to conscientious objection', see European Parliament resolution of 24 May 2012 on the fight against homophobia in Europe, (2012/2657(RSP)), available at https://tinyurl.com/mzw6xdxt (last visited 20 September 2023).

[19] European Court of Human Rights, *S.V.* v *Italy*, App no 55216/08, para 70, available at www.echr.coe.int.

[20] A. Pugiotto, 'Aporie, paradossi ed eterogenesi dei fini nel disegno di legge in materia di contrasto all'omofobia e alla transfobia' 1 *GenIUS*, 10 (2015).

offences criminalizing hate speech – see again Arts 604-bis and 604-ter of the Criminal Code – should remain 'an exception rather than a rule', by deference to the right to free speech (Art 21 of the Italian Constitution). Some authors have gone as far as to say that, sexual orientation being a 'choice', any discrimination thereof would not warrant the same reaction as other forms of hate speech (eg on grounds of race and ethnicity).[21] To counter such arguments, Pelissero argues that the real focus of the proposed criminal provisions is 'human dignity', a founding tenet of the Constitution (see Art 2) and an overarching value informing the ECHR.[22]

The understanding of dignity in question is not one that values and protects every single choice regarding one's individuality, nor the mere perception of self. Such an interpretation would effectively pave the way for what some critics see as a risk of criminalization of any disagreement with each one's deep-seated views on almost every single aspect of social life (including views and orientations as trivial as the choice of supporting a football team).[23] But as Pelissero convincingly argues another way of understanding dignity requires to take seriously a person's identity as a source of a 'relationship of recognition'.

Dignity must be understood as a concept which speaks to the recognition one receives from other members of the community. In this peculiar understanding, the notion of dignity forms a pre-condition to express one's individuality towards others and the society as a whole. As this interpretation can be inferred directly by Art 2 of the Constitution,[24] one can consistently argue that punishing hate speech and any form of incitement to homophobic discrimination does not sit at odds with the harm principle. Quite the contrary, a limited resort to criminal law provisions (understood as extrema ratio within a legal continuum that includes non-criminal measures to prevent discrimination) must feature as a necessary instrument in the 'policy toolbox' of liberal and pluralistic democracy which must secure 'social solidarity' and the co-existence of different ethical codes through communicative and procedural strategies.

In addition, the notion of equality, as it emerges from Art 3 Constitution, requires that the identity of LGBTQI+ persons is protected in a way that acknowledges their peculiar identity in a pluralistic society.[25] These considerations justify the use

[21] L. Eusebi, 'Colant omnes quemque. Tornare all'essenziale dopo il ddl Zan', *Jus Rivista di scienze giuridiche*, 287 (2021): in the cases considered by the proposed provisions on homophobia and transphobia, unlike other cases covered by existing antidiscrimination law, the elements of one's identity at stake result from 'behavioural choices of victims', a choice on which an 'ethical disagreement' might still exist (*scelte comportamentali delle persone offese* (…) *in merito ai quali sussistano sul piano sociale differenti valutazioni etiche*).

[22] M. Pelissero, 'Il disegno di legge Zan' n 11 above, 249

[23] See again L. Eusebi, n 21 above.

[24] As the Italian Constitutional Courtput it in its ruling no 221/2015, gender identity is an essential element of the right to a 'personal identity', falling within the scope of individual fundamental rights as protected by Art 2 of the Constitution.

[25] Different circumstances warrant a different treatment. In this context, one cannot claim the risk of 'reverse-effect discrimination' determined by a lower protection secured to non-biased criminal behaviours. As empirical evidence shows bias crimes have a peculiarity which lies in the

of aggravating circumstances when crimes are driven by a homophobic motive,[26] but As Goisis reminds,[27] human dignity and equality, thus the 'equal' protection/ recognition of each one's identity, are a *rechtsgut* in itself as suggested by the already existing antidiscrimination laws. Arts 604-bis and 604-ter have been included in the Criminal Code under the heading of 'crimes against equality'. Hence the notion of equality, as it provides a legal basis to punish racist and xenophobic hate crimes (and hate speech, in particular), must be a solid enough ground to justify the new criminal provisions on homophobia and transphobia.

V. Crime Control, Criminal Justice and Conversion Therapies

On a separate note, the reviewed volume deals with the question of how to handle the practice of conversion therapies. Such therapies are defined as 'any formal therapeutic attempt to change the sexual orientation of bisexual, gay and lesbian individuals to heterosexual'.[28] While clearly at odds with the growing recognition of LGBTQI+ identities as non-deviant and expressive of self, conversion therapies remain widely promoted, privately advertised and often institutionally endorsed as a tool to deal with non-heterosexual identities. Evidently, the question that comes to the fore is whether a room for such therapies can be maintained when it takes place as a conscious, informed and non-coerced practice.

As far as the content of such therapies is concerned, the American Psychological Association uses the term 'sexual orientation change efforts' (SOCE) to describe methods that aim to change a person's same-sex sexual orientation to an other-sex sexual orientation.[29] These methods typically include behavioral techniques, psychoanalytic techniques, medical approaches, and religious and spiritual approaches. In her chapter,[30] Scaroina makes a strong argument in favor of criminalizing such practices. Not only are conversion therapies, as the author claims, deprived of any scientific ground; they are also a vessel for ideals that cast homosexuality as 'evil', a pathology that should cured or a form of deviance that requires a remedy.

In keeping with the palette of constitutional principles one can derive from

special vulnerability of their victims, L. Goisis, n 16 above, 234.

[26] Such a claim echoes the arguments used in the US to justify the establishment of state and federal 'penalty-enhanced statues' for bias crimes. As Frederick Lawrence put it: 'a society that is dedicated to equality must treat bias crimes differently from other crimes, and must enhance the punishment of these crimes', see F. Lawrence, *Punishing Hate Bias Crimes under American Law* (Harvard: Harvard University Press, 1999), 110

[27] L. Goisis, n 16 above, 238.

[28] Canadian Psychological Association, 'CPA Policy Statement on Conversion/Reparative Therapy for Sexual Orientation' (2015).

[29] American Psychological Association, 'Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation' (2009), 12.

[30] E. Scaroina, 'Terapie di conversione e diritto penale', in M. Pellissero and A. Vercellone eds, n 2 above, 293.

the Italian basic law, Scaroina argues that such therapies should be punishable in that they harm a person's moral liberty and their dignity.[31] The scope of criminal laws targeting conversion therapies should be as wide as possible, protecting anyone – including under-aged individuals – who could be subject to the therapies in question. While such criminal provisions are absent in Italy, Scaroina offers a wide comparative overview of the law and practice of jurisdictions that have implemented criminal laws to discourage conversion therapies. The strategies used to tackle such phenomenon vary widely across jurisdictions. Interestingly, the Italian criminal justice system belongs to a group of legal systems that chose to tackle such form of coercion by means of other existing criminal offences: these include grievous bodily harms, domestic violence, and other crimes of fraud.

In this connection, the most pressing question is whether an *ad hoc* set of criminal provisions would be needed and, if so, under which conditions therapeutic conversions must be penalized. Clearly, a key distinction in this respect is whether victims of such therapies are minors – whose LGBTQI+ is developing – and may be coerced into a treatment, or adults which provide, more or less spontaneously their consent to treatment. As far as children are concerned, parental authority encounters a limit in the minor's right to express and develop their 'personality'. Such principle may be found in the case law of the Italian Constitutional Court and is outlined in the Oviedo Convention which outlaws any treatment of individuals who are legally unable to provide consent unless the required therapy is directly beneficial to the patient.[32]

The question of whether conversion therapies involving adults shall be penalized rests on the critical issue of consent. Interestingly, some jurisdictions – such as France's and Canada's – have taken a hard line against conversion therapies, criminalizing any such treatment because of their inherent blameworthiness. However, most jurisdictions – as Scaroina observes – have preferred to resort to criminal provisions only when those subject to conversion treatments are regarded as 'vulnerable individuals'. The underlying thought is that informed consent would operate as a defense, thus excluding – at least partially – the blameworthiness of the act. To respect people's agency and self-determination, the requirement of consent must not be understood as purely formal. In accordance with the Oviedo Convention, the author argues that a conscious adherence to conversion therapies must be grounded on informed consent, after being made cognizant of 'prognosis, benefits, and risks' involved in the therapy.

[31] In doing so, the author draws heavily on the understanding of human dignity as a self-standing legal interest which warrants and provide legitimacy to criminal law intervention: A. Spena, *Riflessioni in tema di dignità umana, bilanciamento e propaganda razzista* (Torino: Giappichelli Editore, 2013).

[32] Accordingly, some jurisdictions – including France – have provided for an enhanced penalty when crimes of conversion are committed against vulnerable victims, among them minors, and foresees the accessory penalty of revoking parental authority whenever such crimes are committed against children.

This notion of informed consent is inspired by rulings made by the European Court of Human Rights and the Italian Constitutional Court, most recently in connection to questions involving the lawfulness of euthanasia or assisted suicide. Yet in such cases, any medical protocol proposed to the patients is based on solid scientific knowledge. According to Scaroina's argument, in the case of conversion therapies, consent would have to be given to treatments which are – in the very author's words – lacking a robust scientific basis. While some jurisdictions – such as Germany – rule out criminalisation when patients are able to provide effective (and thus, not only apparent) consent (regardless of the scientific plausibility of the proposed treatments), it seems more convincing to conclude that every treatment deprived of a scientific grounds would harm the individual.[33] As the American Psychological Association put it

> 'to date there are no scientifically rigorous data about selection criteria, risks versus benefits of the treatment and long-term outcomes of the reparative therapies'.[34]

VI. Corrections, Prison, and the Status of LGBTQI+ Individuals Behind Bars

The two last chapters of this most intriguing volume explores the status of justice-involved individuals and the relationship of life behind bars with their identity of LGBTQI+ people. The understanding that 'pains' of corrections (to paraphrase seminal 1958 Gresham Sykes' volume, *The Society of Captives*) have specific implications for homosexual and transgender people behind bars lies now at the center of the queer criminology's debate. In the US, Bureau of Justice Statistics study found that 8% of prison inmates and, most crucially, 20 per cent of youth in custody self-identified as non-heterosexual. In Italy, however, the quantitative dimension and the legal status of such a special group of inmates (and the peculiar issues raised by their experience of custody) is widely under-researched. The chapter by Laura Scomparin and Martina Maria Marchisio[35] portray a vivid picture of

[33] I. Trispiotis and C. Purshouse, 'Conversion Therapy' As Degrading Treatment' 42 *Oxford Journal of Legal Studies*, 104 (2022): from a human rights perspective it is argued that all forms of 'conversion therapy' are 'disrespectful of the equal moral value of LGBTIQ+ people and violate specific protected areas of liberty and equality that are inherent in the idea of human dignity'.

[34] American Psychological Association, 'Therapies focused on attempts to change sexual orientation. Position statement', May 2000. If most recent meta-studies 'preclude strong assertions that therapy-assisted change in sexual orientation is never possible, they also do not support strong assurances that therapy-assisted change is generally achievable in the sexual minority population', see D.P. Saullins et al, 'Efficacy and risk of sexual orientation change efforts: a retrospective analysis of 125 exposed men' available at https://tinyurl.com/3e3vk9wm (last visited 20 September 2023).

[35] L. Scomparin and M.M. Marchisio, 'La detenzione delle persone transgender nel sistema penitenziario italiano', in M. Pellissero and A. Vercellone eds, n 2 above, 297-314.

detention conditions imposed on transgender persons; at the same time, Fabio Gianfilippi's contribution[36] offers a broad overview of the practice of imprisonment for both homosexual and transgender persons in the Italian penitentiary system.

Scomparin and Marchisio's chapter bears witness of the increasing awareness between judges and correctional staff of the risks of discrimination LGBT individuals suffer when deprived of liberty. Non-binary identities, in particular, are a special challenge for the rigid and traditional partition along gender lines of sections within the prison complex. The practice to safeguard individuals with transitioning identities has so far consisted in the establishment of 'protected sections'. While such practice reduces the risk of episodes of physical and psychological violence, it lays bare their profound social isolation within 'total institutions'. The insulation of transgender inmates within prison, along with the relative exiguity of their numbers, reduces the ability of correctional practitioners to offer adequate rehabilitative programs. Prison staff often lack adequate training and, as reminded the National Ombudsman on persons deprived of liberty, the vulnerability raised by sexual orientation and sexual identity should not be deal with by establishing separate prison sections, but rather through 'specific training and educating to the respect of differences'.[37]

The issue of what kind of 'rehabilitation' can be offered to LGBT people in prison is addressed head-on by Gianfilippi in his chapter. The lack of adequate programs aimed at re-entry risks to raise the odds of further stigmatization and marginalization of former 'queer' inmates upon release. Therefore, the author argues vigorously in favour of new methods and practices geared towards a human treatment of justice-involved individuals belonging to the LGBTQI+ community. Such a change of attitude would increase the awareness of rights among homosexual and transgender inmates and foster the identity-searching process through scholarization when needed. Such a paradigm shift also requires a change in the use of words, working towards a more inclusive language for all justice-involved people. The requirement of a more effective re-entry process for queer folks can only be met by overcoming stereotypes and prejudices among the overall prison population and the correctional staff. As far as transgender or transitioning people are concerned, the rehabilitative challenge requires to secure therapeutic processes (eg free hormonal treatments) to accompany the process of 'rectification' of one's gender identity.

[36] F. Gianfilippi, 'Omosessuali e transgender in carcere: tutela dei diritti e percorsi risocializzanti', in M. Pellissero and A. Vercellone eds, n 2 above, 315.

[37] L. Scomparin and M.M. Marchisio, n 35 above, 310.

Book reviews

The Landscape of LGBTQI+ Rights in Italy: Advancements and Setbacks

Book Review: M. Pelissero and A. Vercellone, *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2022), 1-353.

Nausica Palazzo*

Diritto e persone LGBTQI+ (Law and LGBTQI+ people), a volume edited by Marco Pelissero and Antonio Vercellone, and published by Giappichelli is an anthology on the rights of LGBTQI+[1] persons in Italy. The volume combines comparative legal methods and an interdisciplinary and holistic approach to addressing this important topic. It cuts across a number of disciplines and willfully defies traditional boundaries amongst different areas of law – in a context where the legal professional culture still displays an attachment to such boundaries – to offer a comprehensive picture of a complex relationship: that between LGBTQI+ populations and the law. These disciplines include history, law, and socio-legal studies, and within the area of law, covered fields span criminal law, constitutional law, administrative law, private law, international private law, anti-discrimination law, to mention a few. The book has another notable merit that pertains to the chosen methodology: in its decision to involve as contributors not only legal scholars but also prominent voices within the Italian LGBTQI+ movement,[2] it adopts what the European Commission would call open science practices, 'involving all relevant knowledge actors including citizens, civil society and end users in the co-creation of R&I agendas and contents'.[3]

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[1] The present review adopts the acronym chosen by the editors, 'LGBTQI+'.

[2] See, eg, the introductory notes of Gigi Malaroda: 'Interesting is the choice of addressing the invitation for this collection to activists of the LGBTQI+ movement alongside those who work in academia and research. Indeed, I read in this choice a stimulating call for 'positive cross-fertilization' between an academic knowledge and a social knowledge, built on the basis of political and civic engagement'. G. Malaroda, 'Un po' di storia, tante storie', in M. Pellissero and A. Vercellone eds, *Diritto e persone LGBTQI+* (Torino: Giappichelli, 2021), 15 (my translation).

[3] Horizon Europe Programme, Standard Application Form Marie Skłodowska - Curie Actions - Postdoctoral Fellowships (HE MSCA PF), Project proposal – Technical description (Part B), 05 May 2022.

With its wide-ranging set of contributions on various topics related to the rights of LGBTQI+ people, *Diritto e persone LGBTQI+* turns out to be the first opus magnum on LGBTQI+ rights in Italy. The chosen topics are diverse but the editors walk us through the book and all readers, including non-specialized audiences, can easily understand its structure.

The first three chapters offer an historical overview of the notion of homosexuality and of the LGBT movement in Italy (respectively pp 1-14 and 15-30), and an introduction to queer theory (pp 31-54), thereby setting solid foundations to the subsequent chapters focusing on more niche topics. The chapters on civil unions (pp 55-76), and same-sex couples' parenting rights (pp 77-90 and 91-110), including surrogacy (pp 111-136), offer an in-depth analysis of Italian law. The volume then expands its geographic reach to the international, European, and comparative context. Here, the authors look at the notion of ordre public in international law (pp 137-162), at European anti-discrimination law and whether it can offer protection to intersex persons (pp 163-176), at the issue of the legal recognition of polyamory in the West (pp 177-194), and, ultimately, at international refugee law and its application to LGBTQI+ people (pp 195-210).

The last part of the collection is devoted to pressing issues in criminal law. These include the criminalization of homophobic speech (respectively, pp 211-224, 225-244, and 245-264), conversion therapies and their criminalization (pp 265-296), and the delicate issues surrounding the incarceration of trans people (pp 297-314) and LGBTQ persons in general (pp 315-334), including the ways in which Italy fails to recognize the specific harms suffered by the trans and LGBTQI+ community in prison. While this third part is fascinating, this review will not address the chapters therein as they form the object of a separate review for *this journal*.

Thus, as mentioned, this is a book about LGBTQI+ rights and the law. Its first mentioned merit is the editors' decision to offer a 'unitary reflection on the law',[4] across and beyond categories. Its additional merit is to present itself as a handbook for students who will want to study this topic at the university level: considering that university courses on this specific topic are almost absent in Italy,[5] this anthology aims to first create an imagery and sense of possibility, the very possibility of having a university class on LGBTQI+ rights; at the same time, it creates a language and a comprehensive conceptual framework for navigating the topic. While it must be admitted that language and ways of seeing (imagery) cannot affect reality alone,[6] they could indeed 'facilitate ways of perceiving it and thus affecting

[4] M. Pellissero and A. Vercellone, n 2 above, XIV.

[5] The University of Turin has this year offered for the first time a course on LGBTQI+ rights open to 4th and 5th year law students ('Seminario di Diritto LGBTQ+'), that gave rise to the idea of creating a handbook for future courses at the University of Turin and elsewhere.

[6] This seems to be MacKinnon's claim in chapter 13 'Not a Moral Issue' in C.A. MacKinnon, *Feminism Unmodified Discourses on Life and Law* (Cambridge: Harvard University Press, 1988), 149.

our chances of changing it'.[7] This is precisely what *Diritto e persone LGBTQI+* does.

What is 'homosexuality', for instance? The first chapter by Maya De Leo and the second one by Gigi Malaroda answer this conceptual question by situating the notion in the contemporary moment and explaining how unthinkable it was in the ancient world (p 4), and pretty much until it was constructed as an identity (p 17). It is not until the second half of the Nineteenth Century in the Germanic Reich, Malaroda observes, that can one see personal experiences and conducts linked to what we now define as a homosexual identity, and that the two themes of 'identity' and 'visibility' start surfacing more clearly (p 17).

Further, this is a rare book which includes a queer perspective to addressing this convolute relationship (between LGBTQI+ rights and the law), thereby answering the call of those who recognize how scant works in queer legal theory are[8] – unlike other disciplines, such as queer sociology, that are now relatively established.[9] Queer theory embraces the critique of the liberationist movement within the LGBT community to celebrate non-normative identities, ie all those identities and subjectivities that deviate from proscribed steps and mainstream ways of experiencing a certain identity (eg gender, sexual orientation or family status). It arose as a reaction to the 'institutionalization' of sexuality by the American liberal left through the conformist lenses of identity politics in the 1980s.[10] In sum, as a popular definition puts it, ' 'queer' can refer to… whatever is at odds with the normal, the legitimate, the dominant. There is nothing in particular to which it necessarily refers'.[11]

> This perspective complicates things further, because queer identities hold a skeptical stance towards the law, a love-hate one. As Marella notes in her chapter, there are several dangers associated with legal recognition:
>
> '…one of the theoretical premises of the queer attack on identity politics is the realization that it 'makes up people', that is, it itself creates the subjects who are the addresses of the law. Queer theory is also a tool for analyzing and critiquing performativity of social norms, culture – the high and the pop culture of cinema and, not least, law. The various forms of normativity that intervene in social relations are responsible for the 'invention' of the subjects they normalize. Similarly, reforms, legal change, law in general, as already

[7] R. Gavison, 'Feminism and the Private/Public Distiction' 45 *Stanford Law Review*, 40, fn 104 (1992).

[8] R. Leckey, *After Legal Equality* (Abingdon: Routledge, 2014).

[9] See S. Seidman, *Queer Theory/Sociology* (Oxford: Blackwell, 1996); A. Stein and K. Plummer, ' "I Can't Even Think Straight": Queer' Theory and the Missing Sexual Revolution in Sociology', in S. Seidman ed, *Queer Theory/ Sociology* (Oxford: Blackwell, 1996), 129-44.

[10] M.R. Marella, 'Teoria queer e analisi giuridica', in M. Pellissero and A. Vercellone, n 2 above, 31.

[11] D. Halperin, *Saint Foucault: Towards a Gay Hagiography* (New York: Oxford University Press, 1995), 62.

> pointed out, 'make up people', and create their own subjects. A queer approach is valuable in grasping these dynamics and discussing them'.[12]

Legal recognition can hence suffocate the vitality of the identity at stake, by generating a risk of normalization, civilization, and assimilation into the mainstream.[13] Marella offers as a tangible example the limits of the legal regulation of families through same-sex marriage, a widely critiqued institution in queer literature for its compression of plural lifestyles.[14] Yet, queer theory can also become a critical posture when conducting legal analysis more generally. Such theory foregrounds the idea of resisting normativity, and the mainstream: to achieve this aim, one must resist the gravitational pull of any new orthodoxy, including within queer theory,[15] and strive to connect multiple dimensions, including, as Marella notes, a redistributive one, attentive to material conditions.[16]

Family is a core theme within the book. The hurdles encountered by LGBTQI+ families testify to how law is needed as a tool for obtaining material benefits that would make the life of LGBTQI+ families much easier – such as the ability to enjoy default provisions in case the parties did not stipulate contracts or, more importantly, the possibility of accessing the universe of public benefits that cannot be allocated through contracts.[17] Equally important, family status also conveys expressive or symbolic benefits, including a sense of belonging and acceptance within one's community. More generally, it confers upon couple that kind of 'dignity' that public recognition conveys.[18]

What we could call a 'longing for law' crisply emerges from the chapter discussing the introduction of civil unions in Italy, and the rich chapters on the hurdles that LGBTQI+ parents encounter when seeking the legal recognition of their ties with children.

Civil unions were introduced in 2016 to offer legal recognition to same-sex couples alone – in the sense that, unlike other countries they are not open to opposite-sex couples, despite a growing interest towards their expansion in

[12] M.R. Marella, n 10 above, 40.

[13] N. Barker, 'Sex and the Civil Partnership Act: The Future of (Non) Conjugality?' *Feminist Legal Studies*, 241-259 (2006).

[14] See, eg, J.R. Feinberg, 'Avoiding Marriage Tunnel Vision' 88 *Tulane Law Review*, 259 (2013); P. Ettelbrick, 'Since When Is Marriage a Path to Liberation?' reprinted in W.B. Rubenstein, C.A. Ball and J.S. Schacter, *Cases and Materials on Sexual Orientation and the Law* (West Academic, 3rd ed, 2008), 683; M. Bernstein Sycamore, *That's Revolting!: Queer Strategies for Resisting Assimilation* (New York: Soft Skull Press, revised ed, 2008).

[15] In Italy, for instance, philosopher Mariano Croce is currently investigating the risk of essentialism inherent to queer theory. See the conference schedule 'Populismi, identità personali, diritti fondamentali', available at https://tinyurl.com/yeyzw66v (last visited 20 September 2023).

[16] M.R. Marella, n 10 above, 51.

[17] N. Palazzo, 'Marriage Apostates: Why Heterosexuals Seek Same-Sex Registered Partnerships' 42 *Columbia Journal of Gender and Law*, 193 (2022).

[18] As to the United States, see L.A. Rosenbury, 'Friends with Benefits' *Michigan Law Review*, 189, 231 (2007). See generally also E. Grande, 'La famiglia poliamorosa nel prisma del diritto', in M. Pellissero and A. Vercellone, n 2 above.

Europe.[19] The law conjured up different reactions. On the one side, civil unions were seen as a major step forward improving the social and legal status of LGB couples, once invisible, with Italy being the sole Western European country unable to offer comprehensive legal recognition to such couples – as opposed to scattered legal recognition through court decisions. Italy's inability to provide what the European Court of Human Rights would call a 'specific legal framework'[20] even triggered a bolder case law of the Court, which now basically recognizes a convention right to legalized unions for same-sex couples (through, at minimum, registration) – a right which it recently upheld against former contracting party Russia.[21]

Hence, on the one side the new legal framework was a clear victory for these couples.[22] On the other side, queer commentators noted that law turned out to be

> 'a genuine pinkwashing strategy that has had all too easy a game in instrumentalizing a significant segment of the population, which due to its complete legal invisibility, could now settle for little'.[23]

In his chapter, Azzarri looks at this law from an interesting angle. The chosen angle is that of an internal comparison between the civil union law and marriage law; the aim is to outline the differences; the perspective is, however, original in that not only do these differences can be analyzed from the perspective of the symbolic harms inflicted upon same-sex couples but also from the perspective of modernizing family law,[24] including marriage law, through a critical assessment of some of its provisions. Examples of (marriage law) provisions not included in the civil union law and in need of critical contemplation are the duty of fidelity,[25] the

[19] N. Palazzo, n 17 above, 252, fn 324. Italian nonprofit organization Certi Diritti contemplated taking action to expand the law to opposite-sex couples. Their argument is that the current legal framework is perpetrating an arbitrary and irrational discrimination towards both same-sex couples (unable to access marriage) and opposite-sex couples (unable to access civil unions). D. Tarozzi, 'A tu per tu con la libertà: i diritti civili e i sex workers in Italia e non solo. Amore Che Cambia #23' *Italia Che Cambia*, 9 September 2021, available at https://tinyurl.com/4cd6ma3h (last visited 20 September 2023).

[20] Eur. Court H.R., *Oliari and Others* v *Italy*, Judgment of 21 July 2015, available at www.hudoc.echr.coe.it, ('the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions').

[21] Eur. Court H.R., *Fedotova and Others* v *Russia*, Judgment of 13 July 2021, available at www.hudoc.echr.coe.it.

[22] F. Azzarri, 'Le unioni civili: luci e ombre', in M. Pellissero and A. Vercellone, n 2 above, 55.

[23] F. Zappino, 'Il diritto, l'amore e i fantasmi' *Effimera*, available at https://tinyurl.com/5h7u4y4n (last visited 20 September 2023) (my translation).

[24] F. Azzarri, n 22 above, 58. See also I. Pistolesi, 'La legge n. 76 del 2016 sulle unioni civili e sulle convivenze: qualche breve osservazione' *Quaderni di diritto e politica ecclesiastica,* 891 (2017); M. Gattuso, 'Cosa C'è nella Legge Sulle Unioni Civili: Una Prima Guida' *Articolo29,* 25 February 2016, available at https://tinyurl.com/y4b4zbcz (last visited 20 September 2023).

[25] On the expressive harms that certain political parties wanted to inflict upon same-sex couples see A. Carugato, 'Unioni civili, Renzi: 'Accordo fatto'. Dopo la stepchild adoption, salta

duty of cooperation under Art 143, para 2 Civil Code,[26] and the public display of the decision to create a civil union (pubblicazioni).[27] Examples of new provisions in civil unions that move in the direction of modernizing family law include the gender-neutral regulation of the common surname.[28]

Same-sex parents are also displaying that kind of longing for law that reminds us how central legal-regulatory tools are to the life, sense of wellbeing, social status, and dignity of LGBTQI+ persons. Same-sex parents include those same-sex couples/single parents who have a reproductive project, that is an intention to procreate. In order to do so, they must resort to artificial reproductive techniques and (or)[29] the intervention of a sperm donor, surrogate, or egg donor, or they must resort to adoption.[30] All the mentioned development complicate the question of 'who is a parent?'. Events of such magnitude, spanning surrogacy, and ARTs, prompt us to rethink the initial question of 'who is a parent?' to ask '*what* is a parent?'.[31] Along more traditional formal definitions of parenthood (parenthood by blood and adoption), functional definitions of parenthood (eg psychological, or social parents) are becoming more widespread, and with them the awareness that these parents lacking biological ties need legal recognition and should not be doomed to legal irrelevance. As an example, think about the non-biological parent of the child in a same-sex couple who needs to be delegated by the biological parent to pick up the child at school.

Chapters by Long, Schillaci and Lollini masterfully tackle this question, by offering a composite picture of same-sex parenting and of the severe hurdles these parents encounter in Italy. Long notes an ongoing attachment under Italian law to biological notions of parenthood. An idea of 'biologic verisimilitude'[32] is engrafted into laws that are supposed to recognize a broader understanding of parent, such as the Italian law on adoption (law of 4 May 1983, no 184) and the Italian law on medically assisted reproduction (law of 19 February 2004, no 40). Tellingly, only opposite-sex couples in a 'potentially fertile age'[33] can access adoption and medically assisted procreation techniques. This model of the heterosexual nuclear family as the ideal site for the upbringing of children is also well instantiated in the words

anche l'obbligo di fedeltà. La vittoria di Alfano' *Huffpost*, 24 February 2016, available at https://tinyurl.com/2vueumua (last visited 20 September 2023).

[26] F. Azzarri, n 22 above, 57.

[27] ibid 62.

[28] Azzarri, however, points to the limits of the new provisions due to the wrongheaded implementation through subsequent legislative decrees. ibid 64.

[29] This occurs in the case of a lesbian couple who decides to procreate through sexual intercourse with a third person, including a friend, which could then join or not join the family thereby creating new, complex kindship structures characterized by camaraderie, and companionship.

[30] J. Long, 'L'omogenitorialità nell'ordinamento giuridico italiano', in M. Pellissero and A. Vercellone, n 2 above.

[31] E. Jackson, 'What Is a Parent?', in A. Diduck and K. O'Donovan eds, *Feminist Perspectives on Family Law* (Abingdon, UK: Routledge-Cavendish, 2006).

[32] ibid 78.

[33] Art 6, Law no 184/1983 and Art 5, Law no 40/2004.

of the Italian Constitutional Court, noting that there is a general 'idea that an *ad instar naturae* family – namely, two parents of the opposite sex, both alive and potentially fertile – represents in principle, the most suitable 'place' to receive and raise' offspring.[34] She then traces the narrow paths for these families to acquire legal recognition, the main one being the so-called special-case adoption (*adozione in casi particolari*).[35] The point of the ongoing attachment of ARTs and adoption laws to traditional models of parenthood is an interesting one. In a completely different – and cutting-edge context – like Canada, where a growing number of provinces recognizes more than two parents as legal parents,[36] for instance, Lois Harder still notes the limited potential of these laws in so as they only can imagine a reproductive project with the two partners and a third person as donor or surrogate.[37] The lack of 'imagination', according to her, negatively affects the status of those families that do not fit the model, including polyamorous families and multiple parents.[38] The gravitational pull of newly constructed models – in this case the monogamous relationship plus a donor or surrogate model[39] – is a point worth flagging for purposes of future reform, to avoid reproducing the harms inflicted upon other non-traditional families.

Lollini offers a picture of this patchworked legal framework noting how differentiated legal protection for same-sex couples is. For instance, on the one side the transcription of foreign birth certificates of children born within a lesbian couple is now well-settled, after a favorable court decision in 2013.[40] Unfortunately, the case law of the Supreme Court (*Corte di Cassazione*) in favor of the transcription for lesbian mothers is framed as an exception, which, as such, does not apply to gay couples, nor does authorize the formation of similar birth certificates in Italy.[41] She furthermore offers a snapshot of the hostile legal framework for children born in Italy, whose same-sex parents *subsequently* seek legal recognition.[42] The legal framework is hostile because their legal invisibility has not been remedied

[34] Constitutional Court 23 October 2019, no 221, cited in Long, n 30 above, 79.

[35] ibid 79, 84-89.

[36] Canadian provinces with laws recognizing more than two parents include British Columbia, Ontario and Saskatchewan.

[37] Multi-parenting laws allow the registration of an 'other parent' on birth registration either in addition to the birth parent or, in cases of surrogacy, in place of the birth parent. L. Harder, 'How queer!? Canadian approaches to recognizing queer families in the law' *Whatever*, 5 (2021).

[38] ibid 5-30.

[39] F. Kelly, 'Multiple-parent families under British Columbia's new Family Law Act: a challenge to the supremacy of the nuclear family or a method by which to preserve biological ties and opposite-sex parenting?' 47 *UBC Law Review*, 565-595, 567 (2014) ('the scenario commonly envisaged… is one in which a couple conceives a child with the assistance of a sperm donor or surrogate with the shared pre-conception intention that the donor or surrogate be the child's third legal parent').

[40] S. Lollini, 'Il riconoscimento della genitorialità omosessuale: un percorso lungo e tortuoso', in M. Pellissero and A. Vercellone, n 2 above.

[41] ibid 95, citing Corte di Cassazione-Sezioni unite 8 May 2019 no 12193; Corte di Cassazione 22 April 2020 no 8029. On the workarounds found by gay fathers see ibid, 96.

[42] The applicable law is Arts 8 and 9, Law no 40/2004, considering that most children of same-sex couples in Italy are born through artificial reproductive techniques. ibid 104.

by the law on civil unions – which explicitly prohibits the application of *status filiationis* rules to such couples. The overall picture is disheartening, and the need for prompt reform is well captured in the words of the Constitutional Court, which recently declared inadmissible the constitutional challenge to law no 40/2004 on ARTs brought by two mothers who could not have their ties recognized under the law. As Lollini notes, the Court did not hear the petition as a matter of legislative coherence – by refusing to tackle the problem through a case-by-case approach – and by recognizing that this is the province of the legislature. In so doing, however, the Court points to

> 'a worrisome shortcoming of the legal system in offering protection to minors and their best interest – in harmony with established case law of the two European courts, as well as domestic constitutional court – through the necessary permanence of affective and family ties, even if not biological, and legal recognition thereof, in order to confer certainty in the construction of personal identity… In declaring the inadmissibility of the petition under consideration, by deferring to the legislature's overriding assessment of the appropriateness of the means suitable to achieve a constitutionally necessary end, this Court notes that *ongoing legislative inertia would no longer be tolerable*, considering how severe is the gap in the protection of the child's preeminent interest found in this ruling'.[43]

Schillaci then enriches this overview of same-sex parenting by zooming in the delicate issues surrounding the regulation of surrogacy. Especially in Italy, this issue has been heated and tainted by political animus and ideology, which emerges from assertions that surrogacy amounts to a 'universal crime'[44] and that is it is a tool whereby women rent out their uterus.[45] Recently, the Constitutional Court seems to have barred the possibility of expanding access to surrogacy through a constitutional avenue. In a first (inadmissibility) decision, scrutinizing the rule on birth certificate contestation due to lack of veracity, the Court concluded that 'surrogacy… intolerably violates the dignity of women and severely undermines human relationships.'[46] However, the reasoning of the Court in declaring the petition inadmissible was much more nuanced. Especially noteworthy is the Court's conclusion that the current legal framework should already be interpreted as excluding any automatic and abstract consequence: the fact that a child was born through surrogacy (what Court refers to as the 'modes of birth') cannot

[43] Corte costituzionale 28 January 2021 no 32, cited in Lollini, n 40 above, 109.

[44] M. Pellissero, 'Surrogazione di maternità: la pretesa di un diritto punitivo universale. Osservazioni sulle proposte di legge n. 2599 (Carfagna) e 306 (Meloni), Camera dei Deputati' *Sistema Penale*, 1-12 (2021).

[45] B. Pezzini, 'Nascere da un corpo di donna: un inquadramento costituzionalmente orientato dall'analisi di genere della gravidanza per altri' *Costituzionalismo.it*, 183 ff, 194 (2017).

[46] A. Schillaci, 'Le gestazioni per altri: una sfida per il diritto', in M. Pellissero and A. Vercellone, n 2 above, 114, citing Corte costituzionale 18 dicembre 2017 no 272.

automatically lead to challenge its status as a child. By contrast, it is necessary to verify, in *concrete* terms, whether the annulment of the birth certificate is in the best interest of the child.[47]

Similarly, in a second decision of 2021, the Court dealt with the transcription of a birth certificate of a child of two fathers born abroad through surrogacy.[48] While the Court does not venture into declaring such transcription admissible into the Italian legal system, the Author argues that the Court seems to show a more open-minded and holistic approach towards the issue.[49] Schillaci then compares the Italian case law with the decisions of the Constitutional Court in Portugal and then urges on a more case-sensitive approach that excludes any automatic consequence from the mere fact of resorting to surrogacy.

Valentina Calderai joins forces with a contribution from the perspective of international private law, rethinking the notion of public order in a way that duly accounts for the phenomenon.[50] She claims that rights protection and harm prevention should be the ultimate aim of future legal reforms.[51] As specifically concerns surrogacy, she notes that

> 'in the context of the transformation of the human body into a resource of the knowledge economy, it is not immediately clear why reproductive labor should be treated differently from other forms of clinical labor underlying the value chains of the biomedical and pharmaceutical industries. … The idea that surrogacy as such violates the dignity of the pregnant woman lends itself to the criticisms of essentialism and paternalism, whereas an interpretation of the principle of dignity from the perspective of distributive and corrective justice raises questions similar to those raised by other forms of use and trade of the body and intimacy – prostitution, medical experimentation, tissue collection and circulation for biomedical research and industry – that could well, according to some, be regulated having in mind rights protection and harm reduction'.[52]

Two additional valuable contributions from Lorenzetti and Grande bring in the comparative and European dimension to account for the multi-level nature of rights protection and the cross-fertilization of legal systems attesting to how comparative endeavors are now commonplace in family law as well.[53] Lorenzetti

[47] ibid 114-15.

[48] Corte costituzionale 9 March 2021 no 33.

[49] A. Schillaci, n 46 above, 118.

[50] She interprets surrogacy not as an expression of self-determination but as an 'extreme and risky product of the convergence of reproductive technologies and regulatory competition.' V. Calderai, 'Il dito e la luna. Ordine pubblico internazionale e drittwirkung dei diritti dell'infanzia', in M. Pellissero and A. Vercellone, n 2 above, 140.

[51] ibid 140.

[52] ibid 146.

[53] See H.D. Krause, 'Comparative Family Law: Past Traditions Battle Future Trends — and

offers a contribution regarding the question of whether the current ground-based anti-discrimination model in force in the European Union could offer protection to intersex persons. After tracing the multiple harms suffered by this especially vulnerable group both at birth and throughout their lives,[54] a common theme through her chapter is the observation that the law has ceased to help the people to accommodate abstract interests that run against the mental and physical well-being of the person concerned – ie, the interest in preserving the gender binary and erase abnormal deviations therefrom.[55]

Ultimately, Grande offers a snapshot of polyamory as a phenomenon, and as an object of legal regulation. In so doing, she draws a parallel with polygamy outlining the multifold ways in which Western legislatures engrafted the monogamous model of family into law.[56] Interestingly, she joins two strands of critique, both the critique in the queer camp and the critique against neoliberalism and its penchant for wearing down social ties – a theme common to other chapters as well.[57] In doing so, she argues that polyamory and polygamy as a family model capable of fostering community and social groups faces special obstacles that hinder its legal recognition by the West, due to its inherent 'incompatibility with the dominant neoliberal agenda'.[58] Drawing from the US literature in the area, she then offers an overview of potential avenues of legal recognition.[59]

'Complexity' is hence the keyword of the collection: an acknowledgement of the delicate and growingly intricate issues surrounding the legal regulation of LGBTQI+ populations are warranted. The editors especially warn us that when it comes to sexual orientation and gender, complexity is often overshadowed by a value-laden and increasingly moralizing political discussion. By the term 'complexity' they especially refer to the 'technical-legal and policy implications

Vice Versa', in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: OUP, 1st ed, 2006), 1101 ('[f]amily laws are unfolding in similar directions. For all their very real differences, nations around the world find themselves facing fundamentally similar questions and dilemmas in defining and regulating the modern family'); F. Nicola, 'Family Law Exceptionalism in Comparative Law' 58 *American Journal of Comparative Law*, 777-810, 780 (2010) (arguing that '[t]his shift to human rights and fundamental principles enshrined in constitutional regimes has enlisted the family as a fundamental field for comparative and international law projects addressing the possibilities for convergence, unification, and harmonization of family law'). See also J. Herring Jonathan, R. Probert and S. Gilmore, *Great Debates in Family Law* (Basingstoke: Palgrave Macmillan, 2nd ed, 2015).

[54] A. Lorenzetti, 'Le persone intersex nel diritto antidiscriminatorio: fra vuoti normativi e necessità di protezione', in M. Pellissero and A. Vercellone, n 2 above, 166-169.

[55] See, eg, ibid 170.

[56] E. Grande, n 18 above, 179. See also A. Vercellone, 'Più di due. Verso uno statuto giuridico della famiglia poliamore' *Rivista Critica di Diritto Privato*, 607 (2017).

[57] See esp. V. Calderai, n 50 above.

[58] ibid 180.

[59] ibid 185-191. See especially, H. Aviram and G.M. Leachman, 'The Future of Polyamorous Marriage: Lessons From The Marriage Equality Struggle' 38 *Harvard Journal of Law & Gender*, 269, 330 (2015).

necessary to enable the rights of LGBTQI+ people'.[60] A suggestion for the next updated version of this volume is to expand on this aspect as it holds potential to resist the increasingly value-laden discourses around LGBTQI+ rights of illiberal actors in Europe, such as the ruling élite in Poland and Hungary. With illiberal political parties such as Lega and Fratelli d'Italia taking center stage in Italy, this backward-looking analysis (trying to understand the traditional-conservative family, gender, and sexual orientation norms on these actors' agenda and which current legal protections are at risk of being dismantled) is not only desirable but indispensable to predict the fate of LGBTQI+ populations in an increasingly fragile Europe.

While I attempted to highlight some specific noteworthy aspects emerging from selected chapters, the width, ambitious and comprehensive nature of the collection speak for themselves. This collection is set to become a reference point for LGBTQI+ studies in Italy, and the starting point of a more sustained, comprehensive discussion about the ways in which law affects the status of LGBTQI+ subjectivities.

[60] M. Pellissero and A. Vercellone, n 2 above, XIII.

* «The articles in the section 'Insights and Analyses' are accepted by the Editors-in-Chief without peer-review»