Europeanization through private law instruments

Rainer Arnold and Valentina Colcelli
(Edited by)

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Universitätsverlag Regensburg

Entwicklungen im Europäischen Recht
Developments in European Law
Développements en droit européen

Herausgegeben von Rainer Arnold

Vol. 6

The book summarizes the work carried out in the Jean Monnet Module
"EUROPEANIZATION THROUGH PRIVATE LAW INSTRUMENTS"
EuPlaw University of Perugia – Ref. N. 542689
EACEA – Lifelong Learning – Jean Monnet Programme

with the scientific support of "Consiglio Nazionale delle Ricerche"
ISAFOM UOS Perugia

Bibliografische Information der Deutschen Nationalbibliothek
Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.dnb.de abrufbar.

1. Auflage 2016

Leibnizstraße 13, 93055 Regensburg
Umschlaggestaltung: Anna Braungart, Tübingen
Layout: ali&no editrice, Perugia
Druck: Docupoint, Magdeburg
ISBN 978-3-86845-126-9

Weitere Informationen zum Verlagsprogramm erhalten Sie unter:
www.universitaetsverlag-regensburg.de

Index

III
European integration and its impact on the national disciplines on parentage

IV
The Law of Obligations and Contract

V
Regulatory functions of non contractual liability

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Introduction

Rainer Arnold and Valentina Colcelli

Effectiveness of European (Private) law

1. *Instruments of private law and incentivising of regional process in European Union.* The present work is one of the outcomes of the Jean Monnet Module EuPlaw — J. Monnet European Modules 2013/2016-Europeanization Through Private Law Instruments — funded by the EACEA (Education, Audiovisual and Culture Executive Agency) in the context of the Jean Monnet — Life Long Learning Programme of the European Union. The idea of the Project comes from the scientific cooperation between the Università degli Studi di Perugia, University of Regensburg, University of Brighton, Universidad de Buenos Aires, University CEU-Cardenal Herrera and University of Malta.

This is a book proposal for the series "Entwicklungen im Europäischen Recht. Developments in European Law. Développements en droit européen", edit by prof. Rainer Arnold for Universitätsverlag Regensburg.

The aim of the book is to investigate, on the more strictly juridical side, the legal nature of the regulatory approach characterizing the EU system. The EU legal system – thanks to the multilevel dimensions of European private law – has been characterized by the use of new ways for governing its market integration, as complementary or alternative answers to legislative harmonisation realised and implemented with institutional instruments. Family private law instruments such as tort or contract now appear only as a small part of many possible tools harnessed to the pursuit of allocative efficiency or distributive justice. Conversely, the range of arrangements of available public regulatory tools is extremely varied[1]. Private law offers complementary remedies in individual situations through contract law, above all consumer law in the case of information problems, and at the same time as tort law assumes the effects of externalities suffered by third parties. Tort law may also give ex post situational remedies, in case one party has been seriously underprivileged. "Social" regulation of Private law[2], is correlated to distributive justice and to the insufficient resources of part of the people excluded from acceding to essential services, to the greater bargaining power of the service provider, or to the inadequate financial and educational endowment of consumers to best measures their preferences. Instrument of European private law may therefore significantly affect regulation of both public and private systems.

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1 CAFAGGI F. and WATT H.M., "The Regulatory Function of European Private Law", Elgar, Cheltenham, 2009, Northampton.

2 JOERGES C., PETERSMANN E.U. and Edited, "Constitutionalism, Multilevel Trade Governance and Social Regulation", Studies in International Trade Edited by Law, 9, 2006, Oxford.

Many theories have been posited to describe the pattern of economic regulation by the government. These include the "public interest" theory and several versions of the "interest group" or "capture" theory[3].

The traditional public law tools for market regulation were listed as state ownership, public franchising, or licensing, or as the more common forms of regulation which rely on semiprivate bodies or independent regulatory agencies for standard making or market control. Additionally, they can include various and still experimental forms of self-regulation by means of voluntary arrangements on the other end of the scale.

However, in the European legal system, private and public law may be seen as two distinct regulatory strategies of the EU and national markets; however, the instruments for rectifying market failures and guaranteeing the economic order sought by the EU range across public and private laws.

This combination of different regulatory strategies must be simultaneously employed to stimulate the design of an integrated European market and provide the reasons for its failures. Consequently, "the variety of means available to achieve these goals – which range from traditional public law tools such as state ownership, public franchising or licensing, through the more familiar forms of regulation, to various and still experimental forms of self-regulation by means of voluntary arrangements on the other end of the scale – call for a general framework in order to avoid conflicts, incoherence or redundancy between regulatory approaches"[4].

Thus, like the traditional system of economic regulation, the EU legal system – thanks to the multilevel dimension of European private law – has been characterized by the use of new complementary/alternative ways to govern its market integration, in place of the old method of legislative harmonisation realised through institutional instruments.

Familiar private law instruments such as tort or contract now appear as only a small part of many possible tools harnessed with the aim of obtaining allocative efficiency or distributive justice and are synthetically described as the correction of market failures (e.g. law rules applying to contracts for services, EC environmental law, environmental liability, product safety, product liability, etc.).

Usually, arrangements for available public regulatory tools are extremely diverse. Private law offers complementary remedies in individual situations through contract law and, most importantly, consumer law in the case of information problems. Additionally, in the manner of tort law, private law assumes the effects of externalities suffered by third parties. Tort law may give ex post situational remedies as well, in case one party has been seriously underprivileged.

However, the choice of using private rules is usually different from that of using public rules, which include licensing, prohibition or prior authorization, quality standards and mandatory disclosure that could potentially be accompanied by administrative or crim-

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3 POSNER R., "Theories of economic regulation", in Bell J. Econ. Manage. Sci., 1974, 5. p. 335-358; ZINGALES L., "The costs and benefits of financial market regulation", ECGI Law Working, 2004, pp. 21; SHLEIFER A., "Understanding regulation", European Financial Manage, 11, 2005, pp. 439-51.

4 CAFAGGI F. and WATT H.M., "The Regulatory Function of European Private Law", Elgar, Cheltenham, 2009, Northampton.

inal sanctions. On the other hand, the use of private transaction rules exposes the sector to possible speculative pressures usually affecting the market segments in which financial intermediation plays a crucial role[5].

"Social" regulation of private law[6] (is correlated to distributive justice and the insufficient resources of that section of the public which cannot access essential services, to the greater bargaining power of the service provider, or to the inadequate financial and educational endowment of consumers to best measure their preferences. In the same area of the market, public ownership models based on tax-financed subsidies have usually been superseded by privatized models[7], in which a contractor may be contractually bound by a universal service obligation or at least an obligation to ensure that vulnerable groups enjoy the service at a lower tariff[8].

Regional integration is the process of overcoming, by common accord, the political, physical, economic[9] and social barriers that divide countries from their neighbours, and of collaborating in the management of shared resources and common regional goods[10].

Generally speaking, "the term integration refers to various kinds of co-operation, co-ordination and association. As perceived by the developing countries, it is a process by which discrimination existing in national jurisdictions is progressively removed between the participating states. This is different from political integration, which may lead ulti-

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5 AMUNDSEN E.S., BALDURSSON F.M. and MORTENSEN J.B., "Price Volatility and Banking in Green Certificate Markets", Working Papers in Economics, 2, 2003, University of Bergen, Department of Economics.

6 JOERGES C., PETERSMANN E.U. and Edited, "Constitutionalism, Multilevel Trade Governance and Social Regulation", cit.

7 LA PORTA R., LOPEZ-DE-SILANES F. and VISHNY R., "Law and finance", J. Political Economy, 106, 1998, pp. 1113-1155.

8 CAFAGGI F. and WATT H.M., "The Regulatory Function of European Private Law" cit.

9 RIESENFELD S.A., "Legal Systems of Regional Economic Integration", in Hastings International and Comparative Law Review, 1997, 20, 3, p. 539, that speaks about the different levels of economic integration speaking about Free Trade Area, where internal trade barriers are eliminated while each member of the Free Trade Area retains their own tariff levels on trade with non-members; or a customs union is a Free Trade Area with the addition of a common external tariff imposed by all the members on external trade; or also a common market is a customs union with free factor mobility (including capital, labour, technology, and goods); an economic union encompasses the common market, with common fiscal and monetary policies, based upon a high level of co-ordination of member states economic policies; or an political union is the highest form of integration, and is based upon common institutions at a supranational level that replace the national institutions as the focus of political decision-making.

10 Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 1 October 2008, Regional integration for development in ACP countries, [COM(2008) 604 final – Not published in the Official Journal], that explains: The three main objectives of regional integration are: political stability: a pre-requisite for economic development; economic development: in larger, harmonised markets, the free movement of goods, services, capital and people enables economies of scale and stimulates investment; "Regional public goods": only cooperation between neighbouring countries can address trans-national challenges such as food security, preservation of biodiversity and tackling climate change".

mately to the complete union of states"[11]. In this way the idea of regional integration explains how nations cease to be fully sovereign, and how they collaborate with neighbouring countries. By giving up their sovereignty, they are gaining in exchange new techniques that can resolve conflicts that already exist or may come into existence[12].

The concept of regional integration recalls the idea of progressive integration between nations that find themselves to be neighbours in a limited space. This process determines a transformation and it is able to generate a change that brings a relative homogeneity in the behaviour of each country, in several spheres: social, cultural, economic, juridical, etc[13].

The peculiar aspect of the actual means of contemporary regional integration is that it is not coercive by nature. Nations can appreciate general advantages - not only economic, but also in relation to other dimensions, such as security and environmental safety issues - in taking part in a process of regional integration, as part of a Union or Community[14].

The system favoured by the European Union is the most advanced form of regional integration[15]. "The EU cohesion policy is aimed at reducing regional inequalities and promoting the development of the lagging regions"[16].

Usually the process of regional integration is realised principally through international treaties, as stipulated by nation states. European integration offers a good example of those instruments that accompany the supranational construction built by constitutive Treaties and the juridical sources adopted by EU Institutions.

Private law instruments, of course, were born from the need to regulate private and interpersonal relationships; they are now also new instruments for the realisation of European policies of regional integration.

The construction of the EU juridical system affects the legal systems of Member States in two ways[17]. On one hand, due to the supremacy of EU law and the process of harmonisation of EU citizens' rights, the legal systems of Member States are directly influenced. On the other hand, competition among the legal systems of Member States influences individual rights indirectly. In the areas that are not part of the EU harmonisation process,

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11 MENON P.K., "Regional Integration: A Case Study of the Caribbean Community", in Korean Journal of Comparative Law, 1996, 24, p. 197.

12 HAAS E., "The study of regional integration: reflections on the joy and anguish of pre- theorizing", in International Organization, 1997, 24, p. 610.

13 MENON P.K., "Regional Integration: A Case Study of the Caribbean Community, (1996), cit., p. 197; on the importance of the learning of the "language" of globalized law in the contemporary processes of integration see ZUMBANSEN P., Globalization and the Law: Deciphering the Message of Transnational Human Rights Litigation", in German Law Journal, 2004, 5, pp. 1499-1520.

14 TELÒ M., "Europa potenza civile", Bari-Roma, 2004, p. 91.

15 ECHOL A.M., "Regional Economic Integration", in International Lawyer (ABA), 1997, 31, 2, p. 453.

16 FARRELL M., "Regional integration and cohesion – lessons from Spain and Ireland in the EU", in Journal of Asian Economics, 2004, 14, p. 930.

17 LIIKANEN E., "Co-Regulation: a modern approach to regulation", Press Releases, 2000; Le Livre blanc sur la gouvernance européenne COM 428 (2001) final and Suivi du Livre blanc sur la gouvernance européenne – Pour un usage mieux adapté des instruments, COM (2782002) final, 5 June 2002, Recours encadré à un mécanisme de corégulation.

this competition is more striking[18]. Participation of Member States in promoting this process, and ensuring the proper functioning of internal markets, as characterised by the free movement of goods, capital, services and persons[19], means that each Member State, in making its own legislative choices, must take the legislative choices of other Member States into account[20].

In EU regulations the instruments and institutions of private law are capable of contributing to the regional integration process, often as effectively as through the use of the traditional instruments of public law.

In Europe, due to the widespread distribution of the EU legal system and legal systems of the Member States, the project of regional integration is also being realised with "*ausilium*" of the typical instruments of private law. The EU has been characterized recently by the use of new ways for governing integration, as complementary or alternative answers to legislative harmonisation realised with institutional instruments.

Private law has been - or is beginning to be seen as - a way to develop the integration process. In the European legal system this use of the typical instruments of private law is clear, because horizontal relationships in the EU legal system, also in view of the functions assigned to legal protection, are selected and adjusted to ensure the existence and survival of the EU legal system.

To understand this use of the instruments of private law it is necessary to analyse how, in the EU legal system, the selection of relevant interests in horizontal legal relationships occurs in the same manner, and for the same purpose, as the qualification of rights in vertical legal relationships. The relationship between legal protection within the EU legal system and the qualification of individual rights in horizontal legal relationships therefore needs to be examined. EU rules, in both horizontal and vertical relationships, aim at consolidating the EU legal system. As a result, the Court of Justice assigns the function of guaranteeing the economic order sought by the EU to the typical principles of private law.

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18 Court of Justice, Centros Ltd v Erhvervs- og Selskabsstyrelsen, C-212/97, in ECR 1999, p. I-01459, para 20 (opinion of Advocate La Pergola): "En l'absence d'harmonisation, en somme, c'est la concurrence entre systèmes normatifs ("competition among rules") qui doit pouvoir s'exercer librement".

19 Art. 3, 1, c), ECT, and Art. 2 EUT.

20 DICKSON J., "Directives in EU Legal Systems: Whose Norms Are They Anyway?", in European Law Journal, 2011, 17, pp. 190–212.

I

Individual Rights

The relevance of the freedom of movement of EU citizens for the emergence of subjective legal situations in the EU

Calogero Pizzolo

European Union integration process has been developed freedom was simultaneously consolidated. the freedoms we are studying along with other basic freedoms were considered primarily as economic freedoms. This approach, during the process of the European integration, was set aside, in favour to in a much broader and more inclusive approach. A criterion that links the free movement of persons, beyond its economic sense, to the rights arising from citizenship status of the Union.

1. *From the basic economic freedom for the common market to a fundamental right of a citizen of the Union*. It could be demonstrated, through the development of the European integration process, that the freedom of movement and the related right of residence are fundamental freedoms.

In other words, the integration process has been developed in a way that the previously stated freedom was simultaneously consolidated. This can be demonstrated by the importance that the topic has always had within both secondary legislation and case law of the Court of Justice.

Specifically, by studying the freedom concerned it may be possible to distinguish a period before and a period after the entering into force of the Treaty of Maastricht.

The Treaty of Rome (1957), in which was established the European Economic Community (see the Article 3), provided for the free movement of the economically active persons (workers), aiming at the development of a common market[1].

That right, therefore, was enjoyed as the central elements of an integration process based on the establishment of a common market in which the economic operators enjoy the freedom of movement in order to access a dependent or autonomous work, and be able to perform it (permanence), provide or receive services, and be able to steadily exercise a profession, etc.

The right permits persons who reside in a Member State, to carry out the aforementioned economic activities, regardless of nationality. Since the mid-seventies of the last century, it had been taken out of any discretionary power of the Member States[2]. The prohibition of discrimination on the grounds of nationality, in this context and

1 This is explained, remember, because the original and distinctive goal of the current European Union was purely economic: the creation of a common market, where free movement of workers was built as an more economic freedom along with the free movement of the capital, goods and services.

2 PIZZOLO C., "Derecho e Integración regional", EDIAR, Buenos Aires, 2010, pp. 696-697.

with the support of the case-law of the Court of Justice, was reaching an outstanding dimension.

However, the freedoms we are studying along with other basic freedoms were considered primarily as economic freedoms. This approach, during the process of the European integration[3], was set aside[4], in favour to in a much broader and more inclusive approach. A criterion that links the free movement of persons, beyond its economic sense, to the rights arising from citizenship status of the Union[5].

2. *The cross-border element interpreted in relation to the status of Union citizenship*. The qualitative jump derived from the approval of the Treaty on European Union (hereinafter "TEU"), signed in Maastricht on 7 February 1992. Freedom of movement Residence had been covering a broad social field (the familiar one) starting from the economic dimension, but it did not concern all subjects, and had no effect before 1992, on "the whole society"[6].

The Maastricht Treaty added a new second part to the Treaty establishing the European Community (hereinafter TCE), entitled "Citizenship of the Union"[7].

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3 The limited original rules of that Treaty of Rome on free non-discriminatory economic circulation had been resized by the Single European Act to the notion of internal market as an area without internal frontiers in which the free movement of persons is ensured then the accompanied right of residence.

4 Although its earliest antecedents can be found in the formulation of certain proposals - in the framework of a project of a European Union that arises in the Paris Summit of 1972 - designed to extend the right of free movement for all nationals of the Members States, the first cracks in the normative plan, on the consideration of such freedom as a right not necessarily concerned with economic content and not limited exclusively to workers or people looking for a job, arrived almost twenty years later. The first turning point was due to the following three Directives of the 28 June 1990: the Directive 90/364/EEC, concerning the right of residence; the Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity; the Directive 90/366/CEE on on the right of residence for students (substituted by the Directive 93/96/EEC of the 29 October 1993). The importance of those Directives – now replaced by the Directive 2004/38/CE – has been crucial for the process we are taking into consideration.

5 In July 2009, the Commission has stated that more than 8 million Union citizens have exercised their right of free movement and residence, and now live in another Member State. The free movement of the citizens "constitutes one of the fundamental freedoms of the internal market and is at the heart of the European projec" (see Communication from the Commission to the European Parliament and the Council of 2 July 2009 on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [COM(2009) 313 final, para 1).

6 See the commentary to the Article 45 of the Charter of the Fundamental Rights of the European Union of MANGAS MARTÍN, "Carta de los derechos fundamentales de la Unión Europea. Comentario artículo por artículo", Fundación BBVA, Araceli (editor), 1998, p. 719.

7 In the wording of the present Article 20.1 of the Treaty on the Functioning of the European Union (hereinafter referred to as "TFEU"): "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship".

So citizens of the Union were beneficiaries of a number of civil and political rights, among which the right to move and reside freely within the territory of the Member States, with independence of the motivations concerning the professional activities. This right has created huge legal and practical impacts[8]. On the other hand, within the Charter of Fundamental Rights of the European Union (hereinafter CFREU), which today has "the same legal value as the Treaties" (see the Article 6.1 TEU); the Article 45.1 recognizes that "Every citizen of the Union has the right to move and reside freely within the territory of the Member States".

We are facing a universal right of every citizen of the Union. A fundamental right inherent to the political status of citizens of the Union. It is a rule of direct application whose enjoyment in itself, is not conditioned by the implementing measures of the Council or the Member States.

3. *The time spent in the host state*. The direct effect of the former Article 18.1 (TCE) – the present Article 21.1 TFEU – was taken over directly by the EU case-law[9]. In the words of the Court, the vocation of citizenship of the European Union "is destined to be the fundamental status of nationals of the Member States"[10].

As the judge of Luxembourg states, the TEU does not require that Union citizens exercise a professional activity, whether employees or self-employed, in order to enjoy the rights to citizenship of the Union. In addition, the Court held, there is nothing in the text of the Treaty to consider that citizens of the Union, who are established in another Member State to exercise an employed activity, will be deprived of the rights conferred by European citizenship, when that activity ceases[11]. The free movement of persons is one of the foundations of the European Union.

Therefore, any exceptions to this principle have to be interpreted strictly[12].

The introduction of a citizenship of the Union, with the corollary of the free movement through the territory of all Member States, represents a qualitative jump forward, because it unlinks that freedom from its functional or instrumental elements (the links with an economic activity or the achievement of the internal market) and rises it to the level of its own independent right inherent in the political status of citizens of the Union[13].

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8 According to the Article 21.1 TFUE: "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect".

9 C-413/99, Baumbast and R., ECR 2002 p. I-7091, para 84.

10 C-184/99, Grzelczyk, ECR Rec. 2001, p. I-6193 para 31.

11 Baumbast and R., ref. para 83.

12 C-139/85, Kempf / Staatssecretaris van Justitie, ECR 1986 p. 1741, para 13; C-33/07, Jipa, ECR 2008 p. I-5157, para 23.

13 See the Opinion of the Advocate General Dámaso Ruiz-Jarabo Colomer delivered on 20 March 2007, concerning the joined cases C-11/06 and C-12/06, para 82.

4. *Conclusions.* In defining the scope of the free movement of persons and residence, it becomes important, as we will see the cross-border element[14].

The claim of the protection of this freedom, as of the other basic freedoms, requires some kind of movement between Member States.

It is the approach that follows the Directive 2004/38/ EC of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[15].

This Directive applies to any citizen of the Union to "who move to or reside in a Member State other than that of which they are a national, and to their family members" who accompany or join them (see the Article 3 of the Directive "Beneficiaries").

The free movement of people, says Molina del Pozo[16,] has a triple aspect: a) the free movement of non-active persons, in close connection with European citizenship, b) the free movement of workers, both employed and self-employed and c) not only the free movement of nationals of EU countries but also third country nationals who wish to live or reside in the territory of the Member States.

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14 From the Article 21 (TFEU) it derives that both the circulation and the residence have to be vested with the a intra-european nature, becasue within each Member State the citizens have, in accrdance with the domestic law, their rights of the residence and movement, which of course are not "subject to the limitations and conditions laid down in the Treaties". The same happens with the prohibition of discrimination on grounds of nationality (Article 18 TFEU) applies "Within the scope of application of the Treaties".

Also in the application of f the Charter of Fundamental Rights of the European Union which is addressed to the institutions and bodies of the Union and the Member States only when they are implementing Union law and requires that the Institutions respect it in all areas of competence of the Union (Article 51, of Charter). Making it clear that the Charter "does not create any new power or task for the Community or the Union". Also the Charter, as Union law, will applied only to intra-EU situations.

15 The mentioned Directive modifies the Regulation (EEC) Nº 1612/68 and the Directives 64/221/ EEC, 68/360/EEC, 72/194/ EEC, 73/148/ EEC, 75/34/ EEC, 75/35/ EEC, 90/364/ EEC, 90/365/ EEC and 93/96/ EEC.

16 MOLINA DEL POZO C.F., "Derecho de la Unión Europea", Editorial Reus S. A., Madrid, 2011, pp. 328 and ff.

Court of Justice and national courts: the system of legal protection of EU individual rights

Susana Sanz Caballero

Protection of individual rights national/EU Courts is the best method for EU integration. In the EU, national courts protect individual rights in horizontal and vertical relationships. However, the Treaties have made "a number of instances for private persons to bring a direct action, where appropriate, before the Court of Justice, (…) not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law" (Rewe v Hauptzollamt Kiel (C- 158/80), [1981] ECR, 1805).

1. *Introduction.* Access of individuals to the Court of Justice of the EU (ECJ) has never been a high-ranking priority for the EU. This assertion should not be understood as a sign of EU's indifference or rejection towards the rights of individuals but as evidence of the way the EU jurisdictional system has been framed. One of the most outstanding characteristics of the EU jurisdictional system is the involvement of national courts as regular applicators of EU Law. The constitutive treaties of the European Communities (before) and of the European Union (today) make it clear that national courts are also a part of the system of application of EU Law and, as a consequence, a part of the system of protection of EU individuals' rights[1].

The EU is a legal order. It produces its own legislation. EU Law is incorporated into the legal orders of the 28 member States. Therefore, it needs an effective and credible system of judicial safeguards when EU Law is applied or is challenged. A judicial institution is crucial in order to guarantee that EU Law is understood, observed and uniformly applied. According to article 13 of the Treaty of the European Union (TEU), the ECJ (called the Court of Justice of the European Communities before the Lisbon Treaty) is the judicial institution of the EU and, consequently, it is also the key element of the EU system of jurisdictional safeguards. It ensures that in the interpretation and application of the Treaties the law is observed. But the ECJ (composed for the moment of three courts: the Court of Justice, the General Court and the Civil Service Tribunal) is not the only jurisdictional safeguard of the EU legal order. The domestic judicial organs of the member States are the ordinary judges of EU Law in this decentralized legal system and EU Law can be invoked by applicants, judges and defendants in domestic courts.

[1] Art. 19 TEU: "The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law".

The ECJ, in accordance with the Treaties: (a) rules on actions brought by a member State, an institution or a natural or legal person; (b) gives preliminary rulings, at the request of courts or tribunals of the member States, on the interpretation of Union law or the validity of acts adopted by the institutions; and (c) rules in other cases provided for in the Treaties[2].

The purpose of this article is twofold: 1) To show the direct and indirect modalities of access that individuals enjoy to the EU judiciary as evidence of a systemic but complicated vertical dialogue undertaken between the ECJ and national courts. 2) To shed some light on the effects that the Lisbon Treaty may have had on this judicial dialogue with the new binding character formally acquired by the Charter of Fundamental Rights of the EU.

2. *The vertical dialogue between the ECJ and national courts of the member States.* Individuals may invoke EU Law directly in domestic courts. National courts and tribunals will apply EU Law as part of their legal order and will refrain from applying domestic norms that are not compatible with EU Law. The constitutive treaties established neither a constitutional court nor a supreme court competent to judge in appeal the rulings of domestic courts[3]. When an individual loses his/her case before a domestic court of last instance, he/she cannot introduce an appeal before the ECJ. The ECJ does not have jurisdiction to overturn decisions delivered by domestic courts. Instead, the constitutive treaties include the mechanism of the preliminary ruling to guarantee the uniform application of EU Law throughout all the member States. In case of doubt about the interpretation or the validity of an EU norm, the Treaties mention the possibility of the national judge to suspend the dispute and to request a preliminary ruling to the ECJ. Decisions of the ECJ, upon a preliminary reference, are binding on the courts of member States. Whenever the Court concludes that an EU act is incompatible with EU Law or whenever it gives a specific interpretation about an EU norm, this decision is binding and all member States and courts are obliged to follow that ruling. This unifying function of the ECJ is established in article 267 of the Treaty on the Functioning of the European Union (TFEU), which enables the ECJ, at the request of domestic courts, to rule on the validity or on the interpretation of a given EU norm. This article makes a distinction between national courts whose decisions are not final because there are still further judicial remedies available and national courts and tribunals whose decisions are not susceptible of a further remedy. For the former, resource to the ECJ for a preliminary ruling is an option and they have the discretion

2 Article 19.3 of the Treaty of the European Union.

3 According to articles 256 and 257 of the Treaty on the Functioning of the EU, to articles 56-60 of Protocol No. 3 of the TEU on the Statute of the ECJ and to the latter's Annex No. 1 on the EU Civil Service Tribunal, appeals, limited to points of law, may be brought against judgments of the General Court before the Court of Justice. If the appeal is well founded, the Court of Justice will quash the General Court's decision. Also, decisions given by the Civil Service Tribunal (or any other specialized court to be established in the future) may be subject to an appeal before the General Court and generally will be only limited to points of law.

to make a preliminary reference to the ECJ whereas courts of last instance are bound to refer in case of doubt about the interpretation or the validity of the EU norm at stake[4].

The mechanism of preliminary rulings provides an excellent opportunity for national courts to challenge member States' actions for failing to comply with their obligations under EU Law. However, this mechanism is not such a big deal for individuals, as the decision to refer the case to the ECJ does not depend on them but on the members of the national court or tribunal. Individuals will try to persuade national judges about the opportunity, or even the need, of such a referral but the decision is not theirs, it belongs to the judge. When a national court decides to request the ECJ for a preliminary ruling, the citizens concerned by the dispute will have the possibility to present their observations and make their views known to the ECJ as well.

That being said, there are two basic principles of EU Law which are of help for both individuals and legal persons when the request for a preliminary ruling is at stake. The first one is the principle of the direct effect of EU Law, which means that EU rights can be invoked by individuals before national courts against the administration and sometimes even against other individuals[5]. The other one is the principle of the primacy (or supremacy) of EU Law over national law, which means that EU Law takes precedence over domestic law and applies on an equal footing in all the 28 member States[6]. According to Tridimas, combining the procedure of preliminary references with the principles of direct effect and primacy enables both individuals and companies to assert EU rights in the courts of member States. Individuals may use EU Law as a "shield" to defend themselves from action by national authorities which infringes EU rights, or as a "sword" to challenge the compatibility of member States' actions with EU Law[7].

National courts play a key role in the process of implementing EU Law and the ECJ works in conjunction with them. Preliminary references have become a regularly used procedure to enforce EU Law and, as a consequence, an extraordinary mechanism in the process of legal integration. "What is important in the procedure, indeed crucial, is the fact that it is the national court which renders the final judgment[8]. The EU gives national judges their share of prominence in the process of European construction because the ECJ does not decide the dispute itself. It is the national court which finally decides the case once the ECJ has answered about the validity or the interpretation of the EU norm under discussion.

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4 On these referrals, see: BROBERG M., FENGER N., "Preliminary References to the European Court of Justice", 2014, Oxford University Press, 2nd edition.

5 C-26/62, Van Gend en Loos v. Nederlandse Administratie von Belastingen, 5 February 1963. This principle enables individuals to rely directly on EU provisions before national courts.

6 C-6/64, Costa v. ENEL, 15 July 1964. Through this principle, national courts will disregard domestic provisions which contradict EU law.

7 TRIDIMAS G. & TRIDIMAS T.P., "National courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Rule Procedure", in Social Science Research Networks, 13 December 2001, accessible at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=320784.

8 WEILER J.H.H., "The European Community in Change: Exit, Voice and Loyalty", in Irish Studies in International Affairs, 1990, vol. 3, No. 2, p. 515.

I. Individual Rights

Though preliminary ruling is a crucial element of individuals' rights adjudication in the EU judicial system, it is not the only one. The TEU also establishes that, in accordance with the Treaties, the ECJ will also rule on actions brought by a Member State, an institution or a natural or legal person. The TFEU in article 263 paragraph 4 settles that a natural or legal person may bring an action before the General Court (one of the ECJ's courts) against any act of one of the institutions, of one of the bodies, offices or agencies of the EU which is addressed to him/her or which is of direct and individual concern to him/her or against any regulatory act that concerns him/her directly and which does not entail implementing measures. Article 265 paragraph 3 adds that any natural or legal person may complain to the Court of Justice of the European Union that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion. Thus, the Treaties also envisage the introduction of direct actions by individuals. However, the procedure and the path that the individuals have to follow in order for the ECJ to be able to grant them jurisdiction is tortuous and twisting. The rigorous conditions that natural and legal persons have to fulfil in order to be allowed to bring an action before the General Court are only requested to them. Similar conditions are not requested from European institutions and member States when they submit actions for annulment before the ECJ. Individuals and companies have to show that either the act is addressed to them or is of direct and individual concern for them, or either they are regulatory acts which concern them directly and do not entail implementing measures. On top of that, individuals cannot bring an action against another natural or legal person or against a member State before the ECJ. This kind of case must always be dealt with at the level of national jurisdictions. Not without reason, authors have traditionally talked about first and second class litigants[9].

Both the ECJ and the national courts of the 28 member States constitute the EU's judicial branch. The latter also play a vital role as they apply EU Law at the local level and refer cases to the ECJ for preliminary ruling. From their side, individuals can persuade

[9] MATTLI W., SLAUGHTER A.M., "Constructing the European Community Legal System from the Ground up: The Role of Individual Litigants and National Courts", in Jean Monnet Center for International and Regional Economic Law and Justice. The NYU Institutes on the Park, June 1996, accessible at: www.jeanmonnetprogram.org/archive/papers/96/9606ind.html; GRANGER M.P., "States as Successful Litigants before the ECJ", in CYELP, 2006, No. 2, pp. 27-49, p. 35 ff.; ARNULL A., "Private Applicants and the Action for Annulment under Article 173 of the EC Treaty", in Common Market Law Review, 1995, vol. 3, No. 2, pp. 7-49, p. 13; SOULARD C., "Recours en Annulation", en Jurisclasseur de Droit International, 1990, vol. 161, No. 23, pp. 1-18. p. 11; DE FARRAMIÑÁN GILBERT J.M., "El Control de la Legalidad Comunitaria: el Recurso de Nulidad y el Recurso por Omisión", in El Derecho Comunitario Europeo y su Aplicación Judicial, 1993, Cívitas, pp. 453-526, p. 457; ABELLÁN HONRUBIA V., Lecciones de Derecho Comunitario Europeo, 1993, Ariel, Barcelona, p. 145; ISAAC G., Manual de Derecho Comunitario General, 1997, Ariel, Barcelona, p. 302; MOITINHO DE ALMEIDA J.C., "Â Contribuçao da Jurisprudência do Tribunal de Justiça das Comunidades Europeias para una Ciudadania Europea", in Divulgaçao do Dereito Comúnitario, 1993, n. 13, pp. 23-42; BIERNAT E., "The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community", in Professor Joseph H. H. Weiler Jean Monnet Chair. Jean Monnet Working Papers 2003, n. 12/03.

national courts to refer cases for preliminary ruling to the ECJ. Individuals can also request the ECJ for the annulment of EU acts or for the sanction of EU failures to act but only if they succeed in showing that they fulfil the requirements of article 263 paragraph 4, or of article 265 paragraph 3 for a direct action. These are the ways (indirect and direct, respectively) for individuals to gain access to the ECJ.

However, as said before, the courts of member States are the ordinary courts in matters of EU Law. As a result, there is not such a thing as a general judicial remedy available before the ECJ for breaches of EU Law affecting the fundamental rights of individuals. That is not supposed to be the role of the ECJ. Cases on individuals' fundamental rights protected by EU Law could reach the ECJ only through three ways: 1) through article 263, if the individual requests the Court to review the legality of a EU act that supposedly violates his/her fundamental rights; 2) through article 265 paragraph 3 on the failure to act (omission remedy) which holds similar restrictions on individuals, and 3) through article 267, according to which fundamental rights could be invoked and claimed in ordinary national courts (including constitutional and supreme courts and courts of last instance) and, eventually, these domestic courts could raise a preliminary question to the ECJ.

3. *Adjudication of individual rights in the EU judiciary system after the Lisbon Treaty.* Despite this vertical "judicial dialogue" between the ECJ and national courts, voices have increasingly been raised against this rather narrow framework for individual rights' adjudication before the ECJ[10], especially since the entry into force of the Lisbon Treaty in November 2009 which definitely provides binding force for the Charter of Fundamental Rights of the European Union (CFREU). Regarding individual litigants, there are clear constraints imposed on them by the EU judiciary process. Among them, mention should be made to the differential ability to bring before the ECJ a series of suits rather than just one and to the different (discriminatory?) treatment that individuals receive in terms of access to the Court compared to the so-called "privileged" litigants (namely, member States and EU institutions).

From the moment of acceptance of the doctrine about the primacy of EU Law over national law in the case Costa v. ENEL, national courts were granted the right to leave aside national legislation incompatible with EU Law. However, the possibility to set aside national legislation was based in the presumption that the standard of protection of individuals' fundamental rights was similar both at domestic and supranational EU level. The solemn proclamation of the CFREU in December 2000 reinforced this idea because the EU finally had its long awaited formal declaration of fundamental rights which, supposedly, would cover any lacunae that the EU order may have in the field. Moreover, the Charter asserts in paragraphs 3 and 4 of article 52 that the level of protection will be, at least, the same – if not higher – as the level of protection guaranteed by the constitutional traditions of the member States and to that of the Convention for the Protection of

[10] HOUSE OF LORDS, UK (EU COMMITTEE): The Workload of the Court of Justice of the EU. 14th Report of Session, 2010-11, 2011, HL Papers, p. 59.

Human Rights and Fundamental Freedoms of 1950 (ECHR), to which all EU member States are parties and are bound to comply with[11].

The problem arises if the level of protection of individual rights is *de iure* or/and *de facto* higher at the national level. The CFREU is formally prepared for this situation. Article 53 asserts that the Charter cannot be understood as restricting the human rights and fundamental freedoms recognized, among others, by the ECHR and the constitutions of the member States[12]. This provision is indirectly saying that the higher standard of protection will prevail, irrespective of the origins of the obligation, and that the Charter should be taken as the minimum common denominator of protection. But this clause has to be read and interpreted in combination with the very intriguing provision of article 52.2, which settles that the rights recognized both in the Charter and in the Treaties will have to be interpreted with the limitations established by the latter[13]. No less intriguing is the content of article 52.1 of the Charter, according to which limitations of Charter rights may be made, among others, in the name of unclear "objectives of general interest recognized by the Union"[14]. Authors have raised concerns about this limitation clause whose wording differs from those contained in the ECHR and national constitutions, which permit limitations of rights "necessary in a democratic society". Article 52 of the Charter, instead, permits the restriction of the rights of individuals because of overarching objectives specific to the EU, including economic ones[15]. This is not a theoretical interpretation anymore. The global financial crisis has shown that the EU is now restricting social policies and is forcing States to do the same (e. g. concerning the right to a decent salary, the right to a home or the right to health care and to social assistance) in the name of compelling interests such as the recovery of the banking system, or the progress of liberal economy and free competition.

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11 Article 52 of the Charter: "(…) 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions".

12 Article 53 of the Charter: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

13 Article 52.2 of the Charter: "Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties".

14 Article 52.1 of the Charter: "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

15 DE BÚRCA G., "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", in Maastricht Journal of European and Comparative Law, 2013, vol. 20, No. 2, pp. 168-184, p. 173.

4. *A not always easy judicial dialogue: the cases Melloni and Aklagaren.* The occasion to rule on conflicting levels of protection at the national, supranational and international scales recently arose in two preliminary rulings issued on the same date. In these cases, the standard of protection of two rights recognized by the Charter was interpreted by the Grand Chamber of the ECJ in a way that was significantly lower in level to that accorded for those same rights in the legislation of the member States affected by the judgments[16].

4.1. The Melloni case. Mr. Melloni[17] was sentenced *in absentia* to 10 years' imprisonment for bankruptcy fraud by an Italian court (Ferrara Tribunal). Bologna's Appeal Court issued a European arrest warrant against him[18]. He was arrested in Spain but opposed surrender to the Italian authorities contending that under Italian procedural law it is not possible to appeal against sentences imposed *in absentia*, for which the execution of the European arrest warrant against him would have the effect of undermining his right to a fair trial. His case was heard by the Spanish Audiencia Nacional, which authorized surrender to the Italian authorities arguing that Mr. Melloni's rights of defence had been respected because: 1) he deliberately absented himself from the trial that sentenced him and 2) he was legally represented in the judicial process by two lawyers of his own choosing.

He filed a "recurso de amparo" before the Spanish Constitutional Court on the grounds that consenting extradition to countries which, in cases of serious offences, allow convictions *in absentia* without making the surrender conditional upon the convicted being able to challenge the same order to safeguard his rights of defence, gives rise to an infringement of the requirements deriving from a fair trial affecting human dignity. The High Spanish Court had a reasonable doubt about whether the surrender to Italy of Mr. Melloni applying the Framework Decisions 2002/584 and 2009/299 on the European arrest warrant would go against articles 47 of the Charter, on the right to an effective judicial remedy, and article 48.2 on the rights of defence. It also argued that the obligation to surrender without right to appeal may infringe both article 53 of the Charter as well as the Spanish Constitution.

The Court of Justice gave priority in its judgment to the objectives of general interest of EU legislation, in this case, the Framework Decision's objective of facilitating judicial cooperation in criminal matters. As to the question of whether the surrender would violate EU Law, the Court of Justice contested that the right to a fair trial is not absolute. Thus, an interpretation of the Framework Decision that permitted the extradition was compatible with articles 47 and 48 of the Charter, especially since Mr. Melloni had always

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16 For a short but nevertheless brilliant analysis of both judgments, see: WEILER J.H.H., "Editorial: Human Rights, Member States, European Union and European Court of Human Rights Levels of Protection", in EJIL, 2013, vol. 24, No. 2, pp. 471-473.

17 Court of Justice (Grand Chamber), C-399/11, Stefano Melloni v. Ministerio Fiscal, 26 February 2013.

18 For other comments on the case, see: DE BOER N., "Addressing rights divergences under the Charter: Melloni – Case C-399/11, Stefano Melloni v. Ministerio Fiscal, Judgment of the Court (Grand Chamber) of 26 February 2013", in Common Market Law Review, 2013, vol. 50, No. 4, pp. 1083-1103; LECZYKIEWICZ L., "Melloni and the future of constitutional conflict in the EU", in U.K. Const. L. Blog (22nd May 2013), available at:http://ukconstitutionallaw.org.

been aware of the trial and had been officially informed of the scheduled date for the criminal proceeding against him.

Concerning the question of whether article 53 (on the level of protection of the Charter's rights) must be interpreted as allowing the executing member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing member State, in order to avoid an adverse effect on the right to a fair trial and the right of defence guaranteed by its Constitution, the Grand Chamber ruled that such an interpretation of article 53 cannot be accepted[19]. The reason for this decision is based on the application of the principle of primacy of EU Law. Rules of national law, even of a constitutional order, cannot undermine the effectiveness of EU Law. Thus, for the Grand Chamber, the interpretation envisaged by the Spanish Court of article 53 of the Charter would give the State a general authorization to apply the standard of protection of fundamental rights guaranteed by its Constitution when that standard is higher than that deriving from the EU Charter of Fundamental Rights and this is not acceptable.

In Melloni the Court of Justice interprets the rights of the Charter to a fair trial and to defence in a very restricted way and rejects the application of the most favourable norm for the individual. Confronted with a Constitution that affords a higher standard of protection to fundamental rights than that of the CFREU, the interpretation made by the Court of Justice of article 53 of the Charter ("Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized… by the Member States' constitutions") seems rather forced, even contradictory with the terms of article 53 itself. Overriding considerations about the primacy of EU Law over national law make the Grand Chamber say that national authorities and courts remain free to apply (higher) standards of protection of fundamental rights "only if" the primacy, effectiveness and unity of EU Law are not compromised[20]. *A contrario sensu*, the Court of Justice fails to grant the individual concerned his best interest.

In that situation, what are the options for the State? Should Spain apply EU Law and transfer the individual to Italy? With this solution, the State will contravene its Constitution and its higher fundamental rights' standards. Or should Spain infringe EU Law and refuse to extradite the individual? With this second solution, the State will apply Spanish higher human rights standard but will contravene the principle of supremacy of the EU legal order. The solution was complicated for Spain in either case.

Finally, in its judgment of 13 February 2014, the Spanish Constitutional Court agreed to lower the level of protection[21], but deliberately avoided making reference to article 53 of the EU Charter in its legal reasoning. Instead, it reached the conclusion of extraditing Mr. Melloni by reinterpreting its well-established case-law about the hard core of the right to a fair trial, which previously and until this date had always included the right to be present in person in criminal procedures for serious offences. The Constitutional Court employed similar terms to those used before by the Audiencia Nacional about the difference between criminal proceedings *in absentia* where the convicted in-

19 Paragraph 57 of the Melloni judgment.

20 Paragraph 60 of the Melloni judgment.

21 Tribunal Constitucional: STC 26/2014 of 13 February 2014.

dividual has not been informed and has not been legally represented and proceedings where the individual was formally summoned but simply decided to flee from justice.

Interestingly, the judgment relays on the case-law of the European Court of Human Rights concerning article 6 on the right to a fair trial. The Spanish court specifically mentions the jurisprudence of the Strasbourg Court in the Sejdovic case, according to which there is no violation of article 6 of the ECHR if the individual unequivocally waives his right to be present during the judicial procedure against him[22]. While modifying its previous jurisprudence, the Court chose not to mention article 53 of the Charter or the Grand Chamber's preliminary ruling as the real reason or, at least, one of the reasons for his change of criterion. The Constitutional Court does not make reference whatsoever to the content of article 53 of the CFREU to consent the extradition to Italy of an individual convicted *in absentia* to 10 years' imprisonment and who will not enjoy the opportunity to challenge his penalty before any higher Italian court. The Spanish Court pretends to be changing its own doctrine (and lowering the level of protection afforded by the Constitution) on its own grounds and choosing, instead of as a result of the limits imposed by the ECJ's preliminary ruling[23]. In that way, the Spanish Constitutional Court avoids delving in the always risky debate about the primacy of EU Law over Spanish Constitution, a controversial question already addressed by the latter in its Declaration of 2004[24].

4.2. The Aklagaren case. Mr. Akerberg[25] was accused of serious tax offences by the District Court. This Swedish tax evader was prosecuted for failing to declare employers' contributions to the social security system and for providing false information linked to the levying of income tax and value added tax. He was convicted for his criminal activity by the criminal court and was also fined by the tax office for the same acts. The decision imposing the penalties was based on the same grounds, something he found incompatible with the principle *ne bis in idem*.

The nexus of the case with EU Law is quite meager and has been the object of recent doctrinal debate[26]. The Grand Chamber acknowledges the fact that collecting taxes is a matter of national law and that article 51.2 of the Charter does not extend the field

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22 Paragraph 82 of the judgment.

23 GARCÍA M., "STC 26/2014: The Spanish Constitutional Court Modifies its Case Law in Response to the ECJ's Melloni Judgment", in European Law Blog. News and Comments on EU Law, posted 17 March 2014, accessible at: http://europeanlawblog.eu/?p=2261.

24 Tribunal Constitucional: Declaration 1/2004 of 13 December 2004 (Boletín Oficial del Estado No. 3 of 4 January 2005).

25 C-617/10, Aklagaren v. Hans Akerberg Fransson, 26 February 2013.

26 Analysis of the judgment can be found in: VAN BOCKEL B., WATTEL P., "New Wines into Old Wineskines: The Scope of the CFREU after Akerberg Fransson", in European Law Review, 2013, issue 6, dec., pp. 866-883; IGLESIAS SÁNCHEZ S., "TJUE. Sentencia de 26 de Febrero de 2013 (Gran Sala)", in Revista de Derecho Comunitario Europeo, 2013, No. 26, sept-dic.; FONTANELLI F., "Hic Sunt Nationes: The Elusive Limits of the EU Char ter and the German Constitutional Watchdog: Court of Justice of the European Union: Judgment of 26 February 2013", in European Journal of Constitutional Law, 2013, vol. 9, No. 2, sept.

of application of EU Law beyond the powers of the EU. Nevertheless, it finds the link of the case with EU Law in the fact that tax penalties and criminal proceedings for tax evasion imposed by member States concerning the value added tax (VAT) are acts of implementation of EU Law because VAT revenues contribute to the EU budget[27].

Once established the (indirect and very loose, in our opinion) jurisdiction of the Court, the Grand Chamber studies the questions referred by the national court, and especially the question whether the *ne bis in idem* principle laid down in article 50 of the Charter[28] should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information. As in Melloni, the Court of Justice makes reference to the overarching objectives of the EU, in this case, the need that the financial interests of the EU are adequately protected. As in Melloni as well, in Aklagaren the Court of Justice asserts that national authorities and courts remain free to apply national standards of protection of fundamental rights provided that the level of protection provided for by the Charter, as interpreted by the ECJ and the primacy, and that the unity and effectiveness of EU Law are not thereby compromised.

The Court of Justice interprets that article 50 of the Charter does not preclude a member State from punishing tax evaders twice for the same acts of non-compliance with declaration obligations in the field of VAT, first as a tax penalty and second as a criminal penalty, in as far as the tax penalty is not criminal in nature, a matter which is for the national court to determine[29]. Therefore, the Court of Justice interprets that this double sanction is not inconsistent with the *ne bis in idem* principle enshrined in article 50 the Charter.

Concerning the question referred to the Court of Justice about the compatibility with EU Law of a national judicial practice if it makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the ECHR (in this case, article 4 of Protocol 7 to the ECHR), the Court gives a rather strange answer: "As regards, first, the conclusions to be drawn by a national court from a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn

[27] For a detailed interpretation of the Charter's scope of application with regard to member States' actions, see: MORJIN J., "Akerberg and Melloni: What the ECJ said, did and may have left open", in Eutopialaw, posted 14 March 2013, accessible at: http://eutopialaw.com/2013/03/14.

[28] "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

[29] Paragraph 37 of the Aklagaren judgment.

by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law (see, to this effect, Case C-571/10 Kamberaj [2012] ECR I-0000, paragraph 62)"[30]. Thus, the Luxembourg Court concludes that, in as far as the EU is not yet a party to the ECHR, the Convention is not applicable to the case. With this legal reasoning the Court of Justice makes a weak favour to itself, since article 6.2 of the TEU establishes that the EU shall accede to the ECHR as an obligation of result[31]. The process of accession formally started in July 2010 between the two negotiating parties, the Council of Europe and the EU. Thus, it is a question of time that the ECHR will formally become EU Law[32]. Informally, the ECHR is already part of the EU legal order, because since 1964 with its judgment in the Nold case[33] the ECHR has been used by the Court of Justice as one of the fundamental inspiring documents to identify the principles of EU Law about fundamental rights that are applicable in the EU. However, in this 2013 judgment, the Court concludes that "Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of European Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements, which are the very essence of European Union law (Melki and Abdeli, paragraph 44 and the case-law cited)"[34]. The Court of Justice maintains this position regardless of the eventual human rights' character of the provision or practice that might impair the effectiveness of EU Law. In other words, member States may have the obligation imposed by EU to disregard human rights provisions in the name of the supremacy of EU Law.

Be it as it may, in Aklagaren the Court of Justice fails to protect the right of individuals not to be punished twice on the same charges. The Luxembourg Court does not protect this right at the same level that the ECHR does. In so doing, it puts Sweden in an awkward position: the ECHR may not be of application to the EU yet (at least officially), but it is of application to Sweden. So, should the country apply EU Law and violate its international obligations under the ECHR? Or should it apply the ECHR and ignore the principle of supremacy of EU Law?

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30 Paragraph 44 of the Aklagaren judgment.

31 Article 6.2 of the TEU: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties".

32 On the negotiations between the Council of Europe and the EU about the accession, see: SANZ CABALLERO S., "Crónica de una adhesión anunciada: algunas notas sobre la adhesión de la UE al Convenio Europeo de Derechos Humanos", in Revista de Derecho Comunitario Europeo, 2011, No. 38, pp. 99-128.

33 C-4/73, Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities, 14 May 1974.

34 Paragraph 46 of the Aklagaren jugdment.

4.3. A joint lecture of Melloni and Aklagaren. Melloni and Aklagaren are two different cases issued by the Grand Chamber of the Court of Justice that have many features in common. Both are preliminary rulings. Both were issued on the same date (26 February 2013). Both affect the (sometimes) difficult balance between the principles of supremacy of EU Law and of the protection of individuals' fundamental rights. Both concern the question of the ECJ denying member States the right to apply a higher standard of protection of individuals' rights compared to that ensured by EU Law. In both of them the ECJ sends the message that it is the ECJ itself who is in charge, no matter how worrying the consequences for member States may be. Both concern the application by the Luxembourg Court of a very narrow interpretation of the rights of the Charter of Fundamental Rights of the EU in the name of some objectives of general interest of EU Law (namely, the need of member States' cooperation in criminal matters and the need to preserve the financial interests of the EU ant its revenues through a States' rigorous tax collection and policy of fraud prevention, respectively).

However, they differ on the norms that are supposedly in contradiction with those overriding general interests of EU Law. In Melloni, this norm is the Constitution of the State involved in the case (Spain). In Aklagaren, it is the ECHR, whose contents the State concerned (Sweden) is bound to apply. Both cases share the same dilemma for the States involved: should they apply EU Law and disregard their other obligations? Should Spain disregard the application of fundamental rights of a constitutional character? Should Sweden disregard the application of fundamental rights of an international conventional character? What can States do when the EU standard is lower than national or Strasbourg standards on human rights? The question is not new. Years ago, Weiler already maintained that "the surface "language" of the Court in this case-law is the language of human rights. The "deep structure" is all about supremacy"[35].

5. *Conclusions.* Without individual litigants invoking EU Law before national courts there would be no judicial application of EU Law at the domestic level and, consequently, no reference for preliminary rulings to the ECJ. Vertical judicial dialogue between national courts and the ECJ is the very foundation of EU legal integration. For decades, subnational and supranational courts in Europe have been able to forge closer ties[36] that amount to a real autonomous EU judiciary. However, this does not mean that the system is perfect. On the contrary, it is perfectible. The EU judiciary can be improved and should be improved. Access of individual litigants to the ECJ is difficult. It is often indirect and frequently depends on national courts' will. When the access is direct, in the action of annulment and in the action for failure to act, the requirements imposed on individuals are numerous and sometimes insurmountable for litigants. The

[35] WEILER J.H.H., "Protection of Fundamental Human Rights within the Legal Order of the European Communities", in International Enforcement of Human Rights, JOLOWICZ J.A., BERNHARDT R. (eds.), 1985, Springer-Verlag, Heildelberg, pp. 113-142, p. 121.

[36] POLLICINO O., "The new Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?", in Yearbook of European Law, Oxford, pp. 65-111, p. 66.

acquisition of compulsory value by the CFREU calls for a renewal and enlargement of the basis for individuals' access to the Luxembourg Court. The prospective accession of the EU to the European Convention of Human Rights is another sign that calls for action in the same direction. The constitutive treaties should be, once again, amended so as to improve and facilitate the access of individuals to the EU judicial institution. This amendment may be of help in the fight against citizens' increasing disaffection towards the EU.

For years, the Luxembourg Court has had to rule on fundamental rights cases affecting individuals[37]. Early in the past it also had to face conflicting cases that concerned the level of protection afforded by national and supranational law[38]. But recently the ECJ had to delve into this matter again under a new and different angle: that of the EU having a Charter of Fundamental Rights with binding character. Today, the ECJ is considered as a true adjudicator of individuals' fundamental rights. But it still has to develop its human rights sensitiveness and skills deeply and further. The rather aseptic and minimalist style of the ECJ argumentation is not an advantage. Neither its determination to limit the protection of Charter rights according to the "general interests of EU Law" even if sometimes at the risk of this level of protection falling under the level of that of the constitutions of member States or under the level of the ECHR protection. The adequacy of the standard of protection of individual rights between the national and supranational levels remains a delicate question and the recent acquisition of binding character by the CFREU has not contributed to solve the problem. Despite this new step taken by the EU to consolidate a complete system of protection of fundamental rights[39], member States still feel a dual or even triple obligation of loyalty, towards their Constitution, towards the EU, and towards the ECHR to which all of them are parties.

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37 Since the Stauder case the European Court of Justice has protected fundamental rights of both individuals and legal persons as principles of European Community Law (Judgment of the Court of 12 November 1969, Erich Stauder v. City of Ulm, Sozialamt).

38 Judgment of the Italian Constitutional Court of 27 December 1973 in the case Frontini and judgment of the German Constitutional Court of 29 May 194 in the case So Lange.

39 Recent positive and negative opinions about the EU system of protection of fundamental can be found in: ARRESTIS G., "Fundamental Rights in the EU: Three Years after Lisbon, the Luxembourg Perspective", in Cooperative Research Paper. College of Europe, 2013, No. 2, p. 5; DUTHEIL DE LA ROCHÈRE J., "Challenges for the Protection of Fundamental Rights in the European Union at the Time of the Entry into Force of the Lisbon Treaty", in Fordham International Law Journal, 2011, vol. 33, issue 6, pp. 1176-1799; ÁLVAREZ LEDESMA M.I., CIPPITANI R., "Individual Rights and Models of International Cooperation", in Derechos Individuales e Integración Regional (Antología), ÁLVAREZ M.I., CIPPITANI R. (coordinators), 2013, ISEG, Roma-Perugia-Mexico, pp. 19-68; SANZ CABALLERO S., "La Integración Regional a través de los Derechos Fundamentales: El Caso de la UE como Historia de un Éxito", in Derechos Individuales e Integración Regional (Antología), ÁLVAREZ M.I., CIPPITANI R. (coordinators), 2013, ISEG, Roma-Perugia-Mexico, pp. 367-476, SANZ CABALLERO S., "Los Derechos Fundamentales como Instrumento de Integración Regional en Europa", in *Urbe et Ius,* 2014, No. 50.

Between these interacting judicial regimes there is still a risk of misunderstanding and the ECJ, in its recent case-law, does not seem to be ready to ensure that the EU level of protection of individuals' fundamental rights will always be as developed as that of the member States. The future of this vertical judicial dialogue on individuals' rights does not seem to be clean of rainy clouds due to the existence of 28 overlapping national standards, the EU standard, and international and regional standards. And, by the way, the accession of the EU to the ECHR will probably not be the final stitch in this patchwork.

Individual rights as construction of the EU legal system

Valentina Colcelli

To guarantee the existence of the EU legal system, the Court does not rely on Members States but attributes subjectivity to individuals instead. Attributing subjectivity to individuals and providing remedies (by the Court) is another measure to strengthen the Community primauté *(Forsberg T., 2011).*

1. *Individuals as principal guardians of EU Law*. The European Court of Justice originally played the principal role in qualifying EU individual rights. The Court of Justice identified the existence of the EU legal system in the judgment Van Gend en Loos[1]. To guarantee existence of the EU legal system, the Court does not rely on Members States but recognizes subjectivity to individuals. Individuals, through the recourse to judges and implementation of remedies, become the principal guardians of EU Law. Recognizing subjectivity to individuals and providing remedies (by the Court) was also one way to strengthen the Community *primauté*. The Court uses the strategy of declaring rights to individuals to ground his "constitutional" intuition of existence of the Community legal system.

In order to achieve these aims, it is first necessary to analyse the methods adopted by the EU legal system to qualify individual rights, recalling that, in this system, the handling of individual rights cannot be separated from the analysis of remedies and of the systems for their protection.

In its early period of operation, between 1960 and 1970, the Court of Luxembourg used Schutznormtheorie to identify individual rights against European Institutions. Schutznormtheorie recognised a legal position without distinguishing between substantive rights and interests. At the same time, the Court of Justice used the principle of direct effect to identify individual rights against Member States.

This initial approach is no longer applied. The competences of the Community were increasing in a functional way in order to reach the internal market. Thus, it was very difficult to identify new individual rights – created during the expansion of Community powers – by applying Schutznormtheorie and the direct effect theory.

The Court of Justice therefore subsequently used the principle of useful effect to identify individual rights against Member States, which thus became debtors of the individual. The reference here is to the Francovich judgement, after which the qualification criteria for selecting individual rights changed.

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[1] Court of Justice, Van Gend en Loos v Nederlandse Administratie der Belastingen, C-26/62, 1963, ECR 1. See VAUCHEZ A., "The transnational politics of judicialization. Van Gend en Loos and the making of EU polity", in European Law Journal, 2010, 16, pp. 1–28.

The Court uses the idea, borrowed from the common law tradition, that remedies are one of the selection methods of significant subjective interest in the EU legal system. Remedies – ways of qualifying individual rights – follow the classical system of qualification of individual rights in the civil law, in which rights are expressed as rules.

Recourse to remedies goes beyond the approach – which we could define as continental – which makes rules the locus of the importance and effectiveness of individual rights. Thus, individual rights are qualified when the judges apply rules concreting and conforming to the objectives pursued by the Community.

In the EU, individual rights in horizontal and vertical relationships are protected by National Courts. However, EC (now the Treaty on the functioning of the European Union) and EU Treaties have made "a number of instances for private persons to bring a direct action, where appropriate, before the Court of Justice, not intended to create new remedies in the national courts to ensure the observance of Community laws other than those already laid down by national law"[2].

In the Commission's Notice of 13 February 1993 on cooperation between national courts and the Commission in applying Articles 85 and 86 EC[3], the EU Commission explains that natural persons and enterprises are entitled to access all legal remedies provided by Member States, in the same conditions that Member States apply in the cases of the violation of domestic rules.

Referring to the question of Arts. 105 and 106 TFEU (ex arts. 85 and 86 EC), the Commission stated that this equality treatment between domestic and Community rights does not only concern the final declaration of violation of competition rules, but, in order to promote effective judicial protection, also all EU rights.

EU individual rights find their legal protection in the national courts, in a sort of equality treatment with national individual rights. This is not surprising, in view of the relationship existing between directly applicable Community rules and the system of national legal sources.

The effective protection of individual rights regarding the EU legal system derives from the possibility of using them in actions before national courts[4]. It is for "the legal system of each Member State to determine which court has jurisdiction to hear disputes involving individual rights derived from Community law, but at the same time the Member States are responsible for ensuring that those rights are effectively protected in each case"[5].

When the national system of protection is not able to guarantee Community rights sufficiently, the "equipment" provided by the EU legal system comes into action. The EU legal system has established a uniform network of safeguards of Community individual rights (liability of a Member State, recovery of sums paid but not due, disapplication and obligation to interpret national law in conformity with Community law) when the judiciary legal system of the Member State does not safeguard the effectiveness of the protection of Community rights. The EU legal system does not envisage

2 C-158/80, Rewe v Hauptzollamt Kiel, 1981, ECR 1805.

3 OJ C39/6, 1993.

4 C-208/90, Theresa Emmont v Minister for Social Welfare, ECR 1991, p. I-4269.

5 C-179/84, Bozzetti v Invernizzi, ECR 1985, p. 2317.

specific or special protection for individual rights. It envisages that national legal protection provided by the Member States should be effective[6].

The Court is not interested in whether the legal protection guaranteed by different jurisdictions of Member States to Community rights is extremely high or better than any other. The national legal protection cannot descend below the minimum standard of necessary safeguards to ensure the effectiveness of the protection of Community rights. If and/or when this happens, the "equipment" (liability of a Member State, recovery of sums paid but not due, no-application and obligation to interpret national law in conformity with Community law) provided by the EU legal system for the protection of the Community comes into action. The development of international regulation and the particular configuration of the Europe Union legal system can influence the status of individual rights in the legal system of Member States in different ways, by means of the circulation of juridical models among the various European systems[7].

Thus, the judiciary legal systems of the Member States ensure the supremacy of EU law and, at the same time, its effectiveness[8].

Individual rights protected by national/EU courts[9] are the best ways for EU integration.

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6 About origins and scope of the general principle of effective judicial protection in EU law, see ARNULL A., "The principle of effective judicial protection in EU law: an unruly horse?", in Eu L Rev. 2011, 36, 1, p. 51; COLCELLI V., "Il sistema di tutele nell'ordinamento giuridico comunitario e selezione degli interessi rilevanti nei rapporti orizzontali", in Europa e Diritto Privato, 2, 2009, pp. 557-585.

7 MONATERI P., "The Weak Law: Contaminations and Legal Cultures", in Global Jurist, 4, 2001, p. 575.

8 LENAERTS K., CORTHAUT T., "Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law", in E.L. Rev., 2006, 31, p. 287.

9 On how the national Courts participate in the process of legal integration within the EU see JAREMBA U., "The Impact of EU law on National Judiciaries: Polish Administrative Courts and their Participation in the Process of Legal Integration in the EU", in German Law Journal, 12, 3, 2011, p. 930.

A general characteristic of personal rights in the constitutional law of Russia

Ekaterina Cardone

This paper will provide how, in a comparative analysis whit EU, Russian Constitution consists of a catalogue of rights that orientates itself on personal rights, the autonomy of the individual and personal abilities in their development and self-determination, custody of the individual against interventions into the area of its private life and its personal freedoms from the side of the state or other individuals. Personal constitutional rights, thus, serve the guarantee (custody) of freedom and autonomy of the individuals a member of the civic society, its legal custody against any illegal outside assault. This legal category guarantees the priority of the individual, inner orientation of the personality development, the so called negative freedom (both from state as well as from private assaults

1. *Development of personal rights and freedoms in Russia.* Personal rights can be found in chapter II of the Russian Constitution and are of great importance in Russia. As a modern constitution it consists of a catalogue of rights that orientates itself on personal rights, the autonomy of the individual and personal abilities in their development and self-determination, custody of the individual against interventions into the area of its private life and its personal freedoms from the side of the state or other individuals. "The law-maker does not only acknowledge the inalienable human or natural rights but also aspires towards the mounting into the Russian Constitution(basic rights and freedoms), in order to secure them with guarantees and custody mechanisms"[1]. The beginning of the modern constitutional order in Russia started 21 years ago and is in a relative young stage.

The distinctiveness of personal rights is derived from their so called "native nature" "nature of the human being", and is nowadays generally accepted in the legal theory as well as in the actual jurisdiction[2].

Personal rights and freedoms characterize a person, on the one hand, as an "autonomous-biological-social" substance or a "theological-ethical-biological" being[3], so as his reproduction and self-realization are warranted. On the other hand, personal rights and freedoms are closely linked to the acknowledgement of the individual as equal to other human beings, condign/honorable member of the society; rights, that warrant the

1 LUKASHEVA E., "Obshhaja teorija prav cheloveka", M.1996, p. 16.

2 See the decision of the Russian Constitutional Court N 10-P 21.05.2013 (No. 5 para 4).

3 SOLOV'EV V., "Tri razgovora", M. 2007, p. 32; BERDJAEV N., "Filosofija svobody", M. 2010, p. 219-238; IL'IN I., O russkom nacionalizme, M. 2007, p. 113-125, in NESHATAEVA T., "Reshenija Evropeiškogo Suda po pravam cheloveka: novelly i vlijanie na zakonodatel'stvo i pravoprimenitel'nuju praktiku", M. 2013, p. 32.

freedom of personal volition. Thus, personal rights and freedoms are defined as basic or primary rights.

2. *The notion of personal rights and their place in the system of constitutional rights and freedoms.*

2.1. *Terminology*. In the Russian literature the terminology is still being discussed. The following terms are used, but need to be circumvented from personal constitutional rights:

"Prava cheloveka" – human rights – in the sense of the universal standards of rights[4]: these rights and freedoms are not being given by the state via the constitution but are enshrined to each and every human being. This differentiates these rights, that are immanent to the nature of human beings, from those that become constitutional rights only after their enactment by written law:

"Konstitucionnye prava" and "Osnovnye prava" – Constitutional rights/ basic rights as inalienable rights and freedoms of citizens and human beings, that are lied down in the constitution, and are in accordance with the goals and development path of a society and a state; that have been acknowledged as "sound" as well as the minimum necessary rights from birth on and as "secondary" – rights, derived rights, to which every citizen with Russian citizenship is enshrined to[5];

"Prava lichnosti"– right of one person – as entirety of the entitled rights;

"Sub'ektivnye prava"– subjective rights – as the central characteristic of the basic rights[6], as well as the rights in a civic sense[7];

"Prava grazhdanina – rights of the citizen – rights that depend on the citizenship;

"Grazhdanskie prava"– citizen's rights – mostly in the sphere of private law, but also as personal constitutional rights: "a group of rights, which embody the individual freedom of a person", that needs to be understood as "freedom of a person from the state"[8].

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4 Art. 17, 18 of the Russian Constitution (RuC); LUKASHEVA E., "Prava Cheloveka", M. 2013, p. 145 (see also ZOR'KIN V. D., "Kommentarii k Konstitucii RF", M. 2011 - Art.17 part 2, PEREVOZCHIKOVA E., PANKRATOVA E., "Konstitucionnoe pravo na zhizn' i pravovoj status jembriona cheloveka", in Medicinskoe pravo 2006, No. 2).

5 NEVINSKIJ V., "Osnovy konstitucionnogo stroja. Obespechenie dostoinstva lichnosti. Konstitucionnye principy publichnoj vlasti: izbrannye nauchnye Trudy" in NEVINSKIJ V., Altajskijgo S. un-t, M. 2012, p. 124; AVAKJAN S., "Konstitucionnoe pravo RF", M. 2014, p. 656.

6 Due to this direct relationship the basic rights of the Russian Constitution can be qualified as subjective rights (see also decision N 2-P 29.01.2004 and N 3-P 21.03.2007) although they are not directly qualified as subjective rights; see also Comm. BONDAR', KRUSS, "Art. 18 in Zor`kin", M. 2011.

7 JOFFE O., SHARGORODSKIJ M., "Voprosy teorii prava", M. 2006, p. 51.

8 RUDINSKIJ F., "Nauka prav cheloveka i problemy konstitucionnogo prava", M. 2006. p. 211-212. More on this topic, see NUDNENKO L., "Konstitucionnye prava i svobody lichnosti v Rossii", SPb. 2009, p. 125; BRATUS' S., "Sub'ekty grazhdanskogo prava", M. 1950, p. 13; VOEVODIN L., "Konstitucionnye prava i objazanosti sovetskih grazhdan", M. 1972, p. 35, BONDAR' N., "Vlast' i svoboda na vesah konstitucionnogo pravosudija. Zashhita prav cheloveka Konstitucionnym Sudom Rossijskoj Federacii", M. 2005, p. 211.

3. *Features of personal rights as basic rights according to the Russian Constitution*. The rights and freedoms of the human being and citizen as "highest values" (Art. 2 of the Russian Constitution) are "acknowledged and guaranteed", which is in accordance with and subject to international law and the Russian Constitution (Art. 17 of the Russian Constitution, as well as the Russian Constitutional Court)[9]. The orientation on international law is also stated in Art. 15 para 4 of the Russian Constitution, in which international law is declared a constituent element of the Russian legal system[10]. The priorities of international law and of "international acts"[11] are highlighted against the internal jurisdiction in the sphere of custody of the rights and freedoms, i.e. in the situation of a wrongful decision by the court, that cannot be seen as a fair act of justice and should be changed[12]: International acts are most often not used directly by the courts, rather as a help in its argumentation. However, the Russian Constitution remains always the reason for a verdict[13].

According to art. 17 in conjunction with art. 2 of the Russian Constitution the Constitution formulates the rights and freedoms[14] and also "guaranteed", thus the obligation to protect becomes the central component of the constitutional state[15].

Moreover, basic rights and freedoms are inalienable and human beings are entitled to them from birth on[16]: This differentiates these rights, that are immanent to the nature of human beings, from those that become constitutional rights only after their enactment[17].

Basic or fundamental rights apply directly and can thus be qualified as subjective rights[18]. "Direct impact" means, that fundamental rights have a direct normative custody effect towards the bearer of fundamental rights[19]. Basic rights as norms have a directive character: they incorporate already in the process of jurisdiction values that the state and the society are obliged to follow. This mirrors the objective dimension of fundamental rights. The binding effect reaches however also to the application of laws by the executive and the judicative[20].

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9 Decision N 5-P 11.05.2005.

10 Also The Russian Constitutional Court (RuCC) decisions N 2-P 05.02.2007; N 8-P 27.03.2012.

11 To the term "International acts"– see decision of The Highest Court of Russia (RuHC) 31.10.1995 N 8, also the "generally acknowledged principles" see decision of RuHC 10.10.2003 N 5 with the remark on the Vienna Convention on Law and Treaties.

12 Decision N 4-P 02.02.1996.

13 See LAZAREV L. V., "Pravovye Pozicii Konstitucionnogo suda Rossii", M. 2008, p. 127 para 2, 128 para 1; decision of the Russian Constitutional Court N 87-O 03.07.1997; decision of RuHC N 8 31.10.1995; decision of the Russian Constitutional Court N 78-O 08.02.2001.

14 See also EBSEEV, Comm. Art. 17 in ZOR´KIN, M. 2011.

15 Decision N 8-P 14.06.2005 (Nr.2), Decision N.6-P 16.05.2007; N 8-P 19.04.2010 see also decision N 13-P 17.07.2012 etc.

16 Art. 17 II of the Russian Constitution; decision N 15-P 27.06.2012;

17 See also ZOR'KIN, "Comm. Art. 17", part 2, cit., PEREVOZCHIKOVA E., PANKRATOVA E., "Konstitucionnoe pravo na zhizn' i pravovoj status jembriona cheloveka" in Medicinskoe pravo 2006, N 2: Reference to the point in time of birth and the custody of the embryo.

18 See decision N 2-P 29.01.2004 and decision N 3-P 21.03.2007, see also Comm. BONDAR', KRUSS, Art. 18 in ZOR´KIN, 2011, cit.

19 Decisions N 7-P 27.06.2005 and N 17-P 19.07.2011.

20 Decisions N 1-P 21.01.2010; N 2-P 24.10.2012; N 24-P 07.11.2012; N 29-P 30.11.2012. On

The observance of the fundamental law by the law-maker applies to vertical (the relationship between the state and individual) as well as horizontal regulations, that encompass the relationship among private persons.

4. *Definition of personal rights*. Personal rights might be understood in the wider and the narrow sense:

– In the wider sense: all subjective rights of a person (personal rights, political, social, economic and cultural rights), as all basic-/ constitutional rights[21]; Thus, the personal constitutional rights are a reference point for the legal position of a person and are defined through principles of legal positions (also named "ideological categories")[22]. The legal position is understood as i.e. "the entirety of the fundamental rights, - freedoms and -obligations. These rights, freedoms and obligations build a consistent complex of legal possibilities, that determines the equality of the legal existence of the citizens of the Russian Federation as a foundation for mutual relationships among society and state"[23].

– In the narrow sense: a special group of rights, that portray individual capabilities or qualities of a person. Personal constitutional rights, thus, serve "the guarantee (custody) of freedom and autonomy of the individuals a member of the civic society, its legal custody against any illegal outside assault". This legal category guarantees the priority of the individual, inner orientation of the personality development, the so called negative freedom (both from state as well as from private assaults)[24].

5. *Personal rights in the system of constitutional rights*. Attempts to narrow the circle of personal rights have been undertaken by several scientists: Lukasheva E. A.[25], Baglaj M. V., Kozlova E. I., Kutafin O. E., Tiunov O. I., Utjashev M. M., Utjasheva L. M.[26], Avak'jan S. A.[27]. It must be underlined that there is no exact distinction possible between person-

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subjective rights see BONDAR' N., "Vlast' i svoboda na vesah konstitucionnogo pravosudija. Zashhita prav cheloveka Konstitucionnym Sudom Rossijskoj Federacii", M. 2005, p. 218.

21 KOZLOVA E., KUTAFIN O., "Konstitucionnoe pravo Rossii. Uchebnik", M. 2007, p. 258.

22 Art. 64 of the Russian Constitution, cit. of VOEVODIN L., "Predely osushhestvlenija prav i svobod cheloveka i grazhdanina v rossijskoj federacii // Prava cheloveka v uslovijah stanovlenija grazhdanskogo obshhestva. Materialy mezhdunarodnoj nauchnoj konferencii (Kursk, 15, 16 maja 1997 g.)" - Kursk, 1997, p. 30.

23 BONDAR' N., ibidem, p. 219; Other: VOEVODIN L., ibidem, p. 27-38; see also NEVINSKIJ V., "Osnovy konstitucionnogo stroja. Obespechenie dostoinstva lichnosti. Konstitucionnye principy publichnoj vlasti: izbrannye nauchnye trudy", M. 2012, p. 324, 337: 3 levels of legal position of a person.

24 LUKASHEVA E., "Prava Cheloveka", M. 2013, p. 153.

25 Ibidem, p. 154.

26 TIUNOV O., "Konstitucionnye prava i svobody cheloveka i grazhdanina v Rossijskoj Federacii: Uchebnik dlja vuzov", M. 2005, p. 33; KOZLOVA K., ibidem, p. 258-267; UTJASHEV M., UTJASHEVA L., "Prava cheloveka v sovremennoj Rossii: uchebnik dlja vuzov", Ufa 2003, p. 135.

27 AVAKJAN S., "Konstitucionnoe pravo Rossijskoj Federacii", M. 2014, p. 662; BAGLAJ M., "Konstitucionnoe pravo Rossijskoj Federacii: Uchebnik dlja vuzov", M. 2002.

ality rights and other categories of constitutional rights: freedom of thought and speech, personal or political rights? Freedom of belief and religion: personal or social right[28]? Based on the logic of the Russian Constitution personal constitutional rights belong to the Art. 20-29 of the Russian Constitution, "political rights" to Art. 30-33, "socio-economic rights" to Art. 34 – 44 and "right-guarantees" to Art. 45-54, although a horizontal entity (consistent regulation and indivisibility of rights and freedoms on the same level of the normative law-giving) and a vertical entity (as imperative for the authorities of state power on the entire territory of the Russian Federation) exist. In this sense personal constitutional rights are not the most important rights in the system of constitutional rights: freedom of a person as well as the entire system of the basic rights cannot be divided.

5.1. *Categorization of personal rights in the constitutional law*. A relative categorization is only possible, because of the functionality and the separability of the warranty of freedom of a person[29].

First group: rights, which guarantee physical and mental inviolability of a person.

– The right to live from Art. 20 I of the Russian Constitution – is in the narrow sense, restricted to the question of death penalty, although this question is discussed much more in depth in the literature[30]. The right to live counts as principle and prerequisite for the usage of other rights[31] due to the absolute character of life as something especially worthy: The realization of this right is not possible without guarantees of inviolability and personal freedom.
– The right to freedom and personal inviolability from Art. 22 I of the Russian Constitution means, that there might be no permission of interventions from outside in the area of individual life-activity of a person and that it contains physical (life, health of the person) and mental (ethics, honour, soul, dignity of the person) inviolability[32].

Second group: rights, which guarantee the ethic or moral value of the person.

– Human dignity is understood by Art. 21 of the Russian Constitution in a narrow sense, namely as the right not to be tortured, threatened or in any other way punished in a sorrowful or dignity-degrading manner. Nobody can be used for medical, scientific or other experiments without his or her voluntary consent. Human dignity

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28 Social constitutional rights

29 BONDAR' N., "Vlast' I svoboda na vesah konstitucionnogo pravosudija. Zashhita prav cheloveka Konstitucionnym Sudom Rossijskoj Federacii", M. 2005, p. 356.

30 KOZLOVA, KUTAFIN, ibidem, p. 259, The right to live as native right; AVAK'JAN, ibidem, p. 664: 4 elements of the right to live: 1) right to physical existence; 2) no arbitrary taking of life; 3) state custody; 4) death penalty, if possible, as last measure (Ultima Ratio, Art. 59 of the Criminal Code of the Russian Federation: death penalty is not use, see decision N 3-P 02.02.1999, decision of the Russian Constitutional Court N 1344-O-R 19.11.2009).

31 LUKASHEVA E., "Prava Cheloveka", M. 2013, p. 154.

32 "The right to personal inviolability, that prohibits arbitrary influence on body or soul, the term 'body inviolability' (or 'physical inviolability') applies not only to the living time but also to the body of a dead person" (decision N 459-O 04.12.2003 (Nr.2 ff.), more on that LUKASHEVA, ibidem, p. 156; AVAK'JAN, ibidem, p. 667.

is understood as objective value of all people and each individual[33], acknowledged as native right by the Russian Constitutional Court[34] and guaranteed in the in simple jurisdiction[35]. The Russian Constitutional Court defines human dignity often as the right to judicial custody, what is seen as guarantee of the human dignity and furthermore as a necessary prerequisite for the realization of personal constitutional rights and a general condition for the realization of all basic/ constitutional rights[36].

– The right to custody ones reputation as stated in Art. 23 I 3 alt. in the Russian Constitution.

Third group: freedom rights.

– The right to inviolability of private life, to personal and family secret, to secret of written communication, phone calls, postal, telegraphic and other communications Art. 23 in conjunction with Art. 24 I of the Russian Constitution.
– Right to access information Art. 24 II in conjunction with Art. 29 IV of the Russian Constitution.
– inviolability of ones living space Art. 25 of the Russian Constitution.
– right to determination and naming of one's nationality and the right to use one's mother tongue Art. 26 of the Russian Constitution.
– freedom of movement (the right to move freely and to determine one's place of residence).
– freedom of conscience and the freedom of religion Art. 28 of the Russian Constitution.
– freedom of thought and speech, Art. 29 of the Russian Constitution.

6. *Importance of personal rights in the civic law.*

6.1. Indirect third party impact on the decisions of the Russian Constitutional Court. The impact of basic rights on civil rights is of great importance and is called in Germany "indirect third party impact". There is a similarity in the Russian law, where it reads in the civil code: "concretion of constitutional norms". The right to access to jurisdiction in the case of an infringement means "realization of the inalienable right to judicial custody, a procedural guarantee for all other rights and freedoms as well as a most of the times effective means for warranting human dignity (Art. 46 I in conjunction with 19 I, 47 I, 123 III of the Russian Constitution). These constitutional norms are defined in the civil law, especially relating to the custody of immaterial goods"[37].

The importance of human dignity is not questioned by the civil traffic: "… Russia is permitted and at the same time obliged, … to define the minimum level of exceptions in the rights of the obligee, which implementation could lead to a narrowing of human dignity of the defaulter, because the retention of this principle is also fundamental for

[33] PALAD'EV M., "Konstitucionnoe pravo cheloveka na chest' i dostoinstvo: osnovanija, soderzhanie, zashhita", Diss. Samara 2006, p. 41.

[34] Decision Nr. 10-P 21.05.2013, No. 5 para 4.

[35] Dignified treatment Art. 9 of the Criminal Code of the Russian Federation, Art. 12 II of the Criminal-Procedural Code of the Russian Federation.

[36] Decision 03.05.1995 (Nr. 4 ff.) as well as N 20-P 02.07.1998 (Nr. 4 para 4); N 8-P 28.06.2007 (Nr. 2 para 5).

[37] According to the RuCC in Nr. 2 para 7-8 decision N 18-P 09.07.2013.

the civil traffic"[38]. That is the reason why it is partly possible to widen the constitutional dispositions of Art. 55 I of the Russian Constitution to relations among equal civil traffic participants. This, however, does not apply automatically (it is only allowed to legally restrict rights and freedoms of humans and citizens to such an extent that the core or main assumption of the right is not lost)[39].

6.2. Immaterial goods and personal non property law[40]. In the civil code there is a list of special immaterial goods, such as life and health, a person's dignity, personal inviolability, honor and reputation[41], business standing, inviolability of the private life[42], personal and family secret, right to movement[43], free choice of the place of residence, right to one's own name[44], copy right and "…other immaterial goods[45], to which the citizen has a right to either from birth or due to a law and which are inalienable and cannot be in any other way alienable"[46].

According to the new version of the Art. 152[47] and having in mind the analysis of its wording the Art. 152might be also interpreted in the way, that "personal non property rights" can be seen as an autonomous object of civil rights, just as "immaterial goods" are understood.

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38 N. para 2 ff. of the differing opinion of judge BONDAR' N. to the decision N 18-P 09.07.2013.

39 Ibidem.

40 Chapter 8 of the Civil Code of the Russian Federation "Immaterial goods and their warranty".

41 Art. 152 of the Civil Code, see also plenum of the Highest Court, decision from 24. 02. 2005 Nr. 3, explanation 5 and decision of the Constitutional Court from 17.07.2012 Nr. 1335-O Erl. 2 para 4).

42 Article 152.2 of the Civil Code.

43 Literal interpretation – "pravo svobodnogo peredvizhenija", thus "right to move freely" (see also Art. 11 I of the German Constitution).

44 Literal interpretation – "pravo na imja", thus "right to have one's name" Art. 19 Civil Code, Art. 32, 58-59 Family Code of the Russian Federation from 29.12.1995 Nr. 223-FZ, and Art. 58-63 in the federal law on the register of births, marriages and deaths from 15.11.1997 Nr. 143-FZ in conjunction with the decision of the Highest Court of the Russian Federation from 18.08.2010 G. Nr. 45-V10-15, para 17 ff.; European Court for Human Rights (T. V. Alekseyeva and others) Nr. 15846/03 from 20.02.2007, A. para 9-10, A. para 13 S. 2, A. para 14, complaint, Nr. 1.

45 Right to one's own image, added via the federal law from 18.12.2006 N231-FS: Art. 152.1. Civil Code "custody of images of the citizen".

46 Art. 150 I of the Civil Code.

47 Changes from 2nd July 2013 N 142-FZ came into effect from 1st October 2013.

II

Legal Status of the individual in the process of European integration

The evolution of the idea of citizenship status

Antonio Palazzo

This paper aims to analyze the evolution of the idea of citizenship status which was born in the private law during the period of the Renaissance of civil law and from the French civil code. From the analysis mentioned above derives a new reading of the status's idea: individual status like cosmopolitan citizen and juridical capacity to understand the EU idea of citizenship as fundamental status in the EU legal system

1. *The evolution of the idea of citizenship status*. Within the historical ideas of personal status lies the increasingly evolving concept of citizenship. The core idea of a general status can be found in the Renaissance period of civil law in the comment *De statu hominum* Title V, Book I of the Digest when Donello and Duareno look to its content which consists of the rights and obligations of the individual[1] But it was still, at that moment in history, the social status of the person, and that is his class, was the legal test for their determination. This consideration ceased with the French Revolution and the affirmation of the principle of equality, according to which all are given the enjoyment of civil rights. Article. 7 of the civil code, therefore, expresses the rule that all men, as such, have the power to exercise on himself and on their property the rights to negotiate, to test, to bear witness etc. All discrimination between free and slave, between nobles and commoners, between rich and poor falls, and then immunities and privileges cease that distinguish individuals in a discriminatory manner.

The contents of the Civil code were prepared by the idea of the French Enlightenment according to which order is dictated by nature which man must adjust, and in the discussion on the draft of the Code Portalis which said that the honest authority of nature must be combined with power because natural laws are enforced and are applied in a reasonable manner and not by following simple instinct[2].

The person is seen as a fragment of nature, but also as a member of society, who has the essence of the law that regulates the ability of the person.

2. *Kantian and Marxist thoughts on the unity of cosmopolitan status.* The enjoyment of civil rights is extended by the Civil Code to non-French persons such as the French born

[1] DUARENUS F., "Opera omnia", tomus I, Francofurti, 1592, in Tit. V, lib. I Pand., p. 10; H. DONNELLUS, "Opera omnia. Commentarium de iure civili", tomus I, Lucae, 1762, lib. II, cap. IX, pp. 231-232, from COSTA P., "Civitas. Storia della cittadinanza europea", vol. 1, Dalla civiltà comunale al settecento, Roma-Bari, 1999, p. 597.

[2] PORTALIS J.E.M., "Code civil des français suivi de l'exposé des motifs", Paris, 1804, anno XII, p. 3.

outside of France, those born in France to a foreigner who has now reached the age of majority, the woman who married a Frenchman, the children of French parents who were born abroad and whose fathers have lost French nationality.

This starts a truly enlarged view of citizenship status which, however, does not reserve the same treatment to foreigners. State Councilor Treilhard distinguishes between foreigners who chose to live in France, and therefore deserves greater attention, from the foreigner who stays only temporarily on the principle of reciprocity[3].

But it is Kant who steers the conversation toward the status of the person as a cosmopolitan subject. He introduces the idea of an "association perpetually peaceful" as a legal principle to be implemented through a federation of states. According to this principle all human beings are citizens of a "single community", in a "shared market" and in a perpetual relationship with each other"[4].

Two consequences derive which are: "rights due to all men", the right of every foreigner not to be treated with hostility when he arrives in another state; and the refusal of the colonial enterprise[5].

Also with Marx, the call for a world unity of workers and the idea of social classes, just as a point of passage for the "abolition of general class distinctions", mark the need for unity of the cosmopolitan *status*[6].

3. *Capacity and* status *from the geopolitics to biosphere politics*. The person's ability and their citizenship status. What we refer to here are the interests that all citizens of the world have for the common good of all, such as air, water, food, health, school, and work. The historical moment in which we live offers us a vantage point to deepen our understanding of this. These interests of the people can't be limited by the fulfillment of the home State, in which they hold citizenship marked by *ius soli* or by *jus sanguinis*, but they must also be protected by the mere fact of simply living in a given territory if they were to miss the fulfillment of those needs or goods. The scholars of the interrelationships between status and ability have long shown that they are now subject to agreed international rules[7].

It was also thought that the era of international transform and international relations, would pass "from geopolitics to biosphere politics"[8]. It is considered then the end of the biosphere as "the space between the ocean floor and the stratosphere in which living

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3 ALPA G., "Status e capacità. La costruzione giuridica delle differenze individuali", Roma-Bari, 1993, p. 97.

4 KANT I., "Principi metafisici della dottrina del diritto, Scritti politici e di filosofia della storia del diritto", Torino, 1956, p. 543.

5 KANT I., ibidem.

6 MARX K., "Le lotte di classe in Francia dal 1848 al 1850", in Opere, vol. X, Roma, 1977, p. 126; DE SOUSA SANTOS B., "Democrazing Democracy. Beyond the Liberal Democratic Canon", London, 2005, p. 11.

7 ALPA G., "Status e capacità", cit., p. 194; POCAR F., "I diritti umani a 40 anni dalla Dichiarazione universale", Padova, 1989, p. 36; BALIBAR E., "La proposition de l'egaliberté", Paris, 2010, p. 21.

8 RIFKIN J., "La terza rivoluzione industriale. Come il "potere laterale" sta trasformando l'energia,l'economia e il mondo", Milano, 2011, p. 216 ff.

creatures and the geochemical processes of our planet interact, making life possible on earth"[9].

4. *The international Conventions on the status of citizenship and the protection of the environment*. The interrelationships between the freedom of movement and citizenship status have already been dictated by two rules from Articles. 13 and 15 of the Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948, with the first rule that "everyone has the right to leave any country, including his own, and to return to his country," and the second "no one shall be arbitrarily deprived of the right to change his nationality". Following the International Covenant on Civil and Political Rights adopted in New York December 16, 1968, where for art. 12, in the first paragraph, "every individual who is lawfully in the territory of a State has the right to liberty of movement and freedom to choose his residence in that territory," and for the art. 13 "an alien who is lawfully in the territory of a State shall not be expelled". With this freedom to choose a status of a particular nationality is a correlated freedom to revoke the choice in cases that do, or do not involve political persecution (article. 14), in order to find a "work freely chosen and accepted" (art. 16 of the International Agreement on economic, social and cultural matters adopted in New York December 6, 1968), but also to the protection of their health which involves both human and environmental factors. These are given in the rules on environmental protection, climate change and pollution. The Agreement provides for the establishment of a "Committee of Human Rights," which "consists of eighteen members" (Article. 28, first paragraph), who are citizens of States involved in the Agreement (one for each state), "who shall be persons of high moral character with recognized competence in the field of human rights. It will also be taken into account the person's legal experience" (art. 28, second paragraph). It is not irrelevant that the competencies and procedures for the protection of the rights will be treated with more completeness in the Agreement of 2008 which is relative to the Protocol of economic rights which will be discussed later.

The Declaration on the Human Environment of 16 June 1972, after having disposed art. 1 that "man has a fundamental right to freedom, equality and adequate living conditions, in an environment that is good for his well being is highly responsible for the protection and improvement this environment for future generations."

Art. 2 specifies the contents stating that "the Earth's natural resources, including air, water, flora, fauna and particularly the natural ecological system must be safeguarded for the benefit of present and future generations through careful planning and proper administration".

The two rules seem to mark the interrelationships between the capacity to live, which must be guaranteed to every person and capital goods for a life that is adequate for man.

The indication of common goods has already concretely affirmed in these provisions a prelude to the first indication of the protections under art. 10 of the Declaration

[9] RIFKIN J., ibidem.

on Environment and Development of June 4, 1992, that "the best way to deal with environmental issues is to ensure the public interest at different levels", specifying that "there will be access to legal procedures, judicial and administrative remedies, and damages".

The further definition of this regulatory system is marked by the Convention (Aarhus) on access to information, public participation in decision-making, and access to ZJA in environmental matters of 25 June 1998[10].

This Convention opens the way to a system of safeguards the obligation of informing the public (art. 1-31), which has on its part the right of access "to environmental justice"(art. 4) and even the assignment of inhibiting the interested parties concerned in advance to avoid environmental damage (art. 5)[11].

[10] WATES S., "The Aarhus convention: a driving force for environmental democracy", in Journal for European Environmental and Planning Law, 2005, 2, 1, p. 1 ff; KRAVCHENKO S., "The Aarhus convention and innovations in compliance with multilateral environmental law and Policy, in Colorado journal of International Environmental Law and Policy", 2007, 18, 1, p. 1 ff 50. AARTI G., "Transparency under scrutiny: Information disclosure in Global Environmental Governance, in Global Environmental Politics", 2008, 2, p. 1 ff; MASON M., "Information disclosure and environmental rights: The Aarhus Convention", in Global Environmental Politics, 2010, 3, p. 10 ff.

[11] RODENHOFF V., "The Aarhus convention and its implications for the "Institutions" of the European Community", in Review of European Community and International Environmental Law, 2003, 11, 3, p. 343 ff.; BELL D.R., "Europe, globalization and sustainable development", New York, 2004; MARGERA E., "An Update on the Aarhus Convention and its continued global relevance", in Review of European Community and International Law, 2005, 14, 2, p. 138 ff.

Relevance of individual status on the European process of integration

Valentina Colcelli

This paper will provide answers to the following research questions: has the process of EU integration changed the juridical traditional definition of Individual status? EU law impacts on traditional legal status (i.e. status of parent and child, workers' family members) and it also creates a new legal status connected with economic rules, market organisation and free circulation (f.i. status of consumer, status of producer, status of farmer, status family member, etc.). The EU legislator introduces or amends laws ordering them on the status of whom the law is addressed to. The Idea underpinning the paragraph is that studies on the drivers of various forms of EU Law have an impact on the individual's position, and under this perspective, aims at assessing the role of individual's status in the process of EU integration, as well as citizenship status, free movement, individual well-being in regional migration flows in the light of income distribution and sustainability of national welfare states. In the scenario of full implementation of EU citizenship status, what are the consequences of the freedom of movement on the well-being of individuals and on the sustainability of national welfare states?

1. *Introduction.* Why a reflection on "vetus" institute like status? For two empirical evidences.

Until now the expression of individual legal status, starting from the Roman law still returns and survives in the juridical idioms and law constantly, but the meaning is still vague.

I'm not able to investigate if the status concept was born before historical societies or if it was only like a simplification of realty, prepared by the jurists and law scholars. In any case this concept survives changing overtime the references in the law and the social identification of groups[1].

Elements now able to weigh on the way of seeing individual legal status comes from the EU Legal system.

They are strengths that function during the changing times. Across time and law traditions there are several concepts of individual legal status that have something in common, this is the description of people groups in relationship with the State and other private and public persons.

The second reason is that the EU Court of Justice used the phrase "fundamental status" about citizens': see ECJ 20.09.2011, C-184/99; ECJ 17.09.2002, C-413/99, I-7091, p. 82. And the Court of Justice used also the phrase "individual legal status", i.e. ECJ 15.11.2011 C-256/11; ECJ 7.10.2010 C-162/09; ECJ 8.03.2011 C-34/09; ECJ 29.11.2011 C-371/10; ECJ 6.12.2011, C-329/11; ECJ 9.02.2012 C-277/10;

[1] CICU A., "Il concetto di status", in Scritti minori di Antonio Cicu, vol. 1, I, Milano, 1965, p. 181.

16.09.2010, C-149/10; ECJ 21.07.2011, C-325/09; ECJ 8.09.2011 C-177/10; ECJ 9.12.2010 C-296/09; ECJ 30.09.2010 C-104/09: ECJ 10.03. 2011 C-516/09 etc.

2. *Legal Status of the individual in the process of European integration*. The process of European integration has been accompanied by structural and economic changes which have influenced the Individuals' Legal Status in different manners. The chapter aims to analyze how the individual legal status of the European citizen – and of third-country nationals presents in EU – are influences deeply by the present EU law. This altered the traditional Individual's Legal Status of European private law: i.e. status of worker, of citizen, status of immigrant and emigrant, and it sets up a "new" Individual's Legal Status i.e. status of family members different from the traditional notion grounded on the mononuclear and heterosexual family (see cap. IV, R. Cippitani).

The EU Court of Justice identified the existence of the EU legal system, through the direct recognition of individual rights by the European Union. Primarily concerned with economic actors and the free market, it now extends into a lot of aspects of the lives of its citizens, enacts provisions which regulate matters that impact families, children and generally on individual's Legal Status indeed.

Protection of individual rights national and EU Courts is the best method for EU integration. To guarantee the existence of the EU legal system, the Court does not rely on Members States but attributes subjectivity to individuals instead. Thus, for performance of its law and market, EU postulated some legal status (including a worker and producer), and at the same time widely modified them.

Due to the close functional relationship between legal protection and substantive rights in the EU legal system, integration with national Courts strengthens the above considerations: private relationships have the aim of conserving the legal system, which was established by Treaties.

As mentioned above (see cap. II - Colcelli), individuals, through the recourse to judges and implementation of remedies, become the principal guardians of EU Law.

EU individual rights find their legal protection in the national courts, in a sort of equality treatment with national individual rights. This is not surprising, in view of the relationship existing between directly applicable Community rules and the system of national legal sources. The effective protection of individual rights regarding the EU legal system derives from the possibility of using them in actions before national courts. Also in horizontal relationships, EU rules have the purpose of consolidating the EU legal system, which was initially structured by the regulation of vertical relationships.

EU individual rights are contributing to create and redraw the Legal Status of person in the light of the European process of integration.

Rescigno (1993) remembers as the individual rights has a temporally and occasional character[2] and is able to identify relevant selection of interest by a juridical legal system[3].

[2] RESCIGNO P., "Situazione e status nell'esperienza del diritto", in Riv. dir. civ., 1973, L, p. 209.

[3] PALAZZO A., "Interesse legittimi e tutela dei diritti del privato", Aa. Vv., Nuove forme di tutela delle situazioni giuridiche soggettive, Atti della Tavola rotonda in memoria di Lorenzo Migliorini (Perugia, 7 dicembre 2001), Torino, 2003, p. 23.

On the contrary Individual's Legal Status is a long living personal condition. It is able to organize individual rights and duties and preliminary condition (or better justification) for the regulation of multiplex events regarding the individual's life and private and public individual activities.

Thus, the attention to the individual's status and the network of private actors in relations among them within the EU legal order is crucial to understanding the development of the EU legal system.

Also, the EU rules that take into account the typology of the persons addressed, and classify them by economic affairs which have organized specific rules[4].

Under EU law the individuals are defined by virtue of their activities or status and they are regarded as being of direct interest to EU law in two ways:

a) without reference to any connection they may have with any other specific individual (as concerns the requirement of a certain activity or status, their activities might have involved, for example, exercising a right of free movement as a worker, or as a student or freedom to provide, or (indeed receive) a service or freedom of establishment). Or they may have the status of retired persons or merely that of persons not otherwise enjoying rights under Community law who have sufficient resources to avoid becoming a burden on the social assistance system[5];

b) they may benefit in some measure from EU law because of the relationship they enjoy with another person e.g. as somebody's family member. Such persons may be said to enjoy "derived" rights, not necessarily because the rights they enjoy are conferred any less directly by the EU legal system, but rather because the interest that EU law has in conferring rights upon them derives from the relationship which these individuals enjoy with another person, whose benefit is the main interest of EU law.

Thus European Union law impacts on "traditional" Individual's Legal Status (i.e. status of parent and child, workers' family members, status of partner, status of wife/husband) and it also creates new Individual's Legal Status connected with economic rules, market organisation and free circulation (f.i. status of consumer, status of producer, family member etc.). Also, the European Community in the time, the EU today give a new dignity to the "secret status" (as they were defined by Alpa[6]: status of homosexual or the common law husband or common law mother). The EU law promotes their dignity: The first disappears or second has the dignity of family members.

The EU legislator introduces or amends laws ordering them on the Individual's Legal Status of whom the law's addressed to, even though.

It is very common to think about the EU law in an economic manner.

The person is the centre of the EU action, on the contrary. And in any case, individuals are the first addressee of these rules.

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4 LIVI M.A. and MACARIO F., "Profili generali, I soggetti", in Diritto privato europeo, (edit by) N. Lipari, Padova 1996, p. 113.

5 BARRETT G., "Family matters: European community law and third-country family members", Common Market Law Review, 40, 2003, p. 369-421.

6 ALPA G., "Status e capacità", Roma-Bari, 1993, p. 37.

But, at the moment the European legal system does not have a composite reflection on how the EU law impacts the person and how it is able to change the traditional categories of individual status. And in any case, for the member states legal systems it is now impossible to analyze and regulate the Individual's Status of the people and citizens without taking into consideration the EU rules that have direct or indirect effects on the legal status of the person.

Thus the chapter implements an analysis on the relations between EU institutional settings and individuals, in view of the European Law integration process. In particular, it will provide answers to the following questions: has the process of European integration changed the juridical traditional definition of Individual status? Has the legal status concept a new function? Which role has been played by EU Law on a new modern function of individual status? Under EU Law, is it possible to build a unitary definition of legal status of person above and beyond the Member states legal system? And also, is the selection of the individual's status by the EU legal system and their increased numbers synonymous of new privileges? Is the selection of the individual's status by the EU legal system and their increased numbers an instrument only of formal equality? Is the selection of the individual's status by the EU legal system and their increased numbers going back to the past?

We can say immediately "no". Why? Because the selection of the individual's status by the EU legal system is not the same as the categorization of persons in Europe's historical past, but it does have its roots there.

What does the selection of the individual's status by the EU legal system not only do? No formal equality No synonymous of new privileges. It is not an instrument only for formal equality (as in the legal systems built after the French Revolution) and synonymous of new privileges. We try to explain.

3. *EU citizenship as fundamental EU individual legal status*. According to the freedom of circulation the identification of individuals' legal status is regarded as being of direct interest to European Union law.

The direct relationship between the right of free movement and individual legal status of persons exists. Free movement of citizens means the possibility of seeking a job in another country; working in that country without special work permission; living there not only for that purpose; remaining even after the end of employment and of enjoying treatment equal to national workers in the access to employment, in working conditions and in all other social and tax advantages that may help integration in the host country.

But the free movement of workers as now guaranteed also to EU citizens also means the right of residence, social advantages, right to stipulate contracts (not only work contracts), and the extension of certain rights also to workers' family members.

For these reasons free movement - not only of workers but now citizens - has a direct and indirect effect on the individual legal status of person, national family law, contracts law and no discrimination on the contracts different from employment contracts (i.e. sale, rent contracts, etc.), and respect of the fundamentals and social rights.

Thus the regulation of the rights usually connected with the status of person – typically – is a way to engrave deeply on the social position of the persons.

Within the domain of European Union law, EU citizenship seems to have the same elements for a jointly fundamental status.

Generally being a worker or self-employed persons, some EU rights can be gained under Treaties articles. These depend on certain situations being fulfilled. Most of the Treaty freedoms and much secondary legislation contain specific provisions on anti-discrimination. This appears as a focused structure of EU rights distinctive of the fundamental individual legal status of citizenship.

Close to these fundamental status are, worker or self-employed persons and citizenship lawfully resident in other Member States may still have the option of their basic status as EU citizens, as above-mentioned.

Thus could be relevant the examining of the significance to the EU Court of the Justice and introduces the expression "fundamental status".

Of course, in the first sense the EU citizenship is without doubt connected with all the conditions characterizing status of citizenship under national law, and "Citizenship of the Union, established by Article 17 EC, is not, however, intended to extend the scope "ratione materiae"(also known as subject-matter jurisdiction) of the Treaty to also include internal situations which have no link with Community law[7]. Thus "Fundamental status" cannot, then, signify some usurpation of Members States citizenship, but the national citizenship could be a limitation for the freedoms established by the Treaties incorporated in the notion of EU citizenship.

This paper does not take in consideration the problem of the reference to the "duties" of EU citizenship as 20 TFEU ex art. 17 TEC makes.

Many believe that duties not should be at the essence of EU citizenship. Because EU citizenship is commonly associated with the EU rights immediately based on the Treaties. The topic is controversial and in any case the approach of this paper is more connected with the counterpoint to the rights that the ECJ has held Articles 17 and 18[8].

In any case, EU citizenship is explicitly not planned to replace Member States citizenship, but is in accumulation thereto[9]: in the case Baumbast, pronouncing EU citizenship as a fundamental status of nationals of the Member States, it is "enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality'. The case cited remembers also that Article 21(1) TFEU (formerly 18(1) TEC) is directly effective, that is, it confers on individual's rights which are enforceable before national courts".

Indeed, EU citizenship is not free loading on the set of laws by which Member states citizenship applies. ECJ has consistently held that EU citizenship is of no relevance in just internal situations[10], but remarking on the above reflexion on non discrimination as the main aim of the EU as an instrument to building a "European Union welfare state" ex art. 2 and 3 TFEU.

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7 Case C-148/02, Carlos Garcia Avello v État belge; Joined Cases C-64/96 and C-65/96, Uecker and Jacquet, 1997, ECR I-3171, paragraph 23.

8 Case C-413/99, Baumbast and R, 2002, ECR I-7091.

9 Article 17(1) TEC.

10 See case C-184/99, Grzelczk, in Racc., I-6193, p. 31; case C-413/99, Baumbast e R, in Racc., I-7091, p. 82.

Discrimination founded on Member States citizenship is the main genus that EU law (until it was only Community), intends to get rid of. If national citizenship becomes a ground for discrimination then it has become mistaken, and any case divergent to the aims of the Union and the Treaties. As such, national citizenship must fall away, revealing this back up, egalitarian, EU citizenship. Union citizenship is fundamental in the sense that it is the safety net once national citizenship leads to erroneous results. See for instance the ECJ approach.

And how I said in a lot of sentences where EU Court of Justice used the expressions of Status: I propose as an explanation for the case law, that in ECJ expressions of Status means eliminating discrimination.

In 200/02 Chen (2004), the ECJ threw out the UK's unmeritorious argument that a baby could not avail herself of EU citizenship because the resources that would satisfy the requirements of Article 7(1) (b) of the Directive belonged to her mother. The Court takes a realistic appreciation of fact situations to eliminate discrimination in fact and in law for any nationality discrimination.

The reconsideration is high but it does not spill over into internal situations. The consideration above could be extended to the question of the surname of the child (Case C-148/02, Carlos Garcia Avello v. Etat Belge)[11], because according with EU law rules the free circulation of citizens, the status of the person circulates with the person himself/herself. For instance it could happen that if a Member state's legal system permits the legal recognition of a child by a couple of same sex, the legal recognition of the child must be realised in a Member state that does not have the same permissive legislation. Thus this paper shows that in the light of EU law and the EU legal systems that they have influences indirectly in a "paidocentric" relationship between parents and children, also if this area of rules are not part of the EU harmonization process, and extends the analysis to the relevance or irrelevance of the sexual orientation of the parent and in reaction with the children's rights.

By "fundamental state" the EJC has revealed itself to be concerned with discrimination as a general principle of EU law. It has, consequently, engaged an expansive approach to the direct applicability of Articles 12, 20 TFEU and 21TFEU. In addition, its way of thinking looks upon the limits used of the exercise of citizenship rights and the fact situations that will be completely internal is designed such that nationality based discrimination is eliminated. Recourse to EU nationality as a fundamental state, thus, is not a different way of saying that EU citizenship has enriched internal citizenship, in an anti-discriminatory manner.

Opinion of Mr Advocate General La Pergola delivered on 1 July 1997, Maria Martinez Sala v Freistaat Bayern, clears the aspect: "(20). The prohibition of discrimination on grounds of nationality is laid down in the Treaty and interpreted by the Court as a general principle. It is a principle which, potentially, applies throughout the area of application of the Treaty, although it applies 'without prejudice to' and therefore through particular provisions laid down for putting it into effect in one or another sector of the Community legal order: for example, the free movement of workers and the freedom to provide

[11] Case C-148/02, Carlos Garcia Avello v. Etat belge, 2003, ECR I-1, 1613.

services or the right of establishment. The creation of Union citizenship unquestionably affects the scope of the Treaty, and it does so in two ways. First of all, a new status has been conferred on the individual, a new individual legal standing in addition to that already provided for, so that nationality as a discriminatory factor ceases to be relevant or, more accurately, is prohibited. Secondly, Article 8a of the Treaty attaches to the legal status of Union citizen the right to move to and reside in any Member State. If we were to follow the reasoning adopted by the Governments represented at the hearing, then despite its explicit wording, Article 8a would not afford Union citizens any new right of movement or residence. In the present case, however, it is not necessary to examine the foundation of that view. If - as in this case - a Community citizen is in any event granted the right to reside in a Member State other than his Member State of origin, his right not to be discriminated against in relation to nationals of the host State continues to exist for as long as he is resident there: even if the person concerned is unable to rely on the directive on the right of residence, that right derives directly and autonomously from the primary rule of Article 8, which in the application of the Treaty is relevant in conferring on the person concerned the status of Union citizen. That individual status will always and in any circumstances be retained by the nationals of any Member State: consequently, in this case, it does not matter whether leave to reside in the host State was derived from the directive or from the domestic law of the Member State concerned"[12].

A lot of EJC judgments take this direction. In this sense also, Lucy Stewart v. Secretary of State for Work and Pensions[13], that clearly explicated: "(80) The status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to receive, as regards the material scope of the Treaty, the same treatment in law irrespective of their nationality, subject to such exceptions as are provided for in that regard[14]. (81) Situations falling within the material scope of EU law include those involving the exercise of the fundamental freedoms guaranteed by the Treaties, in particular those involving the freedom to move and reside within the territory of the Member States, as conferred by Article 21TFEU. (82) In the case of the main proceedings, it is common ground that Ms Stewart has, in her capacity as a citizen of the Union, exercised her freedom to move and to stay in a Member State other than her Member State of origin.(83) In as much as a citizen of the Union must be granted, in all Member States, the same treatment in law as that accorded to nationals of those Member States who find themselves in the same situation, it would be incompatible with the right to freedom of movement were citizens to receive, in the Member State of which they are nationals, treatment less favourable than that which they would enjoy if they had not availed themselves of the opportunities offered by the Treaty in relation to freedom of movement[15]". In this direction also EJC 20 September 2011, C-184/99, Grzelczk[16].

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12 See, to that effect, Case C-184/99, Grzelczyk, 2001, ECR I-6193, paragraph 31; D'Hoop, paragraph 28; and Case C-544/07 Rüffler, 2009, ECR I-3389, paragraph 62.

13 Case C-503/09, Lucy Stewart v. Secretary of State for Work and Pensions, 21 July 2011.

14 See, to that effect,Grzelczyk, paragraph 33; D'Hoop, paragraph 29; and Rüffler, paragraph 63 and the case-law cited.

15 D'Hoop, paragraph 30, and Pusa, paragraph 18.

16 Racc., I-6193, p. 31.

The novelty of this approach starting with the reflexion over the notion of "citizen as fundamental status" is that it extends not only to workers and jobseekers and the other classifications of people created by the other substantive Treaty rights. The corpus of European Union law actually betrayed a general principle of anti-discrimination within EU law.

The nature of the Court's reasoning in cases like Martinez Sala and Trojani shows the way EU citizenship has been used as a way of further buttressing protection in Community law against discrimination based on nationality.

This is also reflected in the way the Court has policed the restrictions that MSs may legitimately place on the exercise of citizenship rights. Directive 2004/38 codified much of the Court's case law and earlier Residency Directives.

Starting from the analysis of the reality of domestic laws – thinking of the Spanish, Portuguese, Belgian, Dutch, Swedish, Norwegian and Icelandic – and from the respect of the fundamental rights of the person, the remark has to value how the European Union law impacts on traditional status and taking into account how the protection of rights of family members occurs in the decisions of the EU Court of Justice is not based on an unilateral favour of formal unity of the family, but on the protection of vulnerable people in need of solidarity, bearing duties and responsibilities of the holders of family status.

The right of free circulation of citizens has some effects also in relation of the parent responsibility, presumption of paternity, or declaratory action and disownment of paternity. Many aspects of children's lives are, however, not properly within the competence of the EU, but the free market has generated unwanted side-effects for children. In 2000 the Community adopted a Regulation on jurisdiction and recognition and enforcement in matrimonial matters and in matters of parental responsibility for children of both spouses (Brussels II). The regulation adopted by the E.U. in 2003 (Brussels II bis) extended the scope of Brussels II to all decisions on parental responsibility (which was an improvement on Brussels II) and included provisions on jurisdiction and the return of the child in cases of child abduction. These Regulations have not only a procedural effect, but also substantial effects; see f.i. the notion of parental responsibility.

4. *EU citizenship as fundamental EU individual legal status and the engraving deeply on the social position of the EU citizens.*

According with the above consideration, the fact is freedom of movement and the individual status can be separated from the sociality that accompanies one's pre-border crossing status and his/her settlement in another Member State.

The analysis will be done taking strongly into account the Jurisprudence of the EU: "(32) According to settled case-law, a benefit may be regarded as a social security benefit as long as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71[17]. (35) With regard to determining

[17] See, in particular, Case C-286/03 Hosse, 2006, ECR I-1771, paragraph 37; Joined Cases C-396/05, C-419/05 and C-450/05 Habelt and Others, 2007, ECR I-11895, paragraph 63; and Case C-228/07, Petersen, 2008, ECR I-6989, paragraph 19).

the precise nature of the benefit at issue in the main proceedings, it follows from the Court's settled case-law that the required EU law be applied uniformly implies that the concepts to which that law refers should not vary according to the particular features of each system of national law but rest upon objective criteria defined in a context specific to EU law. In accordance with that principle, the concepts of sickness and invalidity benefits in Article 4(1) (a) and (b) of Regulation No 1408/71 are to be determined, for the purpose of applying the regulation, not according to the type of national legislation containing the provisions giving those benefits, but in accordance with EU rules which define what those benefits shall consist of[18]. (36) In that regard, in order to distinguish between different categories of social security benefits, the risk covered by each benefit must also be taken into consideration"[19].

Or taking in account the legislation of second level, the Preamble to Council Regulation 1612/68 (now Directive 2004/38 explicitly referred above) to "the fundamental right of workers to improve their standard of living which must be exercised in freedom and dignity"[20].

Instrument of European private law may change the regulate approach on both the Product Market and Labour Market.

For instance, in the case of Labour Market, EU countries differ to a considerable degree in the way they regulate their labour markets (see, e.g. OECD, 1994, 2004). While common law countries depend more on markets and contracts, civil law countries depend more on regulation.

This area of analysis has a strong relationship with the workers' right of free movement, typical EU individual right. This right has existed since the foundation of the European Community in 1957. Today it is part of the more general right to free movement of persons, one of the fundamental freedoms guaranteed by European law to EU citizens.

For the EU countries that joined the EU on 1 May 2004 (Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, Slovakia) and on 1 January 2007 (Bulgaria, Romania), the right of free movement of workers may be restricted during a transitional period of maximum seven years after accession. For the first two years following accession, access to labour markets of the EU incumbent Member States will depend on their national law and policy (in particular Denmark, Italy, France, United Kingdom, Netherlands, Spain, Portugal and Ireland). At the moment, three Member States - Germany, Austria, and the United Kingdom – continue applying national measures on labour market access. These national measures will irrevocably end on 30 April 2011 at the latest. Free movement of workers guaranteed to EU citizens means the possibility of job searching in another country, of working there without any need of a work permit, of living there for that purpose, of remaining there even after the employment has finished and of enjoying treatment equal to national workers in the access to employment, in working conditions and in all other social and tax advantages that may help integration in the host country.

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18 See, to that effect, Case 69/79, Jordens-Vosters, 1980, ECR 75, paragraph 6.

19 Case C-503/09, Lucy Stewart v. Secretary of State for Work and Pensions, 21 July 2011.

20 KOSTAKOPOULOU D., "European Union Citizenship Rights and Duties: Civil, Political and Social", Forthcoming in ISIN E. and NEYERS P. (eds.), "Global Handbook of Citizenship Studies", London, Routledge, 2014.

Thus the regulation of the rights usually connected with the status of person – typically – is a way to engrave deeply on the social position of the persons[21].

"The Court sought to shelter the various aspects of workers' lives from discrimination on the grounds of nationality and to promote their integration into the fabric of the host society by upholding family reunification rights, granting them the same tax and social advantages that nationals of the host Member State enjoy and protecting them from differential conditions of employment and from dismissal. It also ensured that their children and their spouses had access to educational opportunities, housing and trade union participation. In other words, both secondary legislation and case law sought to shelter their whole life, that is, both its economic and social dimensions, from the disadvantages that accompanied, and continue to accompany, "alienage". True, one might argue here that this protective layer of legislation had one objective only, namely, to eliminate restrictions in the exercise of free movement rights in order to promote the single market ideal and guarantee economic productivity. Yet, this argument fails to capture the complexity of free movement in the European Union since it essentially disentangles it from its context and its socio-political aspects"[22].

For the period of three months[23] and five years of residence, the presence of other member States becomes a play of conflict for a number of claims: a) states' right to maintain the integrity of their welfare system; b) to shelter it from the claims of "outsider insiders"; c) claims to equal treatment that EU citizenship law; d) policy has generated situations that have exceeded the liberalising trend of the free market ideology. It is easy to say the judicial way does not guaranty their rights. The EU country of destination as EU citizenship is not adequate for the complete progress of the social dimension of European Union citizenship.

"Possible social citizenship duties that might find their way into the TFEU's provisions on EU citizenship in the future are: a) a duty addressed to both the Member States and the Union to promote the equal standing of all citizens in the EU by taking all possible measures to promote labour market participation and to fight poverty, homelessness and social exclusion; b) a duty on the part of the Member States and the Union to promote inclusive access to the resources, rights and opportunities needed for participation in the democratic life of the Union; c) an institutional equality duty applying to all levels of policy making and a horizontal (i.e., citizen) duty of non-discrimination on any of the prohibited grounds (Articles 18 and 19 TFEU) and d) a solidarity duty"[24].

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21 The Free Movement of Workers in the Countries of the European Economic Community, Bull. EC 6/61, pp. 5-10, p. 6; European Council (1968) Regulation 1612/68 on Free Movement of Workers OJ Special Edition 475, OJ L257/2.

22 KOSTAKOPOULOU D., "European Union Citizenship Rights and Duties: Civil, Political and Social", cit. and NEYERS P. (eds.), "Global Handbook of Citizenship Studies", cit.

23 The residence of Member states citizen is unqualified during the first three months.

24 KOSTAKOPOULOU D., European Union Citizenship Rights and Duties: Civil, Political and Social, Forthcoming in ISIN E. and NEYERS P. (eds.), Global Handbook of Citizenship Studies, London, Routledge, Forthcoming, 2014.

In any case the EU law, as interpreted by the Court of Justice, recognises the relevance - in the field of social security, for example - of international agreements which confer on citizens of a Member State more extensive rights than those deriving from Community provisions, such as those contained, for example, in Regulation (EEC) No 1408/71. The individual concerned may not be denied the rights provided for by the more favourable provisions of such international agreements[25]. The same applies in this case to the European Convention on Social and Medical Assistance, signed in Paris on 11 December 1953, of which Germany is a signatory. The right not to be expelled, as laid down therein, of necessity entails the right to reside in the host State. That therefore constitutes a legal ground justifying the presence of the plaintiff in Germany, even for Community law purposes.

Thus according with above sustained: citizenship status, free movement, individual well-being in regional migration flows in the light of income distribution and sustainability of national welfare states. What are the consequences of the freedom of movement on the levels of well-being of individuals and on the sustainability of national welfare states in the scenario of full implementation of the EU citizenship status? To what extent would regional migration flows be driven by fiscal competition? Would more generous welfare state contexts attract low-income immigrants in search for stronger protection? How will this reverberate on inequality and growth of the origin and destination regions? It is not too easy for me to give a response to these questions without an economic formation. The problem is that it is not neutral and indifferent for the EU Court of Justice and EU secondary legislation to take into account some effect of the expression "Status".

5. *Selection of the individual's status by the EU legal system, and their increase numbers: Are we going back to the past? A historical overview*. The individual legal status topic has a long historical tradition, and this concept/idea was born: from Roman ages to Middle Ages, up until the French Revolution[26]. Thus it could strengthen the populist approach to the European Union politics through the traditional relationship among individual legal status, privileges and discrimination.

The EU Individual legal positions concern persons and goods in relationship with the legal system and individuals. Individual's Legal Status in the EU legal system could be defined as a public personal condition from which comes rights, duties and it also justifies a lot of activities and facts regarding the individual's life[27]. It is not an instrument for formal equality and synonymous of new privileges.

The common roots of Europe were born during the Middle Ages[28], the concept of the

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25 See Case C-227/89 Ludwig Rönfeldt v Bundesanstalt für Angestellte [1991] ECR I-323 and Case C-475/93 Jean-Louis Thévenon and Stadt Speyer-Sozialamt v Landesversicherungsanstalt Rheinland-Pfalz [1995] ECR I-3813).

26 VIOLA L., "Lo stato giuridico della persona in prospettiva storica", in Scienza e filosofia della persona in Duns Scoto, LAURIOLA G., Alberobello, AGA, 1999, p. 25-45.

27 RESCIGNO P., "Situazione e status nell'esperienza del diritto", in Riv. Di dir. Civ., 1973, L, p. 209.

28 LE GOFF J., "Il cielo sceso in terra. Le radici medievali dell'Europa", Bari, 2004; GROSSI P., "L'Europa del diritto", Bari, 2009.

individual legal status is borrowed from Roman law, but during this historical period the concept of the person was loosed. The no more "person" as Institutions of Gaio (right person, lex, actions)[29] talks about category, class or caste. It refers to the individual social role that Le Goff organized into four categories: nobles, merchants, farmers and religious. The conventional and legal customs and also religious habits strictly distributed these status and it was very difficult to shift ones own individual social role/individual status.

The individual status strictness existed from the XVIII century until the French Revolution especially where the equal right of man are held to be universal and free individuals protected equally by law: "Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good"[30]. Equal rights are not beyond the formal equality limits, but it is enough to identify the man and the citizen as owners of the same formal individual legal position.

Staying on the surface, the individual status as rigid casts seems to have been overcome after the French Revolution. However what signified individual status during the Middle Ages and throughout the 1600s was ones belonging to a specific religion. At the end of the 1800s, this concept was re-born as grounds for discrimination based on nationality and race.

The person as such did not exist if he was not a member of a group grounded on nationality or belonging to a particular group. He was considered a simple nomad because he did not have the requirements that would distinguish him from the others in his group. Discrimination based on race, to belong or not belong to the ruling class, and the placement of the individual in the economic system based on the simple fact that a person was either a worker or a farmer created a situation of great weakness during the XIX century.

At the end of XIX century (1882), an American scholar - Henry Sumner Maine- theorized the passage from status to contract in progressive societies[31]. For him, social structures were no longer what would determine individual legal status. Maine's academic reflection influenced not only American culture, but also the Europe society, and crossed over by industrial revolution. Within a new integrated economic system and the distribution of work, individuals lost their status as described above. Status based on contract highlighted the transition to modern reality with respect to the Middle Ages and marked a shift from status reports based on non-dynamic relationships of dependence between human persons and will.

People that voluntarily join the others determine their individual legal position.

Thus only voluntarily joined by persons each were aware of the rights and obligations recognizing some freedom of the human will. It was also true that working conditions were established by who was stronger, which is still the case now of course. So going from status to contract, apparently it is presented as an asset or the predetermined phase structure; unchanging practice is abandoned and hard, however. Do not forget that this is a limited or circumscribed freedom.

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[29] ALPA G., "Status e capacità", cit.

[30] Art.1, Déclaration des droits de l'homme et du citoyen – August 1789.

[31] MAINE H.S., "Ancient Law. Its Connection with the Early History of Society and its Relations to Modern Ideas" (1861), pp. 163-165.

Also during the last part of the 1800s the individual legal status was connected with the idea of race conceived by anthropology and psychology studies to give some rank of dignity. It is human nature to introduce differentiation between people. Signs like skin colour, eye colour, nose shape, hair colour, structure or body morphology indicated a category and classification of people in a hierarchy, thus according to attitudes a person can be classified by a lower or higher level within the legal systems. "We should outline the changes of the concept of status that become brittle when formalized through legal rules that differentiate people building a legal position for placing these people"[32].

After the Second World War and the following years a desire for freedom and equality showed through the Declarations of the Rights of Man of the UN, European Convention on Human Rights signed in 1950, and in national constitutions (i.e. German basic Law (Article 2) and later the Italian Constitution (Article 2 and art. 3), the provisions relating to the person and fundamental rights found that the individual legal status was based on the concept of universal and not formal value of the person.

6. *What the selection of the individual's status by the EU legal system is not.* The EU concept of individual legal status is not to conform to the academic hypothesis about the status called "Organic". The theory was born in Italy during the second half of the nineteenth century starting from the Hegel's organic theory of the State, and the individual legal status exits as for the affiliation of the main social and collective groups of family and citizens[33].

In the EU legal system it is relevant the concept of family and citizens. This evidence could help to explain what the individual legal status is in the European legal system. It is not for the following three reasons: first of all for theory the individual connected with market regulation are not individual legal status. To explain these conditions the theory above mentioned does not fit. It is possible to say these are not preliminary conditions for the EU law application, and we do not care about them.

In any rate the organic theory of the individual legal status has to be related to the supranational dimension, not to a national approach. Reference to the European Union legal system is a way to cross over this theory, and is not able to explain the multilevel complex of the EU realty. First of all the main individual legal status used by the organic theory of individual legal status is the family as a collective group of which to be a member. As Roberto Cippitani mentions (cap. IV) the family collective group is of large relevance in the EU legal system too. However this system puts forth the problem of identification what is considered the genotypic form of family we have to refer to[34]. The EU legal system relates to Member State legal systems the concept of the family and family member as one preliminary condition that applies to the free movement (see Dir. n.34/1998). To do this, the EU legal system compares the traditional notion of family and familiar relationships ground on heterosexual marriage to new formulations of marriage not common to every Member States. Thus we can say that a new modelling of family and family members in the

[32] ALPA G., "Status e capacità", cit.

[33] CICU A., "Il concetto di status", in Scritti minori di Antonio Cicu, vol. 1, I, Milano, 1965, p. 181.

[34] SACCO R., "Introduzione al diritto comparato", Torino, 1980, 39-40.

EU legal system is increasing. Meanwhile in the internal legal systems the family as a centre of interest – different and additional when compared to the traditional – is vaguer indeed[35].

The only other individual legal status present in the organic theory of individual legal status is the citizen's condition. If the reference to the family as a collective group affiliation isn't possible anymore, as it was explained above in the Cippitani's book Chapter, the only reference for the application of the organic theory of individual legal status to EU status is the citizen's concept.

Problems exist: The concept of EU citizenship was born only after the 1992. Before 1992 the main preliminary condition for applying the Community law and the free movement rights was the status of worker, not citizen indeed. The status of worker was derived from a formal or informal contract, as Henry Maine[36] said underlining that this condition could be limited during the human life.

To explain what the individual legal status, in the contemporary age and especially in the EU legal system is a reference to the contract only is not enough. In any case trying to explain could be important. The reason is that it is not possible to use the concept of status by jurists, Courts and national or EU legislators to expend it to every personal situation.

It could be really dangerous for the people's freedom and democracy.

In the next paragraph I will try to explain the dilatation about what could be considered individual legal status is so high that every meaning connected to individual legal status disappears losing any relevance without any consequence. In fact, the dilatation will generate a new underhand form of discrimination and privileges under the veil of the non relevance.

7. *EU Individual legal status: the new deal between voluntary adhesion and status "functionalization ".* To answer what the individual legal status is in the EU legal system and also in the sentences of the EU Court of Justice (… EU citizenship is the fundamental status of the EU individual, by Articles 17-18 of the TEU), it is important to remember as in the EU legal system, the selection of relevant interests in horizontal legal relationships arises for the same reason and in the same way as the qualification of rights in vertical legal relationships, that is, to consolidate the EU legal system.

It analyses the network of private actors and the relations among them within the EU legal order. Familiar private law instruments such as tort or contract now appear as only a small part of many possible tools harnessed with the aim of obtaining allocative efficiency or distributive justice and are synthetically described as the correction of market failures.

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35 LEMMI L., "Una nota sul concetto di status", cit., p. 663: "applicata con la dovuta coerenza logica, tenendo nel debito conto le modifiche intervenute tra i principi che reggono il diritto di famiglia, gli status si riducono alla fini fine oggi soltanto a due: quello di cittadino dello Stato e quello di figlio di due genitori determinati (o di uno solo)".

36 MAINE H.S., "Ancient Law. Its Connection with the Early History of Society and its Relations to Modern Ideas" (1861), cit., p. 163-165. STEIN P., "Legal Evolution. The Story of an Idea", Cambridge - New York, 1980, p. 85.

All European Union laws regulate relationships – whether vertical or horizontal – but not generic relations. These relationships aim to pursue the *primauté* of the EU and conserve its legal system and internal market and, in horizontal relationships, to consolidate the EU legal system – initially structured by the regulation of vertical relationships.

The EU legal system has also typical civil law principles, the recovery of sums paid but not due and contract liability but also the concept of Individual legal Status, which are aimed at guaranteeing that the economic order sought by the Union is maintained.

Therefore, horizontal relationships in the EU legal system, in view of the functions assigned to legal protection, are selected and adjusted to ensure the existence and survival of the EU legal system. Relationships are aimed at conserving the legal system which was established by the Treaties and which, even within the interstices of the rules, the Court of Justice originally encoded and continues to interpret.

The selection of the individual's status by the EU legal system, is functional to its building and working, underlines the trend to a new form of welfare state, thus the individual's status is not synonymous of privilege in a historical manner and also not only an instrument of formal equality as in the legal systems built after the French Revolution. "Il principio di eguaglianza è nato (…) dalle ceneri politiche e filosofiche degli status personali di stampo feudale dell'epoca medievale e moderna, e in un rapporto di piena ed aperta contrapposizione con essi".

The coming of the welfare state imposed creation of rules direct to the social promotion and for the protection of weak persons through the demarcation of the diversity and peculiarity but no more in a discriminatory manner. Thus, taking distance from the tradition of the concept, the individual's status does not strengthen situations of privilege ground on subjection and is forced no more only in the formal relationship of the liberal state.

The evolution of society and of the legal systems brings to light the acknowledgment of the individual's status as the legal system's responsibility to remove the obstacles in order to apply the equality principle in a substantial manner and not formal, actually.

In the EU legal system, the reference to an individual's status as an operativeness condition of EU law and EU individual rights confirms the public interest to supervise their identification.

The mutation of meaning of public interest in the referring juridical system chanced also the personal condition for the identification of individual's status. This is the actual difficulty for its real definition. In the EU legal system the public interest is its aim. In the articles 2 and 3 TFEU the opening up of obstacles to equality is functionalized to the construction of the legal system itself, in which the number of the individual's status is not endless, but delimited to the individual precondition for the operativiness of the EU law and not discordant from the necessary promotion of the centrality of person in the member states legal systems and in the European Union welfare state.

As a matter of fact, the reference to the EU legal system reinforces the idea of the status as a gathering and synthesis between private law and public law, where according to the different areas there is a greater or lesser degree of self-determination of the individual within dominated areas / determined by a public interest. Tracing the presence of the

latter is crucial in understanding the function of the status in contemporary reality and not letting it be limited to a subjective; it tends to expand it beyond the function that is to be given. Sorting EU reinforces the idea that the concept of status describes the ever-changing balance between freedom of will and freedom of movement on one hand, that essentially is a matter of private law, and the social objectives of the welfare state expressed in terms of public law.

To realize the aim mentioned above and to avoid new privileges or discrimination, Maine's reflection cannot be forgotten.

According to the actual explanation of diverse personal conditions and the further and new private relationship incidental to them, it does not seem to be that of a movement from Status to Contract, but it is. Starting from this limited point of view, the actual definition of individual legal status - as different personal conditions and preliminary position within the application of EU law, it could not seem to be a movement from Status to Contract because more personal relations engrave them.

Movement from Status to Contract is also a boundary to law of Property, taking that expression in its widest common sense as comprehensive of whatever has a worth quantifiable in trade. As a matter of fact, the propensity of contemporary legislation has been to make the closure of marriage a little more difficult. It is an exemplum of the relationship with juridical relevance that the parties shall be free to settle for themselves which is not a contract indeed. Once more, a minor person cannot contract unless his parents or protector give permission. The analysis which Maine proposed is that persons are free to make contracts and form associations with whomever they choose, but by self mitigating your own affairs,, there is a shaping of free will in their own interests. As matter of fact, the interests which rule their regarding are not those of the parties alone. Supreme reflection over the stability of society, or the general convenience of third persons, takes priority over the autonomy more often than not when left to the individual in their own affairs.

Thus, Maine's contract has been declared to contain some generalizations. The movement from Status to agreement is more in line with EU goals.

The protection of weak persons (minority, consumers, immigrants, non heterosexual couples, etc.) or the other collective groups by the EU which has selected to aim its goals is only possible if the collective groups agree with their selection. The individual legal status in the EU legal system must ground theirs operativiness on the will of EU public protection, but also in the individual awareness that this is to guarantee that the economic order sought by the Union is maintained in the light of building a "European Union welfare state" *ex* art. 2 and 3 TFEU.

Also out of the agreement, and not within the range of relevance of jurisprudence of the EU Court and the EU legislation, are personal relationships, contractual o non contractual partnerships for citizens and non citizens. For instance, a limitation of the effective excise of the free movement right is a choice to avoid a lot of consequences of EU citizens status according to Twain deep connections. The exercise of free circulation, at the moment is a choice and is voluntary self adhering to the preliminary conditions which apply the EU law regarding traditional and non traditional status (i.e. status of parent/child, workers' family members, status of partner homosexual or common law

husband/mother, etc.), new status connected with economic rules, market organisation and free circulation (f.i. status of consumer,. etc.).

For private persons, the other choice at the moment is voluntarly self adhering in order to bring a direct action, where appropriate, before the EU Court of Justice or National Courts. In the Commission's Notice of 13 February 1993 over cooperation between national Courts and the Commission which concerns applying the old articles 85 and 86 EC[37], the EU Commission explains that natural persons and enterprises are entitled access to all legal remedies provided by Member States, in the same conditions that Member States apply in case of the violation of domestic rules. Thus, EU individual legal status is strengthened when the judges apply rules concreting and conforming to the objectives pursued by the European Union. The effective protection of individual rights regarding the EU legal system derives from the possibility of using them in actions before national courts[38]. It is for "the legal system of each Member State to determine which court has jurisdiction to hear disputes involving individual rights derived from Community law, but at the same time the Member States are responsible for ensuring that those rights are effectively protected in each case"[39].

8. *Unitary definition of Individual's Legal Status in the EU legal system.* In accordance with the relevance of the concept of the individual legal status under EU Law, it may be possible to think about the existence of a "unitary" definition of Individual's Legal Status above and beyond the Member States legal system.

The definition as above demonstrated comes to the EU as an open cluster of positive or negative indifferent positions in which a person is as part of social relationships[40] relevant to the EU law because its centre is on prerogatives and duties by EU legal system postulated to regulate personal and economic affairs. Do to the free movement throughout the EU boundaries, the individual's status is postulated by the EU law for performance of itself, and circulates too.

Thus the reflection over the singular individual's status (worker, consumer, family member etc.) could introduce another consequence: a new remark for a joint reconstruction of individual's status under the EU light. During this time there is an increasing demand of this (see Conclusion of general advocate Pergola[41])

Indeed, due to the fact that the legal status of person (i.e. wife, brother, son, daughter, of EU citizens or third-country nationals present in the EU) is the personal condition postulated for performance of EU law and for the enjoyment of the same EU rights, it could not be considered in a different manner in each Member States legal system.

For the Member States legal systems it is now impossible to analyze and regulate the

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37 OJ C39/6, 1993.

38 C-208/90, Theresa Emmont v Minister for Social Welfare, 1991, ECR I-4269.

39 C-179/84, Bozzetti v Invernizzi, 1985, ECR 2317.

40 FRIEDMANN W.G., "Some reflections on status and freedom", Essays in honour of Roscoe Pound, Indianapolis, 1962, p. 222.

41 Case C-336/94, Dafeki, Racc., I-6761.

status of their persons and their citizens without taking into consideration the EU rules that directly or indirectly have an effect or address the legal status of the person.

In the light of the above mentioned analysis, it could be a setting of Principles of the European Law of persons. It would be able to give coherence to the various EU legislative and case law-solutions. This solution and the obstacle to effectiveness of the free circulation in the EU does not to EU Institution: in this sense the "Draft Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 Commission Staff Working Documents: Impact Assessments".

In fact the real problem for effectiveness of the circulation of status of persons is i.e. the Administrative obstacles of the free circulation of individual legal status. The EU has the Legal bases to realize effectiveness to the circulation of Individual status: see Articles 21(2) and 114(1) TFEU.

The above considerations in the object of the "Draft Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012. "Certain formalities for the legalisation of documents also represent an obstacle or an excessive burden. Given the possibilities offered by the use of new technologies, including digital signatures, the Union should consider abolishing all formalities for the legalisation of documents between Member States. Where appropriate, the EU throught there should be the possibility of creating, in the long term, authentic European documents".

"6.2 The Commission considers that the cost and bureaucracy involved in seeking to authenticate public documents makes it more difficult for EU citizens and businesses to exercise their free movement rights"[42]. "The draft Regulation establishes multilingual standard forms in all official languages of the EU concerning birth, death, marriage, registered partnership, and the legal status and representation of companies, and requires public authorities to make them available to EU citizens and companies on request as an alternative to the equivalent national public documents (Article 12)"[43].

"6.1 The Commission estimates that around 12 million EU citizens live, work or study in a Member State of which they are not a national, and that nearly half of EU businesses are involved in some form of cross-border economic activity. EU citizens and businesses exercising free movement rights are often required to submit official ("public") documents to authorities in another Member State for a wide variety of purposes. These documents may provide proof of civil status (for example, birth or marriage certificates), ownership of property, absence of a criminal record, or concern the legal status and representation of a company. Public documents are presumed to be authentic in the

[42] Draft Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

[43] Draft Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

issuing State, but this presumption generally ceases to apply when the documents are submitted to authorities in another Member State"[44].

The fact of Civil Registry and its document has not a secondary importance. Keep in mind however that the principle of oneness of status has to be applicable to the Act of Civil Status. An oneness notion of individual's status is already operative for the EU functionaries and how the document formed by the Member state Civil Registry is not only an obstacle to free circulation but sometimes are really an impediment for the creation of a status with EU relevance.

In the literature[45], i.e. in Italy, the Act of birth is also qualified as a fact of status of filiations. The Act of birth and the birth certificate provide a person with documentary evidence of his/her status. Thus the status (fact) is incorporated in the document (Act of birth and birth certificate)[46]. For the same author[47], the document is the fact on which the juridical legal system determines the juridical relationship between child and parents. The status and its form – that is a document (Act of birth) – are different: the form of the document is not a substantial requirement, because the status of the person can never be based on the form of a document.

However the juridical relationship of filiations could also exist without an Act of birth. It is possible to prove the juridical relationship of filiations in a judgment and it is also possible that the Act of birth as an attesting document does not coincide with the historical fact and the nature of the information that was registered in it. The possession of status also has a substantial relevance, e.g. in the Italian legal system. In any case, the nature of the information, the birth, is relevant in itself.

The birth as a fact is relevant its registration in the formal document and after Act of Birth and against the Act of Birth if the information there in is false[48]. Indeed, in the case of a contrast between the historical fact of the birth and act of birth, it can only be corrected by a sentence on the status of filiations. Indeed, correction of a birth certificate is only possible as consequence of a judgment on the status of filiations[49].

The Act of Birth bases the constitution of the child's status in relation to the status of the parents and depends on whether the father and mother are married when making the registration, or are not married to each other at the time of his/her birth.

Thus, the declaration of birth is preclusive evidence and has greater effectiveness with respect to the presumption of legitimacy. In the new Italian system of birth registration

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44 Draft Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

45 See CICU A., "La filiazione", Trattato Vassalli, III, 2, Torino, 1969 p. 6.

46 PALAZZO A., "La filiazione", in CICU A. e MESSINEO F. (a cura di), "Trattato di Diritto Civile e Commerciale", Milano, 2007, p. 264.

47 BARBERO D., "Titolo di stato e stato di filiazione legittima", in Studi legislativi sulla filiazione, Milano, 1952, p. 76.

48 See again PALAZZO A., "La filiazione", in CICU A. e MESSINEO F. (edit by), Trattato di Diritto Civile e Commerciale, cit., p. 264.

49 See FORNACIARI M., "La ricostruzione del fatto nel processo. Soliloqui sulla prova", Milano 2005, p. 343.

the public officer in charge of the "Register of births, marriages and deaths" has no power to check the truth of the parents' declaration or that of the persons who are qualified to give information concerning birth[50].

One has the right to be maintained, educated and educated by his/her own parents, as a consequence of decisions made at the moment of the procreation[51].

The legal recognition of child could be defined as a "formal document" made by the person who confirms the historic fact of the birth[52]. The historic fact of the birth precedes the registration of birth.

Thus, this is the public declaratory of a historic fact[53]. The mother might not be nominated during birth registration[54].

A Registry that strongly is only a certificate "narration" of a historical fact could be able to deny the "authenticity" of the status of a person and the consequences connected with it.

Another relevant exemplum is that it is impossible in the Italia Civil Registry to introduce marriage that is not ground on the traditional legal principle.

As said, European Union law has an impact on the "traditional" Individual's Legal Status (i.e. status of parent and child, workers' family members, status of partner, status of wife/husband) and it also creates a new Individual's Legal Status, and i.e. it take in account a notion of the family and its members is taken into account by the EU and is relevant for the application of the Dir. 2004/38/CE. For the Directive 2004/38/EC's definition of "Family Member"(a) The spouse;(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a [EU/EEA] Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;(c) The direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);(d) The dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)".

The EU law and its jurisprudent relationships enter into the issues of family member care and in the light of free movement effectively raise them.

The safeguard of the family, the respect of family life, and the right to marry and have a family are EU Fundamental rights. The notion of family member has relevance in particular to a connection to the right of asylum, expulsion of emigrant, family reunification and other aspects because the life of the persons is connected with the mission of the EU legal system.

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50 PALAZZO A., cit., p. 264.

51 PALAZZO A., "La filiazione", CICU A. e MESSINEO F. (edit by), "Trattato di Diritto Civile e Commerciale", cit.; VERCELLONE P., "La filiazione legittima, naturale, adottiva e la procreazione artificiale", Trattato Vassalli, III, 2, Utet, Torino, 1987; SESTA M., "La filiazione", Trattato dir. priv., direct by BESSONE M., III, Torino, 1999.

52 Art. 236, 1, Italian Civil Code.

53 See PALAZZO A., "Atto di nascita e riconoscimento nel sistema di accertamento della filiazione", Riv. dir. civ., 2006, vol. 52, 2, p. 145.

54 Art. 30 "Decreto del Presidente della Repubblica" n. 396/2000.

In the notion of registered partner, it could be defined as same sex persons or not, and the sons born in a homosexual relationship, as in Spain, Portugal, Holland, and Belgium. These concepts are very distance notions of family according to the traditional notion of marriage that is used in most of the Member States legal systems, an i.e. in Italy the status of registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State has not relevance. In this manner Registry for formal documents" made by the person who confirms the historic fact of the birth, marriages, death, divorces etc. could set an individual legal status out of its history. But the historic facts of the birth, death, marriage, divorces, etc. precedes their bureaucratic registration.

If the status is set up as a prerequisite for the enjoyment of a right of an individual within the Union and the Union set, cannot take recourse to a principle of unique status within the EU, because the "pre-conditions "for the enjoyment of EU rights cannot change depending on where the same subject or different subjects who are facing the same conditions are. This mixes up the principle of equality of European citizens. The notion of unitary status is that which is already operational in secondary legislation and is directly related to EU officials. In this context, the application is known, for example, the independent concept of the family and especially parent-child relationships. On the subject, of the Statute of the EU, for example, employees are expected to a family allowance for dependent children as well as the pension for orphans (see Articles. 1 and 2 of Annex VII to the Staff Regulations do art. 80 of the Statute).

In order to determine the condition of the son of the official beneficiary one must detect the relations of filiations or matrimonial bed and not established it between the adoptive child and the official EU or between the child and the official's spouse as long as it is actually being maintained by the same official (Art. 2, par. 2 of Annex VII cit.). Remember the Court of First Instance that the criterion for determining the condition of a dependent child is still "the emotional commitment to satisfy in whole or in part the essential needs of the child, in particular with regard to housing, food, clothing, education, care and medical expenses". The divorce or custody of a child to the spouse who is not an official does not negate the condition of dependent child

The principle of uniqueness would apply, therefore, to the acts of civil status, as well as the status of the person as defined in the Member State of origin. This is because the existence of such status and pre-conditions to determine this depends on the existence and enjoyment of the benefits and rights established in the European Union, whether for admission and residence or other benefits too - and not only - character of pay and pensions.

In its judgment Dafeki, in fact, the subject of the judgment of equivalence is an act of civil status. Likewise also noteworthy is García Avello, the obligation to object recognition seems to be the status of the person (linked to the right to a name) purchase in your country of origin (paragraphs 31 and 45). "The judgments Dafeki and Garcia Avello and conclusions Niebüll delineate an obligation for the State of destination - that is, for the State of the Forum - to meet in a particular case, the clarification of status in the state of origin, without checking whether the law applied then set up status that is competent according to the conflicting rules of the State of destination".

It should be recalled how the Court of Justice has established matters in the judgment in Dafeki, that in the absence of legislation to harmonize the matter, with reference to the value of the extraterritorial certificate of civil status of a country, the administration and the courts of the Member State of destination or residence of citizens have an obligation to abide by the contents of the documents of civil status issued by the country of origin, even when compared to the mere recognition of the probative value of that document, as submitted, or as recognition of the validity of the act.

In addition, the reference made is not limited to the State of origin of the person as to the training of the condition to be respected in the Member State where the person is bound, being inherent to the concept of European citizenship and its close connection with the principle freedom of movement the opportunity to acquire personal and family status in Member States other than their own.

At the same time the non Registration does not give a formal/documental existence to the individual legal status that could be influenced, used, or presupposed for the operativinesss of EU Law or c'est a dire (clarification) of its aims.

This fact has a relevant consequence to EU and member States costs: "6.17 Its accompanying Impact Assessment (ADD 1) seeks to illustrate the scale of the problem encountered by citizens and businesses moving within the EU. Whilst acknowledging the difficulty of quantifying the number of public documents circulating between Member States and subject to some form of legalisation or equivalent administrative formality, the Commission estimates that, each year, approximately 1.4 million apostilles are issued at a cost of more than €25 million. It suggests that the costs to EU citizens and businesses of legalisation other than by apostille are likely to be in the range of €2.3 million to €4.6 million and that the production of certified copies of public documents and certified translations amounts to €75-€100 million and €100-€200 million respectively each year"[55].

The unification of the EU Individual legal status is not only a relevant problem for respecting individual rights and fundamental rights but also an economic weight for the EU legal system.

[55] Draft Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012.

Vernacularizing Asylum Law in Malta

David E. Zammit

This chapter reviews, from a legal anthropological standpoint, certain key features of the legal and administrative structures through which African asylum seekers are "received" and "managed" in Malta. Particular attention is paid to the ways in which the Refugee Status Determination process operates and how this process itself, as well as the various forms of subsidiary and/or humanitarian status which result from it, are a medium through which vernacular Maltese understandings of refugee law are constructed. Thus this review shows how official structures, procedures and statuses are implicated in producing and re-producing grass roots' social perceptions of these migrants as abusive recipients of humanitarian charity instead of being subjects of legal rights. In this context integration can only occur through the informal economy and through mechanisms of incorporation which are not based on legal categories and administrative practices, but on social relationships of friendship, patronage and hospitality.

1. *Introduction*. This chapter seeks to explore subsidiary and humanitarian status as products of the administrative machinery for managing the asylum claims of African boat people in Malta. Following a period of compulsory detention in which these asylum seekers are placed in a social limbo, those individuals who are neither recognised as entitled to refugee status nor rejected are given an intermediate protected status such as subsidiary or humanitarian status. In Malta these intermediate statuses are usually understood as providing a "temporary" form of protection justified on a "humanitarian" basis. Recipients receive benefits but not entitlements. In practice subsidiary status militates against migrant integration in Maltese society by confining these migrants to a largely informal status of recipients of hospitality and thus affirming their position as (temporary) guests while ensuring that they are not seen as stable legal subjects (i.e. as genuine refugees and potential citizens). Preserving a sense of the provisional character of the arrangements for receiving irregular immigrants allows the Maltese state to continue to characterize the regular annual influx of migrants to an external audience as an exceptional crisis for which it is ill prepared. Internally, it prevents the full application of international refugee law, with its rights focused exilic orientation and enables the state to highlight its "charitable" and "humanitarian" response. At the same time, however, this feeds into negative social perceptions of these informal migrants as individuals who lack rights and subsist on the margins of Maltese law and society.

2. *Methodology.* While this chapter draws upon my skills as a legal researcher, it is primarily based upon anthropological fieldwork conducted over a period of around ten

years between 2005 and 2015; mainly in the form of participant observation in various settings within Maltese society. In particular it draws on research conducted between 2005 and 2006 while working as a volunteer with Jesuit Refugee Services (JRS) Malta helping asylum seekers prepare and present their claims for refugee status. In addition, this chapter draws upon: (1) a series of interviews conducted with friends and family members by University of Malta students following the course in Advocacy Skills taught by Prof. Michele Pistone in 2006, (2) a review of newspaper and other media reports on Malta's migration crisis conducted by me over the last ten years and (3) a series of interviews carried out in 2009 with various asylum seekers residing at the Marsa Open Centre.[1]

3. *Discursive Contradictions.* The starting point is a case of bureaucratic ambiguity. Consider the following public statements, each made by a leading Maltese state official involved in developing and implementing laws and policies towards irregular migrants and asylum seekers:

(1) *"Malta grants refugee or humanitarian status to 53% of the irregular immigrants that land on our shores. This is by far the highest rate of acceptance in Europe."* (Justice & Home Affairs Minister Tonio Borg at a public seminar: 31/8/2004).[2]

(2) *"Malta has the highest rate of granting refugee or humanitarian status to deserving migrants, such as those who have suffered persecution in their countries* (Minister Borg in Parliament: 5/10/2005).[3]

(3) *"The majority of immigrants (to Malta) are really economic migrants and not refugees… Women, sick people and children are automatically given humanitarian status. In practice only those immigrants who are given refugee status are not economic migrants and these only amount to some two percent."* (Judge Franco Depasquale at a University Seminar: 6/4/2006).[4]

(4) *"Humanitarian status is not given automatically to women and children, but is granted to immigrants who do not qualify for refugee status but who, nevertheless, come from conflict-stricken countries deemed unsafe."* (Refugee Commissioner, Charles Buttigieg: 8/4/2006).[5]

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1 These interviews were conducted by Amalia Susan Creus and other researchers under my supervision in the context of the Fredriech Ebert Stiftung (FES) sponsored research project on "Integration of Irregular Migrants in the Maltese Labour Market".

2 I attended this seminar and noted these words myself. See "Seminar to discuss situation regarding asylum seekers," *Malta Independent*, 5th September 2004: http://www.independent.com.mt/articles/2004-09-05/news/seminar-to-discuss-situation-regarding-asylum-seekers-68342/.

3 "Clamp down on unfounded applications for refugee status," *Times of Malta*, 6th October, 2005: http://www.timesofmalta.com/articles/view/20051006/local/clamp-down-on-unfounded-applications-for-refugee-status.76219.

4 Adapted from the report carried by the *Times of Malta* on the 7th April 2006.

5 MICALLEF M., "Humanitarian status not automatic" - Refugee Commissioner," *Times of Malta*, 8th April 2006. http://www.timesofmalta.com/articles/view/20060408/local/humanitarian-status-not-automatic-refugees-commissioner.57729.

These statements delineate an area of some ambiguity generated by the Maltese refugee status determination process and corresponding to the concepts of subsidiary and/or humanitarian status. The first two statements were made by the Justice and Home Affairs Minister who, during his tenure in this role (1998-2008), was widely perceived as the official responsible for first developing Malta's laws and policies in regard to irregular migrants and asylum-seekers. They appear to conflate refugee and humanitarian/subsidiary status, implying that they are both forms of protection that are "granted" to those who deserve them and it contrasts the "generosity" of the Maltese nation-state in asylum matters to that of other European countries. The third statement was made by a retired Maltese judge who in December 2005 published a long report investigating the causes of a riot which had broken out in one of Malta's detention centres for irregular migrants. He rigidly distinguishes between refugees and recipients of humanitarian status, suggesting that the latter are really economic migrants and that the real refugees are very few. Finally we have a more nuanced statement from the principal state official in charge of adjudicating asylum claims; diverging from the judge's approach since it observes that humanitarian status is not automatically given and that the recipients of this status still deserve protection since they come from "unsafe" countries.

If three state officials of this stature could send such contradictory messages about the respective meanings of refugee and subsidiary status over a period of only 18 months, then this might be considered as evidence of the Maltese authorities' confusion and lack of coordination in developing laws and policies vis-à-vis migrants. Equally, however, it could be seen as a cunning policy of 'strategic ambiguity' on their part. This chapter will try to explore these contradictions in order to ethnographically contextualise these Maltese responses to irregular immigration. After all, what makes it possible for such seemingly contradictory pronouncements to be made? What relationship do they bear to the bureaucratic processes by which immigrant arrivals are "processed", "managed" and otherwise dealt with by the state? What impact do they have on public perceptions of migrants? Who are the various addressees of such statements? What weight are we to ascribe to local and global forces in shaping the discourses of Maltese policy makers in regard to migration?

4. *The Maltese Context.* The need for such an investigation is particularly urgent in view of the recent prominence of migration issues within Southern Europe as a whole and Malta in particular. Located between Sicily and Libya in the centre of the Mediterranean, the tiny Maltese nation-state has a land area of a hundred square miles and a population of around 423,000; making it the smallest and most densely populated country in the EU. It lies on one of the principal sea-routes by which African migrants travel to the European Union. As a result it has experienced in recent years growing annual landings of irregular migrants, who generally arrive in small boats and land in Malta either because they mistakenly assume that have reached Italy or because their petrol runs out and, finding themselves in distress at sea, they are rescued by the Armed Forces.[6] These 'boat

[6] Malta manages a huge "Search and Rescue Area," stretching from close to Tunisia to the environs of Crete, in the center of the Mediterranean.

people' represent various nationalities. Most come from the Horn of Africa, including Somalia, Eritrea, Ethiopia and Sudan. Others are Congolese or come from Liberia or the Ivory Coast. Still others are Arab North Africans and there are even some Asians from countries like Bangladesh.

Until 2002[7] Malta used to receive less than a hundred of these 'boat people' a year. From 2002, onwards the numbers swelled to an annual average of around 1,400 boat people, reaching a high point of 2,775 in 2008 and a low of only 47 in 2010, when an agreement was reached between Libya and Italy to contain the migration of boat-people. This massive increase in arrivals appears to be related to Malta's entry into the EU in 2004, particularly as EU entry compelled the government to enact a new Refugee Act. This law entered into force in 2001 when Malta also agreed to lift the geographical limitation it had previously applied, restricting access to status determination procedures to European asylum seekers and setting up an institutional structure to receive and process asylum claims.

It is in the context of these realities that we must place the official pronouncements with which I started this chapter. It is clear that in Malta the process of creating and implementing refugee law has occurred as a result of external EU pressure and that this has happened simultaneously with and in parallel to what must, relatively speaking, be considered as a massive ongoing influx of irregular immigrants. Most of these migrants arrive undocumented, vigorously assert that they do not want to be in Malta but to go on to Europe, are of unclear nationality and are difficult if not impossible to repatriate. As one might imagine, these "boat people" have presented a hefty challenge to the Maltese state and society.

Over the last fourteen years, the Maltese state has responded to "boat people" by developing new policies, procedures and institutions (including a Refugee Commission

[7] See *News Release issued by the National Statistics Office, Malta* on the 20th June 2015 and downloadable from: file:///C:/Users/User/Downloads/News2015_116.pdf.

Year	Number of boats arriving	Number of people on board*
2002	21	1,686
2003	12	502
2004	52	1,388
2005	48	1,822
2006	57	1,780
2007	68	1,702
2008	84	2,775
2009	17	1,475
2010	2	47
2011	9	1,579
2012	27	1,890
2013	24	2,008
2014	5	569
* Figures under this category also include persons found and airlifted from the sea		

to process their asylum claims) and setting up an array of "closed" and "open" detention camps to receive them. In the process, politicians and policy makers have also sought to justify and legitimise their approach, by balancing their international obligations against their sense of what the electorate expects. The response at the grass-roots social level has included vigorous and often acrimonious public debate, which veers from anguished soul searching about the limits of Christian charity, the nature of Maltese identity and whether Maltese are racist, to concerns about refugees "taking our work" and sporadic denials of any obligation to allow the entry of and/or the provision of assistance to these immigrants. Local NGOs have broadened their mandate and sought to cater for the needs of immigrants, while other neo-rightist groups have emerged which seek to whip up and profit from anti-immigrant feelings.

These responses to immigration reflect and refract the Maltese cultural and social context. Malta is a small island-state and as Government officials love to point out, it is small, with a geographical land area of around 350 square kilometres and, with a population of 423,000, it is the most densely populated place in Europe. Despite a long history of migration to and from the island, there were no substantial ethnic minorities prior to the arrival of migrant "boat people" in the last five years. The economy is tourist-based, with a large informal sector. There are two main political parties with a history of bitter opposition to each other, most recently evidenced by controversy as to whether Malta should join the EU, which it did in 2004. Socially, it is a conservative place, with something like 90% of the population claiming a Catholic religious identity and a legal system which, until 2011, did not permit divorce and still does not allow abortion. Certain aspects of Maltese political culture, are also relevant to the arguments made in this paper and will be referred to further on. These include a heavy involvement of the Government in people's daily life, where it is still the largest employer on the island and an important source of patronage, a colonial background with associated traditions of covert resistance towards the state and its legal system and a historical narrative which is remembered in terms of successful resistance to invasions, whether of the Ottoman Turks in the sixteenth century or of the Germans in the Second World War. Malta is "an imaginary community superimposed upon a real community",[8] where the politics of marginality have been turned into an art. All these features of Maltese society find expression in the way it responds to migration.

5. *Vernacularizing Asylum Law*. This chapter seeks to develop a specifically legal anthropological perspective to explore this Maltese response. The overarching question posed is: what does this response tell us about the Maltese state and society and the relationship between them? Can we learn something about the nature of Maltese governance by looking at the way in which the state manages the reception of irregular migrants? More specifically, how do the actions of the government mould the application of international refugee law in order to render it conformable to internal social values? In posing these questions, I locate myself within recent trends in migration studies which question the usefulness of purely economic,

8 Anthropologist Jon Mitchell, personal communication.

social or demographic paradigms to the study of migration: it is argued that the receiving state is itself an important actor and its laws and policy decisions make a difference.[9] As sociologist Cecilia Menjivar observes in a recent publication: "Highlighting the role of the state in shaping undocumented immigration necessitates a shift of focus from examining undocumented immigration as a group of individuals possessing this characteristic (and how this legal status might affect their lives), to how the category into which they are classified, is created, recreated and transformed."[10] Furthermore, she notes how such a perspective "moves us away from a focus on 'undocumented status,' as a naturalized category that de-emphasises the role of the state in its creation, to one that allows us to bring in the central place of the receiving state in actively producing this category."[11]

This focus on how the state through its laws actively creates and constitutes new kinds of categories of migrants through creating new kinds of legal statuses, can be usefully approached through the kind of anthropological study of the state which political anthropologists like Akhil Gupta have pioneered. Gupta aims to study the Indian state ethnographically, by examining the discourses of corruption in contemporary India. He observes that this involves both the analysis of the everyday practices of local bureaucracies and the discursive construction of the state in public culture. Ironically, this often happens when people are complaining about corruption.[12] Thus, Gupta studies how the state, the national community and the individual subject are imagined and thus constituted in the process of talking about/practising corruption in India. Similarly, this chapter will focus both on the everyday practices of the bureaucracies involved in managing the reception of migrants (specifically in processing asylum claims) and also on official and popular discourses produced about migration and its management, both within the host society and by the migrants themselves. The aim ultimately will be to show how a particular model of governance, based on a specific way of conceiving/constructing the migrant subject, has developed and to show how this can be seen as a kind of vernacular expression of International and European Refugee law.

Such an approach, tacking back and forth between law and society has recently been pioneered in Southern Europe, especially in regard to migration law. Thus, Kitty Calavita, working within the American Law & Society paradigm, shows how migration law in Spain and Italy, far from integrating migrants, actually works to push them away.[13] In a more anthropological inquiry, Liliana Suarez Navaz has focused on the situation in an Andalusian village and she explores how Spanish migration law impacts on migrants and

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9 An early paper promoting this approach was: DOUGLAS, S. MASSEY,, "International Migration at the Dawn of the Twenty First Century: The Role of the State", *Population and Development Review*, Volume 25 Issue 2 (Jun., 1999) pp. 303-322.

10 MENJIVAR C., "Undocumented or unauthorized immigration" in Steven J. Gold & Stephanie J. Nawyn (eds.) *Routledge International Handbook of Migration Studies* (Routledge International Handbooks) 1st Edition, 2013, London, p. 356.

11 *Ibid.*

12 GUPTA A., "Blurred Boundaries: The Discourse of Corruption, the Culture of Politics, and the Imagined State," *American Ethnologist*, Vol. 22, No. 2 (May, 1995), pp. 375-402.

13 CALAVITA K., *Immigrants at the Margins: Law, Race, and Exclusion in Southern Europe* (Cambridge Studies in Law and Society), Cambridge University Press, 2005, Cambridge.

on the attitudes which Andalusians hold towards their state and its legal system.[14] She observes that the practical implementation of Spanish migration law requires migrants to provide various documents, including a signed statement from their employer in order to obtain a work permit and be considered as 'legal'. She shows how the process of helping to regularize the status of their employees thus forces their peasant employers to be much more involved in legal processes than they otherwise would be and to learn to use the law in an instrumental manner; leaving behind the attitude of suspicion and distrust of the legal system which previously characterized the relationship of most Andalusians with the state and its institutions. She suggests in an arresting phrase that this change in attitude can be imagined as the "legitimation of law", given that the legitimacy of the legal system itself cannot be assumed as a given in a Mediterranean context marked by the prevalence of patronage and distrust of the state.

The usefulness of the concept of "legitimation of law" as a theoretical frame for this inquiry is suggested by the similarity in geographical, social and political conditions between Malta and Andalusia, which are both located on the new Southern border of the EU and among the first EU territories encountered by migrants crossing the Mediterranean. However it is important to note that in Malta the central legal framework in terms of which the society responds to the "boat people" is not Migration law, which is fairly restrictive in its orientation and effects, but rather Asylum law. That this is the case is indicated by the significant convergence between the passing of the new Refugees Act and the arrival of the first big influxes of irregular migrants to Maltese shores. Moreover, as will be shown further on in this paper, the government considers all African "boat people" as asylum applicants and presents its policies for receiving and processing these migrants as the practical implementation of international refugee law in a manner consistent with Malta's special circumstances. This means that during the past five years Maltese society has had to undergo a crash course in refugee law, as new institutional structures and procedures were developed and put to use in processing thousands of asylum claims. As the evolution of public debate and the implementation of refugee law have occurred in tandem, terms and categories drawn from refugee law have circulated widely. Refugee law, as mediated by the state, has supplied the key categories in terms of which people perceive and understand this issue.

At the same time, Refugee law also poses a serious challenge to the Maltese state authorities; due to the fact that they have little formal control over the contents of this body of legislation, which enacts an international treaty and which, since Malta joined the European Union, has had to be drafted and applied in a manner which conforms with the various EU Directives and other forms of European law which aim to harmonise its application across Europe. In this context, I will argue how the response of the Maltese state goes beyond simply fostering a climate which helps to legitimise its own laws and can usefully be compared to that of the women's rights NGO's studied by anthropologist Sally Merry. She observes how these NGO's, located in countries like India, Peru and China, find it necessary to translate international human rights into a local idiom, if they are to

[14] SUÁREZ-NAVAZ L., "Rebordering the Mediterranean: Boundaries and Citizenship in Southern Europe", Berghahn Books, 2005, Oxoford.

have meaning for local actors, particularly the women they wish to help. Thus this process of "making women's rights in the vernacular" involves an interaction and cross-fertilisation between international legal rules and local social norms, which has the potential of altering both: "We call this process of appropriation and local adoption vernacularization. As women's human rights ideas connect with a locality, they take on some of the ideological and social attributes of the place, but also retain some of their original formulation. We see this as analogous to the ways in which organic molecules connect with each other. New pieces attach at points of similarity, producing a new overall structure. Even though the features of the original core do not necessarily change, the new composition of elements is different. How vernacularization actually works varies according to a number of factors."[15]

This chapter will therefore argue that the practical application of Asylum law in Malta should be seen as part of a process by which the Maltese state itself makes European and International Law in the vernacular; insofar as it seeks to give a local significance to International legal rules which conforms to a particular understanding of the values and social norms which operate at the grass roots level in Maltese society. This will be demonstrated primarily through an ethnographic study of the development of Maltese laws and policies for managing asylum claims and asylum applicants over the past fifteen years or so.

6. *Great Expectations before the Introduction of the Refugees Act in 2001*. Examining the situation before the implementation of the Refugees Act in October 2001 helps to give a bird's eye view of the development of Maltese laws and policies for protecting refugees. At the time the state had only assumed the legal responsibility to provide protection to refugees of European origin. Despite this, formal status determination procedures were not set up for these European asylum seekers and in practice they were only granted temporary permission to stay in Malta without ever being officially recognized as refugees. Non-European asylum seekers were interviewed by the Emigrants Commission a Catholic voluntary organization set up and headed by a prominent priest, which sent their interview results and other documentation to the UNHCR offices in Rome for a determination of their eligibility for refugee status. However the protection given, even to recognized refugees, was mostly limited, in the words of one human rights lawyer: to allowing them to remain in Malta until a permanent settlement could be found for them elsewhere.[16] Thus even recognized refugees were not considered to have a right to work or to family reunification, although they might be allowed to work at the discretion of the Government. While those who acquired refugee status were allowed to remain in Malta, even those who were rejected might be allowed to remain if they were deemed worthy of protection due to the conditions prevailing in their home countries.[17] Finally, there was

[15] LEVITT P. and MERRY S., "Vernacularization on the ground: local uses of global women's rights in Peru, China, India and the United States," *Global Networks* 9, 4 (2009) p. 446.

[16] CAMILLERI K., "The Legal Protection of Refugees in Malta", "Mediterranean Journal of Human Rights", Vol.4, double issue, 2000, p. 13.

[17] CAMILLERI K., *ibid*, p. 18 observes: "Over the years another category of 'semi-protected persons' has emerged. This group is made up of persons of non-European origin who remained in

also a policy of detention which applied to all immigrants who entered Malta irregularly, including most[18] asylum seekers unless and until they achieved refugee status.

Thus the way in which refugees were treated before the introduction of the Refugees Act was based on five characteristic features: 1) limiting legal responsibility for asylum seekers and refugees as far as possible; 2) a preference for giving discretionary benefits to some of these refugees instead of enforceable rights to all; 3) a refusal to create formal procedures for status determination; 4) a theoretical differentiation of refugees into distinct categories which was usually not implemented in practice; and 5) a policy of detaining asylum seekers for long periods. At the time a lawyer working on behalf of refugees for a Christian voluntary organization noted that the cumulative effect of these factors was to create: "a system based largely on humanitarianism and governmental discretion…as a result of which refugees and asylum-seekers in Malta are forced to survive in a grey area outside the protection of the law, excluded from effective participation in Maltese society."[19] A perceptive anthropological study carried out at the time also pointed out that this lack of recognition of refugee rights and the consequent reliance on the informal distribution of favours by government ministries and voluntary organizations had the effect of inducting refugees into traditional patron-client relationships with their benefactors based on the idiom of charity: "Without legal structures to guarantee refugees their livelihood, they were pushed into relations more akin to traditional networks of patronage."[20]

Given this background, these observers hoped that the introduction of the new law would replace the reliance on discretion and patronage with one on legally guaranteed rights. They pinned their hopes on the fact that this legislation was meant to implement the provisions of the Dublin Convention; so that the Maltese state would now be taking responsibility for processing and deciding the asylum claims of the "boat people." The law envisaged a formal and unitary procedure for status determination which would be adjudicated by the Refugee Commissioner in the first instance and from which appeals could be made to the Appeals Board; both being new administrative offices established by the Act. Moreover, the Act firmly recognized some core rights of refugees and asylum-seekers, especially the rights to remain in Malta until the asylum claim is finally determined, the rights of non-refoulement, of free internal movement and free access to state educational and medical services. Although the Act left out other important rights, such as the right to work, it was hoped that it would at least bring about: "a qualitative shift, from a system based largely on humanitarianism and governmental discretion, to one that offers legal protection to refugees and asylum-seekers and offers some guarantees of respect for their rights."[21]

Malta for one reason or another, in spite of the fact that their application for refugee status was rejected by UNHCR".

18 Those asylum seekers who entered in an irregular manner, but managed to file a claim for asylum before they were apprehended by the authorities, were usually not detained according to Camilleri (above).

19 CAMILLERI K., *ibid*, p. 11.

20 YOUNG M., "The *Miskin* and the Big Man: Surviving as a refugee in Malta", "Mediterranean Journal of Human Rights", Vol.4, double issue, 2000, p. 243.

21 CAMILLERI K., ibid, p.9.

7. *Keeping the Policy of Detention*. When the new refugee law came to be implemented, this was done in a way which frustrated the expectations of those who hoped that the system of discretion and patronage would be replaced by a new focus on rights. In this section, I will draw upon reports by NGO's, newspaper reports, interviews I conducted with key officials and my experiential knowledge of working with the system offering legal assistance to asylum seekers to describe some of its features. As I have observed, the inauguration of the new system for protecting refugees and asylum seekers coincided with what state officials described to me as an "explosion" in the numbers of irregular migrants who came to Malta. Even so, it is surprising to note how effectively the bureaucratic procedures for implementing the law succeeded in reproducing the previous system based on administrative discretion, humanitarian discourse and patronage.

For a start, the government continued to maintain its policy of detaining asylum seekers who enter the island irregularly until their asylum claims are finally determined. To implement this policy, which is distinctive to Malta on the European stage[22] and to cope with the growing numbers of irregular migrants, it opened five detention centres staffed with army or police personnel and sited in old colonial army barracks and in the central police headquarters. Conditions of life inside these detention centres are harsh and unpleasant. These barracks are all located in what most Maltese consider to be remote peripheral areas in the countryside. These areas have long been associated with foreigners and they continue to be considered as a kind of no man's land. Many of the immigrants in the Safi detention centre, one of the barracks which I regularly visited, were hosted not in the barracks itself but in canvas tents inside a field enclosed within a high chicken-wire fence next to the airport and the army barracks. Inside this field something like 300 persons of mixed nationalities, some with families and most without, were cooped up indiscriminately together for indefinite periods of time with little attempt being made to ensure privacy or to provide them with any form of work or recreational activity, barring a football. As a rule they slept on mattresses on the ground, possessed only a blanket or two to protect them from the cold in winter and were exposed to the sweltering heat of a Maltese summer. Sanitary conditions were bad and medical care sporadic and inadequate. One of the first things that used to strike me in the Safi detention camp was the stench and the fact that two toilets had to be shared by hundreds of detainees. This seemed rather ironical in view of the fact that Safi in Maltese means pure. Food was provided regularly by the soldiers, but many of the African inmates were not used to bread and pasta and complained of stomach pains.

For most asylum-seekers, however, the worst aspect of detention is not the living standards of the camps, but the uncertainty, delays, their lack of freedom and of anything meaningful to do and their dependence on what seem to them to be the arbitrary decisions of the authorities. In reality the decision to detain asylum-seekers is authorized but not mandated by Maltese law and decisions to detain or free particular individuals or

[22] The Global Detention Project describes this policy thus: "Malta applies a form of mandatory detention which, although apparently unique among EU countries, has some similarities to the policy pursued by Australia. Non-nationals without the right to enter, transit, or reside in the country can be subject to a removal order, which once issued automatically triggers detention." See: http://www.globaldetentionproject.org/countries/europe/malta/introduction.html.

groups are made selectively by the authorities and in a manner which is not always very transparent. This could lead to a sense of resentment and accusations of discrimination and/or favouritism were sometimes made by detained migrants in relation to the authorities. The sense of abandonment and despair was compounded by the length of detention, which was not subject to any clear limitation at the time when I started to research the area. While it is true that since 2005, the government has adopted a policy that it will release an asylum seeker from detention when he or she is granted some form of protected status, or after the lapse of eighteen months if his claim had been rejected, one should note that this was only a policy decision and not a legal commitment.[23] Furthermore, eighteen months is still a very long period of time to be imprisoned if you have not committed any crime.

Detained asylum-seekers find themselves in a kind of bureaucratic limbo, what Mary Douglas calls an "institutional grey area,"[24] where no one informs them of their rights, they have little or no access to knowledge about the progress of their own asylum claims and where they face the prospect of being detained for a long and unknowable period of time. These features of detention stem from other policy decisions taken by the authorities. Thus, as we will see, the immigrants are only informed about their legal status, rights and duties when they come to attend the hearing of their case before the Refugee Commissioner and this can take place many months after they have landed. The status determination process can take a long time to conclude, often prolonging the period of detention.[25] The protective and security-conscious attitude of the soldiers and police who guard the detention centres also disempowers the asylum-seekers. Thus they usually take away any money that the asylum-seekers bring with them to Malta and keep it on deposit to give it back to them when they are released from detention. They do not allow them to cook their own food, because they claim that this might give them access to knives which they could use to attack the soldiers themselves. Moreover, the soldiers and police restrict access to the detention centres to Government officials and members of certain NGOs and exclude journalists, on the grounds that they want to protect the privacy of the detainees and also to prevent the entry of persons who might create a security problem by, for example, encouraging the detainees to start a riot and demand their freedom. From my personal experience working with an NGO, there were regular delays of around 30 minutes before I was allowed to enter the Safi detention centre, in which time the guard would consult with Headquarters and engage in long discussions

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[23] Global Detention Project, Malta Detention Profile: "time limits (on the duration of detention) are determined by a government policy document, the Ministry's for Justice and Home Affairs 2005 Policy Document: Irregular Immigrants, Refugees and Integration. This policy provides that no one is to be kept in detention for longer than 18 months. However, because this maximum period is not stipulated in law, the WGAD has expressed concern over the possibility of people being detained for longer than 18 months". http://www.globaldetentionproject.org/countries/europe/malta/introduction.html.

[24] DOUGLAS M., *How Institutions Think*, N.Y. Syracuse University Press, 1986, Syracuse.

[25] Although when I interviewed the then Refugee Commissioner back in 2006 he pointed out that there is no necessary and intrinsic connection between the status determination process and the decision to detain asylum seekers, it remains true that a positive outcome from the status determination process frees the asylum seeker from detention.

with them to establish whether I was on the list of persons permitted to enter or not. Moreover, other volunteers would tell stories about how the soldiers kept developing new rules as to what one was prohibited to bring into the centre on the grounds that it could potentially be used as a weapon. At one point, a volunteer who brought a guitar along was prevented from entering on the grounds that a small spanner he carried with him to fix the guitar could be used as a weapon!

Over the years, detained asylum seekers have tried various means to bring their plight to the attention of a wider audience. But these efforts have tended to boomerang against them and provoke a harsh reaction which makes their position worse. When I visited detainees in certain closed centres before the policy of indefinite detention had been changed, I couldn't help noticing the graffiti and slogans which they painted on the walls of their rooms or drew on the walls of corridors outside. One rejected asylum seeker I visited had "Where is the Love?" scrawled on the wall of his room. On that visit, he told me: "I feel like every struggle I make to try to improve my position has made it worse". He had ended up in a psychiatric hospital due to a suicidal depression brought on by his seemingly endless detention. Since some other immigrants who were similarly detained with him had rioted in the hospital, all the immigrants including him had been transferred to another wing of the institution composed of small prison-cells and locked in. He felt particularly aggrieved that this could have taken place despite the fact that he had not taken part in the riot. Another graffito from Safi read: "This is a terrible place for a man. An hour is like a day, a day is like a month, a month is like a year".

The detained asylum seekers have also tried various forms of protest. In August 2004, for example, a group of 23 asylum seekers staged a hunger strike which lasted for around ten days to protest the length of time for which they had been detained (one of them had even been detained for 2 years). In January 2005, there was a peaceful protest by around 80 African migrants, who refused to go back into their barracks at Safi and lay down in the field within the detention centre singing peace songs. This protest was brutally suppressed by a charge of soldiers who hit the protesters with truncheons and hospitalized a few of them.[26] This incident was shown on the national television news and generated enough outrage to compel the Prime Minister to commission a judicial inquiry to investigate the matter. The judge later concluded that excessive force had been used by the army.[27] In June 2006, there was a mass breakout by up to 200 asylum seekers from the Safi barracks, who intended to march to the Prime Minister's Office a few miles away to protest at the fact that they had been detained for too long. They ended up fighting a pitched battle with the police until the latter managed to shepherd them back to the detention centre.[28] A decade later similar fruitless demonstrations and

[26] GRECH H. and FARRUGIA M., "Immigrants beaten in peaceful protest," *The Times of Malta*, Friday, January 14th, 2005: http://www.timesofmalta.com/articles/view/20050114/local/immigrants-beaten-in-peaceful-protest.102231.

[27] MICALLEF M., "UNHCR calls for action on Safi report," *The Times of Malta*, Wednesday, December 21st, 2005: http://www.timesofmalta.com/articles/view/20051221/local/unhcr-calls-for-action-on-safi-report.68500.

[28] GRECH H., "Another breakout by illegal migrants," *The Times of Malta*, June 22nd, 2006: http://www.timesofmalta.com/articles/view/20060622/local/another-breakout-by-illegal-migrants.50046.

escapes were still being staged. Thus, on the 6th March 2014, some 19 asylum seekers escaped from the Safi detention centre, only to be captured by the police a few hours later.[29]

8. *Constructing a National Consensus on Migration*. Since 2002, various political and social developments have accompanied the annual arrivals of boat people and the process of developing an institutional response on the part of the Maltese state. In particular one should note that the two principal political parties which traditionally opposed each other strenuously on every subject on which disagreement is possible, decided to close ranks and support the Government's policy of detention and the particular way in which it chose to implement refugee law. This "national consensus,"[30] which has continued to exist in relation to detention and the securitisation of migration more broadly,[31] was justified on the basis of what was presented as a grave threat to national identity and security stemming from the boat people and drew upon a widespread sense that Malta had been let down by its partners in the EU and left to tackle irregular migration on its own.[32] Thus, in 2009 when the then leader of the Opposition presented his party's action-plan on migration to the Maltese Parliament, he observed that: "Malta should be ready to raise the ante. Not by letting anyone drown. But by drawing the attention of the international community to move things. If they did not budge, Malta should make it clear that it was prepared to move ahead and if numbers grew, it could not exclude starting to interpret international obligations

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29 PECORELLA R., "Mass escape from Safi detention centre, migrants arraigned, Five migrants still missing," Malta Today, 6th March 2014*:* http://www.maltatoday.com.mt/news/national/36279/mass-escape-from-safi-detention-centre-20140306#.VhGcrfmqpBc.

30 This point can be illustrated by the comments of Dr. George Vella, the current Minister for Foreign Affairs, made in Parliament in 2009, when he was Shadow Minister: "Earlier, Dr. Vella said that illegal immigration had become Malta's greatest challenge and it would be wrong if this became a political football. The opposition had declared time and again that it was four-square behind the government… Malta expected tangible and effective solidarity from the other EU member states. The Maltese were neither racist nor xenophobic but their fears that a large number of illegal immigrants could impinge on cultural and religious traditions had increased … Dr. Vella asked that Parliament sends a clear message that nothing and nobody would be allowed to impinge on the nation's values. Immigrants must adapt - take it or leave it." "Consensus on foreign policy does exist: Illegal immigration is Malta's greatest challenge," Times of Malta, 21st November 2009: http://www.timesofmalta.com/articles/view/20091121/local/consensus-on-foreign-policy-does-exist.282654.

31 DALLI M., "Government, Opposition 'very close' to consensus on migration," *Malta Today*, 5th October 2015: http://www.maltatoday.com.mt/news/national/57886/government_opposition_very_close_to_consensus_on_migration#.ViW5AX4rKUm.

32 In the words of then Minister for Home Affairs Tonio Borg in 2005: "People were not kept in detention simply because they applied for refugee status, Dr Borg said. The detention policy applied only to those people who landed in Malta illegally. 'We will resist every attempt, whether from the EU, the UN, Amnesty International or anyone else to remove the detention policy' Dr Borg said." "Clamp down on unfounded applications for refugee status," *Times of Malta*, 6th October, 2005: http://www.timesofmalta.com/articles/view/20051006/local/clamp-down-on-unfounded-applications-for-refugee-status.76219.

in a different way which was more suited to the national interest. Malta should even consider suspending such rules for a specific period".[33]

As this consensus developed, there was a hardening of social attitudes towards the boat people. Thus, in October 2005 the President of the GWU, Malta's leading trade union, gave a speech in which he accused immigrants of taking work from Maltese workers and said that: "Malta may be forced to take measures which were not necessarily 'just and humane' to solve the illegal immigration crisis." A newly formed neo-fascist group, the *Imperium Europa*,[34] also seized on this issue to highlight what they saw as the weakness of the Government response and to argue for a more aggressive response designed to preserve the 'racial purity' of the Maltese. In 2005 a new political movement, the ANR, or *Republican National Alliance*, was created to promote Maltese patriotism and to lobby against illegal migration. The leaders of this new movement argued that the Government response to irregular migration was too weak as politicians were caving in to international pressure to allow "illegals" to stay in Malta and take the jobs of the Maltese. On the 3rd October 2005, this group held a rally in Valletta "against illegal migration", which was attended by a few hundred supporters.[35] An ANR spokesman argued that the policy of detention should be retained and that: "the demonstration had shown that the public was concerned about illegal immigration and was ready to support the state if it put the national interest at the forefront of its agenda".[36] A similar demonstration was organised a decade later in Valletta, on the 20th September 2015, by a movement calling itself the *Ghaqda Patrijotti Maltin* (the Association of Maltese Patriots). During this demonstration, some two hundred people marched behind banners condemning what they called "forced integration."[37]

At the same time as right-wing discourses became more pervasive, these trends was contested by the NGOs assisting migrants, various liberal journalists and some leading priests within the Catholic Church. Malta's most popular television chat show, the Friday night *Xarabank* show, discussed irregular migration on various occasions and the presenter often tried to steer the debate towards a humane and welcoming approach. Various journalists and opinion writers to Maltese newspapers also criticised the Government's policy of indiscriminate detention of asylum seekers, claiming that this was a shameful violation of human rights. Protagonists from within the Church also argued in favour of a more charitable and welcoming approach to the boat people and apart from those priests who lead NGOs such as JRS-Malta, the Emigrants Commission and the Peace Laboratory, various other priests and religious persons have taken the initiative to collect donations of clothes and other materials to give to the detained immigrants and to

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33 "Muscat presents action plan on immigration," *Times of Malta*, March 16, 2009: http://www.timesofmalta.com/articles/view/20090316/local/muscat-presents-action-plan-on-immigration.249099.

34 SPITERI A., "A spotlight on Imperium Europa," *The Malta Independent*, 1st June 2014: http://www.independent.com.mt/articles/2014-06-01/letters/a-spotlight-on-imperium-europa-5273354240/.

35 MASSA A., "Tempers flare at Valletta protest," *Times of Malta*, 4th October 2005: http://www.timesofmalta.com/articles/view/20051004/local/tempers-flare-at-valletta-protest.76401.

36 DEBONO F. G., "ANR launches campaign against illegal immigration.

37 "Anti-migrants demo in Valletta - Peppi Azzopardi heckled," *The Malta Independent*, 20th September 2015: http://www.independent.com.mt/articles/2015-09-20/local-news/Anti-migrants-demo-in-Valletta-Peppi-Azzopardi-heckled-6736142341.

promote prayers on their behalf. Despite these positive developments laying stress on the need to be charitable towards refugees, the official Church hierarchy was not initially very proactive in criticizing the Government's policies and opted for a policy of promoting charity and diplomatic silence instead of championing migrants' rights.

The rising tension between right wingers and those who favoured a more liberal and welcoming approach to migrants came to a head in March and April 2006, when a series of arson attacks took place targeting and destroying vehicles belonging to the Jesuit Order in Malta and the car and front door of a prominent JRS lawyer were torched. These attacks were widely understood as retaliation for the stands against racism and xenophobia adopted by the Order as a whole and JRS in particular.[38] They provoked a backlash of solidarity with migrants and their defenders in various parts of Maltese civil society.[39]

Following this incident, there were various positive developments suggesting that the trend towards ever more right wing anti-migrant politics had been somewhat checked. Membership of the new far right political movements remained relatively small and by 2007 the ANR had disbanded, while *Imperium Europa* never managed to come close to its stated objective of having one of its representatives elected as a European MP. By 2009, the GWU had moved decisively away from the anti-migrant views expressed by its President in 2005 and had set up a section for Third Country Nationals and hired a prominent pro-migrant advocate to increase its membership among migrants.[40] In 2012, this union was considered as "the most proactive union (in Malta) on ethnic and racial equality issues"[41] and in September 2015, the GWU proclaimed its willingness to: "cooperate with the Government on the regularisation of migrant workers".[42] Similarly, the Labour Party, which was considered as more hostile towards migrants than the Nationalist Government while it was in Opposition, moved towards adopting a more liberal approach after it was elected to Government in 2013 and after its attempt to send 102 Somali asylum seekers back to Libya before their asylum claims had been filed was blocked by a group of NGOs; who managed to obtain an Order from the European Court of Human Rights prohibiting this transfer.[43]

At the same time it is important not to exaggerate these positive trends. As the

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38 FARRUGIA M., "Jesuits see links between suspected arson attacks," *Times of Malta*, March 14, 2006: http://www.timesofmalta.com/articles/view/20060314/local/jesuits-see-links-between-suspected-arson-attacks.60328.

39 "Sliema Arson attack: More express solidarity with JRS lawyer," *The Malta Independent*, 13th April 2006: http://www.independent.com.mt/articles/2006-04-13/news/sliema-arson-attack-more-express-solidarity-with-jrs-lawyer-89922/.

40 DARMANIN D., "GWU's Godsend," *Malta Today*, 29th March 2009: http://archive.maltatoday.com.mt/2009/03/29/interview.html.

41 DEBONO J., "GWU most migrant friendly, according to EU-funded study," *Malta Today*, 24th January 2012: http://www.maltatoday.com.mt/news/national/15444/gwu-most-migrant-friendly-according-to-eu-funded-study-20120123#.ViaWKH4rLcs.

42 TVM, "The GWU is ready to cooperate with Government on the regularisation of migrant workers," 14th September 2015: http://www.tvm.com.mt/en/news/the-gwu-is-ready-to-cooperate-with-government-on-the-regularisation-of-migrant-workers/.

43 See "Repatriation flights called off - NGO volunteers at police headquarters to stop trucks from leaving," *Times of Malta*, July 9, 2013: http://www.timesofmalta.com/articles/view/20130709/local/government-considering-sending-migrants-back-to-libya.477273.

attempted pushback indicates, while the Maltese political class increasingly frowns upon the overt expression of racist and discriminatory views, in practice it has committed to a way of managing migration which frames it as a potential threat to national security. Thus Cetta Mainwaring argues that the reasons for maintaining detention are rooted in a dual imperative to: (1) construct a narrative which by emphasising Malta's exceptional vulnerability makes it possible to exert soft power on the European Union authorities and attract EU funds to manage this "threat"; and: (2) deter migrants from choosing to come to Malta because of its negative reputation as a site of imprisonment.[44] Moreover, Mainwaring also observes how detention and associated practices also affect the way in which migrants and asylum seekers are perceived by the grass-roots: "Not only are migrants and refugees incarcerated on arrival, but the practice of handcuffing migrants while transporting them (e.g. to hospital) is also widespread…Such practices deprive migrants of their freedoms, while sending an unambiguous message to the Maltese population that they are a dangerous element in society".[45]

9. *Hospitality as a Tool for Excluding Migrants.* Popular perceptions of migrants at the grass roots level have echoed key features of the official policies and discourses. During my fieldwork and in my review of letters and comments published in the *Times of Malta* - a conservative English language newspaper which caters for a mostly middle class, business and professional readership - three prominent discursive themes were identified, which tend to surface whenever migration related issues come to be discussed in Malta:

(a) "*They don't want to come here*": This theme acquires a completely different meaning depending on the political orientation of the writer: In the hands of liberals and NGOs, it means something like: 'we should not be worried about the migrants coming to Malta as they have no interest in coming to a small island with so few opportunities for work etc. Therefore practices like detention are superfluous insofar as they are meant to deter would-be immigrants.' However in the hands of many correspondents and commentators, it means: 'we don't need to worry about integrating these immigrants or even treating them well as they are not really our problem.'

(b) "*I am not a racist but…*" This theme appears to have been first introduced as a by-product of JRS reports warning that racist feelings appear to be present and growing among the Maltese. One of the outcomes of these warnings has been an ongoing debate in the Maltese newspapers on this theme. On the whole this debate has neither focused on defining racism nor on whether certain sentiments should be considered as racist and condemned and disallowed in debate. Rather, it has focused on the ontological nature of the Maltese people. The debate has been couched in terms of the identity of the Maltese as a community, and included references to overarching historical narratives (we never invaded other countries etc.) and the small size/intricate social fabric of the islands. Because of its inherent tendency to essentialise a "Maltese people", the claim

[44] MAINWARING, C., "Constructing a Crisis: the Role of Immigration Detention in Malta", *Population, Space and Place*, 2012.

[45] Mainwaring, *ibid.*

that 'Maltese are racist' has often tended to backfire against its (liberal) proponents. Thus some commentators agree that Maltese *are* racist and from this they draw the conclusion that irregular migrants should not be allowed to come to Malta because of the racism (conceived almost as an inherent genetic Maltese trait) they must inevitably provoke. Thus tolerating racism comes to be conceived as part of what anthropologist Michael Herzfeld calls the 'cultural intimacy' of being Maltese. He defines 'cultural intimacy' as: "that part of a cultural identity that insiders do not want outsiders to get to know yet that those same insiders recognize as providing them with a comfort zone of guiltily non-normative carryings-on".[46]

(c) *"Maltese are hospitable but…"* Throughout the decade covered by my research, contributions to newspapers were replete with references to Maltese hospitality in relation to asylum seekers. Hospitality was evoked by comparing them to Saint Paul, whose alleged shipwreck on Maltese shores is considered as the foundational event for Christianity in Malta. The "unusual kindness" ascribed to the Maltese by the writer of the Acts of the Apostles[47] was often invoked, both in order to justify the existing treatment of asylum seekers and to criticize it. Indeed, just like the two other themes earlier discussed, references to hospitality were equivocal, tended to essentialise "the Maltese" and could be used to deny any obligation to help "undeserving" or "ungrateful" or "unscrupulously exploitative" migrants. As one NGO helper observed to me: "Maltese are hospitable, but we cannot accept that anyone should want to abuse of our generosity by just coming and taking away our belongings from us. We would prefer to give away our possessions for free instead of having others steal them".

The above themes are closely interrelated, as they draw upon cultural codes of hospitality which pervade social life in Malta and other Mediterranean societies. This is clearly the case in regard to the third theme: "*Maltese are hospitable but…*" However the theme that migrants "*don't want to come here*" is also about denying that the migrants want to be guests in the first place; thus absolving their hosts of any duty to provide hospitality to them. Similarly, the theme "*I am not racist but…*" tends to justify the refusal of hospitality towards migrants on the basis of cultural intimacy. Thus 'Maltese racism' comes to justify itself, based on the notion that the Maltese state has been let down by its EU partners.

These discursive uses of hospitality in order to exclude migrants tend to replicate and respond to the symbolic messages sent by state institutions through the policy of detention and other practices through which migration is 'securitised' and migrants portrayed as a threat to the social order. At the same time, the ambivalence inherent in these discourses can also help interviewees to position themselves within a more centrist mainstream in terms of their attitudes towards migrants and to distance them from extreme right-wing stances. A

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[46] HERZFELD M., "The European Crisis and Cultural Intimacy," *Studies in Ethnicity and Nationalism*: Vol. 13, No. 3, 2013, p. 491. Herzfeld continues on p.492: "those (state) institutions actually, and to a surprising degree, depend on and even surreptitiously sustain that comfort zone as a way of securing the continued fealty of their members".

[47] "The islanders showed us unusual kindness. They built a fire and welcomed us all because it was raining and cold." Acts of the Apostles 28:2, *The Bible: New international Version.*

sense of the ways in which ordinary people are responding to this issue can be obtained from various interviews which my Maltese students conducted in 2006 with their mostly middle class friends and family. These interviews indicate how a common-sense understanding of appropriate ways to comprehend migration was being developed by balancing between a 'humanitarian' stress on hospitality towards asylum seekers and a sense that the approach could not afford to be too welcoming, in the face of what was considered to be a palpable threat to Maltese well-being, sovereignty and existence as a people.

The views of a female lawyer, who was in her early thirties when interviewed, show how a stress on hospitality can quickly turn into its opposite: "There are too many (migrants) in Malta to handle. In the beginning I was tolerant, but now it is worrying. Perhaps the Government should consider giving notice that it will no longer be a party to the Refugee Convention, so that Europe will really wake up to see what it can do to help manage the influx... alone we cannot cope". Similarly, a secretary in her mid-twenties gave a succinct description of why asylum seekers were bad guests: "As much as I hate to say this, I do not agree with them coming and staying here. They are taking from our taxes. They are not hygienic". This understanding that migrants are bad guests was echoed by a male pensioner in his late seventies, who described them as culturally alien beings who could never understand Maltese codes of conduct: "For instance I have read that for them theft is something normal. I should thank a person who steals from me for taking a precious thing away from me". He proceeded to elaborate on this point by drawing an express contrast between the excessive humanity shown by the Maltese state and society as expressed in our excessive readiness to save migrant lives and the inhumanity shown by the migrants who demonstrate that they are bad guests by entering the country illegally: "Our biggest weakness is that if there is a sick person on board one of these boats the Government sends rescue boats for them. This is wrong. Yes I know they are humans, but why haven't they been human? Why couldn't they, like everyone else in Europe who wishes to travel, get a passport… come here the proper way?".

Interviewees were eager to stress that they were not racist or uncharitable individuals by nature, but that special circumstances had overridden their otherwise humane outlook. These special circumstances were Malta's limited resources to handle a feared apocalyptic event involving a massive 'influx' of migrants. In 2006 some interviewees suspected that the then Libyan leader Colonel Gaddafi had a long-term plan to destabilise the EU through provoking the mass exodus of the "*6-7 hundred million*" sub-Saharan Africans allegedly waiting to cross the Mediterranean. Others pointed to possible colonisation by Chinese, who are: "quiet and resourceful people and will stand their ground someday. While all of us are going on about the shiploads from Africa, we are being invaded slowly but surely by these clever experts from the east. What is their excuse? China is nowhere near Europe". The response of most interviewees was in line with that of a retired banker in his early seventies who stressed that he agreed with the Maltese Government that: "the immediate need is for the problem to be resolved by blocking the source through EU assistance as the problem is well beyond Malta's limited resources both human and financial".

In itself a discursive focus on Malta's exceptional vulnerability could also justify harsh and hostile stances towards asylum seekers and this even without needing to imply that these migrants are bad guests. Thus a middle-aged shop manager showed horror at the

migrant's plight and empathy for them, while at the same time recommending a policy by which the army would push back migrant boats "far from our shores". He stated: "I am terribly sorry for these poor people who find themselves in a situation that forces them to flee and get into an even bigger mess. Of course I am referring to the shiploads that land on our shores all too often and in far too many numbers. These godforsaken souls are treated worse than cattle herded to an abattoir. But the long and short of it is that we have to deal with it and that's not fair either…. we are pulled into a vortex beyond our control and we are victims too". A tension between the charitable humanitarian concern most interviewees initially showed for asylum seekers and the harsh measures they subsequently recommended to confront the "threat" posed by the latter could also be glimpsed in the words of a retired banker: "Spain has taken the very drastic measure of putting up fences with razor sharp wire to keep illegal immigrants out. This is inhuman and I hope that Malta will not end up having to do likewise".

A female English teacher in her early forties clearly expressed the tension between conflicting moral imperatives arising from these discourses: "In a nutshell, this is my non-politically biased consensus: I am heartbroken to hear and see all the illegal immigrants coming to Malta. They must be in dire straits to leave kin and country to go where no man has gone before. (However) I have heard horror stories from people who help them in their free time. For example a chap, Maltese, professional person, teaches groups of them English to help them get a better job, and on the way out daily gets: 'when I get out of here I screw your mother/sister/wife' and calling the Maltese scum". Having expressed empathy with both pro- and anti-migrant sentiment, she proceeded to show her support for NGO workers too: "I am afraid of the dividing line that causes prejudiced Maltese to turn against other Maltese who work on a voluntary basis (my friend Dr X)[48] and get their house burnt, but do not receive police protection". However, this interviewee proceeded to recommend that hospitality should be selectively applied to favour needy Maltese citizens first: "I am worried that there are lots of people living on the poverty line here, much more that you could imagine… and then we clothe feed and educate as many immigrants that come here, before looking after our own!". When concluding, this interviewee seemed to despair of her ability to resolve the moral dilemmas arising from her choices: "Is there a solution? Politically, I doubt we will ever get through the red red red tape. Morally, we do our best, but must look after our own! First we look after our own. Maltese are racist at heart: 'they (migrants) are scum…end of story.' Does anyone think that a lot of these immigrants had no choice, that they are educated individuals? Probably not. At the moment, they are just seen as a social and economic nuisance. Me? I pray to God for protection for us and providence for us all".

Just like the ambivalent discourses of hospitality and Maltese vulnerability, admissions that 'the Maltese' are racist often end up justifying racist conduct because all these discourses evoke an essentialised Maltese community which can then proceed to justify its conduct on the basis that 'this is what we are like'. Thus, while a male Government employee in his mid-thirties admitted that: "There is a lot of racism in Malta", he followed this up with: "but people shouldn't point fingers to us Maltese as though we are a racist country. The Maltese react the way they do because it is the way we were brought up… it is our way

[48] A prominent refugee lawyer in Malta.

of living. I also experienced this in another country. When in Egypt we had to get a train back to the airport. There they separate locals from tourists. There are trains for locals and for tourists, and you can never mix- it is unheard of".

Finally the discursive elaboration within Maltese society of these themes of hospitality, vulnerability and racism, appears closely connected both to the political discourses about migration and also to the administrative practices through which migration has been 'securitised.'[49] Thus, the retired banker began his interview by remarking that: "We are hospitable by nature but I feel we are being abused as most of the immigrants are leaving their home country for economic reasons and are not genuine refugees at all. Therefore the fact that these immigrants all arrive without travel documents is an excuse". Thus the alleged abuse of Maltese hospitality by migrants was based not on concrete experiences of migrant ingratitude, but on the fact that many of them did not qualify for full refugee status according to the Maltese status determination procedure. This interviewee then proceeded to echo the claims of Maltese exceptionalism made by successive Ministers of Foreign affairs revolving around the small size of the archipelago and its high population density: "Malta told the EU that the number of illegal immigrants hitting our shores as a ratio to our population is equivalent to about 300,000 entering Italy or Germany! This is an undeniable fact". This in turn justified an attitude of support for the Government and a jaundiced approach towards NGOs who advocate for migrants' rights: "Frankly, I feel that certain NGOs (like the Jesuit Refugee Service) should be more careful before they criticise the Malta government for its control of immigration policy. The solution they advocate of letting in all comers and not even have detention centres will only lead to serious social upheavals. The short-term solution for Malta is to keep pressing for more effective controls and to retain its detention policy".

This tendency to see migration 'through the eyes of the state'[50] clearly ends up reproducing within Maltese society that blend of humanitarianism and securitisation which characterises the state's response to irregular migration. Thus another interviewee, a retired businessman in his mid-sixties, complained that African migrants filled the Maltese cancer-treatment hospital when he had last visited it: "Only last Thursday morning after a three hour wait with a relative at Boffa hospital, my wife and I witnessed a scene when the corridors of Boffa outpatients was inundated with blacks who were there for tests. About fifty to sixty men and women who had arrived on two boats the day before were sitting on the ground outside in groups guarded by Maltese soldiers waiting for their turn for tests etc". This account suggests that the administrative practices adopted by the state to govern irregular migration, such as detention, medical testing of new arrivals and the use of soldiers to guard groups of detained asylum-seekers, have conditioned the way in which this interviewee perceived and experienced these migrants as a threat. This connection is made obvious by his next observation that: "What made the scene worse

[49] By the 'securitisation of migration', I follow Bigo in understanding this process as: "*A transversal political technology used as a mode of governmentality by diverse institutions to play with the unease, or to encourage it if it does not yet exist, so as to affirm their role as providers of protection and security and to mask some of their failure."* BIGO D., "Security and Immigration: Toward a Critique of the Governmentality of Unease", *Alternatives* 27, Special Issue 2002, p. 65.

[50] SCOTT J. C., "Seeing like a State", Yale University Press, 1999, Londra.

was that they were transported in two large army trucks and surprisingly not in police buses, (not cattle trucks either!)".

After stressing that "of course I do sympathise with these people," this businessman continued to cite various reasons for his concern about asylum-seekers, including: (1) the fact that some of them are economic migrants and not refugees, (2) that they are a drain on Maltese resources, (3) that some Maltese exploit them by making them work for very low wages, and finally: (4) that "Libyan human trafficking 'barons'" are making a substantial profit by exploiting the misery of these migrants. These concerns reflect the pervasive influence of legal and administrative categories and practices in structuring the way in which asylum seekers are perceived by individuals located within the different strata of Maltese society. They reflect concerns about the budgeting and allocation of state finances, the observance of employment law and the need to clamp down on international human trafficking; which all seem to reflect political rhetoric more than the specific concerns of 'ordinary people.'[51] Moreover the claim that some of the asylum seekers are not refugees directly points to the influence of the status determination process in shaping perceptions of migrants.

10. *Developing the Refugee Status Determination Procedure.* The implementation of the new Maltese refugee status determination process envisaged in the Refugees Act has tended to reinforce an emphasis on humanitarian paternalism as opposed to legally enforceable human rights. While the Act apparently envisaged that this process would start with an application for asylum filed by the applicant, what happens in practice is that the state assumes that all the "boat people" who have entered Malta and who cannot be immediately deported want to apply for asylum. Thus they are not really treated as actors with agency and given any choice in this matter, but are all required to fill in a preliminary questionnaire (a PQ), shortly after they are first detained. While the PQ is not the formal application for asylum, it serves to kick-start the process,[52] albeit it is only upon arrival at the hearing venue and just before the actual hearing starts, that the asylum-seeker is instructed to fill in his formal application.

Despite the fact that it is not the formal application, the PQ appears to make it possible to circumnavigate the legally imposed deadline, which holds that the application would usually be invalidated if not filed within two months of the applicant's arrival in Malta.[53] Thus the actual practice in the case of detained asylum-seekers is for the

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51 On this point see: BAYLISS O., "Managing irregular migration : the central challenges as perceived by Maltese state officials", Unpublished Bachelor in Criminology Dissertation, 2008.

52 "The initial stages of the procedure require the filling in of a form known as the Preliminary Questionnaire (PQ) which asylum-seekers are asked to complete following an information session given by RefCom staff members. The PQ is considered to be the registration of the asylum-seeker's desire to seek international protection." Aditus & JRS Malta, *AIDA: Asylum Information Database,* http://www.asylumineurope.org/reports/country/malta/asylum-procedure/general/short-overview-asylum-procedure.

53 According to section 4.4 of Subsidiary Legislation 420.07 entitled: "Procedural Standards in Examining Applications for International Protection Regulations".

Refugee Commissioner to determine the date when a particular asylum-seeker's claim will be heard; sometimes after 6 months or even a year have passed from his or her arrival and detention. The asylum seeker is normally not notified in advance of the hearing if he is detained. He is simply escorted to the place where the hearing will be held by an armed guard, often without realizing what will take place there. Moreover, a written statement of his rights and responsibilities as a detained asylum seeker used only then to be given to him, regardless of the fact that he would probably have already been detained for several months.[54] Thus, the PQ makes it possible for the application to appear to have been lodged within the short legal deadline, while in practice facilitating an arbitrary fixing of the date of hearing at the near-complete discretion of the Refugee Commissioner. In this way the asylum-seeker is rendered dependent upon the arbitrary decisions of this official as to the date of the hearing and this in the context of an information vacuum and when he or she is already feeling very vulnerable as a result of detention.

The actual hearing takes place before the Refugee Commissioner or one of his case workers. It is inquisitorial in character[55] and the ones I observed seemed aimed primarily at establishing whether the applicant was credible and only secondarily at establishing whether he or she qualified as a refugee in terms of the Geneva Convention.[56] Normally the persons present were the Commissioner, a secretary who records and types the interview, an interpreter, who is usually another recognized refugee who speaks the same language as the applicant and the applicant himself. Lawyers do not normally attend these hearings. The Commissioner usually researches the situation in the applicant's stated country of nationality very thoroughly before the interview and then asks more and more questions to the applicant in an attempt to catch him out in a statement which contradicts something else he said previously or stated in the PQ and thus casts doubt on the credibility of his story; often by showing he could not have come from the precise location he claims to be a national of.[57] Sometimes the Commissioner appeared to be

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[54] In most cases, I got the impression that this statement was treated as a mere formality. Although the authorities claimed that this statement was translated if the asylum seeker did not understand it, there was a near total absence of well-trained translators and it was therefore highly unlikely that adequate care was taken to ensure that every applicant understands all the clauses of this rather technical statement.

[55] GRECH A., "The role of the lawyer in asylum adjudication: a lesson from comparative legal systems", unpublished LL.D. dissertation, University of Malta, 2008. See also BUSUTTIL N., "Safeguarding the rights of asylum applicants to a fair and effective refugee status determination procedure", unpublished LL.D. dissertation, University of Malta, 2012.

[56] Thus Assistant Refugee Commissioner Nathalie Massa Zerafa recently observed that: "Every applicant has to undergo a credibility assessment, which culminates in a two-hour, one-to-one interview with the office's case workers. 'This is very crucial to the asylum process. We first have to believe the applicant's story before we can move to the second step of determining whether they qualify for protection or not. In fact, the majority of our rejections are due to a lack of credibility – basically we do not believe their story, that they are telling us the truth. They do not substantiate their claims' ". DALLI K., "Putting Migrant Myths to Rest", *Times of Malta*, 23rd August 2015: http://www.timesofmalta.com/articles/view/20150824/local/putting-migrant-myths-to-rest.581822. See also John Axiak, *The concept of credibility in refugee law*, unpublished LL.D. dissertation, University of Malta, 2011.

[57] Thus Assistant Commissioner Zerafa (*ibid.)* stated: "During the lengthy recorded interview, asylum

baffled by particular applicants who come up with apparently plausible stories which are too generic to allow him to identify any incredible details. In these cases, he did his best to ask more probing questions and entered into quite a lot of detail in his attempt to establish credibility. His task became easier when the applicant brought some documentation with him; however many claimed not to have access to any documents. In this situation, the hearing often dragged on and on and could easily reach some 7 hours in length or require a second hearing before the adjudicator was satisfied that he could come to a decision as to whether the applicant deserves refugee status or not.

A few weeks after the hearing, the applicant usually receives a letter informing him of the decision taken by the Refugee Commissioner awarding him or her refugee status or some other form of protected status or rejecting his or her application and giving him a very brief summary of the reasons motivating this decision. The applicant (and the Minister) may appeal within a fortnight from the decision of the Refugee Commissioner before the Refugee Appeals Board. However this latter body used to hold its sittings in secret and usually not in the presence of the asylum seeker and, at the time when I was researching this field most actively, rarely used to overturn decisions taken at first instance.[58] Moreover decisions taken by this Board could not, in principle, be appealed before the courts; although it was always possible to file an action alleging breach of fundamental human rights before them.[59] Thus it is clear in this context that the procedure used for processing asylum applications tends to isolate applicants and does little by itself to remove the sense of vulnerability and dependency on others engendered by other aspects of the system, notably detention.

The decision taken by the Refugee Commissioner can have a significant impact on the duration of detention. Once a positive decision granting refugee or some other form of protected status is delivered, the asylum seeker is usually released from detention. In the event of a negative decision being taken, asylum seekers who are not repatriated or resettled in the interim are only freed after 18 months of detention and if a decision is not reached within 12 months from arrival in Malta, the asylum applicant must also be released from detention. Upon release, asylum seekers are usually housed in one of the two large "open centres" which the Government has constructed for them to live in, in Hal-Far or Marsa.[60] Each of these centres can house around 500 former detainees. They are given access to free education and healthcare by the state and those who apply and have some form of status are generally given permission to wok and a travel document. Those who cannot apply for a work permit or do not do so, often find work anyway in the construction sector or other areas of Malta's informal economy. The atmosphere in some of the "open centres" is different from the "closed centres" in which asylum applicants were formerly detained and

seekers are asked a multitude of detailed questions – each moulded to the person's life situation and story – to determine whether they are telling the truth…We don't try to entrap people, but we expect that a person asking Malta for protection should provide detailed information about what happened to him".

58 Back in 2006, a rumour, which I am not in a position to verify, used to circulate to the effect that only one in five hundred appeals had led to the overturning of the decision of the Refugee Commissioner.

59 See *Refugees Act*, Article 7 (9).

60 There are also a number of smaller centres, such as the Balzan home operated by the Catholic Church.

most migrants experience a sense of being empowered to take control over their own lives.[61] There is a more peaceful atmosphere as the migrants go about their lives, with less of the despair and pent-up frustration which characterizes the "closed centres".

The experience which detained migrants themselves have of the status determination proceedings is mixed and depends greatly on whether they achieve refugee/protection status or not. Partly due to the lack of information and the fact that they are denied an effective choice in the matter, many of them tend to be both cynical and very anxious about the asylum hearing. Usually they place their trust in the information they are given by other migrants who have already been through the process and they are aware that everything depends on coming up with a compelling story which can persuade the Refugee Commissioner that they deserve to be considered as refugees. Informal observations on my part suggest that some of the migrants try to exchange information about particular stories or events which appeared to have been successful in the past and I have heard of clients who beg their lawyers to "give" them a good story to tell. Those migrants who are rejected and remain in detention generally grow more and more cynical about the process, especially as they come to realize how small the possibility is that the decision of the Refugee Commissioner will be altered on appeal. Quite a few of these rejected asylum seekers neglect to appeal, because they come to view this as a useless process. Others claim that the Commissioner is biased, pointing to particular national groups who have achieved some kind of status and suggesting that they were discriminated against. My observations suggest that it is among this category of detained migrants, who have been through the process and have no faith in the system that cases of depression, even at times of attempted suicide, are most common.

11. *Constraints on Maltese Civil Society.* The above-described system for receiving and detaining asylum applicants and determining their status also affects the kinds of interventions made by NGO's; subtly conditioning the way they carry out their work. Of the seven Maltese NGO's that concentrate most of their work on asylum seekers known to the author, three of them are Catholic Organizations headed by priests and one is headed by a Protestant pastor.[62] Until 2001, the Church's Emigrants Commission -originally set up to support Maltese migrants in countries like Australia and Canada- used to cater for all the needs of Malta's asylum seekers, including the processing of their asylum applications. Since then, it has changed its focus to helping irregular migrants and asylum seekers who have been released from detention. It is a recognized institutional partner of the Government in regard to the issuing of travel documents and the provision of accommodation and welfare benefits to recognized refugees. The Malta Red Cross also concentrates much of its energy on providing charity and humanitarian assistance

[61] Thus, the "open centre" at Marsa had a barber's shop, a mosque, a church, a computer room and various canteens, all maintained by the immigrants.

[62] The three Catholic NGOs are the Peace Lab, the Emigrants Commission and the Jesuit Refugee Service (JRS). The Foundation for Shelter and Support to Migrants (FSM) is headed by a Protestant Pastor. The other NGOs are the Malta Red Cross, ADITUS (founded in 2009 by the former head of the UNHCR office in Malta) and the People for Change Foundation (PFC), a think-tank focusing on human rights.

to detained asylum seekers, while until 2015 the Foundation for Shelter and Support to Migrants (FSM), focused on running the Marsa open centre. PFC focuses on documenting and reporting on the Human Rights situation in Malta and ADITUS also focuses much of its energies to this task and to lobbying the government and issuing reports and press releases on behalf of asylum seekers in Malta. This leaves JRS, Peace Lab, ADITUS and a very few lawyers who take asylum cases as the only Maltese groups or individuals which focus on giving legal assistance at first instance to detained migrants. Moreover, Peace Lab and ADITUS have only recently branched into this kind of work, unlike JRS, which has been involved in this work from the beginning and which has organized many seminars, commissioned and produced a stream of reports and issued various press releases as part of its activities. JRS is known as the most professional organization working on refugee legal assistance in Malta and it has made various criticisms of the practice of indiscriminate prolonged detention, which it wishes to end, as well as pointing out various areas where improvements are necessary in the status determination process; warning of the dangers of racist discourse in Malta and asserting the human dignity of all irregular migrants.

While the work carried out by JRS is exemplary given its limited resources, it is significant that most NGOs tend to steer clear of offering legal assistance to migrants or even lobbying for changes in the laws and administrative practices by which boat-people are managed. This indicates the system by which refugee law is implemented in Malta does not encourage *pro bono* legal representation and advocacy of detained asylum seekers. NGOs are encouraged by the authorities to view asylum seekers primarily as humanitarian cases of suffering which they will help to relieve and not as legal subjects who need legal assistance to make their voices heard, both individually and collectively. At the same time and precisely because they are in close contact with detained migrants, workers in these NGO's realize that the cause of many of the humanitarian problems of the detainees is precisely their lack of freedom which derives from the interaction between government policies and their legal status or lack of it. Thus, while working at Safi detention camp with JRS, I was often told by top army officials that they encouraged visits by NGO's because they helped to keep the migrants busy and gave them someone to talk to, creating a peaceful atmosphere. They seemed to see our work as primarily a sort of social service cum psychological counselling. However, when I spoke to the detainees and asked them if they were comfortable and if there was anything I could get them, their reply was often that they did not need anything apart from their freedom. It is therefore clear that the string of press releases and reports issued by JRS[63] and other NGOs such as ADITUS[64] and PFC[65] advocating changes in the way the Government implements refugee law, reflect the pressure which the detainees place on them and their awareness of the defects in the system. They are in a double bind as they can only properly cater for the humanitarian needs of asylum seekers if they address their legal needs too, while the administrative practices which the Government has implemented make it hard for them to cater for these legal needs.

By comparison, international NGOs and bodies, who are less constrained by the need to maintain long term working relationships with the Maltese authorities, are more

[63] See the website of JRS-Malta at: http://www.jrsmalta.org/content.aspx?id=225444#.ViSJ8X4rKUk.
[64] ADITUS publications can be found here: http://aditus.org.mt/publications/.
[65] PFC publications can be accessed at: http://www.pfcmalta.org/publications-and-research.html.

critical of these administrative practices like detention, the time delays in determining the application and the conditions of the detention camps. There have been a string of negative reports over the past few years prepared by international NGOs and other international organizations, all condemning these practices and calling for reform. Thus in 2003, the Council of Europe's Commissioner for Human Rights visited the Maltese detention centres and was highly critical of what he found there, pointing out that immigrants were kept in conditions which were far worse than ordinary prisoners. He called for an immediate reform in this regard and that in principle asylum seekers should not be detained.[66] In 2004, another highly critical report was prepared by the FIDH, the Federation Internationale de Droits de l'Homme.[67] They pointed out that the Maltese authorities kept referring to Malta's small size and dense population to exempt themselves from any duties towards irregular migrants and they claimed that these arguments did not permit Malta to exempt itself from all the international obligations it had towards asylum seekers and refugees. In particular, the FIDH noted that the right to asylum in Malta had become a *trompe d'oeuil*, because it was implemented in a manner which did not really permit integration of immigrants into the society. Other critical reports were also prepared over the years by Médecins Sans Frontières,[68] Amnesty International[69] and notably by a European Parliament delegation, which visited Malta in 2006 and called for the closure of all the detention centres, observing in words which continue to ring true today, that: "The delegation was particularly struck by the hardship in the detention centres visited and the de facto denial of the right of asylum".[70]

12. *Statuses Resulting from Refugee Status Determination.* The stated aim of the Refugee status determination procedure is to assess whether the applicant qualifies to be recognised as a refugee or not. In the former case, he/she is considered to possess Refugee status. In the

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66 See the Report prepared by Mr. Alvaro Gil-Robles, on his visit to Malta (20-21 October 2003), which is accesible together with subsequent reports and letters on: http://www.coe.int/en/web/commissioner/country-report/malta.

67 See the 2004 FIDH Report entitled: *Locking up foreigners, deterring refugees: controlling migratory flows in Malta*, which can be downloaded from: https://www.fidh.org/IMG/pdf/mt403a.pdf.

68 Médecins Sans Frontières, *Not Criminals: Médecins Sans Frontières Exposes Conditions for Undocumented Migrants and Asylum-seekers in Maltese Detention Centers*, April 2009, available at: www.msf.org.uk/exposing_appalling_conditions_malta_20090416.news.

69 See for example the Amnesty International Report on Human Rights in Malta for 2014/15, which states: "The authorities continued to automatically detain undocumented migrants, often for up to 18 months, and asylum-seekers, for up to 12 months, in breach of Malta's international human rights obligations. On 30 March, the Prime Minister publicly pledged to end migrant children's detention. However, children and other vulnerable people continued to be routinely detained as well as unaccompanied minors detained alongside adults while awaiting the outcome of their age or vulnerability assessment". This report can be downloaded from: https://www.amnesty.org/en/countries/europe-and-central-asia/malta/report-malta/.

70 See Report by the LIBE Committee Delegation on its visit to the administrative detention centres in Malta, Brussels, 30 March 2006, p. 9: http://www.europarl.europa.eu/document/activities/cont/200801/20080104ATT17406/20080104ATT17406EN.pdf.

latter, the application for asylum is formally rejected. Recognition of Refugee status means that the applicant is considered to satisfy the eligibility requirements of the International Refugee Convention, as reproduced in Maltese law. This status provides access to a package of legal rights which are formally granted by the Refugees Act and the most important of which is *non-refoulement;* meaning that the refugee may not be returned to his or her country of origin, where he or she is at serious risk of persecution. Other important rights which are included in this package according to Maltese law are: (1) to a residence permit valid for a period of 3 years, which is renewable, (2) to a 'Convention Travel Document' allowing the refugee to leave and re-enter Malta without the need of a visa, (3) to access family reunification procedures and (4) "to have access to employment, social welfare, appropriate accommodation, integration programmes, State education and training and to receive State medical care, especially in the case of vulnerable groups of persons".[71]

While all asylum seekers whose claim is rejected should be deported in terms of Maltese immigration law, there is often a big divergence between theory and practice. This is because the Maltese state simply does not have the diplomatic contacts, the finances or the clout to deport irregular migrants to many (especially African) countries of origin. Moreover, although most of these migrants would have travelled via Libya and the Maltese Government has at various points over the past decade tried to invoke the principle of safe third party state in order to argue that they should be deported back to Libya, this option was usually not available. This is because the conditions in which migrants live in Libya, particularly since the Libyan crisis began in 2011, have not been such as to offer any guarantee that the human rights of these migrants would be respected. Furthermore, the Libyan authorities have generally simply refused to accept the return of any non-Libyan migrants whom the Maltese government wishes to deport there. It is thus clear that many of the migrants whose status suggests they should be deported, end up living in Malta and finding some form of informal work anyway. Thus the rejection of an application for asylum is sometimes understood not as leading to the termination of the asylum-seeker's connection with Malta, but as the grant of a kind of "Rejected Status;" thus recognising that an informal connection continues to subsist.[72]

Apart from deciding that the applicant is entitled to refugee status or to reject his/her application, the Refugee Commissioner is also given a third option in terms of Refugee law: to decide that the applicant is entitled to Subsidiary or Humanitarian status or some

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71 European Migration Network National Contact Point for Malta, *The Practice in Malta concerning the Granting of Non-EU Harmonised Protection Statuses*, September 2009, p. 16. https://homeaffairs.gov.mt/en/MHAS-Information/Documents/EMN/EMN%20Non-Harmonised%20forms%20of%20protection%20report%20-%20MT%20.pdf.

72 For instance Maria Pisani has this to say about rejected female Somali migrants in Malta: "Often labelled as 'illegal', female asylum seekers' opportunities as pedagogical agents are not just limited as a result of patriarchal, social, economic and material conditions that are historically grounded; rather, their legal status, in particular those whose request for asylum has been rejected, implies that they lack political leverage, and often fear the prospect of identification, retribution and/or forced deportation if they do speak up". Maria Pisani, " 'We are going to fix your vagina just the way we like it.' Some reflections on the construction of [sub-Saharan] African female asylum seekers in Malta and their efforts to speak back," *Postcolonial Directions in Education*, 2(1), p. 93, 2013.

other form of status considered to offer lower protection than Refugee status, while not amounting to a formal rejection. In practice, these other forms of protected status translate into temporary permission to remain in Malta without being detained. These intermediate forms of protection status play a critical role in the system, as indicated by the statistics produced by the Maltese National Statistics Office; which classify the asylum seekers whose applications have been "processed" by the Refugee Commissioner since 2002 in terms of whether they received protected status and of what kind following the hearing before the Commissioner:

Refugee Status Determination Outcomes in Malta (2002-2014):[73]

Year	Granted Refugee Status	Subsidiary or other Forms of Protection	Rejections	Total
2002	22	111	286	419
2003	53	328	187	568
2004	49	560	259	868
2005	36	510	556	1,102
2006	22	481	542	1,045
2007	7	623	329	959
2008	19	1,397	1,281	2,697
Year	**Granted Refugee Status**	**Subsidiary or other Forms of Protection**	**Rejections**	**Total**
2009	20	1,671	884	2,575
2010	43	179	126	348
2011	70	814	722	1,606
2012	35	1,398	157	1,590
2013	43	1,563	299	1,905
2014	191	1,068	476	1,735

A cursory glance at the above table indicates how small a proportion of the total asylum applications processed between 2002 and 2014 has resulted in a decision acknowledging refugee status. According to the figures, these only amount to 3.5% of the total. Moreover 35.3% of these applications have been rejected. Thus it is clear that 61.6% of asylum seekers have neither been granted refugee status nor been rejected, but have instead

[73] The above table is based upon "Table 6" of the News Release issued by the Maltese National Statistics Office on the 19th June 2015 and entitled *World Refugee Day: 20 June 2015*. https://nso.gov.mt/en/News_Releases/View_by_Unit/Unit_C3/Population_and_Tourism_Statistics/Documents/2015/News2015_116.pdf.

received 'Subsidiary' or some other form of intermediate protection status. Since most of the statuses which asylum seekers receive in Malta consist of such intermediate forms of protection status, it is important to understand the differences between them, the basis on which they are 'granted' and the implications they carry in terms of the entitlements and/or benefits they carry.

Until 2008, there was only one kind of intermediate protection status, called "Temporary Humanitarian Protection" (THP). This was defined in terms of the Refugees Act as: "special leave to remain in Malta until the person concerned can return safely to his country of origin or otherwise resettle safely in a third country".[74] Beyond this, Maltese legislation made no attempt to define the criteria on the basis of which this purely local form of protection status was granted, apart from making it clear that this was a decision which rested exclusively with the Refugee Commissioner and that it was not possible to appeal from the decision to grant or withold this status. Research conducted in 2006 by JRS-Malta indicates that while as a general rule this form of status was only granted to asylum seekers who could prove that they came from a country which was "*torn apart by civil conflict, to which safe return is, in the view of the Refugee Copmmissioner, impossible,"*[75] there was also an exception made in relation to Eritreans in that they received THP on a different basis: "*that they would suffer serious violations of their human rights...if returned home".*

If the criteria for which THP was given could vary and were defined case by case at the complete discretion of the Refugee Commissioner, the content of THP was also opaque and might vary from one case to the next. This is because the law was silent on this issue; beyond stating that the beneficiary of THP had special leave to remain in Malta until this status was revoked. In practice THP was usually granted for a fixed period of one year, after which it might or might not be renewed at the complete discretion of the Refugee Commissioner. There were a number of benefits which were routinely granted by the state to THP beneficiaries, which included, access to free medical care, to free state education, a permit to work and a travel document. Some financial assistance was also often given to THP beneficiaries, although unlike Refugees they were not given access to the possibiity of family reunification.

While THP status might, at first sight, appear to be substantially comparable to Refugee Status, a critical difference is that its content was not defined in any formal piece of written legislation. "Therefore as opposed to asylum seekers and refugees who enjoy certain legal rights which are linked to their status, people granted humanitarian protection enjoy benefits rather than rights, all of which are granted on a purely discretionary basis.[76] Compared to recognised refugees, THP beneficiaries experienced: "a sense of insecurity engendered by the manifestly temporary nature of this form of protection, with its total lack of legal rights".[77] In reality, therefore the impact of the grant of THP status was to shift the beneficiary out of the arena of internationally protected legal statuses by granting him or her a locally administered status which did not give the beneficiary any legal

[74] See article 2 of the Refugees Act 2000, quoted in JRS Malta Legal Assistance Project 2006, *Update,* unpublished report circulated on the 26th July 2006.

[75] See Update, 2006, *ibid.* p. 3.

[76] See Update, 2006, *ibid.* p. 2.

[77] *Ibid.*

rights but produced dependency for overall wellbeing and protection upon "Government policy." The content of Government policy is itself fluid and in practice depended upon the benevolence of Maltese state officials such as officials responsible for Employment, Education and Social Welfare. Thus it is clear that the logic behind THP status corresponds closely to the protectionist humanitarian logic on which Malta's detention policy is based and which is also reflected in the status determination procedure. As its name implies, this was a "temporary" status awarded on a "humanitarian" basis and thus it was not intended to be a secure long-term status giving rise to legal rights.

In 2004, the European Union intervened by means of the Qualifications Directive which was intended to harmonise forms of intermediate protection status across the whole EU. In terms of this Directive, which Malta was expected to transpose into national law by 2006, Malta was expected to replace THP status with a new form of status called Subsidiary status, awarded upon fulfilment of the same criteria as in other EU states and with a meaning and content which was similarly harmonised. In reality, Malta delayed the transposition of this Directive until 2008 and only finally completed this process after it was taken to the European Court over its delay.[78] The resulting Subsidiary Protection largely replaced THP, in that it is granted to individuals,[79] who if repatriated to their country of origin, would face a "Serious and individual threat to.... life or person by reason of indiscriminate violence in situation of international or internal armed conflict".[80] Moreover, Subsidiary Protection is also granted to persons who risk the death penalty, torture or inhuman or degrading treatment if repatriated.

The content of Subsidiary Protection is broadly similar to the package of rights granted to refugees, with the difference that the rights are somewhat diluted to reflect a lower degree of protection. Thus, while refugees are given the right to a residence permit renewable every 3 years, Subsidiary Protection beneficiaries were originally only granted a right to an annually renewable permit; although as from the 10th March 2015 this has been extended to 3 years. Unlike refugees, holders of Subsidiary Protection are not granted access to the family reunification procedure, their access to work is subjected to a labour market test and "travel documentation for overseas travel would only be given on a case by case basis via the Emigrants' Commission".[81] Moreover persons with Subsidiary Protection are not given full access to social welfare benefits and medical care, but are only entitled to "core benefits and care".[82]

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78 CAMILLERI I., "Malta taken to court over EU asylum directive," *Times of Malta*, 30th April 2008: http://www.timesofmalta.com/articles/view/20080430/local/malta-taken-to-court-over-eu-asylum-directive.206148.

79 There was a process by which persons with THP status granted before 2008 had their status converted to Subsidiary Status, following the transposition of the Qualifications Directive.

80 See Section 2 of the Refugees Act, Chapter 420 of the *Laws of Malta*.

81 People for Change Foundation, *Researching Migration and Asylum in Malta: A Guide*, April 2013, p. 16, http://www.pfcmalta.org/uploads/1/2/1/7/12174934/researching_migration_and_asylum_in_malta_-_a_guide.pdf.

82 See Aditus & JRS, *'Refugees (Amendment) Act, 2014' Comments on the Exercise of Transposing the EU Recast Qualification Directive*, 2014, p. 5: http://aditus.org.mt/Publications/aditusjrsrefugees-actchanges_122014.pdf.

Subsidiary Protection beneficiaries are thus considered as 'not quite refugees,' although in many ways their status is assimilated to the latter. While this status is largely governed by EU law, it is also reminiscent of the THP status which used to be granted before 2008 in that it was until 2015 an annually renewable status; which thus did not provide much security to holders and made them dependent on the good will of the authorities to renew their permit. Moreover the limitation of their access to social welfare benefits and medical care to "core benefits and care," which has been preserved in the latest amendments to Malta's refugee law, has raised particular concern because its meaning is abstract and ill defined, giving rise to: "serious legal and policy confusion... From the rights-holder's perspective, the lack of clarity as to level of entitlements and related procedures and criteria results in great difficulties understanding their role in society and benefitting from rights otherwise guaranteed under international and EU law".[83] Thus it appears that as regards its content Subsidiary Protection resembles THP and, despite being a status regulated by EU law, tends to make the holder dependent upon benefits granted (or witheld) at the discretion of Maltese Government officials, instead of granting clearly defined legal rights.

This trend to replace legal rights with discretionary benefits appears even more clear when considering three other forms of status which have been developed at the local, Maltese, level since 2008 and which are not harmonised at the EU level or even enacted in Maltese law. Temporary Humanitarian Protection THP) started to be given again, on an annual renewable basis in 2008 to individuals who, while not qualifying for refugee or subsidiary status are: "deemed particularly vulnerable and may not be sent back to their country of origin for reasons such as illness (including had they to suffer from a chronic condition for which treatment in the country of origin is not available) or being minors";[84] Moreover from 2010 another kind of Humanitarian Protection, called Temporary Humanitarian Protection New (THPN), started to be offered to migrants who had been rejected, had been in Malta for some years and showed good prospects of integration. Finally Provisional Humanitarian Protection is also sometimes given by the Refugee Commissioner during the pendency of an individual applicant's asylum claim. In all these cases the distinguishing features of Humanitarian Protection are the same as the Temporary Humanitarian Protection which used to be granted before 2008, in that: (i) Humanitarian Protection is granted for one year on a renewable basis, (ii) that there is a lack of clarity regarding the grounds to grant this status and that it is granted at the sole discretion of the Refugee Commissioner, (iii) that this status is not harmonised at at an EU level but is purely local in its meaning and application, (iv) that its content does not emerge from any law but is a matter of policy and that it is generally speaking a diluted version of subsidiary status, with the difference that instead of granting rights to the holder, it only grants benefits.

Temporary Humanitarian Protection status now occupies a space alongside Refugee status and Subsidiary Protection as an important protection status within Maltese law. Thus, EU statistics[85] indicate that in 2014 this status was awarded to 165 applicants,

[83] *Ibid.*

[84] People for Change Foundation, *ibid.*

[85] Eurostat, *Asylum decisions in the EU: EU Member States granted protection to more than 185,000*

while subsidiary status was awarded to 925 and refugee status to 200 applicants.[86] The reasons given by Maltese state officials for the re-introduction of Temporary Humanitarian Protection in the same year in which it was apparently replaced by Subsidiary Protection are that: "For Malta, the decision to adopt this protection status (—temporary humanitarian protection) within the national asylum policy framework, rather than laying it down in law, was considered by the Refugee Commissioner as offering a greater degree of discretion and flexibility, thus ensuring that this form of protection could be granted whenever it was deemed necessary. This could thus cover particular cases which might arise, but which could not yet be foreseen".[87]

Other reasons behind the decision to introduce this status can be discerned from a review of recent developments in relation to applications for asylum made by Syrians as a result of the ongoing conflict in Syria. It appears that a distinction was initially made between the kind of status awarded to Syrians who arrived in Malta following the start of the conflict and who were either awarded refugee or subsidiary status and the status awarded to Syrians who had already been in Malta for some time before the start of the conflict and who were awarded Temporary Humanitarian Protection. In 2013, the Refugee Appeals Board disagreed with this assessment and as a result the discrepancy was removed and all Syrian asylum seekers were granted subsidiary or refgugee status.[88] While this issue was resolved, this episode suggests a preference for awarding Temporary Humanitarian Protection in lieu of Refugee status or Subsidiary Protection, where the possibility of awarding any of these statuses exists.

This appears to reflect a preference, suggested in a recent report,[89] for awarding Subsidiary Protection in lieu of Refugee status, where the possibility of awarding either of these statuses exists. Thus: "Whereas it should be the case that an individual's application is made for the granting of refugee status, and that other forms of protection (such as humanitarian or subsidiary protection) be given only in cases where the aforementioned conditions for status are not met, the Board has instead taken the approach of reviewing cases with the aim of granting some form of protection (often subsidiary) or rejecting the claim. Whereas this may seem to be a legal detail, it does have serious ramifications, since a case can rather more easily be made for the granting of subsidiary protection, especially for Somalis, on the basis of lack of possibility of return due to dangerous

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asylum seekers in 2014, News Release 82/2015 -12th May 2015: http://ec.europa.eu/eurostat/documents/2995521/6827382/3-12052015-AP-EN.pdf/6733f080-c072-4bf5-91fc-f591abf28176.

86 There is a small discrepancy here with the figures given by the National Statistics Office and reported in the table in this section. However, the general trend is clear.

87 European Migration Network, *The different national practices concerning granting of non-EU harmonized protection statuses*, December 2010, p.109: http://www.sisekaitse.ee/public/ERV/synthesis_reports/0_EMN_Synthesis_Report_NonEUharmonised_FinalVersion_January2011.pdf.

88 See Aditus and JRS Malta, "Treatment of Specific Nationalities," *AIDA Asylum Information Database*, http://www.asylumineurope.org/reports/country/malta/asylum-procedure/treatment-specific-nationalities.

89 The People for Change Foundation, *Researching Migration and Asylum in Malta: a Guide*, 2013, p.17: http://www.pfcmalta.org/uploads/1/2/1/7/12174934/researching_migration_and_asylum_in_malta_-_a_guide.pdf.

conditions. However, subsidiary protection allows the individual far less rights than does refugee status...".[90]

These preferences for giving Temporary Humanitarian Status instead of Subsidiary Status and for giving Subsidiary Status instead of Refugee Status, make sense if understood as part of a strategy to assert unfettered discretionary control by the Maltese state over the process by which particular statuses are awarded to asylum seekers and over the very meaning and content of these statuses. In this way its control might still be asserted by defining the vernacular meaning at the level of policy of legal statuses which, having been harmonised at the level of the EU as a whole, might appear to leave the member state with little room for manoeuver. This would explain the decision to leave undefined the content of the "core welfare benefits" to which recipients of Subsidiary Protection are entitled and also to develop new forms of Humanitarian Protection at the level of policy instead of law. Furthermore, the existence of such a strategy helps explain the relatively low recognition rates of Refugee status by the Maltese state and the relatively high numbers of awards of Subsidiary and Humanitarian status. In fact, it explains the very high overall rate of positive decisions in granting status in Malta; where 73% of all asylum applications in 2014 received a positive outcome (mostly composed of awards of Subsidiary and Humanitarian status), compared to 45% for the EU as a whole.[91]

The motivation behind this strategy surfaces if we recall the discursive contradictions with which this chapter started; particularly the contrast between the speech by Minister Borg in which he praised Malta's generosity in "giving" refugee or subsidiary status to 53% of the irregular migrants who reach Malta's shores and Judge Depasquale's estimate that the true percentage of refugees only amounts to some 2%, the rest being economic migrants. It is clear that the difference between the two accounts lies in whether one considers asylum seekers with subsidiary/humanitarian status as being refugees or as disguised economic migrants. Thus the significance of the decision to privilege the award of subsidiary/humanitarian instead of either refugee or rejected status, apparently lies in the way these statuses can accommodate and blend these two contradictory understandings of the "boat people." On the one hand they are understood as subjects of rights granted to them by EU and International law and on the other as undeserving recipients of Maltese generosity, dependent upon the Maltese state for 'protection'. While the understanding of asylum seekers as subjects of rights conforms to the way their position is understood by most international and local NGOs and by UNHCR, the understanding of asylum seekers as recipients of hospitality conforms very closely to the humanitarian logic upon which the system of detaining asylum seekers and processing their asylum claims is based, which in turn reflects and shapes social perceptions of the asylum seekers.

The table on the next page clarifies the discursive contrast between these two ways of understanding the status of "boat people" and the appropriate way to manage their presence in Maltese society:

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90 *Ibid.* Footnote 33.

91 Eurostat, Asylum decisions in the EU: EU Member States granted protection to more than 185000 asylum seekers in 2014, News Release 82/2015 -12th May 2015, *cit.*

UNHCR UNDERSTANDING	VERNACULAR INTERPRETATION
Refugee status is acknowledged by states and not granted. States which sign the Geneva Convention are legally obliged to grant refugee status to deserving applicants	Refugee status is "granted" by the Maltese State which is generous in this regard
Asylum seekers have a right to apply for asylum and should not as a rule be detained during the status determination process	Asylum seekers are tolerated on condition that they abide by the law which requires them to be detained
The Refugee Definition in the Conventions is the basis for determining refugee status	The Refugee Definition is a starting point which is inadequate. We will supplement it on the basis of our own understandings
Determining status is a matter of law: The process should focus on the elements of the definition	Determining status is a bureaucratic matter which focuses on evaluating credibility
The Convention is very specific as to who is a refugee	There is ambiguity as to who counts as a refugee as we are free to include people with subsidiary or humanitarian status. These latter are alternately classified as refugees or as economic migrants, depending on the context
Determining refugee status is a serious matter. A lot hinges on this decision	In practice it does not make much difference if a person obtains refugee or humanitarian status
It is up to the individual to decide whether or not to apply for refugee status	An application for refugee status is made on behalf of all migrants by the state
Status determination is an individualizing process, which focuses on the particular life history of the applicant	In cases where intermediate protection status is awarded, status determination is decided solely on the basis of whether one belongs to a national or other collective grouping of applicants
Asylum seekers and refugees are choice-making actors	Asylum seekers and refugees are at best people to be pitied and protected. They don't always know what is in their best interest. At worst, they are violent criminals. Most are in bad faith
Recognized refugees have rights	Beneficiaries of International Protection are given access to various benefits by our policies

13. *Conclusion - Humanitarianism as a Substitute for Law.* At this point it is helpful to recall the five earlier noted features of the system for managing asylum seekers which existed in Malta before 2001. It is clear that key aspects of this system have been preserved despite the enactment of the Refugees Act, which had inspired hopes that the underlying basis of the system would shift away from unfettered administrative discretion and towards a system based upon respect for legal rights. In fact the Maltese system continues to detain migrants, to limit legal responsibility for asylum-seekers as far as possible and to substitute a system based on benefits given according to an unfettered administrative discretion for one based upon knowable legal rights.

This chapter has documented the working of a 'system' for managing asylum seekers and their claims which is based upon a humanitarian logic. This system constructs asylum seekers as dependent upon the Maltese state, which grants them a status according to a humanitarian stance, that however imposes reciprocal duties of gratitude, patience and forbearance upon the asylum seeker. This system coexists with the formal legal procedures and statuses which envisage the granting of a legal status to the asylum seeker, giving rise to rights which are grounded in International and European law and which may be enforced against the state by the asylum-seeker. To a large extent the outcome of this system is to push particular asylum seekers out of the legal arena and into a zone where they are dependent for their well-being upon their ability to construct 'unequal friendships' and working relations with Maltese employers and state officials. Very often these relationships revolve around informal employment or the discretionary granting of benefits which is mandated more by the law of hospitality and gift exchange than by the law of the state, strictly understood.

At the same time it is important to note that we are not talking about a clear divide between law and society here; since it is the Maltese state's own laws and administrative policies which are simultanously constructing these two parallel normative systems for dealing with the 'boat people.' The result is the kind of superimposition of two normative orders which have been described by comparative lawyers, like Esin Orucu, who talks about 'covert mixtures' in which formal law co-exists with different socio-cultural norms which influence the working of the formal law itself.[92]

Hospitality changes its character when it comes to be inscribed, however, covertly, into legal statuses and relationships. It acquires a durability and inflexibility it does not possess as a social code. This is what seems to be behind many of the complaints of the migrants who in July 2015 organised a protest march in Valletta, requesting the Maltese to "protect the lives you have saved." In the words of a memorandum prepared by these migrants:

"*Above everything else, there is the question of our future – we always ask ourselves: 'If we are still here in 10 years who will we be? What can we expect? Will we still be just refugees, renewing our permit every three years or can we hope for something more permanent?'*"[93]

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92 ÖRÜCÜ E., 'Turkey's synthetic legal system and her indigenous socio-cuture(s) in a "covert" mix, "Mixed Legal Systems at New Frontiers", (ed. by) ESIN ÖRÜCÜ, Publisher London, Wildy, Simmonds & Hill, 2010, pp.159-203.

93 See Memorandum prepared by the Malta Migrants Association for the *Public Consultation: Mind D Gap – Together We Can Make A Difference National Migrant Integration Strategy 2015-2020* and viewable on: https://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Documents/Integration/11.Malta%20Migrants%20Association.pdf.

III

European integration and its impact on the national disciplines on parentage

Equality between men and women as a long lasting process

Nevila Saja

The right of free circulation of citizens has some effects also in relation of the parent responsibility, presumption of paternity, or declaratory action and disownment of paternity. Many aspects of children's lives are, however, not properly within the competence of the EU, but the free market has generated unwanted side-effects for children. And also when the UE law rules the free circulation of citizens, the status of the person circulates with the person himself/herself. Thus the paper at the light of UE law and how the *EU legal systems influences indirectly in a "paidocentric" the relationship between parents and children, also if this area of rules are not part of the EU harmonization process, and extends the analysis to the relevance or irrelevance of the sexual orientation of the parent and in reaction with the children's rights.*

One of the main principles of the German Constitution, the Basic Law (Grundgesetz), is the equality of men and women, as laid down in Article 3.2. The early interpretation of the standing between men and women was mainly influenced by the mentality of the 19th century. Also the family law which belongs partly to the Civil Law Code (BGB), supported the dominant role of men in society. The rules of equality were further laid down in the draft law of the 1896 which finally entered into force in 1900, as we shall see below, this had a significant impact.

The following years had proved to be crucial in the way in which the roles of men and women were shaped and seen continued to be reflected in the civil law. During this time the family structure had been predominantly patriarchal. Generally women had the same rights and duties as men in society however, as we shall see in detail further, in their daily life, women had to accept the dominant role of the men. Their position had been in many ways more inferior. The biggest differences of the roles were seen in their social life, which had principally been in the hands of the husband. This was laid down in Article 1354 of the old BGB, which granted the husband exclusive rights in making all decisions relating to family matters.

The Constitution of Weimar had been implemented the following year after the First World War. This constitution of 1919 established the principles of equality of men and women as evident in. Article 109 (1) of the Weimar states that "All Germans are equal in front of the law". However, this is followed by article 109 (2) which state that "In principle, men and women have the same rights and obligations". From this section it is arguable that this caused considerable controversy as clearly women and men were granted equal rights as citizens, although, in principle only. Therefore, making this section ambiguous in that it gives rise to the opportunity for the law to be interpreted perhaps differently than what should have been intended.

Further inequalities between men and women were highlighted in Article 1356 BGB which identified the woman's main role was that of a housewife and mother within the household. This arguably viewed as discriminatory and is seen to be in direct contradiction with the Weimar constitution, mentioned above, which allowed for equal rights for both men and women. The wife was obliged by the same provision (Article 1356 BGB) to work in the household and in the commerce of the husband as far as such activity is "usual" according to the circumstances in which the spouses live. This was considered partial as these duties were only for the wife and no similar provisions were placed on the husband to abide by the same rules. This paragraph therefore, essentially bound the women and their property to their husbands. Furthermore, the husband also had the exclusive rights of the decision making in matters relating to the education of the children and was also able to unilaterally terminate the employment contracts of the wife, even against her will.

In the following years, the opposition against the law began to grow in their protest against the inequitable formulation. As a result, this led to a new formulation of the law in the new constitution after the Second World War in Germany. In 1949 the German Constitution (Grundgesetz) entered in force. The equality of men and women was now laid down in Article 3.2. The new formulation was that "Men and women shall have equal rights". Furthermore, "the state shall promote the actual implementation of equal rights for women and men and takes steps to eliminate disadvantages that now exist".

As well as the new law a second Article was implemented to the Basic Law, Article 117 BL. This Article provided that the principle of eternal equality of women and men was not going to be enforced all at the same time, but rather gradually. This provision contained a specific order which stated that, those legal norms which failed to correspond to the principle laid down Article 3.2 were still to remain in effect but not beyond the spring of 1953. This was a direct order to the German Parliament, written down in the constitution. The constitution is the supreme law within a State and as such all other legal norms have to correspond to what is laid down in the constitution. Therefore, orders of the constitution have to be implemented in the whole legal system of a state.

The constitution also provides for other orders, similar to those mentioned above, which provide further guidance relating to this topic. For instance, Article 6.5 BL which includes special constitutional equality rights regarding those children who are born out of wedlock.

This Article states, "children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage". This Article therefore established that no matter what marital status the child was born in, they all enjoy the same opportunities. Furthermore, a crucial point to consider here is the fact that these children were at first referred to as either legitimate or illegitimate children depending on whether they were born within wedlock or out of wedlock, however, as referred to in this Article, this was later changed to either those born "within marriage" or "outside marriage", a terminology which is less discriminatory than that previously used. Accordingly, these points highlight the progress that has been achieved through time.

However, not all constitutional orders are always enforced, and consequently this leads us to consider the question of what consequence should be imposed should the specific

constitutional order not be fulfilled by the legislator in time. An example of this is referred to above (Article 117 BL) regarding the equality between women and men, whereby the legislator had been given a time frame up until the spring of 1953 in which to act upon, but did not fulfil his duty. The court confirms in its decision the direct applicability of equality which has to be satisfied now by the judges directly, even without the existence of legal basis in a piece of legislation. If the legislator fails to fulfil the constitutional order in time, the judges have to power to act and apply the constitution directly. This was first established in 1953, whereby the constitutional court relied on a case of the Higher Regional Court in Frankfurt. This particular case related to a divorce of a married couple, in which the woman requested that the man should pay the costs of the court proceedings. However, the court was unable to make a decision until they were certain that they were conforming to the basic principles of the constitution. The court referred this application to the constitutional court and requested a detailed definition of the application of the law which had not been adapted by the legislator in time. The Higher Regional Court, however, preferred to use the existing law even though the legislator had not fulfilled his duty. As far as it concerns to the Higher Regional Court of Frankfurt, they took guidance from the Constitutional Court, and in particular requested to know whether Article 117 BL was in conform with the constitution. Ultimately the decision of the Constitutional Court was that this was not unconstitutionally. The constitutional court denied the request of the Higher Regional Court, to declare that the second half sentence of article 117 BL unconstitutionally. Article 117 first sentence did not breach to the constitution because it is a norm itself which specified the requirements of Article 3.2 BL.

The Constitutional Court used its power to take influence on the development of the law. In its decision, the court declared that the single terms of equality between men and women are inoperative. The second part of the first sentence of article 117 BL was the base for the decision. The time limit for adopting the law to the new constitution was the 31 March 1953. With the clear formulation of Article 117 BL to Article 3.2 BL had the legislator made clear the importance of equality. This belongs to the fundamental principles of the German constitution.

One of the first important laws was the Equality Law of 1958. This was the end of the era when legal certainty was not given since the judgement dating back to 1953. The 1958 Law brought important changes in the legislation of equality between men and women. Which included firstly, the right of the husband to be the ultimate decision maker in all family matters was removed. Secondly, the right of the husband to terminate the employment of the women was also removed. Furthermore, the community of acquisitions was at the same time established, this meant that the husband was no longer the only one with the possibility to administrate the heritage that the family possessions. For instance, in should the married couple get divorced, the court will consider both the properties that the couple bought before they got married and also the properties they accumulated during the marriage.

However, although the above rights have shown considerable positive change in favour of the women with regards to the equality matters between the wife and husband; little has changed when considering the decision making concerning the children of the family.

In cases of children matters the husband is solely responsible for the decision making, and this was a part of the new law which brought much dissatisfaction to many women. For this reason many cases of complaints were made by women, one of which was from four women belonging to the Women Lawyer Association. The principle purpose their complaint was against the discrimination of women in the matters concerning the education of children. Their primary purpose of the complaint was against Articles 1628 and 1629 Abs. 1 German Civil Code (BGB). As a result of this case, The Federal Court of Germany repealed these Articles to allow more rights to be given to mothers. Furthermore, it was established that the above Articles were not compatible nor were they acting in accordance with Article 3 abs. 2 of Basic Law, by which the main principle was essentially to establish equality between women and men in all matters, as mentioned previously.

In addition to the legislation, society also played a big role to the obligations of what a man or a woman is defined to do. This perception allowed us to go back to the old tradition. In fact religion also played a main role in this relationship whereby it was considered proper for the husband to be the breadwinner and wife to look after the children. This was further emphasised by an old expression that the society used over the years was that the woman has to do the housework and the man has to work to take care of his family, this kind of discrimination was dominated through a patriarchal society.

Opposition to this view of living standards was also an opposition to traditions and the religion. Needed again was the resistance of women against the politic dominated by men and also the decision of the German Supreme Court which had shown the legislator his boarders, the fundamental right of equality.

As time went on, further decisions were made concerning the equality of men and women and as a result narrowing the gap. A few examples of these developments include the following: In 1968 the Maternity Protection Act was introduced or in 1970 new laws concerning the legal status of the children born outside marriage were considered, as mentioned above. In this particular case a time limit was set by the Supreme Court in the year before. Here the court decided that children out of marriage have the same maintenance rights as those children born within a marriage, even in cases where the father dies before the birth of the child.

Another important Law was the Pension Reform Act in the year 1972, which allowed housewives the right to enter into the pension insurance. Additionally, one of the most important Acts in that time was the Reform of Marriage and Family Law in 1977. This reform was significant as the civil law changed the way in which the role of a wife was perceived. Firstly, the role of the house wife was no longer defined or bound by the same boundaries as previously and this allowed women to have more freedom. Secondly, women now had the right to use their own surname or a common surname. A further change was seen in the divorce law, where the the principle of guilt changed into the principle of the irretrievable break down (of a marriage). Moreover, an essential and relevant reform was the pension right adjustment which aims to provide the social insurance for divorced housewives and mothers. Although less significant, the Supreme Court interacted to take corrective action to some parts. One point which might be the most important of the critic was the hardship case referring to deny the divorce of a marriage in special cases after five years. The critic was that it would be hard to prove every single term of a divorce

and so unfair judgements could follow. The reaction of the legislator was to delete the passage completely instead adopting it to the new requirements.

Another significant law was established in 1980, which allowed for equal treatment between men and women at work. Equal treatment at work is written down as a legal right on the German civil code, and included firstly, the right to equal charge or payment. Secondly, it contained provisions that the advertisement of vacancies should be formulated in such as way as to be gender-neutral. And thirdly, if an employee feels that they have been discriminated at work, they can bring the case to the court against the employer, however, they must provide evidence to prove that such discrimination had in fact occurred. The new law had also been an adoption to the new rules of the European Community. But the influence of the European law will be discussed more detailed later.

As time went on new legislation came into effect in order to improve the conditions for working women and also for families. The main purpose of such legislation was to make it easier for women to gain access to the working environment. Therefore, in 1985 the Law Act on the Promotion of Employment was established. This main purpose of this Act was to improve the conditions of women and families with children. However, its main purpose was to decrease unemployment levels. The content of the Act nevertheless brought important reformation in the law for women, for instance part-time employment was from now on legally equivalent to full-time employment. Also women who had not been in employment for a long time period (due to the fact that they stayed at home with their children), were now able to gain and easier better access to vocational training.

A further new legislation was established the following year, which brought another opportunity for parents to handle their work and the education of their children. The child-rearing allowance law implied benefits for parents when one of them stayed at home after the birth of a child, irrespective of whether the stay at home parent was the mother or the father. The benefits were paid for a time period of ten months, in the first six month this was independently from their earnings. In addition, this provided the stay at home parent to have the security and protection against dismissals.

To further improve the situation for women, the changes were not only seen through legislation but on a political level also whereby important reforms were additionally made, such as the implementation of a new section for women at the Ministry for Youth, Family and Health. From 1986 onwards this is now called Ministry for Youth, Family, Women and Health. This step was significant for the promotion of equality between men and women in society. The tasks of the Ministry in the case of equalisation are to take influence on legislation by consulting other Ministry's. As well as the work on a political level, particularly the work on new legislation, the Ministry also supports women's associations or organisations in their work. Furthermore, it creates its own programs to improve the situation of women. Nevertheless, the most important fact is the direct influence to the legislation. In 1990 with the German reunification, the Ministry was extended through the East-German Ministry Family and women which was founded 1990. This brought also greater staff with it for the West-German section. Due to this development in the years 1989/90, the section for women at the ministry became its own department. Thereby it received more rights and tasks, which also strengthen the position and the influence of it.

In July 1992, the Pregnant and Family Welfare Act was established which included new regulations to help single mothers and families. The content of the law had provided guidance in family planning or the legal claim for a place for children at the age of 3 in kindergarten. Furthermore, the time was extended for home care of a child from 5 to 10 days in a year, for single parents, to 20 days in a year. The age of the child, who has to be take care of was also extended to 12 years.

In 1994 significant changes were made in the adaptation of the Civil and Basic Law. The first legislation concerned the name of a married couple. From now on a couple was free to choose which name they want to give themselves following a marriage, therefore, the woman was no longer bound to take the surname of her husband. The second law was the adaptation of the law of equality. It was the first major reformation of the principles established in the decades before. Reforms were made on different fields of the law. The main aim was to improve the conditions for women in the working place. This therefore, also implemented new legislation against sexual and the new law of filling of seats in a committee which is under the influence of the federal state. A further legislation adapted was that against gender discrimination in work place, in particular when applying for workplace or career advancement.

Another point which occurred in the same year was that the German Basic Law was extended by a new paragraph. This did not have an immediate influence to women as such; however it did have an effect on the legal system as a whole. The new paragraph was inserted in Article 3.2 BL and stated that, "The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist". This addition to Article 3.2 established a significant order to the legislator and to politics, however it was not something entirely new, but rather it was an enforcement of the decision of the German Constitutional Court in 1953. This supplement to the Basic Law was achieved under the pressure of female associations and the female members of the committee. The new part of Article 3.2 BL was now seen as a specific Constitutional Order by the judges of the Constitutional Court, similar to children born out of wedlock as previously mentioned. It took one year until the constitutional court made the legislator clear, that he now had to act. This could also happen by laws or rules, which prefer women if a disadvantage is eliminated. The general order is from this time on a standard for every act of the legislator. Every new law would be compared to this order and if there will be any doubt in its conformity it will be unquestionably brought to the constitutional court. Therefore, the effect to the whole legal system would also have an effect to the situation of women's rights as a whole.

The German parliament did not only make decisions to improve the situation of women in workplaces and those with children, but it also tried to improve the situation for women within a marriage. As mentioned before it gave women the possibility to keep their own names. However, other decisions were not so quick to be implemented and rather took a long time. In 1996 finally the parliament also decided to penalise rape inside a marriage. It took 25 years until this law could become effective but it gave women the possibility to determine their sexual life even in a marriage.

The progress of equality also reached fields which had been dominated by men for a long time. Further variations were made to the Basic Law by the legislator in 2000 which

now allowed women to be part of the military and take part in the armed forces. This was a major mile stone in achieving equality as until this time access in some fields had been restricted for women.

However, women were not the only ones who benefit from changes in legislation, but men also. Women had been free in their decision to join the armed forces and could not be forced to serve in the armed military. However, since 2011 after the conscription was exposed by the legislator men are now also free in their decision to join the military. This decision took considerable time to be implemented but it was also a decision of the European Court of Human Rights (ECtHR).

This was not the first time that the European Union took influence on the legal system of Germany, although the decision of the European Court of Human Rights was not always needed in order to change a particular legislation. Since the European Community was established, it had influence to the German law of equality. In most cases, German laws were replaced or adapted to the principles of European Community as time went by. One of the first implementations of European guidelines was the already mentioned law of Equal Treatment at work in 1980. But the German government and legislator used the guidelines to establish an even more far-reaching law. In actual fact the European Community guidelines demanded only for better dismissal protection in the case of a complaint against inequality.

In the late 1990's attempts has been made to establish a women's committee at the level of the European Community, however this was not satisfied until today. Although, an informal committee of women of the European Community was founded in Germany in 1988, but even this committee does not have the same rights or power as that of accepted committee, therefore, this is a chance for the women to connect and to increase their pressure in politics and legislation.

A further influential legislation was the Treaty of Amsterdam which was signed in 1997 in which the principles of equality influenced the basics of the treaty of the European Community. Article 2 laid down the equality between men and women, Article 3 stated that that the community will take all measures to eliminate disadvantages and support equality in all areas. Furthermore, written down in the Treaty was a direct order in payment for work, whereby it establishes that men and women have to be paid equal, not only for equal work but also for comparable work like men.

The fundamental rights of equality between men and women in the Treaty of the EC are very similar to the principles of the Basic Law in Germany. Although the principles in the German BL are older, the European agreements have direct influence to the law of its members. Every member of the EC or now EU has to transfer the principles to their state law.

The non-discrimination rules, (not only gender discrimination) had influenced the German system also. An example is the already mentioned is the equal treatment at work legislation in 1980 and the non-discrimination rule had been enhanced since that time.

To conclude, the development of equality between men and women is a process which has not ended until today. In the last decades since the Second World War many positions, laws and directives have changed. The German legal system had to realise the importance of equality and the ever changing positions in society. Women especially had

fought for their right of equality since the beginning of the German federal state. Changes have been ongoing for a long time, with change to the voting system in 1919 or the laws of the Weimar Constitution, however the real changes were made in 1953 through the decision of the German Constitutional Court. This was an indication of to the difficulties that women faced at the beginning; they had to fight for their rights, and in some cases at the highest courts in Germany. However, as shown as time went on, there was more influence in terms of legislation, as shown above, which gradually narrowed the gap of equality between men and women. In the last 30 years, most pressure came from the EU since equality is one of the basics aspects of the union. However, the reality shows in many parts somewhat a different picture. Even though equality is written down in laws, women have to suffer under disadvantages which are not always apparent. An example of this is still the within the work place, whereby research shows that women are less paid than men in average for the same work. Also representations in the highest committees are mostly male dominated. However, the representation in political body has changed somewhat with a female Federal Chancellor and six female ministers. But the plan of a law to increase the proportion of women in the highest committees in economy shows also that a negotiated agreement did not change the situation. Therefore it is fair to say that, despite many changes and improvements in the past, there are still disadvantages for women in society. A real change to de facto equality could only become practice if the society is willing to act and not wait until the next decision of the German Constitutional Court or the European Court of Human Rights.

European integration and its impact on the national disciplines on parentage

Roberto Cippitani

The right of free circulation of citizens has some effects also in relation to parent responsibility, presumption of paternity, or declaratory action and disownment of paternity. Many aspects of children's lives are, however, not properly within the competence of the EU, but the free market has generated unwanted side-effects for children. And also when the EU law rules the free circulation of citizens, the status of the person circulates with the person himself/herself. Thus the paper at the light of EU law and how the EU legal systems influences indirectly in a "paidocentric"manner the relationship between parents and children, also if this area of rules are not part of the EU harmonization process, and extends the analysis to the relevance or irrelevance of the sexual orientation of the parent and in reaction with the children's rights

1. *Family law and European legal sources*. During the last decades, the legal discipline of parentage has been deeply modifying at an enormous speed, when compared to other branches of private law. The filiations from the legal point of view have been strongly engraved by the societal changes, and on the other hand, the modifications of legislation in this field have contributed to a new idea of the role of children in society, and of their relationships with parents and adults.

During a span of three thousand years, stretching from the Roman law to the modern age, children were considered to be objects of the legal relationship with their parents. In the last centuries, this opinion was just corrected by a paternalistic vision, which has considered the children as imperfect beings unable, by definition, to take care of their own interests[1].

Therefore the Civil Codes of the XIX century (like the French "Napoleon" Code Civil) and those of the first half of the XX (as the Italian *Codice Civile* of 1942) considered "minors" to be children from birth to the age of majority, without any capacity to legally act.

Furthermore the relationship between children and parents was characterised by the parental authority ("potestà", "potestad", "autorité"), conceived as a "set of powers"[2] which the law recognises as a private office in the interest of children[3], who are subject to

1 See, for an historic overview of the legal and social concept of the child, PALAZZO A., "La filiazione", Trattato Cicu Messineo, II ed., Giuffrè, Milano, 2013, *passim*.

2 BELVEDERE A., "Potestà dei genitori", Enciclopedia giuridica Treccani, vol. XXIII, Roma, 1990, pp. 1-2.

3 SANTORO-PASSARELLI F., "Poteri e responsabilità patrimoniali dei coniugi per i bisogni della famiglia", Rivista trimestrale di diritto e procedura civile, 1982, p. 8 f.

those powers[4].

The parental powers well complied with the ancient idea of the family as an authoritative social group under the authority of the *pater familias*[5].

Such a group was considered as a fundamental structure of the State, and was conceived from a formal point of view, composed by a married couple and by the children born in the wedlock. The child born out the marriage was considered illegitimate.

After the Word War II, with the adoption of the national Constitutions, the rights of people become the main focus of the legal discipline of the family[6]. The power of the father-husband was cancelled but still, in spite of this, the family is still considered as a group. It is thought of though rather as the frame in which the personality of the individuals has to develop.

The Constitutions have recognised, among the other fundamental rights, those of the children to be cared for, maintained and educated by their parents or by other persons, in case the parents cannot provide for (see for example the Article 30 of Italian Constitution).

The Constitutions led the family law to a true Copernican revolution, recognising the rights of children and putting them at the centre of the entire legal system.

This focus on the rights of children imposed to protect them independently from the marriage of the parents.

The subconstitutional legal sources progressively were conformed to the Constitutional dispositions. During the 70s of the XX century in most European Countries, the legal discipline of the parentage, as well as, more in general, the family law, was amended.

In particular, in Italy, the Law No. 151/1975 modified the First Book of the *Codice Civile*, reforming the entire discipline of family relationships, especially concerning marriage and parentage indeed[7].

The reform of the 70s and the recent laws allows the domestic disciplines to better comply with the constitutional principles.

However the Italian legislation, as well as other European Countries, has to face not only with the respective Constitutions, but also with the rules provided, at the continental level, both by the European Union and by the Council of Europe.

In particular, the European Union deals with family relationships, only from some limited perspectives, in order to safeguard the cultural and historical differences in the Member States, which could prevent any form of unification and harmonisation.

Under the European Union law, just with the Treaty of Lisbon explicitly, the family law becomes as a communitarian competence, forming part of the policy of judicial

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4 Cfr. SANTORO-PASSARELLI F., "Dottrine generali del diritto civile", Iovene, Napoli, 1987, p. 73.

5 Cfr. RESCIGNO P., "Personalità giuridica e gruppi organizzati", Id., Persone e comunità, Cedam, Padova, 1988, p. 111.

6 PERLINGERI P., "Famiglia e diritti fondamentali della persona", Legalità e giustizia, 1986, p. 488.

7 During the following years, other legislative interventions were put in place by the Italian legislator, in particular in order to make more effective the dispositions of the judge in the situations of crisis of the marriage (see for example the Law No. 154 of 4 April 2001) and of the no married parents (see the Law No. 54 of the 8 February 2006, concerning the joint custody of the children in case of separation and divorce).

cooperation in civil matters (Article 81 Treaty on the Functioning of the European Union, hereinafter "TFEU").

But this competence is established only with respect to the cross-border implications of family relationships and on the base of an exceptional legislative procedure, which requires unanimity in the Council and only a consultative role of the European Parliament (Article 81, par. 3 TFEU, which makes an exception to the ordinary legislative procedure).

In this matter, just a couple of specific legislative sources have been adopted (see the Council Regulation No. 2201/2003 of 27 November 2003, called Brussels II bis, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in the matters of parental responsibility; see also the Council Regulation (EC) No. 4/2009 of 18 December 2008, providing the applicable law, recognition and enforcement of decisions, and cooperation in matters relating to maintenance obligations).

Other dispositions are contained under the Charter of Fundamental Rights of the European Union (hereinafter referred to as "EU Charter"), and, within the system of the Council of Europe, under the European Convention of Human Rights (hereinafter referred to as "ECHR"), today making a section of the EU law (see the Article 6 of Treaty of the European Union).

This paper aims at verifying if those few provisions of European Law concerning family, as well other legal principles[8], are able to impact on the domestic regulation of family relationships and in particular on the parentage.

In particular the analysis will be carried out on the Italian legislation, which is traditionally less reactive to changes in the family matter, from social and legal viewpoints, with respect to other European Countries.

2. *The substantial definition of family relationships*. Within Europe, the national and supranational legal sources underline that the familiar relationships main task today is to protect the individual rights.

This leads to overcome the purely formal conception of the family, leaving open the possibility of protecting the person in all familiar relationships, regardless of their formal recognition by the State.

According to the continental case-law this should mean Article 7 of the Charter of Fundamental Rights of the European Union and the Article 8 ECHR, which both protect the "family life".

This attitude of the European regional law depends on the indeterminacy of legal sources in the familiar matter, which has facilitated the work of the regional courts (especially the European Court of Human Rights) to apply protection to a large number of situations[9], quickly adapting the legal meanings to societal changes[10].

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8 SANZ CABALLERO S., "La familia en perspectiva internacional y europea", Tirant lo Blanc, Valencia, 2006, p. 29.

9 COUSSIRAT-COUSTÈRE V., "Famille et CEDH", Protection des droits de l'homme: la perspective européenne. Mélanges à la mémoire de Rolv Ryssdal, Carl Heymanns, Köln, 2000, pp. 281-307.

10 SANZ CABALLERO S., "El TEDH y las uniones de hecho", Repertorio Aranzadi, 2003, n. 8, pp. 14-3; Id., "Las uniones de hecho en la jurisprudencia del Tribunal Europeo de Derechos Humanos",

This substantial conception of family relationships can be observed both under the EU and ECHR legal systems.

Within the EU law, the concept of "family" is considered for the purpose of the exercise of freedom of movement[11], it is not only a reference to the descendants, ascendants, spouse or registered partners, according to a national law, but also to any other member of the family or partnership (see Articles 2 and 3 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and the members of their families to move and reside freely within the territory of the Member States; see also Article 4, para 3, the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification).

The importance of "de facto" family relationships is particularly evident in the EU case-law.

For example, in the case Carpenter of 2002[12] the Court of Justice pointed out the relevance for the EU law regarding the relationship between a person (not a citizen of the European Union) with the spouse's children (see paragraph 44).

In other judgements, the care of the child is expected to show the existence of family relationships between divorced spouses[13].

Familiar relationships and especially those between parents and children are seen as instrumental to exercise the rights relating to EU citizenship.

According to the Zambrano judgment[14], the Court of Justice states that the right of residence cannot be refused to the father, from a Third Country, of a young EU citizen.

Otherwise, the child would be deprived of the "full and effective enjoyment of the rights conferred by [his] status" as a citizen of the Union (paragraph 42), forcing him to follow his father outside the EU.

The principle established by the case-law Zambrano has also been applied to the wife of the father of the EU citizen, when both spouses are nationals of Third countries[15]. Even in this situation, family relationships relevant for the EU law are those established de facto between the spouse of the parent and the child, and between that child and his/her stepbrothers.

According to the recent judgment of 10 October 2013, Alokpa and Moudoulou (C-86/12, not published yet in ECR), a citizen from a Third country, who is the mother of EU citizens, is entitled to benefit from derived right to reside in Member States (paragraph

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in MARTÍNEZ SOSPEDRA (edited by) La ley valenciana de uniones de hecho. Estudios, RGD, Valencia, 2003, pp. 37-67.

11 About the concept of the "free movement", see PIZZOLO C., "Libre circulación de personas: alcance y límites", ÁLVAREZ LEDESMA M.I., CIPPITANI R. (coord. by), Derechos Individuales e Integración regional (Antología), ISEG, Perugia-Roma-México, 2013, p. 205 ff.

12 ECJ, 11 July 2002, C-60/00, Carpenter/Secretary of State for the Home Department, ECR 2002 p. I-6279.

13 See ECJ, 22 Jun 2000, C-65/98, Safet Eyüp, ECR 2000, p. I-4747; Id. 17 September 2002, Baumbast y R., C-413/99, Rec. 2002 p. I-7091, concerning the Regulation of the Council No. 1612/68 (Articles 12 and 18).

14 ECJ 8 March 2011, C-34/09, Ruiz Zambrano, ECR 2011, p. I-1177.

15 ECJ 6 December 2012, C-356/11 and C-357/11, O. and S, not published yet.

34), based on the grounds that she is the only one to care for the children, and that she has had a family life with them since their birth (see the para 54 and 55 of the Opinion of the Advocate General Paolo Mengozzi, delivered on 21 March 2013).

Moreover, also the European Court of Human Rights finds that the protection of family life (in the sense of Article 8 ECHR) depends on the existence of de facto family ties and the notion of family should not be limited to relationships based on marriage[16].

This approach is also shown by the legal sources approved under the ECHR system, as by the definition of the "family ties" under Article 2.d of the Convention of Council of Europe on Contacts concerning Children, signed in Strasbourg on May 15, 2003: ""family ties" means a close relationship such as between a child and his or her grandparents or siblings, based on law or on a de facto family relationship").

Therefore the European Court of Human Rights considered as a family: a single mother and her son[17]; a stable partnership[18], a *de facto* partnership with or without children[19]; a couple with children conceived naturally or not, and, obviously, with adopted children[20].

In addition, the Court of Strasbourg believes that the physical capacity to procreate or to have sex cannot be considered as essential conditions for the marriage[21].

The content of family relationships is the affectivity and it has to be protected by the States with adequate acts, as stated, for example, in the case-law of European Court of Human Rights on child custody and adoption.

The measures adopted by the administrative or judicial powers have to be addressed to safeguard, as much as possible, the relationship between the child and the family of origin.

In fact, the judgment Scozzari and Giunta vs. Italy of 13 July 2000 was considered as illegitimate because of the lack of monitoring by the competent court and social services, after the award of custody to another family, which has prevented a rapprochement between parents and children.

Similarly, in the case Clemeno (Clemeno vs. Italy of 21 October 2008) Italy has been condemned because it allowed contact to be lost between the birth family and a child, who was given to a foster family (and then declared adoptable),on the bases of alleged sexual abuse by the father, which was later demonstrated as an unfounded accusation.

On the other hand, in the decisions concerning the child, the emotional ties that have been established for the family dealing with custody should be taken into consideration.

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16 European Court of Human Rights, 27 April 2010, Moretti and Benedetti v. Italy, Application No. 16318/07, para 44; see, among other, Id., Johnston et al. v. EIRE, 18 December 1986, serie A No. 112, p. 25, para 55; Id., Keegan v. EIRE, 26 May 1994, series A No. 290, p. 17, para 44; Id., Kroon et al. v. Netherlands, 27 October 1994, series A No. 297 C, pp. 55 ff., para 30, and Id., X, Y and Z v. United Kingdom, 22 April 1997, Reports of Judgments and Decisions, 1997 II, p. 629, para 36.

17 ECtHR, Marckx / Bélgica, in E. Ct. H. R., 13 Jun 1979.

18 LEVINET M., "La Revendication Transsexuelle et la Convention Européenne des Droits de l'Homme", in Revue Trimestrielle Des Droits De L'homme, 1999, pp. 637-672 and p. 648.

19 ECtHR, Saucedo Gómez/ Spain en E. Ct. H. R., n.37784/97, 8 July 1998.

20 ECtHR, Rieme / Sweden, in E. Ct. H. R., 22 April 1992, series A, No. 226-B.

21 Report of the European Commission on Human Rights of the 1 March 1979 concerning the case Van Oosterwijck, para 59.

III. European integration and its impact on the national disciplines on parentage

In its judgment in the case Moretti and Benedetti[22], the European Court of Human Rights found Italy at fault for not having considered relevant, for the purpose of adoption, the fact of prolonged custody of a child by a new family.

Furthermore, the substantial relevance of family relationships implies that supranational rules do not distinguish between "legitimate" and "illegitimate" family.

This is because it cannot discriminate against a person with respect to the conditions of his birth, according to Article 14 ECHR. The judgement Marckx vs. Belgium (see in particular paragraph 31)[23] considered illegitimate the Belgian law which did not recognise the relatives of the parents as successors for the child who was born out of wedlock.

Also in Italy, at least until the recent law 219/2012 and the legislative decree No. 154/2013 – which have eliminated some differences in the treatment of the children of non married parents. – The *Corte costituzionale* had an interpretation of Article 74 Italian Civil Code which was consistent with the formal conception of the family, and argued that children born out of wedlock were not relatives of their ancestors[24].

3. *The prohibition of discrimination for the couple of same sex*. The European Parliament since 1994, and then with other interventions (see the Resolutions of 8 February, 1994; that of March 16, 2000; that of July 14, 2001 and September 4, 2003), requires that the Member States recognise and protect the single-parent families, the families "extended" and "recomposed", and the partnerships between persons of the same sex.

The Recommendation CM / Rec (2010) 5 of the Committee of Ministers of the Member States of the ECHR, adopted on 31 March 2010, affirms that "Taking into account the child's best interests should be the primary consideration in decisions regarding the adoption of a child. Member States whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity" (see the paragraph 27).

This does not mean that the Member States of the EU and the ECHR systems are obliged to allow the adoption by same-sex couples.

Anyway the European Courts consider the same-sex couples and their adopted children fully included in the concept of family[25].

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22 ECTHR, 27 April 2010, Moretti and Benedetti v. Italy, ref.

23 See ECTHR, 13 Jun 1979, Markx v. Belge; Id. 29 November 1991, Vermeire v. Belge, series A, No. 214-C; Id. 18 December 1986, Johnston et al. v. EIRE, series A, No. 112; Id. 28 October 1987, Inze v. Austria, series A, No. 126.

24 Corte costituzionale, 23 November 2000, No. 532 (all the judgments herein mentioned are available in the official site cortecostituzionale.it); Id., 12 May 1977, No. 76; Id., 2 Jun 1977, No. 99; Id., 4 Jun 1979, No. 55. See from a critical point of view PALAZZO A., "La filiazione", ref. p. 564; BIANCA C.M., "I parenti naturali non sono parenti? La Corte costituzionale ha risposto: la discriminazione continua", in Giustizia civile, 2001, p. 591 ff.; DELLA CASA M., "La vocazione a succedere dei parenti naturali tra garanzie costituzionali e normativa codicistica", in Familia, 2001, p. 502.

25 ECtHR, 31 August 2010, Gas and Dubois v. France, No. 25951/07.

On the other hand, according to the European law, discrimination between heterosexual couples and same sex couples is prohibited[26].

In fact, even in this area, the European Court of Human Rights does not allow discrimination based on sexual orientation, which goes beyond the margin of appreciation normally recognised to the State[27].

As in other familiar matters, the Court of Strasbourg also considers illegitimate discrimination against same-sex couples, whether national legislation equates these effects to certain heterosexual couples (as in the case of registered partnerships)[28].

The European Union approach to the issue of sexual orientation discrimination has undergone a significant evolution in the last t years[29].

From the time when this issue was considered only a matter concerning human rights[30], but outside Community competences, it has come to the current situation where the prohibition of discrimination is considered a principle of European Union law, as established by the Treaty of Amsterdam and by the derived legislation[31].

The EU case-law (see below) holds that a national discipline concerning the individual's status cannot be invoked as grounds for direct or indirect discrimination.

This also applies when the domestic law is directed to the constitutional protection of the family based on marriage (as according to the Article 29 of the Italian Constitution, or by the German Grundgesetz)[32].

Of particular interest is the application of the prohibition of discrimination provided under the directive 2000/78/EC of 27 November 2000 which establishes a general framework for equal treatment in employment and occupation.

According to Article 1 of the directive "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief,

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26 See the judgment of the Grand Chamber, X et al. v. Austria, Application No. 19010/07, 19 February 2013; however for the use the same principle to exclude the discrimination, see the judgment Gas and Dubois v. France, above mentioned.

27 See ECtHR, E.B. v. France ([GC], No. 43546/02, 22 January 2008; Id., Kozak v. Poland, No. 13102/02, 2 March 2010; Id., Karner v. Austria (No. 40016/98, CEDU 2003-IX).

28 ECJ, 1 April 2008, C-267/06, Maruko, ECR 2008, p. I-1757.

29 See the analisys carried out for the Advocate General Dámaso Ruiz-Jarabo Colomer within the conclusions delivered on 6 September 2007 in the above mentioned case Maruko. See, with the respect to the Italian situation, SEGNI M., "La disciplina dell'omosessualità: Italia ed Europa a confronto", in Famiglia Persone e Successioni, 2012, 4, p. 252.

30 ECJ, 17 February 1998, C-249/96, Grant/South-West Trains, ECR 1998, p. I-621. Then the thought heterosexual and homosexual couples could not have been put on the same plan (see in particular the para 35).

31 See: the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

32 See the arguments of the Advocate General Niilo Jääskinen delivered on 15 July 2010, concerning the case C-147/08, Jürgen Römer/Freie und Hansestadt Hamburg, para 170 ff., referred to the Article 6 of the German Fundamental Law.

disability, age or sexual orientation in regards to employment and occupation, and has the purpose of putting into effect in the Member States the principle of equal treatment".

The application of this directive should be "without prejudice to national laws on marital status and the benefits dependent thereon". (recital 22)

The Court of Justice, in the judgment of 12 December 2013, case C-267/12, Frédéric Hay vs. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, states that the directive "must be interpreted as precluding a provision in a collective agreement, such as the one at issue in the main proceedings, under which an employee who concludes a civil solidarity pact with a person of the same sex is not granted the same benefits, such as special leave and salary bonus, which are granted to other employees on the occasion of their marriage in Member States that do not permit same sex marriage., The conditions relating to the granting of those benefits, are quite comparable to an employee who marries".

Indeed, as the Court of Justice points out that the Article 2(2)(a) of Directive 2000/78 provides that direct discrimination occurs when a person is treated in a less favourable manner than another one in a comparable situation, such as in the situation listed in Article 1, including sexual orientation.

The existence of direct discrimination presupposes that the situations were at least comparable (see, inter alia, Römer, paragraph 41), not in a global and abstract manner, but in a specific and concrete way in the light of the benefit concerned[33].

Even if a civil partnership and the marriage are not considered as comparable (in respect of the formalities governing its celebration, the possibility that it may be entered into by two individuals of different sexes or of the same sex, the manner in which it may be broken, and in respect of the reciprocal obligations under property law, succession law and law relating to parenthood); and even if the Constitutional French Court highlighted that difference in relation to the survivor's pension, according to the Court of Justice, on the contrary, the situation of married employees and homosexual employees in a "PACS" for the purposes of the grant of days of leave and bonuses at the time of marriage are comparable (see the judgment Hay, points 38 and 39).

The case-law of the Court of Justice, concerning the argumentations there in provided, lead one to understand that they are contrary to EU principles in countries such as Italy which do not permit same sex marriage, nor civil partnerships are not in line with the EU ideals.

So, even if the Court of Luxemburg, requested to establish the legitimacy of the Italian law which recognises the right to perceive the pension only for the spouse (and not for the partners), refused to decide on the ground of the assumption that the case was not linked to the EU law[34].

Anyway, some doubts may arise about the legitimacy in the European framework of the jurisprudence of the Italian Constitutional Court (see the case 138/2010) that also recently found as legitimate a different regulation between homosexual unions and heterosexual marriage.

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[33] See the case Maruko, para 67 to 69, and Römer, para 42, both above mentioned.

[34] ECJ, Order of 17 March 2009, C-217/08, Mariano, ECR 2009, I-35.

4. *The "paidocentric" law*. The substantial conception of family relationships, under the European law, leads to put persons who are most in need of protection in the centre of the legal system.

According to the Court of Justice[35], the State's obligation to respect the personal and family life should be built around the protection of the interests of the child, that becomes the pivot of the entire legal system (in accordance with Article 24, para 2 the EU Charter).

The EU and national legislation have to be interpreted in the light of that interest (see thirty recital of Regulation No. 2201/2003).

The "best interests of the child" is the key of the international legal instruments concerning children (see the Convention on the Rights of the Child of the United Nations 20 November 1989; see the European Convention on the Exercise of Children's Rights, signed in Strasbourg, on 25 January 1996)[36].

The interest of the children is always prevalent on other interests, such as, for example, those relating to public policies on migration[37].

The interests of child implies the "protection and care as is necessary for their well-being" (Article 24, para 1, EU Charter), as well as the rights such as those established by the Convention on the rights of the Child, to the name, the nationality, the family, food, health, home, play, education, tolerance, peace, solidarity, protection against abandonment, cruelty, exploitation and discrimination, and the right to a "full life" for children with disabilities.

Also it is solemnly declared that "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration". (Article 24, para 2, of the EU Charter).

However, the European law not only establish a paternalistic protection of children as vulnerable person.

To describe the feature of the modern legal systems, especially of the European law, Antonio Palazzo, uses an expression of Carbonnier, which speaks of "paidocentric law"[38].

Along with "Copernican revolution", there is a changing of the axis of the legal systems to the child. Also recently a "Relativistic turn" has occurred, due to the new position of children within the parentage. The children are not longer just the object of paternalistic attention of the parents, but they become the main actors, holders of supranational and constitutional rights, such as the freedom to express their own opinions and the right to be heard in any judicial and administrative proceedings affecting it.

Even this change has been produced by the rules provided by the international or supranational law.

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35 C-540/03, Parliament/Conseil, ECR 2006, I-5769, para 58.

36 According to the case-law of the Court of Strasbourg on the interest of child, see in particular EC-THR, Neulinger and Shuruk v. Swiss, 6 July 2010, para 49-64.

37 See the conclusions of the Advocate General Eleanor Sharpston of 30 September 2010, concerning the case C-34/09, Ruiz Zambrano, para 61.

38 PALAZZO A., "La filiazione", ref. p. 533; Id., "Famiglia e paidocentrismo tra carta dei diritti fondamentali e ordinamenti civili", in PALAZZO A., PIERETTI A. (coord.), Incontri assisani nell'attesa di Benedetto XVI, ISEG, Roma-Perugia, 2011, p. 71 ff.

In particular, those legal sources recognise rights of children which are often not explicitly recognised by the domestic constitutional law, like: the freedom of expression (Article 24, para 1, EU Charter); the right to mobility (see for example Article 165 TFEU); the right "to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests" (Article 24, para 3, of the EU Charter)[39]; the right "to be heard".

In particular, the right to be heard has been formalised by the EU Charter(Article 24, para 1) and by the secondary legislation, such as the by Regulation No. 2201/2003 (see, in particular the Articles 11, para 2, ff.; 23 letter. b); 41 para 2).

The right to be heard has to be fulfilled at any stage of the procedures concerning children. Otherwise the whole procedure[40] must be considered as illegitimate, as stated for instance by the recent Italian case-law[41].

5. *From the authority to the "responsibility"*. As above mentioned, according to the traditional private law, this relationship is characterized as the basis of a legal position of the parents, the parental, conceived as a power.

This conception is incompatible with the current (in particular supranational) legal systems which in any case protect the rights of children and, above all, provide obligations and penal consequences for the parents in cases of non fulfilment of their duties.

Both the EU Regulation No. 2201/2003 and the Convention of The Hague of 1996 (Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children) use the expression "parental responsibility", also used in some European national legislations, in order to make reference to the set of subjective legal situations between parents and children.

Responsibility has to be considered the most complex of the legal instruments to protect the "superior interests of the child" (see the recital 12, of the Regulation No. 2201/2003, see also the Preamble and other provisions of the Hague Convention).

In addition, the definition of "parental responsibility" is actually so broad as to include all which is useful to the care of the child[42].

The notion of "parental responsibility" used in Regulation No. 2201/2003 "shall mean all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, operation of law, or by an agreement having legal effect. The term shall include rights of custody and rights of access" (Article 2, No. 7).

This set of obligations of the parents is associated with the rights of the child which are recognised at national and supranational levels, as seen in the previous paragraph.

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39 See C-403/09 PPU, Detiček, ECR I-12193, para 58-59.

40 GRAZIOSI A., "Una buona novella di fine legislatura: tutti i "figli" hanno eguali diritti, dinanzi al tribunale ordinario", in Famiglia e Diritto, 2013, 3, p. 263.

41 Tribunal of Varese, 24 January 2013, in Corriere del Merito, 2013, 6, 619 comment of PAPARO.

42 It is clear in the elaboration of principles by scholaras as the "Principles of European Family Law Regarding Parental Responsibilities", by the Commission on European Family Law (in ceflonline.net), which under the Article 3.9 set out "Parental responsibilities may in whole or in part also be attributed to a person other than a parent".

In Italy, only recently, the Law No. 219/2012 has modified the Codice Civile introducing the notion of responsibility, which now substitutes the obsolete concept of "potestà".

Anyway, there are other discrepancies which have not been dealt with by the Italian law.

Indeed, in accordance with the substantial idea of filiations, the national legislation should provide legislative and administrative instruments to protect the children not only through the responsibility of parents or guardians, but by means of all people who have a privileged relationship with the child (see Article 3, para 2 of the Convention on the Rights of the Child of 1989).

On the basis of the substantial concept of family relationships, at the regional level it is considered that the right to respect of private and family life is inclusive, not just the parents' relationship with the child, but also by their relationships with relatives, such as between grandparents and grandchildren[43].

Some national laws have developed this idea, highlighting the role of the "reference persons" using the expression contained under § 1685 BGB (Bezugspersonen).

The UK Children Act 1989 provides some dispositions concerning the "step-parents". For those persons, it is provided the acquisition of the parental responsibility, based on the agreement with the parents or on a court order (see Article 4).

Furthermore, the Children Act provides that the courts may impose that parents would allow visits and assistance for the children from persons like (see Article 10): the spouse or partner of the other parent; every person who has lived with the child for at least three years; every familiar who has lived at least one year with the child, and in general any person identified by the court to satisfy the interest of the child[44].

In France, on 2009, an Avant projet de loi sur l'Autorité parentale et le droits de tiers was submitted to the attention of the Parliament. The draft of law, among other topics, aimed at recognising the right to put in place some "ordinary acts", such as those related to child health care (such as vaccines, dental care and the treatment of minor injuries); as well as the application of administrative documents; relationships with schools, etc. to persons other than the parents.

Moreover, independently of the success of this project, which so far has not had much luck especially for ideological reasons, the French legislation provides instruments to formally involve other persons in the care of the child, as the delegation de l'autorité parentale (see Article 377 Code Civil), according to which "Les père et mère, ensemble ou séparément, peuvent, lorsque les circonstances l'exigent, saisir le juge en vue de voir déléguer tout ou partie de l'exercice de leur autorité parentale à un tiers, membre de la famille, proche digne de confiance, établissement agréé pour le recueil des enfants ou service départemental de l'aide sociale à l'enfance ", ("The parents, together or separately, may apply to the court to see delegated all or part of the exercise of parental authority to

[43] ECTHR, 13 Jun 1974, Marckx v. Belge, ref.; Id. 9 Jun 1998, Bronda v. Italy, No. 22430/93, Reports of Judgments and Decisions, 1998-IV, § 51.

[44] According to the Article 8, para 1, the contact order is defined as "an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other".

a third party, a member of the family, worthy of close confidence, which is authorized for the collection of children, or county department of social assistance to children when the circumstances require so").

The second paragraph of Article 371-4 of the Code Civil states that "Si tel est l'intérêt de l'enfant, le juge aux affaires familiales fixe les modalités des relations entre l'enfant et un tiers, parent ou non". ("If it is in the interest of the child, the family court judge can lay down the rules regarding the relationship between the child and the third party, regardless of whether the person is a relative of the child or not").

On the contrary, in accordance with the traditional concept of family, the Italian law does not recognise other types of parents or other persons formally identified by the judge as responsible for the child.

Just now, the relevance of the role of grandparents is being formally recognised by the new Article 317-bis of the Code Civile, as modified by the Legislative Decree No. 154 of 2013.

However, the question of the position of the third persons in the care of the child is emerging in the Italian case-law, which states that divorced parents are entitled to involve their child in living with a new partner[45].

6. *Responsibility and the biological and social grounds of procreation*. Within the European law it is possible to find some principles concerning the relation between parentage and biological aspects of the procreation.

a) The first principle is the freedom of procreation. According to the European Court of Human Rights, Article 8 ECHR recognises the right to become or not become a parent[46].

The respect of private life includes the right to access the techniques of medically assisted procreation in order to become genetic parents[47], among which the heterologous fertilization[48].

Each State decides which techniques to make available for medically assisted procreation, as also recently stated by the Court in the case S.H. v. Austria. As a matter of fact, there are certain matters that involve sensitive moral and ethical questions which may be solved with different approaches (see S.H. et oth. v. Austria, par. 61). In particular in the past, the European Court of Human Rights underlined the absence of homogeneity in the solutions adopted by the States members of the Convention[49].

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45 Tribunal of Milano, 23 March 2013, in ilcaso.it.

46 See ECTHR, Evans v. the United Kingdom [GC], No. 6339/05, § 71, ECHR 2007-IV; Id., A, B and C v. Ireland [GC], No. 25579/05, § 212, 16 December 2010; Id., R.R. v. Poland, No. 27617/04, § 181, ECHR 2011.

47 See ECTHR, Dickson v. the United Kingdom [GC], No. 44362/04, § 66, ECHR 2007-V. According this case-law the Court of Strasbourg hold as illegitimate, in accordance with the Article 8 ECHR, to provide the applicants – a prisoner and his wife – with facilities for artificial insemination.

48 See ECTHR, S.H. and Others v. Austria [GC], No. 57813/00, § 82, ECHR 2011.

49 See decision ECTHR, X, Y and Z v. the United Kingdom of 22 April 1997, Reports of Judgments and Decisions 1997-II.

However the Court observes the need of the State to respect other principles, as the principle of proportionality.

In the matter concerned, the European Court invokes the principles of proportionality and affirms, in S.H. v. Austria, the necessity of an "assessment of the rules governing artificial procreation, taking into account the dynamic developments in science and society noted above" (see the paragraph No. 117).

The European principles had a strong impact on the legislation of a more restrictive Italian law No. 40/2004, concerning medically assisted reproduction. Such a law provoked much criticisms, since its approbation, concerning the particularly restrictive approach (in particular: the establishment of a limit in the fertilisation of the embryos; prohibition of the analyse of the embryos before the implantation in the uterus; prohibition of the heterologous fertilization).

With respect the Italian legislation on medically assisted procreation, the Court of Strasbourg argues that it is not proportional to forbid, as the Law 40/2004 did, the pre-implant diagnosis which would prevent the implantation of diseased embryos, with the justification supported by the Italian Government that, in the case of a disease affecting the fetus, the woman would be able to abort (see case of Costa and Pavan v. Italy, Application No. 54270/10, of 28 August 2012, in particular para 57).

As the Court Stated: "The consequences of such legislation for the right to respect of the applicants' private and family life are self-evident. In order to protect their right to have a child unaffected by disease, the only possibility available to them is to start a pregnancy by natural means and then terminate it if the prenatal test shows that the fetus is unhealthy. In the instant case the applicants had already terminated one pregnancy for that reason, in February 2010" (para 58).

The non-proportionality of the Italian legislation on procreation has been affirmed in the last years also by the Italian Constitutional Court.

The obligation of the "single and contemporary implant of the embryos at the maximum of three", according to the Article 14, para 2, Law No. 40/2004, has been considerate as "unreasonable" by the judgment of the Corte Costituzionale No. 151 of the 8th May 2009, in particular because such a disposition does not allow the physician to decide the number of embryos to be implanted, taking into account the specific situation of the woman (i.e. her age) and technical and scientific evolution. The case-law of the Corte usually underlines the law making power and is limited by "the scientific and experimental knowledge, which is constantly evolving and is the base of modern medicine. In the field of therapeutic practice, the basic rule is that it is left up to the autonomy and responsibility of the physician, who, with the consent of the patient, makes the necessary professional choices" (see para 6.1 of the judgment No. 151/2009; see also the judgments No. 338/2003 and 282/2002).

More recently the Italian Constitutional Court, with the judgement n. 62 of 10 Jun 2014, abrogated also the Article 4, para 3, Law No. 40/2004, which prohibits access to heterologous techniques of procreation, on the grounds of principles stated by the Court of Strasburg, further censured the use of the power of appreciation of the Italian legislator. In particular the *Corte Costituzionale* states that it is irrational to forbid in any case the heterologous fecundation, because it so leads to a complete negation of the

fundamental right to become parents, especially for the persons affected by grave diseases (see judgment No. 62/2014, para 13).

b) The European Court of Human Rights holds respect for family life, which is considered from a substantial point of view. The Court recognises in any case, the prevalence of parentage in a biological or social sense based on any form of presumption[50].

Under the European law, the role of the biological relationship between parents and children is highlighted.

According to the Article 2 of the Convention of Strasbourg of the 1975 (European Convention on the Legal Status of Children Born out of Wedlock), the motherhood out of wedlock is established by the mere fact of birth.

A subsequent act of legal recognition should be considered in violation of Article 8 ECHR, because such an act would comply with the Article 14 ECHR, which prohibits discrimination on grounds of birth (see the above mentioned case-law Merckx).

According to fathers who are not married, the parental responsibility does not work automatically, but could depend on the recognition or judicial decision. However, the right to recognition should not be restricted by the State[51].

Based on the positive obligation of the State to ensure the protection of family life in the emotional sense, the Case Chavdarov vs. Bulgaria, decided on 21 December 2010, the European Court of Human Rights recognised the right of the biological father to form a family with his children, although it is no longer legally possible to contest the putative paternity of another man.

This principle can also be seen from the negative point of view. The separation between the biological parents and the child in the custody case, for example, leads to a weakening of the ties that are, the basis of the substantial conception of family[52].

c) Anyway, where the biological relationship did not become a parent-child relationship, European case-law calls for the recognition or at least the right to know the origins of the child, which should be well balanced with the right to the anonymity of those who have procreated.

On the ground of this principle, for example, the Court of Strasbourg condemned Italy (see case Godelli vs. Italy, judgment of 25 September 2012) for violation of Article 8 ECHR in relation to the discipline of "anonymous birth" (see law 184 /1993).

In fact, the Italian law establishes the right of the mother to not be mentioned in the birth certificate, without any chance for the child to access any information about the birth mother, even if she is not identified, or for the mother to change the choice of anonymity.

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50 ECTHR, 27 October 1994, Kroon et al. v. Netherlands, para 31, series A no 297-C.

51 Both the European Court agree in respect of that argument: see ECtHR, Guichard v. France, 2 September 2003, Reports of Judgments and Decisions 2003-X; see also the judgment concerning the case ECTHR, Balbontin v. United Kingdom of 14 September 1999, No. 39067/97); see ECJ, judgment 5 October 2010, C-400/10 PPU, MCB, ECR 2010, p. I-8965.

52 See ECTHR, Ignaccolo-Zenide v. Romania, No. 31679/96, § 102, CEDU 2000 I; Id. Maire v. Portugal, n. 48206/99, § 74, CEDU 2003-VI; Id. Pini et al. v. Romania, No. 78028/01 and 78030/01, para 148, CEDU 2004-V.

The Court in its judgment Odièvre vs. France of 2003[53] points out that Article 8 ECHR protects the right to identity and the personal development, to establish and deepen relationships with other human beings. According to the case-law Godelli, the exercise of the right to personal development, the person needs knowledge of the details of his identity and in particular those concerning their parents[54].

The circumstances of birth belong to the private life of the child, then of the adult.

Thus, according to the European Court of Human Rights, Italy has not carried out a balancing of the interests involved, especially that of the child to know his/her origins, in particular the rights to protect his/her health, and the right to anonymity for the mother.

On the contrary, in the aforementioned case Odièvre the French legislation discipline anonymous birth is considered as compliant with Article 8 ECHR, providing the retention of not identifying genetic information of the birth mother, and establishing the possibility of eliminating anonymity with the agreement of the biological mother[55].

7. *Freedom of movement of the status and national legislation*. The "freedoms" guaranteed to persons by the EU Treaties (freedom of movement and establishment) have important consequences for private law relationships, opening domestic law beyond the traditional international private law.

Those freedoms have an impact not only on the economic relationships, but also on social and personal rights, as shown in the earlier case-law of the Court of Justice, which gradually extended such rights, initially attributed exclusively to workers (employed or self-employed) and entrepreneurs, to other persons and in particular to the members of family of the workers, even if they have retired or have died[56].

The application of the right to free movement of persons and families also produces tension between EU law and the domestic law of Member States.

This tension is particularly evident within the Italy law, as it could be verified in respect, for example, to the cases as follows:

i) The Italian law and especially the law No. 40/2004 on the assisted procreation, prohibits heterologous fertilization with donated sperm or eggs.

The Court of Appeals of Bari, on February 25, 2009[57], declared that the transcription of the parentage of two children born based on a surrogacy is considered as admissible in Italy, as the two children were citizens of the United Kingdom, therefore EU citizens, and according to the best interest of the child.

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53 ECTHR, 13 February 2003, Application No. 42326/1998, Odièvre c. France. See Joelle LONG, La Corte europea dei diritti dell'uomo, il parto anonimo e l'accesso alle informazioni sulle proprie origini: il caso Odièvre c. Francia, in Nuova giurisprudenza civile e commentata, 2004, II, pp. 283-311.

54 ECTHR, Mikulić c. Croacia, No. 53176/99, § 53, CEDU 2002 I, para 54 and 64.

55 See also ECTHR, 10 January 2008, Kearns v. France, No. 35991/04.

56 C-257/2000, Nani Givane et al. /Secretary od State for the Home Department, ECR 2003, I-345.

57 In leggiditalia.it.

More recently a decree of 1 July 2011 the Tribunal of Naples ordered the transcription of a certificate of a child born abroad under the technique of heterologous artificial insemination, as it is thought that this may not be a violation of public order.

The same principle is applied by the French courts (see the Court of Appeal of Paris, 25 October 2007) and by the Spanish practice (see Resolution of the Directorate General of Registries and Notaries, 18 February 2009).

ii) Another case is the homoparental filiations prohibited by Italian law and recognized in other European legal systems.

The Italian case-law is beginning to admit the filiations of the same sex couples, legally established by the rules of other EU countries, although in cases not covered by Italian law[58], as argued by the legal literature[59].

Moreover, the tendency of the case law is to leave the disapproval of same-sex unions, as recently demonstrated by the Corte di Cassazione, thus denying the negative effects of custody to a parent living with a person of the same sex, which would not be based on scientific evidence, but simply on prejudice.

This is consistent with the prohibition of any form of discrimination in family relationships[60].

iii) The adoption by a single person in Italy is possible only as "adoption in special cases" in accordance with Article 44 of Law 184/1983, which however is not a kind of full adoption[61]. This form of adoption could be considered discriminatory, according to the jurisprudence of the European Court of Human Rights in a similar case involving the law of Luxembourg[62].

The adoption of same-sex couples should be allowed under the judgment of the Court of Strasbourg, which has established the illegality of banning adoptions by reason of homosexuality of adopters[63].

It should be taken into consideration that the new Strasbourg Convention on the Adoption of Children of 2008 (amending the precedent one), in his article 7, para 2, provides for the possibility of states to provide for the adoption by cohabiting same-sex couples who are married or who are part of a registered partnership.

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58 The Tribunal of Rome on 2009 rejected the action concerning the action for the denial of the paternity promoted by the brothers of a man, Italian citizen, married with another man in accordance with the UK Law. See GARIBALDI A., "La dinastia e i figli della provetta. I Doria in tribunale per l'eredità", in Corriere della Sera, 10 October 2009; MOLASCHI B., "La procreazione medicalmente assistita: uno sguardo comparato tra Italia e Inghilterra", in Famiglia, Persone e Successioni, 2010, 7, p. 524.

59 BILOTTA F., "Omogenitorialità, adozione e affidamento famigliare", in Diritto di famiglia e delle persone, 2010, p. 901 ff.

60 Cassazione, 11 January 2013, n. 601, in Giurisprudenza Italiana 2013, p. 4.

61 See Cassazione 14 February 2011, No. 3572, in Famiglia e Diritto, 2011, 7, p. 697 comment of ASTONE; in Giurisprudenza Italiana, 2011, 6, 1275; in Foro Italiano, 2011, 3, 1, p. 728.

62 ECTHR, 28 Jun 2007, Wagner v. Luxemburg.

63 ECTHR, 22 January 2008, E. B. v. France.

In all the above cases, when a valid form of parentage is recognised in another EU Country, the application of the principles of substantial definition of family relations, the prohibition of discrimination, the right to the free movement, and especially the duty to protect the interests of the child should require a full recognition in all other States.

The necessity to comply with the European principles, along with the defence of the traditional approaches, normally leads to very curious formal solutions.

It is the case of the Conseil d'Etat in France[64], which in the case of surrogacy performed abroad suggests transcribed paternity, but not the maternity of the "mere d'intention".

However, the Conseil proposes that the relationship between mother and son could be indirectly recognised through the "delegation" (Article 377 Code Civil) or to note on the birth certificate of the decision of the foreign administrative authority in order to demonstrate the link of relations to daily life (with the public administration, schools, etc.).

A similar formal solution is adopted under the judgment of the Italian Corte di Cassazione No. 4184 of 15 March 2012, which decided that the marriage of same sex is "inexistent" for the domestic law, although, using an ambiguous formula, the Court holds that cohabiting homosexuals couples are entitled to a "family life" and have the right to an "uniform treatment" with regard to spouses of the different sex.

Such a formalistic approach has been disowned by the European Court of Human Rights in the recent judgment Mennesson v. France of the 26 Jun 2014 (application No. 65192/11). The Court of Strasbourg argues that, as the domestic case-law and the opinion of the Conseil d'État itself shows the absence of the transcription of the filiations in case of surrogacy turns into an obstacle and thus affects the full exercise of the right to a familiar life, as recognised by the Article 8 ECHR.

8. *Legal mechanisms of adaptation of the domestic legal system to the transnational principles*. As it has been shown in the precedent paragraphs, whereas the European law is based on principles such as the substantial nature of the familiar relationship and the free movement of status, that there are legal systems, as the Italian one, still anchored to a formal approach and often characterised by a closure which is grounded in the transnational norms.

However, also the Italian law has to adapt itself to those rules.

Indeed, even matters as family law, which are not subject to the exclusive supranational competence, are anyway deeply influenced by the European law.

There are several mechanisms by which such an influence works, depending on the features of the European legal integration process.

Firstly, family law, as conceived today is a matter related to the fundamental rights of persons, especially of children, which the protection of whom is considered the main objective of the present "paidocentric" legal system.

64 Conseil d'État, La révision des lois de bioéthique, Paris, 2009, in legifrance.gouv.fr.

III. European integration and its impact on the national disciplines on parentage

In the second half of the XX century, along with the costitutionalisation of human rights, there was the implementation of their internationalisation. Indeed, it affirmed the idea that the protection of individual rights is too important to be left up to the national forms of protection[65], but it has to be approached from the viewpoint of a "global constitutionalism"[66].

Together with the establishment of international organisations and treaties concerning economic fields, the States entered into international agreements related to the recognition and protection of the rights of human beings, like the United Nations Charter of 1945 and the Universal Declaration of Human Rights of U.N. of 1948.

The international legal sources composed a "corpus iuris of human rights", which strongly influences the domestic legal systems[67].

The corpus iuris of human rights, is a set of international norms, that penetrates into the national law especially through domestic dispositions as the Article 10 of the Italian Constitution (see also the Article 10.1 of the Spanish Constitution, and in particular the Article 40.2 concerning the rights of children; see the § 25 of the German Fundamental Law).

The legal doctrine argues that the national judges are allowed to implement the Drittwirkung[68], according to which the fundamental rights, in particular as interpreted by international courts[69], should be directly applied to the relationships between individuals[70].

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65 The establishment of the international organisations, as instrument to achieve the peace, is underlined, for example, in BOBBIO N., "Il problema della guerra e le vie della pace", Il Mulino, Bologna, 1984.

66 See ESPINOZA DE LOS MONTEROS SÁNCHEZ J., "Contitucionalismo global", in Diccionario Histórico Judicial de México, Ideas e Instituciones, México, 2010, Tomo I, p. 236.

67 See O'DONNELL D., "Derecho Internacional de los Derechos Humanos. Normativa, jurisprudencia y doctrina de los sistemas universal e interamericano", Oficina en México del Alto Comisionado de las Naciones Unidas para los Derechos Humanos-Escuela de Graduados en Administración Pública y Política Pública del Tecnológico de Monterrey, México, 2007, pp. 55-78; FAUNDES J.J., "Corpus juris internacional de derechos humanos", in ÁLVAREZ LEDESMA M.I., CIPPITANI R. (coord. by), Diccionario analítico de Derechos humanos e integración jurídica, ref. p. 93 ff.

68 CASSETTI L., "Il diritto di "vivere con dignità" nella giurisprudenza della Corte Interamericana dei diritti umani", in Federalisimi.it, n. 23/2010, p. 15 f.

69 SCOTT R.E., STEPHEN P.B., "The Limits of Leviathan. Contract Theory and the Enforcement of International Law", Cambridge University Press, New York, 2006, quote the case-law of the Supreme Court of USA, especially the judgment Sosa v. Alvarez-Machain which has supported [542 U.S. 692 (2004)] the idea that the federal courts can use the international law; see also Medellin v. Dretke, 544 U.S. 660(2005); Roper v. Simmons [543 U.S. 551 (2005)].

70 See, for example SPIELMAN D., "L'effet potentiel de la Convention européenne des droits de l'homme entre personnes privèes", Bruylant, Luxembourg, 1995. In Italy the legal literature and the case-law affirm that the European Convention of Human Rights is directly applicable. See among others NUNIN R., "Le norme programmatiche della CEDU e l'ordinamento italiano", in Rivisa internazionale dei diritti dell'uomo, 3, 1991, p. 719 ff. For he case-law see for example: Corte di Cassazione, 27 May 1975, No. 2129, in Gius. it., 1976, I, p. 970; Id. 2 February 2007, No. 2247, in Nuova giur. civ. comm., 2007, p. 1195.

According to Luigi Ferrajoli this situation implies a change in the notion of international law, which is no longer only based on bilateral relationships between States, but it is a true international legal system[71], in which people become subjects.

Secondly, the Italian discipline of parentage is subject not only to the international system of human rights, but to a specific regional system, that of the European Convention of Human Rights.

The regional integration is not only a kind of international cooperation between States[72].

As matter of fact, it is characterised by a strict connection within a region of the world and the relative problems linked to the movement of the people and goods.

In this situation the intergovernmental relations become closer. Even if supranational institutions are not established, regional judges enforce the norms issued by the regional organisations: human rights, commercial issues, and so on. The regional judges may be requested to take decisions by States and, in some cases, also, by private legal subjects. Furthermore, usually the judgments of the regional courts are not directly enforceable but they need the cooperation of the Member States.

Anyway, the presence of the regional judges deeply changes the perception of the integration processes: the interpretative strategy put in place by the regional judges, based on a teleological approach, recognises the existence of a legal system which is prevalent to those domestic ones. Furthermore, the regional judges build the legal system filling in it the autonomous legal meaning and in particular drawing up the concepts of the individual rights arising from the regional legal order.

The regional model is particularly developed in Europe, with at least two regional organisations (the Council of Europe and the European Union) are involved in the protection of human rights (with specific attention on the rights of children), which are supported by two regional Courts, which carry out an important role in the construction of the continental transnational law. In particular the European Court of Human Rights considers itself a "constitutional guarantor of European public order"; on the other hand the Court of Justice recognised the existence of the community legal system from the case-law Van Gend en Loos issued in 1963, at the beginning of the European integration history[73], thus developing it during the last decades.

But the major impact on the legal systems occurs when the domestic laws are integrated under the supranational legal system of the European Union.

The supranationality implies the lost of the sovereignty of the States involved in the process in few or many competences[74], as the case-law of the Court of Justice has established since judgments as Van Gend en Loos or Costa vs. Enel.

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71 FERRAJOLI L., "Más allá de la soberanía y la ciudadanía: un constitucionalismo global", in CARBONELL M., VÁZQUEZ R., Estado constitucional y globalización, UNAM, Porrúa, México, 2001, pp. 313-318.

72 PIZZOLO C., "Derecho e integracion regional", Buenos Aires, 2010, p. 5.

73 ECJ, 5 February 1963, 26-62, Van Gend en Loos / Administratie der Belastingen, ECR 1963, p. 3.

74 HAAS E.B., "The study of regional integration: reflections on the joy and anguish of pre-theorizing", in International Organization,Vol. 24, 1970, p. 610.

9. *The free circulation of the familiar status*. One of the most important effects of the supranationality of the EU law is the establishment of a set of specific rights (but also of duties) directly in favour of the natural persons and other legal subjects, in particular the freedom of movement[75].

The case-law under the previous paragraphs shows that freedom of movement requires that all obstacles laid down by regulatory differences between the Member States have to be eliminated. Here the question is not, as under the private international law, to establish criteria for choosing which law to apply, from the point of view of a national system.

Instead the EU law identifies its own legal status and subjective legal situations connected to which national laws should necessarily meet[76].

According to the Court of Justice, that status "enables nationals of the Member States who find themselves in the same situation to enjoy within the scope *ratione materiae* of the EC Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for"[77].

Although, in principle, the discipline of family status is subject to the national competences, domestic law cannot be invoked for not implementing EU provisions or principles such as non-discrimination[78].

As the Court of Justice states, EU law guarantees respect for the family life of citizens, in order to eliminate all obstacles to the exercise of fundamental freedoms recognized by the Treaties[79].

The possibility of maintaining family relationships is considered a prerequisite for the effective enjoyment of the freedom of movement[80].

From this viewpoint, the rights and status validly formed in one of the Member States cannot be ignored or weakened in another country of the Union, as this would constitute an obstacle to the freedom of movement, and therefore an obstacle to the effective exercise of EU citizenship.

EU rules on freedom of movement and on family reunification make reference to the qualifications (spouse, partner, unmarried partner, other family members) provided by the national laws applicable in the Member States with respect to which they arose.

The concept of "registered partnership" in Directive 2004/38/EC may include unions of heterosexual couples, as well as unions between persons of the same sex, when national

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75 See CIPPITANI R., "Libre circulación de las personas", in ÁLVAREZ LEDESMA M.I., CIPPITANI R. (coord.), Diccionario analítico de Derechos humanos e integración jurídica, ref. p. 141 ff.

76 COLCELLI V., "Situaciones legales subjetivas otorgadas por la Unión Europea", in ÁLVAREZ LEDESMA M.I., CIPPITANI R. (coord. by), Diccionario analítico de Derechos humanos e integración jurídica, ref. p. 617 ff.

77 C-148/02, Garcia Avello, ECR 2003 I-11613, para 23; C-184/99, Grzelczyk, ECR I-6193, para 31; C-224/98, D'Hoop, ECR 2002 I-6191, para 28.

78 See the observations of the Advocate General Niilo Jääskinen, delivered on 15 July 2010, in the case C-147/08, Jürgen Römer/Freie und Hansestadt Hamburg, para 69 ff.

79 C-157/03, Comission/Spain, ECR 2005, I-2911, para 26.

80 C-9/74, Casagrande / Landeshauptstadt München, ECR 1974, 773.

laws provide for these types of unions, as is the case in Spain, Portugal, Belgium, Holland, and the United Kingdom.

According the legal base of the programmes of transnational mobility of researchers in the European Union (the so-called "Marie Skłodowska-Curie" programmes), the researcher's salary depends on situations like marriage or even "Relationship with equivalent status to a marriage recognised by the national legislation of the country of the host organization or of the nationality of the researcher" and the presence of "dependent children who are actually being maintained by the researcher" (People Work Programme, 2013, C (2012) 4561 of the 9 July 2012). Those provisions have to be applied in accordance with the law of the nationality of the researcher, and not the law applicable to the host institution. For example, if the researcher is part of a registered partnership according to the law applicable in other EU Country, even if he/she is working in Italy (a Country that does not recognise the partnerships), the Italian host institution shall recognise the status of the researcher and it shall pay the salary provided for the married researchers.

States cannot raise barriers to the implementation of the status established by other EU laws, such as reciprocity (see Article 16 preliminary provisions to the Codice Civile) or "public order" (see always in Italy Article 16 of Law 218/ 1995 providing the Reform of the Italian system of private international law).

Or rather, EU law allows the Member State to oppose limitations of "public order" on the free movement of persons (see Article 27, para 2 Directive 2004/38/EC). But the reference to such limits of public order "presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society"[81].

Therefore, the EU case-law does not consider as valid justifications those relating to the national discipline on the choice of the name of a child[82], although it is considered as a question of personal status and therefore in principle subject to the national competence[83].

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[81] C-249/11, Hristo Byankov/ Glaven sekretar na Ministerstvo na vatreshnite raboti, para 40, not published yet; see also C-33/07, Jipa, ECR 2008 I-5157, para 23; C-430/10, Gaydarov, para 33. According to the limitation of the free movement of the persons see PIZZOLO C., "Libre Circulación de Personas: Alcance y Límites", en ÁLVAREZ LEDESMA M.I., CIPPITANI R. (coord. by), Diccionario analítico de Derechos humanos e integración jurídica, ref. p. 406 ff.

[82] C-353/06, Grunkin y Paul, ECR 2008, I-7639, 38. C-208/09, Ilonka Sayn-Wittgenstein/ Landeshauptmann von Wien, Rec. 2010 I-13693, considers as justified, on the ground of the public order, the non recognition of a nobiliar title of another Member State (para 93-95).

[83] The name is referred to the personnel status, according to Advocate General Eleanor Sharpston in her observations delivered on 24 April 2008, concerning the case C-353/06, Grunkin y Paul, para 93.

III. European integration and its impact on the national disciplines on parentage

In the judgement K.B.[84] the national legislation which prevents a transsexual wedding was declared as illegitimate, by the fact that in this case the law does not allow the person to receive a widow's pension[85].

Similarly, discrimination is identified in cases where, registered same-sex partnership are allowed, but marriage is not so the members of the partnership will not able to receive the widow's pension (see the Opinion of Advocate General Damaso Ruiz-Jarabo Colomer in the Case Maruko).

[84] C-117/01, K.B., ECR 2004, I-541.

[85] See the comments of the Advocate General D. Ruiz-Jarabo Colomer in the observations delivered on 10 Jun 2003 referred to the case K.B. above mentioned.

IV

The Law of Obligations and Contract

Contracts and obligations as tools of the European integration

Roberto Cippitani

Under EU law, contracts continue to play their traditional role within national systems, but no have been inserted into a new legal framework and have purposes beyond the traditional ones. The contract is no longer an isolated area, which governs the relationships between the parties, regardless of the context. Within the EU law, it can be observed on one hand a growing number of integrative interventions to protect the fundamental rights and the weaker parties (it is the case of the discipline concerning the consumers or protecting the SMEs). Thus, the EU law considers the legal subjects and their relationships from a global approach, no longer from the restricted perspective of the relations between the parties.

1. *Contracts and obligations as elements of the patrimony*. The European private law, especially that represented by the continental civil codes, is based on the concept of "patrimony".

Patrimony is usually considered to be composed of obligations and property rights[1]. Such patrimonial elements can be measured in monetary terms[2].

The legal system takes into consideration the patrimony as the guarantee for the creditors (the "general patrimony" of the subjects, see Article 2740 Italian Civil Code)[3]and as a set of elements which can be transferred from a subject to another one through instruments such as contracts or inheritances.

The traditional contract law is the main legal framework which regulates the circulation of the patrimonial elements (rights in rem and obligations) from a subject to another[4].

Such perspective was inspired moreover by the Pandectists of XIX century like B. Windscheid and F.C. Savigny. Indeed, the set of the legal relationships organised by the *System des heutigenrömischen Rechts* of Savigny is properly a system of patrimonial relationships.

This view was crystallised in the civil codes of continental Europe. As Portalis argues in his *Discours préliminaire* to the draft of the *Code Civil* of Napoleon "*Les contrats et les successions sont les grands moyensd'acquérir ce qu'onn'a point encore*"[5].

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1 VON SAVIGNY F.C., "Il sistema del diritto romano attuale", Ital. transl. of SCIALOJA V., vol. I, Torino, 1886, p. 337 ff.

2 See Relazione al Re to the Italian Civil Code (para n. 23).

3 SANTORO-PASSARELLI F., "Dottrine generali del diritto civile", Jovene, Napoli, 1997, p. 85.

4 CAPRIOLI S., "Il Codice civile. Struttura e vicende", Giuffrè, Milano, 2008; HALPERIN J.L., "L'impossible Code Civil", Presses universitaires de France, Paris, 1992.

5 PORTALIS J.É.M., "Discours préliminaire du premier projet de Code civil", of 1801.

This idea is clearly expressed within the definitions of "contract" provided by the Civil Codes.

The Italian CodiceCivile sets out that the contract is the agreement in order to establish, to modify and to end a patrimonial relationship (see Article 1321 Codice Civile). According to the Article 1101 of *Code Civil*: "*Le contrat est une convention par la quelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelques chose*".

With the same focus the Article 1254 of the Spanish *Código Civil* states that: "*El contrato existe desde que una o varias personas consienten en obligarse, respecto de otra u otras, a dar alguna cosa o prestar algún servicio*".

Whatever is the national law, the discipline of the contract is based on the concept of "exchange", although such a concept can be expressed in different ways.

The traditional civil law relationships are based on the rule of the patrimonial equilibrium, according to which each modification (increasing or decreasing) of the patrimony of a subject should be justified by a patrimonial movement from an opposite direction.

Therefore in the contract law the equilibrium is granted by concepts as "*corrispettività*" and "*onerosità*" in the Italian Codice Civile; "*bilateralité*" and "*onerosité*" under the French Law; bilateral contract in accordance with the common law. The exceptions to the exchange scheme have to be allowed by the law in particular hypothesis, as it is in the case of the donations justified by a liberal intent and recognised by means of a particular form.

It argues Sacco within all legal systems it is possible to observe, in the contract law, a sort of "dogma of bilateralism"[6].

The function of the other typologies of obligations (tort/delict, unjust enrichment, *negotiorum gestio*) is granting the patrimonial equilibrium.

This is achieved by correcting a forbidden violation of the property or other rights in rem (through the tort law); as well as the unjustified increase of the patrimony of a subject, corresponding to the pauperisation of another one (according to the schemes of the unjust enrichment and the *negotiorum gestio*).

The difference between contractual and non contractual obligations should be based on the will: the obligations arising from the contract are based on the agreement of the parties; on the contrary, the source of the non contractual obligations is the illegal conduct of a subject (the wilful act or the negligence under the tort law; the voluntary management of an activity of a third subject in the negotiorumgestio) or a natural or legal event which is able to cause the unjust decrease of a patrimony for the benefit of the another one (in the unjust enrichment)[7].

The liability is the legal mechanism which allows the maintenance or restoration of the patrimonial balance.

Further, the traditional private law is thought of as a system basically closed. This closure could be mainly observed in respect with the other legal systems. The relationship

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[6] SACCO R., "Introduzione al diritto comparato", in SACCO R. (edit by), Trattato di diritto comparato, V ed., 2006, p. 75 ff.

[7] For a critical overview about the topic, see JANSEN N., "The Concept of Non-Contractual Obligations: Rethinking the Divisions of Tort, Unjustified Enrichment, and Contract Law", in Journal of European Tort Law, 1/2010, pp. 16-47.

between legal systems is based on an intergovernmental logic and is regulated by international treaties, which indirectly affect the national law. The "treatment of foreigners" is regulated by the private international law, namely a set of criteria for resolving potential conflicts of application among legal systems. The rights given to a foreigner depend on rules such as that of "reciprocity". According to that principle, the citizen of another State may be entitled to exercise the rights only to the extent that the Country of origin recognizes the same rights to persons coming from the hosting State (see, for example, article 16 Preliminary Dispositions of the Italian Civil Code).

2. *The private law in the age of the national and supranational constitutionalism*. In the second half of the twentieth century, the context of private law, expressed by the civil codes, changed radically in comparison with the past.

After the tragedy of World War II, the national constitutions were adopted, anticipated by the brief but significant experience of the Constitution of Weimer.

The constitutions put in the centre of the legal system the fundamental rights of the natural persons. The State becomes the "Rule of law"[8], which has an obligation to protect the political, civil and social rights of the people, in a perspective of solidarity and substantial equality[9]. Indeed, the realisation and protection of fundamental rights plays the role of the first priority of the State[10] and the new justification of political power[11].

The legal systems shaped by the constitutions are no longer focused only on regulation of patrimonial issues[12], and thus, this process has affected the traditional conception of civil codes. The rights conferred to the persons are no longer only patrimonial, such as property, but above all personal rights[13].

In addition, the fundamental rights, recognised and protected by the constitutions, are applied both to vertical relationships (those between citizens and public authorities) and horizontal relationships (i.e., those between individuals)[14].

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8 See SEPÚLVEDA IGUÍNIZ R., "El Estado de Derechos", in ÁLVAREZ LEDESMA M.I., CIPPITANI R. (coord.), Diccionario analítico de Derechos humanos e integración jurídica, Roma-Perugia-México, 2013, p. 239 ff.

9 See CIPPITANI R., "Solidaridad", in ÁLVAREZ LEDESMA M.I., CIPPITANI R. (coord.), Diccionario analítico de Derechos humanos e integración jurídica, ref. pp. 642-648; Id. "La solidarietà giuridica tra pubblico e privato", ISEG, Roma-Perugia, 2010.

10 PÉREZ LUÑO A.E., "Los derechos fundamentales", Tecnos, Madrid, 1991, p. 19.

11 Cfr. RAWLS J., A Theory of Justice, The Belknap Press of Harvard University, Cambridge, Massachusetts, 1980, pp. 4-7.

12 PERLINGERI P., Depatrimonializzazione e diritto civile, in Rassegna diritto civile, 1983, p. 1 ff.

13 With respect to the impact of the constitutional principles on the private law, see among others, see PERLINGERI P., Il diritto civile nella sua legalità costituzionale, ESI, Napoli, 1991; RODOTÀ S., Ideologie e tecniche della riforma del diritto civile, ESI, Napoli, 2007.

14 Often the constitutional principles do not influence directly on the interpretative praxis: see, for example, OST F., "Droit et intérêt", Vol. II, Entredroit et non-droit: l'intérêt, Bruxelles, 1990, p. 161. In Italy some scholars argued that the dispositions of the Constitution establish only "programmatic" norms to be implemented by the legislator: see, CRISAFULLI V., "Costituzione e

This impact of constitutional rights in relations between individuals, which is generally accepted today, was proposed during the period of the Weimar Constitution[15].

The direct application of the constitutional rights was claimed, for example, with respect to the employment contract in order to establish the prevalence of the general clause of paragraph 242 BGB (Performance in good faith) on the nominalist principle established for monetary obligations.

Above all, another event has changed the destiny of Europe[16], and also, the idea of private law and especially that of contract law.

In the 1950s, the process of European integration put a strain on the ideas of the national legal systems.

The process of European integration, since an early period, has established a community "market", i.e. an area without borders, in which the free movement of persons, goods, services and capital, is recognised and protected.

This market is not merely an economic context, but a legal system, as recognised by the Court of Justice since the 1960s, with the judgments Van Gend en Loos[17] and Costa v Enel[18].

The European law, in fact, "derives not only from economic interpenetration but also the legal interpenetration of the Member States"[19].

Even before the Treaty of Amsterdam, which had introduced a competence concerning civil and criminal legal matters, it was argued that the concept of "market" involves "the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market"[20].

The same judgement provides that "it is important that not only commerce as such but also private persons who happen to be conducting an economic transaction across national frontiers should be able to enjoy the benefits of that market".

The internal market is a legal system that is not addressed only to the Member States. As stated in Van Gend en Loos, EU law recognizes as subjects the persons and other legal entities.

Such a legal system provides several subjective legal situations directly applicable in re-

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protezione sociale", in La Costituzione e le sue disposizioni di principio, Giuffrè, Milano,1952, p. 135; BARETTONI ARLERI A., "L'assistenza nell'attuale momento normativo e interpretativo", in Rivista infortunistica, 1975, II, p. 410 ff.; CALAMANDREI P., "La illegittimità costituzionale delle leggi nel processo civile", Padova, Cedam, 1950, p. 28 f.; LUCIFREDI R., La nuova Costituzione italiana raffrontata con lo Statuto albertino e vista nel primo triennio di sua applicazione, Milano, 1952, p. 275.

15 COSTA P., "Civitas. Storia della cittadinanza in Europa", Vol. IV, L'Età dei totalitarismi e della democrazia, Roma-Bari, 2002; MORTATI C., La Costituzione di Weimar, Firenze, 1946.

16 See PAMPILLO BALIÑO J.P., "Integración regional y derecho comunitario", in ÁLVAREZ LEDESMA M.I., CIPPITANI R. (coord.), Diccionario analítico de Derechos humanos e integración juridica, ref. pp. 305-312.

17 ECJ, 5 February 1963, 26-62, Van Gend en Loos / Administratie der Belastingen, ECR 1963, p. 3.

18 ECJ, 15 July 1964, 6/64, Flaminio Costa / E.N.E.L., ECR 1964, p. 1141.

19 ECJ, 18 May 1982, 155/79, AM&S Limited/ Commission, ECR 1982, p. 1575 (para 18).

20 ECJ, 5 May 1982, 15/81, Schul, ECR 1982, p. 1409, para 33.

lations between individuals, the so-called "civil matters", including, mainly, the discipline of contract and obligations.

According to the legal sources and documents of the EU institutions, civil matters are the cornerstone for the construction of a European Legal Area (see Chapter VII of the Presidency Conclusions of the Tampere European Council 15 and 16 October 1999).

In particular, the construction of EU contract law is carried out through a set of several legal techniques, in particular through legislative interventions and non-legislative actions.

As a matter of fact, during the last decades, the EU legislation concerning contracts and obligations has become very important, covering many matters, such as: contracts between professional and consumers; contracts between enterprises; public procurements; discipline of contracts related to the information society, applicable laws on trans border contracts and obligations, etc.

According to the European Commission's view, the legislative action in the concerned matter is not always possible or adequate[21].

Therefore, the Commission has proposed the concept of identifying common principles, especially by groups of scholars and legal practitioners, useful in the preparation of contracts and implementation of national and EU law on cross-border relationships. Furthermore, those principles could be the basis for future legislation both supranational and national[22].

Therefore, they have created research groups promoted directly by the Commission or that have established independently.

A first example of great importance in this field was the "Commission for European Contract Law", established in the early '80s which has published the book Principles of European Contract Law ("Principles of European Contract Law" or PECL)

However, the activity that is making more of an impact on the production of European law regarding the subject of contracts is the Common Frame of Reference (Common Frame of Reference for European Contract Law), prepared by the Study Group on European Civil Code and by the Research Group on EC Private Law ("Acquis Group"), coordinated by Christian von Bar, Eric Clive and Hans Schulte-Nolke. The Draft ("DCFR"), published by the European Commission in May 2011 and developed with the participation of stakeholders and other subjects[23] emerged from the work of those Groups.

The CFR is the result of over twenty years of collaboration between jurists and legislators from all European countries and covers a field broader than the discipline of contracts.

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21 Communication of the Commission, A more coherent European contract law - An action plan, COM (2003) 68 of 12 February 2003, para 77.

22 Communication of the Commission on European contract law, COM (2001) 398 final, of 11 July 2001, para 53.

23 FUCHS A., "A Plea a Europe-Wide Discussion of Draft Common Frame of Reference", in Era forum, 9:S1-S6 (2008); CLIVE E., "An Introduction to the Academic Draft Common Frame of Reference", in Era forum, 9: S13- S31 (2008).

The Common Framework is primarily intended as a "container" of terms and concepts available to EU legislative Institutions to ensure the coherence of private law in the EU legislation, not only with regard to contractual matters[24].

One application of this function is the proposal of a regulation on the Common European Sale Law (CESL), providing "a comprehensive set of uniform contract law rules covering the whole life-cycle of a contract, which would form part of the national law of each Member State as a "second regime" of contract law"[25].

Thus, the CFR helps to improve the contract law, through a suitable reference text in order to eliminate the contradictions present in many of the EU legal sources and to provide appropriate definitions of the legal terms.

In this context, the development of the "*acquis communautaire*" should precede in parallel with the draft CFR, which, in turn, should be a tool to strengthen the Acquis, and integrate it with the new principles to be developed[26].

However, the CFR cannot and should not be seen as a finished or perfect product, but simply it is to be regarded as a step on the path toward a more coherent system of European contract law.

In addition to the development of principles in contractual matters, the Commission also proposes to act through other actions, such as model contracts and standard terms which may be used for transnational contracts[27], as provided by several EU legal sources[28].

Finally, a central role in the construction of contractual non legislative Union law is played by the case-law, especially by the Court of Justice.

The Court elaborated many legal concepts based on the principle of the autonomy of the meaning of EU law[29], stating that "It should also be recalled that the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question"[30].

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[24] The decision of the Council of 18 April 2008, making reference to the CFR, uses the expression "a tool for better law-making targeted at Community lawmakers".

[25] See the Communication of the Commission, A Common European Sales Law to facilitate Cross-Border Transactions in the Single Market, COM(2011)0636.

[26] DE GIORGI M.V., Principi, "Aquis" e altro, in Europa e Diritto, 3/2008, p. 649 ff.

[27] Communication of the Commission on European contract law, ref. para 56.

[28] For example, see the Decision of Commission of 15 Jun 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/; Commission Decision of 27 December 2004 amending Decision 2001/497/EC as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries.

[29] CIPPITANI R., Interpretación de las Cortes regionales, in ÁLVAREZ LEDESMA M.I., CIPPITANI R. (coord.), Diccionario analítico de Derechos humanos e integración jurídica, ref. pp. 312-324.

[30] ECJ, 9 November 2000, C-357/98, Nana Yaa Konadu Yiadom, ECR 2000, p. 9256, para 26. Cfr. also ECJ, 19 September 2000, C-287/98, Luxembourg/Linster, ECR 2000, p. 6917, para 43; Id. 4 July 2000, C-387/97, Commission/Greece, ECR. 2000, p. 5047; Id. 18 January 1984, 327/82,

Based on this principle, the Court of Justice has developed and put in light principles, including those concerning private law, which form part of EU law[31].

However, the private law of the Union has been built with a fragmentary and gradualist approach.

The documents of the EU institutions denounce this circumstance, which is particularly evident in the area of contracts and obligations, butt can be observed within all civil law matters[32].

Nevertheless, this massive set of legislative rules and principles may be seen in a global and coherent manner.

The contracts and obligations participate to the building of the EU legal system, both implementing the features of the EU law and producing the rules of such a system, how will be shown in the following paragraphs.

3. *The features of the European law of contract and obligations.* The European law of contract and obligations is an expression of the aims of the EU legal system. This situation appears to be able to update the traditional notions concerning private law.

Ekro/Produktschapvoor Vee en Vlees, ECR 1984, p. I-107, para 11; the principle of uniform interpretation is implemented also in the private law, cfr. ECJ, 23 March 2000, C-373/97, Dionisios Diamantis/ Elliniko Dimosio (Greek State), Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE), ECR 2000, p. I-1705, para 34; Id. 12 March 1996, C-441/93, Pafitis et al. /TKE et al., ECR 1996, p. I-1347, para 68-70.

31 About the function of the Court of Justice in interpretation the EU Law, see, among others: ADINOLFI A., "I principi generali nella giurisprudenza comunitaria e loro influenza sugli ordinamenti degli Stati membri", in Rivista italiana di Diritto pubblico comunitario, 1994, p. 533 ff.; AKEHURST M., "The Application of the General Principles of Law by the Court of Justice of the European Communities", in The British Year Book of International Law, 1981; CIPPITANI R., "Il giudice comunitario e l'elaborazione dei principi di diritto delle obbligazioni", in Rassegna giuridica umbra, 2/2004, p. 847 ff.; Id., "El Tribunal de Justicia y la construcción del derecho privado en la Unión Europea", in JuríPolis, 2007, p. 85 ff.; Id., "El "ordenamiento jurídico de género nuevo": metáforas y estrategias en la jurisprudencia comunitaria", in FERRER MAC-GREGOR E., de J. MOLINA SUÁREZ C. (coord.), El Juez Constitucional en el Siglo XXI, México, 2009, Tome II, p. 21 ff.; Id., "Tribunal de Justicia de la Unión Europea (Interpretación y construcción del ordenamiento jurídico)", in Diccionario Histórico Judicial de México: ideas e instituciones, Suprema Corte de Justicia de la Nación de México, México, 2010, Tome III; PAPADOPOULOU R.E., "Principes généraux du droit et droit communautaire. Origines et concrétisation", Bruylant-Sakkoulas, Bruxelles-Athenes,1996.

32 See, in particular, along with the Communication as above mentioned, also: Communication from the Commission of 11 October 2004 to the European Parliament and the Council - European Contract Law and the revision of the acquis: the way forward, COM(2004) 651 final; the Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation (COM (2002) 654 of 14 January 2003); Commission Report of 25 July 2007: Second Progress Report on the Common Frame of Reference (COM(2007) 447).

3.1 *Openness*. The European legal system is open on the contrary of the domestic ones. The EU legal system grants to the citizens the freedom of movement and establishment and thus a general legal capacity to be part of any type of legal relationship, especially contracts and obligations.

In this respect, the EU law imposes the overcoming of the rules of international private law, in particular the principle of reciprocity. The persons coming from the other EU Countries are allowed to exercise all rights, provided for domestic legal subjects. Under some circumstances, if the discipline of a case is different in two EU Member States, the person may request the application of the more favourable legislation or may choose one of these (see for example, the principle affirmed in the judgment Carlos Garcia Avello[33]).

The perspective, from which the individual rights are exercised, including the patrimonial rights, is the need to implement the EU market and to reach the other objectives of the legal system. For example, the exercise of the right of property has to be consistent with the freedoms guaranteed by the Treaties, in particular the freedom of movement of goods, removing (the physical, technical and in general normative)[34] barriers to the trans border contractual relationships. The exceptions to the openness only are applicable for the protection of relevant interests (health, public safety, fairness in trade to protect consumer, see Articles 12 and 114, para 3, TFEU), but only if such a protection is proportionate to the aim pursued and if it is applied in order to represent the least possible obstacle to the circulation[35].

3.2 *Contextuality*. The traditional contract law considers the parties of the contracts as formally equal subjects. By contrast, EU law affirms the possibility that parties may not be at the same level.

This is approach aims, mainly, at preventing discrimination and at protecting the weaker parties.

In public contracts and other disciplines covered by EU contract law, it is granted the substantial equality of the parties, through the prohibition of any form of discrimination, including that derived from nationality.

In addition, the parties are considered in relation to each other and in the context of the internal market.

Thus, on the EU market, some subjects such as "consumers" are safeguarded against those who carry out an economic activity (the professionals); the undertakings are classified according to their size (see the discipline of the small and medium enterprises) and it is relevant the context in which they are included (groups); and the behaviours that

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33 C-148/02, Carlos Garcìa Avello, ECR 2003, p. I-11613.

34 C-120/78, Rewe/Bundesmonopolverwaltungfür Branntwein, ECR 1979, p. 649. See also the Communication of the Commission "Mutual recognition in the context of the follow-up of the action plan for the single market" (COM(1999) 299 final).

35 See several judgments of the Court of Justice: 13 December 1979, Hauer, 44/79, ECR 1979, p. 3727; 26 June 1980, Gilli, C-788/79, ECR 1980, p. 2071; 12 March 1987, Commission/Germany, C-178/84, ECR 1987, p. 1227; 10 November 1982, Rau/De Smedt, C-261/81, ECR 1982, p. 3961; 14 July1988, Zoni, C-90/86, ECR 1988, p. 4285; 23 Febbruary 1988, Commission/France, C-216/84, ECR 1988, p. 793.

may distort competition and impede the proper functioning of the internal market are prohibited.

The EU case-law, for example in the Courage judgement, points out how a party may be in a situation of "serious inferiority" due to the conclusion of a contract that can severely limit its contractual freedom[36].

An argument particularly interesting is the protection of the parties that may be affected in their interests because of they have less information than other parts.

Several directives foresee the need to offer a wide range of pre-contractual information. In addition to the information required by the consumer contracts, Directive 97/5/EC on cross-border bank transfers includes the obligation to provide information on the execution time and on the transaction expenses (see Article 3); Directive 2000/31/EC on electronic commerce requires the communication of information regarding the different technical steps to conclude the contract, the storage information systems, the languages in which the contract can be concluded, as well as the possible presence of codes of conduct (Article 10, para 1 and 2); Directive 87/344/EEC on the legal protection in the insurance sector requires the insurer to inform the customers of their right to request arbitration; Article 4 para 2 of Directive 90/314/EEC on package travel sets out that the text of the contract has to include some specific information.

The information is obviously also an obligation arising from the phase of the contractual relationship. Under Directive 92/96/EEC on life insurance, the insurer shall provide the insured with updated information on the insurance company and the policy conditions (Article 31, para 2 and Annex II).

Similarly, in accordance with Directive 87/102/EEC on consumer credit, the consumer must be informed of any change in the annual rate of interest and other applicable charges (Article 6, para 2). Directive 97/5/EC concerning cross border bank transfers provides that after the execution of the payment, the bank is obliged to provide the customer with the necessary information to identify the transaction, the initial amount, the fees and expenses (Article 4). In accordance with Article 12 of Directive 86/653/EEC on self-employed commercial agents, the commercial agent shall be supplied with a statement of the commissions earned, along with the essential elements on which the calculation was performed.

The need for information is also expressed from the perspective of the "form" of the contract. In the traditional private law, the principle is the freedom of form, which can be repealed only in exceptional cases, to meet the publicity needs relating to an act (in the case of contracts and other acts concerning the real property, see for example Article 1350 of the Italian *Codice Civile*).

In EU law, "formalism" serves to inform, allow, and at the same time, to verify if the contract has met the expected content. As an Author argued, such formalism performs the same function as a product label, showing the characteristics of the contract[37].

This approach is also evident in the DCFR where a list of pre-contractual information

[36] C-453/99, Courage and Crehan, ECR 2001 p. I-6297.

[37] JANNARELLI A., "La disciplina dell'atto e dell'attività: i contratti tra imprese e tra imprese e consumatori", in LIPARI N. (coord.), Trattato di diritto privato europeo, Cedam, Padova 2002, vol. III, L'attività e il contratto, p. 50 ff.

is provided that the parties should exchange *inter se*, either in general, or with reference to contracts with consumers, or between professionals (Articles 14 to 29).

The consequence of the violation of the obligation of information has to be the compensation of the damage not only by the negative interest, but also for having concluded the contract on different terms to those that would have accepted (Article 30).

3.3 *Non patrimonality*. The main innovative aspect of EU contract law is related to the importance of human rights in the implementation and interpretation of contractual matters.

Since its early case-law the Court of Justice has recognised the importance for Community law of the fundamental rights[38].

Indeed, the Judge of Luxembourg, by the Stauder judgment[39], argued that among the general principles of Community law the fundamental rights of the natural persons should be included.

All rights, including economic ones such as the right to property, must be viewed in the context of the protection of fundamental rights.

Today, this action is reinforced after the entry into force of the Lisbon Treaty, which constitutionalised the Charter of Fundamental Rights and the reference to the European Convention on Human Rights and the European Court of Human Rights system, provided by the Convention (see Article 6 TEU).

The system of values defined in the Charter of Fundamental Rights is built around principles such as dignity, freedom, justice and solidarity, and which were not foreseen in the original Treaties of the 1950s.

The Communication of the European Commission, accompanying the Charter of Fundamental Rights, provides that all legislative proposals and any other proposal that is adopted by the Commission shall, as part of the regular law making process, be assessed on its compatibility with the Charter, including rules relating to contracts[40].

This approach, which is so different from that of the European civil codes, has impacted the process of developing the European principles of contract.

The change of perspective is particularly evident in the DCFR[41], as it can be seen

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[38] See on the necessity that the ownership would comply with the protection of the fundamental rights, for example, ECJ, 30 Jun 1996, C-84/95, Bosphurus/Minister for transport, ECR 1996, 3953.

[39] C- 29/69, Stauder/Stadt Ulm, ECR 1969, 419.

[40] RODOTÀ S., "Il Codice civile e il processo costituente europeo", in Rivista Critica di Diritto privato, 2005, p. 21 ff.; RESCIGNO P., "Cinquant'anni dopo il Codice civile", in Codificazione del diritto dall'antico al moderno, ESI, Napoli, 1998, p. 423.

[41] See CHEREDNYCHENKO O., "Fundamental Rights, Policy Issues and the Draft Common Frame of Reference for European Private Law", in European Review of Contract Law, Vol. 6, 2010, No. 1, pp. 39–65, in particular p. 42. According to the costitutionalisation of the European contract law, see, for example, HESSELINK M., "The Horizontal Effect of Social Rights in European Contract Law", in HESSELINK M. et al., Privaatrechttussenautonomie en solidariteit, Den Haag, Boom Juridische Uitgevers. 2003, p. 119; COLOMBI CIACCHI A., "The Constitutionalization of European Contract Law: Judicial Convergence and Social Justice", in European Review of Contract Law, 2, 2006, p. 167.

already in the first articles. In fact Article I.-1:102 provides that the rules contained in the DCFR should be interpreted and applied in the light of fundamental rights and fundamental freedoms.

This concept is developed even in the books II and III, and in some of the provisions of Book VI on torts. For example, Article VI.-2: 203 states that "loss caused to a natural person as a result of infringement of his or her right to respect for his or her dignity, such as the rights to liberty and privacy, and the injury as such are legally relevant for damage".

The CFR has "privatised" the fundamental rights, recognising an "overriding nature" of principles (DCFR 2009, No. 5, 14) as solidarity and the promotion of social responsibility, the preservation of cultural and linguistic diversity, the protection and promotion of the welfare within internal market (DCFR 2009, No. 5, 14-17).

The violation of these rights carries sanctions under the civil law. As a matter of fact, the Article II.-7: 301 DCFR also states that "a contract is void to the extent that: (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle".

3.4 *The non patrimonial feature of the EU discipline concerning the contract is also expressed by the importance of the role of the "general clauses" in the interpretation and application of the contractual relationships*.

The civil codes have done everything possible to avoid any reference to undefined notions. However, EU law makes extensive use of these concepts.

For example, the DCFR refers to general clauses like using the concept of "reasonableness" (Article I-1: 104) or expressions in which "basic principles infringe contracts" (Article II.-7: 301).

Another example is the concept of "good faith" largely used under the European law, impacting also on domestic system that traditionally did not admit such a concept before the transposition of the EU law[42].

This principle is invoked, for example, by Directive 1986/653 which provides for the respect of good faith in fulfilling the obligations of the agent and the employer. The notion of good faith is taken into consideration when unfair clauses are agreedon by the parties which may produce an imbalance, even in the case that the clause is elaborated in good faith (art. 3, para 1, the 93/13l Directive)[43].

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[42] See the decision of the House of Lords, Director General of Fair Trading vs. First National Bank de 2001, concerning the application of the Directive 93/13/CEE in the English legal system. According the application of the principle of the good faith in the European Countries, see WHITTAKER S., ZIMMERMANN R., "Good Faith in European contract law: surveying the legal landscape", in ZIMMERMANN R., WHITTAKER S. (coord.), Good Faith in European Contract Law, Cambridge University Press, Cambridge, 2000, p. 7 ff., 44 ff.; WILLETT C., "General Clauses and the Competing Ethics of European Consumer Law in the UK", in Cambridge Law Journal, 2012, p. 412 ff.

[43] Cfr. DE NOVA G., "Criteri generali di determinazione dell'abusività delle clausole ed elenco di clausole abusive", in Rivista trimestrale di diritto e procedura civile, 1994, p. 693; RIZZO V., "Il significativo squilibrio "malgrado" la buona fede nella clausola generale dell'art. 1469 bis c.c.: un collegamento ambiguo da chiarire", in Rassegna di diritto civile, 1996, p. 497.

The EU law principle of good faith is more widely used than in the national law[44], which only serves as a benchmark for verifying compliance with the obligations (see Article 1175 *Codice Civile*), the loyalty of the negotiations (cfr. article 1337 *Codice Civile*), and the performance of the contract (see Article 1375 *CodiceCivile*).

In contrast, the EU law principle of good faith is the standard concerning the content of all community obligations, and especially those imposed to the parties who are in a position of advantage, such as the government (see the discipline of public procurement) and professionals in their dealings with consumers (see the rules on unfair terms)[45]. Good faith requires that the exercise of an edge should have the character of transparency, in order to avoid abuse of the law[46] and take into account the legitimate expectations (*confiance légitime*)[47] of other subjects, the need for security of duties (*sécurité juridique*), the rule of law and equal treatment[48].

The good faith is invoked in order to establish the pre-contractual liability of the EU Institutions in the formation of contracts[49].

Another important concept in EU law is the principle of "equity", which is used, for example, in Article 8 of Directive 87/102 concerning consumer credit, which establishes the right to an equitable reduction of the total cost of credit, if the consumer exercises his right of early compliance; in Article 6 of Directive 1986/653 of 18 December 1986, according to which, in the absence of agreements, standards and customs, the agent shall be entitled to reasonable remuneration; Article 3, para 3 of the Directive on late payments (Directive 2000/35/EC) which provides compensation for damages in cases which have agreed upon due date for the payment, or which have consequences, or penalties for late payments which are harmful to the creditor. In this case the legal terms apply, if the national court does not modify the contract based on the principle of equity.

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44 Cfr. ECFI, 22 January 1997, T-115/94, Opel Austria/Conseil, ECR 1997, p. II-39. The EU Judge normally elaborates the notion of "good faith", making reference to the international law. See the case-law of the International Court of Justice, the judgment of 25 May 1926, Intérêts allemands en Haute-Silésiepolanaise, CPJI, series A, n. 7, pp. 30, 39, afterwards included in the Wiener Convention on the International Treaties of 1969.

45 See the recital 16 of the Directive 93/13/EEC (on unfair terms in consumer contracts), according to which "an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account".

46 Cfr. about the relation between good faith and abuse of the right FRANZESE L., "Ordine economico e ordinamento giuridico". La sussidiarietà delle istituzioni, Cedam, Padova 2004, p. 32; GALGANO F., "Squilibrio contrattuale e malafede del contraente forte", in Contratto e impresa, 1997, p. 420.

47 C-112/77, Töpfer/Commission, ECR 1978, 1019, para 19.

48 ECFI, 24 April 1996, T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94, Industrias Pesqueras Campos et al. /Commission, ECR 1996, p. II-247.

49 See, for example, ECFI, 17 December 1998, T-203/96, Embassy Limousines & Services/European Parliament, ECR 1998, p. II-4239; Id. 29 October 1998, T-13/96, Team/Commission, ECR 1998, p. II-4073.

This principle is widely applied in the case-law of the Court of Justice[50].

Its typical function is to adapt the rule to the specific case, as it occurred in case-law of the medieval courts (*Aequitas singularis*)[51].

3.5 *Collaboration.* As mentioned above, within traditional private law, there are interests in patrimonial issues, which are the main instrument to ensure that the movement of assets are represented by the exchange.

Marginally, the civil codes deal with contracts without exchange (among the exceptions, see the Italian Civil code, containing few provisions relating to the contracts "plurisoggettivi con comunione di scopo" (Articles 1420, 1446, 1459, 1466, Italian Civil Code).

On the contrary, the EU legal sources of the last period make continuous references to the contracts governing the collaboration between universities, undertakings, public bodies and other entities for research initiatives, education and training. These agreements are referred to by different names: Consortium Agreements (Article 24 Regulation (UE) No. 1290/2013)[52], Partnership Agreements, Groups of economic operators which submit tenders under public contracts (Article 1, par. 8, Directive 2004/18/EC), Clusters and other "business networks"[53], the public-private or public-public partnerships[54], Joint Research Units[55], and so on.

Moreover, the knowledge society requires overcoming legal and regulatory restrictions limits the participation in the conclusion of cooperation agreements.

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50 Among others, C-446/93, SEIM, ECR 1996, p. I-73, para 41; Id., C-58/86, Coopérative agricole d'approvisionnement des Avirons, ECR 1987, p. 1525, para 22; Id., C-283/82, Schoellershammer/Commission, ECR 1983, p. 4219, para 7; ECFI, 4 July 2002, SCI UK/ Commission, T-239/00, ECR 2002, p. II-2957, para 44 and 50.

51 SASSI A., "Equità e buona fede oggettiva nel diritto interno ed "europeo"", in SEDIARI T. (ed.), Cultura dell'integrazione europea, Giappichelli, Torino, 2005.

52 CIPPITANI R., Il Consortium Agreement, in CIPPITANI R., FULCI L., I programmi comunitari per la ricerca e l'innovazione, ISEG, Perugia, 2007, p. 247 ff.

53 The cluster can be defined as "a group of firms, related economic actors, and institutions that are located next to each other and have reached a sufficient scale to develop specialized expertise, services, resources, suppliers and skills" (Commission, Towards world-class clusters in the European Union: Implementing the broad-based innovation strategy, 17 October 2008, COM(2008) 652; see the document enclosed, The concept of clusters and cluster policies and their role for competitiveness and innovation: Main statistical results and lessons learned); European Cluster Memorandum of January 2008 on http://www.proinno-europe.eu/NWEV/uploaded_documents/European_Cluster_Memorandum.pdf.

54 See Commission, Green Paper on public-private partnerships and Community law on public contracts and concessions, of 30 April 2004, COM (2004) 327.

55 The Joint Research Unit, provided under the documents of the Framework Programme "Horizon 2020", make reference to the French experience of the Unité Mixte de Recherche (UMR) (Article 2 Décret No. 82-993, 24 November 1982,and the Decision No. 920520SOSI, 24-7- 1992, relating to the "organisation et fonctionnement des structures opérationnelles de recherche".

4. *The function of contracts and obligations between parties under the European Law*. Under EU law, contracts continue to play their traditional role within national systems, but now they have been inserted into a new legal framework and have purposes beyond the traditional ones.

The contract is no longer an isolated area, which governs the relationships between the parties, regardless of the context.

Within the EU law, it can be observed on one hand a growing number of integrative interventions to protect the fundamental rights and the weaker parties (it is the case of the discipline concerning the consumers or protecting the SMEs). On the other hand, the law takes into account various effects of the agreement on several other subjects different from the parties of the contract (see for the entire discipline of competition).

The private autonomy, in this context, cannot be understood simply as the intention of the parties addressed to have direct effects recognised by the legal system (as Windscheid asserted in paragraph 69 of his Lehrbuch des Pandektenrechts, dealing with the concept of "negotium").

Thus, the EU law considers the legal subjects and their relationships from a global approach, no longer from the restricted perspective of the relations between the parties.

This change can be observed in the contract law. In the past they were governed by principles such as private autonomy and that of the relativity of the effects (as above mentioned, the contracts have effects only on the parties)[56].

In the EU law a different principle has to be applied. The contract is considered from the point of view of the whole system. The contracts are taken into account by the perspective of the interests protected by the entire system, as the freedom of movement, gender equality, consumer protection, competition rules, etc. The EU legal system provides several instruments of reaction whenever the contract violates these interests, thus breaking the kingdom of the will of the parties[57]. Those instruments of reaction are applied in every type of agreements, also if they are without consideration[58] or "binding in honour only"[59]. Indeed, the competition rules, for instance, shall be applicable also to the gentlemen's agreement[60] and to other non-binding agreements[61].

The global function of the contract can also be seen in the consequences of the breach of obligations arising from the contract. The instruments provided under the EU law to

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[56] See the analysis of the position of Carnelutti in IRTI N., "L'ordine giuridico del mercato", Laterza, Roma-Bari, 2003, p. 41 ff.

[57] The contractual autonomy, in this context, cannot be considered no longer the power of the parties to produce effects recognised by the legal system, see WINDSCHEID B., "Il diritto delle pandette", ref. § 69, p. 264 ff.

[58] ETFI, 10 July 1991, T-76/89, Independent Television Publication Limited/Commission, ECR 1991, p. II-575.

[59] ECJ, 17 September 2002, Town and County Factors, C-498/99, ECR 2002, p. I-7173.

[60] ECJ, 15 July 1970, Chemiefarma/Commission, 41/69, ECR1970, p. 661; Id. 29 October 1980, Heintz van Landewyck Sarl et oth./Commission, from 209/78 to 215/78 e 218/78, ECR 1980, p. 3125.

[61] See, for example, the case Polypropylene (European Commission, 23 April 1986, Polypropylene, in O.J., 1986, L 230/1).

react against the non fulfilments are conceived in order to re-establish a legal rather, than a patrimonial, equilibrium.

The legal sources use tools already known in domestic law such as the Italian ones, as the nullity and the automatic insertion of the clauses provided under the law (see, in relation to the annulment, Article 1339 of the Civil Code, which refers to the automatic insertion of clauses and Article 1419, paragraph 2, which establishes the invalidity of agreements contrary to the mandatory provisions).

This is the case of nullity by law established by the agreements in conflict with EU rules that govern the jurisdiction in accordance with Article 101, para 2, TFEU. In these cases, the supranational law leaves to the national discipline the establishment of the consequences of nullity[62].

However, in specific cases the primary objective of protecting those interests, and especially the consumer or the weaker party, requires solutions different from the termination or the nullity, leading to the end of the contractual relationships.

The directives provide, in this regard, different technical solutions which are often not foreseen in the traditional civil codes.

That is the case of the "right of withdrawal", provided by the Article 9 of Directive 2011/83/EU defined as the consumer's right to "withdraw from a distance or off-premises contract, without giving any reason, and without incurring any costs" if exercised within a specific term (14 days).

This right does not act only in contracts between consumers and professionals, but also in cases of relations between professionals (see, for example, Article 15 of Directive 86/653/EEC, which refers to commercial agents). The mentioned rights allow the possibility to dissolve the contractual relationship without proof of default.

Another alternative to the invalidity is the interpretation in favour of the party to be protected.

This is the case of Directive 93/13, which provides that unfair terms are not binding for the consumer (Article 6), but also that "Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail" (Article 5), to avoid the inefficiency of a clause which may affect consumer interests.

In the contract of sale between the professional and the consumer, EU law provide not only the right to demand the termination or the price reduction (as the also Article 1492 Italian Civil Code does, but only if the fault is particularly grave according to the Article 1490 *Codice Civile*).

As a matter of fact, the EU law also provides that, in case of any lack of conformity, the buyer has the right to a spectrum of protective instruments, which include, along with the termination and the price reduction, also the repair or the replacement (see Articles 3, Directive 1999/44 / EC on sales of consumer goods; see also Article 5 of Directive 90/314/EEC on package travel).

EU law also uses the technique of compensation for damages, for example, in the case of non-delivery of goods and services or in case of delivery not in accordance with con-

[62] C-319/82, Société de vente de ciments et bétons, ECR 1983, 4173; C-10/86, VAG France SA, ECR 1986, 407.

tractual requirements (see Article 17 Directive 86/653/EEC on self-employed commercial agents; in 97/5/EC on cross-border transfers and the 90/314/EEC on package travel (see Article 4, paragraphs 6 and 7). Directive 95/46/EC on the protection of individuals with regard to processing of personal data (Article 23, para 1) establishes a specific compensation in the event of unlawful processing. Directive 2000/35/EC on late payments provides that, unless the debtor is not responsible for the delay, the creditor is entitled to claim compensation for all costs incurred by delay (Article 3, para e). Moreover, Directive 2000/35/EC also recognises the right of the creditor to claim the default interest (Article 3).

The compensation does not refer only to the patrimonial damages, as established, for example, by the Court of Justice in the judgment Leitner (C-168/0080), in relation to Article 5 of the Directive on package travels.

In that judgment, the Court emphasises that different interpretations of the concept of compensation could affect the competition within the market and the harmonization of the disciplines of the Member States and the effectiveness of consumer protection offered by the Directives.

In cases of voluntary termination by the consumer as well as in cases of cancellation by the provider for reasons other than the fault of the consumer, some directives provide for the right to reimbursement of the sums paid (cf. Article 7, para 2 Directive 97/7/EC on distance contracts; article 4, para 6, Directive 90/314/EEC on package travel).

5. *The contracts as instruments of Governance.* While the contractual autonomy no longer has the exclusive function of regulating relations between parties, the contracts can be used to achieve new aims.

According to the White Paper on European Governance[63] the Union should adopt "a less top-down approach that complements its policy tools more effectively with non-legislative instruments".

Therefore, the institutional documents give a great emphasis on the "button-up" European integration, that is to say a process promoted by the EU Institutions but fully implemented by the legal subjects. The latter are not only required to ensure the effective application of the rules imposed by both EU Institutions and Member States. Indeed, the EU law provides that the legal subjects, on the grounds of their autonomy, have the power to adopt rules integrating the legal system.

As matter of the fact, the EU law provides the establishment of several kinds of codes of conduct[64] and agreements that complete and implement the supranational disciplines.

The EU legal sources consider the cooperation agreements as the main instruments to implement the EU policies. For example, under the Bologna Process and the EU higher education policy, these agreements actually create the Higher Education Area, establishing joint degrees and recognised training periods (by means ECTS)[65]; the cooperation

[63] Communication of the Commission, European Governance, COM (2001) 428 final/2, of 5 August 2001.

[64] GALGANO F., "Lex mercatoria", Il Mulino, Bologna, 2001, p. 215.

[65] See CIPPITANI R., "L'Europa della conoscenza (la ricerca e l'educazione al centro della costruzione comunitaria)", in SEDIARI T. (ed.), Cultura dell'integrazione europea, ref. p. 81 ff.

agreements help carry out the technology transfers between universities, research institutions and enterprises[66].

Regional integration can also be achieved by means of contractual agreements, particularly for contracts concluded between public authorities, public bodies, and subjects performing activities of public interest (such as universities and institutions issuing legal academic qualifications, schools or professional organizations). Normally these authorities have no power to conclude international treaties, but obviously can stipulate contracts.

In particular the European law disciplines the agreements between sub-regional or local authorities and municipalities, autonomous regions or communities (depending on the structure of the each States).

As regards local authorities, the White Paper of the Committee of European Regions on Multilevel Governance ("Building Europe in partnership" of 17 June 2009) affirms that: "By recognising the contribution of territorial governance and decentralised cooperation, international and European institutions have in recent years strengthened the role of local and regional authorities in global governance" (paragraph 1.3)[67].

The public bodies become actors of international politics[68], playing the functions known as "para-diplomacy", "decentralized cooperation"[69], border and interregional cooperation.

The role of non-state public actors is recognised at the international and supranational levels[70], especially in Europe where there is a specific legal framework in the area of the Council of Europe and the European Union.

In particular, according to the EU law the role of transnational non-state entities have a constitutional relevance through the principle of subsidiarity and the cohesion policy.

In particular the cohesion policy aims at "reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions" (Article 174 TFEU). The main instrument for implementing the policy of economic, social and territorial cohesion (since the Treaty of Lisbon) is represented by the Structural and Cohesion Funds, which have an important impact on economic and social development of European regions[71].

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66 Commission Recommendation of 10 April 2008 on the management of intellectual property in knowledge transfer activities and Code of Practice for universities and other public research organizations (notified under document number C(2008) 1329).

67 See also the Communication, Local Authorities: Actors for development, (SEC(2008)2570).

68 COLETTI R., RHI-SAUSI J.L., "Paradiplomazia e politica estera nell'Unione europea", 2010, in cespi.it. About the role of the regions, see the Communication of the Commission, Local Authorities: Actors for Development, above mentioned.

69 According to the Communication, Local Authorities: Actors for development, above mentioned, the expression "decentralised cooperation" is used in order to "describe the publicly and privately funded aid provided by and through local authorities, networks and other local actors" (para 2.1).

70 See the Chapter 28 of the document "Agenda 21", agreed by the 170 Countries participating to the Conference on Environment and Development in Rio de Janeiro of 1992; see also OECD, Lessons Learned on Donor Support to Decentralisation and Local Governance, 2004, in oecd.org.

71 ARMSTRONG H.W., "Convergence among regions of the European Union. 1950-1990", in Paper in Regional Science, 1995, n. 74; BARRO R.J., SALA-I-MARTIN X., "Convergence Across States and Regions", in Brookings Papers on Economic Activity, vol. 2, 1991, pp. 107-182; DE LA

One area where collaboration is very significant is the cross-border cooperation, which is expressed through forms of collaboration between the local authorities of different countries concerning issues along the nearby border territories[72].

Cross-border cooperation in Europe was born spontaneously for the first time after World War II, especially by means of establishing the twinning between towns and other local authorities. Later in the 80s, that form of collaboration was recognised by the Council of Europe, through the European Outline Convention on Trans frontier Co-operation between Territorial Communities or Authorities ("Madrid Agreement" of 21 May 1980)[73].

Subsequently, cross-border cooperation has received a legal and financial framework for the EU since the 1990s[74].

In accordance with the Madrid Agreement which is meant to be a cross-border cooperation "any concerted action designed to reinforce and foster neighbourly relations between territorial communities or authorities within the jurisdiction of two or more Contracting Parties and the conclusion of any agreement and arrangement necessary for this purpose. Trans frontier co-operation shall take place in the framework of territorial communities' or authorities' powers as defined in domestic law" (Article 2, para 1). The Convention also provides an appendix in the "Models and outline agreements, statutes and agreements on trans frontier cooperation between territorial communities or authorities".

The Additional Protocol to the Convention of Madrid Protocol (Strasbourg, 9 November 1995) subsequently recognised "the right of territorial communities or authorities under its jurisdiction (…) to conclude trans frontier co-operation agreements with territorial communities or authorities of other States in equivalent fields of responsibility, in accordance with the procedures laid down in their statutes, in conformity with national law and in so far as such agreements are in keeping with the Party's international commitments" (Article 1).

The Additional Protocol No. 2 of the Convention of 1998 extends the discipline of cross border cooperation also to the "interregional", defining cooperation as follows: "any concerted action designed to establish relations between territorial communities or authorities of two or more Contracting Parties, other than relations of trans frontier co-operation of neighbouring authorities, including the conclusion of co-operation agreements with territorial communities or authorities of other States" (Article 1 of the Protocol).

These arrangements involved in the construction of supranational law from various perspectives are especially suitable for European integration, where the legal complexity

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FUENTE A., DOMENÉCH R., "The redistributive effects of the EU budget: an analysis and some reflections on the Agenda 2000 negotiations", CERP Discussion Paper, 1999, n. 2113; LÓPEZ-BAZO E., VAYÁ E., MORA A.J., SURIÑAC J., "Regional economic dynamics and convergence in the European Union", in Annals of Regional Science, 1999, n. 33, pp. 257-370.

72 Cfr. PERKMANN M., "Cross Border Regions in Europe. Significance and drivers of regional cross-border cooperation", in European Urban and Regional Studies, n. 10, 2003, pp. 153-171.

73 Conseil of Europe, Practical Guide to Transfrontier Co-operation, 2006.

74 COLETTI R., "La experiencia europea como marco general de referenzia", in RHI-SAUSI J.L., CONATO D. (coord.), Cooperación transfronteriza e Integración en América Latina, Cespi, Roma, 2009, p. 33 ff.

and principles such as subsidiarity, would lead to consider as more advisable the use of techniques of to soft law[75].

In particular, the agreements concerned allow the participation of the various actors involved in decision-making processes in an open and ongoing context, which is a real "laboratory" of integration[76], as noted with reference to the legal instruments of territorial cooperation in Europe[77].

These agreements contribute to the governance of the integration processes, especially through its "normative" function.

The legal doctrine speaks of "negotiated law"[78], especially in regards in specific fields, such as the establishment of the professional codes of conduct[79].

The agreements between local entities also play a regulatory role, establishing rules which can be applied to the communities concerned, but which may be considered as precedents and as best practices that can be formalised by sources at the national or supranational level.

The contracts have the undeniable advantage of allowing the introduction of common agreement, at least potentially, of standards that help remove barriers to cross-border cooperation, i.e. on the basis of the needs arising from these agreements, interpretation for the implementation of the objectives described in the same welcome.

6. *Liability as instrument to grant the application of the EU law*. Obligations have assumed the function of ensuring that the EU Institutions and the Member States will implement the supranational legal system.

According to the EU law, if the Member State does not fulfil its duties, it will be subject to the legal consequences provided for under civil law, that is to say the compensation or, if possible, the restoring of the previous situation.

The affirmation of the civil liability of the States is the result of a process of external and internal limitations of the concept of state sovereignty, a process that will strengthen the present regional integration processes[80].

Under Article 4, para 3 EU Treaty, the Member States, on the grounds of the principle

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75 Generally speaking see WELLENS K., BORCHARDT G., "Soft Law in European Community Law", in European Law Review, 1989, p. 267 ff.

76 See the Communication of the Commission, European Governance, ref. para 2.3.

77 In particular according to the European Group for the Territorial Cooperation: "The EGTC provides a clear and permanent framework for cooperation. As said in the contribution to the Green Paper on Territorial Cohesion, the EGTCs provide platforms for an integrated approach to addressing problems on an appropriate geographical scale. It allows the direct participation of all the actors, which are able to manage the programmes in a more efficient, consistent and coherent way (less resources, joint management, shared responsibility)" (para 6 The role of the EGTC in the European integration.)

78 LIPARI N., "La formazione negoziale del diritto", in Rivista di diritto civile, 1987, I, 307 ff.; ALPA G., Autodisciplina e codice di condotta, in ZATTI P. (ed.), "Le fonti di autodisciplina", Cedam, Padova, 1996, p. 3 ff.

79 ZAGREBLESKY G., "Il diritto mite", Einaudi, Torino, 1992, p. 45 ff.

80 About the notion of the "sovereignty", see HALLIVIS PELAYO M., "Interpretación de tratados internacionales tributarios", Porrúa, México, 2011, p. 26 ff.

of "sincere cooperation" must take "any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union" and they also have to refrain "from any measure which could jeopardize the attainment of the objectives of the Union".

In the case of default (positive or negative) of these obligations the Court of Justice recognises the liability of the State, which ever branch of the State whose actions or inactions have caused the failure[81], even when it is a constitutionally independent institution[82], such as a local authority or the judiciary.

Therefore, as the EU Court stated in the judgement Francovich "It follows that the principle whereby a State must be liable for the losses and damages caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty"[83].

This kind of liability can be claimed by all subjects which are affected by the behaviour of the State, as, in the case-law originated by Francovich, by the citizens of the Member State that did not implemented a directive or other supranational normative.

Also, always in Europe, the European Court of Human Rights develops its jurisprudence on the issue of State liability in the application of Articles 41 and following the European Convention of Human Rights, providing that "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party". The compensation is decided in order to enforce the respect of human rights, even if they are not connected to the patrimonial sphere[84].

Furthermore, the Court of Strasbourg also often makes reference to the protection of the patrimonial rights, especially the property recognised by the Article 1 of the Additional Protocol to the Convention, when it wishes to grant the protection of personal rights, as is the case of the case-law Maurice and Daon of 2005. In this particular case the European Court decided that the French law No. 2002-203 (also known as "*loi anti-Perruche*"), which has limited medical liability in the event ofa malformation of the foetus, which has not be detected before the birth, but also for controversies raised before the law entered into force, did not comply with the duty to respect credit as form of property.

Moreover, there are other types of liability that can serve for the effective implementation of supranational law.

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81 Among the other cases, see for example C-34/89, Italy/Commission, ECR 1990, I-3613, which makes reference to the lack of adoption of the acts in order to remedy to the irregularities of the beneficiaries of the EU grants.

82 C-129/2000, Commission/Italy, ECR 2003, I-14672.

83 C-6/90 and C-9/90, Francovich and Bonifaci / Italy, ECR 1991 p. I-5357, paragraph 35 ff.

84 Just as example, among the last judgement, see the judgement of EctHR in the case Mennesson v. France, application No. 65192/11, of the 26 Jun 2014, concerning the violation of the right to respect of family life (Article 8 ECHR), in case of the lack of recognition of the filiation arising from the surrogacy forbidden by the domestic legislation (in the case the French law).

This is the case of contractual liability, and the repeat of undue payment and the unjustified enrichment.

According to the contractual liability, the case-law of the Court of Justice considers all the relationships which, in the past, some legal systems held as matters or objects of the administrative and unilateral power of the public administration to be contracts[85]. As is the case of the social services, that are seen as other economic activities[86]. Also the European Court of Human Rights holds that the social services are to be included in the notion of civil matter[87], as objects of its competence (See the case Mennitto v. Italy of 5 October 2000). This allows the protection of the personal rights of weak persons against the State, through the idea of the social service as a contract and of the liability in case of the non fulfilment by the public administration.

According to the other typologies of liability, it is considered as an undue payment when a State approves national taxes which are not in compliance with the EU law. In this situation the case-law established that the Member State has to guarantee the repayment of such taxes[88].

The Advocate General of the EU Court of Justice, Geelhoed, states that "It is a general legal principle that an individual on whom the authorities have incorrectly imposed a pecuniary charge has the right to recover the sums paid. Taxes can be imposed only when they are founded on a sound legal basis. When no such basis exists, the charge is unlawful and must be reimbursed"[89].

Another case usually treated by the EU Court of Justice is overpayment, by States, of funds from the EU budget. If a beneficiary has received a grant, without the right to receive it, the contribution has to be recovered. Failing to do so is a State liability and the consequent obligation of compensation for damage is the European Union.

Another kind of liability useful to the implementation of the supranational legal system is that concerning EU Institutions.

Indeed, according to Article 340 TFEU the European Union is subject to the contractual and extra contractual liability for its conduct.

The EU case-law concerning the application of the contractual and extra contractual liability of the Institutions has elaborated an interesting set of principles in this matter.

Therefore, a large number of sentences contain the definition of non-contractual liability (at least by the judgment Lütticke of the 28 April 1971, in the case No. 4/69)[90],

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85 CIPPITANI R., COLCELLI V., "Prestazioni sociali e situazioni giuridiche soggettive", in Il Foro Padano, 2011, p. 135-166.

86 C-158/96, Raymond Kohll, ECR 1998 p. I-1931; C-120/95, Nicolas Decker, ECR 1998 p. I-1831; C-67/96, Albany International BV, ECR 1999 p. I-5751.

87 For example see ECTHR, 26 February 1993, Salesi v. Italy, in ECR Series A, No. 257-E, p. 59, § 19.

88 C-104/1986, Commission/Italy, ECR 1988, p. 1799; C-197/03, Commission/Italy, ECR 2006, p. I-60.

89 Observation delivered on 3 Jun 2003, case C-129/00, Commission/Italy, para 68.

90 For example, see C-49/79, Pool/Conseil, ECR 1980, p. 569; C-253/84, GAEC de la Ségaude / Conseil and Commission, ECR 1987, p. 123, para 9, 21; C-326/86 and 66/88, Francesconi et al. /Commission, ECR 1989, p. 2087; para 8; C-122/86, Epicheiriseon Metalleftikon Viomichanikonkai Naftiliakon e altri /Commission and Conseil, ECR 1989, p. 3959, para 8.

which exists when in a given case three "conditions" are brought together: the existence of an"actual" damage[91], unlawful conduct[92], and a causal link between the damage and conduct[93].

The damage, the unlawful conduct and causation, are also required for the assessment of contractual liability[94]and in the case of pre-contractual liability of the Institutions[95].

Furthermore, the case-law has developed, in the absence of explicit legislation in this regard, the various types of exclusion of liability, such as force majeure[96], the state of necessity[97] and self-defence[98].

In the EU case-law it is admitted the recoverability of emerging damage, made up of "the charges and expenses incurred" and the "loss of earnings".

It shall be excluded, in the cases of alleged pre-contractual liability of the institutions, the damage "hypothetical and future"[99]. On the contrary, the recognition of a damage future would have the same effect of the contract, even if this has not actually stipulated. The compensation for the loss of profit is therefore only permitted in the case of contractual liability[100].

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91 The damage is considered as actual if it is certain. It cannot be excluded the liability in case of the imminent and foreseeable damages. See, for example, ECR 2 Jun 1976, 56-60/74, Kampffmeyer/ Commission and Conseil, ECR 1976, p. 711.

92 The illegal conduct could be an omission, as in ECJ, 15 September 1994, C-146/91, Kydep/Conseil and Commission, ECR 1994, I-4199.

93 There is a causality link "existe un lien de cause à effet entre la fautecommise par l'institution concernée et le préjudiceinvoqué", ECFI, 22 October 1997, T-213/95 and T-18/96, SCK et FNK / Commission, ECR 1997, p. II-1739, para 39, 98.

94 ECJ, 20 February 1997, C-114/94, Intelligente systemen, Data base toepassingen, Elektronischediensten BV (IDE) / Commission, ECR 1997 p. I-803.

95 See, for example, ECFI, 17 December 1998, T-203/96, Embassy Limousines & Services/European Parliament, ECR 1998 p. II-4239; Id. 29 October 1998, T-13/96, Team/Commission, ECR 1998 p. II-4073.

96 ECJ, 17 December 1970, 25-70, Einfuhr- und VorratsstellefürGetreide und Futtermittel / Köster, ECR 1161; Id., 28 May 1974, 3-74, Einfuhr- und Vorratsstelle für Getreide und Futtermittel / Pfützenreuther, ECR 589; Id. 30 May 1984, 224/83, Ferriera Vittoria/Commission, ECR 2349, para 13; Id. 12 July 1984, 209/83, Ferriera Valsabbia/ Commission, ECR 3089, cfr. para 21; Id. 17 September 1987, 70/86, Commission/Greece, ECR 3545, para 8; Id. 27 October 1987, 109/86, Theodorakis /Greece, ECR 4319, para 7; Id. 8 March 1988, 296/86, McNicholl / Minister for Agricolture, ECR 1491, para 11; Id. 10 July 1990, C-335/87, Greece/Commission, ECR I-2875, para 22; Id. 266/84, 22 January 1986, Denkavit France / FORMA, ECR 149, para 27; Id. 5 February 1987, 145/85, Denkavit / Belgium, ECR 565, para 11.

97 See ECJ, 11 May 1983, 244/81, Klöckner-Werke AG/Commission, ECR 1983, p. 1451.

98 ECJ, 12 July 1962, 16-61, Acciaiere ferriere e fonderie di Modena / Haute Autorité, ECR 1962, p. 547.

99 ECFI, 29 October 1998, T-13/96, TEAM / Commission, ref.

100 ECFI, 17 December 1998, T-203/96, Embassy Limousines & Services/ European Parliament, ref.

With particular regard to the cases of non-contractual liability, compensation covers only the sufficiently direct consequences[101]. It is not generally considered to be relevant, therefore, the moral damage[102], unless it is proved an "actual injury and certain"[103].

7. *Contract and obligations as instrument of the European Integration.* The previous paragraphs tried to show how, in Europe, private law is both the product and the means to achieve the legal integration of the Continent.

During the last decades private law has ceased to be a specialist field of law far from the other ones, as the international, administrative/public/constitutional law.

Private law has come back to its ancient function as an archetype of all branches of the law, providing the conceptual bases of the legal theory.

In particular, according to the important role of private law to support the legal integration between the national legal system, in the present age one come back to rediscover the old ties between civil law and international law.

As matter of fact, the latter was originated as an application of private law in the relations between States.

International relations would be based on the same ground of relationships in civil law, as Grotius argued in his *De iure belli ac pacis*. The "international law", which arose from the *ius gentium*, that's to say the private law applicable also to the non Roman citizens, was represented as a set of rules to protect the property of the Sates and the international relationships were considered as contractual agreements or unilateral declarations. The breach of the obligations of the international relationships could be sanctioned by repairing the damage caused by a one State to another.

In the current historic period, private law becomes one of the tools for achieving the purposes of international law, in particular for establishing and developing transnational relations.

The concepts of private law (mainly individual rights, including property, contractual and non-contractual obligations) are used in the framework of the regional law for purposes that are not traditionally assigned to these instruments.

Thus, the concepts of private law, in particular the contracts, perform many tasks that are distinguished from patrimonial purposes for which they were conceived, becoming tools for the application of EU and national policies rather than the traditional administrative measure[104].

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[101] C-64 and 113/76, 167 and 239/78, 27, 28 and 45/79, Dumortier / Conseil, ECR 1979, p. 3091.

[102] Cfr. C-169/83 and 136/84, Leussink-Brummelhuis/Commission, ECR 1986, p. 2801, para 21-22; ECFI, 21 March 1996, T-230/94, Farrugia / Commission, ECR 196, II-195, para 42, 46.

[103] ECFI, 28 January 1999, T-230/95, BAI / Commission, ECR 1999, p. II-123, para 38-39.

[104] In Italy see the legislation concerning the agreements of the Public Administration as the Article 11 ff. of the Law No. 241/1990.

The apparent political neutrality of these instruments, and their legal relevance, make them a powerful and flexible measure of governance[105], to implement processes and promote international cooperation, and in particular, supranational integration[106].

In a similar manner, many differences between public and civil law, considered as insurmountable in the past, do not make sense now.

According to Savigny at the centre of the public law there are the public aims, meanwhile the people are left in the background. On the other hand, private law is focused on the persons and the relationships between them. Today, as mentioned in the previous paragraphs, private relationships are strongly influenced by the collective interests (fundamental rights, and the need of a functioning market); on the other hand the implementation of public policies no longer uses only unilateral instruments and administrative acts, but even more so contracts and obligations.

Some scholars make reference to that situation as "confusion" between public and private law[107]. However rather than a mutual invasion of spheres of competence, today one is witness of the building of new hybrid models, beyond the strict disciplinary classifications between private and public law[108].

Both legal experiences contribute, with complementary and interdependent visions, in order to regulate the legal phenomena.

On one side public law emphasizes the theological role of the fundamental interests in all legal relationships. On the other side, private law provides the legal instruments to reach, in a more efficient and flexible manner, the aims recognised by the legal system, including the protection of fundamental rights.

On this ground, several scholars propose theoretical approaches aimed at overcoming the rigid divisions[109] and at using formulations more comprehensive as "Private Law of Public Administration"[110].

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105 See the Communication of the Commission, European Governance, ref.

106 Communication of the Commission, Trans-European Networks: Towards an integrated approach, COM(2007) 135, 21 March 2007. See among others, DE BERNARDIS R., GIOVANNELLI S., Innovazione e competitività. Potenziare I circuiti della conoscenzane I distretti italiani, in Quaderni LDE, 2/2008; OELSNER A., VION A., "Friends in the region: A comparative study on friendship building in regional integration", in International Politics, Vol. 48, n. 1, 2011, p. 129 ff.; VION A., "The Institutionalization of International Friendship", in Critical Review of International Social and Political Philosophy, vol. 10, n. 2, 2007, p. 281 ff.; JAYNE M., HUBBARD P., BELL D., "Worlding a city: Twinning and urban theory, in City: analysis of urban trends, culture, theory, policy, action", vol. 15, n.1, 2011, pp. 25 ff.

107 See GUETTIER C., "Droit de contrats administratifs", Presses Universitaires de France, Paris, 2008, p. 33 ff.

108 TERNEYRE P., "Le montages contractuels complexes", in AJDA, 2000, p. 575 ff.

109 Within the French doctrine the debate is always live: see, for example, GAUDEMET Y., "Prolégomenès pour un théorie des obligations en droit administrative français", in Mél. En hommage a Jean Gaudemet, Paris, 1999, p. 626; DRAGO R., "Le contrat administrative aujourd'hui", in Droits, 1990, n. 12, p. 110 ff.; JOSSAUD A., "Pour un droit public des marchés", in AJDA, 2002, p. 1483; LICHÉRE F., "Droit des contrats pubblics", Dalloz, Paris, 2005, p. 79 f.

110 SAPORITO L., "I vizi della volontà della Pubblica Amministrazione", in STANZIONE P., SATURNO A. (edit by), Il diritto privato della Pubblica Amministrazione, Cedam, Padova, 2006, p. 241.

Private law shows great vitality in adapting to new and unexpected demands of society and the economy[111].

Anyway, today private law demonstrates its strength and versatility, rediscovering its ancient and modern main function, which is to provide the logical tools (such as contracts) to solve problems in the relations between individuals, whatever subjects may be involved (private and public entity or states)[112].

[111] See PENNASILICO M., "L'interpretazione dei contratti della pubblica amministrazione tra conservazione e stabilità degli effetti", in Rassegna di Diritto civile, n. 2 del 2005, p. 432, who takes into consideration the use of the private law in the activities of the Public Administration.

[112] During all the history of the Roman Law were utilised the ancient scheme of agreement in order to cover the new needs which were emerging, through a "reproductive imitation (dicis causa)". Seeabout the topic, BETTI E., "Diritto romano", vol. I, Cedam, Padova, 1935, p. 279 ff.; TREGGIARI F., Fiducialitas. Tecniche e tutele della fiducia nel diritto intermedio, in LUPOI M. (edit by), "Le situazioni affidanti", Giappichelli, Torino, 2006, p. 45 ff.

Internal market: governance and the regulatory functions of the contract

Andrea Sassi[1]/ValentinaColcelli[2]

The fundamental interests of the weaker party with regard to the contract may coincide with a desire not to maintain an unfair or unbalanced contract if the party suffers damages because of that contract. In this case, the remedy which most likely coincides with the weaker party's interest is a nullity action related to an action for damages, within the bounds of the negative interest. Conversely, the weaker party may envisage maintaining a contract which infringed competition rules. Thus, the balance of the terms of the contract is guaranteed by an action for damages, which is based on violation of rules intended to safeguard the internal market. In such cases, protection for compensation is not connected to any nullity action. In this situation, the EU legal system assigns to the contract not only the role of self-regulation of interests of individuals directly involved in it but also a function of guarantee of the EU economic order. For this reason, contractual liability and for damages are measures to safeguard the EU economic orderactions.

1. *The nature of Art. 101 and 102 of the Treaty on the functioning of the European Union.* Relationships between individuals concerning contractual rights and obligations therefore emerged later in the EU legal system, but they are still required to perform the same function that is reserved for individual rights in vertical relationships.

Due to the close functional relationship between legal protection and substantive rights in the EU legal system, integration with national courts strengthens the above considerations. Thus, results achieved in terms of the function and nature of non-application may be extended from vertical to horizontal relationships. In both, non-application is a tool of control at the discretion of Member States in transposing Directives into national law.

National laws are inapplicable if they conflict with the effects envisaged by EU rules. This is especially true in cases when the time for protection through non-disapplication is anticipated with respect to the moment of the transposition of a Directive, when that Directive contains technical standards and regulations. This happens when Member State discretion is weak. That is, in horizontal relationships, national legislation contrary to a Directive when the period for its transposition has not yet expired need not be applied.

The Court of Justice also gives an additional meaning to non-contractual liability in

[1] Andrea Sassi: § 2; 3.
[2] ValentinaColcelli: § 1; 4.

horizontal relationships. Such non-contractual liability ensures the full effectiveness of EU law, like that in vertical relationships.

The fact that today we can trace a trend to the uniform definition of non-contractual liability in EU law reinforces the logic of the EU judges: infringement of EU rules described for the purpose of conserving the EU legal system, carried out by individuals against other individuals, means ensuring the effect utile of EU rights (Courage/Crehan (C-453/99))[3].

Also the EU discipline of competition may be interpreted in this sense, since anti-competitive business practices having a direct impact on final consumers are prohibited. Thus, consumers may receive compensation for damage caused to them by businesses infringing EU competition rules. Art. 101 of the Treaty on the functioning of the European Union[4].

In this last situation, the EU legal system assigns to contract not only the role of self-regulation of private interests directly involved in it, but also the function of guaranteeing the economic order sought by the European Union. The nature of Art. 101 of the Treaty on the functioning of the European Union, in protecting the economic order of the Community, legitimates anyone to rely on the invalidity of competition-restricting agreements and therefore to seekdamages suffered, if a causal link can be established between the competition-restricting agreements or practice and the damage suffered. The case law of the Court of Justice on infringement of Arts. 101, 102 et seq., the Treaty on the functioning of the European Union (Arts. 81 and 82 of the EC Treaty), which are aimed at structuring and safeguarding the EU internal market, often combine claims for damages with those for absolute or relative nullity of the competition-restricting contract.

The expansion of the number of persons protected by EU legislation on competition, including consumers, is a way of enhancing the use of non-contractual liability to preserve the effectiveness of internal markets as competitive structures. This is perhaps the aspect that most greatly emphasises the trend highlighted by the Court, which also applies to horizontal relationships, in that actions for damages (for non-contractual liability) is away of ensuring the full effectiveness of EU rights[5].

Instruments for correcting market failures range across the public and private laws. For instance, the "economic" regulation has to guarantee allocative efficiency, but must covenant also with externalities and informational asymmetries. The selection of public rules is very different (and includes licensing, prohibition or prior authorization, quality standards, mandatory disclosure), and it could be potentially accompanied by administrative or criminal sanctions. In individual situations, through contract law, private law could provide complementary remedies: as the consequences in the particular case of consumer law of information problem, or the tort law that allocates the effects of externalities suffered by third parties. In the internal market may complement traditional private law instruments, techniques and new remedies have a truly regulatory function[6].

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3 Case C-453/99, Courage Ltd v Crehan, ECR, 2001, I-6297.

4 COM (2001) 398 final, 11.7.2001, OJ C 255, 13.9.2001, 1; Grundmann, Stefan and Stuyck, Jules (eds) An Academic Green Paper on EuropeanContract Law (2002, Kluwer, Den Haag).

5 C-128/92, Banks v BBC, ECR 1994, I-1212, paragraphs 36-54.

6 COLCELLI V., Il sistema di tutele nell'ordinamento giuridico comunitario e selezione degli interessi rilevanti nei rapporti orizzontali", in Europa e Diritto Privato, 2, 2009, pp. 557-585.

Also protection for compensation guarantees the fundamental interests of the weaker party to conservation of the contract if the compensation means re-equilibration of the terms of that contract[7]. In this situation, the EU legal system assigns to the contract not only the role of self-regulation of interests of individuals directly involved in it, but also a function of guarantee of the EU economic order[8]. For this reason, contractual liability and actions for damages are ways of safeguarding the EU economic order[9].

The Community legal system, as mentioned above, also assigns the function of the guarantee of the economic order sought by the European Union to the recovery of sums paid but not due[10].

Therefore, horizontal relationships in the EU legal system, also in view of the functions assigned to legal protection, are selected and adjusted to ensure the existence and survival of the EU legal system. Relationships are aimed at conserving the legal system which was established by the Treaties and which, even within the interstices of the rules, the Court of Justice has originally encoded and continues to interpret[11].

Private and public law are a way to describe the difference betweentwo regulatory strategies of European Union and local markets. "However, to the extent that regulation and private law instruments are now seriously entwined and no longer territory-specific, it is also time to think about the way in which such tools are implemented in trans- European situations"[12]The reference to artt. 101 and 102 it is a good explanation to what was mentioned above[13].

2. *Contractual liability and compensation for damages suffered: the guarantees in the EU legal system*. The explanation of the union between civil law and antitrust law comes from the Community case-law. The Court of Justice has underlined out how the success of the EU antitrust law is largely left to the private enforcement of national courts.

In fact, as demonstrated by the case Courage / Crehan[14], an individual who finds themselves in an inferior position, and sees their freedom of contract injured, is entitled

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7 COLLINS H., "Regulating Contracts", Oxford University Press, 1999.

8 COLLINS H., "The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher's Stone", 2006, 2 European Review of Contract Law, pp. 213.

9 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas Ireland, 1996, ECR I-255

10 See C-199/82, San Giorgio, 1983, ECR 3595; ex multis Vreugdehil, C- 282/90, 1992, ECR 1937; C-70/72, Commission v Germany, 1973, ECR 813; Express Dairy Foods, C-130/79, 1980, ECR 1887, and to contract liability (two typical civil law principles).

11 ERKKI L., "Co-Regulation: a modern approach to regulation", 2000, Brussels, 4 May. Le Livreblancsur la gouvernanceeuropéenne COM (2001) 428 final and Suivi du Livreblancsur la gouvernanceeuropéenne – Pour un usage mieuxadapté des instruments, COM (2002) 278 final, 5.6.2002, Recoursencadré à un mécanisme de corégulation.

12 CAFAGGI F., WATT H. M., "The Regulatory Function of European Private Law", 2009, p. XI.

13 LECZYKIEWICZ D., "Private Party Liability in EU Law: In Search of the General Regime", 2009-2010, 12 Cambridge Yearbook of European Legal Studies, p. 257-282.

14 C-453/99, Courage v Crehan, 2001, ECR I-6297.

to claim compensation for damages suffered according to the EU competition law[15].

The Court of Justice shall try, in this regard, to clarify arguments that are entirely acceptable:

It is precisely the principles of equivalence and effectiveness that are the basis of the most recent intervention by the Court of Justice for damages regarding the breach of the European Community competition law, with the important judgment of the 13™ of July 2006 (case Manfredi)[16].

The principle of equivalence requires the Member States of the European Union to ensure that the protection of EU civil rights is at least as effective as the national rights[17].

The principle of effectiveness requires the Member States of the European Union to adopt a national framework that will ensure the practice and the exercise of rights.

On the basis of these premises, the Luxembourg judges have addressed four questions that were submitted to them, in reference under Article. 234 TEC, the Justice of the Peace of Bitonto, in accordance to the application of art.81 TEC (locus standi, the competent court, amount of compensation, the statute of limitations).

The Supreme Court has recently decided that

"For the purpose of the assessment of damages suffered by the insured (who has participated in an anti-competitive agreement), who claims to have paid a higher premium than what you would pay in free market conditions, the court may determine the amount of equitable compensation. This compensation will be settled at a percentage of the premium paid, net of taxes and miscellaneous charges. Claims for compensation regarding damages suffered by the consumer as a result of the anti-competitive agreement shall expire five years from the date on which the injured is aware of the damage and its injustice. The court will determine the merits and will be blameless by the Supreme Court if consistently motivated".

Power of Market and Consumer Protection. The oppression of the oblate in contracts that offer monopolistic opportunities result in the abuse of the freedom of the enterprise to bargain inside the single market. To understand the concept of dominance one needs only to refer to the anti-trust legislation and the case law of the Community source, being the Italian antitrust ruling is a direct spin-off of it.

The art. 82 of the TEC Treaty (now art. 102 TFEU) states that "it is incompatible with the common market and prohibited, insofar as it may affect trade between Member States, the abuse by one or more undertakings in dominant positions within the common market or in a substantial part of this". "Similarly, the art. 3 l. n. 287/1990 provides that "Abuse is forbidden by undertakings in dominant positions in the national market or in a substantial part of it". It follows, both the Community rule and Italian rule, without exemption regarding a number of prohibited behaviors, substantially corresponding to those which are the subject of agreements restricting competition.

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15 SCAGLIONE, F., "La tutela civile nei contratti ad offerta concorrenziale, permanenze nell'interpretazione civile", PALAZZO A., SASSI A. and SCAGLIONE F., (Eds.), Perugia, 2008, pp. 257.

16 ECJ, Manfredi, C-295-298/04, 2006, ECR I-6619

17 Anyone (not only businesses but also consumers) who suffers damages because of competition-restricting agreements can claim for damages (Corte di Cassazione, n. 2305/2007, (2007) Foro it., I, 1097).

It is of particular concern in situations that:

a) Directly or indirectly impose purchase prices, sales or other unfair contractual conditions.
b) Limit or control production, limit the flow or access to the market, hinder technical development or technological progress, in order to impair the consumers.
c) Apply to relationships with other trading partners who have objectively different conditions to the same type of transactions, thus placing them at an unjustifiable competitive disadvantage.
d) Make the conclusion of contracts subject to acceptance by other parties of supplementary performance, which by their nature or according to commercial use, have no connection with the subject of such contracts.

The above mentioned provisions, however, do not provide neither the notion of a dominant position, or that of any abuse. With regard to the first of these concepts, the Court of Justice has made clear that this position is identified with:

A position of economic strength, in which the undertaking can hinder the continuation of effective competition in the relevant market, and has the ability to behave to an appreciable extent independently of its competitors, its customers, and ultimately, consumers.

This market power or dominance of undertaking which, among other things, may be the normal outcome of a victory for the competitive race, involves a special responsibility which prevents it from the abuse of that power to the detriment of competitors and, ultimately, consumers.

In other words, the undertaking in a dominant position has a special responsibility not to impair its conduct of a genuine undistorted competition in the domestic market and / or in the community.

In particular, according to the most recent position of the Court of Justice (which refers to the c.d. essential facilities doctrine), the undertaking in a dominant position may be refused to be granted a license for the use of intellectual property rights, which constitutes abuse of the dominant position under the following conditions:

It must constitute an obstacle to the emergence of a new product or service for which there is a potential demand;

It must be without any objective justification; It must be such as to exclude any competition on the relevant market. In a famous preceding (the Oscar Bronner case of 1998) it looks at a small Austrian newspaper company who wanted to make use of a bigger newspaper's delivery system, but the latter refused to grant this access. The Court of Justice has ruled that such a refusal would integrate the extremes of abuse of a dominant position. The excessive burden and technical impossibility for the smaller company to find another delivery solution is abuse by the bigger company.

The Commission's practice and the case law, (on the basis of Art. 82 of the EC Treaty, according to which the abuse of a dominant position may also be committed by more companies), have drawn the figure of a collective dominant position (so-called collective dominance).

3. *The anti-competitive agreements*. The agreements prohibited by antitrust law, domestic and community, may consist of agreements or concerted practices between undertakings, and decisions by associations of the undertakings.

Therefore, one of the conditions for the application of the case collusive prohibited by art.81 TEC (III-161 of the Constitution Eur) and 2.1 n. 287/1990, is first and foremost the identification of what an undertaking is. The ECJ has taken a rather broad concept that goes far beyond the definitional criteria laid down by art. 2082 Italian Civil Code.

In fact, an undertaking is:

Any entity engaged in economic activity, regardless of its legal status and its way of financing.

In addition, economic activity is any activity that consists of offering goods and services in a given market.

The extreme flexibility of this definition has allowed us to understand that the professional intellectuals, such as real estate agents and insurance adjusters, medical specialists, lawyers or agents fall into the category of undertaking. The Court of Justice stated the fact that "the activity of a customs agent is intellectual, and requires an authorization, and can be pursued without the combination of material, intangible and human elements, should not be excluded from the sphere of the application of Articles. 85 and 86 of the EC Treaty (now Articles. 81 and 82, note)"

As for the lawyers, the Court has recently stated that they perform economic activity and, therefore, constitute undertaking, as they offer, for a fee, legal aid services consisting of opinions, contracts or other documents, as well as in representation and defence before the courts. In addition, they assume the financial risks related to carrying out these activities because, in the case of imbalance between expenditure and revenue, the lawyer is required to bear the burden of deficits.

According to the above concept of an undertaking, it may also include entities that are non profit and public agencies that carry out economic activities outside of their institutional tasks (the exercise of public functions).

The indications from the case law have now been collected by the European Commission Recommendation of 6 May 2003, according to which (Article 1 of the attachment below)

"An undertaking is any entity, regardless of its legal form, engaged in economic activity. Especially those entities that are considered to be engaged in a craft or other activities on an individual or family basis, partnerships, or associations exercising an economic activity".

Of particular interest are also the cases where undertakings are linked by a relationship of dependency. It reinforces the principle concerning the prohibition of agreements restricting competition; it does not affect agreements or concerted practices between undertakings belonging to the same group as in the case of the parent company and subsidiary. If they constitute a economic unit (c.d. single firm doctrine), in which case, the company "daughter" does not enjoy any autonomy in determining their own conduct in the market and a possible agreement with the parent company (so-called intra-enterprise conspiracy) is solved in a simple allocation of functions inside the group of companies.

Similarly, in the case of the succession of undertakings over time. The liability of a successor to collusive conduct of the enterprise comes from recognizing all the times in the past where there was still an economic and functional continuity between the two companies. In this regard, the ECJ stated that the purpose of application of Art. 81 TCE, "the change of the legal form of the name of the enterprise does not have the same effect as creating a new undertaking free of liability for anti-competitive behavior of its predecessor If, under the economic aspect, there is identity between the two".

On the other hand, the Competition Authority of the market has accused the Italian company EnteTabacchi of anticompetitive conduct which was already carried out by the Autonomous Administration of State Monopolies, as the first had been formed for the purpose of continuing the economic activities of second.

From a generic point of view, the collusion may not only come from a real contract, but also from any common manifestation of desire, (although not legally binding) whose object or effect is the restriction of competition, as in the case c.d. patti between gentlemen (gentlemen's agreements),even if not in written form.

In this regard, it is imperative to remember the Polypropylene case. In this case, heavy fines were imposed by the Commission on fifteen undertakings in the chemical industry for having participated for several years in an agreement and concerted practice, whereby they formed a price cartel and introduced quota arrangements and other measures supporting the price cartel on the polypropylene market. But there is more: in this case, in fact, between the undertakings concerned there was only a parallel pipeline that did not grant a constant participation of all parties involved.

As for practices, (namely those in collusion arising from the exchange of information between companies operating in an oligopolistic market), the Court of Justice has recognized that there are forms of coordination between undertakings. Some of which, without having reached implementation of real agreements, are aware of the collaboration between the companies themselves, to the detriment of competition. This presupposes the existence of direct or indirect contact between the parties, which have the purpose or effect of influencing the conduct on the market by an actual or potential competitor or to disclose to such a competitor the conduct which they themselves have decided to adopt or contemplate adopting in the market itself.

A typical example of this is the Italian case Vetri, where the Competition Authority and the market has recognized an agreement between the four leading manufacturers of hollow glass food, with which, among other things, the sale prices of glass were aligned at the same level from the companies involved with discount policies "irrational", which showed the existence of a concerted practice aimed at enhancing the general price of bottles sold.

In particular, despite the homogeneity of the production costs, it allowed the undertakings concerned to compete on equal terms in the relevant market, which together held a market share of 90%. They had put in place a common practice of billing and packaging according to which wholesalers and distributors were forced to buy packaging at a price higher than what they would be credited back on the date of repayment.

The separate billing had also allowed the glassworkers to obtain greater profits of approximately 65 billion lire a year.

The restrictive practices prohibited, may elapse between undertakings operating at the same stage of the production/ distribution process. Namely horizontal agreements or cartels that harm the inter-brand competition and are at different levels of the process itself. Vertical agreements between producers and distributors that damage the intra-brand competition concerning goods covered by the same brand, so there is competition between distributors of the same supplier).

According to the article 81 TEC (and 2 1. N. 287, 1990), entrepreneurial behaviour must have a purpose or effect on the alteration of the competitive game in the common market (or the nation).

These two criteria (purpose and effect) do not have to resort cumulatively, but rather alternatively, in the absence of clearly unlawful purposes, the cartel should be examined to see its effects on the relevant market.

Some types of prohibited agreements have been typed by the legislature, which exist to aid in the requirement of the anti-competitive objective and focus on the collusive agreement.

Among these, of particular relevance is the conduct of direct pricing (Articles 81, 1, letter a, TEC and 2, No. 2, letter. At ln 287 1990) (price-fixing). The price is the main instrument for the existence of a competitive market; in fact, it is the central nervous system. In particular, the fixing of a price-even-indicative only affects competition because it enables all the participants to predict, almost with certainty what the prices are of its competitors.

When the setting of a price is the objective of a vertical agreement, it involves an illusion created by the producers who set a minimum price for resale to distributors who have a demand for a particular product (resale price maintenance, RPM). This can be very harmful to competition, since the constraints from the RPM allow retailers to stay in a faulty market because of the permanence of higher prices that ensure cost coverage.

Another case of alleged anti legislature (Art. 81, 1, letter. B, TCE and 2 No. 287 1990) is that of the so-called quota output which involves assigning to each undertaking involved in the cartel a certain quota for production or sales. The limitation of production can be achieved even in an indirect way, by setting caps on investment in a given area, or by restricting entry into the market of new products.

The allocation of Markets and supply sources (Art. 81, 1, Doubles. C, ln 287 1990) are certainly some of the most harmful restrictions of competition, since they are aimed at the subdivision which includes potentially rival firms. The geographical areas in which they pursue their activities, or that of the customers, can create situations of a true monopoly, resulting in the foreclosure of a single market zone, thereby preventing a competitive race.

The case law in this regard provides a large series. The allocation of Markets, for example, can be done with a direct clause to prevent a buyer from reselling or exporting the goods purchased.

In the event of a breakdown of the supply source (Frubo case), the Court of Justice ruled that the completion of the agreement prohibiting wholesalers from the Netherlands, who participated in the public auction of Rotterdam, to buy citrus that had not already been imported and cleared through customs in a another Member State.

This clause, which prevented the above-wholesalers group "FRUITUNIE" - the direct import to the Netherlands, was considered likely to distort the "natural course of trade flows" and, therefore, liable to affect intra-Community trade.

Discrimination contract especially boycotts, as well as the binding clauses or tying contracts, under Articles. 81 1, letter. d and e, TEC and 2, No. 2, letter. d) and e), 1. n. 287 1990, are criminal cases that are most often carried out by a single firm in a dominant position. The cartels exhibit a high degree of instability, which tends to promote a conspiracy when a large number of the companies involved in the agreement do not offer highly homogeneous products.

In particular, the Commission adopted the recent Notice on minor importance agreements, which do not substantially restrict competition under Article. 81 TEC, 22 December 2001 (de *minimis* 2001 \ C 368 \ 07). This article fixes a threshold for the quotas with the understanding of what should be considered harmless to the proper functioning of the market.

Therefore, art. 81 TEC does not apply to horizontal agreements between undertakings that have an overall market share of 10% or less, or to vertical agreements between undertakings, which hold no more than 15% of the market.

These thresholds do not apply to the consistency of inherently anti-competitive agreements, hardcore restriction, which are always prohibited. It is, in particular, the horizontal agreements which have price fixing as the objective, limit output or sales, allocate markets or customers, vertical agreements intended to restrict the buyer's freedom to set prices, make possible the establishment of a maximum price, or restrict the area in which the buyer may sell the products.

They are exempt from the application of Article. 81 TEC, even when these thresholds are exceeded, because the agreements between small and medium-sized undertakings defined in the Commission Recommendation of 6 May 2003 states that such agreements can rarely have a significant effect on trade between Member States and on competition in the common market.

4. *The system of civil actions regarding the protection of the freedom of market*. On the basis of the complex and substantial framework of antitrust outlined above, it is now possible to make a few observations on the actual application of the remedial system of private law on the market.

The civil protection of the weaker party in a contract to supply a monopoly is expected, according to jurisdictional rule, Art. 33, paragraph 2, of the Law 287/1990 (antitrust law), that "the actions of nullity and damages, as well as urgent actions related to the violation of the provisions under Titles I to IV are promoted to the Court's appeal".

The foresight of nullity has traditionally been reconnected to the penalty provided for by art. 2, l. n. 287 1990 for the violation of restricting competition. Conversely, the remedy against the abuse of a dominant position is the accountability for damages, which are considered to be of a non-contractual nature.

This vision of the remedial system of parent companies goes against the illegal offenses of antitrust, however, in our opinion it is has ended.

Invalidity of the contract and damages, in fact, are intertwined and take different contours depending on the nature of the interests to be protected. This can be found only through a proper investigation of the systematic and conceptual synthesis of the doctrine.

Let us try, therefore, to provide a clear as possible reconstruction of the competitive market that is consistent with the values expressed by the legal and economic systems. We will start with the recognition of the essential unity of the subject, especially with regard to the execution of contracts that have entered into an agreement that is prohibited in respect of contracts that achieve an abuse from a dominant position.

In both cases, the reformative situations to be contemplated are identical, and should be distinguished on the basis of the interest claimed in court.

We must observe how the civil court is called upon to intervene on the facts that are subject to administrative proceeding by the Authority for Competition and Market.

It should be noted that the administrative measures used to find violations of the antitrust law that precede the establishment of the civil process, combine to form the conviction of the ordinary courts to rule on the same facts that are expressed by the Italian Antitrust Authority on competition and the Market Authority (AGCM). They must conclude that the measure itself constitute evidence of an antitrust offense.

On the other hand, the Competition Authority and the market is the body institutionally appointed to issue technical-discretionary as to the compatibility or otherwise of business conduct concerning the principles of freedom of competition.

Ever since the civil judgment on compensation, the consumer can try to prove the existence of a causal link between the anti-competitive conduct of the undertaking and the damage suffered as a result of a surcharge imposed monopoly, in the contract stipulated by the undertaking with the consumer. The Market Authority (AGCM) makes the administrative decision whether or not the undertaking has violated the antitrust law.

Therefore it is useless for the consumer to provide further evidence of the actual damage suffered, in all cases regarding a prohibited agreement. The purpose of a price cartel, in fact, is exclusively that of charging consumers the same increase within the contract in which the undertaking receives concrete execution. This, moreover, is clear from the same investigation conducted by the Antitrust Authority that has determined, based on very specific documented evidence (which, among other things, the consumer could hardly come into possession, if not through a court order of presentation of the same, in accordance with Articles. 210 ff. Italian Civil Procedure), the causal link between the agreement and the rise in insurance premiums, without, among other things, any technical justification.

In this sense, it is certainly to censure the judgment of the Court of Appeal of Naples, when it is referred to by a consumer as a result of the Joint Sections' recognition of the right to damages arising from antitrust offenses, according to which anticompetitive behaviour established and sanctioned by the Authority of the Competitive Market with the order n. 8546 of 2000 does not behave as a statement of liability to insurance companies regarding the alleged increase in premiums of insurance, it must make sure the incident has the same effect when considering damages.

Therefore, it had no basis of observation in the trial court, which dismissed the claim for damages, because of the fact that:

"It cannot be held that the defendant's participation in the sanctioned cartel has been the immediate and direct cause of the increase in the insurance premium paid by the plaintiff".

In regard to the question of proof of the offense, we must settle once and for all the liability of the company imposing unfair conditions on the basis of a position of substantial monopoly or through an agreement with the potential competitors.

In fact, the inability on the part of the consumers to find satisfactory alternatives offers a suitable situation for monopolistic opportunities for undertakings in dominant positions. It involves the irrelevance of the subjective element of tort, in this case the guilt of business conduct, without the need to use the application by analogy of Article. 2600, paragraph 3 of the Italian Civil Code, on the presumption of guilt in unfair competition, because what is in the foreground is the damage to the injury of the freedom of contract of the consumer and needs to be tested primarily on the basis of investigations to determine whether the apparent arbitrariness or irrationality of the price-fixing by the undertaking in the absence of technical and business justifications related to costs of production incurred, or discrimination in terms and conditions applied to customers for equivalent services, not justified by objective circumstances.

The case studies examined by the Authority of competition and the market in the course of the most recent, valuable, investigations conducted by it is, in this respect, the most effective and influential example of this approach.

That said, the fundamental interests of the weaker party may be assert before the civil courts have a double order and coincide with those already examined in respect of the contracts to competitive bidding:

a) The interest in the elimination of the unfair unbalanced contract and b) The interest in the preservation of the contract by the balancing of the contracts' terms.

However, while the assumption may be a) The most appropriate remedy is that of relative nullity, accompanied by an action for damages, and b) Awarding damages should open the gate to begin rebalancing the relationship.

The determination of the quantum of damages (unlike in the contracts of competitive bidding) may not be reinstated according to unfair decisions based on the willingness of the contracting parties. It is determined by using objective guidelines consisting of the terms offered in comparison to the competitive structure of the market.

It must be executed in this way because the weaker party is unable to assess the economic viability of the matter for the purposes of free and informed choice of the contractual conditions most favourable to him. He has nothing to compare the terms of the offer to. He is only able to appreciate the prejudice that arises from the absence of bargaining power. So much so that, often, the investigations of the Competition Authority conclude with measures of investigation and not antitrust violation concerning the price and or other terms and conditions in accordance with the above mentioned guidelines for undertakings (i.e., not arbitrarily set) and \ orthat comply with the conditions prevailing in the comparable markets.

In the light of what has been mentioned here, it is easy to see that the nullity imposed

by paragraph 3 of art. 2, 1. n. 287 \ 1990, according to which "prohibited agreements are null and void", is essentially a nullity-sanction. The shared interests of the undertakings participating in the cartel, outside of cases of exemption, relentlessly clash with the public interest in the efficiency and competitiveness of the market.

Overlooking the heart of the legal problem of contracts that pursue a prohibited agreement is not, as we have seen above, the illegality or invalidity derived from the upstream cartel, but of illegalities that are contrary to the public policy of economic protection that prohibit the hindering of the freedom of contract of the weaker party.

As a result, unlike the nullity of the agreement, (which is absolute) the nullity of contract is valid and important because it has been put in place to protect the harassed or weaker party.

The same reasoning can be used in cases of abuse from a dominant position through imbalanced or unfair contracts. This is because the only correlation of possible invalidity of relative nullity arises as a general remedy for the imbalance of economic power and, thus is contractual.

Article. 140-bis of the Consumer Code also provides for the possibility of collective action for damages for the collective interests of consumers and users, some of which may want to claim their right to compensation and restitution for the sums due to individual consumers or users within the framework of legal relations concerning stipulated contracts or membership, as a result of anti-competitive behavior (or unfair trade practice).

Contractual liability and compensation for damages suffered are the guarantees in the EU legal system. In accordance with Art. 101, paragraph 1 of the Treaty on the functioning of the European Union (Art. 81 of the EC Treaty) (conferral of rights on individuals), one can claim for damages caused by actions or contracts which may restrict or distort the competitive process.

The full effectiveness of such a disposition – and specifically the effectiveness of the prohibition established in paragraph 1 – may be jeopardised if the domestic legal system does not render, because of distortion of competition, either practically impossible or excessively difficult an exercise of the rights conferred by Community law (the principle of effectiveness) (Courage v Crehan (C-453/99) [2001], ECR I-6297).

In the Manfredi judgements (Manfredi (C-295-298/04), [2006] ECR I-6619), confirming the Court's reading of Courage v. Crehan, the Court of Justice pointed out that Art. 101, paragraph 1 of the Treaty on the functioning of the European Union produces direct effects in horizontal relationships and confers on individuals rights which national courts must protect.

In protecting the economic order of the Community, the nature of Art. 101 of the Treaty on the functioning of the European Union legitimates anyone to rely on the invalidity of competition-restricting agreements and therefore seek remedy for damages suffered if a causal link maybe established between the aforementioned agreements or practices and damages.

Anyone (not only businesses but also consumers) who suffers damages because of competition-restricting agreements can claim for damages (Corte di Cassazione, n. 2305/2007, (2007) Foro it., I, 1097).

The case laws of the Court of Justice on infringement of Arts. 101, 102 et seq., the Treaty on the functioning of the European Union (Arts. 81 and 82 of the EC Treaty), aimed at structuring and safeguarding the EU internal market, often combine claims for damages with those for absolute or relative nullity of competition-restricting contracts.

Protection for compensation guarantees that it would be in the weaker party's fundamental interests to preserve the contract if, as a compensatory measure, the terms of the contract are revised.

The fundamental interests of the weaker party with regard to the contract may coincide with a desire not to maintain an unfair or unbalanced contract if the party suffers damages because of that contract. In this case, the remedy which most likely coincides with the weaker party's interest is a nullity action related to an action for damages, within the bounds of the negative interest.

Conversely, the weaker party may envisage maintaining a contract which infringed competition rules. Thus, the balance of the terms of the contract is guaranteed by an action for damages, which is based on violation of rules intended to safeguard the internal market. In such cases, protection for compensation is not connected to any nullity action.

In this situation, the EU legal system assigns to the contract not only the role of self-regulation of interests of individuals directly involved in it but also a function of guarantee of the EU economic order. For this reason, contractual liability and actions for damages are measures to safeguard the EU economic order (The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland), [1996], ECR I-2553).

Non-wrongful conduct of Member States and recovery of sums paid but not due

ValentinaColcelli

This combination of different regulatory strategies must be simultaneously employed to stimulate the design of an integrated European market and provide the reasons for its failure. The sum paid but not due would remain in the hands of the receiving Member State which, not being in a State of non-contractual liability, would keep for itself this sum of money collected in violation of an EU law. Again, the Member State which does not recover illegally granted State aid invalidates any judgement of the Court of Justice on the aforementioned aid, but not without consequences for, for example, competition in the EU internal market.

1. *Introducion*. Just to complete how in E.U. law new modes of governance are emerging as a complementary or alternative response to legislative harmonization, we note the issue of Non-wrongful conduct of Member States and recovery of sums paid but not due.

Protection through recovery of sums paid but not due is a tool for the effectiveness of EU law and the fulfilment of its purpose. Therefore, the EU has a particular interest in ensuring that the Member State in question reimburses on the charges regardless of whether they are paid or unimplemented, and that it does not illegally recover the state aid granted. The Court of Justice must be aware that the completeness of this kind of protection and its effectiveness may be mitigated by the tendency of domestic legislation, especially in the field of fiscal law, to reduce or eliminate the requirement of the national government to pay sums perceived as not due.

Wrongful conduct undertaken by Member States, as above noted, can be curtailed when a contravention is identified.

Before any parties can be held liable for compensation, any infringement of the rules on the part of Member States and the EU must be seen as sufficiently important[1]. Any presumed breach by Member States and institutions has to go beyond the limits of their power, in such a way that a causal link can be seen between the breach and the damage. When such a breach is not clear, the individual retains, in any case, the right to have any funds paid but not due to Member States and Institutions returned.

With regard to the non-wrongful conduct of Member States or Institutions, there

[1] VAN GERVEN, V.W., "Non-contractual Liability of Member States, Community Institutions and individuals for Breaches of Community Law with a View to a Common Law for Europe", in Maastricht Jour. Eur. and Comp. Law, 1993, pp. 9.

is one way of protecting the individual rights of EU citizens: the principle of unjust enrichment.

2. *Non-wrongful conduct of Member States*. The action of recovery of sums paid but not due is an additional way of guaranteeing the effectiveness of rights within EU law and its supremacy.

In such cases, we explain the tendency on the part of the Court of Justice to identify the existence of a right to repeated sums paid to Member States, which receive sums obtained on the basis of a national rule contrary to EU law. For example, it would be in contrast with the requirement for correct implementation of EU law for an individual to pay a tax which was later proved to be incompatible with EU law[2]; or to pay sums on the basis of an unlawful act according to EU regulations, which has been altered or annulled[3], and, in the reverse case, a Member State that does not recover illegally granted State aid[4].

In his opinion to Express Dairy Foods[5], the Advocate-General Capotorti qualifies the recovery of sums paid partially or totally unnecessarily but not due as a "true subjective right" of EU citizens. This right derives from a general principle common to the legal systems of all Member States.

In the recovery of sums paid but not due, the Court of Justice recognises the nature of a remedy common in the European legal system (reimbursement of charges paid but not due) applicable in vertical and horizontal relationships. For this reason, the Draft Common Frame of Reference (DCFR) contains a detailed description of recovery resulting from the termination of a contract or from any flaw in it. For example, the wrongful nature of sums which are the object of a contract and which are indicated in it may give rise to a claim of infringement of Arts. 101, 102 et seq. TFEU.

Thus, a typical principle of civil law, such as the reimbursement of charges paid but not due, achieves a specific purpose of the Community (whose right and whose supremacy would otherwise be frustrated). The aim of EU law would not be achieved if the effectiveness of the return of a sum received by a Member State by reason of a procedure adopted in violation of an EU law had not been ensured. The sum paid but not due would remain in the hands of the receiving Member State which, not in a State of non-contractual liability, would keep for itself a sum of money collected in violation of an EU law. Again, the Member State which does not recover illegally granted State aid would invalidate any judgement of the Court of Justice on illegal State aid - with consequences, for example, for competition in the EU internal market.

Protection, through recovery of sums paid but not do, represents a tool for the completion and effectiveness of EU law. The EU therefore has a particular interest in

2 C-199/82, Amministrazione delle Finanze dello Stato v. San Giorgio, ECR 1983, p. 3595.

3 See *ex multis* C- 282/90, Case Vreugdenhil BV v Commission of the European Communities, ECR 1992, p. 1937.

4 C-70/72, Commission of the European Communities v Germany, ECR 1973, p. 813.

5 C-130/79, Express Dairy Foods v. Intervention Board for Agricultural Produce, ECR 1980, p. 1887.

ensuring that the Member State in question does not leave reimbursement of charges paid, or, vice versa, unimplemented, that it does not recover State aid illegally granted. The Court of Justice must be aware that the completeness of this kind of protection and its effectiveness may be mitigated by the tendency of domestic legislation, especially in the field of fiscal law, to reduce or exclude the requirement of the national government to pay sums perceived as not due.

The different functions of the "exchange" within the European Union public contracts law and the traditional private law

Roberto Cippitani

"Contract law instruments such as tort or contract appear only as a small part of many possible tools harnessed in the pursuit of allocative efficiency or distributive justice, synthetically described as the correction of market failures" (F. Cafaggi, H. Muir Watt, The Regulatory Function of European Private Law, Cheltenham, 2009, p. XI)

1. *The expressions concerning "exchange" within the EU law.* Within the European Union ("EU") law there are several expressions, which make reference to the exchange of performance between the parties of a contract.

The discipline of public contracts (Article 1, par. 2, letter a, Directive 2004/18/EC) is referred to the contracts with "pecuniary interests".

The legislation concerning the Value Added Tax (the "VAT", see article 2 Directive 2006/112/EC) is applicable to the supplies of goods and services made "for consideration". Nevertheless the exchange is useful to define the field of application of many other matters governed by the EU law. For example the Regulation of the European Parliament and the Council of 24 September 2008 on common rules for the operation of air services (Recast) defines the "air service" as "a flight or a series of flights carrying passengers, cargo and/or mail for remuneration and/or hire" (Article 2, let. 4).

According to the legal sources in other European languages, different from the English, similar expressions are used as "*a titolo oneroso*", "*entgeltlich*", "*a titulooneroso*", "*à titre onéreux*".

Among the legal sources above mentioned, those concerning the public contracts assume a relevant position, due to the impact both at European and National level, and for the important elaboration in the case-law of the Court of Justice.

In this field, the EU law is applicable to a broad set of relationships through which a public body (a "contracting authority") purchases goods and services from an economic operator (see the definitions under the Article 2 of the Directive 2004/18/EC).

For example, it is subject to the Directive concerning the public contracts the selection, by the municipal authorities, of a contractor implementing a development plan, concerning several infrastructure works, when the public authority concerned, in return for the execution of the works, provides a total or partial set-off against the taxes to be paid by the contractor (infrastructure contributions)[1].

[1] C-399/98, Ordine degliArchitetti and others, ECR 2001 p. I-5409.

The discipline of public contracts also applies to "framework agreements"[2], joint ventures[3], or the instruments of incorporation with the scope to establish a corporation providing works or services[4].

By way of illustration, in compliance with this approach, the Italian Law, implementing the EU Directive, provides that "in cases where laws and regulations allow the establishment of, joint ventures for the construction and / or the management a public work or service", the selection of the private partner has to be subject to the public procurement procedures (Article 1, para 2, Legislative Decree No. 163/2006)[5]. In consideration of the notion of contract with pecuniary interest, the relationship between a public body and a contractor will develop social housing units which are subsequently to be sold at capped prices to a public social housing institution, or with substitution of that institution for the service provider which developed those units[6]. It is not relevant "the fact that the development of social housing units is a requirement imposed directly by national legislation and that the party contracting with the authorities is necessarily the owner of the building land"[7].

Also with regard to the VAT legislation, it is possible to consider as subject to the Tax contracts, legal relationships or other facts very different from each other.

This is the case of the partnership contracts, under which are taxed the allocation of assets to the members, and it is also the hypothesis where the shareholder transfers the individual assets to the company[8].

The case law considers as subject to the VAT the fees received by the organiser of a competition[9].

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2 ECJ, 4 May 1995, C 79/94, Commissione/Grecia, Racc. 1995, p. I 1071, paragraph 15.

3 As stated under by ECJ, 22 December 2010, C-215/09, Mehiläinen Oy, Terveystalo Healthcare Oy, formerly Suomen Terveystalo Oyj, v Oulunkaupunki, ECR 2010, p. I-1374, the "Directive 2004/18 must be interpreted as meaning that, where a contracting authority concludes with a private company independent of it a contract establishing a joint venture in the form of a share company, the purpose of which is to provide occupational health care and welfare services, the award by the contracting authority of the contract relating to the services for its own staff, the value of which exceeds the threshold laid down by that directive, and which is severable from the contract establishing that company, must be made in accordance with the provisions of that directive applicable to the services in Annex II B thereof" (point 47).

4 See European Commission, Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, 30 April 2004, COM (2004) 327 final.

5 Also see the judgement of the Consiglio di Stato. See for example, Consiglio di Stato, Sez. V, 30 April 2002, n. 2297, in Foro Italiano, 2002, III, 553 with the commentary of Scotti; Cons. Stato, Sez. V, 3 Septemebr 2001, No. 4586, in Rivista della Corte Conti, 2001, 5, 258.

6 ECJ, 8 May 2013, joined cases C-197/11 and C-203/11, Eric Liber, et al., not published yet in ECR points 108 ff., in particular 119.

7 See the judgement ECJ, Eric Liber, ref. point. 113, and also ECJ, C-399/98, Ordinedegli Architetti and others, ref. para 69 and 71.

8 The Article 19, para 1, of the Directive 2006/112/CE provides that "In the event of a transfer, whether for consideration or not or as a contribution to a company, of a totality of assets or part thereof, Member States may consider that no supply of goods has taken place and that the person to whom the goods are transferred is to be treated as the successor to the transferor".

9 C-498/99, Town & County Factors Ltdc. Commissioners of Customs & Excise, ECR 2002, I-07173.

It is also subject to VAT the use by a taxable person "of goods forming part of his business assets for his private use or for that of his staff, or their disposal free of charge or, more generally, their application for purposes other than those of his business, shall be treated as a supply of goods for consideration, where the VAT on those goods or the component parts thereof was wholly or partly deductible" (see Article 16, Directive 2006/112/EC) or "the transfer, by order made by or in the name of a public authority or in pursuance of the law, of the ownership of property against payment of compensation;" (see Article 14, para 2.a, Directive 2006/112/EC).

2. *The exchange according to the legal sources: the advantage for the public administration*. In order to identify the contractual relationships, which may be covered by the expressions as mentioned above, several subjective and objective conditions have to be met.

For the purposes of public contract law, it is necessary to determine if the activity object of the contract falls within the definition of work, supply or service established by national and EU legislation (see Article 1, para 2, Directive 2004/18/EC). In the case of the services, they have to be included within the list of the Annex II enclosed to Directive 2004/18/EC.

However, several hypotheses may occur when the qualification of the relationship is not so obvious and it is therefore necessary to identify otherwise the proper meaning of exchange ("the pecuniary interest", "the patrimonial interest", "the consideration" and so on) according to the EU law.

What emerges from the application of procurement law, even in the examples given in the first paragraph, is that those relationships have in common an exchange of values between the subjects.

The case law and administrative practice often make reference to the fact that, in those cases, a "direct counter-performance" ("*controprestazione diretta*"; "*contraprestación directa*", "*contrepartie direct*")[10] is put in place.

Similarly, the EU case law concerning the VAT refers to the "direct link" between the performances of the parties[11].

The case law of the Court of Justice emphasizes that the exchange is relevant for the purposes of procurement law or the VAT, only when it is mandatory and not merely possible. Indeed, as the Advocate general Paolo Mengozzi observes "Thus, public contracts are clearly mutually binding. It would obviously be inconsistent with that characteristic to accept that, after being awarded a contract, a contractor could, without any repercus-

[10] See in France, the Conseil d'État, 6 luglio 1990, Comité pour le développement industriel et agricole du Choletais – CODIAC, in D.F. 11 May 1991, p. 573, observations by ARRIGHI DE CASANOVA, pp. 497 et f. For the administrative practice, see the document drown up by CNRS (Centre National de la Recherche Scientifique) del 1 dicembre 1999 "Instruction de procédure no 990310BPC définissant les modalités et les circuits d'attribution des subventions, les principals règles de gestion et les documents types applicables", para 1.1. See the Annex 1 (La notion de contropartie pour la livraison de biens et le prestations de services) del documento del CNRS, Secrétariat Général Direction des finances, Le régime fiscal du CNRS en matière de TVA.

[11] C-154/80, Cooeperatieve Aardappelenbewaarplaats, ECR 1981, 445.

sions, simply decide unilaterally not to carry out the specified work. Otherwise, it would mean that contractors were entitled to exercise discretion with regard to the requirements and needs of the contracting authority"[12].

The direct counter-performance or the direct links will occur when the relationship produces two kinds of benefit[13] in favour of the administration[14].

Firstly, the relationship will satisfy the needs related to the functioning of the public entity (for example, purchases of office supplies, computers for their employees, insurance for their premises).

Secondly, the relationship will be able to supply goods or services useful for the citizens (for example, the contract for the school transport service).

Another criterion for determining the benefit for the contracting public authority is the discipline of the ownerships of the results[15].

It may be considered as "results" either material (work) or immaterial assets (economic rights in patents, copyrights or other forms of legal protection of the intellectual property), arising from the activities carried out by the contractor.

There is a benefit for the contracting administration, also when it will obtain the right to make use of the property. It is considered a benefit also the case when the right is attributed to a subject belonging to the public body[16].

In the matter of public contracts, in contrast to other relationships such as grants, normally these rights belong exclusively to the administration. However, there is a pecuniary interest, even when the ownership of the results is jointly owned by both the administration and the contractor.

The rules provided under the Article 19 of Directive 2004/18/EC, which refers to the so-called "pre-commercial" contracts for services of research[17], can be extended to all public contracts.

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12 See the Opinion of the Advocate general Paolo Mengozzi, delivered on 17 November 2009, in the case C 451/08, Helmut Müller GmbH/Bundesanstaltfür Immobilienaufgaben, point 80.

13 It could be make reference to the French administrative practice concerning the public contracts, and in particular see para 4.1 of the Circulaire du 3 août 2006 portant manuel d'application du code des marchés publics; see also the décret n. 2001-210 of 7 March 2001 relating to the Instruction pour l'application du code des marchés publics, elaborated by the French Minister of the Economy, Finance and Industry.

14 C 399/98, Ordinedegli Architetti and others, ECR 2001, p. I 5409, para 77, stating "It must be pointed out that the pecuniary nature of the contract relates to the consideration due from the public authority concerned in return for the execution of the works which are the object of the contract referred to in Article 1(a) of the Directive and which will be at the disposal of the public authority". See also DANIEL DÜER J.L., "Le traitement fiscal des aides des collectivités locales aux Entreprises", in Annuaire des collectivités locales, book 12, 1992, p. 61 ff.

15 See the Opinion of the Advocate general Mengozzi, in the case C 451/08, Helmut Müller GmbH/ Bundesanstaltfür Immobilienaufgaben, ref. point 55.

16 See the Opinion of the Advocate general Wathelet, delivered on 11 April 2013, in the Case C-576/10, Commission/ Kingdom of the Netherlands, point 120.

17 According to the European Commission: "Where no commercial solutions exist on the market, pre- commercial procurement can help public authorities to get technologically innovative solutions developed according to their needs. In pre-commercial procurement public procurers do not pre-

The aspect that characterizes the pre-commercial procurement is, in fact, that the developer does not assume the exclusive ownership of the results, but shares them with the contractors[18].

3. *The exchange according the legal sources: the advantage for the economic operator*. This exchange will takes place only when it involves a patrimonial decrease of the contracting authority.

This reduction can be achieved directly or indirectly. In particular "Direct financing will occur when the contracting authority uses public funds to pay for the works or services in question. Indirect financing will occur when the contracting authority suffers economic detriment as a result of the method of financing the works or services"[19].

The direct economic detriment may consist in the payment of a sum or the granting of a right to use[20].

The indirect mode can be represented by the waiver to receipt of sum, which the public authority would have the right to collect, as in the case of infrastructure contribution, mentioned above.

But it is also the case, where the public authority compensates the activities carried out by the contractor not with a price, but with a grant[21].

Another hypothesis of indirect financing will occurs if "the economic benefit may also lie in the economic advantages which the contracting authority may derive from the future use or transfer of the work, in the fact that it contributed financially to the realisation of the work, or in the assumption of the risks were the work to be an economic failure"[22].

There is also a patrimonial interest, if the administration does not suffer a direct economic detriment, but the contractor will receive prices or other kinds of advantages by third parties.

In this case, however, it shall apply the discipline of the public works concessions, defined as "contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to

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scribe a specific R&D solution to be developed, but solicit alternative solutions that could address a problem of public interest". European Commission, Communication, Putting knowledge into practice: A broad-based innovation strategy for the EU, COM(2006) 502 final, 13 September 2006, para 2.6.

18 See the Communication of the European Commission "Pre-commercial procurement: driving innovation to ensure sustainable high-quality public services", COM(2007) 799 final, of 14 December 2007.

19 See the Opinion of the Advocate general Niilo Jääskinen, delivered on 16 September 2010, concerning the case C-306/08, European Commission/Kingdom of Spain, para 86 and 89.

20 This is the problem faced by the Advocate general Paolo Mengozzi under his Opinion in the case C 451/08, Herbert Müller. See in particular the para 76,

21 See the judgment Helmut Müller, cited above, paragraph 52. Furthermore, see the Opinion of the Advocate general Wathelet in the Case C-576/10, Commission/Kingdom of the Netherlands, ref. para 124.

22 See C-451/09, Helmut Müller, ECR 2010, I- I-2673, para 52.

exploit the work or in this right together with payment". (Article 1, para 3, Directive 2004/18/EC).

The procedures applicable to the concessions are slightly different from those of public procurements[23], while respecting the same underlying principles (see Articles 3, 17, 56 ff. Directive 2004/18/EC)[24].

As already mentioned, what is important for the purposes of the definition of patrimonial interest are the exchange and not the payment of a price[25].

However, without a doubt, the cases in which the public administration pays an amount to the other party are the most important ones.

In these cases, it is necessary to distinguish between relationships for pecuniary interest, subject to the provisions of the public contracts, and relationships without consideration, such as the grants[26].

The latter have many points of contact with the public contracts: the legal base of the grants also provides the carrying out of an activity (the project concerning topics as research, education, protection environment, culture, etc.); even for the grant the public body pays a sum (see the definition provided by the Article 121 of the Regulation (UE) No. 966/2012). Nonetheless, according to the grants scheme, the contribution will be calculated as a percentage of the costs actually incurred by the beneficiary (see Article 125, para 3 Regulation 966/2012). In agreement with the co-financing rule, beneficiaries are required to cover the portion of costs not funded by the grant, through its own resources, financial transfers from third parties, in-kind contributions, if allowed (Article 183 Regulation (UE) No. 1268/2012).

The beneficiary, to obtain the contribution, has the obligation to justify and to document the costs incurred, unless it is the hypothesis where the grant is determined as lump sums or flat rates (see Article 124 of the Regulation (UE) No. 966/2012).

The same discipline of the public procurements law refers to the co-financing as a criterion of demarcation, although not explicitly mentioning the grants and apparently only with respect to a specific case that is the research services.

Indeed, the 23rd recital of the preamble and the Article 16, para 1, letter f) of the Directive 2004/18/EC, exempts from the application of the Directive the services of research and technological development, where the costs are not fully covered by the contracting authority.

As a matter of the fact, these provisions appear as an expression of the general criterion to distinguish between procurement and grants.

In support of this interpretation, it is also possible to make reference to the case law of

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23 The interpretation of the application of this exemption must be very strict, in accordance, for example, C-382/05, Commission/Italy, ECR 2007, I-6657.

24 See the Opinion of the Advocate general Paolo Mengozzi, delivered on 20 October 2009, concerning the case C-423/07, Commission /Spain, para 52 ff.

25 As the Advocate general Niilo Jääskinen argues under the Opinion cited above, para 81.

26 In relation to the grant under the EU and the domestic legislations, see CIPPITANI R., "La sovvenzione come rapporto giuridico", ISEG, Roma-Perugia, 2013.

the Court of Justice, in particular the recent judgment Azienda Sanitaria Locale di Lecce of the December 2012[27].

In this case, as reported by the Opinion of the Advocate General Verica Trstenjak "The notion of "pecuniary interest" requires that the service provided by the tenderer is subject to a remuneration obligation on the part of the contractor. This means that, in addition to participation by two persons, reciprocity in the form of the material exchange of consideration. Such reciprocity of the contractual relationship is necessary for the requirement of a tendering procedure to apply" (para 30).

The existence of a remuneration is not excluded either by the lack of a profit for those who perform the service, or, on the contrary, if the price is limited to cover all the costs incurred by the contractor (paragraphs 32 and 33).

Another case law considers falling under the contracts for patrimonial interest only those cases in which the administration will pay a sum higher than the costs incurred by the contractor[28].

Anyway, it is very clear that the condition "pecuniary interest" is met only if the sum paid by the contracting authority is equal or higher than the costs incurred by the contractor to carry out the activity.

According to the case law Azienda Sanitaria di Lecce, a mere formal reference to the costs which will be incurred by the beneficiary, afterwards not actually justified, is not sufficient to exclude the exchange (the arrangement between the Azienda Sanitaria and the University of Salento provided a vague link between the sum transferred by the public body to the University with the value of the stipends of the employees involved in the activity. Subsequently the actual expenditure of those costs was not provided by the University).

This position implicitly confirms that, in the absence of co-financing, the relationship should be considered within the context of public procurement.

4. *The exchange within the contracts between public administrations.* The exchange is not excluded in case of the arrangements between public entities.

Or is the case of the public-private or public-public partnerships, which establish forms of cooperation between public bodies or, respectively, between the latter with legal entities from the private sector[29].

In particular, this is the cases of public-private partnerships to implement the programs of research and technological development (see the Article 2, para 4 and 5, Regulation (UE) n. 1291/2013 of the European Parliament and of the Council)[30], the Structural

[27] C-159/11, Azienda Sanitaria Locale di Lecce not yet published in the ECR; see also ECJ, 13 June 2013, C-386/11, PiepenbrockDienstleistungen GmbH & Co. KG, KreisDüren, not published in ECR yet.

[28] See C-119/06, Commission/Italy, ECR 2007, p. I-168, para 48 ff.

[29] See Commission, Green Paper on public-private partnerships and Community law on public contracts and concessions, of 30 April 2004, COM (2004) 327.

[30] According to the mentioned provision 'public-private partnership' means a partnership where private sector partners, the Union and, where appropriate, other partners, such as public sector bodies,

Funds and the operations of the European Bank of the Investments[31].

Due to the broad definition of contract with pecuniary interests, those relationships are not excluded from the application of the discipline concerning the public contracts[32].

As a matter of fact, the communitarian legislation itself provides that public-public and public-private partnerships may be used either for the public contracts, either for relationships without consideration, as the grant.

Thus, these agreements may be a considered with patrimonial interest, unless are applicable exceptions provided for by law or identified in the case law.

In these hypotheses, the exceptions to the application of procurement law do not arise from the lack of the pecuniary nature of such agreements, but from other kinds of needs.

An exception to the principle that the procurement law applies also to relations between public bodies is established by the Article 18 of Directive 2004/18/EC, according to which "This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaty".

Another hypothesis of exclusion of the procurement law identified by the EU case law is the case of the "in house" provisions.

This is the hypothesis that when the supply of the good or service is performed by a legal entity, subject either to public or private law, on which the contracting public administration exercises a control similar to that regarding its services and the external entity is wholly controlled[33].

A further exception to the application of procurement law to agreements between public bodies is grounded on a recent case law of the Court of Justice[34].

As matter of fact, the judgment Commission vs. Germany states that the legislation on the public contract is not applicable to procurement contracts between public bodies, which set up a collaboration in order to accomplish with a public mission (for example supplying a service) common to the bodies involved in the agreement (see the judgment in Commission vs. Germany, paragraph 37).

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commit to jointly support the development and implementation of a research and innovation programme or activities. On the other hand 'public-public partnership' means a partnership where public sector bodies or bodies with a public service mission at local, regional, national or international level commit with the Union to jointly support the development and implementation of a research and innovation programme or activities.

31 See the Communication of the European Commission, Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships, of 19 November 2009, COM(2009) 615 final, especially the para 3 "The EU Contribution to PPP Projects".

32 See the See European Commission, Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions, cited above.

33 See European Commission, White Paper on the Public Procurement in the European Union, COM (98) 143 def., 1 March 1998, note 46. The leading case was ECJ, 18 November 1999, C-107/98, Teckal, ECR 1999, p. I-8121, in particular para 30 and 50; see also ECJ, 11 January 2005, C-26/03, Stadt Halle e RPL Lochau, ECR 2006, p. I-1, para 49. Most recently see ECJ, 29 November 2012, C-182/11 and C-183/11, Econord SpA et al., not published yet in ECR-

34 ECJ 9 June 2009, C 480/06, Commission / Germany, ECR 2009, p. I 4747.

The Court of Justice recognizes, as it also did in the case law Coditel Brabant[35], that a public administration can fulfil its tasks in the public interest through forms of collaboration with other public bodies. Such cooperation may consist in the establishing both of a specific body and a contractual partnership (which does not create a new legal entity).

This exemption, according to the case-law cited above, applies where contracts are concluded solely between the public bodies, without the participation of any private party.

5. *Exchange within EU law and civil law concepts.* The terminology used by the EU law and by the European case-law seems to suggest that the exchange to which the legal sources make reference can be considered equivalent to the notions of traditional civil law, provided both by the Civil Codes and the Common Law, as "*corrispettività*", in the Italian law, or "bilateralité", according to the French Code Civil.

The traditional contract law belongs to a legal framework which regulates the circulation of patrimonial element (rights in rem and obligations) from a subject to another[36]. Such perspective was inspired moreover by the Pandectists of XIX century like B. Windscheid and F.C. Savigny. Indeed, the set of the legal relationships organised by the System des heutigen römischen Rechts of Savigny is properly a system of patrimonial relationships.

Today the private law in the European countries is built from a patrimonial perspective.

In this context, the contracts are the main instruments in order to allow the circulation of the assets and of rights, as provided by European Civil Codes (see, for example the definitions set out by the Articles 1321 *Codice Civile*; 1101 of *Code Civil*; 1254 of the Spanish Código Civil) (see also the Chapter IV of this book "*Contracts and obligations as tools of the European integration*").

Whatever is the national law, the discipline of the contract is based on the concept of "exchange", although such a concept can be expressed in different ways.

In line with the Italian and French Civil Codes, the exchange is conceived as the mutual interdependence of the performances (the "corrispettività" for the Italian *Codice Civile*)[37] or the obligations (the "*bilateralité*" or "*synalagmaticité*" within the *Code Civil*)[38] between the parties under the same contract.

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35 C-324/07, Coditel Brabant, ECR 2008, I-8457, para 48 and 49.

36 CAPRIOLI S., "Il Codice civile. Struttura e vicende", Milano, 2008; HALPERIN J.L., "L'impossible Code Civil", Presses universitaires de France, Paris, 1992

37 See among the others: GALGANO F., "Il negozio giuridico", in Trattato di diritto civivle e commerciale, directed by Cicu and Messineo, Milano, 1988, 465 ff.; MESSINEO F., "Dottrina generale del contratto", Milano, 1948, 234). See also the Relazione al Re sul Codice civile, para n. 660.

38 According to the Article 1102 Code Civil "Le contrat est synallagmatique ou bilatér allors que les contractants s'obligent réciproquement les uns envers les autres". Here is not important to establish if the two terms are synonymous or they have a different meaning. Anyway it can be noted that the two expressions took the same meaning in the Napoleon Code, through the work of Pothier who derived it from Labeon as cited in the Digest, under D. 50.16.19.

The two concepts are not overlapping[39]. In particular the differences arise when one considers the contracts between more than two parties with a common scope, which according to the Italian *Codice Civile* are regulated in a specific manner[40], in particular for that which concerns the termination of the contract[41].

Within the French, Italian and Spanish Law at least other concepts are considered in order to represent the exchange. It is the case of the terms "onerosità" and "*onerosité*" ("burden")[42], which is opposed to the notion of gratuity ("*gratuità*" and "*liberalità*", "*gratuité*" and "*bienfaisance*", "*liberalidad*" and "*beneficiencia*").

Just as the French, Italian Civil and Spanish Codes the contracts are "onerosi"/"onereux"/"onerosos" if they determine the patrimonial equilibrium between the parties. In order to enrich such equilibrium the parties are able to use not only the contracts "corrispettivi"/"bilaterales"/"onerosos", but also by means of other legal instruments such as the links between different contracts or acts.

On the contrary, the gratuitous acts, including donations, are those ones determining a patrimonial disequilibrium between the parties, leading to a prejudice of other creditors, since they cause a decrease of the patrimony of the debtor (See the Article 809 of the Italian *Codice Civile*)[43] without exchange.

For this reason the gratuitous acts shall be subject to a specific regulation in order to avoid the prejudice for the creditors or other third parties. It is the case of the "Paulian" or revocatory action (see Article 2901 *CodiceCivile*; Article 1167 *Code civil*; Article 1111 *Código Civil*) which is more easy for the creditors in case of gratuitous acts, taking into account that the prejudice for the creditor is considered as "implicit" (see Article 2901, No. 2, Codice Civile; Article 1297 Código Civil)[44].

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39 About the difference between the "corrispettività" e "bilateralité", see PINO A., "Il contratto con prestazioni corrispettive", Cedam, Padova, 1963, p. 12 ff.

40 According to the *Codice Civile* the contract plurilateral (with more than two parties) with a common scope (so called "contratti pluri soggettivi con comunione di scopo") are regulated by the Articles 1420, 1446, 1459, 1466. The Report of the Ministry of Justice concerning the Civil Code clearly stated that the discipline of this kind of contract has been introduced, because of the precedent Italian Code of 1865 (which was a translation of the Napoleon Code) did not considered the specific topic.

41 The dispositions regulating the contracs "plurisoggettivi con comunione di scopo", like the partnership or the consortia, provide that in case of breach of one party (by default, force majeure or hardship), the entire contract will not be automatically terminated, if the performance of the defaulting party is not necessary.

42 According to the Article 1106 "Le contrat à titre onéreux est celui qui assujettit chacune des parties à donner ou à faire quelque chose". On the contrary the Article 1105 provides that "Le contrat de bienfaisance est celui dans lequell'une des parties procure à l'autre un avantage purement gratuit".

43 As some scholars the patrimonial decrease is not always needed, as it happens for the donation of objects with affective, moral, historic, ect., value (CHECCHINI A., Liberalità, (atti di), in Enciclopedia giuridica, 1989, p. 1 ff., in part. 3). Furthermore, other authors point out that in some case to the decrease of the patrimony of the donor does not correspond the increase of the patrimony of the beneficiary, as it occurs in the case above mentioned and in case of "modal donation", from which the obligations for the beneficiary arise (see ARCHI G.G., Donazione (diritto romano), Enciclopedia del diritto, Milano, vol. XIII, 1964, p. 930 ff., in part. 935 f.

44 See the French case-law, for example, Cour de cassation, civile, Chambre civile 1, 16 May 2013, 12-13.637, in legifrance.gouv.fr.

In other European legislation, the hints of the concepts regulating the exchange may be different.

Therefore, the burden, as a gratuity, should not be determined at the level of individual contract, such as the "*corrispettività*" or "*bilateralité*". The burden and gratuity make reference to the overall structure of interests between the parties involved.

Within the German BGB, the *Gegenseitiger Vertrag* ("the reciprocal contract", see § 320 ff. BGB) faces the problem of the time differences in the performing of the parties. Thus a party of the *GegenseitigerVertrag* is entitled to "refuse his part of the performance until the other party renders consideration, unless he is obliged to perform in advance. If performance is to be made to more than one person, an individual person may be refused the part performance due to him until the complete consideration has been rendered" (§ 320). The party who is obliged to perform in advance, as under this kind of contract, has a "Defence of uncertainty" because he/she "may refuse to render his performance if, after the contract is entered into, it becomes apparent that his entitlement to consideration is jeopardised by the inability to perform with the other party. The right to refuse performance is not applicable if consideration is rendered or security is given for it" (§ 321).

Also under the reciprocal contract, similar to the French "contrat bilateral" "if the obligor does not render an act of performance which is due, or does not render it in conformity with the contract, then the obligee may revoke the contract, if he has specified, without result, an additional period for performance or cure" (§ 323, para 1), or when, without the specification of the additional period, other conditions will be met (according to, for example, § 323, para 2).

Some legal systems, as those of common law, the concept itself of "contract" is inseparably linked to the concept of exchange (bargain)[45], which should normally be the consideration of a promise enforceable. The difference between "bilateral" and "unilateral" contracts is based on the moment the contract will become grounded on the consideration, and therefore enforceable[46].

6. *The function of the exchange within EU law.* However, despite the similarities, the expressions used within EU have different legal meanings.

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[45] Cfr. ALPA G., "Il contratto tra passato e avvenire", cit., XIX ff.; FURMSTON M.P. (edit by), "Cheshire, Fifoot and Furmoston, Law of Contract", 4a ed., Oxford University Press, Oxford, 1989, p. 71 ff.; see also the definition of "gift" within BLACKSTONE W., MORRISON W., "Blackstone's Commentaries on the Laws of England: In Four Volumes", Routledge Cavendish, 2001, p. 438 f.: "The English law does not consider a gift, strictly speaking, in the light of a contract, because it is voluntary, and without consideration ; whereas a contract is defined to be an agreement upon sufficient consideration to do or not to do a particular thing".

[46] According to ATIYAH P., "An Introduction to the Law of Contract", 4a ed., Oxford, 1989, p. 124 ff., for the unilateral contract "the promise only becomes binding when the consideration has been actually executed, that is, performed". On the other hand the bilateral contract la consideration arises from mutual promises. Each promise takes a double, indeed it "is at once a promise and a consideration for the other promise". Thus, in this case "mutual promises must stand or fall togheter".

According to the examples given in the first paragraph, the relationships subject to the public contract law or to VAT discipline do not represent an exchange, from the same perspective of the domestic contract Law.

Therefore, it is possible to observe some contracts for pecuniary interests within EU law, which are not contracts establishing an exchange in accordance with the Civil Codes or the common law, and vice-versa[47].

As a matter of fact, the exchange under the private law cannot be considered a sufficient condition in order to identify a contract with pecuniary interest according to EU law.

Further subjective and objective qualifications will be needed, which are not requested by the domestic private law.

It is the case of qualifications as of "economic operator", as well as of "contracting authority" required by the legislation on public procurement, or the exercise of a professional activity provided under the VAT legislation.

In addition, the EU rules do not apply to contracts, which provide the exchange according to the contract law, but they are exempt in order to comply with other needs, as it occurs for certain types of agreements between public administrations.

But even in this case, the burden certainly cannot overlap with the concepts of EU law, being completely different with the function of civil law (which is to protect the patrimony of the settler in favour of the creditors).

Anyway, also such concepts are not useful to elaborate the meaning provided under the EU public contracts law.

Indeed under the EU legislation is not relevant the equilibrium of the exchange of values between the parties, in order to avoid the prejudice against of the creditors.

Also an exchange disproportionate, which according to the traditional civil law, has to be considered as gratuitous (see the case of the so called *negotium mixtum cum donatione)* may be considered with pecuniary interest or with consideration from the perspective of the EU disciplines.

Therefore, the notions linked to the idea of exchange (pecuniary interest, consideration, etc.) provided by the EU law have other goals and then it expresses another legal meaning in respect to the traditional private law[48].

The construction of the EU legal system needs a teleological approach to the interpretation in order to achieve the aims of the Treaties[49].

From the perspective of the theological approach, the legal interpreter, in particular the judge has to elaborate "autonomous meanings" of the words used under the EU legal sources.

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47 According to the function of the price under the VAT legislation, see FILIPPI P., "Le cessioni di beni nell'imposta sul valore aggiunto", Cedam, Padova, 1984, p. 79 ff.

48 See more in general, CIPPITANI R., "Onerosità e corrispettività: dal diritto nazionale al diritto comunitario", in Europa e Diritto Privato, 2009, pp. 503-556.

49 About the importance of the teleological interpretation in the activity of ECJ, see JOUSSEN J., "L'interpretazione teleologica del diritto comunitario", in Rivista critica di diritto privato, 2001, p. 499.

The autonomous meaning are necessary to ensure the survival of regional law, which otherwise would be applied differently in each member State. It is needed to comply with principles such as the equal treatment of legal subjects regardless of their national origins[50].

Therefore, when a legal text of the EU uses terms apparently linked to concepts traditionally belonging to the domestic law, probably the meaning of those terms should not be the same provided by a national legal system.

On other hand, the EU laws have other objectives, different from those of the domestic private law.

At the present stage of the development of the EU law, the exchange is not seen as a notion to establish the existence of the enforceable agreement (as for the consideration under the common law), nor as quality of a specific category of contracts with obligations/performances interdependent (as it is in the cases of "*bilateralité*" or "*corrispettività*"), or the patrimonial equilibrium between the parties in order to protect the creditors (see the notion of the contract "oneroso" or "*onereux*").

Surely, the elaborations of the common rules in the contract law at the European level face the problems typically relevant for the private law. In particular the "Principles of the European Contract Law", the Code of the European Contract Law and the Draft of Common Frame of Reference, are focused on the exchange provided under the same legal instrument and on the remedies in case the bargain will no longer put in place[51]. Other aspects of the exchange according the private law, like as the patrimonial equilibrium or the sufficient ground to justify the existence of the contract, are not considered yet.

Anyway, the perspective of the European law is, at the moment, different.

The present EU law regulates a legal and economic area. The focus is not the discipline applicable to the relationships between the parties, but their interrelationships and their reciprocal effects in the internal market.

Matters as competition, public contracts, VAT, consumer protection and so on, are regulated from the viewpoint the theological approach, in order to determine of the "useful effect", that's to say to reach the maximum implementation of that legal system[52].

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50 ECJ, 9 November 2000, C-357/98, The Queen / Secretary of State for the Home Department, ex parte Nana Yaa Konadu Yiadom, ECR 2000, p. 9256, par. 26; Id. 19 September 2000, C-287/98, Luxebourg/Linster, ECR 2000, p. 6917, par. 43; Id. 4 July 2000, C-387/97, Commision/Grece, ECR 2000, p. 5047; Id. 18 January 1984, 327/82, Ekro/Produktschapvoor Vee en Vlees, ECR 1984, p. I-107, para 11. The rule is applicable also to the relationships in the Civil Law: v. ECJ 23 January 2000, C-373/97, Dionisios Diamantis/ Elliniko Dimosio, Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE), ECR 2000, p. I-1705, par. 34; Id. 12 dMarch 1996, C-441/93, Pafitis and others/TKE and others, ECR 1996, p. I-1347, par. 68-70.

51 See the Article 9:301 of the PECL which takes into account the case of the termination due to the no compliance of one party or in case of delay; within the DCFR in relation to the reciprocal obligations (see Article III. – 1:102, para4), the no compliance of the duty of a party allow the other one to claim the termination; the termination in case of breach is also regulated by the Article 107 of the European Code of Contracts.

52 See for example ECJ 4 October 2001, C-403/99, Italy/ Commission, ECR 2001, p. I-6883; Id. 13 February 1969, Walt Wilhelm and others/ Bubdeskartellamt, 14/68, ECR 1969, p. 1; Corte IDH, Opinión Consultiva OC-1/82, 24 September 1982, "Otros tratados" objeto de la function consultiva de la Corte, ref. See also CARDONA LLORENS J., "Memoria del Seminario "El siste-

The discipline coordinating the public contracts "is subject to the respect of the principles of the Treaty and in particular to the principle of freedom of movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving thereof such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency" (2nd recital of the Directive 2004/18/EC).

Thus, the EU public procurement law is devoted to guarantee the application of these principles and in particular the opening-up to the competition the public contract within the internal market (2nd recital; see also Article 179 Treaty on the Functioning of the European Union).

As noted by the Advocate General Niilo Jääskinen cited in Commission vs. Spain: "Pecuniary interest has been given a wide meaning by the Court, in view of the aims of the public procurement directives, namely, the opening up of national procurement markets to competition and the avoidance of barriers to the exercise of fundamental freedoms recognised in the Treaty" (paragraph 80)[53].

As recently stated by the Court of Justice, the eventual exemptions in the application of procurement law are to be interpreted as tight as possible[54].

It is believed that the use of the instrument of the public contract ensures that there is no distortion of competition in the spending of public funds[55].

Indeed, the discipline of state aid normally does not consider public procurement as a means of distorting the competition within internal market (pursuant to art. 107 Treaty on the Functioning of the European Union)[56], if they are awarded on market conditions[57].

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ma interamericano de protección de los derechos humanos en el umbral del siglo XXI"", Tomo I, San José, Costa Rica, 23 and 24 November 1999, II ed., p. 321, in http://www.corteidh.or.cr/docs/libros/Semin1.pdf.

53 See the 2nd recital of the Directive of the Directive 2004/18/EC and also the Opinion of the Advocate general Kokott in the case C-220/05, Auroux, para 57

54 See the above mentioned judgment Azienda Sanitaria Locale di Lecce and the, especially, Opinion of the Advocate general Verica Trstenjak, para 33.

55 See the Opinion of Advocate General Jäskinen mentioned above, paragraph 88

56 The definition of State aid is huge and it not applicable only to the grants. Ideed, according to the case law of the Court of Justice, the aid are the "Unilateral and autonomous decisions, undertakings or other persons resources or procure for them advantages intended to encourage the attainment of the economic or social objectives sought" (ECJ, 27 March 1980, 61/79, Amministrazione delle finanze dello Stato / Denkavit italiana, ECR 1980, p. 1205. See also, for example, ECFI, 5 April e 2006, T-351/02, Deutsche Bahn / Commission, ECR 2006, p. II-1047.

57 It occurs, only if there will be not a advantage, that is to say that the price "charged properly covers all the additional, variable costs incurred in providing the logistical and commercial assistance, an appropriate contribution to the fixed costs (…) and if, second, there is nothing to suggest that those elements have been underestimated or fixed in an arbitrary fashion" (ECJ, 3 July 2003, 83/01 P, Chronopost / Ufexe.a., ECR 2003, p. I-6993, para 40). Indeed as the judgements of the European judges affirm "It must be stated in that regard that the fact that the transaction was of a commercial nature is not in itself sufficient to show that it does not amount to State aid within the meaning of Article 92 of the Treaty, since such a transaction may none the less be effected at a rate which gives (…) a special advantage by comparison with its competitors" (Tribunal of first Instance, 28 September 1995, T-95/94, Chambre Sindacale Nazionale des Entreprises de Transport de Fonds et Valeurs

et al. /Commission, ECR1995, p. II-02651).

V

Regulatory functions of non contractual liability

Compensation for Damage: The Non-Contractual Liability of Member States and EU Institutions for Breaches of EU Law

Hedley Christ

The system for protecting individual rights, which emerges when the principle of "effet utile" is applied, is a new way of qualifying individual rights. In accordance with this principle, Member States not fulfilling their obligation to implement Community rules which are not directly applicable are rendered debtors. In appropriate conditions, private persons are held non-contractually responsible for not respecting the directly applicable Community law. For the Court of Justice, the liability of private persons, like that of Member States, for infringement of Community law is a measure of guaranteeing that the law is implemented.

1. *Introduction.* Over the last 60 years the European Union (once European Communities) has been the most important aspect of European integration. This is because the European Union is a unique process that continues to evolve, growing in scope with a deepening integration. Deepening in a sense of ever closer ties between the Member States and between the EU Institutions. This has occurred particularly through a process of policy and law making. And widening scopes, in that, the issues coming within the EU competences have been a widening process. This almost natural expansion on the fundamental foundations of the European Communities through its four, now five freedoms; that of the free movement of persons, goods, services, capital, and establishment, and the ever expanding policy areas, initially agriculture, competition and transport, has been the hallmark of European Union law. Through a process of "Treaty building"; adding and supplementing to previous Treaties, and more importantly through a process of law formation using the tools of Article 288 Treaty on the Functioning of the European Union (hereafter TFEU) of derived legislation, European integration has been a step by step process.

This process, however, particularly undertaken by the development of derived legislation, has meant that governments of the Member States have had to act. They have had to oversee the integration of European Union law into their own national law. Whether through Regulations, or more particularly Directives, sometimes Decisions, these Member States have, by their own volition, to oversee this integration of laws. It is not surprising, therefore, to discover, that at times, this has not been a straightforward process. In fact, sometimes a difficult process leading to delays in implementation or incorrect implementation and interpretation of European Union law. In such cases, therefore, we see Member States in breach of European Union law, for which, a mechanism, known as Direct Action, allows for European Union Institutions to investigate such breaches. How-

ever, although such a mechanism may halt the breach, individuals who may have been damaged by such a breach have, by this mechanism of Direct Action, no means of reparation or compensation. In other words where legal or natural persons have been injured by the breach of European Union law by one of its Member States or one of its Institutions, no action lay against that Member State or Institution for the damages so caused.

So it was, particularly during the 1980s, in that a number of Member States were delaying implementation of Directives, which not only hindered European integration, but also potentially damaged legal and natural persons by a non-complying Member State. At this point in time, however, legal and natural persons had no means by which they could seek compensation for damages caused by Member States or EU Institutions in breach of Union law. In fact, not until 1993, with the Maastricht Treaty, were there any penalties for defaulting Member States. However by the now, Article 260(2) TFEU, there is a system of fining Member States for their breaches of European Union law if they persist.

2. *Opening up EU Law for Actions in National Courts.* As a result the European Court of Justice made two major and important decisions. Firstly in Case 26/62 Van Gend en Loos, the Court initiated the principle of direct effect. Based on a Treaty Article the Dutch court referred two questions to the European Court of Justice (hereafter ECJ)[1]. First could a Treaty Article create rights for individuals and second, was the Dutch law in breach of the Treaty Article? Now the Treaty had not specified what legal effect Treaty Articles should have on individuals within the Member States. So the ECJ needed to consider the effect the Treaty had on nationals of Member States. The Article under consideration did not address individuals but Member States. What was clear to the ECJ was that the effect of the Treaty Article had clear implications for individuals. Thus the reasoning of the ECJ was to hold that:

European Union law had become a source of directly enforceable rights and obligations for individuals;

That such rights may be expressly granted by the Treaty or by reason of obligations which the Treaty imposes on individuals;

Those individuals become subject of European Union law, by the creation of rights and obligations, which can only be enforceable before the national courts. Individuals must have access to European Union law within their national courts;

Concerning the Treaty, its objective was to create an internal market of direct concern to individuals and their vigilance to see that Member States were complying with European Union law amounted to an effective supervision in addition to the supervision provided by now Articles 258 and 259 TFEU, known as Direct Action.

The Court, therefore, created a principle of direct effect in which, individuals could

[1] By Article 267 TFEU the Union Courts may provide interpretation of EU law and consider the validity of derived, secondary legislation provided for by Article 288 TFEU. Thus, if a national court requires clarification of EU law, or is questioning the legality of derived legislation it may, and sometimes must, ask the Union Court, through a series of questions, to clarify EU law or consider the legality of derived legislation. This is a process known as referral for a preliminary ruling, i.e. preliminary to a judgment being made by the national court.

use European Union law within national courts and tribunals. The right was not unconditional in that the Court specified criteria by which individuals could discern whether a Treaty Article was directly effective or not[2]. Nonetheless if the criteria could be shown then the ECJ had clearly stated that EU law was a matter for national courts and tribunals. By other cases, this principle of direct effect was extended to all EU law[3].

Although Van Gend regarded an issue in which a Member State was in breach of EU law, the Court did not have to consider whether a Member State could be held liable for damages when the Member State was in breach of EU law. But this was the result of the second important decision by the ECJ, and occurred in Joint Cases C-6/90 and C-9/90 Francovich[4]. In this case Italy had not implemented Directive 80/987 on the protection of employees in the event of their employer's insolvency. So when Francovich found himself in just this position, being owed 6,000,000 lire, the question was could he hold Italy liable for his loss by not having implemented the Directive 80/987? It had already been determined that Italy was in breach of EU law by not having implemented the Directive-[5]so for the Italian court the issue was, could the Italian State be held liable for Francovich's loss? The Italian Court, therefore, made a referral to the ECJ.

In its reasoning the ECJ, in Francovich, sites Van Gend in that the Treaties have created a legal system of its own which has also become an integral part of the legal systems of the Member States. As a result the Member States' courts and tribunals must apply EU law. Furthermore this new legal system not only applies to the Member States but also to the nationals of those Member States. Since EU law imposes obligations upon individuals, so too then, may those same individuals access this developing EU law. And if this should be the case then "the full effectiveness of Community [now Union] rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of Community [now Union] law for which a Member State can be held responsible".

We have, therefore, by these cases a clear indication from the ECJ that should legal and natural persons need to depend upon EU law, within the national courts and tribunals, then this right is inherent within the Treaties, not because of any specific statement to that effect, but by inference. EU law obligates legal and natural persons and thereby requires their reliance upon EU law, which must be applied by national courts and tribunals. Furthermore, should such legal and natural persons suffer damage or injury by any breach of EU law, by a Member State, then that legal or natural person may have redress within national courts and tribunals. In Francovich, therefore, the Court acknowledges that such a right exists, as also being inherent within the Treaties.

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2 These criteria are: the relevant provision(s) must be sufficiently clear and precise; unconditional in that there is no room for discretion in its implementation, and the deadline for its implementation or transposition had passed.

3 In particular this principle of direct effect was extended to Directives through Case 41/74 Van Duyn v Home Office [1974] ECR 1337 and Case 148/78 PubblicoMinistero v TullioRatti [1979] ECR 1629.

4 Joined Cases C-6/90 & C-9/90 Francovich (Andrea) v Italian State and Boniface (Danila) and Others v Italian Republic ECR, 1991, I-5357.

5 Case 22/87 Commission v Italy, ECR, 1989, 143.

3. *Who should be Party to a Claim in Damages*. This acknowledgement of a right to redress for harm caused by a Member State in breach of EU law leads to a number of questions; foremost being who is represented by the Member State? This question was addressed a few years later in Joint Cases C-46/93 and C-48/93 Brasserie du Pécheur and Factortame (No. 3), in which the ECJ held that the right of reparation refers to acts or omissions of any organ of the State; that is by administrations and governments, local authorities, public bodies, legislatures, and even judiciaries – under Francovich the legislature and judiciary were exempt from liability. Under Brasserie and Factortame, therefore, a Member State is liable regardless of the organ of State whose acts or omissions have breached EU law.

The idea that public bodies could be liable for compensation for damage caused, created few problems for the Member States; many in fact already had compensation systems in place. However, the idea that the legislature and judiciary could also be held liable did not sit well with many Member States. That the ECJ believed that such an extension was necessary for the legislature stemmed from the fact that many of the liability claims arose because of non or delayed transposition of Directives. Furthermore Member States' courts and tribunals were reluctant to hold their legislators liable, and in particular for Member States, such as the United Kingdom, in which the legislators could not be held liable for breaches of EU law. Other Member States' courts relied on the principle of non-interference with the legislative power[6]. However, the ECJ, in Case C-48/93 R v Secretary of State for Transport[7], held jointly with Brasserie, and drawing on the principle of international law and Article 258 TFEU, held that a Member State is liable whichever of its organs is responsible for the breach and regardless of the internal division of power between constitutional authorities[8].

The notion that state liability could be extended to the judiciary and even to a supreme court was considered in Case C-224/01 Köbler[9] which held that the principle of state liability could be extended in cases where damage occurred due to judicial errors[10]. However, Advocate General Léger, in his submitted opinion recommended that state liability for judicial errors should be reserved only for those most exceptional cases found to be manifestly infringing the applicable law. The ECJ thus reasoned that "In the light of the essential role played by the judiciary in the protection of the rights derived by individuals from Community [now Union] rules, the full effectiveness of those rules would be called in question and the protection of those rights being able… to obtain reparation

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6 See Symvoulio tis Epikrateias, plenary session, Feb. 8 1997, Vagias v DIKATSA, No. 808/1997; Corti di Cassazione, Sezione III, April 1, 2003 (No. 915), RepubliqueItalienne v Della Minola, Giustizia cilvile, 2003, 1, 1193. See also MAGANORIS E., "The Principle of Supremacy of Community Law in Greece – From Direct Challenge to Non-application", European Law Review, 24, 1999, p. 426.

7 Case C-48/93 R v Secretary of State for Transport, ex p Facortame, ECR 1996, I-1029.

8 See DAVIS R., "Liability in Damages for a Breach of Community Law: Some Reflection on the Question of Who to Sue and the Concept of "the state"", European Law Review, 31, 2006, p. 69.

9 Case C-224/01 Köbler v Austria, ECR 2003, I-10239.

10 See TONER H., "Thinking the Unthinkable? State Liability for Judicial Acts AfterFactortame (III)", in Barav, A. & Wyatt, D.A. (eds) Yearbook of European Law, Clarendon Press, Oxford, 1998.

when their rights are affected by an infringement of Community [now Union] law attributable to a decision of a court of a Member State adjudicating at last instance[11].

Notably, the ECJ draws upon the fact that, for the European Court of Human Rights (ECHR) system, national courts were already considering reparation for infringement of the Convention stemming from decisions of national courts of last instance. Furthermore in Case C-173/03 Traghetti[12] the claimants argued that the Italian Supreme Court was in breach of its obligation, under Article 234 TFEU, to refer a question to the ECJ as a result of Italian rules on Compensation. It had already been established in Case C-224/01 Köbler that failure to request a reference when obligated to, under Article 234 TFEU,[13] constituted a breach under state liability. It seems clear, from these cases, that the ECJ was not going to exclude, as organs of the state, both the legislature and the national courts and tribunals, including the supreme courts. And from its reasoning the principle reasons for their inclusion was the delay in implementation of Directives by Member States' legislature and because the courts were refusing to make preliminary rulings when, under EU law, they should.

Thus it is clear that, all organs of the State are liable for breaches of EU law that cause damage. In other words all public sector bodies are liable. But what of the private sector; could a private party be subject to an action of state liability for breaches of EU law? The ECJ had an opportunity to consider this issue in Case C-453/99 Courage, a case involving European competition law under Article 101 TFEU. The Court held that the effectiveness of competition law would be put "at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition"[14]. It should be noted, however, that this is a rare instance and only referred to private parties which were subject to EU competition law and should not be thought of as a general extension to private parties.

We have therefore, a developing requirement of effectiveness, that the rights individuals acquired as part of their legal heritage, from the European Union, have to be effectively enforced. And as we have seen from Van Gend and Francovich, effectively enforced by national courts and tribunals. The ECJ, therefore, has required Member States to have effective national procedural law in order that these rights, or more particularly, remedies, are available within their Member State[15]. This principle of effectiveness requires that,

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11 Case C-224/01 Köbler v Austria, ECR 2003, I-10239, para 33.

12 Case C-173/03 Traghetti del Mediterraneo SpA v Italy, ECR 2006, I-5177.

13 Now Article 267 TFEU in which, by its second paragraph it states that a national court or tribunal shall bring the matter before the Court of Justice when there is no judicial remedy under national law. This includes the situation where there is no further appeal process such as the last court of instance.

14 Case C-453/99 Courage Ltd v Crehan, ECR 2001, I-6297, para 25.

15 This is known as the Principle of National Procedural Autonomy recognized in Case 33/76 ReweZentralfinanzeb et Rewe-Zentral AG v Landwirtschaftskammerfür das Saarland, ECR 1976, 1989. Within the United Kingdom State liability comes within tortious liability, either as a breach of Statutory Duty or Misfeasance. A breach of Statutory Duty enable a claimant to obtain compensation for losses brought about by the defendent's failure to comply with a statutory obligation. In London Passenger Transport Board v Upson the Court held "That Statutory right has its origin in the Statute but the particular remedy of an action for damages if given by the common law…" i.e. a tort in

the application of Member States rules and procedures, so that the individual's EU rights are protected and not rendered ineffective[16]. In order to undertake this, Member States must not only make sure that there are such procedural rules available for claimants claiming damage for breaches in EU law, but also that the effectiveness of the right is not undermined by national law. In order that this should not occur, compensation itself has to be adequate for the damages sustained. Therefore, that the amount of compensation paid is more than a purely nominal sum and that such compensation should be, not only adequate, but also proportional to deter others from breaching their obligations[17]. The compensation, therefore, must be full and adequate, disregarding any national law setting a maximum limit on recoverable damages[18]. Finally that if such an action for damages was not already available within a Member State then the Member State is to create such a specific damages action[19]. In Case C-213/89 R v Secretary of State for Transport ex Factortame[20] the ECJ held that the UK, which had no procedure of Interim Relief must create a new remedy when national rules do not provide effective protection.

4. *The Conditions For State Liability*. Having determined who comes within the ambit of state liability the second question is what are the conditions for state liability to occur? In Joined Cases C-6/90 and C-9/90 Francovich we find three basic conditions for state liability involving Member States who have not implemented a Directive. First there must be a conferral upon an individual of specific rights within the Directive; second that the content of this specific right is identifiable, and third that there must be a causal link between the State's breach and the damage to the individual. However, Francovich left

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common law. Conceptually therefore, the action is seen as arising under the statute by virtue of an implied legislative intent. In order to bring such an action the claimant must show:

The defendant's conduct infringed the standard set by the statute;

The claimant was a member of the class protected by the statute;

The damage occurred in the manner against which the statute was meant to guard; and

There is a link between the damage and the breach known as the But-For test.

Under misfeasance, damages may be available for an ultra vires act if an official knowingly acts in excess of his or her powers or acts with malice towards the claimant. This is therefore, an abuse of public office which leads to damage. Under misfeasance, unlike statutory duty, the claimant does not have to show that he was a member of a class, or that he was identifiable as an individual who was likely to be harmed. For an example of misfeasance see Three Rivers District Council v Bank of England [2003] 2 AC 1.

16 In Case 45/76 Comet BV v Landesversicherungsanstatt Württemberg, ECR 1997, I-6761, the ECJ required national courts to set aside national law which breached the principle of effectiveness. See also Case 106/77 Simmenthal, ECR 1978, 629.

17 See Case 14/83 Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, 1984, ECR 1897.

18 Case C-271/91 Marshall v Southampton and South West Area Health Authority II, 1993, ECR I-4367.

19 Case C-432/05 Unibet (London) Ltd and Unibet (International) Ltd v Justihekanslern, 2007, ECR I-2271.

20 Case C-213/89 R v Secretary of State for Transport, ex p Factotame Ltd and Others, 1990, ECR I-2433.

unanswered the scope of the remedy in damages, and whether compensation for damages extends beyond those of non-implementation of Directives.

The ECJ had an opportunity to clarify Joined Cases C-6/90 and C-9/90 Francovich in the Joined Cases C-46/93 and C-48/93 Brasserie du Pécheur and Factortame III. In this joined case the ECJ extended the principle of state liability to all breaches of EU law and laid down three conditions, both similar and dissimilar to Francovich, which a claimant must prove. First the rule of EU law, which has been breached, must be one that intended to confer rights on individuals. Second, that the breach of EU law must be one that is sufficiently serious in order to award damages. Third, that there must be a causal link between the Member State's breach and the loss suffered by the individual. The question is therefore, are these conditions different, depending upon the type of EU law breached?

The first condition, for both Francovich and Brasserie/Factortame, relies on the fact that the rule of EU law, being relied upon in a case of breach, must be one in which a right can be identified. Furthermore, once the right has been identified, we need to determine whether the right is sufficiently clear in identifying those individuals who are entitled to benefit from the right. In other words, is the individual claiming this right one of those individuals who comes within the scope of the right? Finally it is necessary to determine the extent and content of the right and identify which Member State organ is charged with protecting that right.

The second condition however, appears to be different between Francovich and Brasserie/Factortame. In Brasserie/Factortame we find the criterion, in determining whether the breach is one resulting in compensation for damages, as having to be a sufficiently serious breach. In Case C-5/94 R v Minister of Agriculture the Court held "where a Member State was not called upon to make a legislative choice and possessed only considerably reduced, or even no discretion, the mere infringement of Community [now Union] law be sufficient to establish a sufficiently serious breach"[21]. This would indicate that any Member State, disregarding EU law, would be considered a sufficiently serious breach. In Brasserie/Factortame the Court held that sufficiently serious breaches were those, which the Member State "manifestly and gravely" disregarded the limits of its discretion. In order to determine this, a national court should consider "the clarity and precision of the rule breached, the measure of discretion left by the rule to the national or Community authorities, whether the infringement and damage caused was intentional or involuntary, whether any error or law was excusable or inexcusable, the fact that the position taken by a Community Institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law"[22].

It seems clear, therefore, from the passage in Brasserie/Factortame, that the disparity, between the second criterion of Francovich and that of Brasserie/Factortame, is non-existent in the sense that, as stated in Joined Cases C-178/94, C-188-190/94 Dillenkofer that in substance these second criteria are "the same since the condition that there should

[21] Case C-5/94 R v Minister of Agriculture, Fisheries and Food, ex p Hedley Lomas (Ireland) Ltd., ECR 1996, I-2553, para 28.

[22] Para 56.

be a sufficiently serious breach, although not expressed in Francovich, was nevertheless evident from the circumstances of the case"[23]. What can be said, regarding the second criterion of Brasserie/Factortame, is that it puts in place a threshold above which the individual has to prove in order to show that the breach is sufficiently serious; the Member State manifestly and gravely disregarding the limits of their discretion.

In Case 392/93 R v HM Treasury[24] regarding Article 8(1) Directive 90/531, the ECJ held that a sufficiently serious breach could not occur when, in this case a Directive, contained unclear and imprecise rules. The Court specified that in considering whether a Member State's breach was sufficiently serious, the national court had wide discretion. In doing so the national court had to consider the wording of the Article, was it clear and precise, and was the appropriate organ of the State able to interpret the rules; had the Member State taken legal advice before implementation; was there any existing ECJ case law regarding the subject of the EU law in question, had there been clarification, regarding the Article in question, and had the Member State sought clarification from the Commission. Furthermore, in Case C-140/97 Rechberger[25] regarding Article 7 of Directive 90/314, the Court held that this Article left no discretion to a Member State on its implementation into national law. The Court concluded that the Member State had thus manifestly and gravely disregarded the limits of its discretion[26].

Thus in order to show that a Member State has breached EU law, sufficiently seriously to be caught by the second criterion, the law so breached must be sufficiently clear and precise to be understood by the body so directed, and be unconditional, that is, there is no discretion as regards to its implementation into Member States' national law. However, it should be remembered that in Francovich the Court was asked to consider whether the rule breached by Italy was sufficiently clear to be directly effective, to which, the Court held that the said rule was, in fact, not sufficiently clear. It should not be assumed, therefore, that the criteria for direct effect is the same as those of sufficiently serious breach, although the same considerations seem to be being applied.

There appears to be, therefore, a number of determining factors when considering sufficiently serious breach. In Case C-278/05 Carol Marilyn Robins[27] the Court noted a number of factors, which should be considered by national courts. These were: whether the provisions in the relevant EU law were clear and precise to the relevant body so directed; the degree of discretion enjoyed by the Member State in its implementation; whether the breach of EU law was intentional or voluntary; was there an error of law which was understandable, and did the EU Institutions contribute to such an error

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23 Joined Cases C-178/94, C-188-190/94 Dillenkofer and Others v Germany, 1996, ECR I-4845, para 23. Dillenkofer also held that non-implementation of a Directive within the prescribed time limit constitutes, per se, a serious breach of EU law. Also see Case C-140/97 Rechberger and Others v Austria, 1999, ECR I-3499 which held that an incorrectly implemented Article 7 of Directive 90/314 was a manifestly and gravely disregard of its decretion.

24 Case 392/93 R v HM Treasury ex p British Telecommunications plc, 1996, ECR I-1631.

25 Case C-140/97 Rechberger and Others v Austria, 1999, ECR I-3499.

26 See also Case C-429.09 Günter Fuβ v Stadt Hall, 2010, ECR I-12167.

27 Case C-278/05 Carol Marilyn Robins and Others v Secretary of State for Work and Pensions, 2007,ECR I-1053.

of understanding. Robins, therefore, has provided a list, like Brasserie/Factortame, by which we may determine whether a Member State's breach is sufficiently serious and can be considered as an expansion on the second criterion of Francovich, that is, that the right identified in the first criterion must be clearly identified and its breach one for which compensation for damages can be claimed. In Francovich this second criterion was so obviously one for which compensation could be claimed that it did not need to expand upon it, as have subsequent cases.

The third criterion is the consideration of whether the breach of EU law, by a Member State, actually caused the damages to the individual so claiming. In determining this criterion the national court must be able to identify the facts and thereby establish their causality. This then requires the court to determine, under national law, the type of damages sustained and thereby the quantification of the loss sustained, using their own national procedural rules. What is clear from EU law here is, that under national procedural rules a claim, for breaches in EU law, must be treated similarly to breaches of national law, under which such a claim may be made. A national court must not treat less favourably claims for breaches in EU law than claims for breaches in national law. This is known as the principle of equivalence. In Case C-261/95 Palmisani[28] the Court held that to determine similarity the national court must consider the essential characteristics of the procedural rules. If similarity is established then the national court must determine whether the action, based in EU law, was treated less favourably under national procedural rules than a similar action in national law. If there is no comparative action, under national law, then the principle of equivalence does not apply. However, it should be remembered that if national laws do not exist, in relation to the action brought against a Member State for damages caused in breach of EU law, then the Member State must create such a law.

What type of breaches are we then considering? In Case 8/81 Becker[29] the Court held that a Member State could not stop an individual relying on an incorrectly transposed directive; in effect the Member State was estopped. A Member State cannot plead, therefore, its own failure to correctly transpose the directive, or not transpose the directive at all, into its own laws. Becker therefore differs from Francovich and Dillenkofer, in which the Member State liability was determined to be inherent within the Treaties. Francovich was a Member State breach of the now Article 288 TFEU for not implementing the directive and therefore in breach of a directly effective provision; the Member State being liable. Under Becker an organ of the State could not plead the failure of the Member State to implement the directive correctly and for which that organ of the State is liable. Both situations require the three conditions to be meet, what differs here is who becomes the defendant; in Becker it is an organ of the State while in Francovich it is the State itself. These differences may certainly have implication in Member States own procedural laws. It should also be remembered that implementing a directive may not only be a legislative act but also an administrative act and that administrative part may also be misapplied. Finally does the directive cease to be a source of rights when the directive

[28] Case C-261/95 Palmisani v INRS, 1997, ECR I-4025.

[29] Case 8/81 Becker v FinanzamtMünster-Innenstadt, 1982, ECR 53.

has been transposed properly? It would seem that the answer is yes; it may be possible to rely upon the transposed directive, if, for example, there is a issue of clarity in which a preliminary ruling is pursued.

5. *EU Institutional Liability for Breaches of EU Law*. So far we have considered legal and natural persons who have suffered damages due to breaches of EU law by Member States. But what if one of the EU Institutions[30]were in breach of EU law and thereby cause damage to an individual? Do the same conditions apply to EU Institutions as they do to Member States? The first thing to note is that this issue, of EU Institution liability, relates to non-contractual liability, that is, not to damages caused by breach of contract. We have, therefore, an issue of the Institutions going beyond their limits, or the limits of their competences. By Article 340(2) TFEU this is made explicit: "In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damages caused by its institutions or by its servants in the performance of their duties".

What type, therefore, of actions would lead to an action for damages? One of the first distinctions to be made is between legislative and non-legislative acts, however, the conditions, demanded for showing breaches in EU law, are, in fact, very similar. Furthermore, in acting legislatively or non-legislatively what degree of discretion did the EU Institution have?

For legislative acts the leading case is Case 5/71 Schöppenstedt[31] in which the claimant claimed that Regulation 769/68 was in breach of Article 40(3) EC. The Court held that, when considering non-contractual liability for legislative acts, the act itself must be one of sufficiently flagrant violation of a superior rule of law for the protection of the individual. So it is clear that all acts, which may be considered illegal, may lead to an action for damages. There has to be a superior rule, proving protection and that superior rule must be flagrantly breached.

What might this superior rule be? An obvious superior rule would be a breach of one of the general principles of law such as legal certainty, subsidiarity, or proportionality[32]. Others would include a breach of one of the fundamental rights of the EU or a breach of non-discrimination. Also there may be superior Regulations, that is, a Regulation may have been enacted as the result of a more general Regulation, one higher in a hierarchy of Regulations[33]. What is clear is that there is not an exhaustive list of superior rules upon which a claimant can draw; the superior rule must be identified in each case. There appears, then, to be some form of equivalence with Member State breaches, in that, a right must be identified from EU law which has not only been breached, but also

30 What constitutes an EU Institution is given by Article 13(1) TEU which gives the Institutions as: European Parliament, European Council; Council; European Commission; Court of Justice of the European Union; European Central Bank, and Court of Auditors.

31 Case 5/71 Aktien-ZuckerfabrikSchöppenstedt v Council, 1971, ECR 975.

32 See Case T-16/04 Arcelor SA v Europan Parliament and Council, 2 Mar. 2010.

33 See Case 74/74 Comptoir National Techniques Agricole (CNTA) SA Commission, 1975, ECR 533.

provides protection to individuals and those individuals can show they are one of those individuals so included.

If then it is possible to identify a superior rule, what might constitute a flagrant breach of this rule? In Case C-352/98 PBergaderm the claimant sought damages for the enactment of Directive 95/34 (inter alia), a Directive whose superior rule was Article 215 EC. The Court held, "As regards Member States' liability for damages caused to individuals, the Court has held that Community law confers a right to reparation where three conditions are met…As to the second condition…the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member States or the Community institution concerned manifestly and gravely disregarded the limits of its discretion"[34]. Here again we find an equivalence occurring, in that, the second criterion for Member States' liability, also appears to be a second criterion for EU Institution liability. As noted by Craig & De Búrca "It means that under Article 340(2) the seriousness of the breach will be dependent upon factors such as: the relative clarity of the rule which has been breached; the measure of discretion left to the relevant authorities, whether the error of law was excusable or not; and whether the breach was intentional or voluntary"[35].

At paragraph 44 of Case-352/98 PBergaderm we also find that the Court held that this consideration of what is effectively the Brasserie/Factortame second criterion, must be undertaken when "the institution in question has only considerably reduced or even no discretion…". The degree of discretion, therefore, that an EU Institution has, is of relevance here; there must be little or no discretion on the Institution to act. As Craig & De Búrca note "the broader and more complex the discretion, the more difficult will it be for the claimant to show the serious breach"[36]. Here then the phrase "manifestly and gravely disregarded the limits on its discretion" becomes relevant. However broad the discretion is, a claimant, therefore, must show that the EU Institution went beyond it. And that, just because the Union courts have annulled an Institution's decision, it does not mean that this automatically becomes a sufficiently serious breach[37].

It would seem, therefore, that, as far as the difference between discretionary acts and non-discretionary acts, the test for breach, and thereby liability, is a nuanced one. There clearly has to be a right, upon which a claimant can depend, but once found it will depend on the nature of the breach being sufficiently serious; the Bergaderm/Brasserie/Factortame text. Interestingly, paragraph 44 of Bergaderm also states "the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach" when an EU Institution has no, or very little discretion. The Court here using the permissive, may, is in its own right, be relevant, such that the Court will have

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34 Case C-325/98, P Laboratoires Pharmaceutiques Bergaderm SA and Goupil v Commission, 2000, ECR I-5291, paras. 42-43.

35 CRAIG P., DE BÚRCA G., "EU Law: Text, Cases and Materials", Oxford University Press, 2011, 5th Ed. Oxford, p. 563.

36 CRAIG P., DE BÚRCA G., "EU Law: Text, Cases and Materials", Oxford University Press, 2011, 5th Ed. Oxford, p. 563.

37 See Case T-212/03 My Travel Group plc v Commission, 2008, ECR II-1967.

to decide the degree of discretion and whether mere breach is sufficient to give rise to compensation of loss incurred[38].

What of non-legislative acts? Are non-legislative acts treated in the same way as legislative acts? It is clear from Article 340(2) TFEU that the EU will make good damages caused by its Institutions, whether legislative or not. The same conditions, therefore, must apply, in that, a claim for non-legislative breach must show a superior rule that has been breached and that that breach is sufficiently serious. The nature of the sufficiently serious criterion may differ. As Craig & De Búrca note "It is therefore possible to list types of errors which might lead to liability, including: failure to gather the facts before reaching a decision, taking a decision based on irrelevant factors, failure to accord appropriate procedural rights, and inadequate supervision of bodies to which power has been delegated"[39].

What of the servants of the Institutions, that is referred to in Article 340(2)? Is the Institution liable for the acts or omission of its servants? In Case 6/69 Sayer the Court held that "By referring at one and the same time to damage caused by the institutions and to that caused by the servants of the Community, Article 188 [now Article 340 TFEU] indicates that the Community [now Union] is only liable for those acts of its servants which, by virtue of an internal and direct relationship, are the necessary extension of the tasks entrusted to the institutions". The Institution can, therefore, only be held liable for the actions of its servants when those servants are undertaking the duties allotted to them and which are within the competences of that Institution[40].

There seems, therefore, that in order to show that an EU Institution has breached EU law which may amount to a claim for compensation of loss, the conditions for proving such loss are, if not the same, very similar for Member States' breaches. What then of the third criterion; the causal link between the breach and the damages suffered? This too, has to be shown by a claimant, as logic would demand. There must be a causal link in which the actions taken by the EU Institutions lead directly to the damages suffered, and thereby, any losses incurred. Furthermore, if there is a chain of causation, that is, that between the breach and the damage, there are intermediary acts; all these intermediary acts must follow, one from another, eventually leading directly to the damage caused. One point of note is that when there is joint liability, that is, when the action for damages involves both the Member State and the EU Institution[41] there could be a possibility that a claimant could received double compensation. In joined Cases 5/66, 7/66, and 13-24/66 Kampffmeyer, the Court held that "it is necessary to avoid the applicants being insufficiently or excessively compensated for the same damage by the different assessment of two different Courts applying different rules of law. Before determining the damage for which

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38 See C-390/95 P Antillean Rice Mills NV v Commission, 1999, I-769.

39 CRAIG P., DE BÚRCA G., "EU Law: Text, Cases and Materials", Oxford University Press, 2011, 5th Ed. Oxford, p. 566.

40 The degree to which a servant may become liable is unclear, particularly as they are given immunity from suit in nation courts (see Protocol (No. 7) On the Privileges and Immunities of the European Union).

41 This may occur when an EU Institution has not taken adequate steps to prevent a breach of EU law by a Member State under Article 258 TFEU, or if the Member State implements unlawful EU legislation.

the Community should be held liable, it is necessary for the national Court to have the opportunity to give judgement on any liability…Furthermore, if it were established that such recovery was possible, this fact might have consequences bearing upon the calculation of damages concerning the second category"[42].

What then of the damages; what type of compensation is available to claimants who have proved the breach? In Case C-308/87Grifoni[43] it was held that compensation should put the claimant in the same position as if the breach had not occurred. This would indicate that the loss should be quantifiable, although it was held in Kampffmeyer that this would also include foreseeable losses if they could be quantified with sufficient certainty. For Member States' breaches, the compensation available will depend on the national laws. For EU Institution breaches, the Union courts will award compensation for losses actually suffered,[44] and exceptionally for non-material damage[45]. In Case 238/78 Ireks-Arkady[46] it was pointed out that compensation would not be paid where the claimant had been able to recoup the loss by passing on the costs to its consumers.

6. *Conclusion.* If then individuals are damaged through the breach of EU law, such individuals may have a right to be compensated for any loss suffered. In effect, this comes down to breaches of EU law by Member States or by EU Institutions. Such regimes already existed within Member States' own national laws for breaches of national laws. Therefore, it would seem logical that this remedy should be extended to breaches in EU law. Overseen and developed by the Union courts, the action for damages, in respect of Member States, is overseen by national courts, often under the guidance of the Union courts. However, there is no harmonization of substantive or procedural EU law governing remedies for damage; there are guiding principles, such as the principle of equivalence and effectiveness.

We have, therefore, at the Member State level, a dual system in which, a claimant for damages must decide; does the claimant use the EU system of remedy for breaches of EU law by the Member State or does the claimant use the Member State's own remedy system?[47]Have the Union courts laid down more onerous conditions than those conditions of national courts? In Case C-201/02 Wells[48] the ECJ left it up to the national courts as to which remedy they should apply, whichever, in fact, the national court found the most suitable.

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42 Joined Cases 5/66, 7/66, & 13-24/66 Kampffmeyer v Commission, 1967, ECR 245.

43 Case C-308/87 Grifoni v EAEC, 1994, ECR I-341.

44 For an analysis of causality and damages see HEUKELS T., MCDONNELL A., (eds), "The Action for Damages in Community Law", Kluwer, 1997.

45 See for example Case T-309/03 Grad v Commission, 2006, ECR II-1173.

46 Case C238/78 Ireks-Arkady v Council and Commission, 1979, ECR 2955.

47 Case C-445/06 Danske Slagterier v Germany, 2009, ECR I-2119, at para 62, the Court held that an obligation to pay compensation does not arise if the injured party has willfully or negligently failed to avert the damage by not utilizing an available legal remedy.

48 Case C-201/02 Wells v Secretary of State for Transport, 2004, I-723.

V. Regulatory functions of non contractual liability

We should not forget, however, the principle of state liability forms part of a wider network of law and policy in which, Member States ought to comply with EU law, as in fact they have signed up to do by the ratification of the Treaties. In that, the Commission is given the responsibility to oversee, at least at the initial stages, the compliance, by Member States, with EU law. In that, individuals have, as part of their legal heritage, EU law, which, may be cited in their national courts. In that, the EU legal system imposes obligations and confers rights, which must be given effect. In that, Member States, and EU Institutions must fulfil their obligations derived from EU law. All of this we find in Francovich and is as relevant now as it was then. And the process has not ended but is still in progress.

Unimplemented Directives, relationships between private individuals and non-application: a control system at the discretion of Member States

Valentina Colcelli

Serious breaches of rules concerning discretionary power in implementing legislative measures are enforcement measures for non-contractual liabilities of Community or Member States. In cases where broad discretion is not applied, a simple infringement of Community rights by the Community or Member States can lead to a configuration of non-contractual liability. On the other hand, when instruments of binding secondary legislation do not contain unconditional and sufficiently precise provisions, non-contractual liabilities of Member States or EU Institutions are not configured. When an Institution does not have discretionary powers strong enough to take legislative measures, the simple failure to fulfil a Community rule can indicate a serious breach of it. Conversely, when discretionary powers are strong enough, the liability of national authorities does not arise. In these cases, the liabilities of both Institutions and Member States arise only if the liabilities do not originate, as they are required to do, from a legal act. Therefore, this omission implies that they have seriously omitted to carry out a required act. The EU legal system shows that liability is not related to the nature of any substantive right. Because of the recognition of the right to compensation, the conduct of others – States, Institutions, or individuals – affects the legal position of a private person and a way to build a joint system of EU Tort Law

1. *Introduction.* This part of chapter argues for the possibility of a unified definition of non-contractual liability in the EU legal system, since decision-making under the precautionary principle is characterized by discretionary power, similar to what happens to single EU Member States when they implement European Union directives.

The ideas on the harmonisation of European Tort Law some times differs radically, but as we observed, the European Court of Justice has developed case law on the basis of general principles common to the laws of the Member States. An idea of a codification of European Tort Law as part of a European civil code exits.

The European Commission has also looked toward harmonisation by suggesting the construction of a Common Frame of References. After the above examination, we may focus on whether or not the liability for the infringement of the precautionary principle operated by food and feed agents fits principles of European tort law formulated by the European Group On Tort Law[1].

[1] See http://civil.udg.edu/php//index.php?id=128

For this reason, thus first, it investigated the juridical setting under which the liability for the infringement of the EU law in present discretionary power the Member States, the function and how it may argue a specific guide for the concrete application of punishment of damages in the presence of discretionary power by private operators (i.e. precautionary principle operated by food and feed).

The way to concrete this general system of tort law borrows from the private law system: in the EU legal framework there does not exist any judgment of the EU Court of Justice expressly recording the existence of legal liability regarding the precautionary principle and damages caused by food and feed products connected by the provisions of articles 7, 19, 20 and 21 Regulation n. 178/2002.

At the same time, the EU law does not provide specific guidelines for the concrete application of punishment of damages in the presence of discretionary powers by private food and feed business operators, but Operators of the food chain may be required to compensate damages caused by their products because the breach of the precautionary principle (Art. 19, Reg. No. 178/2002).

Because requiring private persons who exercise control over the food chain to respect the precautionary principle and, if the principle is breached, their non-contractual liability means assigning the role of protecting general EU interests to a private/civil tool.

2. *Liability of EU Institutions and Member States for infringement of EU law: a brief reconstruction.* The purposes of non-contractual liability in the EU legal system: identifying individual rights. In the history of the European Union, non-contractual liability has been seen as a way to structure the fledgling EU legal system and to safeguard its goals. The Court of Justice recognized the liability of the Community and Members States because to assure the existence of the Communitarian legal system, the Court of Justice must attribute subjectivity to individuals rather than to rely on Member States[2]. By functioning in this manner, the court enables individuals who have suffered damage to obtain compensation on behalf of the EU Institution or Member States that caused the damage.

By the Court of Justice's attributing subjectivity to individuals and providing remedies, the court has been, and remains to be, an important measure in reinforcing the Community *primauté*[3]. Protecting individual rights by national/EU Courts is the best method for EU integration because it involves citizens and their interests. By recourse to courts and the implementation of remedies, individuals become the principal "guardians"of EU Law.

The Court of Justice identified most famous of all of its rulings, and first articulated the doctrine of direct effect. In the case of Van Gend en Loos,[4], the Court of Justice recog-

2 O'KEEFE D., "Judicial Protection of the Individual by the European Court of Justice", in Fordham International Law Journal, 1995, pp. 901-914.

3 FORSBERG T., "Normative Power Europe, Once Again: A Conceptual Analysis of an. Ideal Type", in Journal of Common Market Studies, 2011, pp. 1183-1204.

4 Case 26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen, 1963, ECR 1. See VAUCHEZ A., "The transnational politics of judicialization: Van Gend en Loos and the making of EU polity", European Law Journal, 2010, pp. 1-28.

nized the subjectivity of individuals and awarded remedy. Between 1960 and 1970, in its early period of operation, the Court of Luxembourg used *Schutznormtheorie* to identify individual rights against European Institutions and Member States.

The initial condition for the direct effect of the Communitarian law requirement was that a provision be essentially "self-executing". The criteria which were met by a treaty provision and which enabled it to have direct effect were clear. It must be clear and unambiguous, unconditional, and, this not dependent on further action being taken by Community or national authorities[5].

The Court of Justice made it clear that existence of a direct effect could apply even where the Member States possessed discretionary power in the implementation of treaty provisions or Communitarian rules.

The Court of Justice first used the principle of direct effect to identify individual rights in relation to Member States and Institutions. Thus, to understand the exact scope of the provision for the non-contractual liability of Institutions and Member States, one needs to read beyond the doctrine of direct effect.

The first suggestion of a codification for the provision of the non-contractual liability of the Community Institutions originated in Article 34 of the Treaty of European Coal and Steel Community (TECSC) of 1951. The article spoke of "equitable redress" to undertakings that had suffered "direct and special harm" by decisions or recommendations of the Commission involving a "fault of such a nature as to render the Community liable". Furthermore, Article 40 TECSC provides compensation for "injury" caused by a personal wrong by a servant of the Community in the performance of his duties.

In the Amsterdam Treaty, a consolidated version of the EC Treaty expressly provided for non-contractual liability and indicated that non-contractual liability was governed by Article 249 of Treaty establishing the European Community (*ex* Article 215 of the Treaty of Rome which provided: "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".

However, in order to apply the direct effect, reference to Treaty articles is not required. Thus, the Regulation also includes the direct effect theory due to the fact that it will immediately become part of the domestic law of Member States, without requiring transposition. In fact, Article 288 of TFEU (*ex* Article 249 TEC) provides that a regulation "shall be binding in its entirety and directly applicable in all Member States".

The initial approach relating to the direct effect theory is no longer applied due to the fact that competencies of the Community have been increasing in a functional way in order to reach the internal market. The idea that direct effect was precluded where further measures were required at the national level and was also modified by the Treaty's reference to the position of directives[6]. Thus, it was very difficult to identify

[5] Case C-213/89, The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others, 1990, ECR I-2433

[6] Article 288 TFEU (*ex* Article 249 TEC): 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.

new individual rights, created during the expansion of Community powers, by applying *Schutznormtheorie* and the direct effect theory.

Where there are measures for the implementation, a Directive may leave some discretionary power to the Member States. The aims of legal integration and effectiveness which underpinned the European Community's original articulation of the notion of the direct effect of the Treaty provision, can be equally applied to the case of directives. Thus, in Case Van Duyn v. Home Office[7] the court affirmed (§ 12) that "if, however, by virtue of the provisions of Article 189 regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that article can never have similar effects". The decision also held that "it would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of community law. Article 177, which empowers national courts to refer to the court questions concerning the validity and interpretation of all acts of the community institutions, without distinction, implies that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals.

Thus, the Court of Justice subsequently used the principle of *useful effect* to identify individual rights against Member States, which thus became debtors of the individual. The State's liability in damages for non-implementation of a directive became an important way for an individual to enforce the provision of a directive despite the prohibition of the horizontal direct effect and to file suit against the State for damages.

The Francovich[8] decision is the most important interventionist ruling which required the availability of a particular remedy as a matter of EC law.

Only basic conditions for breaches involving a State's non-implementation of directives were established by the Francovich decision and those conditions were the conferment of specific individual rights[9,] whose content must be identifiable under the directive, upon an individual, and needed to show a causal link between the State's breach and damage to individual[10]. The second paragraph of Article 215 of the Treaty refers to the non-contractual liability of the Community in regards to the general principles common to the laws of the Member States, from which, in the absence of written rules, the Court of Justice also draws inspiration in other areas of Community law[11].

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7 Case 41/74 Van Duyn v. Home Office, 1974, ECR 1337.

8 Cases C-6 & 9/90, Francovich and another v Italy, 1991, ECR I-5357

9 Case C-22/02 Peter Paul et al. v. Bundesrepublik Deutschland, 2004, ECR I-9425.

10 Cases C-6 & 9/90, Francovich and another v Italy, 1991, ECR I-5357, paras. 39-40.

11 Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others, 1996, ECR I-1029. paragraph 42.

Brasserie du Pêcheur and Factortame III[12] clarifies and extends the principle affirmed in Francovich: "the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty. It follows that that principle holds good for any case in which a Member State breaches Community law, whatever is the organ of the State whose act or omission was responsible for the breach. In addition, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied[13], the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities".

Thus, the EU Court uses the idea, borrowed from the common law tradition, that remedies remain one among a variety of methods of significant subjective interest in the EU legal system. Remedies – measures to qualify individual rights – follow the classical system of the qualification of individual rights in the civil law tradition, where rights are expressed as rules[14].

The system for protecting individual rights, which emerges when the principle of effet utile is applied, is a new way of qualifying individual rights of EU citizens and is a measure of guaranteeing that the law is implemented.

3. *The parallel between the conditions for liability of both European institutions and Member States: conferring rights on individuals and the meaning of the "EU higher-ranking principle".* The decision in Brasserie du Pêcheur and Factortame III builds a bridge between European institutions and Member States' liability. In order to determine those conditions, it is important to consider the principles inherent in the Community legal order which form the basis for State liability, namely, first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation of cooperation which is imposed on Member States by Article 5 of the Treaty[15].

To identify these categories of rules, one must clarify which are included in the concept, within the EU legal system rules which confer rights on individuals. Non-contractual liability is thus a litmus test to determine from which EU rules individual rights may be implemented. Principles infringed upon by Institutions must be higher ranking and should protect individuals.

Non-contractual liability relating to Institutions applies to situations where there is a violation of a higher principle which contains a provision for the protection of the individual. The principles must be of a higher ranking, and should protect individuals.

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12 Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others, 1996, ECR I-1029.

13 See, in particular, Joined Cases C-143/88 and C-92/89 Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest, 1991, ECR I-415, paragraph 26.

14 See ARNULL A., "The principle of effective judicial protection in EU law: an unruly horse", in Eur. Law. Rev., 2011, pp. 51-71.

15 Francovich and Others, paragraphs 31 to 36.

Traditionally, higher ranking principles are the general principles of the EU legal system, it is well-established that the Court of Justice always "Europeanizes" the legal principles applicable to the Community/Union, i.e. the content of these principles is primarily defined in light of the distinct features and needs of the Community/Union legal order[16].

In any case, the jurisprudence of the Court of Justice seems to have advanced. While EU judges have traditionally equated the definition of higher rank with general principles, the current trend is somewhat different. Therefore, such non-contractual liability may be recognised, even if the rule that is breached is not a higher-ranking principle, as described above[17].

The criteria for identifying a higher-ranking principle in non-contractual liabilities of Member States are the same as those for identifying rules for a legal review of institutional acts – the reference is not only applicable to general principles but also to the rules and fundamental principles of the Treaty[18].

Since the Bergaderm and Goupil v Commission decision, the EU Court of Justice has used the same criteria to configure the non-contractual liability of Member States to qualify the non-contractual liability of EU Institutions[19]. The criteria are based on the concept that the protection of the rights which individuals derive from EU law cannot vary depending on whether a national authority or a European Union authority is responsible for the damage.

Based on Article. 263 of the Treaty on the functioning of the European Union, the Court of Justice has referred to the meaning of the higher-ranking principle that numbers among those rules the Court makes use of in reviewing the legality of measures taken by EU bodies. Additionally, in cases involving non-contractual liabilities of Member States, when principles designed to confer rights on individuals are not implemented (e.g. Francovich), they are deemed to be directly applicable EU laws[20], not rules. In private relationships, only directly applicable EU laws confer rights on individuals. This excludes Directives, even those that are self-executing.

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16 The Court of Justice's principles of interpretation recall the interpretative practice of another European Court, the European Court of Human Rights. Indeed, it is not rare for this Court to give an "autonomous meaning" to the European Convention on Fundamental Rights' key terms in order to guarantee uniform interpretation and prevent states from redefining the scope of their obligations under the Convention. The European Court of Human Rights can hence give the terms a "European sense" which may differ from the meaning they have in the Member States of the Council of Europe. However, as pointed out by Brems, the independent character of autonomous concepts should not be overstated, "because the Court frequently relies to a certain extent on the common denominator in the legal traditions of the states parties when attributing autonomous meaning". BREMS E., "Human Rights: Universality and Diversity", Martinus Nijhoff, 2001, p. 396.

17 see again Court of Justice, Bergaderm and Goupil v Commission, Case C-352/98, 2000, ECR I-5291.

18 Some judgements of the Court of First Instance are indicative of this see Court of Justice, FIAMM and FIAMM Technologies v Council of the European Union and Commission Case T-69/00, 2005, ECR II-5393.

19 ECJ, Bergaderm and Goupil v Commission, Case C-352/98, 2000, ECR I-5291.

20 ECJ, Brasserie du Pêcheur SA v. Germany, Case C-46 and 48/93 1996, 1996, ECR I-1029.

Some judgements of the Court of First Instance are indicative of the meaning of a "higher-ranking principle conferring rights on individuals'[21], i.f. Portugal v Council (C-149/96). In six decisions, the Court has reflected on the nature of the WTO agreements. The Court of First Instance stated that these international agreements do not confer rights on individuals. Because of their nature and structure, the WTO agreements are not among the rules by which EU Courts review the legality of action of Community Institutions[22]. The Court can review the legality of the conduct of the defendant Institutions by WTO rules when the Community intends to implement a particular obligation assumed within the context of the WTO or when the Community measure expressly refers to specific provisions of the WTO agreements[23]. In these decisions, the Court of First Instance is referring to the meaning of the higher-ranking principle, which, in accordance with Article. 263 of the Treaty on the functioning of the European Union, is among the rules the court uses in reviewing the legality of EU Institutions' measures.

Also, the conditions under which the Member States may incur liability for damage caused to individuals by a breach of EU law cannot, in the absence of particular justification, differ from those governing the liability of the European Union in like circumstances.

The basic requirement of liability is the violation of a provision of EU law intended to protect private parties[24]. Remedies for compensation must be found under national law, as this respects the principle of adequate protection. Existing national remedies must eventually be reshaped and upgraded if they do not meet EU standards. The Court of Justice is not interested in whether or not Member State jurisdictions guarantee extremely high-level legal protection or better legal protection that is different from other states. To ensure that EU rights are effectively protected, national legal protection cannot be lowered below the minimum standard of necessary safeguards. If and/or when this happens, private rights must be for guarantee the EU rights. And, if EU law presents an uncertainty which can only be settled by the case law of the Court of Justice, the responsibility for this uncertainty cannot be allowed to weigh on the shoulders of the defendant or applicant in a tort action[25].

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21 See T-69/00, FIAMM and FIAMM Technologies v Council of the European Union and Commission, 2005, ECR II-5393.

22 C-149/96, Portugal v Council, 1999, ECR I-8395, paragraph 47; in C-307/99, OGT Fruchthandelsgesellschaft case, 2001, ECR I-3159, paragraph 24.

23 See, as regards C-70/87, Fediol v Commission, 1989, ECR 1781, paragraphs 19 to 22, and, with regard to WTO agreements, C-93/02 P, Biret International v Council, 2003, ECR I-10497.

24 G Vandersanden and A Barav Contentieux communautaire, 1977, Büssell: "En une disposition du traité, en un règlement de rang supérieur ou en un principe général du droit, comme par exemple l'interdiction de discrimination, l'égalité devant les charges publiques, le respect de la sécurité juridique, ou le principe de proportionalité".

25 Case C-392/93, R v. HM Treasury ex parte British telecom, 1996, ECR I-1631; Joined Cases C-283/94 et al., Denkavit, 1996, ECR I-5063.

4. *Liability of European institutions and Member States and Discretionary power: a guide for further application in the infringement of the precautionary principle by private business operators.* In the light of Francovich decision, and in accordance with the nature of the EU legal system, it is completely irrelevant whether the unlawful act or omission is attributable to a legislature measure or to an executive act. But the discretionary power can be the decisive element, irrespective of the rank of the provision infringed (Treaty or secondary legislation, at any rate is a provision which takes precedence over national law) or of the method of infringement. (legislative or executive).

"In very general terms, discretion is the room for choice left to the decision maker by some higher ranking source or authority"[26]. Specifically, in the EU legal system, the expression "discretion" relates to an empty space left to the freedom of choice of public authorities, covering not only the field of economic policy decisions but also to technical implementation and legal interpretation. Thus the notion is not only related to the balancing of interests but also to the interpretation of vague and ambiguous legal concepts. And in any case, the broad conception of discretionary power may include legislature measures, decisions of National Courts and administrative acts. In the traditions of the national legal systems of Member States (see f.i. Italian, French and German tradition legal systems) these concepts are considered distinct, and the discretionary power of public bodies is usually identified by the balancing of interests.

In the EU legal system, discretionary power relating to the balancing of interests and freedom of choices applies only to the activities of the EU institutions which have a very broad power, especially in the field of economic policy. In economic policy field, the discretion of the EU Institutions includes the determination of legal concepts and the legal characterization of the facts. "Unquestionably, it would be more correct to apply different rules on liability depending on whether the activity in question was more particularly legislative or in the nature of executive activity, given that, in principle, the discretion available to the Community institutions differs significantly"[27]. For instance, the requirement to avoid non-contractual liability of EU Institutions, such as a Commission, is justified where the Community has broad discretion as in the field of agricultural policy. The Court, confirms also that antidumping measures constitute legislative action involving choices of economic policy[28] because the infringement imputed to the institution is attributable to a breach of the rules inherent in the assessment of complex economic facts and not to a breach of procedural rules binding on the institutions. On the contrary, this last situation is not justified where the conditions for the exercise of the discretion conferred on the Institution are clearly and precisely defined.

Consistently, in the Court of Justice's case-law decisions relating to non-contractual liability provide that if the damage complained of results from a legislative measure involving choices of economic policy, the fact that the measure in question is invalid is not sufficient to cause the EU to incur liability. For damage caused by measures

[26] CARANTA R., "On Discretion" in PRECHAL S., VAN ROERMUND B. (eds), The Coherence of EU law, OUP, 2008, p. 185.

[27] Advocate General Biancarelli's opinion in Case T-120/ 89, Stahlwerke Peine-Salzgitter v Commission, 1991, ECR II-279.

[28] Case T-167/94 Nolle v Council and Commission, 1995, ECR II-2589, paragraphs 44 to 52.

involving a choice of economic policy, European Union liability cannot arise unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.

"The legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals"[29]. For this reason, an Institution's liability, linked with its legislative authority hinges on a set of conditions which includes the unlawfulness of the act of the Institution, the fact of damage and the existence of a direct link in the chain of causality between the act and the damage complained of[30]. However, the discretion of the authorities of Member States is different. Not every breach of Community/EU law involving the invalidity of a measure or the preconditions for liability is capable of causing the State to incur liability or, as a result, of giving rise to an obligation in damages in favour of individuals. And, those cases should be distinguished according to whether or not the discretion has been granted by treaty or by directives. "In order to identify the limits of the possibilities for translating unlawfulness into liability, the discretion factor can and must be the decisive element, irrespective of the rank of the provision infringed (Treaty or secondary legislation, at any rate a provision which takes precedence over national law) and of the measure (legislative or executive) which infringes it"[31].

Provisions of treaties, as all "constitutional" provisions, have broad meanings and are, usually interpreted by the National Constitutional Courts and, therefore, by the EU Court of Justice. Where treaty rules do not provide complete meanings, national authorities are assured of a significant freedom (discretion) in the implementation of the rule. Often, however, the national interest and discretion in the application of EU principles override the EU aims and cause conflicts which result in the EU Court of Justice being called to interpret the provisions of the Treaty and define more clearly the limits of the discretion of the national authorities. At the same time, the court will define the limits that have been exceeded by the Member States in the implementation. This function of the court is performed through procedures and substantive considerations for the evaluation of the principles of proportionality. According to this criteria, the EU Court of Justice has indicated the *minimum* standard for protection for each right provided for in EU treaties. In other words, the EU Court of Justice helps define the basic level of EU rights that are guaranteed protection by Community law, and to which Member States must comply.

If there is a minimum basic level of EU rights protection that is guaranteed, the national authorities can implement their own internal policies without restraint.

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29 Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 HNL v Cornial and Commission, 1978, ECR 1209, paragraph 5.

30 See, for example, the judgment in Case 50/86 Grands Mou- lt/is de Pans v Coimai and Commission, 1987, ECR 4833, paragraph 7.

31 Opinion of Advocate General Tesauro, delivered on 28 November 1995, Joined Cases C-46/93 and C-48/93.

We can analyse this situation by making reference to two cases. The first case is linked to policies. The second is linked to the discretion granted to Member States by the Treaty because the interpretation of discretion depends upon whether it is imposed by precise and unconditional obligations that establish a uniform minimum level of application in all the legal systems of all Member States land whether discretion used by national authorities involves the consideration of their own interests. The conclusion in this first case of Member States' discretion, it is clear that discretionary power gradually decreases where national interest tends to prevail against the need for a uniform interpretation of the EU law.

The degree of discretion available to the States coincides, at least in most cases, with the degree of clarity and precision of the obligation to which it is subject. "It is quite possible to conceive of obligations which are not at all clear or are imprecisely demarcated, even in cases where the States' discretion is small or unimportant. The upshot is that in such cases the States' limits are not clearly defined for that very reason, with the result that the situation is not very different substantively from that in which the States have a significant margin of discretion. It is in precisely that way that the discretion ends up corresponding to the greater or lesser precision of the obligation which it imposes on the States themselves. (…)". For instance the prohibition of discrimination on grounds of nationality (Article 6) identifies precisely and exactly the individual's right, which is – very simply and without any possible alternative – the right not to be discriminated against[32].

Thus, even where provisions directly affect the State because of breaches, they must be categorized as manifest and serious. Article 30 TCE is different, however, because it prohibits quantitative restrictions and measures having an equivalent effect, in cases where the individual's right, in itself is clear, could be limited by the provisions of Article 36 or in cases where measures are applicable without distinction. The State measure in question, which is in principle incompatible with Community law, may well be taken as outside the scope of Article 30 or if it falls within the exceptions provided for in Article 36, it may be necessary to obtain a prior determination from the national court and/or from the Community Court. It must be considered that there are limits it may impose on the action by the Member States. Article 30 of the Treaty is not always clear and precise, and it certainly is not associated with the exercise of broad discretion on the part of the Member States.

For instance, by contrast, the discretion that may be used by Member States, under Article 129a of the Treaty (consumer protection), cannot in any situation be seen as being able to be applied in more restrictive situations relating to liability of, for example, a Member State's rule that excludes citizens of other Member States from the benefit of the national provisions. Also, for example, the reference can be made to Article 12 and its prohibition on the introduction of new customs duties.

Where, in contrast, Member States have wide discretion or where the EU obligations imposed on them are not clearly and precisely defined, the same resolution will need to be addressed where the limitations of action have been manifestly and gravely unnoticed.

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[32] Opinion of Advocate General Tesauro, delivered on 28 November 1995, Joined Cases C-46/93 and C-48/93.

Clearly, this will be the case where the allegedly infringed provision is clear as its description in the Srl CILFIT and Lanificio di Gavardo SpA judgment[33] and where it has already been read by the Court with regard to identical or similar events whether or not the interpretation was given in a preliminary ruling or in a judgment pursuant to Article 169.

In the Srl CILFIT and Lanificio di Gavardo SpA judgment, i.e, the court held that Article 177 of the EEC does not constitute a means of redress. that is available to the parties of a case pending before a national court or tribunal. Therefore, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal is compelled to consider that such a question has been raised within the meaning of that Article. On the other hand, a national court or tribunal may, in an appropriate case and on its own motion, refer a matter to the Court of Justice. It follows from the relationship between the second and third paragraphs of Article 177 of the Treaty that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to render judgment. Accordingly, those courts or tribunals are not obligated to refer a question concerning the interpretation of Community law to the Court of Justice if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case. If, however, those courts or tribunals consider that recourse to Community law is necessary to enable them to decide a case, Article 177 imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise.

As a result, for the reasons of assessment where there is an obligation in damages on the Member States in breach, the weight has been placed, on one hand. On the same criteria devised by the case-law on Article 215 – therefore basically on the concept of a manifest and serious breach. On the other, on fault as the element necessary to typify as serious the infringement of the provisions where discretion is available to national authorities in regard to the individual provision which confers a right on persons.

By using this technique, the use of discretion ends up corresponding to the greater or lesser precision of the obligation which it imposes on the States themselves. Consequently, in such cases the individual continues to have the possibility of relying on the substantive protection of the legal position which may be conferred upon him by the provision in question. Of course, in the event that the Member State does not, with reasonable quickness, remedy the infringement which has been found in the meantime, the injured party may indeed bring an action for damages. At any rate, it surely cannot be ruled out that the interpretation of the EU rules, as made by the Member States in their legislative activity or their lack of action, may be shown to be manifestly wrong, with the consequence that the national authorities in breach of their obligations should be considered liable for damages in such cases. "These were not errors of such gravity that it may be said that the conduct of the defendant institutions (…) was verging on the arbitrary and was thus of such a kind as to involve the Community in noncontractual liability"[34]. According

[33] Judgment of the Court of 6 October 1982- Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health, Case 283/81, European Court reports 1982, 03415.

[34] Judgment in Joined Cases 314/81 to 316/81 and 83/82 Procureur de la République v Waterkeyn]

to the EU Court of Justice, an inverse relationship is established between responsibility and discretion when the discretion achieves the highest levels of intensity and there is less possibility of being liable for damages, and on the contrary, the less the discretion, the greater the probability of a statement in case of default[35].

5. *Grants of discretion by Directives.* The EU Court of Justice has not explicitly provided criteria or guidelines by which a person can verify the broad discretion of the Member States in the implementation of Directives. Therefore, it is preferable to extrapolate the concepts from the analysis of some judgments rendered by the EU Court of Justice.

The Court of Justice has considered Article 215 of the Treaty. Above all, in relation to liability for legislative measures, it allows for, among other things, the composite situation to be regulated, in specific: problems in the application or interpretation of the texts and, above all, the margin of discretion available in the implementation of the Directives by the Member States[36]. It is important to begin with Article 215 to understand the Court of Justice's approaches to the damage issue from the implementation or failure of implementation of the Directives. "The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals"[37]. It could be possible to recognize the content of those rights on the basis of the contents of provisions of the directive, as explained above. "The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the Directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties"[38]. "Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law"[39]. As indicated by the Francovich judgment (see paragraphs 40 and 41). However, the three conditions above mentioned, which the Court identified, are set out here word for word in the form in which they were criticized harassed and abridged also by the Court of Justice in Faccini Dori v Recreb.

And, also, in the case of the damage from the implementation or failure of the implementation of the Directives, the right ensuing from the Directive has to have an exact

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ECR 1982, 4337, paragraph 16. 84 – Sec, for a statement of that concept, the judgment in Joined Cases 116/77 and 124/77 Amylum v Council and Commission, 1979, ECR 3497, paragraph 19.

35 Judgment in Case 283/81 CILFIT v Ministry of Health, 1982, ECR 3415, paragraphs 16 and 17. Sec, for a remark to similar effect but regarding the obligation to make a reference pursuant to the third paragraph of Article 177 of the Treaty, the judgment in Joined Cases 28/62, 29/62 and 30/62 Da Costa en Schnake v Nederlands Belastings administratie, 1963, ECR 31.

36 Judgment of the Court of First Instance (Third Chamber, extended composition) of 9 September 2008, MyTravelGroup plc v Commission, Revue du droit de l'Union européenne 2008, 4 p. 850-857.

37 European Union Law: Text and Materials.

38 § 40 Joined Cases Bonifacci and Francovich judgment C-6 9/90, cit. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the state's obligation and the loss and damage suffered by the injured parties.

39 Francovich case (paragraph 40 and 41).

substance or rather it must be capable of determination, with the consequence that this circumstance should again be considered as to whether or not it is satisfied by Treaty provisions with direct effect, but it is sufficient that the infringement of the provision is capable to confer on the individual a right whose subject-matter can be exactly recognized, and is known to have affected the injured party's financial interests. "If this were not so, in fact, only claims in cases in which the aim of the provision infringed was precisely to confer a "pecuniary" right on the individual would sound in damages"[40].

Of course, "this does not mean that the condition in question has to be interpreted as meaning that whether damages may be awarded in respect of the damage sustained by the individual is dependent on whether the exact content of the pecuniary loss sustained by the individual is capable of being identified on the basis of the actual provision infringed"[41]. Because the Court of Justice expressed that the conditions of liability depend also upon discretion in the implementation of the EU acts: the national legislature – like the EU Institutions – does not systematically have a wide discretion when it acts in a field governed by EU law. Due to the fact that EU law may impose obligations to achieve a particular consequence, obligations or the avoidance of acting reduce the margin of discretion, sometimes to a considerable degree.

According to Francovich, loss or damage caused by a national law, due to the failure to fulfil a European Union provision, must be open to a possible action for damages, and it should be recoverable for the loss or damage resulting from a national measure which is incompatible with the same EU provision only if the restrictive conditions laid down by the Court are fulfilled[42].

Of course, there is no doubt whether the omission on the part of the Member State is an unlawful directive or the result sought by the directive – for which the State has no margin of discretion, at any rate not in relation to the time within which the directive had to be implemented. This is the hypothesis of Francovich judgment, where there is a breakdown to implement a directive within the prescribed period, given, absolutely that the other conditions set out by the Court are satisfied.

But if the query is in those terms, it has to be acknowledged that there will be State liability in principle whenever the State is constrained under EU law to realize a specific effect. But this happens also for other provisions, including those of the Treaty, that are restricted to imposing on the Member States precise, clearly identified obligations to avoid doing some conduct and concurrently giving rise to a right for individuals.

So, in all those sectors and with regard to all those provisions which do not give Member States a significant margin of discretion, in the sense described above, they must be held to be liable and obligated in damages simply on account of the infringement of a EU provision which confers upon individuals a right which is precise and whose subject-mat-

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[40] Opinion of Advocate General Tesauro, delivered on 28 November 1995, Joined Cases C-46/93 and C-48/93.

[41] OPPENHEIMER A., "The Relationship Between European Community Law and National Law: The Cases", II, Cambridge University Press, 2003, p. 504.

[42] Bourgom before the Court of Appeal, Civil Division, Common Market Lau Reports, 1986, OB, 716, considered in SIMON-BARAV, "La responsabilité de l'administration nationale en cas de violation du droit communautaire", in RMC, 1987, p. 165, in particular at p. 170.

ter is determinable; no other factors may be taken into account. When, implementing EU rules, the discretion of a Member State is not considerable or, rather, is completely reduced (as in technical standards and regulations), or when it does not allow changes as a general principle, national legislation contrary to a Directive for which the period for transposition has not expired need not compulsorily be applied[43]. In these cases, Member States cannot implement a Directive, because their discretionary powers, with regard to the implementation of technical regulations, are not a consideration. Non-transposition Directives that define the substantive scope of a legal rule create rights or obligations for individuals, and the national court must decide cases on this basis[44].

This may happen with regard to the infringement by a Member State of a general principle of the EU legal system, as well as in relation to a Directive, where the period for transposition has not expired. In the Unilever judgement, the technical regulation adopted in breach of Article 9 of Directive 83/189/EEC, also had an effect on the free movement of products[45]. Non-application is a control tool at the discretion of Member States in transposing Directives into national law[46].

General conditions for Member States' liability are failure to implement a directive within the prescribed period, but they diverge according to the type of breach and also according to the particular characteristics of a specific type of breach. As regards the timely, but incorrect, implementation of a provision of a directive, the Member State liability will exist only where the application of the provision in question is manifestly wrong and a sufficiently serious breach[47]. Thus to understand what liability of Member States and Institution liability means, it could be necessary to analyse the concept of manifestly wrong and a sufficiently serious breach in relation with the amount of discretionary power.

6. *Sufficiently serious breaches and discretionary power*. According to the judgment in HNI. v Council and Commission[48], the court stated[49], that Institution and Member States' liability cannot arise unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.

In cases where broad discretion is not applied, a simple infringement of Community rights by the Community or Member States can lead to a configuration of non-contractual liability.

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43 T Roes Case C-555/07, Seda Kucukdeveci V. Swedex Gmbh & Co. Kg, 2009-2010, 16, Colum. J. Eur. pp 497-518.

44 Court of Justice, Faccini Dori, Case C-91/92, 1994, ERC, I-3325, paragraph 20.

45 Court of Justice, Unilever Italia Spa v Central Food Spa, Case C-443/98, 2000, ERC, I-07535, paragraphs 50 and 51.

46 T Roes Case C-555/07, Seda Kucukdeveci V. Swedex Gmbh & Co. Kg, 2009-2010, 16 Colum. J. Eur. pp 497-518.

47 Opinion in Case C-392/93 British Telecommunications plc, 1996, ECR I-1631, I-I634, also delivered today, in particular paragraphs 33, 34 and 35.

48 Joined Cases C-101/89 and C-37/90 Mulder and Others v Council and Commission, 1992, ECR I-3061. paragraph 12.

49 See in paragraph 4.

The "sufficiently serious" condition was developed additional in Hedley Lomas Case C-5/94[50]: the UK Ministry of Agriculture, Fisheries and Food declined to issue a licence for the export of live sheep to Spain. The denial was part of a general denial based on a worry that the treatment of animals in Spanish slaughterhouses was contrary to a Community Directive on the treatment of animals[51]. But the Court of Justice said that this constituted only a quantitative restriction on exports, contrary to Article 29 of the Treaty. Further, the court held that the UK could not rely on Article 30 to give good reason for the negative response, since those objectives were already protected by the Directive in question. This was significant since the objectives had been developed in circumstances where the Member States had a wide legislative discretion, but here, "the Member State… was not called upon to make any legislative choices and had only considerably reduced, if any, discretion". In these circumstances, the mere infringement of Community law may be sufficient to satisfy the "sufficiently serious" condition. This In Lomas Case C-5/94 was not a discretion case.

When an Institution does not have discretionary powers strong enough to take legislative measures, the simple failure to fulfil a Community rule can indicate a serious breach of it.

In the Dillenkofer judgment[52], Germany had unsuccessfully implemented the Package Holidays Directive before the prescribed deadline, leaving a number of Claimants not able of obtaining compensation following the insolvency of the tour operators from whom they had purchased holidays. In this casa the Court of Justice's response was that there was a "sufficiently serious" breach evident from the facts because where a Member State failed to take any measure to transpose a Directive within the prescribed period, that Member State manifestly and gravely disregarded the limits on its discretion. As such this constituted a "serious breach" of EU law and gave rise to a right of compensation when the Directive conferred rights on individuals whose content was identifiable, and when a causal link existed between the breach and the loss and damage suffered.

Thus, "serious breaches" of rules concerning discretionary power in implementing legislative measures are enforcement measures for non-contractual liabilities of Community or Member States.

Conversely, when discretionary powers are strong enough, the liability of national authorities does not arise. In these cases, the liabilities of both Institutions and Member States arise only if the liabilities do not originate, as they are required to do, from a legal act. Therefore, this omission implies that they have seriously omitted to carry out a required act.

In such cases, the liabilities of both Institutions and Member States arise only if the liabilities do not originate, as they are required to do, from a legal act. Therefore, this omission implies that they have seriously omitted to carry out a required act.

The Rechberger judgment[53], involved Article 7 of the Package Holidays Directive. In this case, Austria had put into practice the Directive that was not correct, because Austria

[50] C-5/94, R v Ministry of Agriculture, Fisheries and Food, ex p Hedley Lomas, 1996, ECR I-2553.
[51] Directive 2010/63/EU.
[52] Joined Cases C-178/94 and others, Dillenkofer v Germany, 1996, ECR I-4845.
[53] C-140/97, Rechberger v Austria, 1999, ECR I-3499.

incorrectly implemented Article 7 of Directive above mentioned which left great freedom to the Member States in the choice of appropriate measures[54]. "There is, however, no room for interpretation in regards to the very clear aim of the provision: to provide that the security provided by retailers/organisers must cover the total refund of money paid over and the full repatriation costs. Therefore, no solution can be accepted that would, in effect, allow the refund of money paid over and repatriation expenses to be limited, even if that were to happen only under extreme circumstances"[55]. Thus, for the Court of Justice there was no room for any discretion or excusable error in not implementing Article 7 of the Directive. The Court, therefore, had little trouble finding that this was a sufficiently serious breach.

However, the condition of "sufficiently serious breach" of EU rules is not based on fault or negligence, which has been the traditional standard of tort law, but the violation of a duty under EU law, which must however meet a certain threshold. A negligent violation may be regarded as evidence of a "sufficiently serious breach", but on the other hand, "reparation… cannot… depend upon a condition based on any concept of fault"[56].

For instance, in both cases, R v Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas[57], relating to Institutions' liability, the Court of Justice held that where the defendant has little or no discretion, any breach of Community law must be regarded as sufficiently serious for the purposes of establishing liability in damages.

On the other hand, when instruments of binding secondary legislation do not contain unconditional and sufficiently precise provisions, non-contractual liabilities of Member States or EU Institutions are not configured.

For instance, in the case Mr Haim,[58] an Italian with a Turkish dentistry diploma which was recognised by the Belgian authorities, required compensation for loss of earnings from a German association of dentists. The claim followed a previous ruling of the Court finding that the association had infringed on the right of freedom of establishment by refusing to enrol Mr Haim on the register of dental practitioners, without taking into account his experience in both Germany and Belgium.

The Court of Justice did not decide whether, in this case, the Member State had broad or narrow discretion; it left that to the national court. But it emphasised that the rule in Hedley Lomas was not absolute: where there was little or no discretion, a mere infringement may, but would not necessarily, constitute a sufficiently serious breach. The EU legal system shows that liability is not related to the nature of any substantive right.

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54 Art. 7: "The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency".

55 Report on the Implementation of Directive 90/314/EEC on Package Travel and Holiday Tours in the Domestic Legislation of EC Member States.

56 Court of Justice, Brasserie du Pêcheur SA v. Germany, Case C-46 and 48/93 1996, 1996, ECR I-1029, paragraph 79.

57 Court of Justice, R v Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas, Case C-5/94, [1996], ECR I-2553], on Member State liability, and Court of Justice, Commission v Fresh Marine, Case C-472/00, 2003, ECR I-7541.

58 C-424/97, Haim v KVN, 2000, ECR I-5123.

Because of the recognition of the right to compensation, the conduct of others – States, Institutions, or individuals – affects the legal position of a private person.

In the tradition of Member States' civil law, EU non-contractual liability may be described as a subjective right to have legal rights remedied if they are damaged. But, the non-contractual liability of the Institution and Member States may be configured even if rules are not infringed. In such a case, the severity of the damages suffered is sufficient to make a claim: the breach must be sufficiently serious, that is, a causal relationship must exist between it and the damages suffered by the injured party[59] With both State and Institutional liability, the sufficiently serious breach requirement now applies in all cases. The difference is that, with institutional liability, where there is no or limited discretion, a breach will be mechanically considered a sufficiently serious breach without suggestion to the fault factors described in Brasserie. But, as regards State liability, the fault factors are checked in any case. When an Institution does not have sufficiently strong discretionary powers, no real defence is offered to the Institution.

The sufficiently serious breach hurdle is in practice no obstacle at all, as the Institution cannot escape liability by pointing to fault factors that, in another context, contribute to making a breach sufficiently serious.

It follows then that serious breaches of rules concerning discretionary power in implementing legislative measures can be seen as enforcement measures for the non-contractual liabilities of EU Institutions or Member States. This may lead to a "hybridization of remedies" which could be shown in the basic requirements of "sufficiently serious breach".

Taking in account the criteria laid down by the EU Court of Justice with regard to Member States and Institutional liability, this requires that applicants prove the extent of the damage[60]. "There must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties"[61]. It is for the applicants to prove causation; the Court of Justice will not make an assumption about the existence of a wrongful act and damage[62].

[59] C-59/83, Biovilac v Commission, 1984, ECR 4057, paragraph 28.
[60] C-253/84, GAEC v Council and Commission, 1987, ECR 123.
[61] C-46 and 48/93, Brasserie du Pêcheur SA v. Germany, 1996, ECR I-1029.
[62] C-64 & 113/76, Dumortier Frères, 1979, ECR 3091.

Relationships between private parties and direct effect of non implemented EU Directives: the case of "Seda Kücükdeveci" and the control on the Member States discretionally

Valentina Colcelli

Also the non implemented EU Directives have the same effects in the private parties relationships and saves for the control on the Member States discretionally in horizontal as in vertical relationships.

1. *Introduction.* In horizontal relationships, provisions for stakeholders to demand non-application of national legislation if it contrasts with EU law accompany individual rights. The only limitations we find in this case are those EU rules characterised by the *effet utile*.

Non-application in relationships between private individuals does not accompany unimplemented Directives. However, with the expansion in the EU's powers, we cannot exclude the possibility that, in relation to the legal position of individuals in interrelationships dependent on unimplemented Directives, these Directives cannot achieve a horizontal effect. Certain judgements of the Court of Justice may be interpreted in this sense[1].

The Court has recognised some horizontal effects in one Directive not implemented in the United Kingdom's legal system: the rights of an employee against a Member State which was qualified not as a public authority but as a private employer[2]

In another case, the Court of Justice did not apply German law to an employment contract between Werner Mangold and Rüdiger Helm: the national law did not ensure the full effectiveness of the general principle of equal treatment for work done by men and women on grounds of age, during the period in which the transposition of Directive 1999/70/EC had not expired[3].

These anomalous cases and their reasons may be explained by referring to the criteria governing non-application. In horizontal relationships, they assume special connotations.

The reference here is to Unilever Italia SpA v Central Food SpA[4],which involved a law applicable to relationships between private individuals[5]. The question referred to

1 See C-152/84, Marshall and C-186/95, Arcaro, 1996, ECR I-4705.
2 C-188/89, Foster, 1990, ECR I-3313.
3 C- 144804, Werner Mangold v Rüdiger Helm, 2004, ECR I-9981.
4 C-443/98, Unilever Italia SpA v Central Food SpA, 2000, ECR 1-7535.
5 See again C-443/98, Unilever Italia SpA v Central Food SpA, cited.

technical standards and regulations[6] and their direct applicability in civil proceedings between individuals (concerning contractual rights and obligations) when they are contained in unimplemented Directives.

The Court of Justice answered the question – submitted in a preliminary ruling – stating that, in civil proceedings, a national court must refuse to apply a national technical regulation which was adopted during a period of postponement of adoptions prescribed in Art. 9 of Directive 83/189/EC. Arts. 8 and 9, cited, are technical standards and regulations.

The Court of Justice, according to its case law, in which an unimplemented Directive cannot impose obligations on an individual and cannot therefore be relied against an individual, could not apply it in Unilever Italia Spa v Central Food Spa. Non-compliance with Arts. 8 and 9 of Directive 83/189/EC constitutes a substantial procedural defect and renders inapplicable a technical regulation adopted in breach of those Articles.

The Court, therefore, stated that its case law on the prohibition of horizontal effects (rights or obligations for individuals) by unimplemented Directives cannot be applied when the infringement of a Directive constitutes a substantial procedural defect.

Non-transposition Directives that define the substantive scope of a legal rule create rights or obligations for individuals, and the national court must decide the case before it on this basis[7]. This may happen before the infringement by a Member State of a general principle of the EU legal system as well, in a Directive the period for transposition of which has not expired.

In the Unilever judgement, the technical regulation adopted in breach of Art. 9, cited, had an effect on the free movement of products as well[8].

These judgements, which appear to show a trend different from the Court's settled case law on Directives (see, e.g. Faccini Dori), are a clear indication of the meaning of non-application of national law in contrast with the *effet utile* of a Directive.

When, in implementing EU rules, the discretion of a Member State is not considerable or, rather, is completely reduced (as in technical standards and regulations) or when it does not allow changes as a general principle, national legislation contrary to a Directive for which the period for transposition has not expired need not be compulsorily applied.

In these cases, Member States cannot implement a Directive and alter the situation, because their discretionary powers with regard to the implementation of technical regulations, such as in Arts. 8 and 9, cited, is not considerable.

This statement about horizontal relationships confirms the conclusions about non-application in relationships between private individuals and Member States (vertical relationships): non-application is a check on the discretion of the State in question.

Except in the conditions mentioned above, the legal protection of non-application

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6 C-194/94, CIA Security International SA v Signalson SA and Securitel SPRL, 1996, ECR I-220, particularly, paragraphs 11 and 12. See also to C-317/92, Commission v Germany, 1994, ECR I-2039, paragraph 26.

7 Faccini Dori (C-91/92), cited, paragraph 20.

8 C-443/98, Unilever Italia Spa v Central Food Spa, cited, paragraphs 50 and 51.

does not apply when the EU law is characterised by the effet utile. In these cases, judges are obliged to interpret national law in conformity with EU law[9].

Additionally, in horizontal relationships, national courts apply national law partly through interpretations derived from EU Law.

Unimplemented Directives, which cannot produce direct effects between individuals, may render immune from non-contractual and contractual liabilities individuals who are engaged in behaviour which, although not permitted by national law, is provided for in an unimplemented Directive[10].

When the moment for implementing a Directive has expired and the result prescribed by that Directive is not obtainable by the Member State or by interpreting national law in conformity with EU law, it is possible, in appropriate conditions, to invoke the non-contractual liability of the Member State, as described above[11].

In this last period, The Court of Justice has changed its positions about the not implementation of the Directives regarding the relationship between private parties

For instance the judgment in examination the EUCOJ decided that the national court must guarantee the respect of the principles on the EU legal system also if the principles are present in a Directive not yet implemented. The National Court has to disregard the national rule and not conform or go against the EU principles. In this case the principle in examination in the non implemented Directive n. 2000/78 regarding the non discrimination in labour conditions and occupations.

This Judgment is a guide to follow to understand how it could be possible to give authority between private parties to not implement the directives.

In the light of the EU Court of Justice case, this sentence has significant consequences on the position of the private parties in their relationships. Up till now they have not been taken into consideration by the national Judges. Instead they seem to have been ignored in the Court of Justice's consideration according to the first position of the Court of Justice regarding the non implemented directive between private parties. From the beginning the EU legal system has been grounded and structured around the Communitarian Legal System based on individual rights.

The sentence Seda Kücükdeve v. Swedex GmbH & Co. KG[12] regarding the application of directive between private parties who want to arrange in this tradition: "the Court confirms its case-law on the scope of the principle of non discrimination on grounds of age and on the obligation of the national courts to apply European Union law directly, setting aside incompatible national legislation. Having worked for 10 years since the age of 18 for the company Swedex, Ms Kücükdeveci was dismissed with one month's notice. The employer calculated the period of notice as if the employee had only three years' length of service, in accordance with the German legislation in force, which

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9 OLIVER P., ROTH W.H., "The Internal Market and the Four Freedoms", in Comm. mark. law rew., 2004, p. 421.

10 C-106/89, Marleasing SA v La Comercial Internacional, 1990, ECR I-4135, paragraph 9.

11 C-91/92, Faccini Dori, 1994, ECR I-3325, paragraphs 26, 27, 28, 29, 30.

12 C-555/07, Seda Kücükdeve v. Swedex GmbH & Co. KG, in Racc., 2010, para. 55-56.

provides that periods of employment completed before the age of 25 are not to be taken into account in this calculation. Ms Kücükdeveci took the matter to court, invoking that this legislation constituted discrimination on grounds of age, which is prohibited under European Union law. In her opinion, the period of notice should have amounted to four months, which corresponded to a length of service of ten. The Higher Labour Court of Düsseldorf, hearing the case on appeal, referred questions to the Court of Justice on the compatibility of the rules in question with European Union law and on the consequences of any incompatibility. The Court firstly recalls that the principle of non-discrimination on grounds of age is a general principle of European Union law and that it is also included in the Charter of Fundamental Rights. Secondly, it specifies that the conduct at issue in the main proceedings, adopted under the national legislation in question, falls within the scope of European Union law. In fact it comes within the scope of Directive 2000/78/EC establishing a general framework for combating discrimination on various grounds, including age.

Furthermore, the Court points out that, according to its own case-law (see judgment C-144/04 Mangold), the Directive merely gives expression to this general principle of non-discrimination on grounds of age. According to the Court, the legislation in question is contrary to the principle of non-discrimination on grounds of age, as it unduly disadvantages persons who have worked before the age of 25 in relation to persons with a comparable length of service who were older when they joined the undertaking. Consequently, it for the national court, hearing proceedings between individuals involving the principle of non-discrimination on grounds of age, to ensure the full effectiveness of European Union law by finding national legislation contrary to that principle to be incompatible and disapplying it if need be, independently of whether the court makes use of its entitlement, in the cases referred to in the second paragraph of Article 267 of the TFEU, to ask the European Court of Justice for a preliminary ruling on the interpretation of that principle"[13].

2. *The part of the Seda Kücükdeve v. Swedex GmbH & Co. KG relevant in our argument and why.* In this sentence, the second part of the pronunciation is of our interest, not all. Because it states in a relative and innovate manner the criteria for the application of the not implemented directive between private parties.

For the first time The Court of Justice affirms that national judgments have in any case to assure the private parties and their jurisdictional guarantees the effectiveness in their application of rights and general principles if present in EU rules.

The national courts are the first system of legal protection of EU individual rights: In the EU, national courts protect individual rights in horizontal and vertical relationships. However, EC Treaties (in particular, the Treaty on the functioning of the European Union) and EU Treaties have made "a number of instances for private persons to bring a direct action, where appropriate, before the Court of Justice, (…) not intended to create

[13] C-555/07, Seda Kücükdeveci v Swedex GmbH & Co. KG, judgment of 19 January 2010, in Summaries of important judgments, European Commission Legal service.

new remedies in the national courts to ensure the observance of Community law other than those already laid down by national law"[14].

In a notice issued on the 13 of February 1993 on cooperation between national courts and the Commission in applying Arts. 85 and 86 of the EEC Treaty ([1993] OJ C39/6.), the EU Commission explains that in the same conditions that Member States apply in the case of violation of domestic rules, natural persons and enterprises are entitled to access all legal remedies provided by Member States.

With *Seda Kücükdeve v. Swedex GmbH & Co. KG* sentence in reference to the controversies between private parties, that the EU Court of Justice declares in accordance to their traditional position that a directive cannot give immediate duties or rights to private parties and it can give action in claim. The EU Court of Justice affirms in any case that every national judge has a duty in the respect of the effect utile of the directive, whether they are national or administrative institutions of a Member States.

The rights talked about by the EU Court of Justice is to guarantee the final *effect utill* present in the directive, and for this reason the National Court has to adopt every actions or acts to fulfil the above mentioned *effect utill*.

From this effect, derives the need of the national Judge to proceed when possible with a literal interpretation of the EU norm in the light of the final *effect utill* of the directive, to get the correct result ex art. 288, par. 3, TFUE.

The judge has the duty to realize a conformed interpretation of the national norm if the directive is not implemented. In these cases, judges are obliged to interpret national law in conformity with EU law[15].

Also in horizontal relationships, application of national law is pursued by national courts partly through interpretations made following EU Law.

Unimplemented Directives, which cannot produce direct effects between individuals, may make immune from non-contractual and contractual liability individuals who are engaged in behaviour which, although not permitted by national law, is provided for in an unimplemented Directive[16].

When the moment for the implementation of a Directive has expired and the result prescribed by that Directive is not obtainable by the Member State, or through interpretation of national law in conformity with EU law, it is possible, as described above, to invoke the non-contractual liability of the Member State, in appropriate conditions[17].

Court of Justice has underlined that the non implemented directives cannot produce effects between private parties. But the court of Justice can in fact render in the case that the same private parties are immune to the responsibilities when they have behaviours that, are not consent by the national law, but are foreseen by the directive not yet implemented.

In the case that the foreseen results by the directive cannot be held by the simple

14 C- 158/80, Rewe v Hauptzollamt Kiel, 1981, ECR 1805.

15 C- 144804, Werner Mangold v Rüdiger Helm, ECR 2004, p. I-9981 and ROTH O., "The Internal Market and the Four Freedoms", Comm. Mark. Law Rerw., 2004, p. 421.

16 C-106/89, Marleasing SA v La Comercial Internacional, ECR 1990, p. I-4135 para 9.

17 C-91/92, Faccini Dori v. Recreb Srl, ECR 1994, p. I-3325, para 26, 27, 28, 29, 30.

conformed interpretation, the EU law imposes to the Member States the compensation of damages caused by the Non implemented directives. The Conformed interpretation of the national law and its inherent logic of the system of EU treaties.

In specific question, is the art. 662, 2, BGB[18] because it does not allow a conform interpretation to the directive n. 2000/78/CE.

The necessary to guarantee the effectiveness of the principle of non discrimination regarding ones age, present in the directive, means that the judge has to not apply the national norm but the judge is free to decided to reinforce the question about the correct interpretation of the national law in the light of the EU Directive to the Court of the Justice (question referred for a preliminary ruling)

On the contrary to the above mentioned case, according to the EU primate there is also the principle of non discrimination regarding ones age, if a national norm is contrary to this principle of non discrimination, it must not be applied.

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[18] German Civil Code BGB Section 622: Notice periods in the case of employment relationships.
(1)The employment relationship of a wage-earner or a salary-earner (employee) may be terminated with a notice period of four weeks to the fifteenth or to the end of a calendar month.
(2)For notice of termination by the employer, the notice period is as follows if the employment relationship in the business or the enterprise
1. has lasted for two years, one month to the end of a calendar month,
2. has lasted for five years, two months to the end of a calendar month,
3. has lasted for eight years, three months to the end of a calendar month,
4. has lasted for ten years, four months to the end of a calendar month,
5. has lasted for twelve years, five months to the end of a calendar month,
6. has lasted for fifteen years, six months to the end of a calendar month,
7. has lasted for twenty years, seven months to the end of a calendar month.
In calculating the duration of employment, time periods prior to completion of the twenty-fifth year of life of the employee are not taken into account.
(3)During an agreed probationary period, at most for the duration of six months, the employment relationship may be terminated with a notice period of two weeks.
(4)Provisions differing from subsections (1) to (3) may be agreed in collective agreements. Within the scope of applicability of such a collective agreement, the different collective agreement provisions between employers and employees who are not subject to collective agreements apply if the application of collective agreements has been agreed between them.
(5)In an individual contract, shorter notice periods than those cited in subsection (1) may be agreed only
1. if an employee is employed to help out on a temporary basis; this does not apply if the employment relationship is extended beyond a period of three months;
2. if the employer as a rule employs not more than 20 employees with the exception of those employed for their own training and the notice period does not fall short of four weeks.
When the number of employees employed is determined, part-time employees with regular weekly working hours of not more than 20 hours are counted as 0.5 employees and those working not more than 30 hours are counted as 0.75 employees. The agreement in an individual contract of longer notice periods than those stated in subsections (1) to (3) is unaffected by this.
(6)For notice of termination of employment by the employee, no longer notice period may be agreed than for notice of termination by the employer.

As a result, the national court has had controversies between private parties, and does not have the duty to go in front of the National Judge to ask the question about the correct interpretation are also free to do so. If the Judge decides not to go to the Court of Justice, the judge has only to not apply the national disposition contrary of the principle of not discrimination regarding ones age present in the non implemented directive. N. 2000/78.

For this reason the Court of Justice resolves the second, question and affirms that it is a duty of the national judge to respect the principle of non discrimination regarding ones age, which is also present in the directive 2000/78. For this reason it is necessary to disregard the national norm which is contrary to this principle. The national judge decides to reinforce the question about the correct interpretation in front of the EU Court ex art. 267, par. 2 TFUE.

In fact the directive n. 2000/78 is limited in its power to give concrete expression to the principle of non discrimination regarding ones age concerning occupations and working conditions. In this case the principle of non discrimination is a general principle of the EU treaties.

With all consideration it is the duty of the national court to assure that the of high raking principle will always be applied in every condition, also if this principle is present in a non yet implemented directive.

3. *Some reference to the EU Court of Justice to the not implemented Directives and private parties effects*. The affirmation of this judgment in reality is a consequence of hard work for the new interpretation made by the Court about the non implemented directive and its possible application in the position between private parties. The main rule of the directive in any case is that a not implemented directive does not have an effect on the relationship between private parties, with the exclusion that the directive is self-executing, and the window of time for implementation has expired.

It is not possible for the directive non implemented to have some direct horizontal effects based on the ideals of the principle, "certezza del diritto" (principle of legal certainty) and in reason of the EU competency. The principle of the "certezza del diritto" (principle of legal certainty) could be slowed down because the private party does not fully understand their potential rights. According to Art. 288 TFUE gives the discretional power for the implementation of the directive only to the Member States.

Recognizing the duties and rights with direct effects between private parties means giving the EU the power and competence that exists only in the case of regulations.

This limitation is also a consequence derived from the non implemented directive that gives the power to the private party to ask to the Members States for damages for not implementing the directive.

It does not exist between private parties a self executing directive.

The birth of the internal market, above all, has brought the necessity for the Union to look at not only creating rules for the States and the market, but also to intervene in the market regulations regarding the trade between the customers present in the same market.

In fact it already happened in the 1990s, a lot of directives had imposed directly and indirectly the jurisdictional guarantee in the relationship between private parties. For instance we can refer to the directive regarding business and agriculture[19]

In realty, according to the new competences of the EU, we can no longer excluded ex ante that same directives that have the same horizontal effect, do to the fact that some private parties could be depending on the non implemented directives.

4. *Non implemented directives and their direct effect on the relationship between private parties.* According to previous cases the outcome was different than the one indicated now, thus giving us a new interpretation through the Judgments of the EU Court of Justice.

The same Court of Justice, in fact, has already disapplied the German law regarding non discrimination of workers based on ages, sex and race with the Seda Kücükdeve v. Swedex GmbH & Co. KG judgment. Also In a labour contract the same Court of Justice with the sentence Werner Mangold/Rüdiger Helm[20] also disapplied the German law also there is a specific window of time to implement the directive 99\70\CE. In this manner the EU Court had concrete rules to not implement the directive for private parties according to the German workers *rights* against the State, in this case it is not like a public authority, but as a private employer.

5. *The control on the Member States discretionally also in horizontal relationships in occasion of non implemented directives.* In the cases of Werner Mangold/Rüdiger Helm and the sentence Seda Kücükdeve v. Swedex GmbH & Co. KG judgment that seems to be different in respect to the traditional approach of the Court of Justice. The above mentioned sentence could help explain the criteria that regulates the disapplicaction of internal law that has a horizontal relationship when the directive is not implemented.

What we are talking about is the sentence *Unilever Italia spa/Central Food spa,*[21] that re-examines the relationship between private parties and the application of the non implemented directive.

In reference for a preliminary ruling the Court of Justice says that in the case of technical norms inside in the directive not yet implemented there could be applied a trial contractual between private parties.

The Court Justices' response to the question regarding preliminary ruling that its jurisprudence concerning the relationship between private parties and the directive not implemented is not applicable when the non implemented directive talks about technical norms, and procedural norms.

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19 VAN GERVEN W., "The Case Law of European Court of Justice and National Courts as a Contribution to Europeanisation of Private Law", in European private Law, 1995, p. 368 ff.

20 C-144804, Werner Mangold/Rüdiger Helm, Racc., 2004, I-9981.

21 C-443/98, Unilever Italia spa/Central Food spa, Racc., 2000, I-7535.

This hypothesis makes non applicable the national technical rules contrary to the technical rules present in the directive.

The directive that is not implemented and that does not follow procedural norms (according to the juridical rule which is based on the national judgment), must resolve the controversy. In this case the normal rule inside the directive is not able to create neither rights nor duties.

We clarify that normally the Court considers these types of technical rules that are present in the non implemented directive an obstacle to the free circulation of goods in the internal market. This effect hinders the commercialization and diffusion of products and compromises the right of free circulation, that is a fundamental principle of the EU.

More over the sentence Seda Kücükdeve v. Swedex GmbH & Co. KG in examination, regarding the application of the technical rules contrary of art. 9 of Dir. n. 83/189/CEE. has the ability to produce juridical effects on its own, also in the absence of the national administrative technical norms still present because of the non implemented directive.

What we are talking about is about a confirmation of the more general conclusions formed by the Court of Justice about the criteria that regulates the disapplication of internal norms in the vertical relationships: namely the disapplication could be considered a jurisdictional control over the power discretion of the Member States.

From a different point of view the disapplication thus remains a guarantee for the citizens.

The disapplication of the national norms in the vertical relationship produces effects on the public and private rights and in court procedural rules.

When the EU norm has the direct effect within the internal legal system the judge can not use the principle of the disapplication. In this type of case the judge only has the power to interpretation of the national norm in a manner in which conforms to the EU law.

In the presence of a directive that has been put into action in the national law, the judge has the power to disapplication. It is used as an instrument for the evaluation of the national goals to see if the national rules are in line with the EU laws: we can realize the control on the national legislative institution that it did not go over their limit in respect to the application of EU law.

Because the sentence Seda Kücükdeve v. Swedex GmbH & Co. KG calls the disapplication of internal rule if in contrast with technical rules present in Directives or if in the case of violation by the Member State about a EU general principle inside, whether the directive is or is not implemented and is not Self-Executing.

6. *Conclusion*. When, implementing EU rules, the discretion of a Member State is not considerable or, rather, is completely reduced (as in technical standards and regulations), or when it does not allow changes as a general principle, national legislation contrary to a Directive for which the period for transposition has not expired need not compulsorily be applied. In these cases, Member States cannot implement a Directive, because their discretionary powers with regard to the implementation of technical regulations is not a consideration. Non-transposition Directives that define the substantive scope of a legal

rule create rights or obligations for individuals, and the National Court must decide on the case put to it on this basis.

This may happen with regard to the infringement by a Member State of a general principle of the EU legal system, as well as in relation to a directive the period for transposition of which has not expired. In the Unilever judgement, the technical regulation adopted in breach of Art. 9 of Directive83/189/EEC also had an effect on the free movement of products. Non-application is a control tool at the discretion of Member States in transposing Directives into national law.

Citizens should not be discriminated against by the application of a different standard of legal protection to them. National law will always be a starting point in defining the cause of action and legal basis of a claim. Thus, the judiciaries of the Member States ensure the supremacy as well as the effectiveness of European law, in light of the different standards of legal protection available to citizens present in Member States with various legal systems regarding liability and the precautionary principle, and with reference to the fact that under the EU liability system, it is necessary to safeguard citizens.

The opinion of the general advocate Legèr to Linster: §82. "It must thus be possible to exercise rights contained in a directive that has not been transposed, irrespective of the terms in which they are couched, where they are invoked for the purposes of reviewing the legality of rules of domestic law. And "(§85) Individuals have an interest in securing compliance by the authorities with Community rules which bind them in the same way as rules of national law. Infringement proceedings are traditionally brought against a Member State which is in breach of its obligations. However, it is well known that several years may pass between the time when the Commission becomes aware of an infringement and the time when the Court delivers its judgment. Furthermore, as the Court has consistently held, the Commission is not bound to commence infringement proceedings if it does not consider it necessary. In fact, the Commission has a discretion which excludes the right for individuals to require it to adopt a specific position. It may therefore be justified to grant individuals the right to apply to the National Courts to secure compliance with the hierarchy of norms where, due to failure to transpose a directive, that hierarchy is infringed".

It reinforces the doctrines positions about the possibility to open the disapplication of an internal norm, like a really personal right to claim in the Nation Courts, because of the judicial the nature of this kid of personal right could be the procedural rules and not substantial. For these reasons when a directive non implemented containing technical norms or general principles that are directly applicable to the relationship among private parties. In any case unimplemented directives, relationships between private individuals, and non-application is a control system at the discretion of Member States as in the vertical relationships.

The *primauté* of EU law: an attempt to jointly reconstruct the liabilities in horizontal and vertical relationships

Valentina Colcelli

Advocate-general Van Gerven affirmed in his concluding remarks to HJ Banks & Company Ltd v British Coal Corporation he asserted that a significant number of elements could be found in the EU legal case about the Community's liability for qualifying private persons' responsibility in EU law infringement. The criteria guiding actions for damages against Member States in the case of power discretion may be extended to include actions for damages in relationships between private persons. In the EU legal system, infringement by private persons of the precautionary principle in the food chain may be a significant indicator of the possibility of joint reconstruction of compensation for damages. In this sense, some attention should be paid to liability in horizontal relationships, that is, the provisions of EC Regulation No. 178/2002. Operators of the food chain may be required to compensate damages caused by their products because of the breach of the precautionary principle (Art. 19, Reg. No. 178/2002). Requiring private persons who exercise control over the food chain to respect the precautionary principle and, if the principle is breached, their non-contractual liability means assigning the role of protecting general EU interests to a private/civil tool.

1. *To address the question of the use of the precautionary principle in assessing legal liability for the actions of food and feed business operators*. This part of book will explain reasons why, as a means of contributing to the emerging European Tort Law, the EU legal system should require private agents (working and controlling the food chain) to respect the precautionary principle and why the EU legal system should render them subject to non-contractual liability in cases where there is an infringement of the precautionary principle. And, due to the fact that decisions made by firms regarding investments which are made to improve product safety also depend on the tort system, this article will explain why the provisions of EC Regulation n. 178/2002, regarding the precautionary principle and damages caused by food and feed products, could be considered an important step for the joint reconstruction of "horizontal and vertical" liability in the EU legal system.

Thus first, it investigated the juridical setting under which the liability for the infringement of the precautionary principle operated by food and feed agents can emerge. The contribution of the paper to the existing knowledge is twofold.

Also it argues a specific guide for the concrete application of punishment of damages in the presence of discretionary power by private food and feed business operators.

In particular, it resembles the case of the implementation of a directive with technical contents by Member States, with the extent of discretion being relatively limited. Second, we explained the reasons why requiring private agents who control the food chain to respect the precautionary principle and render them subject to non-contractual liability in case of infringement, means assigning the role of protecting general EU interests to a private/civil tools. The most relevant consequence of this interpretation is that all the judgments of the National Courts related to the precautionary principle could be uniformly implemented across the EU.

In reason what we have showed above, on the understanding of the other elements distinctive of the liability, the damage for the infringement of the precautionary principle operated by food and feed agents seems to fit well into the definition of "article 3:201. Scope of Liability" of principles of European Tort Law formulated by the European Group On Tort Law: "whether and to what extent damage may be attributed to a person depends on factors such as: a) the foresee ability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity"[1]. In our specific field of analysis, according to articles 7, 18, 19 and 21 of Regulation n. 178/2002 considered in connection with article 7 (e) of Directive 85/374/EEC, food and feed business operators shall be liable for damages at all stages of production, either if a scientific uncertainty regarding injurious health effects exists, or if the state of scientific and technical knowledge "at the moment in time the product is locate into circulation – was not able to establish the subsistence of any fault yet to be discovered. It is demonstrated by the cases the simple subsistence of a doubt about a potential danger (based on scientific uncertainty) can be the basis that can set off actions on the precautionary principle. Such an uncertainty or doubt, occurring from the state of scientific, technical knowledge and the state of the art, at the time when the food and feedstuff was put in the market it is the positive test for a "sufficiently serious breach". The protective purpose of the rule that has been violated (see (e) of "article 3:201. Scope of Liability") only because the recourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and the scientific evaluation does not allow for the risk to be determined with adequate certainty. The principle now under examination is part of the above-mentioned set of principles (paragraph.), thus it is exercisable in intersubjective (peer to peer_ food and feed business operators) relations by nature, and – according to its purpose – it protects the fundamental right of health protection, adds to the preservation of a high level of protection of public health, environment and consumers. And the liability for the infringement of the precautionary principle operated by food and feed agents is not found on fault or negligence but on the violation of a duty under EU law to take scientific doubt into consideration during commercial activity (see in this sense, article 5:101. Abnormally dangerous activities. (1) A person who carries on an abnormally dangerous activity is strictly liable for damage

[1] Principles of European tort law formulated by the European Group On Tort Law, http://civil.udg.edu/php//index.php?id=128.

characteristic to the risk presented by the activity and resulting from it. (2) An activity is abnormally dangerous if a) it creates a foreseeable and highly significant risk of damage even when all due care is exercised in its management and b) it is not a matter of common usage. (3) A risk of damage may be significant having regard to the seriousness or the likelihood of the damage).

Thus 1) according to the nature and the value of the protected interest (see article 2:102 Protected Interests), 2) in relation with "the extent of the ordinary risks of life" (article 3:201. Scope of Liability, d)), 3) with reference to the liability of Institutions and Member States, and in particular, 4) with attention to fundamental rights, given the nature and construction of articles 7, 18, 19 and 21, and 5) with regard to the framework of the regulation itself, it possible to conclude that the inactivity of chain operators when faced with an unscientific uncertainty (a doubt) is manifest and grave, and consequently involves a sufficiently serious breach of EC law. In order to avoid this kind of potential risk there is no discretionary power, the food and feed operator must a) withdraw food or feed from the market, b) inform the competent authorities and c) recall products already supplied to consumers, when other measures are not sufficient to provide a satisfactory degree of health protection, d) not bring to market a product in the presence of scientific uncertainty about its safety. Out of these kinds of precaution liability exists.

Generally the precautionary principle is applied to public authorities, but the EU legal framework permits the use of the precautionary principle to assess legal liability for the actions of food and feed business operators and not only public authorities. (See articles 7, 19, 20 and 21 Regulation n. 178/2002).

Properly enforcing liability for infringement of the precautionary principle by food and feed business operators in the food chain is a problem. The problem exists because there is often insufficient evidence to evaluate risk and the evaluation is done at the discretion of the private food and feed business operators. The evaluation of risk presupposes precautionary measures; articles 7, 19, 20 and 21 of Regulation n. 178/2002 provide that the punishment of damages as consequence of using a discretionary power by private persons. To avoid abuse by food and feed business operators, it is necessary to establish a rule and guidelines for judges to use in evaluating the measures adopted by private persons.

The EU legal framework is not included in any judgment issued by the EU Court of Justice and no decision expressly provides for the existence of legal liability resulting from the precautionary principle or damages caused by food and feed products that are regulated by the previsions of articles 7, 19, 20 and 21 Regulation n. 178/2002.

Also, EU law does not have specific guidelines for the absolute application of penalties or of damages where discretionary power is used by private food and feed business operators.

It possible to find guidelines for judicial review with respect to precautionary principles used by business operators in the food and feed chain. Thus the aims of the article. It could find that there is a symmetry between non-contractual liabilities of Institutions and Member States in the relationships with EU citizens(vertical relationships)especially for liability in the case of a lack of application/or an incorrect implementation by the

Member States of the EU Directives and where there are non-contractual liabilities in inter-subjective relations (horizontal relationships).

To achieve this goal, some "considerations" expressed in several EU Court of Justice cases should be the starting point because there is a significant number of elements that are found in EU case law relating to the liability of Community Institutions and Member States which show why private persons should be held accountable when there are infringements of EU law.

The same rules that guide a Member State's civil liability in the infringement of EU law (vertical liability) should be used when the Member State's civil liability arises out of the failure to apply the EU Directives relating to the precautionary principle and damages caused by food and feed producers. Using these rules it should be possible because in the application of the EU Directive by the Member States, a discretionary power exits in the application of the precautionary principle by private operators in the food chain. Using these rules has a double purpose: 1) resolving the problem of applying the rules of civil liability of the food chain's private operator arising out of the precautionary principle; and 2) using the food chain private operators' civil liability which arises out of the precautionary principle as a link to the joint reconstruction of liability in the EU legal system in vertical and horizontal relationships.

The criteria guiding actions for damages against Member States and EU Institutions should be extended to include actions for damages in relationships between private persons are provided for in Paragraphs 2.2 and 3.0. Paragraph 2.2 provides that there is a parallel between the conditions for liability of both European institutions and Member States and refers to: conferring rights on individuals and the meaning of the higher-ranking principles. Paragraph 3 discusses the reason for the parallel between the conditions of liability in EU Institutions, Member States and intersubjective relations.).

In order to achieve this goal, this chapter will proceed by first explaining criteria that should guide actions for damages against Member States and EU Institutions (Paragraph 2: Liability of the EU Institutions and Member States for infringement of EU law: brief reconstruction. The aims of non-contractual liability in the EU Legal system: identifying individual rights), in order to show why it is possible to bring a case against food and feed business operators (in horizontal food and feed chain relationships) for infringement of the precautionary principle.

In Paragraphs 2.3. and 2.4 of this chapter the the Member States' liability in the presence of discretionary power in the implement action of legislative or administrative acts will be carefully examined in order to decide whether or not it may be possible to use the same criteria for evaluating a private operators' decisions under the precautionary principle. In order to answer this question, it must be ascertained whether or not articles 7, 18, 19 and 21 of Regulation n. 178/2002 intend to confer rights on the third-parties. It follows, then that a description of the real problem with regard to claims for damages for infringement of the precautionary principle in horizontal relationships is compatible with article. 7 of Directive 85/374/EEC (Product Liability Directive).

Paragraph 7 concludes with a discussion of the food and feed business operators and the infringement of the precautionary principle in view of the uniform definition of non-contractual liability in EU law.

2. *Parallel conditions for liability : EU Institutions, Member States and Private Parties*. In order to explain conditions for the Institution Member States' liability in the presence of a margin of discretionary power in the implementation of legislation or administrative rules, we will use the criteria guiding actions for damages against Member States, and EU Institutions will be extended to include actions for damages in relationships between private persons because the subjects of that legal order comprise not only the States and Institutions but also individuals upon whom Community law confers rights which become part of their legal heritage: these rights arise not only where they are expressly granted by treaties but also by reason of the obligations which Treaties impose upon individuals, the Member States and the EU institutions.

In his concluding remarks in HJ Banks & Company Ltd v British Coal Corporation, Advocate General Van Gerven asserted that a significant number of elements could be found in EU case law relating to the liability of the Community to qualify the responsibility of private persons in the infringement of EU law, as Advocate General Mischo pointed out in the Francovich judgment. It is undesirable that the liability of Community/EU institutions in the case of a breach of Community law should be framed in a manner which differs fundamentally from that of the national authorities or individuals, with regard to a breach of Community law[2].

Starting from the approach taken by EU judges, it is possible to trace a trend toward a uniform definition of non-contractual liability in the EU legal system. Thus the criteria guiding actions for damages against Member States and EU Institutions may be extended to include actions for damages in relationships between private persons.

Therefore, in certain conditions, private persons are held to be non-contractually responsible for failing to respect the directly applicable European Union law.

Scholars have found that some general standards can already be established, with regard not only to "vertical liability" for breaches of EC law, either by Community institutions under Article 288 (2) EC, or by Member States under the Francovich doctrine, but also for "horizontal liability" among private parties[3].

It must therefore be acknowledged that, in relation to the European Union rules governing the situation of individuals which are recognized as prevailing over domestic rules. It may be useful realizing the same specification: the growth of a "EU general regime of liability" born under the Francovich doctrine will necessitate the Court of Justice to deal with the problem of the relationship between the "EU general regime of liability" and specific rules of liability adopted in particular sectors of competence by the EU law.

To understand when using the "EU general regime of liability" born under the Francovich doctrine also in horizontal relationships, it is possible take in consideration three situations: in the first hypothesis a common regime born under the Francovich doctrine could be barred if any other enforcement mechanism were provide by EU law in a specific sector. The example could be the OGM Law and its specific regime of liability (like the system of EU Register of authorised GMOs.). "The exclusion could, however, be restrict-

[2] Cases C-6 & 9/90, Francovich and another v Italy, 1991, ECR I-5357, paragraph 71, with reference to the judgment in Cases 106/87 and 120/87, Astern, 1988, ECR 5515, paragraph 18.

[3] EILMANSBERGER T., "The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link", Common Market Law Review, 2004, p. 1238.

ed only to situations where the legislative enforcement mechanism could be invoked by individuals (private enforcement)" [4]. Second, the "EU general regime of liability" born under the Francovich doctrine could be excluded only if the secondary law imposed liability of damages and set in Member States. Examples could be the same directives which can be found in tort law, including directives on Product Liability Directive and on Unfair Commercial Practices. Directives can be either a maximum harmonisation (which means Member States are not allowed to deviate from them), or a minimum harmonisation, where directives only provide a general framework[5].

Where punishment for damage as rules are present in a directive, the impossibility of relying upon the common regime born under the Francovich doctrine could be limited only to circumstances in which the satisfaction of claimant's damage could actually depend upon a legislative regime.

Thus the "EU general regime of liability" born under the Francovich doctrine could be applicable whether there were any sectorial rules for an enforcement mechanism. For the EU legal system each Member State determines which court has jurisdiction to hear disputes involving individual rights derived from EU law, but at the same time the Member States are responsible for ensuring that those rights are effectively protected in each case'[6]. When the national system of protection cannot guarantee Community rights sufficiently, the equipment provided by the EU legal system comes into action. In the system, there is a uniform network of safeguards of Community individual rights (e.g. "EU general regime of liability")[7].

However, the "EU general regime of liability" born under the Francovich doctrine explicitly addresses damages of private parties where damages result from violation of individual rights described in the Directives not still implemented or in violation of Treaties and in Regulations[8].

The attention the Court of Justice pays to evaluating the existing relationship between the discretion granted to Member States or Institutions and the infringement of rules intended to confer rights on individuals (see paragraph n. 4) should also be extended to the non-contractual liability of individuals, as EU law is not sufficiently equipped to identify the non-contractual liabilities of the European Union or Member States and, following this, of individuals[9].

Citizens should not be discriminated against by applying a different standard of legal protection to them. National law will always be a starting point in defining the cause of action and legal basis of a claim. Thus, the judiciaries of the Member States ensure the

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4 LECZYKIEWICZ D., "Private party liability in EU Law: in search of general regime", University of Oxford Legal Research Paper Series, Oxford University Press 2009–2010.

5 VAN DAMN C., "European Tort Law", Oxford University Press, 2006.

6 C-208/90, Theresa Emmot v Minister for Social Welfare, cit.

7 COLCELLI V., "Understanding of the Built of European Union Legal System: The Function of Individual Rights", Journal of Social Sciences, 2012, pp. 381-389.

8 LECZYKIEWICZ D., "Private party liability in EU Law: in search of general regime", University of Oxford Legal Research Paper Series, Oxford University Press, 2009-2010.

9 Study of the systems of private law in the EU with regard to discrimination and the creation of a European Civil Code [PE 168.511, 56].

supremacy as well as the effectiveness of European law, but in the light of the different standards of legal protection available to citizens present in Member States with various legal systems regarding liability and the precautionary principle, with reference to the EU liability system it is necessary to safeguard citizens.

Thus to apply the criteria of horizontal liability to private food chain operators, the relationship between discretionary and non-contractual liabilities relating to Institutions and Member States must be carefully examined.

Thus regard to enforcement of liability actions for infringement of the precautionary principle by food and feed business operators in the food chain, it must be ascertained whether or not Articles 7, 18,19 and 21 of Regulation n. 178/2002 intend to confer rights on the third party (see paragraph 2).

The criteria mentioned above which have been developed in EU and state liability should be taken into account by analogy to cases of "horizontal liability", in the presence of discretionary power in connection with risk management in the field of food and feed safety.

Furthermore, the application of the precautionary principle is connected with the fundamental right to health.

In non/or low-discretionary cases, the question remains whether the sufficiently serious breach test is too high a hurdle in claims involving fundamental rights. According to the Advocate General Lagrange, "in each case a balance must be struck between the public interest and private interest"[10].

Accordingly, with reference to the liability of Institutions and Member States, and in particular, with attention to fundamental rights, given the nature and construction of Articles 7, 18, 19 and 21, and with regard to framework of the regulation itself, it can be concluded that the inertia of chain operators faced with unscientific uncertainties (doubts) that are manifest and grave, therefore imply a sufficiently serious breach of EC law has occurred. In order to avoid a potential risk, with regard to a) withdrawing food or feed from the market, b) informing the competent authorities and c) recalling products already supplied to consumers, when other measures are not sufficient to provide a satisfactory degree of health protection, d) not bringing to market a product in the presence of scientific uncertainty about its safety, there is no discretionary power.

[10] Case C-14,16,17,20, 14, 26, Meroni v. High Authority, 1961, ECR 161.

Precautionary Principle Liability in the Food Industry: the search of a general regime in vertical and horizontal Liability

Valentina Colcelli

The criteria guiding actions for damages for non-contractual liability against Member States in the case of discretional power in the implementation of Directives may be extended to include actions for damages in relationships between private persons. In this sense, some attention should be paid to liability in horizontal relationships, that is, the provisions of EC Regulation No. 178/2002, because the precautionary principle is addressed to public authorities; however, according to articles 7, 18, 19 and 21 provisions of EC Regulation No. 178/2002 there under, this applies to private persons (e.g. food and feed business operators).

1. *The justiciability of not respect in the precautionary principle by private parties in the food and feed industry (via a "horizontal direct effect").* The precautionary principle in the food and feed industry constitutes a connecting link between different events and situations, in working towards a joint reconstruction of liability in vertical and horizontal EU relationships (between Institutions, Member states and private entities). In order to find a correspondence between vertical and horizontal non-contractual liability in the EU legal system and contribute to the emergence of European tort law, it must be ascertained whether or not articles 7, 18,19 and 21 of Regulation 178/2002 intend to confer rights on a third party.

According to Art. 263 of the Treaty on the Functioning of the European Union, the Court of Justice must refer to the meaning of the higher-ranking principle among those rules the Court makes use of in reviewing the legality of measures taken by EU bodies. Additionally, in cases involving non-contractual liabilities of Member States, when principles designed to confer rights on individuals are not implemented (e.g. Francovich), non-contractual liability not rules. In private relationships, only directly applicable EU laws confer rights on individuals. This excludes Directives, even those that are self-executing.

Thus, to appreciate whether or not the precautionary principle is or not justiciable also among the horizontal relationships of the food and feed industry components, it is necessary to explore its nature.

Generally, the precautionary principle may be considered as a theory and justification for strict liability for harm rooted in the law of obligations or tort law with the goal of compensation for victims in case of harm; the precautionary principle also may be understood broadly as a duty to take precautionary action and avoid risk.

Regulation 178/2002 introduces a precise reaction mechanism to be implemented in the face of scientific uncertainty. Previously, the application of the precautionary principle to different areas was based on EU and EC Treaties, without determining either the conditions needed to put it into practice or the consequences of its implementation. For the first time in the EU legal system, Regulation 178/2002 formulated a legal definition of the principle for all EU food law, and introduced a comprehensive model of risk analysis.

Now, along with some complications, Regulation 178/2002 sets forth the conditions to put this into practice, and defines the consequences of its implementation. As part of its risk analysis methodology, the precautionary principle is addressed to public authorities; however, according to articles 7, 18, 19 and 21 there under, this applies to private persons (e.g. food and feed business operators).

This application has been confirmed in the Communication from the Commission on the Precautionary Principle (COM/2000/0001), which, with regard to the burden of proof, explains that "actions taken under the head of the precautionary principle must in certain cases include a clause reversing the burden of proof and placing it on the producer, manufacturer or importer", underlining the horizontal liability of the precautionary principle in terms of Regulation 178/2002.

Within the EU legal system, one must clarify whether or not the rules under examination confer rights on individuals, and which ones are capable of identifying rights that are relevant in the field of non-contractual liability. The principles infringed upon by institutions must be of a higher ranking of EU principles (as we can address the non-contractual liability of institutions, the latter must be responsible for the violation of a higher principle containing a provision for the protection of the individual), and should protect individuals. Traditionally, the general principles of the EU legal system are higher ranking principles.

In any case, the jurisprudence of the Court of Justice can be seen to have advanced. While EU judges traditionally equated the definition of higher rank with general principles, the current trend is somewhat different. The EU Court of Justice now uses the same criteria used to configure the non-contractual liability of Member States to qualify the non-contractual liability of EU institutions. Therefore, such non-contractual liability may be recognised, even if the rule breached is not a higher-ranking principle, as described above.

The criteria for identifying a higher-ranking principle are the same as those for identifying rules for a legal review of Institutional acts: the reference is not only to general principles, but also the rules and fundamental principles of the Treaties.

The principles set out in Regulation 178/2002, particularly those set forth in articles 5 to 10,have a horizontal nature and apply to "all stages of production, processing and distribution of food, and also of feed produced for, or fed to, food-producing animals" (Arts. 1 (3) and 4 (1) of Regulation 178/2002). In this integrated manner, Regulation178/2002 lays down norms related to all stages of the production, processing and distribution of food (and also of feed produced for, or fed to, food producing animals) with particular attention to product safety. This covers all stages of production, processing and distribution. Food and feed business operators must ensure that foods or feeds

satisfy the requirements of food law (Art. 17, Regulation 178/2002), and avoid the risks connected with the specific activities of adverse health effects, and the severity of such effects, consequential to a hazard (Art. 3, 9 c., of Regulation 178/2002). If product safety is part of a broader strategy concerning risk regulation, safety can be understood as the absence of risk or existence of minimum risk.

The precautionary principle is part of the afore-mentioned set of principles, thus it is horizontal by nature, and according to its function, is to protect the fundamental right of health protection and contribute to the maintenance of a high level of protection of public health, the environment and consumers. It should be noted that the jurisprudence of the Court of Justice considers the precautionary principle as a general principle of the EU legal system, and not just in the field of food safety.

Regulation 178/2002 is a direct effect of EU rule and the Court of Justice might use it in reviewing the legality of measures taken by EU bodies and Member States. (see paragraf n. 2.1).

Indeed, in accordance with the laws in force in EU Member States concerning liability for defective products, food and feed business operators may be liable for a defect, even if the product was manufactured in accordance with the rules of the trade or existing standards, or it was the subject of administrative authorization. To avoid this, food and feed business operators would do well to adopt measures based on the precautionary principle when thus faced with scientific uncertainty. Therefore, a food and feed chain business operator should report any doubts to the Authority, to respect the measures referred to inArt.7, 2 par., Regulation 178/2002, as well as the obligation to withdraw any food or feed in the presence of any potential risk suggested by scientific uncertainty. Failure to comply with these rules of conduct can render operators responsible for the breach of the precautionary principle, without the prejudice of liability for defective products under the aforesaid articles 7, 18, 19 and 21. Moreover, since the food business operator is responsible for the safety of the supply system for food and feed, and ensuring that the food it supplies is safe (see the n. 30 Consideration of Regulation 178/2002), it follows that they should shoulder the primary legal responsibility for ensuring food safety.

In this framework, standards concerning product safety are generated within both civil liability (which also applies to private food chain operators) and the regulatory systems.

2. *The Precautionary principle and discretionary power.* The legal framework permits the use of the precautionary principle to assess legal liability for the action of food and feed business operators, and requires their taking the precautionary principle into account. That being said, presupposing precautionary measures from private parties risks creating a potential for the punishment of damages in the presence of discretionary power. The evaluation of risk, in the light of insufficient scientific evidence, remains at the discretion of the food and feed business operator.

Measures based on the precautionary principle should be subject to review, in the light of new scientific data, and also should be capable of making the food chain operator

responsible for not having studied or conducted research or developed scientific evidence necessary to achieve an effective and comprehensive risk assessment. Any measures based on the precautionary principle relating to a food and feed product are necessarily based on available scientific evidence.

From a legal perspective, the most important aspect of the precautionary principle is the positive action to protect the original environment may be required before scientific proof of harm has been provided. The principle provides a mechanism to enable decision makers to take measures where the relevant scientific evidence is insufficient. Scientific risk assessment and other legitimate factors could determine the content of the measures.

The precautionary principle can thus be defined as a tool that allows us to interpret scientific uncertainty, allowing the interpreter some degree of discretion in relation to which action to take. The real problem with regard to the justiciability of the precautionary principle, and the capacity to assess legal liability in horizontal relationships between food and feed business operators, is the burden of proof, alongside the possible discretion of the operator in reaching a decision.

This topic is related to food and feed products for which a prior approval procedure does not exist. EU rules and those of many third countries enshrine the principle of prior approval (positive list) before certain products are placed on the market, such as OGM foods. In this case, by way of taking precautions when dealing with substances considered "a priori" hazard, or which are potentially hazardous at a certain level of assimilation, EU legislators have inverted the burden of proof by requiring that the substances be deemed hazardous until proven otherwise.

Where such a prior approval procedure does not exist, and in particular in the case of articles 7, 18 and 19 of Regulation 178/2002, which apply to the cautionary conduct of food and feed business operators when faced with a food or feed risk, the problem for the users (be they private individuals, consumers, consumer associations, citizens or the public authorities), is how best to demonstrate the nature of a danger and the level of risk posed by a product or process.

As the Commission explained in its publication COM/2000/0001, action taken according to the precautionary principle must in certain cases include a clause reversing the burden of proof and placing it on the producer, manufacturer or importer. But in the same paper, the Commission affirms that this clause is not systematically a general principle. Thus, the real problem of how best to deal with non-contractual liability to private food and feed operators in the light of precautionary principle applies to the creation of a common system for governing the burden of proof in the European Union.

2.1. *The precautionary principle and discretionary power: towards a unitary definition of non-contractual liability in EU Institutions, Member States and among private individuals.* To apply this liability to private food chain operators, the relationship between discretionary and non-contractual liabilities relating to Institutions and Member States must be carefully examined, as in the European Union legal system this is the only other situation in which a system of liability connected with discretionary power exists.

The attention the Court of Justice pays to evaluating the existing relationship between the discretion granted to Member States or Institutions and the infringement of

rules intended to confer rights on individuals should also be extended to the non-contractual liability of individuals, as EU law is not sufficiently equipped to identify the non-contractual liabilities of the European Union or Member States and, following this, of individuals.

In civil law in the EU, non-contractual liability may be described as a subjective right to have legal rights remedied if they are damaged. Under the EU legal system, it appears that there is no relationship between liability and the nature of any substantive right. Because of the recognition of the right to compensation, the conduct of others –States, Institutions, or individuals – affects the legal position of a private person. Thus, non-contractual liability in the European Union may be configured, even if rules are not infringed. In such a case, the severity of the damage suffered is sufficient to make a claim; a causal relationship must exist between this and the damages suffered by the injured party.

In cases where broad discretion is not applied, a simple infringement of EU rights by EU Institutions or Member States can lead to a configuration of non-contractual liability. When an Institution or Member State does not have discretionary powers strong enough to take legislative measures, the simple failure to respect EU rules can indicate a serious breach.

On the other hand, when instruments of binding secondary legislation do not contain unconditional and sufficiently precise provisions, non-contractual liabilities of Member States or EU Institutions are not configured. When discretionary powers are strong enough, the liability of authorities does not arise. It follows that serious breaches of rules concerning discretionary power in implementing legislative measures can be seen as enforcement measures for the non-contractual liabilities of EU Institutions or Member States. In such cases, the liabilities of both Institutions and Member States arise only if the liabilities do not originate, as they are required to do, from a legal act. The implication in such a case is that they have seriously omitted to carry out a required act.

With both State and Institutional liability, the sufficiently serious breach requirement now applies in all cases. The difference is that, with Institutional liability, in non/or low discretion cases, breach will be automatically considered a sufficiently serious breach without suggestion to Brasserie fault factors. However, regarding State liability, the fault factors are checked in any case. When an Institution does not have sufficiently strong discretionary powers, no real defence is available to the Institution.

The sufficiently serious breach hurdle is in practice no obstacle at all, as the Institution cannot escape liability by pointing to fault factors that, in another context, contribute to making a breach sufficiently serious.

When, in implementing EU rules, the discretion of a Member State is not considerable or, rather, is completely reduced (as in technical standards and regulations), or when it does not allow changes as a general principle, national legislation contrary to a Directive for which the period for transposition has not expired need not compulsorily be applied. In these cases, Member States cannot implement a Directive, because their discretionary powers with regard to the implementation of technical regulations is not a consideration. Non-transposition Directives that define the substantive scope of a legal rule create rights or obligations for individuals, and the national Court must decide on the case put to it on this basis.

This may happen with regard to the infringement by a Member State of a general principle of the EU legal system, as well as in relation to a Directive the period for transposition of which has not expired. In the Unilever judgement, the technical regulation adopted in breach of Art. 9 of Directive 83/189/EEC also had an effect on the free movement of products. Non-application is a control tool at the discretion of Member States in transposing Directives into national law.

Citizens should not be discriminated against by the application of a different standard of legal protection to them. National law will always be a starting point in defining the cause of action and legal basis of a claim. Thus, the judiciaries of the Member States ensure the supremacy as well as the effectiveness of European law, in light of the different standards of legal protection available to citizens present in Member States with various legal systems regarding liability and the precautionary principle, and with reference to the fact that under the EU liability system, it is necessary to safeguard citizens.

The basic requirement for claim damage under non-contractual liability in EU Institutions and Member States is the violation of a provision of EU law intended to protect private parties. Remedies for compensation must be found under national law, as this respects ensure the supremacy as well as the effectiveness of European law. Existing national remedies must eventually be reshaped and upgraded, if they do not meet EU standards. The Court of Justice is not interested in whether or not different Member State jurisdictions guarantee extremely high-level legal protection or better legal protection than each other. To ensure that EU rights are effectively protected, national legal protection cannot be lowered below the minimum standard of necessary safeguards legal protection available to citizens. If, and/or when, this happens, the aforementioned liability used. Also, if EU law presents uncertainty that can only be settled by the case law of the Court of Justice, the responsibility for this uncertainty cannot be allowed to weigh on the shoulders of the defendant or applicant in a tort action.

This may lead to a "hybridization of remedies", which could be shown in the basic requirements of "sufficiently serious breach", particularly in the field of liability and the precautionary principle. In this area, it appears that citizens may be discriminated against by applying them with different national standards of legal protection, because it may prove difficult to find a national tort law that is always connected with liability in the case of a breach of the precautionary principle.

Taking in account the criteria set out by the EU Court of Justice with regard to Member States and Institutional liability, this requires that applicants prove the extent of damage. "There must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties". It is for the applicants to prove causation; the Court of Justice will not make an assumption about the existence of a wrongful act and damage.

However, the condition of "sufficiently serious breach" of EU rules is not based on fault or negligence, the traditional standards of tort law, but on the violation of a duty under EU law, which must meet a certain threshold. A negligent violation may be regarded as evidence of "sufficiently serious breach", but on the other hand reparation cannot depend upon a condition based on any concept of fault'. For instance, in both cases, R v. Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas, on Institutions'

liability, the Court of Justice held that where the defendant has little or no discretion, any breach of Community law must be regarded as sufficiently serious for the purposes of establishing liability in damages.

The criteria mentioned above, which have been developed in EU, and State liability should be taken into account by analogy to cases of "horizontal liability", in the presence of discretionary power in connection with risk management in the field of food and feed safety. Moreover, the application of the precautionary principle is connected with the fundamental right to health.

In non- or low-discretionary cases, the question remains whether the sufficiently serious breach test is too high a hurdle in claims involving fundamental rights. According to the Advocate General Lagrange, "in each case a balance must be struck between the public interest and private interest". Accordingly, with reference to the liability of Institutions and Member States, and in particular, with attention to fundamental rights, given the nature and construction of articles 7, 18, 19 and 21, and with regard to framework of the regulation itself, it can be concluded that the inertia of chain operators when faced with an unscientific uncertainty (a doubt) is manifest and grave, and therefore implies a sufficiently serious breach of EC law. In order to avoid a potential risk with regard to a) withdrawing food or feed from the market, b) informing the competent authorities and c) recalling products already supplied to consumers, when other measures are not sufficient to provide a satisfactory degree of health protection, d) not bringing to market a product in the presence of scientific uncertainty about its safety, there is no discretionary power.

3. *Applying the precautionary principle to the civil liability of food and feed business operators.* Applying the same laws and regulations that apply in the case of tort actions involving Institutional and Member State liability to the infringement of the precautionary principle by food and feed business operators results in avoiding different interpretations among various National Courts (the infringement of Art. 7, 18 and 19 of Regulation 178/2002). This goal is reinforced by the adoption of EC Regulation 864/2007 on the law applicable to non-contractual obligation (also known as the Rome II Regulation), which marks notable progress in the harmonization of private international law among the 27 EU Member States. Regulation 864/2007 can provide for rules that also aim at guaranteeing a high level of health protection and food safety. This contributes to ensuring that these rules should not be infringed by others that deal with the delocalization of agri-food companies.

However, and in accordance with the importance of the Rome II Regulation, this is not an attempt to harmonise the substantive law of the signatories in the field of non-contractual obligations, but merely conflict-of-law rules, with the result that, no matter where in the EU an action is brought, the rules determining the applicable law will always be the same. Within the European legal context, the system of horizontal liability mentioned above is also strengthened by a grooving implementation of the presence of Class Action rules (see for instance, recent events in the Italian legal system and the introduction of the new Art. 140-bis, Consumer Code).

Regarding the burden of proof and the liability of food and feed business operators for infringement of the precautionary principle, Art. 7 (e) of Directive 85/374/EEC must be considered.

Indeed, according to the EU norms on developed risks, the producer (and the producer alone) can mount a defence if they can prove certain facts exonerating them from liability, including proof that the state of scientific and technical knowledge (at the time the product was put into circulation) was not advanced enough to allow the existence of the defect to be discovered (exArt. 7 (e) of Directive 85/374/EEC).

Thus, "whilst the producer has to prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge, without any restriction as to the industrial sector concerned, was not such as to enable the existence of the defect to be discovered, in order for the relevant knowledge to be successfully pleaded as against the producer, that knowledge must have been accessible at the time when the product in question was put into circulation".

The system of horizontal liability for the above-detailed infringement of the precautionary principle allows for a new interpretation to Art. 7 (e) of Directive 85/374/EEC.

There is a less than perfect relationship between the precautionary principle ex Art. 7 of Regulation 178/2002 and a system that has as its aim the avoidance of development risk liability ex Art. 7 (e) of Directive 85/374/EEC. The first relates to a scientific uncertainty, when doubts about a product defect exist. Art. 7 (e) of Directive 85/374/EEC applies in the absence of scientific doubts, in circumstances where the state of scientific and technical knowledge at the time when the food and feed producer put the product into circulation was not sufficiently advanced to enable the existence of the defect to be discovered, although some doubt may still exist.

Furthermore, Art.7 of Directive 85/374/EEC does not apply to all products the safety covered of which is regulated under Regulation 178/2002. Furthermore, Art.7 (e) of Directive 85/374/EEC produces an inequality of treatment for producers (or other businesses involved in the food and feed chain) and users, as they do not have the same instruments available for their defence.

The aforementioned Art. 7 can be applied to all movables, even when incorporated into another movable, or into an immovable, and electricity, with the exception of primary agricultural products and game. The definition of a primary agricultural product includes products of the soil, stock-farming and fisheries, and excludes products that have undergone initial processing (Art. 2 of Directive 85/374/EEC). Indeed, for the purposes of Regulation 178/2002, the term "food" refers to any substance or product, be it processed, partially processed or unprocessed, that is intended to be, or can reasonably expected to be, ingested by humans, also encompassing drinks, chewing gum and any substance, including water, intentionally incorporated into food during its manufacture, preparation or treatment (Art. 2 of Regulation 178/2002), products of the soil, stock-farming and fisheries included.

It might therefore be possible to apply Art.7 of Directive 85/374/EEC to some foodstuffs and not to others. Art.7 (e) of Directive 85/374/EEC applies to processed or partially processed food, and not primary agricultural products. That being said, the safety level of their production may be seen as high-risk, if there is a lack of available scientific

evidence. All these are dyscrasias, meaning that, at least in the field of foodstuffs, the relevance of scientific and technical knowledge that is presented as fact does not automatically exonerate the producer from liability.

Both rules appear to define different liability regimes that have an impact on incentives to monitor product safety and defects, once a product has been put on the market. Directive 85/374/EEC takes a partially different approach from Regulation 178/2002, which is a sector-specific regulatory regime with a treatment of food and feedstuffs that has a clear focus on potential effects on human health, since these products are to be ingested by humans. Directive 85/374/EEC is residual and only applies to consumer products, the safety of which is not specifically regulated.

Directive 85/374/EEC identifies the industrial chain by distinguishing suppliers and distributors. According to the directive, the former are held responsible for the safety of the product, while the latter are not. Regulation 178/2002 applies to all stages of the production, processing and distribution of food and feedstuffs. Thus food and feed business operators, at all stages of production, processing and distribution regarding the businesses under their control, must ensure that foods or feeds satisfy the requirements of food laws pertinent to their activities, and must verify that such requirements are met (Art. 17 of Regulation 178/2002).

For all of these reasons, it is possible to say that in the field of food and feed safety, Art.7 (e) of Directive 85/374/EEC is not completely effective.

According to articles 7, 18, 19 and 21 of Regulation 178/2002, read in conjunction with Art.7 (e) of Directive 85/374/EEC, food and feed business operators shall be liable for damages at all stages of production, either if a scientific uncertainty regarding harmful health effects exists, or if the state of scientific and technical knowledge (at the time when the product is put into circulation) was not capable of ascertaining the existence of any defect yet to be discovered. This is because the recourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and the scientific evaluation does not allow for the risk to be determined with sufficient certainty.

The mere existence of a doubt about a potential danger, based on scientific uncertainty, can be the basis to trigger actions using the precautionary principle. Such a doubt, arising from the state of scientific and technical knowledge, the state of the art (at the time when the food and feedstuff was put on the market) is the litmus test for a "sufficiently serious breach" – not based on fault or negligence – for the violation of a duty under EU law to take scientific doubt into consideration during commercial activity.

In the food and feed sector, the restriction of producer's liability exparteArt.7 of Directive 85/374/EEC works within the limits and cautions of the compatibility of the prevision of point (e) with the precautionary principle. Outside the food and feed chain this has wider operativeness, but in Regulation 178/2002's field of application its operativeness is strictly limited, and simply regards the producer, not other parties participating in the food chain.

Measures based on the precautionary principle also assign to private operators the responsibility for producing the scientific evidence necessary for a comprehensive risk evaluation.

V. Regulatory functions of non contractual liability

In the relationship between the precautionary principle and liability, the first term reinforces the duty of the prevention. A modern understanding of liability, grounded in the relevant presence of prevention, leads to a new form of application of constitutive elements of civil liability, through the assimilation of unknown damage and any serious threat (resulting from scientific studies) of damage. "*Le principe de précaution amorce le passage d'une responsabilité uniquement curative vers une esponsabilité égalment prèventive*". Thus, in the hypothesis of a serious threat of damage and casual nexus, invoking circumstance beyond one's control is not possible. Recourse to the precautionary principle in the field of civil responsibility poses two types of limits. First, it allows for the existence of causal nexus beyond any damage caused by risks only potentially forecasted and scientifically ascertained. In addition, it also allows for the admission of a type of precautionary fault. "*Il ne s'agit plus de réparer un dommage mais un risque. Il faut admettre que la simple création d'un risque est un dommage réparable*".

4. *Parallel conditions for liability : EU Institutions, Member States and Private Parties.* In order to explain conditions for the Institution Member States' liability in the presence of a margin of discretionary power in the implementation of legislation or administrative rules, we will use the criteria guiding actions for damages against Member States, and EU Institutions will be extended to include actions for damages in relationships between private persons because the subjects of that legal order comprise not only the States and Institutions but also individuals upon whom Community law confers rights which become part of their legal heritage: these rights arise not only where they are expressly granted by a constitutional Treaty but also by reason of the obligations which the EU Treaties imposes upon individuals, the Member States and the EU institutions.

In his concluding remarks in HJ Banks & Company Ltd v British Coal Corporation, Advocate General Van Gerven asserted that a significant number of elements could be found in EU case law relating to the liability of the Community to qualify the responsibility of private persons in the infringement of EU law, as Advocate General Mischo pointed out in the Francovich judgment. It is undesirable that the liability of Community/EU institutions in the case of a breach of Community law should be framed in a manner which differs fundamentally from that of the national authorities or individuals, with regard to a breach of Community law[1].

Starting from the approach taken by EU judges, it is possible to trace a trend toward a uniform definition of non-contractual liability in the EU legal system. Thus the criteria guiding actions for damages against Member States and EU Institutions may be extended to include actions for damages in relationships between private persons.

Therefore, in certain conditions, private persons are held to be non-contractually responsible for failing to respect the directly applicable European Union law.

Scholars have found that some general standards can already be established, with regard not only to "vertical liability" for breaches of EC law, either by Community insti-

[1] Cases C-6 & 9/90, Francovich and another v Italy, 1991, ECR I-5357, paragraph 71, with reference to the judgment in Cases 106/87 and 120/87, Astern, 1988, ECR 5515, paragraph 18

tutions under article 288 (2) EC (*now* Art 340 - TFEU The liability of the Europena Union), or by Member States under the Francovich doctrine, but also for "horizontal liability" among private parties[2].

It may be useful realizing the same specification: the growth of a "EU general regime of liability" born under the Francovich doctrine will necessitate the Court of Justice to deal with the problem of the relationship between the "EU general regime of liability"and specific rules of liability adopted in particular sectors of competence by the EU law.

To understand when using the "EU general regime of liability" born under the Francovich doctrine also in horizontal relationships, it is possible take in consideration three situations: in the first hypothesis a common regime born under the Francovich doctrine could be barred if any other enforcement mechanism were provide by EU law in specific sector. The example could be the OGM Law and its specific regime of liability (see paragraph 5). "The exclusion could, however, be restricted only to situations where the legislative enforcement mechanism could be invoked by individuals (private enforcement)"[3]. Second, the "EU general regime of liability" born under the Francovich doctrine could be excluded only if the secondary law imposed liability of damages. In relation to the European Union rules governing the situation of individuals which are recognized as prevailing over domestic rules, the claim of damage under the Francovich doctrine a general absence of liability on the part of the national law means. Examples could be th same directives which can be found in tort law: i.e. directives on Product Liability and Directive on Unfair Commercial Practices. Directives can be either a maximum harmonisation (which means Member States are not allowed to deviate from them), or a minimum harmonisation, where directives only provide a general framework[4]. Where tort law rules are present in a directive, the impossibility of relying upon the common regime born under the Francovich doctrine could be limited only to circumstances in which the satisfaction of claimant's damage could actually depend upon a legislative regime.

Thus the "EU general regime of liability" born under the Francovich doctrine could be applicable whether there were any sectorial rules for an enforcement mechanism. For the EU legal system each Member State determines which court has jurisdiction to hear disputes involving individual rights derived from EU law, but at the same time the Member States are responsible for ensuring that those rights are effectively protected in each case'[5]. When the national system of protection cannot guarantee Community rights sufficiently, the equipment provided by the EU legal system comes into action. In the system, there is a uniform network of safeguards of Community individual rights (e.g. "EU general regime of liability")[6].

However, the "EU general regime of liability" born under the Francovich doctrine

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2 EILMANSBERGER T., "The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link", Common Market Law Review, 2004, p. 1238.

3 LECZYKIEWICZ D., "Private party liability in EU Law: in search of general regime", University of Oxford Legal Research Paper Series, Oxford University Press, 2009-2010.

4 VAN DAMN C., "European Tort Law", Oxford University Press, 2006.

5 C-208/90, Theresa Emmot v Minister for Social Welfare.

6 COLCELLI V., "Understanding of the Built of European Union Legal System: The Function of Individual Rights", Journal of Social Sciences, 2012, pp. 381-389.

explicitly addresses damages of private parties where damages result from violation of individual rights described in the Treaties and in Regulations[7], pursuant to articles 7, 19, 20 and 21 Regulation n. 178/2002.

The attention the Court of Justice pays to evaluating the existing relationship between the discretion granted to Member States or Institutions and the infringement of rules intended to confer rights on individuals (see paragraph n. 4) should also be extended to the non-contractual liability of individuals, as EU law is not sufficiently equipped to identify the non-contractual liabilities of the European Union or Member States and, following this, of individuals[8].

Citizens should not be discriminated against by applying a different standard of legal protection to them. National law will always be a starting point in defining the cause of action and legal basis of a claim. Thus, the judiciaries of the Member States ensure the supremacy as well as the effectiveness of European law, but in the light of the different standards of legal protection available to citizens present in Member States with various legal systems regarding liability and the precautionary principle, with reference to the EU liability system it is necessary to safeguard citizens.

Thus to apply the criteria of horizontal liability to private food chain operators, the relationship between discretionary and non-contractual liabilities relating to Institutions and Member States must be carefully examined.

Thus regard to enforcement of liability actions for infringement of the precautionary principle by food and feed business operators in the food chain, it must be ascertained whether or not articles 7, 18,19 and 21 of Regulation n. 178/2002 intend to confer rights on the third party (see paragraph 2).

The criteria mentioned above which have been developed in EU and State liability should be taken into account by analogy to cases of "horizontal liability", in the presence of discretionary power in connection with risk management in the field of food and feed safety.

Furthermore, the application of the precautionary principle is connected with the fundamental right to health.

In non-, or low-discretionary cases, the question remains whether the sufficiently serious breach test is too high a hurdle in claims involving fundamental rights. According to the Advocate General Lagrange, "in each case a balance must be struck between the public interest and private interest"[9].

Accordingly, with reference to the liability of Institutions and Member States, and in particular, with attention to fundamental rights, given the nature and construction of articles 7, 18, 19 and 21, and with regard to framework of the regulation itself, it can be concluded that the inertia of chain operators faced with an unscientific uncertainties (doubts) that are manifest and grave, therefore imply a sufficiently serious breach of EC law has occurred. In order to avoid a potential risk, with regard to a) withdrawing food or

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7 LECZYKIEWICZ D., "Private party liability in EU Law: in search of general regime", University of Oxford Legal Research Paper Series, Oxford University Press, 2009-2010.

8 Study of the systems of private law in the EU with regard discrimination and the creation of a European Civil Code [PE 168.511, 56].

9 Case C-14,16,17,20, 14, 26, Meroni v. High Authority, 1961, ECR 161.

feed from the market, b) informing the competent authorities and c) recalling products already supplied to consumers, when other measures are not sufficient to provide a satisfactory degree of health protection, d) not bringing to market a product in the presence of scientific uncertainty about its safety, there is no discretionary power.

5. *The justiciability of not respecting the precautionary principle by private parties in the food and feed industry(via a "horizontal direct effect").* The precautionary principle in the food and feed industry constitutes a connecting link between different events and situations, in working towards a joint reconstruction of liability in vertical and horizontal EU relationships (between Institutions, Member States and private entities). In order to find a correspondence between vertical and horizontal non-contractual liability in the EU legal system and contribute to the emergence of European tort law, it must be ascertained whether or not articles 7, 18,19 and 21 of Regulation 178/2002 intend to confer rights on a third party.

According to Art. 263 of the Treaty on the Functioning of the European Union, the Court of Justice must refer to the meaning of the higher-ranking principle among those rules the Court makes use of in reviewing the legality of measures taken by EU bodies. Additionally, in cases involving non-contractual liabilities of Member States, when principles designed to confer rights on individuals are not implemented (e.g. Francovich), non-contractual liability not rules. In private relationships, only directly applicable EU laws confer rights on individuals. This excludes Directives, even those that are self-executing.

Thus, to appreciate whether or not the precautionary principle is or not justiciable also among the horizontal relationships of the food and feed industry components, it is necessary to explore its nature.

Generally, the precautionary principle may be considered as a theory and justification for strict liability for harm rooted in the law of obligations or tort law with the goal of compensation for victims in case of harm; the precautionary principle also may be understood broadly as a duty to take precautionary action and avoid risk.

Regulation 178/2002 introduces a precise reaction mechanism to be implemented in the face of scientific uncertainty. Previously, the application of the precautionary principle to different areas was based on EU and EC Treaties, without determining either the conditions needed to put it into practice or the consequences of its implementation. For the first time in the EU legal system, Regulation 178/2002 formulated a legal definition of the principle for all EU food law, and introduced a comprehensive model of risk analysis.

Now, along with some complications, Regulation 178/2002 sets forth the conditions to put this into practice, and defines the consequences of its implementation. As part of its risk analysis methodology, the precautionary principle is addressed to public authorities; however, according to articles 7, 18, 19 and 21 thereunder, this applies to private persons (e.g. food and feed business operators).

This application has been confirmed in the Communication from the Commission on the Precautionary Principle (COM/2000/0001), which, with regard to the burden of proof, explains that "action taken under the head of the precautionary principle must in

certain cases include a clause reversing the burden of proof and placing it on the producer, manufacturer or importer", underlining the horizontal liability of the precautionary principle in terms of Regulation 178/2002.

Within the EU legal system, one must clarify whether or not the rules under examination confer rights on individuals, and which ones are capable of identifying rights that are relevant in the field of non-contractual liability. The principles infringed upon by institutions must be of a higher ranking of EU principles (as we can address the non-contractual liability of institutions, the latter must be responsible for the violation of a higher principle containing a provision for the protection of the individual), and should protect individuals. Traditionally, the general principles of the EU legal system are higher ranking principles.

In any case, the jurisprudence of the Court of Justice can be seen to have advanced. While EU judges traditionally equated the definition of higher rank with general principles, the current trend is somewhat different. The EU Court of Justice now uses the same criteria used to configure the non-contractual liability of Member States to qualify the non-contractual liability of EU institutions. Therefore, such non-contractual liability may be recognised, even if the rule breached is not a higher-ranking principle, as described above.

The criteria for identifying a higher-ranking principle are the same as those for identifying rules for a legal review of Institutional acts: the reference is not only to general principles, but also the rules and fundamental principles of the Treaties.

The principles set out in Regulation 178/2002, particularly those set forth in articles 5 to 10, have a horizontal nature and apply to "all stages of production, processing and distribution of food, and also of feed produced for, or fed to, food-producing animals" (Arts. 1 (3) and 4 (1) of Regulation 178/2002). In this integrated manner, Regulation178/2002 lays down norms related to all stages of the production, processing and distribution of food (and also of feed produced for, or fed to, food producing animals) with particular attention to product safety. This covers all stages of production, processing and distribution. Food and feed business operators must ensure that foods or feeds satisfy the requirements of food law (Art. 17, Regulation 178/2002), and avoid the risks connected with the specific activities of adverse health effects, and the severity of such effects, consequential to a hazard (Art. 3, 9 c., of Regulation 178/2002). If product safety is part of a broader strategy concerning risk regulation, safety can be understood as the absence of risk or existence of minimum risk.

The precautionary principle is part of the afore-mentioned set of principles, thus it is horizontal by nature, and according to its function, is to protect the fundamental right of health protection and contribute to the maintenance of a high level of protection of public health, the environment and consumers. It should be noted that the jurisprudence of the Court of Justice considers the precautionary principle as a general principle of the EU legal system, and not just in the field of food safety.

Regulation 178/2002 is a direct effect of EU rule and the Court of Justice might use it in reviewing the legality of measures taken by EU bodies and Member States.

Indeed, in accordance with the laws in force in EU Member States concerning liability for defective products, food and feed business operators may be liable for a defect, even if

the product was manufactured in accordance with the rules of the trade or existing standards, or it was the subject of administrative authorization. To avoid this, food and feed business operators would do well to adopt measures based on the precautionary principle when thus faced with scientific uncertainty. Therefore, a food and feed chain business operator should report any doubts to the Authority, to respect the measures referred to inArt.7, 2 par., Regulation 178/2002, as well as the obligation to withdraw any food or feed in the presence of any potential risk suggested by scientific uncertainty. Failure to comply with these rules of conduct can render operators responsible for the breach of the precautionary principle, without the prejudice of liability for defective products under the aforesaid articles 7, 18, 19 and 21. Moreover, since the food business operator is responsible for the safety of the supply system for food and feed, and ensuring that the food it supplies is safe (see the n. 30 Consideration of Regulation 178/2002), it follows that they should shoulder the primary legal responsibility for ensuring food safety.

In this framework, standards concerning product safety are generated within both civil liability (which also applies to private food chain operators) and the regulatory systems.

6. *The Precautionary principle and discretionary power*. The legal framework permits the use of the precautionary principle to assess legal liability for the action of food and feed business operators, and requires their taking the precautionary principle into account. That being said, presupposing precautionary measures from private parties risks creating a potential for the punishment of damages in the presence of discretionary power. The evaluation of risk, in the light of insufficient scientific evidence, remains at the discretion of the food and feed business operator.

Measures based on the precautionary principle should be subject to review, in the light of new scientific data, and also should be capable of making the food chain operator responsible for not having studied or conducted research or developed scientific evidence necessary to achieve an effective and comprehensive risk assessment. Any measures based on the precautionary principle relating to a food and feed product are necessarily based on available scientific evidence.

From a legal perspective, the most important aspect of the precautionary principle is that positive action to protect the original environment may be required before scientific proof of harm has been provided. The principle provides a mechanism to enable decision makers to take measures where the relevant scientific evidence is insufficient. Scientific risk assessment and other legitimate factors could determine the content of the measures.

The precautionary principle can thus be defined as a tool that allows us to interpret scientific uncertainty, allowing the interpreter some degree of discretion in relation to which action to take. The real problem with regard to the justiciability of the precautionary principle, and the capacity to assess legal liability in horizontal relationships between food and feed business operators, is the burden of proof, alongside the possible discretion of the operator in reaching a decision.

This topic is related to food and feed products for which a prior approval procedure does not exist. EU rules and those of many third countries enshrine the principle of prior approval (positive list) before certain products are placed on the market, such as OGM

foods. In this case, by way of taking precautions when dealing with substances considered "a priori" hazard, or which are potentially hazardous at a certain level of assimilation, EU legislators have inverted the burden of proof by requiring that the substances be deemed hazardous until proven otherwise.

Where such a prior approval procedure does not exist, and in particular in the case of articles 7, 18 and 19 of Regulation 178/2002, which apply to the cautionary conduct of food and feed business operators when faced with a food or feed risk, the problem for the users (be they private individuals, consumers, consumer associations, citizens or the public authorities), is how best to demonstrate the nature of a danger and the level of risk posed by a product or process.

As the Commission explained in its publication COM/2000/0001, action taken according to the precautionary principle must in certain cases include a clause reversing the burden of proof and placing it on the producer, manufacturer or importer. But in the same paper, the Commission affirms that this clause is not systematically a general principle. Thus, the real problem of how best to deal with non-contractual liability to private food and feed operators in the light of precautionary principle applies to the creation of a common system for governing the burden of proof in the European Union.

6.1. *The precautionary principle and discretionary power: towards a unitary definition of non-contractual liability in EU Institutions, Member States and among private individuals.* To apply this liability to private food chain operators, the relationship between discretionary and non-contractual liabilities relating to Institutions and Member States must be carefully examined, as in the European Union legal system this is the only other situation in which a system of liability connected with discretionary power exists.

The attention the Court of Justice pays to evaluating the existing relationship between the discretion granted to Member States or Institutions and the infringement of rules intended to confer rights on individuals should also be extended to the non-contractual liability of individuals, as EU law is not sufficiently equipped to identify the non-contractual liabilities of the European Union or Member States and, following this, of individuals.

In civil law in the EU, non-contractual liability may be described as a subjective right to have legal rights remedied if they are damaged. Under the EU legal system, it appears that there is no relationship between liability and the nature of any substantive right. Because of the recognition of the right to compensation, the conduct of others – States, Institutions, or individuals – affects the legal position of a private person. Thus, non-contractual liability in the European Union may be configured, even if rules are not infringed. In such a case, the severity of the damage suffered is sufficient to make a claim; a causal relationship must exist between this and the damages suffered by the injured party.

In cases where broad discretion is not applied, a simple infringement of EU rights by EU Institutions or Member States can lead to a configuration of non-contractual liability. When an Institution or Member State does not have discretionary powers strong enough to take legislative measures, the simple failure to respect EU rules can indicate a serious breach.

On the other hand, when instruments of binding secondary legislation do not contain unconditional and sufficiently precise provisions, non-contractual liabilities of Member States or EU Institutions are not configured. When discretionary powers are strong enough, the liability of authorities does not arise. It follows that serious breaches of rules concerning discretionary power in implementing legislative measures can be seen as enforcement measures for the non-contractual liabilities of EU Institutions or Member States. In such cases, the liabilities of both Institutions and Member States arise only if the liabilities do not originate, as they are required to do, from a legal act. The implication in such a case is that they have seriously omitted to carry out a required act.

With both State and Institutional liability, the sufficiently serious breach requirement now applies in all cases. The difference is that, with Institutional liability, in no- (or low-) discretion cases, breach will be automatically considered a sufficiently serious breach without suggestion to Brasserie fault factors. However, regarding State liability, the fault factors are checked in any case. When an Institution does not have sufficiently strong discretionary powers, no real defence is available to the Institution.

The sufficiently serious breach hurdle is in practice no obstacle at all, as the Institution cannot escape liability by pointing to fault factors that, in another context, contribute to making a breach sufficiently serious.

When, in implementing EU rules, the discretion of a Member State is not considerable or, rather, is completely reduced (as in technical standards and regulations), or when it does not allow changes as a general principle, national legislation contrary to a Directive for which the period for transposition has not expired need not compulsorily be applied. In these cases, Member States cannot implement a Directive, because their discretionary powers with regard to the implementation of technical regulations is not a consideration. Non-transposition Directives that define the substantive scope of a legal rule create rights or obligations for individuals, and the national Court must decide on the case put to it on this basis.

This may happen with regard to the infringement by a Member State of a general principle of the EU legal system, as well as in relation to a Directive the period for transposition of which has not expired. In the Unilever judgement, the technical regulation adopted in breach of Art. 9 of Directive83/189/EEC also had an effect on the free movement of products. Non-application is a control tool at the discretion of Member States in transposing Directives into national law.

Citizens should not be discriminated against by the application of a different standard of legal protection to them. National law will always be a starting point in defining the cause of action and legal basis of a claim. Thus, the judiciaries of the Member States ensure the supremacy as well as the effectiveness of European law, in light of the different standards of legal protection available to citizens present in Member States with various legal systems regarding liability and the precautionary principle, and with reference to the fact that under the EU liability system, it is necessary to safeguard citizens.

The basic requirement for claim damage under non-contractual liability in EU Institutions and Member States is the violation of a provision of EU law intended to protect private parties. Remedies for compensation must be found under national law, as this respects ensure the supremacy as well as the effectiveness of European law. Existing national

remedies must eventually be reshaped and upgraded, if they do not meet EU standards. The Court of Justice is not interested in whether or not different Member State jurisdictions guarantee extremely high-level legal protection or better legal protection than each other. To ensure that EU rights are effectively protected, national legal protection cannot be lowered below the minimum standard of necessary safeguards legal protection available to citizens. If, and/or when, this happens, the aforementioned liability used. Also, if EU law presents uncertainty that can only be settled by the case law of the Court of Justice, the responsibility for this uncertainty cannot be allowed to weigh on the shoulders of the defendant or applicant in a tort action.

This may lead to a "hybridization of remedies", which could be shown in the basic requirements of "sufficiently serious breach", particularly in the field of liability and the precautionary principle. In this area, it appears that citizens may be discriminated against by applying them with different national standards of legal protection, because it may prove difficult to find a national tort law that is always connected with liability in the case of a breach of the precautionary principle.

Taking in account the criteria set out by the EU Court of Justice with regard to Member States and Institutional liability, this requires that applicants prove the extent of damage. "There must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties". It is for the applicants to prove causation; the Court of Justice will not make an assumption about the existence of a wrongful act and damage.

However, the condition of "sufficiently serious breach" of EU rules is not based on fault or negligence, the traditional standards of tort law, but on the violation of a duty under EU law, which must meet a certain threshold. A negligent violation may be regarded as evidence of "sufficiently serious breach", but on the other hand reparation cannot depend upon a condition based on any concept of fault'. For instance, in both cases, R v. Ministry of Agriculture, Fisheries and Food ex parte Hedley Lomas, on Institutions' liability, the Court of Justice held that where the defendant has little or no discretion, any breach of Community law must be regarded as sufficiently serious for the purposes of establishing liability in damages.

The criteria mentioned above, which have been developed in EU, and state liability should be taken into account by analogy to cases of "horizontal liability", in the presence of discretionary power in connection with risk management in the field of food and feed safety. Moreover, the application of the precautionary principle is connected with the fundamental right to health.

In non/or low discretionary cases, the question remains whether the sufficiently serious breach test is too high a hurdle in claims involving fundamental rights. According to the Advocate General Lagrange, "in each case a balance must be struck between the public interest and private interest". Accordingly, with reference to the liability of Institutions and Member States, and in particular, with attention to fundamental rights, given the nature and construction of articles 7, 18, 19 and 21, and with regard to framework of the regulation itself, it can be concluded that the inertia of chain operators when faced with an unscientific uncertainty (a doubt) is manifest and grave, and therefore implies a sufficiently serious breach of EC law. In order to avoid a potential risk with regard to a)

withdrawing food or feed from the market, b) informing the competent authorities and c) recalling products already supplied to consumers, when other measures are not sufficient to provide a satisfactory degree of health protection, d) not bringing to market a product in the presence of scientific uncertainty about its safety, there is no discretionary power.

7. *Applying the precautionary principle to the civil liability of food and feed business operators.* Applying the same laws and regulations that apply in the case of tort actions involving Institutional and Member State liability to the infringement of the precautionary principle by food and feed business operators results in avoiding different interpretations among various National Courts (the infringement of Art. 7, 18 and 19 of Regulation 178/2002). This goal is reinforced by the adoption of EC Regulation 864/2007 on the law applicable to non-contractual obligation (also known as the Rome II Regulation), which marks notable progress in the harmonization of private international law among the 27 EU Member States. Regulation 864/2007 can provide for rules that also aim at guaranteeing a high level of health protection and food safety. This contributes to ensuring that these rules should not be infringed by others that deal with the delocalization of agri-food companies.

However, and in accordance with the importance of the Rome II Regulation, this is not an attempt to harmonise the substantive law of the signatories in the field of non-contractual obligations, but merely conflict-of-law rules, with the result that, no matter where in the EU an action is brought, the rules determining the applicable law will always be the same. Within the European legal context, the system of horizontal liability mentioned above is also strengthened by a grooving implementation of the presence of Class Action rules (see for instance, recent events in the Italian legal system and the introduction of the new Art. 140-bis, Consumer Code).

Regarding the burden of proof and the liability of food and feed business operators for infringement of the precautionary principle, Art. 7 (e) of Directive 85/374/EEC must be considered.

Indeed, according to the EU norms on developed risks, the producer (and the producer alone) can mount a defence if they can prove certain facts exonerating them from liability, including proof that the state of scientific and technical knowledge (at the time the product was put into circulation) was not advanced enough to allow the existence of the defect to be discovered (*ex* Art. 7 (e) of Directive 85/374/EEC).

Thus, "whilst the producer has to prove that the objective state of scientific and technical knowledge, including the most advanced level of such knowledge, without any restriction as to the industrial sector concerned, was not such as to enable the existence of the defect to be discovered, in order for the relevant knowledge to be successfully pleaded as against the producer, that knowledge must have been accessible at the time when the product in question was put into circulation".

The system of horizontal liability for the above-detailed infringement of the precautionary principle allows for a new interpretation to Art. 7 (e) of Directive 85/374/EEC.

There is a less than perfect relationship between the precautionary principle ex Art. 7 of Regulation 178/2002 and a system that has as its aim the avoidance of development

risk liability ex Art. 7 (e) of Directive 85/374/EEC. The first relates to a scientific uncertainty, when doubts about a product defect exist. Art. 7 (e) of Directive 85/374/EEC applies in the absence of scientific doubts, in circumstances where the state of scientific and technical knowledge at the time when the food and feed producer put the product into circulation was not sufficiently advanced to enable the existence of the defect to be discovered, although some doubt may still exist.

Furthermore, Art.7 of Directive 85/374/EEC does not apply to all products the safety covered of which is regulated under Regulation 178/2002. Furthermore, Art.7 (e) of Directive 85/374/EEC produces an inequality of treatment for producers (or other businesses involved in the food and feed chain) and users, as they do not have the same instruments available for their defence.

The aforementioned Art. 7 can be applied to all movables, even when incorporated into another movable, or into an immovable, and electricity, with the exception of primary agricultural products and game. The definition of a primary agricultural product includes products of the soil, stock-farming and fisheries, and excludes products that have undergone initial processing (Art. 2 of Directive 85/374/EEC). Indeed, for the purposes of Regulation 178/2002, the term "food" refers to any substance or product, be it processed, partially processed or unprocessed, that is intended to be, or can reasonably expected to be, ingested by humans, also encompassing drinks, chewing gum and any substance, including water, intentionally incorporated into food during its manufacture, preparation or treatment (Art. 2 of Regulation 178/2002), products of the soil, stock-farming and fisheries included.

It might therefore be possible to apply Art.7 of Directive 85/374/EEC to some foodstuffs and not to others. Art.7 (e) of Directive 85/374/EEC applies to processed or partially processed food, and not primary agricultural products. That being said, the safety level of their production may be seen as high-risk, if there is a lack of available scientific evidence. All these are dyscrasias, meaning that, at least in the field of foodstuffs, the relevance of scientific and technical knowledge that is presented as fact does not automatically exonerate the producer from liability.

Both rules appear to define different liability regimes that have an impact on incentives to monitor product safety and defects, once a product has been put on the market. Directive 85/374/EEC takes a partially different approach from Regulation 178/2002, which is a sector-specific regulatory regime with a treatment of food and feedstuffs that has a clear focus on potential effects on human health, since these products are to be ingested by humans. Directive 85/374/EEC is residual and only applies to consumer products, the safety of which is not specifically regulated.

Directive 85/374/EEC identifies the industrial chain by distinguishing suppliers and distributors. According to the directive, the former are held responsible for the safety of the product, while the latter are not. Regulation 178/2002 applies to all stages of the production, processing and distribution of food and feedstuffs. Thus food and feed business operators, at all stages of production, processing and distribution regarding the businesses under their control, must ensure that foods or feeds satisfy the requirements of food laws pertinent to their activities, and must verify that such requirements are met (Art. 17 of Regulation 178/2002).

For all of these reasons, it is possible to say that in the field of food and feed safety, Art.7 (e) of Directive 85/374/EEC is not completely effective.

According to articles 7, 18, 19 and 21 of Regulation 178/2002, read in conjunction with Art.7 (e) of Directive 85/374/EEC, food and feed business operators shall be liable for damages at all stages of production, either if a scientific uncertainty regarding harmful health effects exists, or if the state of scientific and technical knowledge (at the time when the product is put into circulation) was not capable of ascertaining the existence of any defect yet to be discovered. This is because the recourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and the scientific evaluation does not allow for the risk to be determined with sufficient certainty.

The mere existence of a doubt about a potential danger, based on scientific uncertainty, can be the basis to trigger actions using the precautionary principle. Such a doubt, arising from the state of scientific and technical knowledge, the state of the art (at the time when the food and feedstuff was put on the market) is the litmus test for a "sufficiently serious breach" – not based on fault or negligence – for the violation of a duty under EU law to take scientific doubt into consideration during commercial activity.

In the food and feed sector, the restriction of producer's liability exparteArt.7 of Directive 85/374/EEC works within the limits and cautions of the compatibility of the prevision of point (e) with the precautionary principle. Outside the food and feed chain this has wider operativeness, but in Regulation 178/2002's field of application its operativeness is strictly limited, and simply regards the producer, not other parties participating in the food chain.

Measures based on the precautionary principle also assign to private operators the responsibility for producing the scientific evidence necessary for a comprehensive risk evaluation.