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ABOUT

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ELSA Malta Law Review – Edition VI 2016

EDITORIAL BOARD

FOREWORD

I am deeply honoured to introduce the sixth edition of the ELSA Malta Law Review. The ELSA Editorial Board has, with impeccable regularity, provided us with another collection of legal papers of the highest academic quality. One must of course applaud also the authors that have contributed to this publication with a vast array of legal topics that range from migration to cybercrime, the law of copy right and human rights, delving into an infinite variety of legal streams which include civil, commercial, public and private international law. The value of published legal works in our small but vibrant nation is evident to all members of the legal profession and law students alike, but it has become perhaps just as pertinent to all sectors of our society. The Anthropocene Era we live in, has blurred even further the demarcation lines between the various social disciplines. In a society such as ours, where the only constant is change, legal publications such as the one in hand, highlight the incredible versatility of the law.

Maltese Law has and continues to play a pivotal role in the coming of age of our nation. On the whole it serves our State well in regulating situations that have been part of our domestic legal fabric for many centuries. As Malta continues to assert itself as a pluralistic and multicultural democracy in a globalized world, the major challenge Maltese law faces is the need to keep the pace with emerging situations that necessitate regulation in order to ensure the rule of law for all. In doing so, it must also adapt to the influx of a myriad of norms originating from the *acquis communautaire* and International law which become an intrinsic part of it. Occasionally these legal sources, originating in political fora Malta forms part of, require Maltese law to undergo a paradigm shift in terms of substantive content and procedural modalities. Legal publications such as the ELSA Law Review, serve to underline such legal challenges, identifying gaps and conflicts with existing norms and proposing possible options to legislators, practioners and operators alike.

It is indeed a daunting task to take stock of the current body of Maltese Law and assess its functionability at a time when the cohort of law has never been more varied. As with previous editions, this sixth publication of the ELSA Law Review is commendable for doing so, thanks to the authors who found the time to share their knowledge and experience, as well as the editorial board who assiduously strived to help them materialise these legal papers into another publication of the highest standards. As Deputy Dean of the Faculty of Laws I am indeed

grateful to all who contributed and augur that law students, the legal profession and society at large will greatly benefit from this endeavour.

Professor Simone Borg
Deputy Dean, Faculty of Laws
University of Malta, Msida,
4 December 2016

EDITORIAL

Another year is over and another edition of the ELSA Malta Law Review is upon us. Indeed, the year 2016 marks the publication of the sixth edition of the ELSA Malta Law Review, one of the two books published by ELSA Malta. Six years down the line from its inception, the journal still boasts of peer-reviewed law articles and free online accessibility, making this review a true gold mine for students and professionals alike.

The sixth edition of the ELSA Malta Law Review presents a vast array of contributions, sixteen in total, ranging from articles, essays, and a book review. The works, penned down by students, lawyers, and academics, feature a multitude of contemporary and topical issues including intellectual property rights law, the smuggling of persons by sea, revenge pornography, and the Anti-Money Laundering Fourth Directive. In conjunction with the office of MEP Dr Roberta Metsola, this year ELSA Malta organised an essay competition, offering the winner not only the possibility of a funded trip to Brussels, but also the chance to have their work published in the ELSA Malta Law Review.

At a time when the prospect of legal writing and publishing seemingly continues to plummet down amongst law students, this year the Editorial Board tried to appeal to aspiring lawyers by teaming up with the office of the Attorney General to hold another writing competition, this time offering a six-month internship at this office to the winning author. I would hereby like to extend my appreciation towards Dr Andria Buhagiar, Dr Peter Grech, and Mr Adrian Tonna from the office of the Attorney General as well as Dr Ivan Sammut for providing constant assistance, reviewing these articles, as well as for offering such a valuable opportunity to two students. This competition, along with the Partnership in Research Programme which was once again organised this year, are crucial initiatives necessitated to promote the importance of legal writing and which I hope will retain their presence in future editions of the Law Review.

The ELSA Malta Law Review maintained its quality once again this year through the assistance of the Dean of the Faculty of Laws, Professor Kevin Aquilina, to whom I am tremendously indebted. Indeed, Professor Aquilina was always keen to offer his constant support by ensuring that each contribution was compliant to the plagiarism rules in the Editorial Policy, and never failing to reply to incessant threads of emails, whilst still finding the time to provide a contribution to the Review. I would also like to express my deepest gratitude towards the Deputy Dean Professor Simone Borg, who was kind enough to present us with the foreword to this book. The participation of a large number of academics and

professionals for the peer-reviewing of this edition is testimony to the Editorial Board's efforts to uphold the high standards achieved by past editions of the ELSA Malta Law Review.

This publication would not have been possible without a dedicated and keen Editorial Board. Indeed, I have been lucky enough to have four enthusiastic and hardworking editors who bore with my tight deadlines and last-minute requests. Chantelle, Michelle, Nicole, and Luca: thank you for always being ready to lend a helping hand and for your support throughout these past nine months! My appreciation also goes out to the ELSA Malta Executive Board 2016/2017 and incumbent President, Bernice Saliba. I would also like to thank James Debono, former Vice President for Academic Activities for ELSA Malta, for encouraging me to commence this journey two years ago when I joined the Editorial Board, as well as for his continuous advice and inspiration.

The opportunities bestowed by the ELSA Malta Law Review to those who seek to get published in the legal sphere should be commended and recognised. Even more so, praise should be attributed to the fact that through this journal, students have the invaluable possibility to publish their work alongside that of experts in different fields, with their contribution being peer-reviewed by a professional, and reaching international audiences. Hence, I profoundly encourage future Editorial Boards, along with the assistance of Executive Boards of ELSA Malta, to recognise the significance of this publication and work to ensure that it retains its standard of quality and reputation.

Liza-Marie Cassar
Editor in Chief
4 December 2016

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Dr Deo Falzon LL.D.

ABSTRACT[1]

In 2012 the Court of Justice of the European Union delivered a judgement dealing with second hand software and the so called digital exhaustion principle. It was heralded by some and criticised by others, however, despite providing a much awaited insight into the CJEU's interpretation of the digital world the judgment itself was based on some very creative interpretations of relatively old directives which did not quite tackle the uncertainty surrounding the issue of exhaustion. It's extension and interpretation of other forms of digital content remains unclear and the national courts seem to disagree amongst themselves and find some difficulty in interpreting the CJEU's judgment. The situation 4 years after the 2012 judgment is arguably the same, the single market requires clear indications as to whether exhaustion can be extended to digital goods or a clear cut negative response. The mind-set established by some commentaries which interpreted the CJEU's stance in the Allposters judgment to preclude digital exhaustion has been called into question by the Advocate General's opinion in the VOB case whose final judgment is eagerly awaited.

KEYWORDS: DIGITAL EXHAUSTION – DIGITAL COPYRIGHT – USED SOFTWARE – SECOND HAND SOFTWARE – DIGITAL GOODS

[1] This article was reviewed by Dr Lena Sammut LL.D., LL.M. (Lond.)

COPYRIGHT AND DIGITAL EXHAUSTION, UNANSWERED QUESTIONS AND UNCERTAIN TREATMENT IN THE EU

Deo Falzon[2]

1. Introduction

The principle of exhaustion is a standard feature of all forms of exploitation of goods. An object can, generally speaking and at face value, be freely disposed of according to the owner's wishes. However, if an object is a wrapper or incorporation of copyrighted material, the situation can become a bit more complex. When such an item is transferred with the consent of the copyright owner himself, this first transfer or sale shall have the effect of 'exhausting' the exclusive distribution right in respect of the work, or copy of the work, as the case may be. This means that the copyright owner's distribution right over the object is exhausted. The example of a book purchase will depict the principle in simple terms: Generally, a book is subject to copyright protection. However, no one would claim that a consumer who has bought the book from a store cannot resell the book or even lend it to a friend once he has finished reading it. The copyright owner's exclusive distribution right expires after the first lawful sale of the book. This, of course, does not mean that the reader can further exploit or sell the copyrighted material contained within the book such as by converting it into a film or some other exploitation of the copyrighted material, but he can sell or lend the material object within which the copyrighted material is contained. In this case, the physical book made of paper and binding is the physical wrapper to the copyrighted material within.

The digital era has contributed to the confusion surrounding this seemingly straightforward exhaustion principle, particularly because of the form of exploitation of copyright material in a digital environment, the prevalent form being licenses granting rights of use over various forms of content and media including e-books, films, music and also games. In the digital world, such copies, despite being termed as sales, are not actually sold but licensed for use. This means that before the decision in ***Used Soft vs. Oracle***, a software program bought on a physical disc exhausted the creator's rights over that particular copy; however, the same program bought using a digital delivery system never exhausted the creator's rights, as it was immediately granted under license due to the apparent lack of the physical medium.

Deo Falzon was awarded a Doctor of Laws Degree from the University of Malta in 2015. He was admitted to the bar in 2016. Deo is currently reading for an LL.M. in International Intellectual Property (London).

In ***Used Soft vs. Oracle,*** the defendant company, a major software licensor, provided group licensing agreements for an unlimited period, granting a non-exclusive, non-transferable right to users. The plaintiff is a reseller of used software. In the case at hand, UsedSoft was purchasing unused licenses from clients of Oracle who had previously purchased bundle licenses from Oracle themselves. Oracle sells software licenses in bulk usually under some kind of bundle agreement and price however some clients would not necessarily require the amount of licenses provided in a bundle by Oracle. This means that some licenses would be unused by the original client. UsedSoft operates on a business method which purchases these unused software licenses and sells them on to other third parties. The CJEU held that generally speaking in the digital world, software contracts are classified as licenses or services. However, it also held that the making available of the program by Oracle for an unlimited period, together with the payment of a fee to unlock the usage, were to be taken as conducive to a first sale of the product within the European Union for the purposes of Article 4(2) of the Computer Programs Directive, which provides that,

> The first sale in the Community of a copy of a program by the right holder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.[3]

However, four years may seem like an eternity in the ever-changing digital world, and it has indeed been that long since the CJEU delivered the infamous ***UsedSoft*** judgment in relation to digital exhaustion. Plenty of academics and practitioners commented in the aftermath of the decision, which due to the court's creative and controversial interpretation of the Copyright and Software Directives, was seen to pose more questions than it answered.

Following the answer given to the preliminary reference by the CJEU,[4] the Federal Court of Justice of Germany (Hereinafter referred as 'BGH') had to apply the principle of digital copyright exhaustion which the CJEU had decided. In addition, the BGH also established certain guidelines to help implement the digital exhaustion in practice.

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L118/16, art 4(2).

Described in more detail in Chapter 3 – Deo Falzon, 'Copyright Exploitation in the Digital World – Ownership, Licensing and the Consumer' (Doctor of Laws thesis, University of Malta 2015).

The BGH held that the distribution right of the right holder can only be exhausted when,

a) Appropriate economic remuneration is achieved, namely when the right holder agrees to the download of the copy at a price which the right holder sets;
b) The right holder has granted a perpetual licence (a principle which the CJEU had based its decision upon);
c) Updates and improvements or patches must have been included in the contract between the right holder and original buyer for exhaustion to apply to such updates;
d) The original copy must be rendered unusable;
e) The lawful acquirer is only entitled to use the computer program in its intended manner;
f) The burden of proving the exhaustion lays on the party claiming it.[5]

It has been claimed that these abstract guidelines could lead to somewhat differing interpretations of the principle of exhaustion.[6]

2. Applying *UsedSoft*

As predicted, the ***UsedSoft*** judgment gave impetus to other second hand software dealers to test the waters as regards the applicability of the principle of exhaustion, this time round contesting the terms and conditions imposed by the right holder, rather than being on the receiving end of a lawsuit. Susensoftware is a German company which has been selling used SAP software licences since 2001.[7] It trades solely in pre-owned but unused software products. This is achieved through the purchasing of unused software licenses from companies which would have bought software bundles, usually in the form of volume or bulk licensing methods, some of which may not have been utilised. Susensoftware sued SAP software, a global provider of enterprise application software used to standardise processes within companies. The action was based on a claim of unfair business practices being followed by SAP. SAP restricted the resale of SAP software through SAP's terms and conditions, namely through the

Masa Savic. 'The legality of resale of digital content after UsedSoft in subsequent German and CJEU case law.' [2015] European Intellectual Property Review 414.
ibid.
'About Us' (*susensoftware*) <http://www.susensoftware.com/company/> accessed 5 July 2016.

inclusion of a clause to the effect that 'transfer of SAP software requires, in each case, the written consent of SAP.'[8]

Susensoftware therefore claimed that SAP was in breach of competition law since its terms and conditions tried to prohibit software resale, thereby going contrary to ownership and the exhaustion principle. The Hamburg court agreed and based its decision on ***UsedSoft***.

The ***SAP*** judgment was particularly successful since the formula for the case was very similar to the previous ***UsedSoft*** decision and related to computer programs. The Court could therefore rely on the reasoning given by the CJEU in ***UsedSoft*** when it based its decision on the Software Directive. At first glance, the copyright exhaustion principle may seem to be an intellectual property right issue to be discussed *vis-à-vis* the rules and *raison d'être* of copyright. However, the more realistic interpretation of this issue is from a free movement and competition law angle. This approach is seen in the ***UsedSoft*** judgment itself. Various commentators have posed the question as to whether the reasoning adopted in ***UsedSoft*** is software specific, or whether it was merely the first of a branch of decisions by the CJEU seeking to grant exhaustion to digital goods. It has been claimed, however, that the Court-established concept of economic remuneration corresponding to the economic value of the copy will be the biggest barrier to digital exhaustion and prevent it from being applied to all digital goods across the board.[9] The claim that the ***UsedSoft*** case may spell a new era of digital exhaustion may also be short-lived especially when considering that the Copyright Directive covers the majority of digital content other than computer programs and the Court's interpretation in ***UsedSoft*** did not rely on the latter Directive.[10]

3. Extending exhaustion – a national view

The German Courts faced a question concerning the applicability of the principle of exhaustion to another lucrative branch of digital goods; videogames. France, Germany, Italy, Spain and the UK accounted for almost thirty *per cent* (30%) of the global market of videogames with a valuation of fifteen point two billion US

'News about second hand Software' (*susensoftware*) <http://www.susensoftware.com/news/news/4325376/legally-valid-judgment-against-sap/> accessed 5 July 2016.

Paul L.C Torremans, 'The Future Implications of the Usedsoft Decision' (2014) CREATe Working Paper Series.

[10] Emma Linklater, 'UsedSoft and the Big Bang Theory: Is the e-Exhaustion Meteor about to Strike?' (2014) 5 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 12.

dollars ($15.2 billion) in 2009.[11] The German case concerned an action filed by the consumer protection organisation ***Vebraucherzentrale*** (Hereinafter referred to as 'VBZ'), concerning clauses inserted in Valve's General Terms and Conditions prohibiting the transfer of user accounts between physical persons on the Steam digital distribution platform. Valve is a videogame publisher and developer which also operates a videogame online social network and marketplace called Steam. The following terms and conditions were being contested:

> You may not sell or charge others for the right to use your Account, or otherwise transfer your Account, nor may you sell, charge others for the right to use, or transfer any Subscriptions other than if and as expressly permitted by this Agreement (including any Subscription Terms or Rules of Use) or as otherwise specifically permitted by Valve.
>
> You are entitled to use the Content and Services for your own personal use, but you are not entitled to: (i) sell, grant a security interest in or transfer reproductions of the Content and Services to other parties in any way...[12]

Following ***UsedSoft,*** the VBZ argued that this policy goes against EU and German law, since it binds a user permanently to his account and forbids the sale of software purchased under this account.[13] The German Courts however held that ***UsedSoft*** would only apply in cases where the software was purchased entirely, downloaded and then played locally. The situation in the case of Steam was more akin to a service, while UsedSoft had separated service contracts from the sale of the software itself and had also excluded them from exhaustion. In addition to the fact that the question of exhaustion does not arise in the case of services and online services in particular, the Court also considered videogames as being more than just computer programs but rather as hybrid products due to their audiovisual and cinematographic content, which meant that they fell under the joint protection of the InfoSoc Directive, which necessitates a physical copy of a work for exhaustion to apply:

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11 Grosheide FW, Roerdink H, and Thomas K, 'Intellectual Property Protection for Video Games: A View from the European Union' (2014) 9 Journal of International Commercial Law and Technology 1.

12 'Steam Subscriber Agreement' (*STEAM*) <http://store.steampowered.com/subscriber_agreement/> accessed 5 July 2016.

13 'Valve under pressure for forbidding transfer of user accounts terms and conditions to be illegal' (*IHDE & PARTNER*) <https://www.ihde.de/index.php/en/publications/current-articles/671-valve-under-pressure-for-forbidding-transfer-of-user-accountsterms-and-conditions-to-be-illegal> accessed 6 July 2016.

> Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the right holder or with his consent exhausts the right to control resale of that object in the Community.[14]

Furthermore, Recital 29 of the same Directive provides that, 'the question of exhaustion does not arise in the case of services and on-line services in particular.'[15]

The CJEU later confirmed the view of the German Courts in ***Nintendo vs. PC Box*** when it established that the Computer Programs Directive only takes precedence over the InfoSoc Directive when the protected material falls solely within its scope. The ***Nintendo*** judgment has obliterated the fantasy that the CJEU might consider expanding the exhaustion concept to a wider range of digital products. The case concerned videogames which although are in part computer programs, also contain audiovisual components which fall under the exclusive protection of the InfoSoc Directive and therefore cannot submit to the same reasoning used by the Court in ***UsedSoft*** based solely on the Computer Programs Directive.

In accordance with Article 1(1) thereof, the protection offered by Directive 2009/24 is limited to computer programs.

> As is apparent from the order of reference, videogames, such as those at issue in the main proceedings of the case, constitute complex matter comprising not only of a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29.[16]

Other forms of digital content which are classified as solely artistic works such as e-books and audiobooks have also been explored and some seek to fit them in within the exhaustion principle. In this case, conflicting views exist between German and Dutch courts. A Dutch e-book case (*Tom Kabinet*) which is dealt with elaborately in section 3.6.1 of the thesis,[17] saw the Dutch Court grant exhaustion

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14 Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, Recital 28.

15 ibid Recital 29.

16 Case C-355/12 *Nintendo Co. Ltd and Others vs. PC Box Srl and 9Net Srl* [2014].

17 Deo Falzon, 'Copyright Exploitation in the Digital World – Ownership, Licensing and the Consumer' (Doctor of Laws thesis, University of Malta 2015).

to e-books. This view was rejected in Germany in a case between the VBZ and an internet portal selling digital content.[18] The German Court held that the main consideration for this sort of consumer contract were facilitation and providing the possibility to use e-books to enable repetitive viewing of the files. Digital content provided in such cases differs from mere software which requires that customers are granted extensive use rights. The Copyright Directive specifically excludes exhaustion in the case of online content without a physical embodiment and in this case the situation was more akin to a communication to the public, which never submits to exhaustion, than to a distribution. The Court went with an interpretation based on analysing the legislators' intention when implementing the Copyright Directive and also made a differentiation between computer programs on one hand and e-books and audiobooks on the other. The latter two have little in common with computer programs, as they are not autonomous but rely on other programs to work on a specific operating system. ***UsedSoft*** applicability was here rejected under the reasoning based on a *lex specialis* interpretation, which meant that ***UsedSoft*** applied solely to computer programs and could not be transferred either directly or by analogy to other forms of digital content.

4. Denying exhaustion – the *Allposters* issue

The CJEU delved into the issue of exhaustion once again in early 2015 in a case arising from a preliminary reference by the Appeal Court in Netherlands in ***Art & Allposters International BV vs. Stichting Pictoright***.[19] The case itself is not primarily concerned with digital exhaustion; however academics have observed that the case gives insight into the CJEU's interpretation of this dubious topic and is, in any case, the most recent case concerning the topic which has been decided following ***UsedSoft***.

Pictoright is an authors' collective rights organisation for visual creators and operates amongst other areas in reproduction rights such as posters and merchandising.[20] It is also authorised to take action against copyright infringement. Allposters is a web-based company selling amongst other items, posters showing the works of famous painters covered by copyright administered by Pictoright. It also offers the option of getting the same posters on a canvas instead of paper through a process it calls 'canvas transfer' which results in the destruction of the original paper poster. Pictoright opposed this, claiming that Allposters did not have the necessary rights and right holders'

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18 LG Bielefeld 4 O 191/11.

19 Case C-419/13 *Art & Allposters International BV vs. Stichting Pictoright* [2015] (Not yet published).

20 'About Us' (*Pictoright*) <http://www.pictoright.nl/english/> accessed 6 July 2016.

consent for such a sale. The Dutch Courts at first did not uphold Pictoright's request, but later overturned the original decision and decided that where a copy of a work placed on the market by the right holder is distributed under another form which enables new opportunities for exploitation, there is a new publication. It rejected Allposters' claim that the distribution right had been exhausted under Article 4(2) of the InfoSoc Directive. Allposters appealed this decision and a preliminary ruling was sought on a number of questions. Firstly, the Court of Appeal questioned whether the distribution right in Article 4 of Directive 2001/29 covers a copyrighted work sold and delivered within the EEA in the event that the reproduction of that copyrighted work have subsequently undergone an alteration in its form and brought back into circulation. Secondly, should the distribution right cover an alteration to the reproduction, would it have an effect on whether exhaustion subsisted within the terms of Article 4(2)? Should the latter be answered in the affirmative, it would go on to ask for the criteria to be applied in order to determine whether an alternation exists for the purposes of hindering or interrupting exhaustion under Article 4(2). The CJEU considered that posters reproducing works covered by copyright administered by Pictoright were undoubtedly placed on the market with the latter's consent.

The disagreement arises as to whether exhaustion of the distribution right covers the tangible object into which a work or copy is incorporated or whether the author's own intellectual creation is exhausted, meaning his actual idea which is later embodied physically and subsequently, whether the alteration of the medium upon which the intellectual creation is embodied has any impact on exhaustion of the exclusive distribution right. In the case at hand, the tangible object into which the work is incorporated refers to the material posters. The author's own intellectual creation refers to the author's artistic creation.

The Court here made a rather shallow examination of the case at hand and arguably settled for a simple interpretation of the provisions and recitals within the InfoSoc Directive.[21] In response to the first issue contemplating whether the distribution right covers the tangible object into which a work is incorporated or the author's intellectual creation, the CJEU held that since Article 4(2) refers to the first sale or other transfer of ownership of that object, and Recital 28 states that copyright includes the exclusive right to control distribution of the work incorporated in a tangible article, this must mean that the distribution right in Article 4(2) covers the tangible object and not the self-standing intellectual creation of the author. In the CJEU's view, this interpretation was supported by Article 6 of the WIPO Copyright Treaty, which states that 'authors of literary and artistic works are to enjoy the exclusive right of authorising the making available

[21] Masa Savic. 'The CJEU Allposters case: beginning of the end of digital exhaustion?' [2015] 37 European Intellectual Property Review 378.

to the public of the original and copies of their works through sale or other transfer of ownership.'[22]

Moreover, by an agreed statement concerning Article 6 and 7, the Court established that 'the expressions "copies" and "original and copies" being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.'[23]

As to whether the object which has undergone alterations to its physical medium has an impact on exhaustion, the CJEU considered that the technique used in the alteration significantly increased the durability and quality of the reproduction, even producing a closer copy to the original. The argument that only one copy is made, and that the process results in an original being destroyed does not bear effect, according to the Court, on the fact that the object taken as a whole was altered and was not the original object which was authorised to be placed on the market by the right holder. The CJEU held that 'in such an event, the distribution right of such an object is exhausted only upon the first sale or transfer of ownership of that new object with the consent of the right holder.[24] This should also be considered *vis-à-vis* the remuneration due to right holders, which must be proportionate to the economic value of the exploitation of the protected work, which in the case of canvas transfers, significantly exceeds that of posters.

In summary, the answers to the original preliminary reference are as follows: Article 4 does provide an answer to the question of whether the distribution right of the copyright holder may be exercised in regards to the reproduction which has undergone an alteration in form. The fact that there has been an alteration means that exhaustion under Article 4(2) has also been interrupted. Thus, the ***Allposters*** case seems to indicate a prevention of transferring ownership of digital content if interpreted widely enough so as to cover intangible products.

5. A new hope – Dutch courage and an open-minded Advocate General

Further developments are also on the horizon, courtesy of the Dutch courts. The case in question is ***Vereniging Openbare Bibliotheken (VOB) vs. Stichting Leenrecht***. VOB is an association of Dutch Libraries which is required by Dutch law to pay rental rights (the amount is determined by yet another body) to a copyright collecting society (the defendant in this case) due to materials which libraries lend being subject to copyright. The legal question in this case is

22 WIPO Copyright Treaty, art 6.
23 ibid arts 6-7.
24 Case C-419/13 *Art & Allposters International BV vs. Stichting Pictoright* [2015] para 46.

whether the obligation also extends to e-book lending or not. VOB claims that the lending of e-books falls within the scope of the lending right given that the making available of e-books for an unlimited period of time constitutes a sale for the purposes of the distribution right and the lending of e-books by public libraries against payment to authors of a fair remuneration is not copyright infringement.

The Dutch Court referred to the CJEU. The preliminary reference asked whether the lending right under Directive 2006/115 is to be interpreted as covering a digital copy on a server which enables a user to download that copy for a fixed amount of time, after which the copy is no longer usable and in such a way that during that fixed amount of time, the digital copy will not be accessible to anyone else. The Advocate General's opinion has been released and Advocate Szpunar claims that the interpretation of the Resale Directive should meet the needs of today's society and must try to reconcile the various interests of the stakeholders. AG Szpunar makes it clear that legal acts should be given an interpretation which takes into account developments in technology, markets and behaviour and rigidness.[25] This is also known as the adoption of a technologically-neutral view. AG Szpunar claims that Directive 2001/29 in Recitals 2, 5 and 8 also provides that copyright must adapt to new developments and this surely cannot be achieved simply through a historic interpretation. Rather, 'the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.'[26]

UsedSoft is also mentioned in this case as a defence against an argument brought forward by NUV and the German and French governments that claimed that the lending of electronic books would bring forth a terminological incompatibility in the words 'copy' and 'object' which are given a tangible interpretation in the InfoSoc Directive. AG Szpunar however claims that if terminological consistency had to be followed rigorously, then, certain definitions of concepts given by the CJEU in ***UsedSoft*** to describe 'copies', 'sales' and 'distribution' within the context of Directive 2009/24/EC (The Computer Programs Directive) would have to be interpreted in the same light as in Directive 2001/29 (Info Soc Directive), which uses the same terminology. In ***UsedSoft***, the CJEU held that a computer program downloaded from the Internet was a copy of a work and the download together with a perpetual user licence constituted a sale. Indeed, Article 4(2) of the Computer Programs Directive and the InfoSoc Directive are identical; yet,

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25 Case C-174/15 *Vereniging Openbare Bibliotheken vs. Stichting Leenrecht* [2016] Advocate General Szpunar Opinion.

26 Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, Recital 5.

UsedSoft has still not been extended to other forms of digital content by national courts on the basis of the *lex specialis* interpretation mentioned previously in this article.

> The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the right holder or with his consent.[27]
>
> The first sale in the Community of a copy of a program by the right holder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.[28]

Recital 29 of the InfoSoc Directive excludes exhaustion from applying to online services. However, a distinction should be made between services and digitally delivered goods. This is an issue which has also been discussed further in Chapter 3 of the thesis.[29] AG Szpunar also calls into question the suitability of the ***Allposters*** judgment to digital content which has been heralded widely as the end to an extension of the digital exhaustion first established in ***UsedSoft***. He claims that the ***Allposters*** judgment is concerned with material processes rather than with digital ones. Although through a technologically neutral perspective it discussed the exhaustion of tangible articles, rather than of the author's intellectual creation, this should not be equated to the preclusion of exhaustion after a transfer of ownership in a digital copy of the work. In ***Allposters***, the Court rejected the view that an author's intellectual creation can be exhausted, and rightly so; however, that decision should be able to co-exist with the exhaustion of a digital product granted perpetually and legally which has been transferred to a new owner. The author's intellectual creation in this way is not subjected to exhaustion as the transferring of the copy does not mean that the original proprietor can keep the copy. In fact, the very lexicon of the words used to describe these abstract notions points to tangibility through words such as 'keep' and 'copy'. The prevalence of the digital world should enable the application of such concepts in a technologically neutral manner as they increasingly form a greater part of society in general.

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27 ibid art 4(2).

28 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L118/16, art 4(2).

29 Deo Falzon, 'Copyright Exploitation in the Digital World – Ownership, Licensing and the Consumer' (Doctor of Laws thesis, University of Malta 2015).

If it is argued that if the lending right covers such a situation, the obvious question that comes to mind is whether Member States can subject the derogation right in Article 6 of Directive 2006/115 to a requirement that the copy of the work made available has already been put into circulation by a first sale or other transfer of ownership. The Dutch Court argues that should this also be answered in the affirmative, the question should also be asked as to whether Article 4(2) of Directive 2001/29 is to be interpreted as meaning that the first sale or other transfer of ownership includes the making available for use for an unlimited period a digital copy of books. This would have a significant effect on exhaustion under EU law, if it were to be answered directly by the CJEU. Unfortunately, its introduction into the preliminary reference was deemed unnecessary by the Advocate General, since the lending right is extraneous to the exhaustion of the distribution right and here the referring Court may have made the mistake of associating the intellectual creation with the digital copy. The fact that a digital copy is sold and perhaps exhausted does not mean that a lending or rental right has been granted. In fact, this would still require the consent of the right holder since it is not sufficient to purchase a copy of a work in order to lend it publicly or rent it freely, 'The exclusive right to authorise or prohibit rental and lending shall belong to the following: a) the author in respect of the original and copies of his work.'[30]

In its judgment the CJEU held that Directive 2006/115 on the resale and lending rights excludes intangible objects from the rental rights however the same directive does not exclude digital lending in certain cases.[31] The CJEU also reiterates the argument of the Attorney General's opinion and quotes Recital 4 of the Rental Rights directive itself which also states that 'copyright must adapt to new economic developments such as new forms of exploitation.'[32] The main dispute in the case concerned the lending of books in digital format and the court held that the concept of lending can fall within the meaning of the provisions of Directive 2006/115 when a copy is placed on a publicly accessible server operated by the public library and a user can download a copy of that book, provided that this is only done for a limited amount of time which is subject to expiration and no other user may be able to concurrently access the lent book. This equates the situation of digital lending with that of traditional tangible lending, made possible through advancements in Digital Rights Management technology which ensure that a digital copy is protected from the major piracy attempts. The judgment itself is of limited appeal to digital exhaustion

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30 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28, art 3.

31 Case C-174/15 *Vereniging Openbare Bibliotheken vs. Stichting Leenrecht* [2016]

32 ibid recital 4

particularly since it does not delve into the issue of whether e-books granted for an unlimited time are equated to a sale and consequently ensuring the exhaustion of that particular copy. This issue has already been identified above in the analysis about the Advocate General's opinion and in fact, the judgment follows the opinion to the letter. Despite the positive outcome of the judgment for e-lending rights, a problem can arise in a situation where e-books are prohibited from being lent under the original license since the CJEU held that libraries can only lend e-books without a license as long as the digital copy of a book made available by the library was put into circulation on the market or obtained by the library through a first sale or other transfer of ownership in the European Union. This is actually rarely the case as most forms of digital content is licensed for use rather than actually transferred with full ownership rights thus making the digital exhaustion point of this issue rather moot.

6. Conclusion

It is clear that courts which have implemented the ***UsedSoft*** decision until now have only done so reluctantly. This may be attributed to the power of the right holders' lobby groups at Member State level or alternatively the fact that the original judgment was based on some creative interpretations which courts have found difficulty in applying in congruent situations, let alone to other forms of digital content. The defence against applying the decision to forms of software other than computer programs has been based upon the hybrid nature of the specific software which, due to the CJEU's reliance on the Computer Programs Directive in ***UsedSoft***, can be sometimes justified. However, national courts have also sometimes resorted to justify it on the basis of the appearance of some online marketplaces seen to offer a service, rather than a sale of goods. The courts have not clearly indicated how an online marketplace can be classified as a service provider.

What features must be added to a marketplace to successfully disguise it as a service provider? The German Court in ***VBZ vs. Valve*** claimed that certain matchmaking and updates offered by Valve, as well as the server infrastructure Valve had to maintain to offer the product, coupled with the fact that a constant Internet connection was required to use the software, meant that this was a service. The accuracy of these findings can be contested in certain terms; (i) The server infrastructure Valve maintains to offer downloads can be equated to the expenses that a traditional brick and mortar store has to face in order to offer tangible products for sale and which Oracle themselves underwent to provide an online download of their software in the ***UsedSoft*** decision, (ii) The fact that a constant Internet connection is required is merely a method of security or at times an entirely optional feature of interoperability with other users which the

user may choose to forgo, (iii) The program itself would still be run on a user's local machine, and (iv) In situations such as game streaming, the user would be streaming the software which is running on the provider's servers remotely and this would successfully be labelled as streaming. However, that was not the case in the VBZ scenario and Valve themselves do not offer that service yet, apart from a feature which still requires a user's own machine to do the heavy lifting. Courts can sometimes get side-tracked by claims made by right holders who seek to get the best of both worlds: They rely on online delivery to avoid store inventory discount practices and consequently preclude the resale of their software.

A clearer interpretation by the CJEU is the only method in which this issue can ever be put to rest, aside from an improbable piece of legislative intervention. If the digital and online world seeks to replace the traditional tangible one, it should accept similar notions of intellectual property regulation rather than use its invisible and abstract nature to confuse itself with the intangible intellectual creation which by necessity is to be encapsulated in a material reifer[33] for recognition and fixation.

[33] reification (ree-a-fi-kay-sh.m), n. (1846) 1. Mental con- version of an abstract concept into a material thing.

COMBATTING THE SMUGGLING OF PERSONS BY SEA UNDER THE UNCLOS HIGH SEAS REGIME

Dr Felicity Attard LL.D., LL.M. (IMLI), M.A.(LOND.)

ABSTRACT[34]

The Secretary General of the United Nations has identified the crime of smuggling of persons by sea as one of the seven major threats to maritime security. Various factors - including economic deprivation, war, and violations of human rights - have all contributed to a dramatic increase in human smuggling. The dangerous journeys, often across the high seas, have forced irregular migrants to seek the assistance of smugglers to reach their destinations. Today, the international community faces serious problems raised by the smuggling of thousands of persons such as human tragedies, threats to the safety of navigation, and major economic burdens on recipient States. Regrettably, there are no provisions in the 1982 United Nations Convention on the Law of the Sea, which deal directly with this threat. Notwithstanding this lacuna, there are certain rules in the Convention that are relevant and indeed may contribute to combatting this crime. This article will examine to what extent, if at all, does the high seas regime in the 1982 United Nations Convention on the Law of the Sea, provide a legal basis for combatting the smuggling of persons by sea.

KEYWORDS: SMUGGLING OF PERSONS BY SEA – HIGH SEAS – FLAG STATE JURISDICTION – UNITED NATIONS CONVENTION ON THE LAW OF THE SEA – MARITIME INTERDICTION

[34] This article was reviewed by Dr Stefan Piazza LL.M. (IMLI).

COMBATTING THE SMUGGLING OF PERSONS BY SEA UNDER THE UNCLOS HIGH SEAS REGIME

Felicity Attard[35]

1. Introduction

In recent years, the conflict and instability present in certain regions of the world, such as the Middle East, Africa and South East Asia, has exacerbated the phenomenon of irregular migration by sea.[36] Migrant sea crossings are often organised by human smugglers,[37] who generally transport migrants in overcrowded and unseaworthy vessels.[38] As a result, distress at sea situations, have regrettably become a regular occurrence, leading to numerous human tragedies and negatively affecting the safety of navigation.[39] According to statistics compiled by the International Organization for Migration,[40] more than 5,417 migrants were reported dead or missing in 2015.[41] As of July 2016, the same Organization reports that already 3,600 migrants have lost their lives.[42]

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36 In 2014, the United Nations High Commissioner for Refugees, hereafter referred to as UNHCR, reported over 162,000 sea crossings, mainly in the Mediterranean Sea, Gulf of Aden and the Red Sea, Bay of Bengal and Caribbean Sea. See World's Four Deadliest Sea Crossings (*UNHCR*, 9 December 2014) <http://www.unhcr.org/seadialogue/00_Worldwide.gif> accessed 4 July 2016. These figures are expected to rise dramatically in 2015-2016 in light of the exodus of Syrian Refugees, mainly crossing by sea from Turkey to Greece.

37 According to statistics produced by the International Organization for Migration, it is likely that 'half of all illegal migrants have some interaction with smuggling or trafficking networks – a global industry that generates approximately $10 billion per year'. See Fiona B Adamson, 'Crossing Borders: International Migration and National Security' (2006) 31:1 International Security 165, 174.

38 See generally the United Nations Office on Drugs and Crime, *Issue Paper: Smuggling of migrants by sea* (UN Publications 2011) 26-32, hereafter referred to as Smuggling of Migrants by Sea and European Commission, DG Migration and Home Affairs, 'A Study on Smuggling of Migrants – Characteristics, responses and cooperation with third Countries', Final Report September 2015, 39-40.

39 See Nathalie Klein, *Maritime Security and the Law of the Sea* (OUP 2012) 123; James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff Publishers 2013) 657-659 and Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 404.

40 Hereinafter referred to as IOM.

41 See Latest Global Figures (*Missing Migrants Project*) <http://missingmigrants.iom.int/latest-global-figures> accessed 4 July 2016.

42 The majority of deaths occurred in the Mediterranean Sea - a major commercial shipping route – that has now become the world's most dangerous destination for migrants. IOM reports that during the period between 2014 and 2015 over 7,000 migrants lost their lives

Smuggling of persons by sea also constitutes one of the fastest growing transnational organised crimes,[43] with possible links to other crimes such as those against the safety of navigation, terrorism and corruption.[44] It is for such reasons that smuggling of persons by sea,[45] has been identified by the United Nations Secretary General as one of the seven major threats to maritime security.[46]

The vast majority of the oceans consist of areas which are known as the high seas,[47] and which cannot be appropriated.[48] This presents the international community with major challenges when it comes to maintaining law and order. Under the 1982 United Nations Convention on the Law of the Sea,[49] the preservation of order on the high seas relies on the principle of flag State jurisdiction,[50] where generally each State exercises exclusive jurisdiction and control over vessels flying its flag while sailing on the high seas.[51]

Smuggling vessels typically spend a considerably amount of time traversing the high seas.[52] Even within a semi-enclosed sea, such as the Mediterranean, one

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in the Mediterranean Sea. See Latest Global Figures (*Missing Migrants Project*) <http://missingmigrants.iom.int/mediterranean> accessed 4 July 2016. Migrant crossings continue to increase in 2016, where there have been over 200,000 arrivals by sea, with over 2,900 migrants reported dead or missing. See Refugees/Migrants Emergency Response Mediterranean (*UNHCR*) <http://data.unhcr.org/mediterranean/regional.php> accessed 4 July 2016.

43 Patricia Mallia, *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework* (Martinus Nijhoff 2010) 8.

44 See generally United Nations Office on Drugs and Crime, *Issue Paper: Corruption and the smuggling of migrants* (UN Publications 2013). See also Benjamin Perrin, 'Migrant Smuggling: Canada's Response to a Global Criminal Enterprise' (2013) 1 International Journal of Social Science Studies 139, 142.

45 In this study, unless the context indicates otherwise, references to smuggling shall be taken to mean smuggling of persons on the high seas.

46 See Secretary General of the United Nations, 'Report of the Secretary General on Oceans and the Law of the Sea', 10 March 2008, UN Doc.A/63/63, paras 39 and 89-97.

47 It should be noted that according to UNCLOS, Article 58(2), 'Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part'. Therefore, the geographical scope of this study will cover not only the high seas but also the contiguous zone and exclusive economic zone where a State has declared one.

48 See David Attard and Patricia Mallia, 'The High Seas' in David Joseph Attard and others (eds), *The IMLI Manual on International Law –Volume I The Law of the Sea* (OUP 2014) 239, 242-243; Douglas Guilfoyle 'The High Seas' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 203 and David Freestone, 'Problems of High Seas Governance' in Davor Vidas and Peter Johan Schei (eds), *The World Ocean in Globalisation: Challenges and Responses* (Martinus Nijhoff Publishers, Leiden, 2011) 100.

49 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 hereafter referred to as UNCLOS.

50 ibid art 92(1).

51 ibid art 94.

52 For example, since October 2013, Italian rescue operations in the Mediterranean Sea have saved over 10,000 smuggled migrants on the high seas. See UNHCR, 'On a high seas rescue

may find huge passages of high seas which smuggling vessels would have to cross in order to reach their final destinations.[53] This article will examine to what extent, if at all, does the high seas regime in UNCLOS, provide a legal basis for combatting smuggling. It will begin by addressing possible reasons why UNCLOS does not include any provisions dealing explicitly with smuggling. It will then explain that despite this *lacuna,* there are certain UNCLOS rules which may be relevant to combatting smuggling. The article will also analyse one of the main tools to suppress smuggling on the high seas - maritime interdiction and how this is undertaken within the framework of UNCLOS rules. In this regard, the article will discuss the significance of UNCLOS rules regulating navigation on the high seas. The last section of the article will focus on specific UNCLOS rules, which may be utilised in the process of interdiction including those governing the right of visit, stateless vessels, slavery, and hot pursuit. It will also highlight the importance of the duty to render assistance and rescue in distress at sea situations involving smuggled migrants.

2. Smuggling and UNCLOS

The adoption of UNCLOS in 1982 proved to be a major milestone in the codification and progressive development of the law of the sea.[54] The Convention, often referred to as the 'constitution for the oceans',[55] provides a comprehensive legal framework to regulate ocean uses and the management of their resources. However, notwithstanding the broad ambit of the Convention, there are important *lacunae.*[56]

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mission with the Italian Navy', March 21 2014. <http://www.unhcr.org/532c4cbb6.html>. See also Smuggling of Migrants by Sea and European Commission, DG Migration and Home Affairs, 'A Study on Smuggling of Migrants – Characteristics, responses and cooperation with third Countries', Final Report September 2015, 27-29.

53 More than 50 percent of the Mediterranean Sea falls under the high seas regime. See <http://ec.europa.eu/maritimeaffairs/documentation/studies/documents/mediterranean_expert_group_report_en.pdf >accessed 4 July 2016.

54 See generally Robin Churchill, 'The 1982 United Nations Convention on the Law of the Sea' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) and David Freestone, 'The Law of the Sea Convention at 30: Successes, Challenges and New Agendas' (2012) 27 The International Journal of Marine and Coastal Law 675.

55 Myron Nordquist, *The United Nations Convention on the Law of the Sea: A Commentary Volumes I* (Martinus Nijhoff 1995), hereafter referred to as The Virginia Commentary. See 'A Constitution for the Oceans', Statement by Tommy T.B. Koh, 11-16.

56 Richard Barnes, 'The International law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control – Legal Challenges* (Martinus Nijhoff 2010) 103.

In relation to the high seas regime found in Part VII of UNCLOS,[57] the Official Records of the Third United Nations Conference on the Law of the Sea (Hereafter referred to as UNCLOS III) demonstrate that many of the rules found therein (unless adopted from the HSC) were drafted between 1973-1978.[58] Therefore, the drafting of Part VII reflects those maritime security concerns, which the international community was facing during that period.[59] With respect to smuggling of migrants, this temporal problem has two main ramifications: a) due to the development of certain maritime security threats, the effectiveness of certain rules found in UNCLOS may have to be questioned; and b) there exists a lack of rules dealing with certain contemporary maritime security threats.[60]

UNCLOS, for the above-mentioned reasons, does not provide any rules that directly deal with the problem of smuggling.[61] Although, during the negotiations at UNCLOS III, States may have been aware of the existence of this threat in certain parts of the world, the reasons for this *lacuna* are unclear.[62] A possible reason for the exclusion is put forward by Barnes, who argues that the drafters may have left the problem of smuggling to be regulated in different fora.[63] However perhaps a more likely reason for such exclusion is that at the time of drafting of UNCLOS, smuggling was not considered to be the major problem it is today.[64] Thus the drafters may have not considered the problem to be serious enough to be included in the final text of the Convention. Notwithstanding this *lacuna,* Part VII does contain important UNCLOS rules, which are relevant to the suppression of smuggling. These rules will be examined hereunder.

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57 See Satya Nanda and Shabtai Rosenen (eds), *The United Nations Convention on the Law of the Sea: A Commentary Volumes III* (Martinus Nijhoff 1995) 173, hereafter referred to as the Virginia Commentary Volume III, 27-43.

58 Official Records of UNCLOS III are available at <http://legal.un.org/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html> accessed 4 July 2016.

59 See Felicity Attard, 'IMO's Contribution to International Law Regulating Maritime Security' (2014) 45 Journal of Maritime Law and Commerce 479, 560-561.

60 See Felicity Attard, 'Maritime Security under the 1982 United Nations Convention on the Law of the Sea' (2014) 12 Benedict's Maritime Bulletin 162, 162.

61 Patricia Mallia, 'The Human Element – Stowaways, Human Trafficking and Migrant Smuggling' in David Joseph Attard (eds), *The IMLI Manual on International Maritime Law Volume III Marine Environmental Law and Maritime Security Law* (OUP 2016) 492-493.

62 Richard Barnes 'The International law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control – Legal Challenges* (Martinus Nijhoff 2010) 108.

63 ibid.

64 During the negotiations at UNCLOS III, there were certain cases of smuggling of persons by sea, such as those of the Vietnamese 'boat persons' during the 1970s/1980s Indochina crisis, however these were confined to a certain area and therefore not considered an international problem. See Mark Cutts, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (OUP 2000) 79.

3. Maritime Interdiction as a Tool to Suppress Smuggling on the High Seas

One rationale for suppressing smuggling on the high seas is to ensure that States are not faced with legal problems or economic burdens associated with irregular migration, once smuggling vessels reach their shores. An effective way to prevent such scenarios is through the process of maritime interdiction.[65] A comprehensive definition of this term is provided by the United Nations High Commissioner for Refugee' Executive Committee, where for the purpose of smuggling, interdiction relates to all measures employed by States to,

a) prevent embarkation of persons on an international journey;
b) prevent further onward international travel by persons who have commenced their journey; or
c) assert control of vessels where there are reasonable grounds to believe the vessel is transporting persons contrary to international or national maritime law; where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter; and that such measures also serve to protect the lives and security of the traveling public as well as persons being smuggled or transported in an irregular manner; [66]

According to Guilfolye, the process of interdiction has two 'potential' stages.[67] The first is a boarding procedure akin to the right of visit under Article 110,[68] which involves stopping, boarding and searching the vessel for evidence of illegal conduct. The second step involves possible seizure of the vessel or persons on board, once the boarding has revealed substantial evidence of illegal conduct.[69] If the interdiction is carried out on the high seas, as will be seen, both steps require consent from the flag State; however, the right of visit may be exercised without flag State consent in certain circumstances that will be discussed below.[70]

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65 Interdiction measures implemented by States governments have proved to be very effective in preventing large masses of smuggled migrants arriving by sea. See Thomas Gammeltoft-Hansen, 'The refugee, the sovereign and the sea: EU interdiction policies in the Mediterranean', Danish Institute for International Studies Working Paper, 2008, No.6, 19 available at <http://www.econstor.eu/bitstream/10419/44650/1/560120990.pdf> accessed 4 July 2016.

66 UNHCR, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees* (1975 2009 Conclusion No. 1 – 109, 2009) No. 97, available at: <http://www.unhcr.org/refworld/docid/4b28bf1f2.html> accessed 4 July 2016.

67 Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 9.

68 The right of visit will be discussed in detail in Section 3.5.1.

69 Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 9.

70 See Section 3.5.1.

In the context of this study, maritime interdiction[71] encompasses those measures which involve States exerting control over smuggling vessels, and this may also amount, in certain cases, to an assertion of jurisdiction.[72] In practical terms, interdiction measures can be seen as a way in which official State vessels police the high seas for ships suspected of carrying out smuggling activities.[73] These ships may prevent the onward movement of a smuggling vessel by 'either taking passengers and crew onto their own vessel, accompany the vessel to port, or force an alteration in its course'.[74]

In order for interdiction measures to be lawfully carried out on the high seas, the fundamental UNCLOS rules must be adhered to. The following sections will analyse these rules, their importance to interdiction procedures, and their overall significance in combatting smuggling on the high seas.

4. Navigation

4.1 *Freedom of Navigation*

The high seas regime found in UNCLOS Part VII includes the freedom of the navigation enjoyed by all States whether coastal or land-locked,[75] and are found in a non-exhaustive list provided for in Article 87 of the Convention.[76] UNCLOS extends this freedom to the exclusive economic zone by virtue of Article 58(1),[77]

71 Interdiction may also be referred to as interception. In this study the two terms shall be used interchangeably. See Patricia Mallia, 'The Human Element – Stowaways, Human Trafficking and Migrant Smuggling' in David Joseph Attard (eds), *The IMLI Manual on International Maritime Law Volume III Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 21.

72 ibid 18-21.

73 Interdiction may also take place within a State's territorial sea. However, for the purposes of this study, the measure of interdiction will be discussed in the context of the high seas, exclusive economic zone and contiguous zone when a State has not declared an exclusive economic zone.

74 Joanne van Selm and Betsy Cooper, 'The New "Boat People": Ensuring Safety and Determining Status' [2005] Migration Policy Institute <http://www.migrationpolicy.org/pubs/Boat_People_Report.pdf> accessed 4 July 2016.

75 UNCLOS, art 87(1). It is important that this article is read in conjunction with UNCLOS, art 89. The latter provides that no State shall subject any part of the high seas to its sovereignty and is considered to be a counterpart to the rule that the high seas are open to all States. See The Virginia Commentary (n 23) Volume III, Part VII, 94-97.

76 The list of freedoms in UNCLOS, Article 87 includes; freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines and freedom to construct artificial islands and other installations which are both subject to Part VI dealing with the continental shelf, freedom of fishing which is subject to Part VII, section 2 dealing with conservation and management of the living resources of the high seas, freedom to undertake scientific research which is subject to Part VI dealing with the continental shelf and Part XIII on marine scientific research.

77 UNCLOS, art 58(1) provides; 'In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms

and to the contiguous zone in those cases where a State has not declared an exclusive economic zone.[78]

Unlike most of the freedoms laid down in Article 87, the exercise of the freedom of navigation is not contingent on any other part of the Convention.[79] However, it should not be considered as an absolute freedom, as it is subject to a general responsibility of flag States to act in accordance with international obligations.[80] Moreover, States must exercise such freedom with 'due regard' for the rights and interests of all other States as well as respect to activities carried out in the Area.[81] This rule imposes an obligation on States to exercise this freedom in good faith. It may therefore be questioned whether there exists an obligation on a flag States to take all the necessary action to combat smuggling. It may be argued that if no action is taken, the flag State could be violating its freedom of navigation, as smuggling may have a detrimental effect on the safety and security of navigation as well as the protection of life at sea.[82]

Finally, States are obliged to exercise their navigational freedoms in line with 'other rules of international law.'[83] In this respect it may be argued that there is a trend found in a number of international instruments leading towards a modification or evolution of these freedoms. Scovazzi describes these changes as contributing to an evolution in the law of the sea.[84] He notes that these modifications reflect a tendency towards a progressive erosion of the freedoms of sea.[85] It may be argued that the emergence of certain mechanisms, such as implied consent when the flag State fails to respond to a request to boarding,

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referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention. See further Umberto Leanza and Maria Cristina Caracciolo, 'The Exclusive Economic Zone' in David Joseph Attard and others (eds), *The IMLI Manual on International Law –Volume I The Law of the Sea* (OUP 2014) 191-193.

78 See further David Attard, *The Exclusive Economic Zone in International Law* (Claredon Press 1987) 79, 128-129.

79 Only two of the six freedoms listed in article 87 of UNCLOS - the freedom of navigation and overflight remain unqualified by other provisions of the Convention.

80 See UNCLOS, art 87(1). Some of these obligations would include ensuring safety of navigation, regulation of maritime traffic, protection of life at sea amongst others. See The Virginia Commentary Volume III 23) 81. See also David Attard and Patricia Mallia, 'The High Seas' in David Joseph Attard and others (eds), *The IMLI Manual on International Law – Volume I The Law of the Sea* (Oxford University Press 2014) 244.

81 UNCLOS, art 87(2).

82 See Section 1.

83 UNCLOS, art 87(1).

84 Tulio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' in *Recueil Des Cours, Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff 2001) 231.

85 ibid.

constitute a limitation to the freedom of navigation. Implied consent is manifested in a number of bi-lateral ship boarding agreements between the United States and various other States[86] as part of the Proliferation Security Initiative.[87] These agreements provide authority, on a bi-lateral basis, to board ships suspected of carrying weapons of mass destruction. In order to avoid the risk that a reply to a request will not be given in a timely manner, most of these agreements establish an implied consent rule.[88] Depending on the specific agreement, authorisation may be implied if a certain amount of time after a request to board has elapsed.[89]

It is submitted that these developments, whilst positive, may not be accurately described as inroads, for their implementation ultimately depends on the acceptance of the flag State. In respect to smuggling, the question does not arise – at least for the time being – as there are no anti-smuggling treaties, which provide for implied consent. This could however occur if the problem becomes more pressing. Indeed, this would be a positive development bearing in mind the often degrading and inhumane conditions which smuggled migrants are subjected to, and the need to remedy the situation in the shortest time possible.
It is possible to note a trend in the adoption of treaties, which amplify, compliment and extend the provisions of UNCLOS.[90] Scovazzi observes that the suppression of crimes of international relevance on the high seas is insufficiently addressed by UNCLOS.[91] The UNCLOS provisions dealing with the suppression of

86 These include Antigua and Barbuda, the Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Marshall Islands, Mongolia, Panama, and St. Vincent and the Grenadines. See Ship Boarding Agreements (*U.S. Department of State: Diplomacy in Action*) <http://www.state.gov/t/isn/c27733.htm> accessed 4 July 2016.

87 Here after referred to as PSI. The PSI is a multinational response to the challenge posed by the proliferation and trafficking of WMDs. Launched in 2003, the PSI aimed to strengthen measures among participating States to interdict proliferation-related components at sea, in the air or on land once they have left their State of origin. See James Kraska and Raul Pedrozo *International Maritime Security Law* (Martinus Nijhoff Publishers 2013) 785-794; Nathalie Klein *Maritime Security and the Law of the Sea* (Oxford University Press 2012) 193-208 and Jacek Durkalec, 'The Proliferation Security Initiative: Evolution and Future Prospects' (2012) EU Non-Proliferation Consortium Non Proliferation Papers 16, 1.

88 ibid.

89 See for example the Agreement Between the Government of the United States of America and the Government of the Republic of the Marshall Islands Concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, Their Delivery Systems, and Related Materials by Sea (Honolulu signed, August 13 2004 and entered into force November 24 2004) para. 3(d) which provides a time limit of 4 hours.

90 Tulio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' in *Recueil Des Cours, Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff 2001) 225-226. See also Natalie Klein, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (2007) 35 Denver Journal of International Law and Policy 287, 302-313, 317-330.

91 Tulio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' in *Recueil Des Cours, Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff 2001) 220.

drugs on the high seas – for example – do not deal adequately with the problem and required strengthening.[92] This deficiency was addressed by the 1988 United Nations Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[93] which contains provisions aimed directly at suppressing drug trafficking on the high seas.[94] Article 17(3) of the Convention empowers a State party, which suspects that a foreign vessel is engaged in illicit drug trafficking, to request confirmation of registry from the flag State.[95] Once such confirmation is received, the suspecting State may also request authorisation from the flag State to take appropriate measures including, *inter alia*, boarding the vessel and searching it and if sufficient evidence is found to take further appropriate action.[96]

It may be argued that the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime,[97] is another example of these treaties. The Smuggling Protocol is considered to be the primary instrument dealing with the suppression of smuggling of migrants. The Protocol essentially provides a criminal justice response[98] to various types of smuggling activities, by focusing on prosecution and punishment of smugglers themselves. In this respect, the Protocol provides a more comprehensive regime to deal with smuggling. It allows for the inspection of vessels suspected of carrying out smuggling activities through a boarding procedure similar to that contemplated in Article 17(3) of the 1988 Vienna Convention. Under Article 8 of the Protocol, a State party – that has reasonable grounds to suspect that a foreign ship is engaged in smuggling – may request flag State consent to take appropriate measures including boarding and searching that ship.[99] If evidence of smuggling is found, it may take further measures as

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92 See UNCLOS, Article 108 which relates to the illicit traffic in narcotic drugs or psychotropic substances. Whilst, the two provisions found under article 108 encourage co-operation for the suppression of such drugs and substances, they fail to create a suitable legal structure to address the problem.

93 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 10 March 1988, entered into force 1 March 1992) 27 ILM 685, hereafter referred to as 1988 Vienna Convention.

94 See further Efhymios Papastavridis, 'The Illicit Trafficking of Drugs' in David Joseph Attard (eds), *The IMLI Manual on International Maritime Law Volume III Marine Environmental Law and Maritime Security Law* (OUP 2016) 470-472.

95 1998 Vienna Convention, art 17(3).

96 ibid art 17(4).

97 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime (Palermo, 15 November 2000, entered into force 28 January 2004) 40 ILM 384, hereafter referred to as the Smuggling Protocol.

98 See generally Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?' (2016) 47 Journal of Maritime Law and Commerce 219, 223-225.

99 Smuggling Protocol, Article 8(2). See further Anne Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 434-437.

authorised by the flag State.[100] Whilst said treaties represent a positive development, they all ultimately respect the principle of exclusive flag State jurisdiction. It may therefore be pertinent to ask whether any limitation on exclusive jurisdiction of the flag State in respect of combatting smuggling can be imposed under general principles of law. One possible option, relates to intervention on the basis of the protective principle of jurisdiction.[101] It could be argued that the protective principle allows coastal States to exercise jurisdiction over a foreign vessel on the high seas without flag State consent to prevent or combat acts that go contrary to its security interests. Malanczuk holds that a plot to break the coastal State's immigration rules may be the basis for the exercise of protective jurisdiction.[102] Whilst, the protective principle is utilised by some States, it should be done so with great caution.[103] In respect of the case of boarding and arrest of a foreign vessel, the danger to the security of the boarding State must be real and imminent. In such cases it is probably necessary to exhaust all efforts to obtain flag State consent that remains a primary obligation.

4.2 *Nationality of Ships and Flag State Duties*

The freedom of navigation is intimately linked to nationality.[104] According to Article 91(1) of UNCLOS:

> Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship. [105]

According to the above provision, only registered ships have the right to navigate on the high seas, and they must fly the flag of their State.[106] This rule

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100 See Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?' (2016) 47 Journal of Maritime Law and Commerce 219, 230-232.

101 Under the protective jurisdiction a State may assert its authority over matters which are prejudicial to State security, irrespective of where those acts take place or by whom they are committed. See James Crawford (ed) *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 462.

102 See Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 112.

103 ibid.

104 Tina Shaughnessy and Ellen Tobin, 'Flags of Inconvenience: Freedom and Insecurity on the High Seas' (2006-2007) V Journal of International Law and Policy 1,1. See also Douglas Guilfoyle, The High Seas' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 214-215.

105 UNCLOS, Article 91(1).

106 Under UNCLOS, Article 92 ships may only sail under the flag of one State.

may imply that a ship, which is stateless, is not entitled to navigate on the high seas, but also risks arrest by a warship[107] of any State.[108]

The granting of nationality by a State to a ship, typically through registration,[109] creates a legal link between the ship and that State. The mere administrative act of registration is however insufficient; there must be what is known as a genuine link connecting the State to a ship flying its flag.[110] Regrettably, UNCLOS does not define what constitutes a genuine link.[111] In fact, despite the importance of the genuine link requirement, there appears to be no generally accepted criterion by which 'genuineness' is measured.[112]

The requirement of a genuine link has been quite controversial.[113] It is within the flag State's discretion to decide the conditions upon which nationality are granted.[114] This discretion has led to the development of the so-called 'flag of

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107 For a definition of warship, see UNCLOS, Article 29.

108 This is of particular importance to smuggling as in the large majority of cases, the whole or part of the smuggling occurs on stateless ships. It is argued that this would expose such vessels to the control and jurisdiction of all States. See Sections 4.3 and 5.3 respectively for further discussion on exclusive flag State jurisdiction and statelessness of vessels.

109 Registration is the administrative act by which nationality is conferred upon vessels. It is an official confirmation that ships meet the relevant flag State laws and regulations in return for the flag State's protection of the ship. See Richard Coles and Edward Watt, *Ship Registration – Law and Practice* (2nd edn, Informa 2009) 7.

110 This link is fundamental as it governs discipline in all areas of maritime navigation, the attribution of responsibility of States in cases of violations of the applicable rules by their ships as well as the exercise of flag State jurisdiction and control. See *The Virginia Commentary Volume III* (Martinus Nijhoff 2010) 104. See generally David Attard and Patricia Mallia 'The High Seas' in David Joseph Attard and others (eds), *The IMLI Manual on International Law –Volume I The Law of the Sea* (Oxford University Press 2014) 248-249 and Douglas Guilfoyle 'The High Seas' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 215-216.

111 Tullio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' in *Recueil Des Cours, Collected Courses of the Hague Academy of International Law* (Martinus Nijhoff 2001) 221. In the absence of clarification on the meaning of genuine link under UNCLOS, this criterion is often interpreted in the context of the *Nottebohm* judgment, were the International Court of Justice held that with regards to the nationality of an individual there must exist '... a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.' The absence of this link may lead to non-recognition of nationality by a third State. See *Nottebohm judgment (Liechtenstein v. Guatemala); Second Phase [1955] I.C.J Reports (6 April) 4.*

112 Robin Churchill, 'The Meaning of the "Genuine Link" Requirement in relation to the Nationality of Ships', A Study prepared for the International Transport Worker's Federation, October 2000, available at <http://www.itfglobal.org/seafarers/icons-site/images/ITF-Oct2000.pdf> accessed 4 July 2016.

113 The lack of agreement between States on firm conditions for the establishment of a genuine link is evidenced by the failure of the 1986 United Nations Convention on Conditions for Registration of Ships which is not in force. See further Richard Barnes, 'Flag States' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 307.

114 This principle is laid down in UNCLOS, Article 91(1).

convenience States', which allow ship-owners to register under their flag with little or no real connection to that State.This situation may also lead to problems of enforcement due to poor control, as flag of convenience States may be either unable or unwilling to exercise proper jurisdiction and control over their ships.[115] The use and abuse of flags of convenience by ships are often linked to illegal activities,[116] including smuggling.[117] In 2008, the European Commission produced a working document,[118] which examined the creation of a European surveillance system to better control the EU's external borders.[119] This document *inter alia* discusses the problems of irregular immigration, especially in the Mediterranean, and submitted that a popular method employed by smugglers is the use of larger ships '...under a flag of convenience from a country often located far from the Mediterranean...'[120] in order to transport smuggled persons on to smaller stateless vessels which eventually reach the shore. Moreover, the International Transport Workers' Federation has also expressed its concern about the numerous security risks associated with flag of convenience States, as they are less likely to enforce international requirements concerning the ship and its activities, providing 'unregulated havens' for smugglers to carry out their criminal activities.[121]

115 This could also result in smuggling cases either being ignored or going unnoticed. See Matthew Gianni, 'Real and Present Danger: Flag State Failure and Maritime Security and Safety' available at <http://www.itfseafarers.org/files/publications/9315/flag_state_performance.pdf> accessed 4 July 2016.

116 Judge Jesus, Dissenting opinion, para 34 of the *M/V Virginia G* case <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19_Diss Op_Jesus_orig_E.pdf> accessed 4 July 2016.

117 See Commission of the European Communities, Examining the creation of a European border surveillance system (EUROSUR) – Impact assessment, Accompanying document to the Communication from the Commission, Commission staff working document, SEC(2008) 151 (Brussels, 13 February 2008), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0151:EN:HTML> accessed 4 July 2016, hereafter referred to as Commission of the European Communities staff working document SEC (2008) 151.

118 ibid.

119 The European Border Surveillance System (EUROSUR) is an information sharing system, which became operational on the 2 December 2013. EUROSUR is aimed at improving management of EU external borders and providing faster responses to new routes and methods used by smuggling networks. See Eurosur (*Frontex*)<http://frontex.europa.eu/intelligence/eurosur/> accessed 4 July 2016.

120 Commission of the European Communities staff working document SEC (2008) SEC(2008) 15 (Brussels, 13 February 2008) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0151:EN:HTML> accessed 4 July 2016.

121 Defining FOCs and the Problems They Pose (*ITF Seafarers*) <http://www.itfseafarers.org/defining-focs.cfm> accessed 4 July 2016.

There has been much discussion on how to reduce illegal activities carried out by ships registered under flags of convenience.[122] This discussion centres on an interpretation of UNCLOS Articles 91 and 94,[123] the former dealing with the nationality of ships, whilst the latter deals with flag State duties. Every flag State is required to, 'exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.'[124] If the flag State is not in a position to exercise these duties, this may have implications as to the existence of a genuine link. However, the precise relationship between the capacity to exercise jurisdiction and control and the principle of genuine link is uncertain. The International Tribunal for the Law of the Sea,[125] helped to clarify the law on this issue in the ***M/V Virginia G*** case.[126] The case concerned a Panamanian registered oil tanker which was confiscated, together with the fuel it was carrying, by Guinea-Bissau for unauthorised refuelling of fishing vessels in its exclusive economic zone.[127] Panama claimed that it was entitled to repatriation for damage suffered during the ship's detention. However, Guinea-Bissau argued that the absence of a genuine link between M/V Virginia G and Panama was a cause for inadmissibility of the claims of Panama and the basis for a counter-claim against Panama for repatriation costs.[128]

In its judgment, ITLOS dwelt on the meaning of genuine link and the extent to which the right of a State to grant nationality depends of such a link. The Tribunal referred to and confirmed its previous findings in the ***M/V Saiga (No. 2)*** case,[129] where on the interpretation of UNCLOS Articles 91 and 94 it held that,

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122 Judge Jesus, Dissenting opinion, para 34 of the *M/V Virginia G case* < https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19_DissOp_Jesus_orig_E.pdf> accessed 4 July 2016.

123 ibid.

124 UNCLOS, art 94.

125 Hereafter referred to as ITLOS.

126 *M/V Virginia G* (Panama v Guinea Bissau)(Merits, Judgment of 14 April 2014) ITLOS Reports 2014, hereafter referred to as the *M/V Virginia G* case.

127 ibid, para 62.

128 ibid, para 21.

129 *M/V 'Saiga' (No 2)* (Saint Vincent and the Grenadines v Guinea) (Merits, Judgment of July 1 1999) ITLOS Reports 1999. In this case Guinea arrested an oil tanker, the *M/V Saiga* for providing gas and oil to fishing boats off West Africa which was considered to be a violation its customs laws. Although the *M/V Saiga* was registered in St. Vincent and the Grenadines, the beneficial owner was a Cypriot company which was managed by a Scottish company and then chartered out to a Swiss Company. The officers and crew on board the vessel were Ukrainian. Guinea claimed that the vessel had not been validly registered in St. Vincent and the Grenadines at time the arrest, but that even if it had been there was no genuine link between the *M/V Saiga* and St. Vincent and therefore St. Vincent was not competent to bring a claim on behalf of the *M/V Saiga*. St. Vincent argued that the arrest was contrary to international law.

a) The discretion of a State to grant nationality is a matter reserved to that State, which may under its domestic law prescribe conditions for the registration of such ships in its territory and the right to fly its flag.[130]
b) The purpose of the genuine link is to secure '...more effective implementation of the duties of the flag State',[131] and to not establish prerequisites to be satisfied for the exercise of the right of the flag State to grant nationality to its ships.[132]

In the ***M/V Virginia G*** case, the ITLOS held,

> ...once a ship is registered, the flag State is required under article 94 of the Convention, to exercise effective jurisdiction and control over that ship in order to ensure that it operates in accordance with generally accepted international regulations, procedures and practices.[133]

In the view of the Tribunal, a genuine link between a ship and its flag State exists through the performance of the flag State duties listed in Article 94. A ship may be registered with a flag State, but will only retain the genuine link if it abides with its international obligations to ensure effective jurisdiction and control over that vessel. What are consequences of a lack of genuine link? As a component for the granting of nationality under UNCLOS, the absence of such a link may arguably render a vessel stateless. Within the context of smuggling, flag States which permit or fail to take action against registered vessels carrying out illegal smuggling activities, may be failing to carry out their flag State duties. The absence of a genuine link in such cases may render smuggling ships stateless and therefore subject in the first place to the right of visit under Article 101.[134] Statelessness, as a ground to combat smuggling on the high seas, will be examined below.[135]

4.3 *The Principle of Exclusive Flag State Jurisdiction*

As elaborated upon in Section 1, no State may claim rights or control over any part of the high seas. However, a flag State may exercise authority over their vessels located on the high seas, through the principle of exclusive flag State

130 ibid para 63.
131 ibid para 83.
132 ibid.
133 *M/V Virginia G* case *G* (Panama v Guinea Bissau) (Merits, Judgment of 14 April 2014) ITLOS Reports 2014, para 113.
134 See Section 5.1.
135 See Section 5.3.

jurisdiction. This principle is crucial in relation to interdiction. According to Article 92(1) of UNCLOS,

> Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.[136]

Exclusive flag State jurisdiction is considered to complement the freedom of the seas found in Article 87, and was inserted in order to avoid '...the absence of any authority over ships sailing the high seas which would lead to chaos.'[137] Therefore, according to Article 92(1), a vessel is subject only to jurisdiction of the State to which it is flagged. This principle, which was also upheld by the landmark ***S.S Lotus*** judgment,[138] where the Permanent Court of International Justice held that,

> It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly.[139]

This idea of 'exclusivity' implies that UNCLOS does not allow for non-flag State action over ships on the high seas except: a) in those limited circumstances provided for in the Convention,[140] which include the suppression of slave trade,[141] piracy,[142] illicit traffic in narcotic drugs and psychotropic substances,[143] and unauthorised broadcasting;[144] or b) if they have been granted permission by that flag State.[145] Therefore, other than the aforementioned situations, any other action taken on the high seas would amount to an assertion of jurisdiction over the high seas,[146] and '...would undoubtedly be contrary to international law.'[147]

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136 UNCLOS, art 92(1).

137 ILC, 'Report of the International Law Commission on the Work of its 8th Session' (23 April- 4 July) UN Doc (A/3159), Article 30 Commentary, para 1.

138 *SS Lotus Case (France v Turkey)* [1927] PCIJ Rep Series A No 10 (7 September) 25, para.1.

139 ibid.

140 The exceptions to the principle of flag State jurisdiction will be elaborated upon later on in this Section.

141 UNCLOS, art 99.

142 ibid art 105.

143 ibid art 108.

144 ibid art 109.

145 See Douglas Guilfoyle 'The High Seas' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 220-221.

146 Natalie Klein *Maritime Security and the Law of the Sea* (Oxford University Press 2012) 106.

147 *SS Lotus Case (France vs. Turkey)* [1927] PCIJ Rep Series A No 10 (7 September) 25, para.1.

This point was emphasized by the Netherlands in the ***Arctic Sunrise Case (Kingdom of the Netherlands vs. Russian Federation)***.[148] The proceedings before ITLOS concerned a request by the Netherlands for provisional measures under Article 290(5) of UNCLOS,[149] following the arrest of a Dutch-flagged Green Peace vessel and its crew. The arrest was carried out after the vessel's crew attempted to stage a protest against an offshore oil rig in the Russia Federation's EEZ.[150] The arrest was made without the consent of the Netherlands, which claimed that,

> By acting in this way, without the prior consent of the Kingdom of the Netherlands, the Russian Federation has violated the freedom of navigation of the flag State and its right to exercise its jurisdiction over the vessel under the United Nations Convention on the Law of the Sea and under customary international law...[151]

The Netherlands continuously argued its position as the flag State of the ***Artic Sunrise***, and consequently it was the only State entitled to take enforcement action against the vessel. At the heart of the case put forward by the Netherlands were the fundamental principles of the freedom of navigation and exclusive flag State jurisdiction.[152] In the light of the urgency of the matter, the Tribunal prescribed provisional measures through the posting of a bond or other financial security of 3,600,000 Euros by the Netherlands, which required the Russian Federation to immediately release the ***Arctic Sunrise*** and all persons who had been detained.[153]

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148 The *Arctic Sunrise case (Kingdom of the Netherlands vs. Russian Federation)* (Provisional Measures, Order of 22 November 2013) ITLOS Reports 2013. During proceedings, the Russia Federation did not appear before the Tribunal.

149 According to this Article, if a dispute has been duly submitted to a court or tribunal which considers that *prima facie* it has jurisdiction under this Part of Part XI, Section 5 of the Convention, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment pending the final decision. See UNCLOS, Article 290(5). See further Douglas Guilfoyle and Cameron Mile, 'Provisional Measures and the MV *Arctic Sunrise*' (2013) 108 The American Journal of International 271.

150 ITLOS, Press Release 201, 'Request for Provisional Measures submitted Today to the Tribunal in *the Arctic Sunrise Case* (Kingdom of the Netherlands v. Russian Federation).

151 ITLOS, *The Arctic Sunrise case* (Kingdom of the Netherlands v. Russian Federation) Public sitting held on Wednesday, 6 November 2013, at 10 a.m, at the International Tribunal for the Law of the Sea, Hamburg, Verbatim Record, lines 12-15 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/ITLOS_PV13_C22_1_Eng.pdf> accessed 4 July 2016.

152 ibid.

153 The *Arctic Sunrise case (Kingdom of the Netherlands v. Russian Federation)* (Provisional Measures, Order of 22 November 2013) ITLOS Reports 2013, para 105.

It is submitted that the principle of exclusive flag State jurisdiction has important implications when attempting to interdict foreign flagged vessels involved in smuggling on the high seas. Other than the exceptions provided for in the Convention, or other treaties, a State must receive flag State consent before boarding, searching or interdicting foreign flagged smuggling vessels on the high seas.

In essence, a warship cannot exercise control or jurisdiction over a foreign ship suspected of smuggling, unless it has flag State consent. From a review of the State practice, it appears that States still jealously protects the principle of exclusive flag State jurisdiction. This author could find no case where boarding of a vessel to combat smuggling took place without flag State consent. It is significant that even under the Smuggling Protocol boarding can only take place with the consent of the flag State. Furthermore, from a review of anti-smuggling bi-lateral agreements, it appears that flag State consent has always been required.

Significantly some may argue that the implied consent mechanism is not justified, as it puts extra burdens on the administration, but more importantly it is held that when a State that signs a counter-smuggling agreement in good faith, it is bound to give consent. Whilst this argument has some logic, it may be desirable to insert such mechanisms in counter-smuggling treaties. Considering the importance, of the safety of lives of the smuggled persons, it is important that flag State consent is forth coming in the shortest time possible.

5. The Effectiveness of UNCLOS Rules to Suppress Smuggling on the High Seas

5.1 *The Right of Visit*

Under UNCLOS Article 110, public vessels such as warships,[154] and other duly authorised vessels may exercise the right of visit against foreign flagged vessels on the high seas.[155] The right of visit[156] refers to the right to board, search and inspect foreign vessels on the high seas, but only if there are reasonably grounds to suspect that the vessel is engaged in piracy, slave trade, unauthorised broadcasting[157] or is flying a foreign flag or refusing to show its flag, where the ship is in reality the same nationality as the warship.[158] In order to exercise this

154 For a definition of warship, see UNCLOS, art 29.
155 UNCLOS, art 110(1)(a) and 110(5).
156 See UNCLOS, art 110(2).
157 ibid art 110(1) a-c.
158 ibid art 110(1) d-e.

right the warship must first proceed to verify the foreign vessel's flag and check its documents. If after this initial inspection the suspicion remains, then the warship may proceed to carry out a more thorough examination on board the vessel.[159] As explained in Section 3, this may be considered to be the first step in the process of maritime interdiction of smuggling vessels. This boarding procedure under Article 110 does not require flag State consent,[160] but once the vessel inspection has ended, the boarding State must either leave that vessel or obtain the Master's consent to stay on board.[161] However, it is important to that no enforcement action may be carried out by the boarding State without authorisation from the flag State, even if there are signs of illegal activities on board.[162]

From a *prima facie* reading of Article 110, smuggling is not listed as one of the grounds for which the right of visit may be exercised. Notwithstanding this fact, it may still be exercised in cases of: a) stateless vessels which are often used for smuggling voyages; and perhaps to a lesser extent b) slavery depending on an interpretation of the definition of this term and thus whether smuggled migrants may qualify as slaves. Both of these issues will be dealt with in detail in the following sections.[163]

Furthermore, while UNCLOS does not specifically mention smuggling as a ground for the exercise of the right of visit, the wording of the Convention does contemplate situations where this right may emanate from other treaties:'...except where acts of interference derive from powers conferred by treaty...'[164]As observed by Anderson, examples of such interference are found in numerous bi-lateral, regional and global treaties between States which provide specific boarding procedures.[165] An example of this is the right of visit provided for under article 8 of the Smuggling Protocol.[166]

It is submitted that whilst the right of visit under UNCLOS may be a useful tool in detecting and searching vessels suspected of smuggling, its effectiveness as a means of suppressing the crime may be limited. The right of visit only provides a

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159 UNCLOS, art 110(2).

160 James Kraska, 'Broken Taillight at Sea: The Peacetime International Law of Visit, Board, Search and Seizure' (2010) 6 Ocean and Coastal Journal 1, 26.

161 Patricia Mallia 'The Human Element – Stowaways, Human Trafficking and Migrant Smuggling' in David Joseph Attard (eds), *The IMLI Manual on International Maritime Law Volume III Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 19.

162 ibid.

163 Section 5.3 and 5.4 respectively.

164 UNCLOS, art 110(1).

165 David Anderson, 'Freedom of the High Seas in the Modern Law of the Sea' in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea* (OUP 2006) 342.

166 See Smuggling Protocol, art 8(2) and Section 4.1 respectively.

non-flag State with the power to board and search vessels smuggling vessels, but does not allow it to unilaterally conduct any enforcement action such as arrest or seizure of the vessel. This limitation may weaken the ability of this right to adequately address the threat of smuggling.

5.2 *Hot Pursuit*

The right of hot pursuit provided for in Article 111 of UNCLOS, allows a coastal State to pursue and arrest foreign flagged vessels on the high seas when it has'...good reason to believe that the ship has violated the laws and regulations of that State.'[167] In order for the pursuit to commence, the foreign flagged ship must be in the pursuing State's internal waters, archipelagic waters, territorial sea, contiguous zone, exclusive economic zone or continental shelf and the pursuit must also be uninterrupted.[168] This right may be exercised by warships and military aircraft and only '...after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.'[169] If all these conditions are fulfilled, the right of hot pursuit results in the coastal State's right to seize and arrest the pursued vessel onto the high seas.[170] Guilfoyle argues that this right is considered to be, '...an extension of existing coastal State enforcement jurisdiction, which entirely ousts the jurisdiction of the flag State.'[171] This author agrees that hot pursuit is one of the most effective tools under Part VII, to combat cases of smuggling, as it extends the jurisdictional powers of non-flag States over smuggling vessels on the high seas. This may lead to arrest and seizure, often considered to be the second step of the interdiction process.[172]

Special attention should be given to hot pursuit commencing in the contiguous zone. Under UNCLOS Article 33, a coastal State may in its contiguous zone, exercise the control necessary to prevent and punish infringement of its immigration laws.[173] Thus, UNCLOS does permit specific measures to be taken in the contiguous zone in relation to smuggling, whether it forms part of the exclusive economic zone or the high seas.[174] A coastal State can exercise hot

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167 UNCLOS, art 111(1). See generally David Attard and Patricia Mallia, 'The High Seas' in David Joseph Attard and others (eds), *The IMLI Manual on International Law –Volume I The Law of the Sea* (Oxford University Press 2014) 239, 263-266.

168 ibid.

169 UNCLOS, art 111(4).

170 Douglas Guilfoyle *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 19.

171 ibid.

172 See Section 3.

173 UNCLOS, art 33.

174 See Section 3.4.1.

pursuit against foreign vessels for violations of immigration laws, which can commence up to the outer limit of the contiguous zone i.e. 24 nautical miles.[175]

5.3 *Stateless vessels*

Statelessness of vessels may arise through failure to acquire nationality,[176] or a ship may be treated as stateless, where it 'sails under the flags of two or more States,' according to convenience.[177] The treatment of stateless vessels under UNCLOS is relevant to combatting of smuggling, as many smuggling vessels are stateless.[178] This was confirmed by a 2007 study carried out by the European Commission, which found that illicit migration in Europe's southern maritime external border '...is mainly characterised by being carried out by means of flagless and/or unseaworthy sea craft.'[179] Under Article 110(1)(d), a State may carry out the right of visit which allows it to board and search stateless vessels.[180]

An interesting question relates to what are the powers given to non-flag States, beyond the right of visit, over a stateless vessel on the high seas.[181] Some authors believe that UNCLOS does not specifically confer rights upon non-flag States to subject interdicted stateless vessels to measures such as seizure and arrest. Churchill and Lowe, for example, insist that there '...is a need for some jurisdictional nexus in order that a State may extend its laws to those on a boarding stateless ship and enforce [its] laws against them.'[182] However, other authors such as Rayfuse argue that the consequences of stateless are so grave, that they can result in stateless ships being '...arrested on the high seas and subject to the jurisdiction of any other State.'[183] The present author agrees with the latter position, considering that stateless vessels do not enjoy the freedom of navigation,[184] which is only given to registered vessels. Stateless vessels

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175 UNCLOS, art 111(1).

176 See Section 4.2.

177 UNCLOS, art 91(1).

178 Secretary General of the United Nations, 'Report of the Secretary General on the Oceans and the Law of the Sea', 5 October 1998, UN Doc.A/53/456, para 135. See also Section 4.2.

179 European Commission, Study on the international law instruments in relation to illegal immigration by sea, Brussels, 15 May 2007, SEC (2007) 691.

180 See Section 5.1.

181 Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmented Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 International Journal of Refugee Law 1, 13.

182 Robin Churchill and Vaughn Lowe, *The law of the Sea* (3rdedn, Manchester University Press 2009) 214.

183 Rosemary Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff 2004) 57. See also Myres Smith MacDougal and others, 'The Maintenance of Public Order at Sea and the Nationality of Ships' (1960) 54 American Journal of International Law 25.

184 See Daniel Patrick O'Connell, *The International Law of the Sea – Volume II* (Claredon Press, 1984) 755 and Robert Reuland, 'Interference with Non-National Ships on the High Seas:

effectively lose the protection of any State and may be subjected to the domestic laws of the boarding State.[185]

This view also finds support in two leading judgments on the issue, in the ***Asya*** case,[186] the United Kingdom Privy Council held that,

> ....For the freedom of the open sea, whatever those words may connote, is a freedom of ships which fly and are entitled to fly the flag of a State which is within the comity of nations. The Asya did not satisfy these elementary conditions...[187]

Moreover, in ***Pamuk*** *case,*[188] Italian custom officers had actually seized a flagless vessel which was transporting smuggled migrants on the high seas to another vessel which had then entered the Italian territorial sea; the Italian *Tribunale di Crotone* justified the assertion of enforcement jurisdiction by Italian authorities on the basis that the smuggling vessel was stateless.

5.4 *Slavery*

According to Article 99, UNCLOS requires every State to take effective means 'to prevent and punish the transport of slaves in ships authorized to fly its flag and to prevent the unlawful use of its flag for that purpose'.[189] Although, UNCLOS provides no definition of slavery, it is most likely referring,[190] to the traditional definition of the term which is provided for in the 1926 Slavery Convention[191] as meaning '...the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'[192] However, this definition may now be considered obsolete, considering that virtually all States

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Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction' (1989) 22 Vanderbilt Journal of Transnational Law 1161, 1198-1201.

185 Marten de Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012) 236.

186 *Naim Molvan v. Attorney General for Palestine (The "Asya")*, 81 Ll L Rep 277, United Kingdom: Privy Council (Judicial Committee), 20 April 1948. This case involved the seizure of a vessel *the Asya* by a British destroyer. The *Asya* was travelling toward Palestine with many illegal migrants on board. When it was first spotted by the British Destroyer it was not flying any flag. Soon after it was sighted, it hoisted the Turkish flag and later replaced by a Zionist flag. The ship had no documents to verify its nationality and was then apprehended by the British Destroyer and taken to Haiti.

187 ibid 546.

188 *Pamuk et al.*cited in Rivista di Diritto Internazionale (2001) 1155.

189 UNCLOS, art 99.

190 Satya Nanda and Shabtai Rosenen (eds), *The United Nations Convention on the Law of the Sea: A Commentary Volumes III* (Martinus Nijhoff 1995) 179-180.

191 Slavery Convention (Geneva, 25 September 1926, entered into force on 9 March 1927)60 L.N.T.S. 253.

192 ibid, art 1(1).

have outlawed slavery.[193] Nevertheless, modern forms of slavery and slave-like practices are still very evident in many parts of the world. It could be argued that the crime of smuggling is a manifestation of more modern forms of slavery, considering the harsh and inhumane effects on victims of these crimes and the complete control, which is exercised over smuggled persons. Smuggled migrants are exposed to inhumane and degrading treatment on board smuggling vessels and may also be subjected to violence by the smugglers themselves.[194] In addition to being forced to endure such cruel conditions throughout the smuggling voyage, there are also cases where migrants enter into debt bondage situations or are forced in domestic servitude in order to pay smuggler fees.[195] Such situations could arguably also be considered as contemporary cases of slavery.

Papastavridis argues that UNCLOS '...should be interpreted in the light of the contemporary legal meaning of the terms slavery and slave trade and not only in the light of the meaning when the [UNCLOS] was drafted'.[196] Moreover, he claims that there is nothing in UNCLOS '....to intrinsically prevent an evolutive interpretation of the notion of slavery...'[197] It may be argued that the concept of slavery should not remain static but should adjust itself to contemporary developments, especially in light of the growing need for States to suppress and control harmful smuggling practices.

Consequently, a broad interpretation of UNCLOS provisions dealing with slavery to also include smuggling, would invoke the right of visit, which as explained above may be useful in intercepting and detecting smuggling vessels.[198] However, unlike other maritime security threats such as piracy,[199] UNCLOS does not allow States to seize foreign flagged vessels or arrest those on board under Article 99, and in this regard neither does the right of visit. Therefore, even if, a wide interpretation of term slavery were used to include smuggling activities,

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193 Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing 2013) 270.

194 Migrant Smuggling in the Horn of Africa and Yemen: the political economy and protection risks, Mixed Migration Research Series, June 2013, Study 1, 41 available at <http://www.regionalmms.org/fileadmin/content/rmms_publications/Migrant_Smuggling_in_the_Horn_of_Africa_and_Yemen._report.pdf> accessed 4 July 2016.

195 James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff Publishers 2013) 658-659.

196 Efthymios Papastavridis, *The Interception of Vessels on the High Seas* (Hart Publishing 2013) 277.

197 ibid.

198 See Section 3.3.

199 Under UNCLOS, art 105; all States may seize and arrest pirate vessels on the high seas. See further Mariyan Kulyk, 'Piracy, Hijacking and Armed Robbery against Ships' in in David Joseph Attard (eds), *The IMLI Manual on International Maritime Law Volume III Marine Environmental Law and Maritime Security Law* (OUP 2016) 396-400 and Felicity Attard (n 26) 534-535.

the use of this provision would is still limited when it comes suppressing such activities on the high seas.[200] In this respect, flag State control would still be recognised to go beyond the right of visit, unless of course the smuggling vessel is stateless.[201]

5.5 *The Duty to Render Assistance and Rescue at Sea*

As examined above, migrants often cross the high seas in overcrowded, unseaworthy vessels.[202] Unfortunately, distress at sea situations have become a common occurrence. These situations raise important humanitarian concerns. The duty to rescue persons in distress at sea arises under customary international law and is codified in a number of international conventions,[203] most notably UNCLOS. Article 98(1) of UNCLOS imposes a duty on flag States to ensure that shipmasters of vessels flying their flag provide assistance to persons in distress at sea: [204]

> Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
> (a) to render assistance to any person found at sea in danger of being lost;
> (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
> (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.[205]

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200 Felicity Attard, 'Is the Smuggling Protocol a Viable Solution to the Contemporary Problem of Human Smuggling on the High Seas?' (2016) 47 Journal of Maritime Law and Commerce 219, 228.

201 See Section 3.5.2.

202 See Section 1.

203 See also Regulation 33, para.1 of Chapter V of the International Convention for the Safety of Life at Sea (London, 1 November 1974, entered into force 1 May 1991) 1184 UNTS 3 and Chapter 2, paragraph 2.1.10 of the Annex to the International Convention on Maritime Search and Rescue (Hamburg, 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97,

204 The duty is placed on all shipmasters of all vessels irrespective of whether it may be a military, private or commercial ship. See Anne Gallagher and Fiona David *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 447.

205 UNCLOS, art 98(1).

The shipmasters obligation to render assistance at sea, is supplemented by the requirements of coastal States to organise and carry out search and rescue services,

> Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.[206]

While the general obligation to render assistance at sea is provided for under UNCLOS, Part VIII on the high seas, this should not be construed to mean that the duty should be carried out exclusively in areas beyond national jurisdiction. In fact, the duty has been described by Nordquist, as an obligation of broad application that extends to all areas of the ocean space 'whether in the territorial sea, in straits used for international navigation, in archipelagic waters, in the exclusive economic zone or on the high seas.'[207]

UNCLOS requires the shipmaster to proceed to the assistance of any person in distress at sea.[208] This requirement ensures that there is no distinction exercised in the rescue of persons at sea, the obligation therefore clearly extends from seafarers to irregular migrants in need of assistance at sea. The duty under UNCLOS also requires the shipmaster to be proactive in two ways: a) on receiving relevant information,[209] take active steps to alter the ship's course to rescue persons in distress at sea; and b) to render the same assistance if, *en route*, he happens to discover persons in distress at sea. The duty is qualified in that the shipmaster may provide assistance to persons in distress, only in so far as such action may be reasonably expected of him.[210] Accordingly, he may be relieved of his duty under certain circumstances; for example, in cases where the rescue operation proves to be unfeasible or may endanger the safety of his vessel, passengers or crew.

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206 ibid art 98(2).

207 Satya Nanda and Shabtai Rosenen (eds), *The United Nations Convention on the Law of the Sea: A Commentary Volumes III* (Martinus Nijhoff 1995) 173.

208 The challenges facing the rescue of migrants in distress at sea who are generally found on board small and unseaworthy vessels are discussed above.

209 For example, if a shipmaster is prompted to rescue by a distress call from the vessel in distress or from rescue services ashore. See Richard Barnes, 'The International law of the Sea and Migration Control' in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control – Legal Challenges* (Martinus Nijhoff 2010) 136-137 and Mark Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 International Journal of Refugee Law 329, 338.

210 UNCLOS, art 98 (1)(c).

The duty to assist and provide rescue at sea are considered to be humanitarian obligations towards persons in danger at sea. Interdiction on the other hand, is a tool used by law enforcement agencies to limit or regulate the number of irregular migrant arrivals to their shores.[211] The general view is that although flag State consent is necessary for interdiction and boarding of a foreign ship, it is not required when undertaking a rescue at sea operation.[212] This exception is based on the need to protect life at sea. In fact, it should be narrowly interpreted to be strictly restricted to cases of rescue at sea and great care should always be taken to ensure that beyond humanitarian considerations flag State consent is obtained.

Despite having different policy objectives, in practice the activities of interdiction and rescue at sea may overlap, blurring the boundary between these two types of operations.[213] For example, law enforcement authorities that have targeted a vessel for interdiction purposes may later discover that the vessel is in distress.[214] Uncertainty may arise as to whether such an operation should be classified as one of interdiction due to suspicion of smuggling on board the vessel, or a rescue at sea because of the distressed condition of the vessel.[215]

This uncertainty has led to a disconcerting trend among States which rely on the principle of rescue at sea as a means of interdicting vessels.[216] Besides providing a legal pretext to interdicting foreign vessels on the high seas, the reasons for what Miltner terms as 'interception "cloaked" as rescue'[217]are considerable. A State, which has conducted an interdiction operation, will then be responsible for the disembarkation and processing of any asylum seekers.[218] Furthermore, if a State does secure rescue related disembarkation at a third State, the former may

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211 See Section 3.

212 Barbara Miltner, 'Human Security in the Maritime Context' in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press 2010) 221.

213 ibid 220.

214 The European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union (Frontex) for example argues, '…that saving lives at sea and intercepting both migrants and the people who smuggle them go hand in hand.' See 'Sea' (*FRONTEX: European Border and Coast Guard Agency*) <http://frontex.europa.eu/operations/types-of-operations/sea> accessed 4 July 2016.

215 Barbara Miltner 'Human Security in the Maritime Context' in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press 2010), 220.

216 Jasmine Coppens, 'Search and Rescue of Migrants at Sea' in Adam Weintrit (ed) *Marine Navigation and Safety of Sea Transportation: Navigational Problems* (CRC Press/Balkema 2013) 117.

217 See also Barbara Miltner, 'Irregular Maritime Migration: Refugee Protection Issues in Rescue and Interception' (2006) 30 Fordham International Law Journal 75, 111.

218 Barbara Miltner 'Human Security in the Maritime Context' in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press 2010) 221.

benefit by transferring its international protection responsibilities (e.g. screening, processing asylum claims) to the latter.[219] In light of these problems, UNHCR warns States '...to avoid the categorization of interception operations as search and rescue operations, because this can lead to confusion with regard to disembarkation responsibilities.'[220]

Coppens observes that this practice may also constitute an abuse of right under international law considering that in such cases the duty to render assistance in a rescue is clearly not being used for the purpose for which it was intended,[221] Furthermore, it may be argued that such activities may violate the duty of good faith under UNCLOS Article 300[222] considering that the practice is not only burdening coastal States with excessive and undue disembarkation responsibilities, but may also put at risk persons who require international protection. Whilst States should be obliged to respect the distinction between rescue and interdiction, it may not always be practicable or advisable to place further limitations on the obligation to rescue at sea, for it may shackle or place further burdens on States' responses to granting rescue.

6. Conclusion

Despite the lack of any specific rules to combat smuggling under UNCLOS Part VII, it does contain certain provisions, which can be useful in fighting smuggling. Generally, the combatting of smuggling takes place through the process of interdiction,[223] indeed this has become a major activity that enables States to take action on the high seas, thereby preventing the landing of migrants that were being illegally transported on vessels.[224] It should, however, be noted that in the ultimate analysis for effective action, this process has limitations, as generally in the absence of an agreement, it requires the consent of the flag State.[225] This is a reflection of the fundamental principle enshrined in Article 92(1) of UNCLOS, which grants the flag State exclusive jurisdiction over its ships

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219 ibid.

220 UNHCR, 'The treatment of persons rescued at sea: conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees: Report of the Office of the United Nations High Commissioner for Refugees' 11 April 2008, A/AC.259/17, para 20.

221 Jasmine Coppens 'Search and Rescue of Migrants at Sea' in Adam Weintrit (ed) *Marine Navigation and Safety of Sea Transportation: Navigational Problems* (CRC Press/Balkema 2013) 123.

222 See Article 300 of UNCLOS, which provides that State parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner, which would not constitute an abuse of right.

223 See Section 3.

224 ibid.

225 See Section 4.3

when on the high seas.[226] In this respect the ambiguity of the genuine link requirement is not helpful particularly with regard to vessels registered in States where the legislative and administrative controls may not be satisfactory.[227]

Usually the first stage of the interdiction process is the right of visit, which is regulated by Article 110 of UNCLOS.[228] Whilst this visit may apply effectively, particularly to stateless ships, the consent of the flag State is required for any action once evidence of smuggling found.[229] Another helpful rule is the right of hot pursuit found under Article 111 of UNCLOS.[230] This institution is extremely useful for it allows for the pursuit of smugglers on to the high seas. In this respect, it was noted that the contiguous zone and the exclusive economic zone are subject to the relevant high seas provisions and therefore the right of hot pursuit is also applicable in these zones.[231] Noteworthy also is the right of the coastal State to exercise the control necessary in order to prevent or punish the infringement of immigration laws under Article 33 of UNCLOS.[232] With respect to stateless vessels, the denial of the freedom of navigation to such vessels by the Convention may be a useful weapon in the hands of enforcement authorities conducting the fight against smuggling.[233]

Smuggling raises many safety concerns as it generally involves hazardous journeys on unseaworthy vessels.[234] UNCLOS provides the basis for the execution of the obligation to render assistance and rescue at sea.[235] It was noted that there exists a delicate relationship between rescues at sea, which may sometimes lead to abuse.[236]

It is submitted that the relevant articles on the high seas regime in UNCLOS provide a useful basis for combatting smuggling. Nevertheless, one cannot rely exclusively on the Convention to effectively combat this threat. This has led to the adoption of other international instruments in particular the Smuggling Protocol, which provides further elaboration and development of the rules found in UNCLOS.[237] The Protocol provides a more comprehensive regime allowing for interdiction activities in the cases of vessels suspected of smuggling. However,

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226 ibid.
227 See Section 4.2.
228 See Section 5.1.
229 ibid.
230 See Section 5.2.
231 ibid.
232 ibid.
233 See Section 5.3.
234 See Section 1.
235 See Section 5.5.
236 ibid.
237 See Section 4.1.

ultimately any legal responses to smuggling found in the Protocol, work within a broader legal framework involving obligations under UNCLOS, in particular, respect for the principle of exclusive flag State jurisdiction.

ANALYSING THE EUROPEAN COMMISSION'S FINAL DECISIONS ON APPLE, STARBUCKS, AMAZON AND FIAT FINANCE & TRADE

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ABSTRACT[238]

This article addresses the issues which stem from the State aid investigations opened by the European Commission ("EC") against Luxembourg, Ireland and the Netherlands, concerning aid granted in the form of tax base reduction to certain undertakings, namely Apple Inc., Amazon, Starbucks and Fiat Finance and Trade ("FFT"). Furthermore, this article analysis the EC's main line of argument in the aforementioned State aid investigations that is, acceptance by the Netherlands, Ireland and Luxembourg, of the proposed calculation of the taxable base of these MNEs which do not reflect normal market conditions, may result in State aid, in that it will offer a more favourable treatment to the MNE compared to the treatment other undertakings would normally receive under the Member States' 'normal' tax system. In arriving at what would constitute normal market conditions, the EC uses two benchmarks namely, the internationally accepted standard, the Arm's Length Principle ("ALP") and the Prudent Independent Market Operator ("PIMO"), which makes its first appearance in these investigations. This article demonstrates the relationship between the two and whether both can be used as a benchmark for the purposes of the State aid rules as laid down under Art. 107(1) of the Treaty on the Functioning of the European Union ("TFEU").

KEYWORDS: FISCAL – STATE AID – EUROPEAN COMMISSION

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ANALYSING THE EUROPEAN COMMISSION'S FINAL DECISIONS ON APPLE, STARBUCKS, AMAZON AND FIAT FINANCE & TRADE

Franklin Cachia[239]

1. Introduction

The European Commission (Hereinafter referred to as 'EC') opened three in-depth investigations to examine whether decisions by tax authorities in Ireland, the Netherlands and Luxembourg with regard to the corporate income tax to be paid by Apple,[240] Starbucks,[241] Amazon,[242] and Fiat Finance & Trade,[243] comply with the European Union (Hereinafter referred to as 'EU') rules on State aid. More recently, the EC opened a formal investigation into Luxembourg's tax treatment of McDonald's.[244] On the 21st of October 2015, the EC decided that both Luxembourg and the Netherlands had granted selective tax advantages to Fiat Finance and Trade and Starbucks respectively through tax rulings.[245] Finally, on the 30th of August 2016, the EC issued a press release whereby it concluded that Ireland granted undue tax benefits of up to €13 billion to Apple.[246] Tax rulings as such are not problematic as they are comfort letters by tax authorities giving a specific company legal certainty on how its corporate tax will be calculated or on the use of special tax provisions. However, tax rulings may involve state aid within the meaning of EU rules if they are used to provide selective advantages to a specific company or group of companies.[247]

According to Article 107(1) of the TFEU, State aid which affects trade between Member States and threatens to distort competition by favouring certain

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240 *Alleged Aid to Apple* SA.38373 C(2014) 3606 final [2014].

241 *Alleged aid to Starbucks* SA.38374 C(2014) 3626 final [2014].

242 *Alleged aid to Amazon by way of a tax ruling* SA.38944 C(2014) 7156 [2014].

243 *Alleged aid to FFT* SA.38375 C(2014) 3627 final [2014].

244 European Commission, 'State aid: Commission opens formal investigationinto Luxembourg's tax treatment of McDonalds' (*European Commission: Press*, 11 November 2015) <http://europa.eu/rapid/press-release_IP-15-6221_en.htm> accessed 10 March 2015.

245 European Commission, 'Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules' (*European Commission: Press Release*, 21 October 2015) <http://europa.eu/rapid/press-release_IP-15-5880_en.htm> accessed 10 March 2015.

246 European Commission: Press Release, 30 August 2016. The non-confidential version of the decisions will be made available under the case number SA.38373 in the State aid register on the DG Competition website once any confidentiality issues have been resolved

247 *Alleged aid to FFT* SA.38375 C(2014) 3627 final [2014].

undertakings is in principle incompatible with the EU Single Market. Tax rulings are used in particular to confirm transfer pricing arrangements through a form of tax ruling known as Advanced Pricing Arrangement (Hereinafter referred to as 'APA'). If tax authorities, when accepting the calculation of the taxable basis proposed by a company, insist on a remuneration of a subsidiary or a branch on market terms, reflecting normal conditions of competition, this would exclude the presence of state aid. However, if the calculation is not based on remuneration on market terms, it could imply a more favourable treatment of the company compared to the treatment other taxpayers would normally receive under the Member States' tax rules. This may constitute state aid.

Normally, the Arm's Length Principle (Hereinafter referred to as 'ALP') is the standard used to determine the correct transfer price. The EC acknowledges that market conditions may be arrived at through transfer pricing established through the ALP. However, the EC seems to be applying a standard which goes over and above the ALP to determine whether the transfer pricing calculations are at normal market conditions. This new standard is the Prudent Independent Market Operator (Hereinafter referred to as 'PIMO') standard which makes its appearance for the first time in the four cases.[248] As we shall see the PIMO has similarities, not only to the ALP but also to other tests and principles previously advocated by the EU courts.[249] Furthermore, in the Starbucks final decision the EC is applying the legal principle of equal tax treatment, which according to the EC is reflective of the ALP.

2. Transfer Pricing and The Arm's Length Principle (ALP): A General Note

Transfer pricing refers to the setting of the correct transfer price between associated enterprises forming part of a multinational enterprise (Hereinafter referred to as 'MNE') group.[250] Transfer pricing by itself does not necessarily involve tax avoidance. It is where the transfer pricing does not accord with applicable international norms that mispricing or incorrect pricing occurs, and where issues of tax avoidance and fraud may arise.[251]

[248] *Apple* recitals 53 and 54; *Starbucks* recitals 74 and 75; *Amazon* recitals 53, 54 and 64; *FFT* recitals 60 and 61.

[249] Case 124/10 *European Commission v Électricité de France (EDF)* [2012] (GC), paras 59, 60 and 80; the Prudent Private Investor Test and the Market Economy Agent Test.

[250] Organisation for Economic Cooperation and Development Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD, 1995) para 12.

[251] United Nations, 'Practical Manual on Trnasfer Pricing for Developing Countries' (ST/ESA/347, United Nations 2013) <http://www.un.org/esa/ffd/documents/UN_Manual_TransferPricing.pdf> accessed 8 March 2015.

In order to ensure the determination of the correct transfer pricing between associated enterprises, OECD Member States have chosen to treat each entity in the MNE as a separate entity. This separate entity approach is the most reasonable means for achieving equitable results and minimising the risk of unrelieved double taxation. In order to apply the separate entity approach to intra-group transactions, individual group members must be taxed on the basis that they act at arm's length in their transactions with each other. However, the relationship amongst the members of the MNEs may permit that they establish special conditions between themselves, which do not reflect and/or differ from normal market conditions between independent enterprises. To ensure the correct application of the separate entity approach, OECD member countries adopted the ALP, under which the effect of special conditions on the levels of profits should be eliminated.[252]

2.1 *Interpretation and Application of the ALP*

The general rule is that, 'profits derived by an enterprise of a contracting State are taxable only by the contracting State in which the enterprise has its residence'.[253] Article 9(1) in the OECD Model Convention, allows the State to depart from these general rules by adjusting profits accruing to a domestic enterprise, which is associated with a foreign enterprise, to the extent that the business profits concerned were affected by terms and conditions differing from normal market conditions between independent enterprises.[254] Article 9 concerns the question of whether an element of profit, which has been subjected to tax in the foreign contracting State, may nevertheless be attributed to, and taxed in the hands of a domestic enterprise. Consequently, Article 9 is designed to avoid economic double taxation.[255] Article 9 allows such a rewriting of accounts, that is, reallocation of profits to be made only according to the ALP. Whether or not that contracting State may avail itself of this treaty authorization, depends on its own domestic law.

According to Vogel,[256] Article 9 does not create any legal basis for such a rewriting of accounts. Like any other article of a tax treaty, its effects are to restrict domestic law to the extent that the latter provides for profit adjustments between associated enterprises beyond those permissible under the ALP.

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252 *Alleged aid to FFT* SA.38375 C(2014) 3627 final [2014] preface, para 6.

253 OECD Model Tax Convention on Income and on Capital (2014), art 7.

254 Klaus Vogel, *Klaus Vogel on Double Taxation Conventions* (4th edn, Wolters Kluwer 2015) 555.

255 ibid. See also Lioubov Pogorelova, 'Transfer Pricing and Anti-Abuse Rules' (2009) 37 Intertax 683, 683-693.

256 Klaus Vogel, *Klaus Vogel on Double Taxation Conventions* (4th edn, Wolters Kluwer 2015) 517.

Therefore, a State may not rely solely on Article 9 of a tax treaty concluded with another State to enforce the ALP but it needs to implement the ALP in its domestic law. This is important to keep in mind for the Irish investigation concerning Apple Inc., whereby there were no transfer pricing rules implemented within the Irish domestic tax law. When considering the treaty rules corresponding to Article 9, it should again be noted that the tax treaty merely restricts, rather than generates, domestic law. The only legal basis for profit adjustments between associated enterprises are therefore, the rules of domestic law.

The ALP provides that, the conditions made or imposed between associated enterprises must be compared with those which would be agreed between independent enterprises, thus a comparability analysis taking into account functions performed, assets used and risks assumed, must be performed. There is above all a concrete possibility to make a comparison whenever a market price exists and can be ascertained, at a certain point in time and in a specific market for the, *inter alia,* goods and services received. If there is no such possibility to make a comparison, an attempt must be made to estimate by other means what would have been agreed between third parties that are independent of each other in the absence of any influence under company law. This comparison is necessarily a hypothetical one.[257] What must be taken in consideration is that the price is founded on certain market situations independent of the association of the two enterprises. Another point to be observed in the comparability analysis is the function, which the dependent enterprise has within the group as a whole.[258] For providing concrete basis for comparisons, certain standard methods have been developed for establishing the Arm's Length price.[259]

3. Fiscal State Aid

One of the main objectives of the EU is market integration, that is, it is a union 'where capital, labour, technology and enterprises should move unhindered between participating countries'.[260] State aid provisions, as part of the TFEU, should be regarded as having as a final objective market integration. They aim to promote and ensure, undistorted competition in a free market, thereby strengthening the internal market. State aid rules ensure this by controlling State interventions aimed to provide economic assistance to undertakings on a selective basis.

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257 ibid 527.

258 ibid 528.

259 For a detailed reading of the methods advocated by the OECD, see Chapter II of the TPG and US I.R.C. Sec 482. See also Klaus Vogel, *Klaus Vogel on Double Taxation Conventions* (4th edn, Wolters Kluwer 2015) 530-535.

260 Ali M. El-Agraa, *The European Union: Economics and Politics* (7th edn, Prentice Hall 2004) 2.

According to settled case-law of the Court of Justice of the European Union (Hereinafter referred to as 'CJEU'), within the EU, direct taxation has been left within the competence of the Member States. However, Member States must exercise such taxing powers within the parameters set by the supremacy of EU law.[261] In order to achieve this, it is necessary that two main sets of primary EU law rules are adhered to, namely, the rules protecting the fundamental freedoms and those that prohibit state aid set out in Articles 107-108 TFEU.[262] Both sets of rules aim to avoid distortion of competition with the EU internal market. State aid rules provide for an immediate prohibition of direct and indirect use of public resources for promoting national goods and undertakings, based on prudent estimation of the effect that a measure of this type may have on the functioning of the internal market.[263] Moreover, the ground for expansion of state aid control in the tax area was defined by the 1998 Commission's Notice,[264] however, the Court had long before recognised this from the very beginning of its case law when it held that the concept of State aid should be interpreted broadly encompassing fiscal measures.[265] Thus, in principle, State aid distorts competition, and fiscal aid is one form of state aid.

3.1 *The EC's Competence in State Aid Cases*

The EC is the supervising authority in charge of reviewing the compatibility of aids within the internal market, however, the EC is not the only protagonist in State aid review procedures. According to Article 108(2) TFEU, the Council has also the opportunity to decide the compatibility of an aid. The compatibility decision should be voted unanimously at a Member State's request. It is a derogatory regime which departs from the normal procedure, thus it can only arise under exceptional circumstances. In tax matters this has been used in the ***Belgian Coordination Centres*** case.[266] Moreover, apart from the Council, the CJEU plays a decisive role by reviewing the EC's decisions. Even though the EC is

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261 In the context of free movement provisions e.g. Case C-307/97 *Compagnie de Saint-Gobain, Zweigniedelassung Deautschland vs. Finanzamt Aachen-Innenstadt* [1999] ECR I-6181 para 57; Case C-446/03 *Marks & Spencer vs. David Halsey (Her Majesty's Inspector of Taxes)* [2006] ECR I-10837 para 29; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas vs. Commissioners of Inland Revenue* [2006] ECR I-07995 para 40.

262 "Pasquale Pistone, 'Smart Tax Competition and the Geographical, Boundaries of Taxing Jurisdictions: Countering, Selective Advantages Amidst Disparities' (2012) 40 Intertax 85.

263 Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International 2014) 36-39.

264 Commission Notice of 10 December 1998 on the application of state aid rules to measures relating to direct business taxation [1998] OJ C384.

265 Case 30/59 *De Gezamenlijke Steenkolenmijenen in Limburg vs. High Authority of the European Coal and Steel Community* [1961] ECR 1 para 19; Case C-387/92 *Banco de Credito Industrial SA vs. Ayuntamiento de Valencia* [1994] ECR I-00877 paras 13-14; Case C-241/94 *French Republic vs. Commission of the European Communities* [1996] ECR I-4551 para 34.

266 Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium [2003] OJ L282.

vested with exclusive jurisdiction to review the compatibility of the measure with the internal market, the CJEU overseas the EC's review to ensure that the procedural rules have been respected, the reasoning was sufficient, the facts were exact and there was no manifest error of assessment or misuse of power.[267] Naturally, the CJEU also has the competence to interpret authoritatively the concept of State aid under Article 107(1).

3.2 *The Measures of Tax Settlements and Rulings for State Aid Purposes*

All of the four cases deal with a tax ruling or APA which confirms a particular transaction or structure and through this validation by the Member State an aid is conferred. In its final decision, the EC noted that the tax rulings under investigation endorsed artificial and complex methods to establish taxable profits for the companies which did not reflect economic reality. According to Keyln Bacon, 'an aid to an individual undertaking is obviously selective'.[268] One of the main advantages of tax rulings and APAs is the legal certainty they provide to all parties involved and this is also acknowledged by the OECD Transfer Pricing Guidelines (Hereinafter referred to as 'TPG'). Therefore, one may question how such an instrument can fall within the provisions of the State aid rules. On this point, paragraph 22 of the EC 1998 Notice clarifies that, as far as administrative rulings merely contain an interpretation of general rules, they do not give rise to the presumption of aid.

Furthermore, the 1998 Notice provides that every decision of the administration that departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid. This has also been repeated in the EC Draft Notice[269] and subsequently finalised on the 19 May 2016 whereby the EC published its final notice.[270]The EC Final Notice acknowledged that the use of rulings was used in determining arm's length profits for related party transactions where the uncertainty may justify an advance ruling practice designed to ascertain whether certain controlled transactions are conducted at arm's length. The EC Final Notice outlines that tax rulings should only aim to provide legal certainty to the fiscal treatment of certain transactions and should

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267 Hofmann H. Morini A, 'Judicial Review of Commission decision in State Aid' in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Edgar 2011) 354-389; Edoardo Gambaro, 'The Judicial Phase' in Alberto Santa Maria (ed), *Competition and State Aid* (Kluwer Law International 2007) 221-262.

268 Kelyn Bacon, *European Union Law of State Aid* (2nd edn, OUP 2013).

269 Commission, 'Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU' (Communication).

270 Commission Notice of 19 July 2016 on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262.

not have the effect of granting the undertakings concerned lower taxation that other undertakings in a similar legal and factual situation *but which were not granted such rulings*. From this paragraph we infer that the EC wants to suggest that the comparison test is not between two undertakings obtaining a tax ruling but between an undertaking which obtains a tax ruling, and one which doesn't. The EC Final Notice goes on to say that rulings are selective in particular where, the tax authorities have discretion in granting administrative rulings, the rulings are not available to undertakings in a similar legal and factual situation, the administration appears to apply a more favourable discretionary tax treatment compared with other taxpayers in a similar factual and legal situation and the ruling has been issued in contradiction to the applicable tax provisions and resulted in a lower amount of tax.[271] In the ***Starbucks*** final decision, the EC clarifies that group companies and stand-alone companies are to be treated similarly in order to avoid any selective advantage which may constitute State aid.

The first case involving administrative discretion was ***France vs. Commission.***[272] The EC first noted that, as a result of the agreement concluded between the State (Hereinafter referred to as 'FNE') and Kimberly Clark, the FNE undertook to fund part of the cost of the social plan to the extent of FF 27.25 million. The EC considered that the FNE intervention constituted State aid, since such agreements are negotiated with undertakings encountering employment problems and the FNE contribution, which is financed out of the State budget, is determined case by case by reference to the financial situation of the undertaking and the latter's own efforts.

AG Jacobs in his opinion states that it is clear that the state's discretion enables it to benefit 'certain' undertakings by agreeing or refusing to enter into agreements, by modifying the level of its contribution or by dispensing the undertaking from its financial participation.[273] He goes on to say that by virtue of the existence of and degree of discretion, the contributions are not in fact necessarily available to all undertakings on an equal footing.[274] He agrees with the EC and argues that the existence and degree of discretion in the administration of the FNE scheme takes it outside the definition of a general measure; any specific implementation may therefore constitute aid. He takes the view that the specific intervention in favour of Kimberly Clark, the subject of the decision being challenged, has the character of aid. The Court also agrees with

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271 ibid paras 169–174.

272 Case C-241/94 *French Republic vs. Commission of the European Communities* [1996] ECR I-4551.

273 ibid Opinion of Advocate General Jacobs.

274 ibid para 57.

the EC in that the FNE enjoys a degree of latitude which enables it to adjust its financial assistance having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided.[275]

Following ***Kimberly Clark***, the Court has endorsed this principle in various other judgments. In ***Ecotrade***,[276] the Court held that having regard to the class of undertakings covered by the legislation in issue and the scope of the discretion enjoyed by the minister when authorising, in particular, an insolvent undertaking under special administration to continue trading, that legislation meets the condition that it relates to a specific undertaking and is therefore selective, selectivity being one of the elements of State aid as defined in Article107(1).[277] In ***Rinaldo Piaggio***,[278] the Court confirmed the same exact principle as in ***Ecotrade***. In ***DMT***,[279] the Court outlined that general measures which do not favour only certain undertakings or the production of only certain goods do not fall within that provision. By contrast, where the body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature. Furthermore in ***Lenzing***,[280] the court pointed out that case-law has already established that even assistance which at first sight is applicable to undertakings in general may present a certain selectivity and, accordingly, be regarded as a measure intended to favour certain undertakings or certain products. That is the case, in particular, where the administration called upon to apply the general rule has discretion when applying the measure. More recently, the Court gave further clarification on the degree of latitude or discretion in ***P Oy***.[281]

In terms of the above, it can thus be concluded that individual rulings by tax authorities do not constitute State aid if they are no more than interpretations and practical applications of general tax rules through administrative discretion on the basis of objective criteria.[282] Treating taxpayers on a discretionary basis may mean that a general measure becomes selective, particularly where the exercise of the discretionary power goes beyond the simple management of tax

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275 ibid paras 23-24.
276 Case C-200/97 *Ecotrade Srl vs. Altiforni e Ferriere di Servola SpA (AFS)* [1998] ECR I-7907.
277 ibid para 40.
278 Case C-295/97 *Industrie aeronautiche e Meccaniche Rinaldo Piaggio SpA vs. International Factors Italia SpA (Ifitalia)* [1996] ECR I-3735 para. 39.
279 Case C-256/97 *Déménagements-Manutention Transport SA (DMT)* [1999] ECR I-3919, para 27.
280 Case T-36/99 *Lenzing AG vs. Commission of the European Communities* [2004] ECR II-3609.
281 Case C-6/12 *P Oy* [2013] ECR I-525, paras 22-30.
282 Ben J. M. Terra, *European Tax law* (6th edn, Kluwer Law International 2012)156.

revenue by reference to an objective system of reference.[283] According to Claire Micheau, the fact that national administrations enjoy discretion is a strong indication of the selectivity of the measure.[284] Tax authorities have discretionary power in applying a measure, in particular, where the criteria for granting the aid are formulated in a very general or vague manner that necessarily involves a margin of discretion in the assessment. If the competent tax authorities have a broad discretion to determine the beneficiaries or the conditions under which the tax advantage is granted on the basis of criteria unrelated to the tax system, the exercise of that discretion hints at favouring 'certain undertakings or the production of certain goods'.[285] Decisions by the administration that depart from the general tax rules and benefit individual undertakings lead in principle to a presumption of State aid and must be analysed in detail.[286]

3.3 *Transfer Pricing Decisions by the EC in the Light of the State Aid Rules*

The selectivity test has been difficult to apply in cases dealing with transfer pricing schemes.[287] The TPG establish that to arrive at the correct arm's length transfer price one may use five alternative methods or else any other method, which is compatible with the ALP. To appraise the advantage in cases involving transfer pricing methods, the EC has taken as guidance the TPG, as it does again in the pending cases. It has expressly stated that 'in the area of transfer pricing the internationally agreed standard is the arm's length principle as set out in Article 9 OECD Model.'[288] We have noted that almost all EC decisions on State aid concerning transfer pricing, dealt with the special scheme concerning coordination centres which has been implemented in various Member States. The scheme provides that the taxable income is calculated by using the 'Cost Plus' method, which is a method recommended by the OECD TPG. The EC's 2004

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283 Case C-241/94 *French Republic vs. Commission of the European Communities* [1996] ECR I-4551, paras 23-24.

284 Claire Micheau, *State Aid, Subsidy and Tax Incentives under EU and WTO Law* (Kluwer Law International, 2014) 233.

285 Case C-6/12 *P Oy* [2013] ECR I-525, para 27.

286 Raymond H.C. Luja, '(Re)shaping Fiscal State Aid: Selected Recent Cases and Their Impact' (2012) 40 Intertax 120.

287 *Aid scheme implemented by Germany for control and coordination centres* Commission Decision 2003/512/EC [2003] OJ L177/17; Case C-48/2001; *Coordination Centres — implemented by Luxembourg* (Case C-49/2001) Commission Decision 2003/501/EC [2003] OJ L170/20; *Luxembourg – Finance Companies* (Case C-50/2001) Commission Decision 2003/438/EC [2002] OJ L153/40; *Belgium – Coordination Centres* (Case C-15/2002) Invitation to submit comments pursuant to Article 88(2) of the EC Treaty [2003] OJ L282/25; *Spain – Vizcaya coordination centres* Commission Decision 2003/81/EC [2003] OJ L131/26.

288 *Aid scheme implemented by Germany for control and coordination centres* Commission Decision 2003/512/EC [2003] OJ L177/17.

Report[289] clarifies that although this method as such is not caught by the State aid provisions *per se*, it can give rise to an advantage where the tax arrangements applied do not take proper account of the economic reality (or normal market conditions) of the transactions and thereby result in a lower rate of taxation than if the standard tax method had been applied. In this respect we will see if this departure from the standard tax method may mean a departure from the ALP thus reflecting the issue in the pending State aid cases. For the purposes of this part we shall look at the decisions concerning France, Luxembourg, Spain and Belgium. Belgium brought an action for annulment of the EC decision in front of the Courts, that is, the ***Belgium and Forum 187*** case, which we have mentioned already, and which we shall look at more closely from a transfer pricing point of view. We also note that all the schemes in question were implemented into national law and that specific legal regime derogated from the general tax system.

In the scheme adopted by France for headquarters and logistics centres,[290] the scheme makes it possible to determine profits subject to corporation tax in an alternative manner, using the cost-plus method as opposed to the ordinary manner to calculate the taxable profits. The EC found that the scheme is selective on three grounds, namely, firstly, the measure is limited to supplies of services which correspond to the functions of management, administration, coordination or control and to activities preparatory or ancillary to productive or commercial functions performed in the context of an international group. Only the former activities are therefore capable of benefiting from the advantages identified. Secondly, the benefit of the scheme is limited exclusively to headquarters and logistics centres which provide their services predominantly to associated companies situated outside France. The EC noted that entities which do not provide their services predominantly to associated companies located outside France are excluded from the benefit of the measure. Thus, entities established in France but not satisfying the predominance condition cannot benefit from the advantages of the scheme despite the fact that in their transactions with associated companies or branches situated abroad they must face the same difficulties as headquarters and logistics centres in determining their taxable profits. Thirdly, the fact that logistics centres constituting a department attached to an industrial or commercial branch of activity of an existing enterprise or to a holding company are excluded from the scheme strengthens the selectivity of the measure.[291] The same reasoning was advocated in the scheme adopted by

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289 Commission, Report on the Implementation of the Commission Notice on the Application of the State Aid Rules to Measures Relating to Direct Business Taxation (C(2004)434).

290 *French headquarters and logistic centres* Commission Decision [2003] OJ L23/1.

291 ibid paras 65-67.

Luxembourg regarding coordination centres,[292] and similarly another Luxembourg scheme concerning finance companies,[293] together with the Spanish scheme concerning coordination centres in ***Vizcaya***,[294] In the decision against Luxembourg the EC examined whether the method of determining the mark-up rate, the exclusion of certain expenditure from the calculation of the tax base and the exercise of possible discretionary power by the administration might confer an advantage on coordination centres. Similarly, in the decision against Spain, the EC considered that the exclusion of financial costs from the calculation of profits under the cost plus method could confer an advantage on coordination centres.

The EC concluded that coordination centres and the groups to which they belong were able to derive an advantage by reason of the fact that, in practice, Luxembourg systematically granted the minimum rate of 5% without checking whether it corresponded to the economic reality of the underlying services. It transpires that the Luxembourg authorities failed, at least in some cases, to ensure that coordination centres were subject to taxation comparable to that which generally applied to enterprises liable for tax in Luxembourg, that is, those which do not fall under the scheme for coordination centres. Similarly, to the pending cases, most particularly Starbucks, the EC questions the economic rationale of the scheme. Moreover, such a fixed rate could have derogated (derogation test) from the reference system when compared to other enterprises which would not have been eligible for the scheme (comparability test).[295]

On selectivity, given that the tax provisions in question concerned only coordination centres belonging to multinational groups present in at least two countries other than Luxembourg and having their headquarters outside Luxembourg, only some enterprises had access to the advantages described above. Moreover, some tax advantages are on occasion restricted to certain functions, such as intra-group services. This also holds for the Luxembourg scheme for coordination centres. The criterion of selectivity is thus met.

In Luxembourg's view, there is no precedent for applying the State aid rules to the choice of methods for calculating the tax base. Applying them in this way would involve a radical and unforeseeable extension of the current scope of Article 107 of the Treaty.[296] The EC reiterated that such precedent is not

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[292] *Coordination Centres — implemented by Luxembourg* (Case C-49/2001) Commission Decision 2003/501/EC [2003] OJ L170/20.

[293] *Luxembourg – Finance Companies* (Case C-50/2001) Commission Decision 2003/438/EC [2002] OJ L153/40.

[294] *Spain – Vizcaya coordination centres* Commission Decision 2003/81/EC [2003] OJ L131/26.

[295] ibid paras 46-50.

[296] ibid para 38.

necessary (and this is also applicable for the pending cases). When it comes to reconciling the principle of legal certainty with that of full competition and providing taxpayers with a point of reference, there is nothing to prevent tax administrations from opting for the cost-plus pricing formula. The Commission is not criticising the use of that system as a means of facilitating the determination of transfer prices for transactions between associated entities. Nevertheless, in the case at issue, the systematic application of the 5% minimum rate must be regarded as a derogation from the correct use of the cost-plus pricing method which is liable to have conferred an advantage on some enterprises without being justified by the nature or general scheme of the system.[297] We therefore infer that the cost plus method is the reference framework in this case and that a fixed rate or 'safe harbour' is a derogation from it.

Finally, the ***Belgian Coordination Ventres*** decision,[298] which reached the Courts in ***Belgium and Forum 187***,[299] sheds more light on the interpretation of transfer pricing within EU. In this case, the Belgian authorities recommended that, in the absence of any objective criteria for determining the percentage of profits to be taken into account, a mark-up of 8% should be used, whatever the type of service provided and without any checks being made as to whether this corresponded to economic reality. First, the court points out that a centre's taxable income is determined at a standard rate according to the cost-plus method. It represents a percentage of the total operating expenses and costs, from which staff costs, financial charges and corporation tax are excluded. This constitutes a derogation from the ordinary Belgian tax system. In this point, the EC took the flat-rate assessment of income under the cost-plus method constitutes an economic advantage. Under the regime in question, taxable profits are set at a flat-rate amount which represents a percentage of the full amount of operating costs and expenses, from which staff costs and financial charges are excluded.[300]

In order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, to compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition.[301]

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297 ibid para 57.

298 *Belgium – Coordination Centres* (Case C-15/2002) Invitation to submit comments pursuant to Article 88(2) of the EC Treaty [2003] OJ L282/25.

299 *Belgian Coordination Centres* Commission Decision 2003/755/EC [2003] OJ L282, 55, recitals 89 – 95; Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 vs. Commission* [2006] ECR I-5479.

300 *Belgium – Coordination Centres* (Case C-15/2002) Invitation to submit comments pursuant to Article 88(2) of the EC Treaty [2003] OJ L282/25.

301 ibid para 95.

With respect to selectivity and as regards the method of determining taxable income, while ***Forum 187*** argues that the regime in question applies to those companies for which it was specifically designed,[302] so that the risk of double taxation may be avoided, it is a matter of agreement that the regime applies only to international groups having subsidiaries which are established in at least four different countries, which have capital and reserves of at least BEF 1000 million, and have an annual consolidated turnover of at least BEF 10,000 million. It follows that the regime in question is also selective in that regard.[303] Ultimately the Court annulled the EC decision but not on grounds that the measure did not constitute aid.

By way of conclusion to this part and for the purposes of the pending cases, the EC's 2004 Report clarified that to determine whether a tax scheme derogating from the normal system may constitute State aid, it must be established whether the resulting tax burden is lower than that which would have resulted from the application of the relevant Member's States normal taxation method. We therefore infer that in derogating from the normal tax method (which may also be the cost plus method without the use of fixed margins as demonstrated in the EC decisional practice above) one must compare the tax burden of undertakings calculated by the normal tax method and the tax burden of undertakings calculated by the alternative method. The normal tax system in the EC's TP decisional practice seems to be the correct application of the cost plus method without the use of fixed margins. On various occasions the EC referred to the ALP in its decision. Thus, for example, in the French decision the EC acknowledged that the arm's length principle is the international standard agreed by OECD member countries to determine transfer prices for tax purposes with a view to avoiding, firstly, double taxation of taxable income and, secondly, tax evasion involving the same income. The EC also acknowledges that the French tax system did in fact comply with the ALP as regards the determination of taxable profits in international transactions between controlled enterprises, both at the level of domestic law, under Article 57 of the General Tax Code, and at that of the bilateral double taxation treaties concluded by France with its partner countries.[304]We also note in the Belgian decision that the advantage here derives from the fact that the tax administration refrains explicitly from monitoring the 'at arm's length' nature of operations between FSC and affiliated companies once the minimum mark-up is reached. This approach, together with a small mark-up, reduces the level of corporation tax compared with the conventional method for

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302 Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 vs. Commission* [2006] ECR I-5479.

303 Case C-15/2002 *Belgium – Coordination Centres* [2003] OJ L 282/25 paras. 119-121.

304 *Belgium – Coordination Centres* (Case C-15/2002) Invitation to submit comments pursuant to Article 88(2) of the EC Treaty [2003] OJ L282/25, para 45.

determining taxable income.[305] From this we conclude that even though not specifically mentioned in the decisions outlined above, the EC acknowledges the ALP as the correct standard to be used between related party transactions and may be used as a benchmark. We infer that the application of fixed margins and the exclusion of certain costs to which the margins are applied deviates from the correct application of the ALP as interpreted by the OECD TPG. In this respect, we may also infer that such decisions may be used as precedents for the pending State aid cases.

4. The Prudent Independent Market Operator (PIMO)

4.1 *Understanding the PIMO in the State Aid Cases*

In the four State aid cases, on several occasions, reference is made by the EC to a relatively new principle (this however does not seem to transpire in the EC's final Starbucks decision); the Prudent Independent Market Operator, in particular the phrases 'transactions between prudent market operators' and 'conditions prevailing between prudent market operators'. The EC states that,

> Tax authorities, by accepting that multinational companies *depart from market conditions* in setting the commercial conditions of intra-group transactions through a discretionary practice of tax rulings, may renounce taxable revenues in their jurisdiction and thereby forego State resources, in particular when accepting commercial conditions which *depart from conditions prevailing between prudent independent operators*.[306]

Moreover,

> Thus, where a ruling concerns transfer pricing arrangements between related companies within a corporate group, that arrangement should not depart from the arrangement or remuneration that *a prudent independent operator acting under normal market conditions would have accepted*.[307]

Furthermore,

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305 ibid para 12.

306 *Alleged Aid to Apple* SA.38373 C(2014) 3606 final [2014] recitals 53 and 54; *Alleged aid to Starbucks* SA.38374 C(2014) 3626 final [2014] recitals 74 and 75; *Alleged aid to Amazon by way of a tax ruling* SA.38944 C(2014) 7156 [2014] recitals 53, 54 and 64; *Alleged aid to FFT* SA.38375 C(2014) 3627 final [2014] recitals 60 and 61.

307 *Alleged Aid to Apple* SA.38373 C(2014) 3606 final [2014] recitals 53 and 54; *Alleged aid to Starbucks* SA.38374 C(2014) 3626 final [2014] recitals 74 and 75; *Alleged aid to Amazon by way of a tax ruling* SA.38944 C(2014) 7156 [2014] recitals 53, 54 and 64; *Alleged aid to FFT* SA.38375 C(2014) 3627 final [2014] recitals 60 and 61.

> when accepting a calculation method of the taxable basis proposed by the taxpayer, the *tax authorities should compare that method to the prudent behaviour of a hypothetical market operator,* which would require a market conform remuneration of a subsidiary or a branch, which reflect normal conditions of competition. For example, *a market operator* would not accept that its revenues are based on a method which achieves the lowest possible outcome if the facts and circumstances of the case could justify the use of other, more appropriate methods.[308]

Finally, in Amazon the EC states that,

> although, as the Luxembourgish authorities rightly argue, the OECD Guidelines provide some flexibility with respect to the application of the arm's length principle, that flexibility is limited by the *principle that the remuneration arrived at should reflect what a prudent independent operator acting under normal market conditions* would have accepted.[309]

When looking closely at the last citation, it seems that the EC is invoking a principle which goes beyond the ALP, that is, a stricter or higher standard. Furthermore, this last citation further suggests that the EC seems to be replacing the ALP, which is the internationally accepted standard, which would normally govern a related party transaction, with the PIMO standard. However, in the Apple press release and the Starbucks final decision, there is no reference to the PIMO and the emphasis is being done on the fact the rulings approve transactions which are artificial and do not reflect economic reality

We highlight that the PIMO is practically unknown. There is no guidance by the EC on this standard and no EU court has ever opined or deliberated on the PIMO, moreover, the literature on the PIMO is also very limited hence it will be very difficult to properly define it and correctly understand how the EC is trying to use this standard. Nevertheless, it seems that the EC seems to be applying a variant of the Market Economy Operator (Hereinafter referred to as MEO) test which arises from the EC Final Notice.

We conclude that the MEO is applied onto the public authorities to measure their behaviour in comparable normal market conditions to assess whether economic transactions carried out by public authorities confer an advantage whereas the EC is applying the PIMO, either in aggregation, by way of reinforcement of the

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[308] *Alleged Aid to Apple* SA.38373 C(2014) 3606 final [2014] recitals 56 and 57; *Alleged aid to Starbucks* SA.38374 C(2014) 3626 final [2014] recitals 77 and 78.

[309] *Alleged aid to Amazon by way of a tax ruling* SA.38944 C(2014) 7156 [2014]recital 61.

ALP or in replacement of the ALP, between related private undertakings in a similar fashion to the ALP. We also conclude that it would be not correct to replace an internationally accepted standard such as the ALP with an unknown one to determine what would constitute 'normal' market conditions. In relation to the pending State aid cases, it seems that the EC is using the PIMO to determine whether the transfer pricing arrangements between subsidiaries within the same corporate group depart from arrangements that a prudent independent operator acting under normal market conditions would have accepted. In this context, market conditions refer to transfer pricing established at arm's length. Thus the PIMO cannot be synonymous to the MEO test outlined in the EC Final notice as the latter's application addresses a different tester.

5. The Final State Aid Decisions: Apple, Starbucks, Amazon and Fiat Finance and Trade ("FFT")

5.1 *The EC's Main Arguments, Interpretation and Reasoning*

In all the four cases the EC was of the opinion that the contested tax rulings or APAs do not comply with the ALP. If proven that the tax rulings do not adhere to the ALP, this would mean that the tax rulings lowered the undertakings' tax liability, thereby granting an advantage to the undertakings.[310] Accordingly, the EC is of the opinion that through those tax rulings the tax authorities confer an advantage. Moreover, that advantage is obtained every year and on-going, when the annual tax liability is agreed upon by the tax authority in view of the ruling. The EC emphasises that rulings should not have the effect of granting the undertakings concerned lower taxation than other undertakings in a similar legal and factual situation. Tax authorities, by accepting that multinational companies depart from market conditions in setting the commercial conditions of intra-group transactions through a discretionary practice of tax rulings, may renounce taxable revenues in their jurisdiction and thereby forego State resources, in particular when accepting commercial conditions which depart from conditions prevailing between prudent independent operators.[311]

The EC argues that treating taxpayers on a discretionary basis through tax rulings may mean that the individual application of a general measure takes on

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310 *Alleged Aid to Apple* SA.38373 C(2014) 3606 final [2014] recital 48; *Alleged aid to Starbucks* SA.38374 C(2014) 3626 final [2014] recital 69; *Alleged aid to Amazon by way of a tax ruling* SA.38944 C(2014) 7156 [2014] recital 48; *Alleged aid to FFT* SA.38375 C(2014) 3627 final [2014] recital 54.

311 *Alleged Aid to Apple* SA.38373 C(2014) 3606 final [2014] recital 53; *Alleged aid to Starbucks* SA.38374 C(2014) 3626 final [2014] recitals 74; *Alleged aid to Amazon by way of a tax ruling* SA.38944 C(2014) 7156 [2014] recital 56; *Alleged aid to FFT* SA.38375 C(2014) 3627 final [2014] recital 59.

the features of a selective measure, particularly where the exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria. If, instead of issuing a ruling, the tax administration simply accepted a method of taxation based on prices which departs from conditions prevailing between prudent independent operators, there would also be State aid. The main problem is not the ruling as such, but the acceptance of a method of taxation which does not reflect market principles.[312] The EC considered that the imputability and State resources conditions were satisfied as the rulings were issued by the tax authorities, which are part of the State. Those rulings gave rise to a loss of State resources since any reduction of tax for the undertakings, resulted in a loss of revenue for the State.[313] The EC further considered that all the undertakings are globally active firms, operating in various Member States, so that any aid in their favour distorts or threatens to distort competition and has potential to affect intra-EU trade.[314]

The EC goes on to say that, in the context of a related party transaction (that is a transaction between undertakings within the same group of companies), market conditions can be arrived at through transfer pricing established at arm's length.[315] The EC further acknowledges that the OECD TPG is the appropriate reference document for the approximation of an arm's length pricing outcome. It further states that the document has been previously used in the previous EC decisions.[316]

The EC concluded that the ALP requirement was not met by providing different reasons in each case accordingly as follows. In ***Apple***, the EC stated that the taxable basis in the 1991 ruling was negotiated rather than substantiated by reference to comparable transactions. The Irish Revenue accepted the calculation of profit attributable to the branch on the basis of actual costs without this choice being reasoned in any way. The fact that the methods used to

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312 ibid.

313 *Alleged Aid to Apple* SA.38373 C(2014) 3606 final [2014] recital 49; *Alleged aid to Starbucks* SA.38374 C(2014) 3626 final [2014] recitals 70; *Alleged aid to Amazon by way of a tax ruling* SA.38944 C(2014) 7156 [2014] recital 49; *Alleged aid to FFT* SA.38375 C(2014) 3627 final [2014] recital 55.

314 *Alleged Aid to Apple* SA.38373 C(2014) 3606 final [2014] recital 50; *Alleged aid to Starbucks* SA.38374 C(2014) 3626 final [2014] recitals 71; *Alleged aid to Amazon by way of a tax ruling* SA.38944 C(2014) 7156 [2014] recital 50; *Alleged aid to FFT* SA.38375 C(2014) 3627 final [2014] recital 56.

315 *Alleged Aid to Apple* SA.38373 C(2014) 3606 final [2014] recital 55; *Alleged aid to Starbucks* SA.38374 C(2014) 3626 final [2014] recitals 76; *Alleged aid to Amazon by way of a tax ruling* SA.38944 C(2014) 7156 [2014] recital 54; *Alleged aid to FFT* SA.38375 C(2014) 3627 final [2014] recital 61.

316 *Alleged Aid to Apple* SA.38373 C(2014) 3606 final [2014] recital 56; *Alleged aid to Starbucks* SA.38374 C(2014) 3626 final [2014] recitals 77; *Alleged aid to Amazon by way of a tax ruling* SA.38944 C(2014) 7156 [2014] recital 55; *Alleged aid to FFT* SA.38375 C(2014) 3627 final [2014] recital 62.

determine profit allocation result from a negotiation rather than a pricing methodology, reinforces the idea that the outcome of the agreed method is not arm's length and that a prudent independent market operator would not have accepted the remuneration allocated to the branches in the same situation. No transfer pricing report was included in the documents provided by the Irish authorities to support the calculation of taxable profits as confirmed in that ruling, which is a common manner by which a transfer pricing proposal is made to tax authorities.[317] The EC had also doubts as to the appropriateness of the transfer pricing method chosen as the choice of that particular net profit indicator is neither explained by the tax advisor nor by Irish Revenue.[318]

The EC further outlines that the mark-up of 65% of the costs attributable to the Irish branch appear to be reverse engineered so as to arrive at a taxable income of around USD [28-38] million, although according the figure of USD [28-38] million does not have any economic substance.[319] Moreover, it is important to mention that as regarding the duration of the 1991 ruling, this ruling was applied by Apple for fifteen years without revision. This raised doubts as to the appropriateness of the method agreed between Irish Revenue and Apple to arrive to that allocation in the latter years of the ruling's application, given the possible changes to the economic environment and required remuneration levels. The EC notes, in particular, that that duration is much longer than the length of APAs concluded by other Member States.[320]

In ***Starbucks***, the EC's first set of doubts relates to the fact that the arm's length remuneration accepted in the APA depends on Starbucks Manufacturing BV being classified as a low-risk toll manufacturer, despite evidence pointing to the contrary.[321] The EC TP argument mostly concerned this classification. It then went on to outline another issue concerning adjustments made to the Starbuck's cost base. The EC had doubts on the appropriateness of those adjustments and gave very detailed reasons in this respect.[322] Finally, with respect to the royalty payment and choice of profit level indicator, the EC outlined that the fact that the royalties due by Starbucks Manufacturing BV to Alki LP are dependent on the difference between the remuneration established in the APA and the accounting pre-tax profit before the payment of the royalty, leads to a situation in which that royalty payment is calculated as profit in excess of the SMBV agreement and does not reflect the value of the IP.[323] Accordingly, the EC is of the opinion that by

317 *Alleged Aid to Apple* SA.38373 C(2014) 3606 final [2014] recital 56.
318 ibid recital 60.
319 ibid recital 62.
320 ibid recital 65.
321 *Alleged aid to Starbucks* SA.38374 C(2014) 3626 final [2014] recitals 79-96.
322 ibid recitals 97-114.
323 ibid recital 115.

accepting Starbucks Manufacturing BV's use of the SMBV APAs as regards the calculation of royalties in its profit and loss statement, in so far as the level of those royalties could be overestimated in view of the value of the IP in question, the Dutch tax authorities conferred an advantage on that undertaking.[324]

In ***Amazon***, (same as in ***Apple***) the EC noted firstly that Luxembourg did not submit to the EC any transfer pricing report prepared by Amazon in support of the transfer pricing arrangement in the ruling.[325] Furthermore, the EC expressed doubts as to whether the Luxembourgish tax authorities properly confirmed by the contested tax ruling that the transfer pricing arrangement presented in Amazon's ruling request reflected what a prudent independent operator acting under normal market conditions would have accepted. The EC further notes that the ruling request by Amazon was assessed within eleven working days from the receipt of the first letter constituting the ruling request, which is a very short period of time had a transfer pricing report been submitted and assessed in this case.[326] Secondly, (same as in ***Starbucks***) the EC doubted the choice of transfer pricing method. The method proposed by Amazon's tax advisor in the ruling request and accepted by the Luxembourgish tax authorities in the contested tax ruling does not seem to correspond to any of the methods listed in the OECD TPG. While those methods are not exhaustive, the EC has doubts, particularly in the absence of a transfer pricing report, whether the Luxembourgish tax authorities properly confirmed that the transfer pricing arrangement presented in Amazon's ruling request was in line with market conditions.[327] The EC understood that the remuneration accepted in that ruling is still accepted as being at arm's length by the Luxembourgish tax authorities more than ten years later without any revision, thus this making the ruling not in line with normal market conditions.[328]

Finally in ***FFT***[329] the EC claims that by agreeing to a taxable basis which can vary only marginally, the Luxembourgish tax authorities disregard any significant increase or decrease in the activities of FFT.[330] It further criticises the choice of method and states that the transactional net margin method is one of two indirect methods for estimating the profit level according to the OECD

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324 ibid recital 123.

325 *Alleged aid to Amazon by way of a tax ruling* SA.38944 C(2014) 7156 [2014] recital 63.

326 ibid recital 64.

327 ibid recitals 65-71.

328 ibid recital 76.

329 This decision is being challenged before the General Court – T759/15, T-755/15. 'SA.38375 State aid which Luxembourg granted to Fiat' (*European Commission*, 21 February 2014) <http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_38375> accessed 10 March 2015.

330 *Alleged aid to FFT* SA.38375 C(2014) 3627 final [2014] recital 64.

Guidelines. However, according to the case law[331] as well as those guidelines, the use of direct methods for setting an appropriate level of profits is preferred. In particular, it is acknowledged that, whenever possible, the comparable uncontrolled price method is best at approximating conditions prevailing between prudent independent operators.[332] The EC further questions the capital remunerated and on the method employed together with observing the level of remuneration in that that the Luxembourgish tax authorities accepted the comparables selected by the tax advisor for the determination of an appropriate beta in the transfer pricing report without making any effort to filter out names which might not be appropriate peers.[333]

5.2 *Analysis and Criticism of the EC's Reasoning*

5.2.1 *The ALP as a Benchmark*

We noted that to appraise the advantage in cases involving transfer pricing methods, the EC has taken as guidance the TPG, as it does again in the pending cases, particularly the EC uses the internationally accepted principle, the ALP as its point of departure. The question is whether these transfer pricing decisions may be used as a precedent by the EC and indeed whether the ALP may be used as a benchmark.

First of all, in the previous transfer pricing decisions, the ALP was embedded in the Member States' domestic 'normal' tax system, thus it may be safe to say that it can form part of the reference system of a Member State for the purposes of the first step in analysing selectivity. The EC pointed out in its final decisions concerning the Netherlands that the reference system consists of the general Dutch corporate income tax system regardless whether it is a group or a stand-alone company. The Luxembourg decision outlined that with reference to the need to prevent tax avoidance and to the principle of full competition (the ALP), the Luxembourg authorities pointed out that Article 164 of the Law of 4 December 1967 on income tax constitutes the legislative basis for transfer prices. It was in this context that Circular 119 was adopted to facilitate the taxation of certain types of activity. The status of coordination centres is governed by Circular LIR No. 119 of 12 June 1989. The Circular stated that, for corporation tax purposes, the provision of intra-group services must generate an appropriate trading profit in line with the normal behaviour of a prudent manager in his relations with independent third parties (the ALP). To that end, taxable profit is

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331 Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 vs. Commission* [2006] ECR I-5479, para 95.

332 ibid recital 65.

333 ibid recitals 66-77.

determined according to the cost-plus pricing method by applying a flat-rate mark-up.

Secondly, on numerous occasions of these decisions the EC made reference to the ALP and the OECD TPG as being the point of reference for inter-party transactions. By way of example, in the Luxembourgish decision the EC states that in the area of transfer prices, this international principle (the ALP) is set out in Article 9 of the OECD Model Tax Convention (and, in more detail, in the OECD TPG). Since an analysis requires individual facts and circumstances to be taken into account, the OECD TPG does not recommend the use of 'safe harbours' (such as fixed margins). Moreover, the EC pointed out that the systematic application of the 5% mark-up without checking if it corresponds to the economic reality of the underlying services, departs from the correct application of the ALP thus giving coordination centres an advantage when compared to enterprises not qualifying for the scheme. We have learnt that the EC did not criticise the use of the cost-plus method as laid down under the OECD TPG but rather this systematic application.[334] Similarly in the Belgian decision, the EC stated that the advantage here derives from the fact that the tax administration refrains explicitly from monitoring the 'at arm's length' nature of operations between FSC and affiliated companies once the minimum mark-up is reached. This approach, together with a small mark-up, reduces the level of corporation tax compared with the conventional method for determining taxable income amongst independent entities.

At this point we note that the ALP as implemented in the respective Member State's domestic tax system was the departing point for the EC and was used as the reference framework. We also note that a fixed rate or 'safe harbour' is the derogation from the ALP because it does not reflect correctly the economic reality between independent parties. The EC questions the economic reality of the transactions, that is, that they do not reflect normal market conditions. The EC reiterated that the cost-plus method together with a fixed mark-up may lead to the economic reality being underestimated and therefore to the payment of less tax. We understand that, what determines the economic reality of a transaction is the ALP. A fixed mark-up is not really reflective of the ALP especially when the tax authorities do not check whether such a mark-up corresponds to the economic reality of the underlying services.

Lastly, as we have mentioned above, in the pending State aid cases the EC quotes case law,[335] and the previous EC's decisional practice,[336] on transfer pricing to

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[334] ibid para 57.

[335] Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 vs. Commission* [2006] ECR I-5479, para 95.

reinforce its arguments and seems to be invoking a precedent that the ALP is the benchmark or at least part of the reference framework. The EC further emphasises that the principle which is being applied is a general European legal principle of equal tax treatment which is reflective of the ALP. The EC interprets the paragraph of the quoted case law as meaning that if the method of taxation for intra-group transfers does not comply with the ALP and leads to a taxable base inferior to the one which would result from a correct implementation of that principle, it provides a selective advantage to the company concerned.[337] The paragraph quoted is the following,

> In order to decide whether a method of assessment of taxable income such as that laid down under the regime for coordination centres confers an advantage on them, it is necessary, as the Commission suggests at point 95 of the contested decision, to compare that regime with the ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition.

Even though we feel that in the light of the previous transfer pricing decisional practice the ALP may be used as a benchmark only when it forms part of the domestic tax system of Member State thus forming part of the reference system for the purposes of step 1 of the selectivity analysis, we find it very hard to agree with the EC's aforementioned interpretation of the case law. In our view the paragraph quoted by the EC does not necessarily state that any deviation from the ALP leads to a selective advantage but simply provides a comparability test, that is, that the scheme is compared with the ordinary tax system.

As pointed by Gunn and Lutz,[338] the EC does not appear to follow this three step approach, however, we argue that firstly, as we have seen above in *Gibraltar*, the EC need not follow this three step approach and need not expressly and specifically outline the reference system even though we feel that the identification of the ordinary tax system is a very important step. However, the EC mentions in paragraph 54 of its preliminary decision that the method of assessment of the taxable income needs to be compared to the ordinary tax

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336 Case C-45/2001 *French Headquarters and Logistics Centres* [2004] OJ L23 recitals 50 and 53; Case C-47/2001 *Germany - foreign companies coordination centres* [2001] OJ L177/17 recitals 46-47 and 50; Case C-48/2001 *Spain - Vizcaya coordination centres* [2003] OJ L31/26; Case C-49/2001 *Luxembourg - coordination centres* [2003] OJ L170/20; Case C-50/2001 *Luxembourg - Finance Companies* [2002]; Case C-15/2002 *Belgium - Coordination Centres* [2003] OJ L282/25 recitals 89-95; Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 vs. Commission* [2006] ECR I-5479, paras 96-97.

337 Case C-45/2001 French Headquarters and Logistics Centres [2004] OJ L 23 recitals 50.

338 Anna Gunn, Joris Luts, 'Tax Rulings, APAs and State Aid: Legal Issue' (2015) 24 EC Tax Review 119, 119–125.

system based on the difference between profits and losses of an undertaking carrying on its activities under normal market conditions. Furthermore, the EC goes on to say that market conditions may be arrived at through transfer pricing established at arm's length. Therefore, we infer that the EC is using the ALP as the benchmark or reference 'normal' tax system, which is the first step to take of the three step approach. In the *Amazon* decision it is explained that Article 164 of the Luxembourg Tax Code, which constitutes the legislative basis for transfer pricing in Luxembourg, implements the arm's length principle laid down in Article 9 of the OECD MC.[339] Hence the ALP is part of the national tax system, which is the relevant reference framework in examining the selectivity of national fiscal measures under the State aid rules.

We have seen how far the purposes of selectivity, the courts have established a three step approach. As one of the steps one must identify the normal regime applicable in the Member State concerned. This means that the normal regime must be part of a State's domestic law. The EC clarified in its final decision concerning the Netherlands that the reference system consists of the general Dutch corporate income tax system which has the taxation of the profits of all firms that are subject to tax in the Netherlands as a goal. Whilst the ALP is embedded in the domestic law of Luxembourg,[340] and the Netherlands,[341] it is not the same for Ireland (up to 2010). Therefore, one may question the EC's reasoning and reliance on the ALP vis-à-vis Ireland when technically it did not form part of the Irish 'normal' tax regime. It may be problematic for the EC to ascertain whether the ALP forms part of the reference system of a Member State where no transfer pricing rules exist.

To this effect, it is logical to assume at this stage, that if a principle does not form part of the normal tax system in question, consequently there can be no derogation from it. We have seen how the ALP has achieved an internationally recognised status but can it be considered as forming part of the normal tax system of a Member State within the EU without actual transposition of the ALP in its domestic law? The answer to this question may be achieved if we assume that there is an international tax regime with principles (such as the ALP), which are inherent in every national tax system. However, there is hardly any agreement that such international tax regime exists and even more so that such principles are inherent in every national tax system. According to Reuven Avi-Jonah,[342] he argues repeatedly that a coherent international tax regime exists,

339 *Alleged aid to Amazon by way of a tax ruling* SA.38944 C(2014) 7156 [2014] recital 59.
340 ibid.
341 *Alleged aid to Starbucks* SA.38374 C(2014) 3626 final [2014] recital 31.
342 Reuven S. Avi-Jonah, *International Tax as International Law* (Cambridge University Press 2007) Chapter 1.

embodied both in the tax treaty network and in domestic laws, and that it forms a significant part of international law (both treaty-based,[343] and customary international law). This thesis is quite controversial. Several international tax academics and practitioners in the United States have advocated the view that there is no international tax regime and that countries are free to adopt any tax rules they believe will further their own interests.[344] Other tax academics and practitioners have supported the view advocated above.[345]

6. Conclusions

Firstly, a State may not rely solely on Article 9 of a tax treaty concluded with another State to enforce the ALP but it needs to implement the ALP in its domestic law. That being established, for the purposes of the State aid rules as laid down under Article 107 of the TFEU, if the ALP is not transposed within a State's domestic tax system, it cannot be considered that the ALP forms part of the reference system of 'normal' tax system of the State. Moreover, we also conclude that whilst it is acknowledged that the ALP is the internationally recognised standard for determining the correct transfer price between related parties, it does not have the status of customary international law which would make the ALP directly applicable without the need for traditional means of transposition within the national legal systems. The EC clarify in its Final Notice that the ALP necessarily forms part of the EC's assessment of tax measures granted to group companies under Article 107(1) of the Treaty, independently of whether a Member State has incorporated this principle into its national legal

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343 By way of reminder, we have seen in chapter 1 of this article that a tax treaty does not give tax rights in itself, and according to Vogel, a State may not rely on Article 9 of the OECD Model Tax Convention alone without implementing such within its domestic law.

344 Graetz, Michael J., 'Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies'(2001) 26 Brooklyn Journal of International Law 1357; David H. Rosenbloom, 'Cross-Border Arbitrage: The Good, The Bad and The Ugly' (2007) Taxes - The Tax Magazine; David H. Rosenbloom, 'International Tax Arbitrage and the 'International Tax System' (2000), 53 *Tax Law Review* 137; Julie Roin, 'Competition and Evasion: Another Perspective on International Tax Competition' (2001) 89 *Georgetown Law Journal* 543; Tsilly Dagan, 'The Tax Treaties Myth' (2000), 32 NYU Journal of International Law and Policy 939; Mitchell A. Kane, 'Strategy and Cooperation in National Responses to International Tax Arbitrage' (2005), 53 Emory Law Journal 89.

345 Luca dell'Anese, 'Tax Arbitrage and the Changing Structure of International Tax Law' (2006); Diane M. Ring, 'One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage (2005) 44 Boston *College Law Review* 79; Shay N. Menuchin, 'The Dilemma of International Tax Arbitrage: A Comparative Analysis using the cases of Hybrid Financial Instruments and Cross-border leasing' (PhD thesis, London School of Economics and Political Science 2005); Hugh J. Ault, 'The Importance of International Cooperation in Forging Tax Policy' (2001), 26 Brooklyn Journal of International Law 1693; Paul R. McDaniel, 'Trade and Taxation' (2001), 26 Brooklyn Journal of International Law 1621; Richard J. Vann, 'International Aspects of Income Tax' in Victor Thuronyi (ed.), *Tax Law Design and Drafting* (Volume 2, 2000) 18; Philip R. West, 'Foreign Law in U.S. International Taxation' (1996), 3 Florida Tax Review 147.

system and in what form. It is used to establish whether the taxable profit of a group company for corporate income tax purposes has been determined on the basis of a methodology that produces a reliable approximation of a market-based outcome.[346]

With respect to the EC's transfer pricing decisional practice, the EC's 2004 Report clarified that to determine whether a tax scheme derogating from the normal system may constitute State aid, it must be established whether the resulting tax burden is lower than that which would have resulted from the application of the relevant Members States' normal taxation method. We therefore infer that in derogating from the normal tax method one must compare the tax burden of undertakings calculated by the normal tax method and the tax burden of undertakings calculated by the alternative method e.g. a fixed margin. In this respect, the non-adherence to the ALP between related parties will result in a lower tax burden when compared to undertakings which adhere to the ALP i.e. independent parties.

Furthermore, we conclude that for the purposes of selectivity test as one of the conditions of the State aid rules, the comparables for the purposes of the comparison test, are various. The EC needs to clarify against which undertakings must the comparability test be applied. Indeed, this is the purpose for selecting a reference framework in order to determine those undertakings, which are in a similar legal and factual position. Moreover, as demonstrated by the EC's decisional practice if a ruling allows taxpayers to use alternative methods to calculate taxable profits, inter alia, fixed margins for a cost plus method for determining an appropriate transfer price, that ruling may involve State aid. We further conclude that, tax rulings are selective in particular where, the tax authorities have discretion in granting administrative rulings, the rulings are not available to undertakings in a similar legal and factual situation, the administration appears to apply a more favourable discretionary tax treatment compared with other taxpayers in a similar factual and legal situation and the ruling has been issued in contradiction to the applicable tax provisions and resulted in a lower amount of tax.

Finally, the normal tax system requires related party transactions to be in accordance with the ALP and such transactions can only be examined against the ALP and not any other standard. The ALP already permits that special conditions adopted between related parties are replaced by market conditions which reflect the economic reality between independent parties. Thus, the introduction of the

[346] Case C-241/94 *French Republic vs. Commission of the European Communities* [1996] ECR I-4551 para 172.

PIMO may be unnecessary and the ALP is sufficient to establish normal market conditions.

THE FREE MOVEMENT OF THE POOR: THE LEGAL IMPLICATIONS OF A POLITICAL PROBLEM

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ABSTRACT[347]

Ever since the right to move and reside freely within the Union was extended to economically inactive Union citizens, the fear that such citizens would migrate in order to benefit from the social assistance system of the host state has emerged. This concern for 'benefit tourism' has become so forceful that it has led some Member States, to push for reform of the current rules regarding the Union's citizens access of the host state social assistance system.

This article examines the judgments of the Court of Justice of the European Union concerning the claims made by European citizens for social assistance in another Member State of which they are not nationals. It has been noted that, as opposed to older case law, the Court is more sensitive to Member State's recent political arguments which advocate against the conferment of such benefits. Yet, a difference in approach is noted depending on whether the EU citizen is a worker or a non-economically inactive individual.

N.B. This article was finalized prior to the delivery of Case C-308/14 ***Commission vs. United Kingdom****, dated 14 June 2016. It is for this reason that it has not been included in the article's text.*

KEYWORDS: EU LAW – FREE MOVEMENT – SOCIAL ASSISTANCE

[347] This article was reviewed by Dr. Anne Pieter van der Mei.

THE FREE MOVEMENT OF THE POOR: THE LEGAL IMPLICATIONS OF A POLITICAL PROBLEM

Justine Calleja

1. Introduction

Ever since the right to move and reside freely within the Union was extended to economically inactive Union citizens, the fear that such citizens would migrate in order to benefit from the social assistance system of the host state has emerged. This concern for 'benefit tourism' or 'social tourism' has become so forceful that it has led some Member States,[348] to push for reform of the current rules regarding the Union's citizens access of the host state social assistance system.

The fear for social tourism has not been backed by evidence that 'the main motivation of EU citizens to migrate and reside in a different Member State is benefit related as opposed to work or family related.'[349] This focus on benefit tourism can be viewed as emanating from the more recent lifting of work ban on Romanians and Bulgarians, or as an instance of 'scapegoating inherent in many policy responses to migratory phenomena.'[350] It could also be viewed as a manner of extending the criticism directed towards the recent austerity measures, thereby requiring the re-evaluation of 'the legitimate locus of control over public spending.'[351] More generally it can be perceived as one of the various manners of expressing distrust in the European project, whether this is warranted or not,[352] or also, as another instance of putting the blame on the Union for problems which need to be addressed at 'home'. It has also been argued that the fear of benefit tourism is in fact merely a fear and that no such mass migration will take place to the extent that the sustainability of the host state's welfare system is jeopardised. Yet this possibility cannot be entirely ruled out since, though minimal, there has been an increase in the number of

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348 Meghan Benton, 'Reaping the benefits? Social security coordination for mobile EU citizens' (2013) Migration Policy Institute Europe <http://www.migrationpolicy.org/sites/default/files/publications/Benton-ReapingBenefits-FINAL.pdf> accessed 8 February 2016. This article provides examples which evidence public anxiety regarding intra-European migration.

349 Herwig Verschueren, 'EU migrants and destitution: The ambiguous EU objectives' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing Limited 2015) 413.

350 Daniel Thym, 'The Elusive Limits of Solidarity: Residence rights of and social benefits for economically inactive Union citizens' (2015) 52 Common Market Law Review 17, 20.

351 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 889, 902.

352 Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 249, 260.

economically inactive individuals living and claiming benefits in another Member State[353].

The right to move and reside freely within the Union is laid down in article 21 of the Treaty on the Functioning of the European Union (Hereinafter referred to as 'TFEU'). This right is further developed in Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[354] The latter directive divides the Union citizen's stay in the host state into three stages: (i) up until three months (ii) from three months up to five years and (iii) from five years onwards. During the first temporal stage, the host state is not obliged to provide social assistance benefits to the Union citizen,[355] (unless he is a worker, which fact will be further explained in sections 1.1 and 2.1). On the other hand, once the Union citizen has resided legally for a continuous period of five years, he acquires the right to permanent residence. In obtaining such a right, the individual is deemed to have established a strong link,[356] with the host state, so much so that, if the need arises, he is entitled to the host state's social assistance benefits. It however remains unclear whether Union citizens can obtain these benefits during the second stage. This lack of clarity has garnered much discussion. On the one hand, if the Union citizen is allowed to gain access to such benefits during this stage, the right to move and reside freely could be much more easily put into practice. On the other hand, if access to such benefits is allowed so freely, then an unreasonable burden might be placed on the welfare system of the host state. The tension between the two opposing interests is reflected in Directive 2004/38, and is a recurring theme within this article.

Social assistance benefits, or as also referred to, minimum subsistence benefits, are non-contributory in nature. They are therefore provided to those who lack

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353 See in this regard Eva-Maria Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (European Parliamentary Research Service 2014) 21 <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140808/LDM_BRI(2014)140808_REV1_EN.pdf> accessed 10 January 2016. Reference is here also made to Michael Blauberger and Susanne K Schmidt 'Welfare migration? Free movement of EU citizens and access to social benefits' (2014) October-December 2014, Research and Politics 3 <http://rap.sagepub.com/content/sprap/1/3/2053168014563879.full.pdf> accessed 8 February 2016; and Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 207-208.

354 Council Directive (EC) 2004/38/EC concerning the right of EU citizens and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

355 ibid art 24(2).

356 The establishment of this link is discussed by Michael Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 148.

the basic means of subsistence, whether or not the beneficiaries have contributed to society via the payment of taxes.[357] The issue of benefit tourism and in general terms the free movement of the poor concerns the very basic tenets of a welfare state. Having been developed within the context of the nation state, the conferment of social assistance benefits was seen to be dependent on the prospective beneficiary having the nationality of that very state. This is because a national is traditionally believed to have an inherent bond with his nation state. Non-nationals on the other hand, do not have this bond and would usually need to comply with additional criteria for them to be entitled to such benefits.[358] It is primarily due to the absence of such a bond that the provision of social assistance benefits to non-nationals is considered to be 'unnatural' and therefore controversial.

With regards to coordination of social security, Regulation 883/2004 on the coordination of social security systems,[359] needs to be mentioned. The Union has enacted this regulation so as to facilitate the exportability of benefits when Union citizens move from one Member State to another. However, this regulation does not cover social assistance. Nevertheless, by basing itself on the concept of Union citizenship,[360] the right to free movement[361] and the principle of non-discrimination,[362] the Court of Justice of the European Union (Hereinafter referred to as the 'Court' or the 'CJEU') in the late 1990s, early 2000s provided a pathway through which Union citizens could attain access to the social assistance system of the host state. The Member States could no longer discriminate between nationals and non-nationals. This older case law (as analysed in section 1) was more recently followed by less progressive case law (as analysed in section 2). This article aims to analyse these judgments, especially the more recent ones, in order to give an account of how the Court changed its approach. It will attempt to pin-point the various factors which brought this change and consequently discuss whether such change can be justified.

2. Old Case Law

2.1 *Workers*

[357] Anne Pieter van der Mei, 'Regulation 1408/71 and Co-ordination of special non-contributory benefit schemes' (2002) 27 European Law Review 551, 553.

[358] Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 6.

[359] Council Regulation (EC) 883/2004 on the coordination of social security systems [2004] OJ L 166/1

[360] Treaty on the Functioning of the European Union [2012] OJ C326/47, art 20.

[361] ibid art 21.

[362] ibid art 18.

With economic integration being the cornerstone of the European Economic Community, it is not surprising that the free movement of workers was first to be developed. Initially, the Member States did not even favour such a movement, but the Commission[363] cunningly made use of its right of legislative initiative during the 1960s at a time when, the Member States were no longer too concerned that such movement would constitute a threat to their markets. The enacted Regulation No. 1612/68 spoke of the 'right of freedom of movement'[364] and laid out the rights which non-nationals working in host states could benefit from.[365] Yet it did not specifically tackle the workers' recourse to social assistance. Having moved in order to obtain employment, it was presumed that social assistance would not be resorted to.[366]

Prior to further defining the rights in question, the CJEU first devised a test which would determine whether the individual is to be considered a worker. It established that the 'worker' status had its own Community meaning, as otherwise national law could easily frustrate the application of Community rules.[367] The individual was to engage in 'effective and genuine activities'[368] in order to obtain such status. The Court never clearly defined what constitutes such activities. Yet, from a reading of the judgments, it is clear that the Court adopts a broad interpretation as the definition thereof provides the contours of 'the field of application of one of the fundamental freedoms guaranteed by the Treaty.'[369]

In ***Levin***,[370] the Court held that part-time work which provided the individual with remuneration lower than the established minimum wage, still constituted 'effective and genuine' work, even if such remuneration was to be supplemented with other means. In ***Kempf***,[371] the CJEU added that 'financial assistance drawn from the public funds' of the host state could also constitute the additional means. Had it been otherwise, the rights emanating from the free movement of workers would be forfeited once such assistance is requested. In this manner the CJEU confirmed that stated in ***Hoeckx***,[372] that is that the term 'social advantage'

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363 Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 26.

364 Council Regulation (EEC) 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers within the Community [1968] OJ L257/2, Preamble.

365 Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 126.

366 ibid.

367 Case C-53/81 *D.M. Levin vs. Staatssecretaris van Justitie* [1982] ECR I-1035.

368 ibid para17.

369 ibid.

370 ibid para 16.

371 Case C-139/85 *R. H. Kempf vs. Staatssecretaris van Justitie* [1986] ECR I-1741.

372 Case C-249/83 *Vera Hoeckx vs. Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECR I-973, paras 22.

as used in Regulation No. 1612/68 included social assistance benefits. This meant that, as per article 7(2) of Regulation No. 1612/68, these non-national workers could not be deprived of such benefits. Clearly, the Member States' fear that too big a burden would be imposed on their welfare system when providing non-national workers with social assistance benefits, was disregarded. Despite such a fear the Court, as just explained, still adopted an expansive interpretation of article 7(2).[373]

Therefore, this early case law clarified that once the non-national is carrying out effective and genuine work, he is entitled to all social advantages,[374] including social assistance. There is no waiting period for such entitlement, as claims can be made once employment starts.[375] Nevertheless, the non-national would need to satisfy the criteria set out by the host state law, just like any other host state national. Furthermore, the CJEU[376] has held that the individual's 'true' motive for seeking work in the host state was irrelevant. All that mattered was that 'effective and genuine' work was being carried out; 'they were not required to demonstrate their integration into the host society.'[377]

Van der Mei[378] rightly argues that the 'genuine and effective' test may be considered as the Court's manner of ensuring that Member States' concerns about the possible negative effect on their welfare system are addressed. It may be counter-argued that the broad manner adopted to interpret such a phrase, evidences that these concerns are being largely disregarded. The Court clearly considers the free movement of workers as an opportunity for individuals to improve their living conditions[379] and has strived to put into practice the objective (of free movement of workers) laid out in the Treaty (now article 45

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373 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1245, 1246. See also Síofra O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe?' (2008) 27 Yearbook of European Law 167, 170-171.

374 The Court has given the following definition of social advantages: 'all those [advantages] which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community'. See for instance Case C-249/83 *Vera Hoeckx vs. Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout* [1985] ECR I-973 para 20.

375 Eva-Maria Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (European Parliamentary Research Service 2014) 7-12.

376 Case C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187.

377 O'Leary Síofra O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe?' (2008) 27 Yearbook of European Law 167, 171.

378 Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 130-131, 177, 452-454. O'Leary Síofra O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe?' (2008) 27 Yearbook of European Law 167, 172.

379 Case C-53/81 *D.M. Levin vs. Staatssecretaris van Justitie* [1982] ECR I-1035, para 15.

TFEU) and Regulation No. 1612/68 (now replaced by Regulation 492/2011[380]).[381] Therefore, the test and the manner in which it is applied seeks to ensure that whilst Member States are not obliged to confer social assistance benefits on any non-national who carries out employment activities in their territory, if that non-national is in fact carrying out genuine and effective work, he must be provided with financial assistance from the same welfare system to which he is contributing. In this manner, the conflicting interests are taken into consideration and attempt is ensured to balance them out.

2.2 *Economically Inactive*

The non-national workers, through their employment and payment of taxes, contribute to the social security system of the host state. They do not necessarily contribute as much as they actually obtain in benefits,[382] but at least this 'contribution' element is present. It is upon such basis that one can understand why this 'market citizenship', as largely developed by the CJEU, did not (at least at that time) raise too much concern.[383] A more controversial development has been that concerning economically inactive citizens.

In the early 1990s, three directives[384] (to be later on referred to as the 1990s directives) were adopted. Most importantly, Directive 90/364/EEC[385] on the right of residence, signified that Member State nationals had the right to reside within other Member States, subject to conditions. The fear of benefit tourism led the Member States to restrict this right to individuals covered by health

380 Council Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

381 Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 451.

382 Herwig Verschueren, 'EU migrants and destitution: The ambiguous EU objectives' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing Limited 2015) 420.

383 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1246. Hailbronner holds that Member States accepted the expansive method of interpretation adopted by the Court with regards to free movement of workers because the initial claim that such freedom would constitute a considerable burden on the welfare system of the host state.

384 These directives are the following: (1) Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity; (2) Council Directive 90/364/EEC of 28 June 1990 on the right of residence; and (3) Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students. The last directive was adopted after the Court, in Case C-295/90 *European Parliament vs. Council of the European Communities* (1992) had annulled Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students.

385 Countil Directive 90/364/EEC of 28 June 1990 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing 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.

insurance and having sufficient resources, so that no recourse to the host state's social assistance system takes place – as per Article 1 of Directive 90/364/EEC. Moreover, the subsequent signing of the Treaty on European Union meant that EU citizenship was established (via then article 8 EC, now article 20 TFEU), and the right of EU nationals to move and reside within the Member States (via then article 8a EC, now article 21 TFEU) was formally inserted in the Treaty text. Member States subjected this latter freedom to 'limitations and conditions laid down in the Treaty and by the measures adopted to give it effect'[386], thus meaning that this right was not unconditional.

In ***Martínez Sala***, a Spanish national, had lived and worked in Germany for more than ten years at various intervals.[387] Ms Martínez Sala had applied for a child-raising allowance but her request was rejected because she did not have German nationality, a residence entitlement or a residence permit.[388] She had been authorised and was lawfully residing in Germany but she did not possess a specific type of residence permit which would allow her to receive the benefit.[389] The CJEU[390] held that once an EU non-national lawfully resides within another Member State, the provisions on European citizenship, including the principle of non-discrimination on grounds of nationality (then article 6 TEC, now article 18 TFEU), are triggered. This would therefore mean that the host state is not allowed to deprive the Union citizen, in this case Ms Martínez Sala, of benefits on the ground that she does not possess a specific document which nationals of the host state are not required to have.[391]

This approach was then confirmed in ***Grzelczyk***.[392] Mr Grzelczyk was a French national studying and residing in Belgium. He successfully maintained himself for the first three years of studies, but during the last year he was no longer able to do so and therefore applied for the Belgian minimum subsistence benefit called the 'minimex.'[393] Though initially granted, the benefit was later withdrawn on the basis that Mr Grzelczyk was a student and not a worker.[394] Belgian law had extended entitlement to the minimex only to persons to whom Regulation No. 1612/68 applied, that is to workers.[395] In this judgment the Court held that, the abovementioned articles 6 and 8 TEC (articles 18 and 20 TFEU respectively)

386 Article 8c of the then Treaty on European Union.
387 Case C-85/96 *María Martínez Sala vs. Freistaat Bayern* (1998) para 14.
388 ibid paras 15-16.
389 ibid paras 49-50.
390 ibid paras 61-62.
391 ibid para 63.
392 Case C-184/99 *Rudy Grzelczyk vs. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2001) para 32.
393 ibid paras 10-11.
394 ibid paras 11-12.
395 ibid para13.

did not allow the discriminatory practice whereby the non-national, lawfully residing in the host state, upon a request for a social assistance benefit, would be subjected to conditions (that is requiring him to be a worker) which nationals in the same position would not be subjected to.[396]

The ***Trojani*** judgment further developed this case law and can be said to be the most controversial of the three judgments. Mr Trojani, a French national living in Belgium, resided in a Salvation Army hostel whilst undertaking a personal socio-occupational reintegration programme. Since he lacked resources, Mr Trojani applied for the minimex. The Court in this case held that economically inactive citizens like Mr Trojani, because of their Union citizenship, can directly rely on article 18 TEC[397] (now article 21 TFEU), so as to enjoy a right of residence in the host state.[398] It did acknowledge that such a right was subjected to the requirement that the Union citizen has sufficient resources to avoid becoming a burden on the social assistance system of the host state, as per article 1 of Directive 90/364/EEC. Yet, it went on to hold that though it was clear that Mr Trojani failed to satisfy this condition (as he was in fact requesting a social assistance benefit), it did not mean that he could not invoke the principle of non-discrimination (now article 18 TFEU) once he lawfully resided within the host state.[399] Therefore, as per this case law, an economically inactive non-national lawfully residing in the host state (even if such residence is not based on Union law), gains access to the latter's social assistance system, as otherwise, discrimination on the grounds of nationality would result.[400]

Much criticism has been directed towards this case law. In all the three judgments, the Court held that for the articles in question (that is now articles 18, 20 and 21 TFEU) to be applied, the circumstances at stake need to be within the scope of application *ratione materiae* of Community law. However, the Court has not explained in a clear manner how this was so in the three cases. In ***Martínez Sala*** in order to explain how the child-raising allowance in that case fell within the scope *ratione materiae* of Community law, the Court in the fourth question which dealt with the issue of non-worker and social assistance, made reference to the answers given to the first, second and third questions, which tackled the issue of workers and concerned Regulation No. 1612/68. The first three questions were referred to and considered as providing the needed answers when these did not concern economically inactive individuals as question four

396 ibid para 46.
397 This article laid out the EU citizen's right to move and reside freely within the territory of Member States.
398 Case C-456/02 *Michel Trojani vs. Centre public d'aide sociale de Bruxelles (CPAS)* (2004) paras 30-31.
399 ibid para 40.
400 ibid para 44.

did.[401] In ***Grzelczyk*** the Court considered the exercise of the fundamental freedoms guaranteed by the Treaty and the right to move and reside freely in another Member State to be one of those situations which fall within the scope *ratione materiae* of Community law. In essence, this reasoning is sound. However, one is reminded that the aforementioned 1990s directives made it explicitly clear that the right to residence was subjected to the 'sufficient resources' requirement. In this regard, it is argued that the Court deliberately skipped this requirement (which clearly limited the fundamental freedom and the right relied on as above mentioned) in order for it to come to the conclusion that the circumstances at stake where within the scope *ratione materiae* of Community law.[402] The most perplexing conclusion is however found in ***Trojani***. It remains unclear[403] how lawful residence based on national law (as in that case the Court made it clear that Mr Trojani did not fulfil the requirements laid out in Directive 90/364/EEC[404]) was found to be within the Treaty's scope.

It has been argued that the Court made use of the Union citizenship concept and the principle of equal treatment in order to develop this case law in a manner which clearly disregards the financial requirements, as laid out in the 1990s directives, which the Union citizen should satisfy. This was so despite the fact that then article 12 TEC[405] (now article 18 TFEU) clearly recognised the possibility of having special provisions (such as the 1990s directives) which would constitute an exception to this general principle of non-discrimination[406]. As for the Union citizenship concept, the Court seems to have grasped this concept and developed it upon the assumption that its introduction rendered the conditions laid out in Directive 90/364/EEC inapplicable[407]. Why the Court felt

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401 Case C-85/96 *María Martínez Sala vs. Freistaat Bayern* (1998) para 57. See also Gareth Davies, 'The High Water Point of Free Movement of Persons: Ending Benefit Tourism and Rescuing Welfare' (2004) 26 Journal of Social Welfare and Family Law 211, 217. Davies calls the Court's attempt in *Martínez Sala* as sophistry, that is an illogical method of reasoning. Reference is here also made to Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1254-1255.

402 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1250.

403 ibid 1251.

404 Case C-456/02 *Michel Trojani vs. Centre public d'aide sociale de Bruxelles (CPAS)* (2004) paras 33, 36 and 40.

405 The text of article 12 of the Treaty Establishing the European Community can be found on the following link <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT> accessed 15 January 2016.

406 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1247-1249, 1251-1252. See also Anne Pieter van der Mei, 'Union citizenship and the 'De-Nationalisation' of the Territorial Welfare State' (2005) 7 European Journal of Migration and Law 203, 209, wherein van der Mei has rightly held that the Court seems to consider such conditions as alternative rather than absolute conditions.

407 Refer to: Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review, 1250 and Gareth Davies, 'The High Water Point of Free

that the introduction of this concept[408] brought about such a far-reaching change[409] remains unclear.

In ***Grzelczyk*** and ***Trojani***, the Court heavily restricted the Member States' power to withdraw or renew the residence permit conferred on the economically inactive individual by stating that 'in no case may such measures [that is the withdrawal or non-renewal of the residence permit] become the automatic consequence'[410] of resort to social assistance. Furthermore, the Court held that, all the three 1990s directives require Member States to act with a certain degree of financial solidarity in such situations, especially if the beneficiary's difficulties are temporary.[411] Hailbronner[412] insists that this clearly goes against the spirit of the three 1990s directives, as the requirement of having sufficient resources is clear. Verschueren[413] holds that the Court was merely adopting its usual functional approach, in order to give substance to the right to reside and move freely within the Union territory. Van der Mei[414] argues that in view of the need to act with a 'certain degree of financial solidarity'[415] it is probable that, had Mr Grzelczyk made a request for social assistance prior to his final year, rather than during his final year (which is what he did), the Court would not have come to the same conclusion. The author rightly holds that ***Trojani*** does not change the outcome of ***Grzelczyk***. However, it is argued that in ***Trojani***, the Court directed the Member State to act with more than just a limited degree of financial solidarity. This is because Mr Trojani wished to benefit from the host state's social assistance system, possibly for an unlimited period of time.

Movement of Persons: Ending Benefit Tourism and Rescuing Welfare' (2004) 26 Journal of Social Welfare and Family Law 219.

408 O'Leary (n 28) 16, in fact argues that it this concept has only 'been used to broaden the scope of the non-discrimination principle'.

409 Case C-184/99 *Rudy Grzelczyk vs. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2001) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999CJ0184&qid=1456659831648&from=EN> accessed 15 January 2016, para 43 and Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* (2004) para 35.

410 Case C-184/99 *Rudy Grzelczyk vs. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2001) para 43 and Case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* (2004) para 45.

411 Case C-184/99 *Rudy Grzelczyk vs. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* (2001) para 44.

412 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review.

413 Herwig Verschueren, 'EU migrants and destitution: The ambiguous EU objectives' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing Limited 2015) 430.

414 Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 209-210.

415 As opposed to an unlimited one.

The Court's '*effet utile*'[416] approach would generally be encouraged. However, seen within the context of the then three 1990s directives, it is argued that the Court may have been too over-enthusiastic in its development of the free movement of economically inactive Union citizens, thereby leading to a neglect of the legislator's intention.[417] In this regard, the Court has been criticised for using vague and wide concepts, such as Union citizenship and the principle of equal treatment, in order to open up the host state's social assistance system to economically inactive Union citizens.[418]

3. New Case Law

3.1 *Workers*

The worker's right to reside in the host state still conceptually arises from article 45(3)(c) TFEU. However, it nowadays also features in Directive 2004/38. As mentioned in the introduction, the latter directive presents three temporal stages of the right to reside, which consequently determine the right to social assistance. However, such temporal divisions do not affect the worker's right to social assistance. As per the old case law, once it has been established that the non-national is carrying out 'effective and genuine'[419] activities, he attains the worker status and is entitled to social assistance, just like any other national worker, and this as per article 7(2) of Regulation 492/2011[420]. Therefore, the non-national who has attained the worker status is allowed access to social assistance benefits even during the first three months of residence.[421] When given the chance a Union citizen will strive to hold on to such a status, as the latter, once attained, automatically provides the individual with the 'right to residence [and consequently the right to social assistance] *without having to fulfil any other condition*.'[422]

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[416] Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1258.

[417] Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 142.

[418] Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1266.

[419] For one of the most recent judgments which upholds such a requirement, see for instance Case C-46/12 *L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte* (2013) para 42.

[420] Council Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

[421] Eva-Maria Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (European Parliamentary Research Service 2014) 12 <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140808/LDM_BRI(2014)140808_REV1_EN.pdf> accessed 10 January 2016.

[422] Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 927. Italics as per original text. See also

When compared to the other categories of individuals outlined in article 7(1)(b) to (d) of Directive 2004/38, the worker status (article 7(1)(a)) is certainly a 'privileged' one. This becomes even more evident when one considers the ***Alimanovic*** judgment. Ms Alimanovic and her children, all Swedish nationals, had moved to Germany.[423] Mother Alimanovic and her eldest daughter had worked in temporary jobs in Germany lasting less than a year.[424] For the period of six months from the time when they became unemployed, the two were provided with subsistence allowances for the long-term unemployed.[425] Once those six months elapsed, the two were no longer considered to be workers as per the German law and article 7(3)(c) of Directive 2004/38. The relevant German law held that they could no longer claim such subsistence allowances.[426] The loss of the worker status was confirmed by the Court,[427] which directly applied article 7(3)(c); once six months had passed from when their last employment had ended, the Alimanovics no longer benefitted from the worker status and thus were no longer entitled to the social assistance benefit in question.

It might have been expected of the Court in ***Alimanovic*** to carry out an assessment in order to determine whether article 7(3)(c) constitutes a rightful exception to the primary law concerned (that is article 45 TFEU), and more broadly, whether it is in line with the general principles of Union law. Article 7(3)(c) is a clear instance of Member States displaying the limits of their willingness to act with solidarity towards another Member State's national, and thereby setting conditions to the right to free movement and residence, as per article 1(a) of Directive 2004/38. Therefore, it is argued that had not the Court arrived to the conclusion it did in ***Alimanovic***, it would have been heavily criticised on the basis that it had ignored the legislator's will. Furthermore, though the approach as laid out by the legislation in question hinders a citizen's access to social assistance benefits, it is clearly in line with the need to ensure that individuals exercising their right to reside do not become an unreasonable burden on the social assistance system of the host state during their initial period of residence.[428]

in this regard Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) para 75.

423 Case C-67/14 *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and Others* (2015) para 25.

424 ibid para 27.

425 ibid para 28.

426 ibid paras 34-35.

427 ibid para 55. The Court then moves on to assess whether the Alimanovics could acquire a right to reside on the basis of another article of Directive 2004/38. That part of the judgment will be discussed in section 2.3 below.

428 This is as per recital 10 of Directive 2004/38's preamble. As per the same recital, this 'initial period of residence' entails periods in excess of three months.

3.2 *Economically inactive*

Despite the criticism[429] directed at the Court as explained in section 1.2, the Member States[430] refrained from outrightly barring economically inactive Union citizens from gaining access to the host state's social assistance benefits prior to the attainment of the right to permanent residence (that is for the period between 3 months and 5 years.)[431]) Meduna notes that, as opposed to current times, when Directive 2004/38 was being drafted, there was barely any mention of the fear of social tourism.[432] Yet, the text of the Directive itself evidences that, despite the lack of actual mention during the discussions, the Member States were well aware of such a possibility.

This Directive is torn between, on the one hand, wanting to safeguard the interests of Member States and, on the other hand, granting the Union citizens the right to move and reside freely within the Union's territory. Article 7(1)(b) requires the economically inactive Union citizen to have sufficient resources in order for him not to become a burden on the social assistance system of the host state and to have comprehensive sickness insurance cover in the host state. Article 14(2) then holds that Union citizens shall only have the right of residence as per article 7, if they comply with the conditions set out therein. These two articles therefore aim to safeguard the Member States' concern. On the other hand, article 14(3) holds that an expulsion measure shall not be the automatic

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429 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review.

430 The Commission originally barred such access (unless the host Member State was nevertheless willing to provide such benefits) until the attainment of the right to permanent residence, as evidenced in article 21(2) of *Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001PC0257&from=EN> accessed 31 January 2016. The Commission then subsequently removed such restriction mainly so that it would be in line with the Court's case law, as evidenced in page 7 and 8 of *Amended proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003PC0199&from=EN≥ accessed 31 January 2016. As a response, the Council had only specifically requested that economically inactive Union citizens are not allowed access to social assistance benefits for the first three months of residence. This is reflected in the final version of article 24(2) of Directive 2004/38 (n 8). See in this regard Michal Meduna, 'Institutional Report' in Ulla Neergaard, Catherine Jacqueson & Nina Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges* (DJØF Publishing 2014) 263.

431 This will be the period towards which we direct our focus as the Directive, unlike with regards to the other two temporal stages, fails to make it clear whether the Union citizen is entitled to such benefits.

432 Michal Meduna, 'Institutional Report' in Ulla Neergaard, Catherine Jacqueson & Nina Holst-Christensen (eds), *Union Citizenship: Development, Impact and Challenges* (DJØF Publishing 2014) 264.

consequence of a Union citizen's recourse to the host state's social assistance system. Moreover, article 8(4) holds that Member States may not lay down a fixed amount which they regard as 'sufficient resources', but they must take into account the personal situation of the person concerned. In addition to this, the just mentioned article 14(2) ends with the caveat that the verification as to whether the Union citizen complies with the requirement laid out in article 7 is not to be carried out systematically. Article 14(3) and 8(4), together with part of article 14(2)[433] are clearly trying to ensure that the Union citizen's right to move and reside freely within the Union's territory is not heavily restricted. Apart from this clear 'conflict' between the two opposing interests, after the enactment of the directive, it was still not clear what, for instance, constituted an 'unreasonable burden'.[434] All this lack of clarity signified that it was now up to the Court to give substance to the Directive.[435]

In ***Brey,*** Mr Brey and his wife were two German nationals who moved to Austria.[436] Mr Brey received an invalidity pension and a care allowance from the German state. His wife used to receive a basic benefit in Germany, but upon moving to Austria, she was no longer entitled to it and thus no longer received it.[437] Mr. Brey applied for a compensatory supplement but the relevant Austrian authority refused such an application on the basis that, due to his low retirement pension, Mr Brey did not have the sufficient resources in order to lawfully reside in Austria.[438] The Court held that articles 7(1)(b), 8(4), and article 24 (dealing with the right to equal treatment) of Directive 2004/38 preclude national legislation (such as the Austrian legislation in this case) which ties the attainment of a special non-contributory benefit (to be referred to as SNCB)[439] to

[433] The tension between the two concerns within article 14(2) itself has also been noted by Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 904.

[434] Herwig Verschueren, 'EU migrants and destitution: The ambiguous EU objectives' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing Limited 2015) 432.

[435] Daniel Thym, 'The Elusive Limits of Solidarity: Residence rights of and social benefits for economically inactive Union citizens' (2015) 52 Common Market Law Review 23. See also Eva-Maria Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (European Parliamentary Research Service 2014) 20.

[436] Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) para 16.

[437] ibid.

[438] ibid para 17.

[439] For the purposes of clarity, it is important to point out that SNCB have concurrent attributes of social security benefits and social assistance benefits, as per article 70 of Regulation 883/2004. Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (now replaced by Regulation 883/2004 which, unlike Regulation 1408/71, is not restricted to employed persons and their families) was enacted so as to be able to coordinate the social security systems of the Member States. Most importantly it was enacted so as to allow for the exportability of benefits (as per article 10 of Regulation 1408/71), as otherwise Union citizens would be discouraged in their pursuit of employment in other Member States if, upon doing so, they

the fulfillment of a condition attached to the right to reside,[440] that is, the need to ensure that the individual has enough resources so as not to apply for the said benefit. This was so, in as much as, the national legislation automatically barred the economically inactive individual from gaining access to such benefits once he did not have the sufficient resources. The Court acknowledged the tension between the Member State's concern and the individual's needs[441] (that is, the two opposing interests which have been just explained). It therefore presented a two-tiered test. The CJEU[442] argued that in line with articles 7(1)(b) and 8(4) of the directive, and the principle of proportionality, the personal circumstances characterising the individual situation of the person concerned need to be examined (test 1). The examination carried out in this first test was consequently to be taken into consideration when carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole (test 2). The Court shed light as to what factors Member States need to take into consideration when assessing the personal situation of the individual.[443] With regards to whether the specific request for a benefit constituted an unreasonable burden, the Court put forward one criterion which may be taken into consideration, that is, 'the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State.'[444] Yet it then pointed out that it was up to the national court to decide whether this specific request for the benefit constituted an unreasonable burden.[445]

It is observed that the Court in this judgment, by means of the two-tiered test, tried to give due regard to the opposing interests.[446] These two interests are the

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would thereby forfeit any benefits accrued in the home state. Despite the fact that social assistance benefits were not covered by this regulation, the CJEU, in the 1970s and 1980s developed a wide definition of social security benefits and SNCB which effectively encompassed also social assistance benefits, thereby making the latter exportable. This led to the legislature's intervention in 1992. From then onwards SNCB were no longer exportable as they were only to be distributed in the place of residence. As such benefits were not usually based on payment of contributions and were targeted at providing a means of subsistence, it therefore made sense to tie the provision of such benefits to the place of residence. See in this regard Herwig Verschueren, 'Free movement or Benefit Tourism: The Unreasonable burden of *Brey*' (2014) 16 European Journal of Migration and Law 147, 159-161.

440 Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* (2013) paras 29 and 80.

441 Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* (2013) paras 53, 57 and 63.

442 ibid para 76.

443 ibid para 78.

444 ibid.

445 ibid para 79.

446 See for instance Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) paras 53 and 55. See in this regard also Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 259, and Daniel Thym, 'The Elusive Limits of Solidarity: Residence rights of and social benefits for economically inactive Union citizens' (2015) 52 Common Market Law Review 28.

host state's concern of the burden imposed on its social assistance system once granting the benefit to the Union citizen, as opposed to the citizen's need for benefits. Such an approach meant that when viewing the judgment as a whole, the Court considered the two opposing interests of being more or less of equal importance. Moreover, in listing the multitude of factors (above referred to) to be taken into account whilst carrying out the two tests, the ultimate result was that the Court did not provide clarity[447] as to when there is actually an unreasonable burden. All the factors to be taken into consideration brought about more confusion rather than clarity.

In ***Brey*** the Court affirmed that though being designated as SNCB under Regulation 883/2004 such benefits constituted social assistance benefits within the context of article 7(1)(b) of Directive 2004/38. The definition of 'social assistance' under the two legal instruments was not necessarily the same as the two pursued different objectives.[448] For the purposes of Directive 2004/38, any benefit which provided the individual with resources sufficient to meet his own basic needs, and which, because of that fact, may render that person a burden on the host state's public finance (thus impacting on the overall level of assistance provided by the host state)[449] constituted a social assistance benefit. This was so regardless of the formal structure of the benefit in question.

This was then confirmed in ***Dano***.[450] The benefit in this case was an SNCB as per Regulation 883/2004[451] which was also to be considered as a social assistance benefit as per Directive 2004/38.[452] Elisabeta Dano and her young son were Romanian nationals residing in Germany.[453] Ms Dano obtained child benefits.[454] Additionally, she applied for a grant of benefits by way of basic provision for jobseekers under the specific German law, and this despite the fact that though her ability to work was not questioned, there was nothing to indicate that she

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447 In this regard see Herwig Verschueren, 'Free movement or Benefit Tourism: The Unreasonable burden of *Brey*' (2014) 16 European Journal of Migration and Law 147, 159.

448 Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) paras 58, 50, 57.

449 Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) para 61. An interesting point of discussion is whether, by adopting such a definition for certain SNCB, the CJEU was thereby adding a further condition (that is requiring the residence not only to be factual but also in line with the requirements laid out in article 7(1)(b) of Directive 2004/38) which needed to be considered prior to the conferment of such SNCB – see in this regard Herwig Verschueren, 'Free movement or Benefit Tourism: The Unreasonable burden of *Brey*' (2014) 16 European Journal of Migration and Law 162, 165-166, 169, 179. See also Dominik Düsterhaus, 'Timeo Danones et dona petentes European Court of Justice (Grand Chamber), Judgment of 11 November 2014, Case C-333/13, Elisabeta and Florin Dano v Jobcenter Leipzig' (2015)11 European Constitutional Law Review 121, 132-134.

450 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) paras 63 and 83.

451 ibid para 47.

452 ibid para 63.

453 ibid paras 35, 37.

454 ibid para 38.

was looking for a job or that she entered Germany in order to do so.[455] Such an application was rejected on the basis of the German law, which held that foreign nationals who had entered the German territory in order to obtain social assistance or whose right of residence arose solely out of the search for employment did not have a right to social assistance.[456] The referring court confirmed that on the basis of this German law, it was clear that Ms Dano and her son were not entitled to the benefits in question. It however doubted whether the German law was to be considered invalid when taking into consideration article 4 of Regulation 883/2004 (which encompassed the right to equal treatment), article 18 TFEU (that is the principle of non-discrimination) and article 20 TFEU (that is the general right to reside).[457]

In ***Dano***, the Court does acknowledge the importance of articles 18 to 21 TFEU[458] and the rights laid out therein. Yet it focuses on the fact that such articles allow for the establishment of conditions and limitations to these same rights.[459] It holds that the principle of non-discrimination as per article 18 TFEU 'is given more specific expression in Article 24'[460] of Directive 2004/38 and proceeds to resolve the issue entirely on the basis of that Directive. The CJEU in ***Dano*** therefore makes a clear distinction between Treaty rights and the rights laid out in the Directive, but basis its reasoning on the latter. Though not explicitly excluding it,[461] the possibility of relying on the principle of non-discrimination as per article 18 TFEU despite the fact that the right to reside emanates from national law (as per the old case law discussed in section 1.2 above), seems no longer to be possible.[462] This is because as per ***Dano***, it seems that article 18 TFEU no longer provides complete safeguard from unequal treatment within the context of the right to move and reside freely, as the Court[463] appears to have narrowed down article 18's application only to those instances where article 24

455 ibid paras 39, 42,66.
456 ibid para 43,26.
457 ibid para 43.
458 ibid paras 57-59.
459 ibid para 60.
460 ibid para 61.
461 Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 258. See also Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 915, 931-932.
462 mr. dr. Sjoerd Claessens, 'Dano, or how the CJEU limits rights granted to EU citizens' (*Maastricht Law News & Views*, 13 November 2014) <http://law.maastrichtuniversity.nl/newsandviews/dano-or-how-the-cjeu-limits-rights-granted-to-eu-citizens/> accessed 5 February 2016. See also Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 932.
463 Case C-333/13 *Elisabeta Dano and Florin Dano v s.Jobcenter Leipzig* (2014) para 61.

of Directive 2004/38 is applicable.[464] The Court in ***Dano*** held that a Union citizen can rely on the principle of equal treatment as per article 24 only if his residence in the host state complies with the conditions of Directive 2004/38.[465]

In the case of Ms Dano, who had been residing in the host state for more than three months but less than five years,[466] the sufficient resources requirement as per article 7(1)(b) had to be complied with. The Court held that if Union citizens who do not have a right of residence under Directive 2004/38 were allowed to claim benefits just like any other host state national, an objective of the Directive would have been disregarded. The objective in question is that of preventing Union citizens from becoming an unreasonable burden on the social assistance system of the host state.[467] The Court held that it was clear that article 7(1)(b) seeks to prevent economically inactive Union citizens from using the host state's welfare system to fund their means of subsistence.[468] The CJEU agreed with the Advocate General's statement that any emerging unequal treatment between the Union citizens and the host state nationals with regards to the conferment of the SNCB in question, was an inevitable consequence of Directive 2004/38. More specifically, a consequence of article 7(1)(b) of this directive which establishes that the Union citizen is to have sufficient resources in order not to become a burden on the social assistance system of the host state.[469] The Court held that on the basis of this article, the Member States must have the possibility of refusing to confer benefits upon economically inactive Union citizens who exercise their right to freedom of movement (even if they do not have sufficient resources to claim a right of residence) only in order to obtain access to another Member State's social assistance system.[470] If the Member States did not have such a possibility, the conferred SNCB would allow the individuals to be able to comply with the sufficient resources requirement.[471] When taking into consideration all of the above it is agreed with Düsterhaus when he holds that 'the Court's interpretation finds a sufficiently solid basis in the provisions and objectives of the Citizenship directive.[472]

The CJEU came to the conclusion that the equal treatment articles in Regulation 883/2004 (article 4 thereof) and Directive 2004/38 (article 24(1) thereof),

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464 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 909.

465 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) para 69.

466 ibid para 73.

467 ibid para 74.

468 ibid para 76.

469 ibid para 77.

470 ibid para 78.

471 ibid para 79.

472 Dominik Düsterhaus, 'Timeo Danones et dona petentes European Court of Justice (Grand Chamber), Judgment of 11 November 2014, 132.

together with article 7(1)(b) of the latter directive (that is the sufficient resources requirement) do not preclude national legislation which, like the German law in question, excludes the conferment of SNCB to economically inactive citizens who do not have a right to reside as per Directive 2004/38, despite the fact that host state nationals are entitled to such SNCB. This interpretation emanates from the fact that article 24(1) of Directive 2004/38 grants the entitlement to equal treatment to all Union citizen **as long as they reside on the basis of the Directive.**[473]

This judgment has been referred to as the 'common sense'[474] judgment by UK Prime Minister David Cameron, whilst being heavily criticised by those who had welcomed the Court's progressive attitude in the older case law. There is no denying that when compared to the older case law, the Court in ***Dano*** focuses more on the Member State's concern of the possible burden on its social assistance system rather than the individual's need to obtain the benefits in question. Yet, one cannot criticise the Court for arriving to the conclusion that Member States can deny benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain access to another Member State's social assistance system.[475] Setting aside any nationalists' rhetoric of 'we[476] do not want to pay for them',[477] had the court come to a different conclusion, the sustainability of the host state's social assistance system would be in peril – if not in the short term, in the longer term.[478] This would be an inevitable consequence if many Union citizens rely on the host state's social assistance system without being willing or able to contribute.

4. Further Comments

4.1 *The Individual Assessment Test*

Considering the emphasis put on the individual assessment test in *Brey* wherein the Court provided concrete examples of which criteria should be considered in

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473 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) paras 67-69.

474 Bbc News, 'Eu 'Benefit Tourism' Court Ruling Is Common Sense, Says Cameron' (11 November 2014) <http://www.bbc.com/news/uk-politics-30002138> accessed 5 february 2016.

475 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) para 78.

476 Nationals of the host state.

477 Union citizens claiming benefits in the host state.

478 dr. Anne Pieter van der Mei, 'Alimanovic: social tourism and jobseekers' (*Maastricht Law News & Views*, 27 March 2015) <http://law.maastrichtuniversity.nl/newsandviews/alimanovic-social-tourism-and-jobseekers/> accessed 5 February 2016.

this regard,[479] it was felt necessary to consider whether this test still remains important when taking into consideration ***Dano*** and ***Alimanovic***. The individual assessment test is carried out in order to determine whether the claimant should be entitled to social assistance benefits. However, in two specific instances it remains clear that such a test need not be carried out, as the legislator has made a choice thereby ruling out such a need. This is the case of situations covered by article 24(2) or article 7(3) of Directive 2004/38. With regards to article 24(2) the legislator has made it clear that the host state shall not be obliged to confer entitlement to social assistance during the first three months of residence (except for in the case of workers, as explained in section 2.1) or, the longer period provided for in article 14(4)(b). When the situation is covered by article 7(3) it means that the directive has already taken into consideration the individual circumstances of the case and so such an assessment is not needed, and this as per ***Alimanovic***.[480]

Shuibhne[481] explains that the relevance of the individual assessment test lies in the fact that without such test, the implementation of the rights to residence (which consequently impacts on the implementation of the right to social assistance) becomes more akin to the 'standard immigration rules', thus moving away from the '*rights*-based singularity of a transnational order rooted in citizenship'. Some have held that this individualised approach ensures proper protection of this right to reside and entitlement to social assistance[482]. Others like Verschueren[483] point to the administrative costs involved, and go so far as to argue that the costs emanating from the carrying out of such a test could themselves be considered an unreasonable burden. More significantly, this multitude of considerations and others which may be added to those mentioned in *Brey*,[484] gives rise to further confusion rather than the desired legal certainty. How do we distinguish between, ties between the host state and the non-national which matter, and those which do not? Where do we draw the line?

The Court in ***Dano*** neither denounced nor upheld the individual assessment test laid out in ***Brey***. It merely points to the 'findings of the referring court'[485] thus presumably meaning that an individual assessment had been carried out by he

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479 Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) para 78.

480 Case C-67/14 *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and Others* (2015), para 60.

481 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 913.

482 Eva-Maria Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (European Parliamentary Research Service 2014) 20.

483 Herwig Verschueren, 'Free movement or Benefit Tourism: The Unreasonable burden of *Brey*' (2014) 16 European Journal of Migration and Law 174.

484 Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) para 78.

485 Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* (2014) para 81.

national court. Yet the emphasis put on the 'financial situation'[486] and the lack of sufficient resources may be interpreted as though this was the only criteria which had been taken into consideration. In ***Dano*** the Court does not seem determined to establish whether, despite not having sufficient resources, Ms Dano's reliance on the host state's social assistance system will constitute a burden. If the financial situation is the only criterion taken into consideration, it would then mean that article 7(1)(b) is to be interpreted as it is; if the individual does not have sufficient resources, then he does not attain the right to reside and thus is not entitled to equal treatment and social assistance benefits. In such a case, this 'mechanical' approach would lead one to argue that the ***Dano*** judgment has 'effectively turned Union citizens who are economically inactive and are living abroad without sufficient resources into illegal migrants.'[487] Moreover, such an approach would lead to a situation wherein only those who have sufficient resources are allowed to reside. In that case, if such individuals have sufficient resources, then they should not need social assistance.

Perhaps in a bid to dispel any doubts emanating from ***Dano***, the Court[488] in ***Alimanovic*** made it clear that the individual assessment test as per ***Brey*** was still applicable. However, such proclamation is unconvincing when considering the tenuous[489] reasoning put forward by the Court in that case in order to justify itself for not carrying out the individual assessment test. Moreover, the fact that the Court has already conceded to two generally framed exceptions as emanating from ***Dano***[490] and ***Alimanovic***[491] can be perceived as an indication that, despite not being 'dead', the individual assessment test no longer holds center stage as initially hinted at in ***Brey***.[492] This will in turn effect the citizenship status which the Court explicitly upheld up until ***Dano***.[493] In indirectly doing away with the individual assessment test, the Court is also disregarding the citizenship status,

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486 ibid para 80.

487 Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 260.

488 Case C-67/14 *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and Others* (2015), para 59.

489 Though the Court rightly respected the legislator's choice by following article 7(3), the argument that the carrying out of this test is not necessary since the Directive 2004/38 (n 8) takes into consideration various factors characterizing the individual situation of each applicant for social assistance is, as already discussed in section 2.3, tenuous.

490 That is that Member States may, via their national legislation, exclude Union citizens from entitlement to SNCB which nationals of that host state are entitled to, if the Union citizens do not have a right of residence in the host state since they do not fulfill the requirements of Directive 2004/38 (n 8). See in this regard *Dano* (n 102) para 84.

491 That is that Member States may, via their national legislation, exclude Union citizens who are job-seekers as explained in more detail in article 14(4)(b) of Directive 2004/38 (n 8), from entitlement to SNCB which also constitute social assistance, even if nationals of the host state in the same situation are entitled to them. See in this regard Case C-67/14 *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and Others* (2015) para 63.

492 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 913.

493 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) para 58.

as such a test is 'a consequence of having deployed the status of citizenship in the first place'.[494]

Admittedly the Court in ***Alimanovic*** may have strived to uphold the individual assessment test[495] in order to provide a connection between ***Brey*** and the more recent case law, whilst at the same time not undermining the legislator's will as clearly laid out in article 7(3)(c). Perhaps it decided not to outrightly strike down or ignore this test, in its last attempt to push it (and the citizenship status) forward, despite the current political climate (referred to in the Introduction). In this manner, it has for the time being partially withheld 'the desired *carte blanche* for national authorities to refuse any claim to social assistance by indigent EU citizens'.[496]

4.2 *Backtracking on Union Citizenship?*

In ***Dano***, though still remarking that Union citizenship is to constitute the fundamental status of nationals of the Member States, the Court effectively removes the 'fundamental' nature of such a status for some individuals, by, for the first time, allowing host Member States to treat a whole category of individuals[497] differently from the rest of the Union citizens and host state nationals, and this despite the fact that such individuals are still effectively Union citizens.[498] In ***Alimanovic*** the Court does not even mention such a concept, and though upholding the individual assessment test which is in line with the rights-based approach of the citizenship concept, it validates the legislator's move of singling out a category of individuals (that is, job-seekers as per article 14(4)(b)), which again will not be treated as being equal to other Union citizens and host state nationals. Thym and Shuibhne[499] both ultimately question whether, post-***Dano***, Union citizenship can be considered to be 'as fundamental as it had often appeared to be previously'.[500] Several authors[501] have in fact come to the

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494 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 910.

495 Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) para 59.

496 Dion Kramer, 'Had they only worked one month longer!' (*European Law Blog*, 29 September 2015) <http://europeanlawblog.eu/?p=2913> accessed 3 December 2016.

497 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) para78.

498 Since, as stated in article 20(1) TFEU, Union citizenship emanates from the holding of the nationality of a Member State.

499 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 926.

500 Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 253.

501 See for instance Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 926 and Dominik Düsterhaus, 'Timeo Danones et dona petentes European Court of Justice (Grand Chamber), Judgment of 11 November 2014, 138.

conclusion that rather than a fundamental status, Union citizenship is gradually establishing itself as a privileged status, available only for those who can afford it, and for workers.[502]

Although the Court has repeatedly held that Union citizenship is to be the fundamental status of nationals of the Member States, it has never explained what this actually means.[503] It has tied citizenship to equality, which is coherent when considering that '[e]qual treatment before the law is a basic principle of formal justice'.[504] The focus in both the old and new case law is still equal treatment but a difference in approach is observed. In the older case law, the Court acknowledges the conditions and limitations imposed on the right to move and reside (as per the three 1990s directives),[505] and also the host state's right to act upon its concerns (that is the right to withdraw the individual's residence permit or not to renew it).[506] This acknowledgment is in line with now article 21 TFEU which makes it clear that free movement rights are not unlimited. However, these conditions and Member State's concern are later on considered to be subordinate to the rights laid out in the relevant Treaty articles (that is today's articles 18 to 21 TFEU) and the general principles of Union law. The limitations were given too much importance and were not considered *only* as limitations. In this manner the individual's right to move and reside ultimately gets the upper hand. On the other hand in ***Dano***, as already noticed, though the Court clearly distinguishes between the rights emanating from the Treaty as per articles 18 to 21 TFEU and those emanating from the directive, it downsizes article 18 TFEU's potential. This is because upon holding that article 18 TFEU is given more specific expression in article 24 of Directive 2004/38[507] the Court proceeds to resolve the issues at stake entirely upon the basis of Directive 2004/38. This consequently means that since article 24(1) requires that any Union citizen who wants to benefit from it (that is article 24, meaning the principle of equal treatment) has to first be residing on the basis of the Directive,

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502 It is to be noted that the situation for workers may also (to a certain degree) change if the alert and safeguard mechanism established in page 23 of the Council Decision mentioned in footnote 2 is put into effect. Such a mechanism can only be implemented if the Council authorises the Member State concerned to do so. This mechanism allows for the restriction of access to non-contributory in-work benefits. It is reminded that the Decision will only come into effect if the UK decides to remain within the Union.

503 JHH Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams, Henri de Waele, Johan Meeusen and Gert Straetmans (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* 249.

504 Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) 217.

505 See for instance Case C-456/02 *Michel Trojani vs. Centre public d'aide sociale de Bruxelles (CPAS)* (2004) paras 32-33.

506 See in this regard Case C-184/99 *Rudy Grzelczyk vs. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* para42.

507 Case C-333/13 *Elisabeta Dano and Florin Dano vs. Jobcenter Leipzig* (2014) para 61.

then it is only such complying individuals which will benefit from the principle of equal treatment. The wider covering of article 18 TFEU is in this manner denied since the protection derived from the principle of non-discrimination is limited to the instances were the individual has a right of residence on the basis of Directive 2004/38. Therefore though the mentioned Treaty articles are acknowledged, by nevertheless proceeding to consider the case only on the basis of the directive's articles, in ***Dano***, Shuibhne argues, the Court 'declines to review the legitimacy of legislative limits vis-à-vis the Treaty and wider principles'.[508] In ***Alimanovic***, the Court does not consider the Treaty articles but merely applies the directive's text, that is articles 7(3)(c), 14(4)(b) and 24(2). In this manner the Court 'makes it easier for Member States to justify refusal of benefits than might otherwise have been the case under prior case law'[509] and therefore, this time, the Member State gets the upper hand.

The older case law can therefore be interpreted as either having the 'tendency to interpret secondary Community law against its wording and purpose',[510] or having duly reviewed the validity of secondary legislation against primary law. In the same manner, ***Dano*** and ***Alimanovic*** can be viewed as being faithful to the wording of secondary law to the citizen's detriment,[511] or the Court having failed to undertake a proper review, as though the superior Treaty articles were still being adhered to, since these expressly cater for conditions and limitations, such conditions were given a too broad interpretation and were too emphasised upon. The liberal view that in the older judgments the Court was merely using a functional and teleological approach in order to further the people's rights and that thus such case law is 'politically empowering',[512] will be countered by the republican view that the Court's task is not to 'protect and empower individuals, but rather to express and carry forward the views of a political community'.[513]

Why did the Court change its approach? Clearly it was not the introduction of

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508 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 910.

509 Steve Peers, 'EU citizens' access to benefits: the CJEU clarifies the position of former workers' (*EU Law Analysis*, 15 September 2015) <http://eulawanalysis.blogspot.com.mt/2015/09/eu-citizens-access-to-benefits-cjeu.html> accessed 3 December 2016.

510 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1251.

511 It is considered to be to the citizen's detriment because, via the method of reasoning adopted by the Court in those two cases, Ms Dano and Ms Alimanovic did not obtain entitlement to social assistance benefits. See in this regard Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 935-936.

512 Mark Dawson, 'The political face of judicial activism: Europe's law-politics imbalance' in Mark Dawson, Bruno De Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing Limited 2013) 11.

513 ibid 11-12.

Directive 2004/38 which changed the situation.[514] The sufficient resources requirement, which played a central role in ***Dano*** existed also when the three 1990s directives were in force.[515] Moreover, in ***Brey*** the Court also focuses on Directive 2004/38 but does not come to the same conclusion as ***Dano***.[516] Mr Brey, just like Ms Dano, clearly did not have sufficient resources as otherwise he would not have applied for such a benefit, but the Court in that case still urged the national court to consider the specific circumstances[517] of the individual, thereby being in line with the 'certain degree of financial solidarity'[518] requirement as first established in ***Grzelczyk***. From ***Brey*** to ***Dano*** and ***Alimanovic***, we see a shift: from a willingness to protect the two main concerns as transpiring from Directive 2004/38 (in ***Brey***), to a willingness to prioritise the Member State's concern (in ***Dano*** and ***Alimanovic***). Moreover, it is argued that in ***Dano*** and ***Alimanovic*** the Court may have intentionally omitted its previously uttered statement that Directive 2004/38 'recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States'.[519] The Court might have become aware that though this interpretation of Directive 2004/38 is sound when taken into consideration within the general framework of the directive, it did not adequately take into account the present political debate, whether the latter is based on statistical evidence or mere populist rhetoric. It thus opted, as already pointed out, for another statement which carries a more negative connotation.[520]

Thym has argued that the focus on the Member State's concern[521] cannot be disassociated from the present political context.[522] He[523] holds that though this does not mean that the judges will automatically concede to the political climate's expectations, the Court may make use of tools available to it in order to come to an outcome which would garner less criticism than prior case law did.

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514 Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 903.

515 ibid.

516 Case C-67/14 *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and Others* (2015) is not being referred to here as the situation of Mother Alimanovic and her daughter was different from that of Mr Brey and Ms Dano. The former were considered to be job-seekers, whereas the latter were considered to be economically inactive individuals.

517 Case C-140/12 *Pensionsversicherungsanstalt vs. Peter Brey* (2013) para78.

518 ibid para 72.

519 ibid.

520 That is, as per Case C-67/14 *Jobcenter Berlin Neukölln vs. Nazifa Alimanovic and Others* (2015) para 62, that 'the accumulation of all the individual claims which would be submitted to it would be bound' to impose an unreasonable burden on the host Member State.

521 Daniel Thym, 'The Elusive Limits of Solidarity: Residence rights of and social benefits for economically inactive Union citizens' (2015) 52 Common Market Law Review 25.

522 Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 253. See also Niamh Nic Shuibhne, 'Limits rising, duties ascending: The changing legal shape of Union citizenship' (2015) 52 Common Market Law Review 902.

523 Daniel Thym, 'When Union citizens turn into illegal migrants: the Dano case' (2015) 40 European Law Review 253.

This is arguably what the Court has done via ***Dano*** and ***Alimanovic***. In the latter judgments the Court chose to abandon its aspirational approach vis-à-vis the citizenship concept (as it had done in the older case law) and opted for a doctrinal conservative approach, wherein it focused more on the legislation's actual wording.[524] However, one could also hold that in coming to the conclusion which it did come to in *Dano* and *Alimanovic*, the Court was merely following the Directive's text, and that therefore the current political context had nothing to do with the outcome of such case law.

Whether or not the current political context did bring about the change in the Court's approach, it remains clear that backtracking on the interpretation of Union citizenship has taken place. However, the Court cannot be blamed for adopting this less progressive approach vis-à-vis Union citizenship and the right to move and reside freely within the Union. There is *so much* the Court can do. When taking into consideration *Dano*, the CJEU could not have kept pushing forward this requirement of transnational solidarity (as it did in the older case law), thereby ignoring the Directive's requirement of sufficient resources and the need to prevent an unreasonable burden on the social assistance system of the host state. With regards to *Alimanovic* the Court could not have ignored the clear political will of the legislator vis-à-vis the retention of the worker status as laid out in article 7(3), and the possibility for the Member States not to provide social assistance benefits to job-seekers as laid out in article 24(2). For the Court to adopt a progressive approach (something which it rightly did not do in the more recent case law) a clear political will in favour of an 'equitable redistribution of welfare in the EU[525]' has to be present. Once this is not present, it is argued that in *Dano* and *Alimanovic* the Court was merely carrying out its duty of complying with the legislator's will.

5. Conclusion

The reviewed case law signifies not only that we are presumably[526] approaching a state of play wherein free movement is restricted to those who can afford it, but the end result that EU law will not provide assistance to those who end up destitute is also not consistent with the Union's policy objectives[527] of providing

[524] ibid.

[525] Eva-Maria Poptcheva, 'Freedom of movement and residence of EU citizens: Access to social benefits' (European Parliamentary Research Service 2014) 4.

[526] Herwig Verschueren, 'EU migrants and destitution: The ambiguous EU objectives' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing Limited 2015) page 413 writes 'the right to free movement could very well become impossible for indigent people'.

[527] See in this regard Treaty on European Union art 3(3), Treaty on the Functioning of the European Union arts 9 and 151(1) and Charter of Fundamental Rights of the European Union art 34(3). See also Herwig Verschueren, 'EU migrants and destitution: The ambiguous

social protection and the combating of social exclusion and poverty. Indeed, in a perfect world wherein Union citizenship is in fact a fundamental status, no categorical exclusions *a la* ***Dano*** or ***Alimanovic*** would be permitted. The poor would be allowed to move freely without being perceived as parasites of the host state's social assistance system.[528]

Nevertheless, despite the earlier progressive case law, we see that there are signs which hint at the fact that Member States are not willing to establish a redistributive justice system. De Witte[529] rightly points to, for instance, the Member States' unwillingness to confer competence upon the Union for the latter to be able to define the fundamental principles of the Member States' social security systems.[530] This reluctance emanates from fear that in doing so a constitutive element of the national political system will be given up. If this argument is turned on its head it becomes clear that until the 'central role in the generation and distribution of policies related to citizen well-being'[531] is religiously held on to by the Member States, the EU cannot be perceived to have the 'capacity to generate and sustain interpersonal solidarities and communal redistributive arrangements[532]'. The Member States are still not yet willing to consider non-nationals as 'one of their own', as this 'civic glue' at the European level is still largely absent.[533] It seems that the time is not yet ripe to 'liberate' the Community[534] from its economic preoccupation and to prepare the way for a [true] community[535] of citizens'.[536]

EU objectives' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar Publishing Limited 2015) 413, 416-418.

528 Anne Pieter van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing 2003) 220.

529 Floris De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015) 53-54.

530 Treaty on the Functioning of the European Union art 153(4).

531 Floris De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015) 54.

532 ibid.

533 Meghan Benton, 'Reaping the benefits? Social security coordination for mobile EU citizens' (2013) Migration Policy Institute Europe, <http://www.migrationpolicy.org/sites/default/files/publications/Benton-ReapingBenefits-FINAL.pdf> accessed 8 February 2016> 6.

534 Read as 'Union'.

535 ibid.

536 Kay Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 Common Market Law Review 1245.

THE CRIMINALISATION OF REVENGE PORNOGRAPHY

Elaine Degiorgio

ABSTRACT[537]

Revenge pornography is a current crime which involves disgruntled lovers to upload on social media, intimate pictures of their once loved one with disparaging comments. As soon as the picture is uploaded it is shared within seconds and the victim's life is turned upside down.

The article examines the emotions and legal aspects behind this act of revenge pornography. The introduction focuses on the progress of pornography alongside technology and the growth of sex trade with the development of the internet.

Current Laws are examined to give a good overview of the current Criminal and Civil laws. Criminal laws which specifically target revenge pornography both in Malta and Internationally are also targeted in the article.

KEYWORDS: CRIMINALISATION – REVENGE PORNOGRAPHY – CIVIL LAW – CRIMINAL LAW

[537] This article was reviewed by Judge Michael Mallia LL.D.

THE CRIMINALISATION OF REVENGE PORNOGRAPHY

Elaine Degiorgio[538]

Cardinal Bernardin and the Catholic Church consider pornography to be 'a moral issue because it violates human dignity'.[539] Throughout time, the interdependent relationship seen between technology and pornography has led to an increase in the pornographic industry. If we take the digitalization of photography as one example, it brought with it increased privacy as the development of photographs could be done at the comfort of one's home without the need to go to any photography shop. Moreover, with a click of a button pornography can be easily accessed to on the computer being 'available to every household connected to the World Wide Web'.[540]

Raskin identifies a "boundless" internet with Niels Van Doorn, claiming that there is the 'sexualization' or 'pornification' of media and society' through a reality TV genre where real people are caught on the camera revealing private sexual performances.'

Halder and Jaishankar specifically stress that harassment and victimization can effortlessly be carried out through non-consensual pornography, or what is commonly known as revenge pornography.[541] Such a cybercrime is considered to target certain sectors of society, particularly children and women, exposing them to 'online-harassment, virtual rape and cyber-prostitution'.[542]

1. What is Revenge Pornography?

Revenge pornography is a phenomenon which has become widespread through the rapid development of technology. It occurs when,

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538 The author is in her last year as a law student at the University of Malta. After a year of research, in her fourth year she did her Research Project on the topic of Revenge Pornography with the title *Criminalising Revenge Porn.*

539 'Pornography and obscenity- A threat for the Dignity of the Human person' (*Centre For Migration Studies Special Issues*) <http://onlinelibrary.wiley.com/doi/10.1111/j.2050-411X.1996.tb00130.x/epdf> accessed 25 February 2016.

540 Peter David Goldberg, 'An exploratory study about the impacts that cybersex (the use of the internet for sexual purposes) is having on families and the practices of marriage and family therapists' (Master of Science in Human Development Marriage and Therapy, Virginia Polytechnic Institute and State University 2004).

541 Debarati Halder and K Jaishankar, *Cyber Crime and the Victimization of Women: Laws, Rights and Regulations* (Information Science Reference 2012).

542 ibid.

> an ex-paramour posts sexually explicit images of his former lover on the web, often with 'disparaging descriptions' and contact information for the victim's work and home, and sometimes even for her family members. The purpose of revenge porn is to humiliate and harass former lovers.[543]

Fundamentally, revenge pornography is a form of cyber harassment intended to 'embarrass, annoy, threaten or bother another individual'.[544]

Revenge pornography can occur in various ways; it can either be through photography or video recording without permission or consensual photography or video recordings which are later stolen and shared. It can also occur through consensual photography or video recording that is intentionally sent to third parties.

Even though this phenomenon may seem to have only cropped up recently, it can be found throughout history, and as early as the 1970's. In fact, during the Kennedy era in the United States, Leon Isaac Kennedy circulated an explicit home video of Jayne Kennedy when the latter left him.[545]

Later on in the 1980's, there was the first court case dealing with this phenomenon regarding a magazine which was published including nude pictures of women with their personal details beneath.[546] Eventually, in 2008 a new website was set up which put the issue of revenge pornography back on the policy agenda. *IsAnyoneUp.com* was a website that brought back to light the devastating consequences of cyber harassment and revenge porn. The mind behind this website was Hunter Moore, known as the 'self styled king of revenge pornography'[547]. He was labelled as 'the most hated person in the internet'[548] after permitting users to upload photos of their once loved ones with all their personal details exposing their most private photos to the world. The website

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543 Adrienne N. Kitchen, 'The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment' (2015) 90 Chicago-Kent Law Review 247.

544 Nancy S. Kim, 'Web Site Proprietorship and Online Harassment' (2009) Utah Law Review 993, 999.

545 Michael Salter and Thomas Crofts, 'Responding to revenge porn: Challenging online legal impunity.' in Lynn Comella and Shira Tarrant (eds) *New views on pornography: Sexuality, politics and the law* (Praeger Publisher: Westport 2015).

546 Lajuan and Billy Wood vs. Hustler Magazine, Inc. 736 F.2d 1084 (5th Cir. 1984) U.S. Court of Appeals for The Fifth Circuit - 736 F.2d 1084 (5th Cir. 1984) (July 23, 1984).

547 Nicky Woolf, "Revenge Porn King' Hunter Moore Pleads Guilty to Hacking Charges' *The Guardian* (New York, 19 February 2015) <http://www.theguardian.com/technology/2015/feb/19/revenge-porn-hunter-moore-pleads-guilty-hacking-identify> accessed 28 November 2015.

548 Daniel Kreps, 'Revenge-Porn Site Owner Hunter Moore Pleads Guilty, Faces Prison Time' (*Rolling Stone*, 2015) <http://www.rollingstone.com/culture/news/revenge-porn-site-owner-hunter-moore-pleads-guilty-faces-prison-time-20150220> accessed 28 November 2015.

saw a staggering 30 million users in just a month, reaching up to $10,000.[549] The operator of the site, alongside the hacker Charles Evans who hacked thousands of computers to steal more photos from the victims, were prosecuted and criminally charged on fifteen counts, among which were unauthorised access of private computers and identity theft.[550] The site was shut down in 2012.

Charlotte Law was one of the victims who had to live with the consequences of revenge porn; her daughter being continually harassed when her pictures were uploaded on the above-mentioned website. Instead of remaining passive to the situation, she vowed to bring the issue to the attention of legislators. Apart from protecting her daughter, she felt a compelling duty to protect other victims, in particular those who had no voice or were petrified to speak up. In Law's words: 'Now it's an issue that's taken seriously and victims are seen as victims as opposed to, 'Oh, you brought it on yourself'.[551]

2. Tort Law as a Possible Legal Action

Civil actions have always been important to revenge porn victims as a manner of bringing the perpetrators to justice'. Every individual has the fundamental human right to enjoy a private life. This has been broadened to incorporate not only the protection against physical violence but protects also dignity, intellectual and emotional life.[552]

Tort scholar William Prosser believed that tort law protects four separate interests namely;

a) intrusion into a person's seclusion,
b) public disclosure of embarrassing facts,
c) publicity that places an individual in a "false light" to the public,
d) appropriation of a person's likeness[553]

There is a possibility, at least theoretically, that victims may sue on the basis of 'intentional infliction of emotional stress and public disclosure of private

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549 ibid.

550 Jessica Roy, 'Revenge-Porn King Hunter Moore Indicted on Federal Charges' (*Time*, 23 January 2014) <http://time.com/1703/revenge-porn-king-hunter-moore-indicted-by-fbi/> accessed 28 November 2015.

551 Marissa Charles, 'Meet The Angry Mom Who Took Down the King of Revenge Porn' *New York Post* (17 May 2015) <http://nypost.com/2015/05/17/the-angry-mom-who-brought-down-the-revenge-porn-kingpin/> accessed 28 November 2015.

552 Warren and Brandeis, 'The Right To Privacy' (1890) 4 Harvard Law Review.

553 Paul J. Larkin Jr., 'Revenge Porn, State Law, and Free Speech' (2014) 48 Loyola Law Review 57.

facts'.[554] Nevertheless, many professors have criticised the rigidity of the onus of proof required. This is due to the fact that victims must prove that they have suffered severe disabling emotional distress. Sometimes, humiliation, anger and embarrassment are not enough for a claim for damages to be successful.[555]

Article 1031 of the Maltese Civil code provides that: 'Every person shall be liable for the damage which occurs through his fault.'[556]

Any person who feels aggrieved by any act causing him damage on his person or on his property may sue for damages under Article 1045 of the Civil Code. The main elements, which must be proved on a probability basis, are the causal link and the fault on the side of the other party. As to the quantification of damages, these consist of *damnum emergens*, which is the actual damage caused and *lucrum cessans* which includes loss of future earnings due to said damage. A drawback in our system of quantification of damage lies on the fact that no moral damages can be awarded. This lacuna in the law thus prevents revenge porn victims from suing to secure a sum of money as compensation for the unfair stress the perpetrator created.

The defence of right to privacy can also serve as a sufficient basis upon which a case can be based. Nevertheless, Chief Justice Alex Kozinski argues, 'we need to do a better job of protecting our privacy if we expect the law to do the same'.[557] This indicates that for such a plea to be successful there must be a 'reasonable expectation of privacy'.[558] Once information or a picture is sent to a third party, there cannot be a legal assumption that the victim wanted it to remain private.

If the comments or the images are injurious to the dignity of the victim, then there may be a case on defamation. This, however, can only be successful if it is proved that what is being alleged is being portrayed as factual and that such comments are slanderous and untrue. Comments cannot be the opinionated, but rather posed a state of fact, as that would not be tantamount to defamation.

Article 11 of the Maltese Press Act allows victims of slanderous claims to sue the alleged perpetrator. This article states: 'Save as otherwise provided in this Act,

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554 Amanda L. Cecil, 'Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Non consensual Pornography' (2014) 71 Washington and Lee Law Review 2513.

555 *Smith vs. Amedisys* Inc., 298 F.3d 434, 450 (5th Cir. 2002).

556 Civil Code, Chapter 16 f the Laws of Malta, art 1031.

557 Paul J. Larkin Jr., 'Revenge Porn, State Law, and Free Speech'(2014) 48 Loyola Law Review 57.

558 Kristin M. Beasley, 'Up-Skirt and Other Dirt: Why Cell Phone Cameras and Other Technologies Require a New Approach to Protecting Personal Privacy in Public Places' (2006) 31 Illinois University Law Journal 69.

whosoever shall, by any means mentioned in article 3, libel any person, shall be liable on conviction to a fine (multa)'.[559] A civil as well as a criminal libel case may be instituted and the charged person can also become even liable to imprisonment in criminal proceedings.

Copyright law is another law which may aid revenge porn victims to get the justice they deserve and ultimately order website owners to take down their photo. However, this remedy requires the victim to register the photo under copyright law. Theoretically, this may seem to be a good defence, but in practice almost no victim holds copyright over their photos which were only taken and sent to their loved one. Moreover, if the photos were not taken consensually, that is, the victim was not aware of the explicit videos or photos, copyright law cannot be of any use.[560]

The Maltese Copy Right Act states that all artistic works are eligible for copyright.[561] Therefore, any image can be subject to this act if registered correctly following the procedure established by law. In this way no person can, without the author's consent, 'mutilate, modify, distort or subject to any other derogatory action any work during its term of copyright in a way prejudicial to the honour or reputation of the author'.[562]

Realistically however, the last thing on the victim's mind is to actually register something which was meant to remain private.
Apart from the poof required, civil actions may turn out to be time consuming and costly to victims, as well as being too emotional due to the extreme media coverage and public attention. In addition, there is no guarantee that revenge porn websites will abide by the court judgment and take down the photos, which is ultimately what the victim wants.[563]

3. Freedom of Speech and Expression vs. Right to Privacy

In countries where freedom of speech is an ultimate right, laws against revenge pornography may be seen as restricting freedom of speech. In fact this was the main point of discussion in the US, where they have one of 'the most influential law[s] to protect the kind of innovation that has allowed the Internet to thrive

559 Press Act, Chapter 248 of the Laws of Malta, art 11.
560 Adrienne N. Kitchen, 'The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment' (2015) 90 Chicago-Kent Law Review 247.
561 Press Act, Chapter 248 of the Laws of Malta, art 2; '"publication" means any act whereby any printed matter is or may be communicated to or brought to the knowledge of any person or whereby any words or visual images are broadcast'
562 Copyright Act, Chapter 415 of the Laws of Malta, art 12.
563 Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 Wake Forest Law Review 345, 358.

since 1996'.[564] Section 230 of the Community Decency Act in the United States, states that, 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'.[565]

Therefore, websites which upload photos or videos sent to them by individuals are not deemed to be the owners of the material. Nonetheless, we find Federal Courts who have tried going around this by stating that this protection is not absolute. Once websites 'invite' people to post images immunity is no longer guaranteed. This is however not the position of the majority of courts and until a general rule is acquired, ambiguity persists.

The balance between freedom of speech and the right to privacy was examined in the case ***JPH vs. XYZ***.[566] In this case, Judge Popplewell interestingly utilises the European Convention on Human Rights as a defence to provide the victim with an interim order to stop the defendant from posting plaintiff's explicit photos online. In fact, the judge quotes Article 8 arguing that every individual has a right for private and family life, and that this case was motivated by revenge and blackmail rather than public interest.[567]

4. Criminal law

'Criminal law has long prohibited privacy invasions and certain violations of autonomy'.[568]

In the case ***Union Pac. Ry. Co. vs. Botsford*** (141 U.S. 250, 252 (1891)[569], Supreme Court Justice Jude Horace Grey wrote,

> The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault, and a trespass . . .

In the ***Akayesu*** case,[570] the International Criminal Tribunal for Rwanda said that 'sexual violence is not limited to physical invasion of the human body and may

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564 'CDA 230: The Most Important Law Protecting Internet Speech' (*Electronic Frontier Foundation*) <https://www.eff.org/issues/cda230> accessed 2 February 2016.

565 Community Decency Act, art 230.

566 [2015] EWHC 2871; High Court (Queen's Bench Division); 10 October 2015.

567 Criminal Code, Chapter 9 of the Laws of Malta, art 8.

568 Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 Wake Forest Law Review 345, 358.

569 ibid.

include acts which do not involve penetration or even physical contact.'[571] Therefore, taking the above into consideration, the mere fact that revenge porn does not include physical contact does not reduce its gravity and is still to be considered as a sexual assault.

With the advance of technology, new forms of crime, known as cyber crime, began to evolve, such as cyber harassment and cyber stalking. Legal systems had to keep up with these advancements and new laws started to emerge regulating the World Wide Web. There is a general consensus that a person cannot 'abuse, threaten, or harass' another person. This reasoning certainly aided the fight against revenge pornography. However, as in every other case of harassment, the proof required is quite subjective and this may pose a difficulty to the prosecution to prove the charges.

We find cases where the victim is blackmailed by the perpetrator, taking possession over the victim's life by making the latter abide by what they want. In such cases, blackmailing laws may be utilised by the prosecution once enough proof is brought regarding the threats made to the victim.

Up until 2016, revenge porn terminology did not exist under Maltese Law. However, on the 3rd October 2013, the Court of Appeal was faced with a case which shed light on the Maltese position on revenge porn. The case was ***Police vs. Michael Ellul Vicenti***,[572]in which case the court revoked the sentence of the First Court punishing the accused for one year imprisonment suspended for two years. In this case, Ellul Vincenti was accused of being in possession of pornographic material and for illegally distributing such material with the intention of causing distress to the victim, his wife during the proceedings for separation. The picture was taken without her knowledge and put online together with her work telephone number. The Court of Appeal disagreed with the first court in saying that there was no proof beyond reasonable doubt that the accused was the perpetrator. In fact, Judge Michael Mallia, presiding the case indicated that the prosecution managed to prove a state of fact, that the husband despised his wife so much that he would do anything to degenerate her dignity. This is why the accused was given a suspended sentence on the basis of Articles 208, 252, 256 of Chapter 9 and Article 35(1)(d) of Chapter 399 of the Maltese Law.

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570 *The Prosecutor vs. Jean-Paul Akayesu* (Judgement) ICTR-96-4-T (2 September 1998).

571 Mary Anne Franks, 'Combating Non-Consensual Pornography: A Working Paper' (2014) University of Miami School of Law <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336537> accessed 25 November 2015.

572 *Il-Pulizija vs. Michael Ellul Vincenti*, per Mr Justice Mallia, Court of Criminal Appeal (Inferior), 3 October 2013.

Eventually, in 2014 we had another very important case, namely ***Police vs. Cyrus Engerer***.[573] Mr Engerer was in a relationship with a certain Mr Camilleri and when they called off their relationship, explicit photos of Mr Camilleri, which were stored in his private computer, were stolen and circulated amongst his friends and colleagues. Mr Engerer was accused of having stolen those photos from the Mr Camilleri's computer, of abusing of his position and circulating pornographic material with the intention of harming Mr Camilleri's dignity.

The first court acquitted Mr Engerer from the charges brought against him since it found no link between the IP address from which the images were sent and the accused. Even though the court acknowledged that the only person who had real interest and motive to harm the victim, it was not satisfied that the proof brought, was beyond reasonable doubt, as required by Maltese procedural law.
The Attorney General appealed from the sentence. The Court of Appeal had a different interpretation and by quoting English jurist Pollock C.B.:

> There may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.[574]

The only person with a motive was Mr Engerer himself and this was enough proof to incriminate him, thus finding him guilty and sentencing him to two year suspended sentence. Moreover, the Court of Appeal had also found a link between the accused and the IP address from which the images were distributed. No civil case for damages was brought forward by Mr Camilleri against Mr Engerer.

Theoretically this was a classic case of revenge pornography, yet the Maltese courts could not make use of such terminology as it was alien until a few months ago. Saying this, it does not mean that we have not witnessed further cases of revenge porn. In 2014, explicit photos of a number of Maltese girls were uploaded on the popular website *Tumblr*. The Maltese newspaper Times of Malta spoke to psychologist Fleur Mifsud Bons who said that 'there is then a high risk of mental health difficulties such as depression as well as suicide'.[575] In gathered

[573] *Il-Pulizija vs. Cyrus Engerer*, per Mr Justice Mallia, Court of Criminal Appeal (Inferior), 8 May 2014.

[574] Exall (1866) 4 F & F 929.

[575] Kristina Chetcuti, 'Explicit 'Selfie' Pictures Webpage Is Closed Down' *Times of Malta* (Malta, 10 January 2014) <http://www.timesofmalta.com/articles/view/20140110/local/Explicit-selfie-pictures-webpage-is-closed-down.502043> accessed 29 November 2015.

statistics, 93% of the victims have said that they have suffered considerable emotional distress.[576]

5. Criminalisation of Revenge Porn

It may be state that current civil and criminal laws are not enough to cover situations of revenge porn. Many scholars have pushed and are still pushing for the criminalisation of revenge porn and the drawing up of laws which may aide the prosecution in the fight against such crime. In fact, it has been stated that,

> It is true that existing legal paradigms are being utilized more effectively. But, even in their totality, available civil laws are inadequate in their capacity to combat the speed, breadth and potency with which revenge porn exacts a toll on its victims. Denying victims and future victims criminal legal remedies unique to revenge porn would be to perpetuate its injustice.[577]

Many different countries have opted to follow this trend and have criminalised the illegal sharing of explicit photos. Such states include the United Kingdom (Hereinafter referred to as 'UK'), which is one of the few states that has enacted a law targeting revenge pornography. These laws were enacted and enforced in April 2015, criminalising revenge porn with a punishment of up to two years imprisonment.[578]

In October 2014, the Justice Secretary of the UK agreed to an amendment to the Criminal Law which stated: 'It shall be an offence for a person to publish a private sexual image of another identifiable person without their consent where this disclosure causes distress to the person who is the subject of the image'.[579] This saves exceptions including disclosure to police during a criminal investigation, disclosure in the public interest, and if the person genuinely thinks they were already disclosed.[580]

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576 End Revenge Porn, 'Power in Numbers' (2014) <http://www.endrevengeporn.org/revenge-porn-infographic/> accessed 5 January 2016.

577 Elisa D'Amico and Luke Steinberger, 'Fighting for Online Privacy with Digital Weaponry: Combating Revenge Pornography' (2015) 26 New York State Bar Association: Entertainment, Arts and Sports Law Journal 24, 29.

578 Criminal Justice and Courts Act 2015, art 33.

579 'Revenge Porn-What you need to know' (*South-West Grid for Learning Trust,* 2015) <http://www.revengepornhelpline.org.uk/documents/RP-Helpline_web.pdf> accessed 8 December 2015.

580 Dan Bunting, 'Revenge Porn: What Is the Law and What are the Issues?' (*Halsbury's Law Exchange,* 17 February 2015) <http://www.halsburyslawexchange.co.uk/revenge-porn-will-the-new-laws-make-any-difference/> accessed 17 February 2015.

In this specific crime, there is the need to establish that the person who disseminated the photos 'intended to cause distress to the subject of the images'.[581] This has prompted campaigners to hold that given the emotional damage caused, the circulation of photos without one's consent should be enough proof of wrong-doing. Moreover, photo-shopped images also fall out of the mentioned law.[582]

An interesting ruling by the German Courts on the issue of revenge pornography concerned a man who had taken a number of explicit photos of his partner to which she had consented. After their end of relationship, the woman demanded the deletion of these photos but the man failed to comply. It was reported that the court weighed in favour of personal right over the ownership rights of the photographer. The court also specified that was the case only in nude photos and not any other photo but certainly here the right of privacy was seen at a higher level than that of expression.[583]

Yifat Kariv, an Israeli legislator labels this crime as virtual rape indicating that a harsher law should be present to diminish the rate of such crime. In fact, according to the new law in Israel, the perpetrator may risk five years imprisonment.[584] Moreover, being also a civil offence, compensation of 50,000 NIS without proof of damage may be awarded to the victim, while a higher compensation can be accorded if actual damage is proved.[585] In Israel, there is no need to prove damages but the act itself is enough to trigger compensation.

It was only after ***Audrie's case*** in Saratoga, [586] in which a teen committed suicide due to explicit photos taken when she was drunk were uploaded and shared with

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581 'Part Two: Non-Consensual Sharing of Private, Intimate Images' <http://www.gov.scot/Publications/2015/03/4845/5> (*Scottish Government*, March 2015) accessed 17 February 2015.

582 Dan Bunting, 'Revenge Porn: What is the Law and What are the Issues?' (*Halsbury's Law Exchange,* 17 February 2015) <http://www.halsburyslawexchange.co.uk/revenge-porn-will-the-new-laws-make-any-difference/> accessed 17 February 2015.

583 Philip Olterman, 'Revenge Porn' Victims Receive Boost from German Court Ruling' *The Guardian* (Berlin, 22 May 2014) <https://www.theguardian.com/technology/2014/may/22/revenge-porn-victims-boost-german-court-ruling> accessed 29 June 2016.

584 Yifa Yaakov, 'Israeli Law Makes Revenge Porn a Sex Crime' *The Times Of Israel* (6 January 2014) <http://www.timesofisrael.com/israeli-law-labels-revenge-porn-a-sex-crime/> accessed 12 February 2015

585 Batya Ungan-Sargon, 'What Israel's new 'Revenge Porn' Ban Means' (*Tablet,* 9 January 2014) <http://www.tabletmag.com/scroll/158870/what-israels-new-revenge-porn-ban-means> accessed 16 December 2015.

586 Irving DeJohn, '3 teens admit to attacking Audrie Pott, leading her to commit suicide' (*Daily News*, 15 January 2014) <http://www.nydailynews.com/news/national/audrie-pott-attackers-admit-attack-caused-commit-suicide-article-1.1580284> accessed 16 December 2015.

all the community, that Californian legislators felt that they should update their Criminal law to cater for this new phenomenon. Californian law says,

> (4)(A) Any person who intentionally distributes the image of the intimate body part or parts of another identifiable person, or an image of the person depicted engaged in an act of sexual intercourse, sodomy, oral copulation, sexual penetration, or an image of masturbation by the person depicted or in which the person depicted participates, under circumstances in which the persons agree or understand that the image shall remain private, the person distributing the image knows or should know that distribution of the image will cause serious emotional distress, and the person depicted suffers that distress.[587]

Many legislators noted that this law does not cover the modern trend of 'selfies' that is, when pictures are taken by the victim himself rather than by a third party. The law fails to cover those who hack computers to steal photos and distribute them. Moreover intention is required for the requirements of the law to be fulfilled.[588]

In 2015, the State of Illinois, as international newspapers noted, passed a law 'with teeth'.[589] Illinoisan legislators were careful to draft a law that punishes the perpetrator for the harm caused rather than on the intention to actually cause harm. This puts emphasis on a state of fact rather than on a subjective intention.

This law also uses the criterion of the 'reasonable person' to consider whether persons are able to comprehend that such pictures are to remain private. This is an interesting criterion introduced by Illinoisan law since there must be a level of expectation that the victim actually wanted the images to remain private. The crime is punished by a maximum of three years.[590]

6. The Maltese Position

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587 California Penal Code of 1873, Stat, 47 (4)(A).

588 Michelle Daniels, 'Model Revenge Porn Legislation or Merely a Work in Progress?' (2014) 46 McGeorge Law Review 297.

589 Barbara Herman, 'Illinois Passes Revenge Porn Law with Teeth: 'Other States Should Copy,' Says Privacy Lawyer' (*International Business Times* ,1 JUNE 2015) <http://www.ibtimes.com/illinois-passes-revenge-porn-law-teeth-other-states-should-copy-says-privacy-lawyer-1774974>; accessed 31 October 2015.

590 'Cyber Civil Rights Initiative Seven Reasons Illinois is Leading the Fight Against Revenge Porn' (*Cyber Civil Rights Initiative*, 31 December 2014) <http://www.cybercivilrights.org/seven_reasons_illinois_is_leading_the_fight_against_revenge_porn> accessed 16 December 2015

On the 12th July 2016 Parliament passed radical amendments to the law which introduced revenge porn terminology in our law. The article stated:

> 208E. (1) Whosoever, with an *intent to cause distress or emotional harm*, discloses a *private sexual* photograph or film without the consent of the person or persons displayed or depicted in such photograph or film shall on conviction be liable to imprisonment for a term of up to two years or to a fine (multa) of not less than three thousand euro (3,000) and not more than five thousand euro (5,000), or to both such imprisonment and fine.[591]

This law is very similar to its English legal counterpart, especially in the part where intent to cause distress or emotional harm is required. Maltese criminal law follows the Latin phrase *'Actus non facit reum nisi mens sit rea'*. It means that it must not only be proved that the person actually committed the crime but also had the mental capacity to commit such crime. The perpetrator must, apart from intention have the capability of understanding the actions being committed. This is an important step in criminal procedure to bring proof beyond reasonable doubt that the alleged perpetrator actually committed the crime.

The legislator may also require what we call a specific intent. Thus apart from the general rule of *mens rea*, a further specific intent must be proved in order to incriminate the person. The prosecution has to prove that the alleged offender had the intent to cause harm to the victim. Such intent distinguishes between perpetrators motivated by personal desire to harm the victim and others motivated by other reasons. Nevertheless, it seems to disregard perpetrators who, rather than committing the crime for personal or emotive reasons, they do so for financial return or fame. This group of people do not fall under this article of law and even though the consequences on the victim might be devastating, they might escape without punishment.

This is why revenge porn advocates are seeking to push forward amendments to do away with the need for proof of motive and intent and focus on the act being criminal in itself. Regardless of the motive, the consequences on the victim are still devastating and the emotional stress and psychological trauma certainly cannot be side-lined.

The law continues by giving definitions which may aid in defining whether a case falls under Article 208E.

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[591] Criminal Code, Chapter 9 of the Laws of Malta, art 208E (emphasis added).

The law starts by providing the definition of 'private', '"private" shall refer to any photograph or film taken without the consent or knowledge of the person or persons depicted therein, or to any photograph or film which was never intended for public consumption;'[592]

For a photograph to be private it has to be taken without the consent or knowledge of the victim. This part excludes the recent phenomenon of 'selfies'; a practice which has taken over the traditional way of photography. The victim would have taken the picture him/herself and sent to the boy/girlfriend. Figures show that this practice of sexting is very popular amongst teenagers who are more keen to explore their sexual identity, but is resulting in devastating consequences to teenagers who are vulnerable to peer pressure.

The second part then refers to the sharing of photos which are meant to be private. So even if the victim took the photo him/herself, it was never meant to be made public. However, the problem arises because the victim may have consented to disclose explicit pictures within a small group of people but would not have wanted them to be viewed by the whole world. The wording in the law makes it difficult to prove that the victim actually wanted the picture to remain 'private' in this sense.

Sub Article 3 also defines what a sexual act is: '"sexual" shall include the depiction of all or part of a person's exposed genitals or pubic area, or, in the case of females, of the breasts, or of any content that, when taken as a whole, a reasonable person would consider to be sexual because of its nature'.[593]

The definition is quite general as it tries to cover several acts, which according to the general public, are deemed to be sexual in nature. Lewd acts may thus also fall under this definition.

Similar to English law, Maltese law presents the test of the reasonable man. The average man is kept as the basis to decipher whether an act is sexual or not.

7. The Right to be Forgotten- A Ray of Hope

During a parliamentary question session, Mr Marc Tarabella, from the S&D Group, made reference to the problem of revenge pornography and asked how the EU is addressing the issue and what level of protection is being provided to victims.[594] An answer was provided by Ms Jourová on behalf of the Commission.

[592] ibid.
[593] ibid art 208E(3).
[594] Marc Tarabella (S&D) Parliamentary Question for European Commission (29 June 2015).

She said that the practice of revenge porn certainly breaches the right to private life as protected by the EU Charter of Fundamental Human Rights. Being a private crime, it is however up to the domestic public authorities to seek efficient ways to aid the victims. Nonetheless, she reports that there are yet no concrete projects targeting revenge pornography. Ms Jourová also makes reference to the right to be forgotten which has specific legal basis in Article 16 of the TFEU to implement Article 8 of the European Convention on Human Rights (Hereinafter referred to as the 'ECHR').[595]

The Courts of Justice of the European Union (Hereinafter referred to as 'CJEU') has also given its contribution on this matter, bringing in the concept of the right to be forgotten. In the case ***Google Spain SL, Google Inc. vs. Agencia Española de Protección de Datos (AEPD), Mario Costeja González***,[596] of the 13 May 2014, the CJEU ruled that victims have the right to request search engines to take away any links showing their personal information especially when such data is 'inaccurate, inadequate, irrelevant or excessive'.[597]

This was a ground-breaking decision which gave victims a ray of hope and some form of ultimate closure. In July 2015, the country's data protection authority (Hereinafter referred to as 'CNIL'), ruled that this was not enough and demanded;

> Google to apply the right to be forgotten to all searches on all Google domains. It said at the time "in accordance with the CJEU (European court of justice) judgment, the CNIL considers that in order to be effective, delisting must be carried out on all extensions of the search engine and that the service provided by Google search constitutes a single processing.[598]

A group of academics sent an open letter to Google on the importance of the right to be forgotten. In fact, these academics indicate that with the Right to be Forgotten, Google and other search engines have the right to make decisions on

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595 'Answer given by Ms Jourová on behalf of the Commission' (*European Commission*, 3 December 2015) <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-010481&language=EN> accessed 28 November 2016.

596 C-131/12 *Google Spain SL and Google Inc. vs. Agencia Española de Protección de Datos* [2014] ECR I-317.

597 'Fact sheet on the Right to be Forgotten Ruling' (European Commission) <http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf> accessed 28 November 2016.

598 Alex Hern, 'Google Takes Right to Be Forgotten Battle to France's Highest Court' *The Guardian* (19 May 2016) <https://www.theguardian.com/technology/2016/may/19/google-right-to-be-forgotten-fight-france-highest-court> accessed 6 July 2016.

the balance between right to privacy and right of access to information which are two of the most essential fundamental human rights. Nonetheless, they continue, 'the vast majority of these decisions face no public scrutiny, though they shape public discourse.'[599] Due to this, they believe that the implementation of the ruling is a sensitive step which needs to be taken with care and done in the most transparent manner.[600]

The 14th April 2016 was a ground-breaking day for the European Union as it voted for tougher rules on the right of privacy, especially on data protection. The rules voted to give more power to authorities to charge companies heavy fines for data breaches. The new laws aim at pushing a 'digital single market' between all countries of the European Union to increase cooperation on the matter. In Vivian Redding's words, the person who proposed the amendments, 'This is a historic day for Europe. This reform will restore trust in digital services today, thereby reigniting the engine for growth tomorrow.'[601]

8. Statistics

During my research on the topic, I reviewed several statistics, namely in the UK and USA where the law is relatively new, to discern whether the criminalisation of revenge porn was a step forward or a futile exercise. Statistics indicate that throughout the years, sexual crimes have increased considerably with 15% of adults responding that they have, at least once, received sexts (statistic gathered in 2010).[602]

Sexting is another modern phenomenon which deserves another discussion in its' own right as it has become even more popular amongst teenagers. This is a way of sending explicit selfies to third parties which are not necessarily one's partner. This however can easily lead to revenge pornography since once the photos are in the possession of a third party they become easy to distribute.

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599 Jemima Kiss, 'Dear Google: open letter from 80 academics on 'Right to be Forgotten' *The Guardian* (14 May 2016) <https://www.theguardian.com/technology/2015/may/14/dear-google-open-letter-from-80-academics-on-right-to-be-forgotten> accessed 6 July 2016.

600 ibid.

601 Samuel Gibbs, 'European Parliament Approves Tougher Data Privacy Rules' *The Guardian* (14 April 2016) <https://www.theguardian.com/technology/2016/apr/14/european-parliament-approve-tougher-data-privacy-rules> accessed 6 July 2016.

602 'Lovers Beware: scorned exes may share intimate data and images online' (*McAfee*, 4 February 2013) <http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx> accessed 10 February 2016.
The study was conducted from December 14 through December 30, 2012 by MSI International with a total of 1,182 online interviews with ages between18-54. Interviews among respondents were split evenly by age and gender, and achieved geographic distribution according to the US census.

In a separate study conducted in 2013, McAfee found out that,

> 13% of adults have had their personal content leaked to others without their permission. Additionally, 1 in 10 ex-partners have threatened that they would expose risqué photos of their ex online. According to the study, these threats have been carried out nearly 60% of the time.[603]

The above figures are the reason why many were pushing for the drafting of new laws to prohibit and punish the distribution of explicit photos of an ex-lover. In the UK, the law was introduced in 2015 and in just over a year several cases have been reported. In fact, in a UK press release it was stated that in just six months, 1800 calls were made to a helpline dedicated to revenge porn victims. This means that there were 280 individual new cases in a few months.[604] Through a freedom of information request from 14 Police forces in the UK, it was reported that there was an increase in both revenge porn allegations with victims raging from below 18 years and others aged in their 60's, and that police action had been taken.

It is still too early to say whether the law has been successful or not. Figures show an increase in cases of Revenge Porn and Ms Sarah Green, acting director of End Violence against Women, remains positive and argues that this shows that the new law is encouraging victims to step forward as they feel that they are now being taken seriously.[605]

Dr Holly Jacobs took this crime very seriously and set up a movement namely the Civil Cyber Rights Initiative (Hereinafter referred to as 'CCRI'). This movement was set up to enforce the need for the criminalisation of revenge porn and to provide assistance to the victims. The official website presents important statistics which indicate that one in ten ex partners have been blackmailed by threatening to post explicit images online and that 60% of the blackmailers followed through with their threats.[606]

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603 ibid.

604 Government Equalities Office, MP Caroline Dinenage, MP Nicky Morgan, 'Hundreds of victims of revenge porn seek support from helpline' (*GOV.UK,* 23 August 2015) <https://www.gov.uk/government/news/hundreds-of-victims-of-revenge-porn-seek-support-from-helpline> accessed 28 November 2016.

605 Dr Heather Brunskell-Evans, 'Want to Stop Revenge Pornography? Then We Need to Overhaul Mainstream Porn' (*University of Leicester*, 17 JULY 2015) <http://www2.le.ac.uk/offices/press/think-leicester/arts-and-culture/2015/want-to-stop-revenge-pornography-then-we-need-to-overhaul-mainstream-porn> accessed 20 february 2016.

606 'Power in Numbers' (*Cyber Civil Rights Initiative,* 3 January 2014) <http://www.endrevengeporn.org/revenge-porn-infographic/> accessed 27 February 2016.
CCRI survey results were achieved from a survey that was hosted on endrevengeporn.org

Ms Sarah Green leads an important campaign based on two important issues. Primarily the police and courts should have the expertise to prosecute and charge alleged perpetrators. Moreover a better sexual educational system should be in place from early stages to teach the little ones to not only protect their privacy but to respect other people's privacy based on equality and consent.[607]

Dr Jeff McAllister, a London based lawyer representing revenge porn victims, emphasises on better civil laws which allow victims not only to get the criminal justice they deserve but to also sue for damages for the emotional, psychological and financial losses they suffer due to such act. We must remember that victims are not only abused psychologically by their most personal photos being exposed alongside their personal details, but employers might also reject them leading to loss of promotions and jobs. The requirement to prove intention to cause distress may hinder the fight against the spreading of revenge porn since those who re-distribute the pictures do not have this intention and are thus exempt from punishment. While this law is a good start, more needs to be done.

9. Conclusion

When I started my research on the topic I barely knew what the subject involved and this was a problem in itself. This boils down to weak sexual education. In Malta things have changed over the years but a social stigma still remains. Some victims decide not to report cases due to fear of being labelled a 'whore'. An important tangent from this is the education to be given not only to the public but also to the Malta Police Force to deal with reports as soon as they are filed. We must remember that members of the police force are the only people that can offer actual help to the victims.

On the twelfth of July, 2016 a new law was passed after a long discussion in Parliament which saw the two sides in Parliament agreeing to criminalise revenge pornography[608]. Before this, such terminology was alien to our country. Therefore, this was an important step in our legal history for the protection of our citizens, and more importantly for our youths, who reach a vulnerable age at

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from Aug 2012-Dec 2013. Participants self-selected into the study by visiting our website and filling out the survey on their own accord. Results depicted are reflective of a female-heavy sample, due to most of our site visitors being women.

607 Allison Bazinet, Moriah Daugherty and Ryan Lau, 'Anti-Revenge Porn Act' (2015) <http://www.law.georgetown.edu/academics/centers-institutes/privacy-technology/upload/anti-revenge-porn-act.pdf> accessed 5 february 2016.

608 'Amendments to laws on pornography, freedom of expression and vilification of Religion' (*Television Malta*, 13 July 2016) <http://www.tvm.com.mt/en/news/amendments-to-laws-on-pornography-freedom-of-expression-and-vilification-of-religion/> accessed 26 August 2016.

which they start experimenting, forgetting about the devastating consequences an act today can have in their future.

Dr Andy Ellul, a leading Maltese criminal lawyer, introduced me to a new concept namely that of 'Breach of Trust'. This concept is wider than revenge pornography in the sense that apart from criminalising the spreading of explicit photos between lovers, in this case, it also targets activities which are meant to remain private between friends but end up being publicised over the internet.

This is a very interesting concept which certainly is entitled to a discussion of its own. Nevertheless, the *raison d'etre* behind both concepts; revenge porn and breach of trust, is to punish whoever publishes media which was meant, and expected to, remain private.

I end my article with a quote by Hillary Clinton, when she was asked on her position on Revenge Porn,

> Don't take it personally because it can knock you to your knees if you take it personally," she said. "The online culture of bullying young women is horrible and even the most confident, well prepared girl has to be worrying, like why are people picking on me? Why are they saying these things about me? What is happening here? We have got to stand up against that.[609]

[609] Sam Levine, 'Hillary Clinton Vows to End Revenge Porn as President' (*The Huffington Post*, 29 June 2016) <http://www.huffingtonpost.com/entry/hillary-clinton-revenge-porn_us_5773dc4fe4b0352fed3e85cd> accessed 19 July 2016.

THE EUROPEAN COURT FOR HUMAN RIGHTS CHANGES THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

Harun Išerić B.A. iur.

ABSTRACT[610]

In December 1995 by signing General Framework Agreement for Peace, Bosnia and Herzegovina got a new constitution by which country got a new internal organizational structure: it is divided into two entities: Federation B&H (FB&H) and Republic of Srpska (RS). The Collective Head of State is now the Presidency of Bosnia and Herzegovina. It is composed of three members: Bosniak & Croat (both chosen from the territory of The Federation of BiH) and Serb member (chosen from the territory of Republika Srpska). The upper house of the Parliamentary Assembly is The House of Peoples of BiH which gathers 15 delegates: 5 Bosniaks, 5 Croats (chosen by Parliament of Federation of BiH) and 5 Serbs (chosen by Parliament of Republika Srpska).

Prima facie are obvious the discriminations of all those who do not declare themselves as Bosniaks, Serbs or Croats, as well as the discrimination of these ethnic groups based on the entity they live in. This assertion was confirmed by the European Court of Human Rights in the case of ***Sejdić and Finci vs. B&H***, ***Azra Zornić v B&H***, ***B&H & Ilijaz Pilav vs. B&H***. In the judgment of the case of ***Azra Zornić vs. B&H***, the European Court highlighted their expectations from Bosnia and Herzegovina to establish a democratic constitutional arrangement without discrimination based on ethnicity. With this statement The Court unequivocally asked for modifications in the Constitution of Bosnia and Herzegovina.

KEYWORDS: BOSNIA AND HERZEGOVINA – EUROPEAN COURT FOR HUMAN RIGHTS – CIVIL LAW – SEJDIĆ AND FINCI – AZRA ZORNIĆ – ILIJAZ PILAV – DISCRIMINATION – CONSTITUTION

[610] This article was reviewed by Dr Tonio Borg LL.D.

THE EUROPEAN COURT FOR HUMAN RIGHTS CHANGES THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

Harun Išerić

1. The Constitution of Bosnia and Herzegovina - The Nightmare of Bosnia and Herzegovina

In December 2015, twenty years had passed since Bosnia had implemented a new Constitution. After the four-year-long war in which crime of genocide was committed,[611] the General Framework Agreement for Peace in Bosnia and Herzegovina,[612] whose Annex 4 is the Constitution of Bosnia and Herzegovina, was signed in Paris on 14th of February 1995. The agreement was written in the English language, and consequently, the Constitution of Bosnia and Herzegovina was thus written in the English language.[613] This is perhaps a unique case of a Constitution which was not written in the official language of the country and in fact, it has never been published in its official languages. The Constitution is relatively short, with only 12 articles[614] and two annexes.[615]

The Constitution primarily brought changes to the internal arrangement of Bosnia and Herzegovina. Country got divided into two entities - Republika Srpska (49% of the territory of Bosnia and Herzegovina) and the Federation of Bosnia and Herzegovina (51% of the territory of Bosnia and Herzegovina).[616] The Brčko Distrikt was established by a sub-sequential decision of The International Court of Arbitration. The entities have their constitutions and Brčko District also has its own constitution that is called the Statute. The

611 See more: Judgment of the International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia) [2007] ICJ 2.

612 General Framework Agreement for Peace in Bosnia and Herzegovina: Organization for Cooperation and Security in Europe Mission in Bosnia and Herzegovina. The agreement was signed by the representatives of Bosnia and Herzegovina, Croatia, Serbia, European Union, United States of America, France, United Kingdom, Russian Federation, and Federal Republic of Germany.

613 The translation of the Constitution to Bosnian, Croatian, Serbian language was completed by The Office of The High Representative.

614 Article I: Bosnia and Herzegovina, Article II: Human Rights and Fundamental Freedoms, Article III: Responsibilities of and Relations Between the Institutions of Bosnia and Herzegovina and the Entities, Article IV: Parliamentary Assembly, Article V: Presidency, Article VI: Constitutional Court, Article VII: Central Bank, Article VIII: Finances, Article IX: General Provisions, Article X: Amendment, Article XI: Transitional Arrangements, Article XII: Entry into Force.

615 Annex One is Additional Human Rights Agreements to Be Applied in Bosnia and Herzegovina and Annex Two is Transitional Arrangements.

616 Nedim Ademović and Christian Steiner, *Constitution of Bosnia and Herzegovina Commentary* (Konrad Adenauer Stiftung 2010).

Federation of Bosnia and Herzegovina subdivided into ten cantons. Each of the cantons has its own constitution. Moreover, each territorial unit has its own legislative, executive and judicial branch.

The Preamble of the Constitution states the following: 'Bosniaks, Croats, and Serbs, as constituent peoples (along with 'Others'), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows...'[617]. The Preamble, therefore, mentions the three population groups: constituent peoples, 'Others' and citizens of Bosnia and Herzegovina. Constituent peoples are the following: Bosniaks, Serbs and Croats. The word 'constitutionality' refers to the full equality and positive discrimination of members of these three groups when filing vacancies of state institutions and certain guaranteed special constitutional rights. The European Court for Human Rights, calls 'Others' as members of ethnical minorities, that do not declare themselves as members of any of the groups due to mixed marriages, mixed parenthood or due to other reasons are, and lastly 'Citizens' as those who declare them self as citizens of Bosnia and Herzegovina.[618]

The principle upon which the new constitutional and legal order of Bosnia and Herzegovina is based is ethnic-territorial. This principle is best presented through two state institutions: Presidency and the House of Peoples. The collective head of state is the Presidency of Bosnia and Herzegovina. It consists of three members: one Serb who is directly elected from territory of Republika Srpska, one Bosniak and one Croat directly elected from territory of the Federation of Bosnia and Herzegovina. The Parliamentary Assembly of Bosnia and Herzegovina is composed of two houses: the House of Representatives and the House of Peoples. The House of Representatives is the lower house whilst the House of Peoples is the upper house. It has fifteen delegates: two-thirds from the Federation of Bosnia and Herzegovina (five Croats and five Bosniaks) elected by the lower house of the Parliament of the Federation, one-third from Republika Srpska (five Serbs) chosen by the National Assembly of Republika Srpska. The House of Peoples, that is, the upper house, is in terms of power completely equal to the lower house, the House of Representatives. Both houses have to ratify international documents, accept laws and adopt state budget, in order for them to come into force. 'That makes it distinctively powerful and different from other upper houses in both Europe and the world'.[619] Only those who declare

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[617] Preamble of Constitution of Bosnia and Herzegovina. Constitution of Bosnia and Herzegovina.

[618] *Azra Zornić* vs. *Bosnia & Herzegovina* App no 3681/06 (ECHR, 15 July 2014) para 8.

[619] According to one comparative study from 1997, House of Peoples of Bosnia and Herzegovina, together with American Senate, is only upper house that has bigger power than lower house of Parliament: Nystuen Gro, *Achieving Peace or Protecting Human Rights?:*

themselves as members of constituent peoples can become candidates and elected/chosen to serve in two, previously mentioned, state institutions. This ethnical principle is related to the territorial principle: Bosniak and Croat, members of the Presidency and the House of Peoples are exclusively from the territory of Federation of Bosnia and Herzegovina, and Serb, member of the Presidency and the House of Peoples, is exclusively from the territory of Republika Srpska.

The presented ethnical principle is also reflected in legal order of entities. For example, the President and two Vice Presidents of entities how to be members of one of three constituent peoples. The President and two Vice Presidents of the Parliament Assembly of the Federation of Bosnia and Herzegovina have to come from three constituent peoples. President and vice presidents of Governments of Republika Srpska and the Federation of Bosnia and Herzegovina have to ba members of one of three constituent peoples.

At a glance, the following discriminations can be identified in constitutional provisions of Bosnia and Herzegovina,

a) Discrimination of 'Others' and citizens of Bosnia and Herzegovina in terms of composition of the Presidency and the House of People;

b) Discrimination of the constituent peoples in terms of the House of People related to following: Bosniaks and Croats because they cannot be elected from the territory of Republika Srpska, and Serbs, because they cannot be elected from the territory of Federation of Bosnia and Herzegovina.

c) Discrimination of constituent peoples regarding the Presidency of Bosnia and Herzegovina due to the following: Bosniaks and Croats cannot be elected on the territory of Republika Srpska, and Serbs cannot be elected from the territory of the Federation of Bosnia and Herzegovina.

Discrimination under the first point was confirmed by the judgments of the European Court for Human Rights in the cases of ***Sejdić and Finci vs. Bosnia and Herzegovina,***[620] ***Šlaku vs. Bosnia and Herzegovina,***[621] and ***Azra Zornić vs.***

Conflict between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement (Martinus Nijhoff Publisher 2005) 165.

620 *Sejdić & Finci vs. Bosnia and Herzegovina App* no. 27996/06 & 34836/06 (ECHR 22 December 2009).

621 *Šlaku vs. Bosnia and Herzegovina* App no. 56666/12 (ECHR 26 May 2016).

Bosnia and Herzegovina.[622] The judgment in the case of ***Ilijaz Pilav vs. Bosnia and Herzegovina***[623] confirmed discrimination described under the third point. There is still no judgment regarding discrimination under point two.

In Article II of the Constitution, *Human Rights and Fundamental Freedoms*[624], it is stated that the European Convention on Human Rights and Fundamental Freedoms and its Protocols are directly applied in Bosnia and Herzegovina, and shall have supremacy over all other law. Hence, the Convention and Protocols have the same power as constitutional regulations. While considering the direct application of the Convention and its advantages over legislation, the Constitutional Court of Bosnia and Herzegovina determined that the Convention does not have the advantage over other constitutional regulations.[625]

In April 2002, Bosnia and Herzegovina became a member of the Council of Europe. When it became a member of the Council of Europe, Bosnia and Herzegovina committed itself to reviewing the electoral law regarding norms of the Council of Europe, and making changes where it is required within a year, with help from the Venice Commission. Also, in February 2008, the European Union stated that within two years it is expected from Bosnia and Herzegovina to 'amend electoral legislation regarding members of the Bosnia and Herzegovina Presidency and House of Peoples delegates to ensure full compliance with the European Convention on Human Rights and the Council of Europe post-accession commitments.'[626] That did not happen.

2. *Sejdić and Finci* vs. *Bosnia and Herzegovina*[627]

The first judgment of the Court, in which it found the violation of the article No.1 of Protocol No.12 (general prohibition of discrimination) of European Convention for the Protection of Human Rights and Fundamental Freedoms (Hereinafter referred to as ECHR), was in case ***Sejdić and Finci vs. Bosnia and Herzegovina***. The judgment was announced by the Grand Chamber in December 2009.

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622 *Azra Zornić vs. Bosnia and Herzegovina* App no. 3681/06 (ECHR 15 July 2014).
623 *Pilav vs. Bosnia and Herzegovina* App no. 41939/07 (ECHR, 9 June 2016).
624 Article II of Constitution of Bosnia and Herzegovina. Constitution of Bosnia and Herzegovina.
625 Decisions U 5/04 and U 13/05.
626 Council Decision 2008/211/EC of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Bosnia and Herzegovina and repealing Decision 2006/55/EC [2008] OJ L80/18.
627 *Sejdić – Finci vs. Bosnia and Herzegovina* App no. 27996/06 & 34836/06 (ECHR, 22 December 2009).

The applicants were Dervo Sejdić, of Roma ethnicity, coordinator of Council of Roma in Bosnia and Herzegovina and Jakob Finci, of Jewish ethnicity, president of Jewish community in Bosnia and Herzegovina.

They argued that they cannot run for the position of a member of the Presidency of Bosnia and Herzegovina and the House of Peoples because of their origins, and thus referred to the following article of the ECHR: the prohibition of discrimination (Article 14 of ECHR), the right to free elections (Article 3 of Protocol No.1 of ECHR), and the general prohibition of discrimination (Article 1 of Protocol No.12 of ECHR).[628]

The Court stated that the fact that 'the present case raises the question of the compatibility of the national Constitution with the Convention is irrelevant in this regard'.[629] Strasbourg's Court concluded that Bosnia and Herzegovina might not be held responsible for passing these regulations, but can surely be held responsible for them still being valid.[630] The basis of discrimination is the ethnic origin which represents one type of racial discrimination.

In the application, the applicants stated that the state would have a difficult task if it tried to find an objective and acceptable justification regarding the foundation of the appeal (direct racial and ethnical discrimination) and the field in which it is applied (political participation and representation in the highest level of government), as well as the time frame in which this exclusion is taking place - ten years.

The government based its arguments on the attitudes of the Court in the case ***Ždanoka vs. Latvia***,[631] and the historical context in which the Constitution of Bosnia and Herzegovina was created.[632]

The European Court first tested the applicability of Article 14 of ECHR in relation with Article 3 of Protocol No.1 of ECHR regarding elections for members of the House of Peoples. Since Article 3 of Protocol No.1 ECHR is referring only to elections for legislative authority, it was necessary to state whether the House of

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628 Applicants also raised violation of Article 3 of ECHR (prohibition of torture) and Article 13 of ECHR (right to an effective remedy). The Court found these claims ill-founded.

629 *Sejdić - Finci vs. Bosnia and Herzegovina* App no. 27996/06 & 34836/06 (ECHR 22 December 2009), para 29.

630 ibid para 30.

631 *Ždanoka vs. Latvia* App no. 58278/00 (ECHR, 16 March 2006).

632 Government stated that Constitution came at the end of the most devastating conflict in modern European history in order to achieve peace and dialogue among three ethnical groups.

Peoples is a legislative authority.[633] Deciding whether something is considered a legislative authority is based upon the constitutional structure, the state's constitutional tradition and the extent of legislative jurisdiction. Considering the constitutional authorization, being the decisive factor for the Court, Article 14 in relation with Article 3 of Protocol No. 1 was declared to be applicable. Discrimination against ethnical origin is a sort of race discrimination[634]. The Court previously stated that none of the various acts, which can be exclusively or in a critical volume based on ethnical origin of an individual, cannot be objectively justified in the contemporary democratic society established on principles of pluralism and respect of other cultures.[635]

With these constitutional regulations, Court found one goal from the preamble of the Convention – being the establishment of peace. However, the Court emphasized the improvement and development which Bosnia and Herzegovina has made after signing the General Framework Agreement for Peace in Bosnia and Herzegovina - with establishing single military force, joining NATO's Partnership for Peace, signing the Stabilization and Association Agreement with European Union and membership in Security Council of United Nations.

Accordingly, long-term inability of the applicants to run for a member of the House of Peoples does not have an objective and acceptable justification, and it violates Article 14 related to Article 3 of Protocol No.1 of ECHR.

Regarding the elections for the Presidency of Bosnia and Herzegovina, the applicants adverted to Article 1 of Protocol No.12, which prohibits discrimination with regard to all the rights provided by the law. Since the constitutional regulations prevent candidacy for the Presidency, Article 1 of Protocol No. 12 is applicable. By not distinguishing the differences regarding the discrimination, that is, disaffiliation to any of the constituent peoples, the Court confirmed that there is no difference between the House of Peoples and the Presidency, and that the precondition, which refers to the suitability of candidacy for the elections for the Presidency, represents violation of Article 1 of Protocol No.12 of ECHR.[636]

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633 Judge Mijović, in is partly concurring and partly dissenting opinion discuses applicability of Article 3 Protocol 1 on Hose of Peoples. Judge points out that Court concluded before that Article 3 Protocol 1 is applicable only on House of Representatives which composition is result of direct elections. Judge Mijović, finally concludes that there are no elections for House of Peoples – its members are chosen by entities parliaments.

634 *Sejdić - Finci vs. Bosnia and Herzegovina* App no. 27996/06 & 34836/06 (ECHR, 22 December 2009), para 43.

635 *D.H. and Others vs. Czech Republic* App no. 57325/00 (ECHR, 13 November 2007) para 176.

636 Judge Mijović, from Bosnia, and judge Hajiev, had partially consentient and partially different opinion. Judge Boneli in his distinguished opinion described dramatically his disagreement: 'The Court did not affirm that the risk of civil war, avoidance of massacre or

3. *Azra Zornić vs. Bosnia and Herzegovina* [637]

Five years after the Sejdić and Finci judgment, the European Court of Human Rights announced the judgment on **Azra Zornić vs. Bosnia and Herzegovina** case. Azra Zornić declared herself as a citizen of Bosnia and Herzegovina. Hence, not as a member of constituent peoples, nor a member of 'Others' (like Dervo Sejdić and Jakob Finci were). She is member of third group stated in the preamble - the citizens of Bosnia and Herzegovina. In her appeal, she states that due to her affiliation she cannot run for a member of the Presidency of Bosnia and Herzegovina and cannot be a delegate in the House of Peoples of Bosnia and Herzegovina, which leads to violation of Article 1 of Protocol No. 12 of ECHR and Article 14 related to Article 3 of Protocol No. 1 of ECHR.[638]

The Government repeated similar arguments from the Sejdic-Finci case. It stated that the constitutional structure was established after 'the most destructive conflict in the modern history of Europe',[639] in order to establish peace and dialogue among the three ethnical groups. The government also stated that the applicant had willingly decided not to declare herself a member of any of the constituent peoples, and she could at any time choose to change that decision in case she would like to participate in the political life of Bosnia and Herzegovina. The Court claimed that this case was identical to Sejdić and Finci: 'Although, unlike the applicants in that case, who were of Roma and Jewish origin respectively, the present applicant does not declare affiliation with any particular group, she is also prevented from running for election to the House of Peoples on the ground of her origin.'[640]

The Court confirmed the applicant's assertions.[641] In the judgment the Court, in a very sharp tone, emphasizes that eighteen years after the end of the war, there could no longer be any reason for the maintenance of the contested discriminatory provisions.

> The Court expects that democratic arrangements will be made without further delay ... The Court considers that the time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the right to stand for elections to the Presidency and the House of Peoples

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maintenance of territorial unity, has a social value big enough to justify certain limitations of rights of these two applicants. I cannot support the Court which sows ideals, but reaps bloodshed.'

637 *Azra Zornić vs. Bosnia and Herzegovina* App no. 3681/06 (ECHR, 15 July 2014).

638 ibid para. 13.

639 ibid para. 24.

640 ibid para. 30.

641 ibid para. 33 and 37.

of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities or citizens of Bosnia and Herzegovina.'[642]

4. Šlaku vs. Bosnia and Herzegovina[643]

The Šlaku case is very similar to Sejdi-Finci case. The applicant was Samir Šlaku. He declares himself as member of Albanian national minority community in Bosnia. After he received confirmation by Bosnia and Herzegovina Electoral Commission that as member of national minorities cannot run for Presidency or House of Peoples he failed application to European Court for Human Rights. Applicant claimed violation of Article 14, Article 3 of Protocol No.1 and Article1 of Protocol No. 12. Government has repeated the same arguments found in previous two cases. It also stated that constituent peoples also have limited their passive voting rights when it comes to elections for House of Peoples and Presidency. When it comes to House of Peoples, Court stated that this case 'is identical to case Sejdić-Finci in which Court concluded that these constitutional provision lead to discriminatory treatment which is in contrary to Article 14 in relation to Article 3 of Protocol No.1'.[644] The Court concluded that beside a violation of Article 14 in relation to Article 3 of Protocol No.1, in relation to House of Peoples, there was also and violation of Article 1 of Protocol No. 12 – general prohibition of discrimination, due to continuous inability of applicant to run for member of this House. Following its practice in case Sejdić-Finci, Court stated that provisions which do not allow applicant to run for presidency are violating Article 1 of Protocol No. 1. of ECHR. In the judgment, the Court dedicated special attention to the Article 46 of the ECHR[645]. European Court for Human Rights stated that violation of human rights in the present case is a direct consequence of failure of Bosnian government to execute Sejdić-Finci judgment. 'The failure of Bosnia and Herzegovina to adopt amendments to the constitution and electoral law in order to end current incompliance with ECHR ... represents the threat for future efficiently of mechanism of the Convention.'[646] The Court also stated that 'more than 18 years after the end of tragic conflict, there cannot be any reason for keeping disputable constitutional provisions.'[647]

5. *Ilijaz Pilav vs. Bosnia and Herzegovina*[648]

642 ibid para 43.
643 *Šlaku vs. Bosnia and Herzegovina* App no. 56666/12 (ECHR, 26 May 2016).
644 ibid para 29.
645 Binding fore and execution of judgments.
646 *Šlaku vs. Bosnia and Herzegovina* App no. 56666/12 (ECHR, 26 May 2016) para 37.
647 ibid para 40.
648 *Pilav vs. Bosnia and Herzegovina* App no. 41939/07 (ECHR, 9 June 2016).

Ilijaz Pilav declares himself to be a Bosniak. He lives in Srebrenica, on the territory of Republika Srpska. Ilijaz Pilav wanted to run for Serb presidency member from Republika Srpska. But, as he declares himself a Bosniak, Central Election Commission refused his application with an explanation that afore mentioned cannot be elected for the position from the territory of Republika Srpska since he declared himself as a Bosniak, but not as Serb. Ilijaz Pilav appealed to Constitution Court claiming that Article 1 Protocol 12 of ECHR was violated. Constitutional Court of Bosnia & Herzegovina found his appeal to be unfounded.[649] This is a case of discrimination of constituent peoples in relation to the territory they live on. This particular case refers to a Bosniak living on the territory of Republika Srpska who was not permitted to run for a member of Presidency from Republika Srpska because he declares himself to be a Bosniak.

Before the Court, the Government had repeated that Bosnia & Herzegovina could not be held responsible for Constitutional provisions as it is part of international agreement. Bosnia & Herzegovina also claimed that Mr. Pilav was not a victim as he could move to Federation of Bosnia and Herzegovina where he would enjoy his right to vote and stand for election without restriction.[650] It means that Mr. Pilav could change his residency at any time. In addition, Government repeated arguments presented in case ***Zornić vs. Bosnia and Herzegovina***.[651]

In its observations, the Court states that the applicant lives in Bosnia & Herzegovina and that presidency is a political body of the State. It is not an entity institution. 'Its policy and decisions affect all citizens of Bosnia and Herzegovina.'[652] In its conclusion, the Court states that applicant exclusion from election to the Presidency is based on a combination of ethnic origin and place of residence and, as such 'amounts to the discriminatory treatment in breach of Article 1 of Protocol No. 12 of ECHR.'[653] This judgment was delivered on 9th June 2016.

6. The consequences of the judgments and proposals for their implementation

These are some of the rare judgments brought by the European Court which have shaken the very foundations of the constitutional arrangement of one Member State of the Council of Europe. Stated judgments of the European Court for Human Rights are not related solely to the elections of Presidency and the

649 Constitutional Court of Bosnia and Herzegovina referred to case *Ždanoka vs. Latvia*.
650 *Pilav vs. Bosnia and Herzegovina* App no. 41939/07 (ECHR, 9 June 2016) para 23.
651 ibid para 31 – 34.
652 ibid para 45.
653 ibid para 48.

House of Peoples of Bosnia and Herzegovina. They will affect the whole set of institutions and functions in Bosnia. It means that massive changes in the legal order of Bosnia and Herzegovina will have to be taken. For illustration purposes, the following legal provisions will have to modified: president and two vice presidents of the House of Representatives of Bosnia and Herzegovina are chosen from constituent peoples, president and two vice presidents of Republika Srpska and the Federation of Bosnia and Herzegovina are also chosen from constituent peoples, president and two vice presidents of cantonal assemblies in the Federation of Bosnia and Herzegovina are chosen from constituent peoples, etc. The ethnic-territorial principle of political and legal order will have to be dismissed.

Due to failure to fulfil judgment in case Sejdić-Finici Bosnia and Herzegovina is risking to be the first country to be kicked out of Council of Europe. Minority Rights Group International has asked Committee of Minister of council of Europe to initiate infringement proceedings[654] in accordance with article 46 (binding force and execution of judgments) point 4 of European Convention. Infringement proceedings consist from two steps: Committee of Ministers will serve formal notice to Bosnia and Herzegovina by interim resolution and then Committee shall adopt decision referring to the ECHR with the question whether Bosnia and Herzegovina has fulfilled final Court's decision in case Sejdić-Finci.[655] After Court's answer, which in case of Sejdić-Finci judgment implementation, is going to be negative, the Committee will take other measures. The only left one is mechanism in Article 8 of Council of Europe Statute.[656] In accordance with article 8, member state may be suspended from its rights of representation and could be requested by the Committee of Ministers to withdraw from Council of Europe. 'If such member state does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.'[657] Previously, Committe of Ministers has increased communication with Bosnia and Herzegovina and eximination of Sejdić-Finci case. It was followed with three interim resolutions.[658] In the last interim resolution from 2013, Committee strongly urged all government and political leaders of Bosnia and Herzegovina to ensure that the constitutional and

654 Secretariat of the Committee of Ministers, 'Communication from NGO (Minority Rights Group International) in the case of Sejdić and Finci against Bosnia and Herzegovina' <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168069794d> accessed 1 August 2016.

655 ibid 3.

656 Statute of the Council of Europe, art 8.

657 ibid.

658 Committee of Ministers, Interim resolution CM/ResDH (2011) 291, adopted 2 December 2011; Committee of Ministers, Interim resolution CM/ResDH (2012) 233, adopted 6 December 2012 & Committee of Ministers, Interim resolution CM/ResDH (2013) 259, adopted 5 December 2013.

legislative framework is immediately brought into line with the requirements of the Convention, so that the elections in October 2014, are held without any discrimination against those citizens who are not connected with any of the 'constituent peoples.'[659] Parlamentary Assembly of Council of Europe in its recommendation from 2013 called B&H to 'amend the constitution and electoral law to comply with the Sejdic-Finci case without delay.'[660] Human Rights Watch and Minority Rights Group International in their communication with the Committee of Ministers from December 2015 stated that the non-implementation of judgment Sejdić-Finic has far reaching consequence and that it 'undermine[s] legitimity of Conventional system.'[661] The request of Minority Rights Group International will be examined in September 2016.

Since the judgment in case Sejdi-Finci was announced, in December 2009, the European Union starting making its implementation a key condition for Stabilisation and Association Agreement between EU and Bosnia and Herzegovina to enter into the force. EU Progress report from 2014 on Bosnian and Herzegovina stated that,

> Full implementation of the Sejdić-Finci ruling is a key element for Bosnia and Herzegovina's membership application to be considered as credible by the EU. Moreover, the compliance of the country's Constitution with the European Convention on Human Rights as regards the Sejdić-Finci judgment remains to be ensured.[662]

The first to implement the judgment of Sejdić and Finci was Sarajevo Canton. In January 2013, Sarajevo Canton, one of the ten in the Federation of Bosnia and Herzegovina, adopted the amendments to the Constitution of Sarajevo Canton, by which the Sejdić and Finci judgment was implemented. Based on the previous legislation, the cantonal assembly had one presidents and two vice presidents who were chosen from the three constituent peoples. With the modified Constitution, the Presidency has one president and three vice presidents coming

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659 Committee of Ministers, Interim resolution CM/ResDH (2013) 259, adopted 5 December 2013.

660 Council of Europe Recommendation 2025, Parliamentary Assembly of the Council of Europe, 'The functionality of democratic institutions in Bosnia and Herzegovina' (2013) 12.

661 Secretariat of the Committee of Ministers, 'Communication from NGOs (Human Rights Watch and Minority Rights Group International) in the case of Sejdić and Finci against Bosnia and Herzegovina' 10 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804ae87a> accessed 2 August 2016/

662 European Commission, 'Bosnia and Herzegovina 2014 Progress Report' (2014) <http://ec.europa.eu/enlargement/pdf/key_documents/2014/20141008-bosnia-and-herzegovina-progress-report_en.pdf> accessed 15 February 2016.

from among one of the constituent peoples and from among the category of 'Others'. Nine other cantons are expected to do the same.

In 2014, general elections in Bosnia and Herzegovina were held. Once again Roma, Jews, 'Others' and the citizens of Bosnia and Herzegovina were not allowed to run for election to the Presidency of Bosnia and Herzegovina and the House of Peoples. In the past years, the representatives of European Union organised a series of meetings with the presidents of leading Bosnian parties in order to find appropriate constitutional amendments through which the judgment of Sejdić and Finci, and Azra Zornić against Bosnia and Herzegovina would be implemented. All of them ended unsuccessfully.[663] There were several proposals for implementation of the judgments.

Two proposals came from the international community. The first one is called the April package.[664] Several years before the Sejdić-Finci judgment, the April package of constitutional changes was proposed, written under the auspices of the United States of America. The same structure of the House of Peoples was kept, however, with excessively narrowed-down powers of the House.[665] Amendments did not explicitly prescribe for members of the Presidency to be from the three constituent peoples, but they could not be from the same constituent nation. They were chosen by the Parliament Assembly of Bosnia and Herzegovina. With these amendments, there still would not be place for 'Others' and citizens of Bosnia and Herzegovina in House of Peoples, or Croat and Bosniak members could be elected form RS and Serbian from Bosnia and Herzegovina in the House. But as an 'extent of the legislative powers enjoyed by House of Peoples was a decisive factor'[666] for applicability of Article 3 of Protocol No 1. in case Sejdić-Finci, if authorities would have been reduced, it is questionable whether the European Court would find discrimination of Others and citizens of Bosnia and Herzegovina. But, the April package still discriminates constituent peoples regarding composition of House of Peoples, as only Bosniak and Croat members are chosen from Federation of Bosnia and Herzegovina and Serb members only from Republika Srpska.

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663 'Ethnically based discrimination in Bosnia and Herzegovina constitutional system' (*Coalition Equality*, 2014) <http://eu-monitoring.ba/site/wp-content/uploads/2014/06/Written-Submission_EU-Progress-Report-2014_Ethnic-based-discrimination_Coalition-Jednakost.pdf> accessed 2 August 2016.

664 The April Package is package of constitution amendments. It is named after month in which it was rejected by Bosnian parliament in 2006.

665 Powers of House of Peoples would be: adoption of constitutional amendments, right of veto due to protection of vital national interest, and election of the president and the vice president of Bosnia and Herzegovina.

666 *Sejdić - Finci vs. Bosnia and Herzegovina* App no. 27996/06 & 34836/06 (ECHR, 22 December 2009) para 41.

The second proposal was made during the Butmir process. The Butmir process, which started in 2009, was led by the representatives of the European Union. It envisioned the House of Peoples having reduced legislations, narrowed down to those in the April Package. The arrangement would remain the same. Modifications related to the Presidency of Bosnia and Herzegovina were identical to those proposed in the April Package. The Butmir process did not lead to any amendments in Parliament procedure and it was a total failure on behalf of EU officials. As described previously, this proposal discriminates constituent peoples regarding composition of House of Peoples.

They were a number of proposals by the non-governmental sector. The proposal of the Coalition Equality abolishes the Presidency of Bosnia and Herzegovina and the House of Peoples. Powers of the Presidency would be transferred to Council of Ministers and powers of House of peoples would be transferred to the House of Representatives. The House of Representatives would thus be the Parliament of Bosnia and Herzegovina. This perhaps was the best proposal from a financial perspective. It also would solve the complicated structure and means of how delegates are chosen in House of Peoples.

The proposal of the Council of National Minorities of Bosnia and Herzegovina[667] increase number of delegates of House of Peoples for four delegates coming from group of 'Others' - two from the Federation of Bosnia and Herzegovina and two from Republika Srpska proposed by the Council of National Minorities of Bosnia and Herzegovina. It also increased the number of Presidency member with one more member, which would come from the group of national minorities, nationally uncommitted, or citizens of Bosnia and Herzegovina. Implementation of this proposal would request additional funding. On the other hand, it does not solve discrimination of Serbs in Federation of Bosnia and Herzegovina and Croats and Bosniaks in Republika Srpska as they would not be able to run for House of Peoples.

The third proposal coming from the civil sector is the proposal of the Forum of Tuzla Citizens.[668] The House of Peoples would be expanded to number of thirty-

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667 National Minority Council, 'Proposal of amendments on Constitution of Bosnia and Herzegovina' (2012) <http://www.ustavnareforma.ba/files/articles/20120903/380/bs.%20Vije%C4%87e%20nacionalnih%20manjina,%20Prijedlog%20izmjene%20Ustava%20BiH,%2003.09.2012.pdf > accessed 19 June 2016.

668 Citizens of Tuzla Forum, 'Proposal of Forum of Tuzla Citizens on how to implement the judgments of the European Court of Human Rights in Strasbourg in the case of Sejdic and Finci vs. Bosnia and Herzegovina, as well as the decision of the Constitutional Court of Bosnia and Herzegovina on the equality of all three constituent peoples on the whole territory of Bosnia and Herzegovina' (2011)

one delegates, from which seventeen would be from the Federation of Bosnia and Herzegovina (six Bosniaks, six Croats and three Serbs, and two from among national minorities and the nationally uncommitted) and fourteen from Republika Srpska (six Serbs, three Bosniaks, three Croats, and three from among the national minorities and nationally uncommitted). The House of Peoples would keep its authorization. Regarding the authority of the Presidency of Bosnia and Herzegovina, it would be expanded to another member from the national minorities, the nationally uncommitted and the citizens of Bosnia and Herzegovina. This proposal implements fully judgments of European Court and also enables Serbs from Federation of Bosnia and Herzegovina and Croats and Bosniaks to run for the House of Peoples. In order to implement this proposal additional funding is needed. The Association Alumni of the Centre for Interdisciplinary Postgraduate Studies (ACIPS) in Bosnia and Herzegovina[669] recommends an increase in the number of the House of Peoples to thirty-two. According to the proposal, delegates from the constituent peoples are elected from both entities, and from both entities, there are two delegates coming from 'Others'. What is new in this proposal, unlike others, is that the Brčko District is now electing one representative from the constituent peoples and one among 'Others'. Unlike the other proposals, according to this one, Bosnia and Herzegovina does not have a vice president or a presidency, but only one president. ACIPS's proposal eliminates discrimination in composition of House of Peoples. It is unexpected that political elites would give up on vice-presidents' chairs.

Serb, Croat and Bosniak leading political parties have also made proposals for constitutional reform. According to the proposal of leading Serb Parties, Union of Independent Social Democrats (SNSD) and Serbian Democratic Party (SDS), the House of People would have 3 delegates from among 'Others' (1 from RS and two from the Federation of Bosnia and Herzegovina). When it comes to Presidency, verdict would be implemented in the way that in Constitution would be stated that two members are elected from Federation of Bosnia and Herzegovina and one from Republika Srpska (without ethnical determination).[670] In the same way as the April package had shown, the proposal

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<http://www.ustavnareforma.ba/files/articles/20111103/368/bs.%20Forum%20gradjana%20Tuzla%20-Privremena%20komisija,%2003.11.2011.pdf> accessed 19 June 2016.

669 Association Alumni of the Centre for Interdisciplinary Postgraduate Studies, 'Proposal of amendments on Constitution of Bosnia and Herzegovina' (2011) <http://www.ustavnareforma.ba/files/articles/20111103/370/bs.%20ACIPS%20%20prijedlog%20amandmana%20na%20Ustav%20BiH%20-%20Privremena%20komisija,%2003.11.2011.pdf> accessed 2 June 2016.

670 'Proposal of amendments on Constitution of Bosnia and Herzegovina' (2012) <http://www.ustavnareforma.ba/files/articles/20120830/382/bs.%20SNSD%20i%20SDS,%20Prijedlog%20amandmana%20na%20Ustav%20BiH,%2030.08.2012.pdf> accessed 20 June 2016.

discriminates constituent peoples regarding House of Peoples, as only Bosniak and Croat members are chosen from Federation of Bosnia and Herzegovina and Serb members only from Republika Srpska.

The proposal of leading Croat parties, Croatian Democratic Union (HDZ)[671] and Croatian democratic Union 1990 (HDZ 1990),[672] states that delegates of House of Peoples, from among the constituent peoples are elected from both entities, provided also that two of them are from among national minorities in the Federation of Bosnia and Herzegovina and from among national minorities in Republika Srpska. The Presidency according to the proposal is elected by the Parliament Assembly of Bosnia and Herzegovina. It consists of three members. These three members cannot be affiliated to the same constituent peoples.[673] This proposal completely fulfil judgments of European Court and complies constitution with ECHR.

The proposal of the leading Bosniak party, Party of Democratic Action, (SDA)[674] is close to the already mentioned April Package. What is quite novel is that it provides the category of 'Others' with a certain number of seats in the House of Representatives, lower house of Parliament. If yet the current powers of the House of Peoples would remain, national minorities would be represented in House of Peoples by two delegates from the Federation of Bosnia and Herzegovina and one from Republika Srpska. The proposal eliminates the disadvantages of the April package described before. However, if the House of Peoples would keep it powers, proposal would still discriminates constituent peoples regarding Hose of Peoples, as only Bosniak and Croat members could be chosen from Federation of Bosnia and Herzegovina and Serb members only from Republika Srpska.

7. Conclusion

It is rather difficult to predict when the Bosnian Parliament will change the Bosnian Constitution in order to implement the judgments handed down by the European Court for Human Rights. In the past, all reforms were conducted with support and pressure of the United States of America and European Union. It should not be expected that there will be constitutional reform without carrot-and-stick policy of any of these two forces. In the meantime, we could expect additional judgments of the Court because of non-compliance of Bosnia and Herzegovina Constitution with ECHR.

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671 Member of European People's Party.
672 Member of European People's Party.
673 Proposal of amendments to the Constitution of Bosnia and Herzegovina.
674 Member of European People's Party.

For six years, a key condition for Bosnian progress on the EU path was implementation of the Sejdić-Finci judgment. However, this has led Bosnia and Herzegovina to nowhere. Bosnia and Herzegovina has made no progress in constitutional reform either on EU access path. Due to that, in 2015, Germany and UK launched a new initiative for Bosnia and Herzegovina. Soon enough, EU Foreign Affairs Council adopted this new initiative and it became new EU approach for Bosnia. The new approach has put in the foreground social-economic reforms. Sejdić-Finci is not priority any more. This is how the only real and powerful pressure on Bosnia to implement European Court of human Rights decisions disappeared.

Finally, the issue which these judgments give rise to a question regarding the limits of the European Court's jurisdiction. Has it become the European Constitutional Court? For the first time in the history, European Court for Human Rights has challenged the Constitutional of Council of Europe member state. Due to these judgments, European Convention for Protection of Human Rights and Fundamental Freedoms, has become the heights legal act in Council of Europe state members, being above member states constitutions.

ACCESSION OF THE EUROPEAN UNION TO THE ECHR

Kirk Brincau LL.D. and Rachel-Marie Vella-Baldacchino LL.D.

ABSTRACT[675]

Based on a universal understanding of the importance of fundamental human rights and the protection thereof, activists, academics and legal professionals alike have often pondered whether the European Union should accede to the European Convention of Human Rights. It is argued that accession would serve to ensure the protection and respect of these fundamental rights for and by all, yet numerous obstacles have halted the accomplishment of this ideal.

This paper delves into these obstacles by primarily focusing on principles emerging from the case law of the Court of Justice of the European Union, as well as the European Court of Human Rights. It then proceeds to discuss Opinion 2/13 of the Court of Justice of the European Union and looks through the crystal ball to consider the consequences of this Opinion. It concludes by questioning whether accession under the terms posed by the Court of Justice of the European Union would indeed be beneficial for the protection of fundamental human rights in Europe.

KEYWORDS: HUMAN RIGHTS – EUROPEAN UNION – COUNCIL OF EUROPE – ECHR – OPINION 2/13

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ACCESSION OF THE EUROPEAN UNION TO THE ECHR

Kirk Brincau and Rachel Vella Baldacchino

Discussions relating to the role of fundamental human rights within the European Union (Hereinafter referred to as 'EU') are far from new. Although the founding treaties of the Union contained no specific provisions on the protection of fundamental rights, due to the prevailing focus, at the time, on the creation of a common market, in the decades following its inception a clear need to protect human rights within this steadily expanding new legal order emerged. This led the Court of Justice of the European Union (Hereinafter referred to as 'CJEU') to start developing a line of jurisprudence on human rights issues. The first reference to human rights related matters by the CJEU was made in 1969 in ***Stauder***.[676] Moreover, in order to strengthen the protection of fundamental human rights within Europe in general and the EU specifically, the idea of the EU's accession to the European Convention on Human Rights (Hereinafter referred to as the 'ECHR') emerged in 1979 when the European Commission issued a Memorandum and officially recommended formal accession.

A considerable amount of time and political prestige has been invested in the accession of the EU to the ECHR, by both the EU and the Council of Europe. This paper seeks to shed light on the *status quo* of the EU vis-à-vis its accession to the ECHR, particularly in the light of developments which have taken place in this regard since the question of accession was first brought to the table by the European Commission.

1. The Origin of the Debate and the Apparent Lacunae in the Protection of Fundamental Human Rights

An analysis of early judgments of the CJEU reveals that the Court refused to exercise judicial review over human rights standards as these could not, at the time, be inferred from Community Law. This is exemplified in ***Geitling vs. High Authority,***[677] wherein it was stated by the CJEU that: 'Community law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights.'[678]

The CJEU's approach changed in time with the increase of competences transferred by the Member States to the EU. An important milestone was

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676 Case 29-69 *Erich Stauder vs. City of Ulm – Sozialamt* [1969] ECR 1969 - 00419.

677 Case 37/59 *Geitling Ruhrkohlen-Verkaufsgesellschaft mbH vs. High Authority of the European Coal and Steel Community* [1960] ECR 1960 - 00423.

678 ibid 439.

reached in the ***Nold II*** judgment,[679] where the Court held that: 'fundamental rights form an integral part of the general principles of law, the observance of which it ensures.'[680]

In its determination of the scope of these fundamental rights, the Court referred to the domestic law of the Member States as well as to international treaties, and notably, explicitly referred to the ECHR.[681] This showcased the CJEU's acceptance of the ECHR and of the principles contained therein. In time, this formalised judicial acknowledgement of the ECHR's norms has prompted the drafters of the Treaty of the European Union (Hereinafter referred to as 'TEU') to expressly stipulate that fundamental rights, as guaranteed by the ECHR, constitute a part of EU law as general principles.[682] This is in turn mirrored within the text of the Charter of Fundamental Rights of the European Union (Hereinafter referred to as the 'Charter') which states that without prejudice to the possibility of more extensive protection, insofar as the Charter corresponds to the rights under the ECHR, the meaning and scope of those rights shall be the same.[683]

Notwithstanding the existent acknowledgements of human rights norms in various European laws and judicial pronouncements, the passage of time has brought to the fore lacunae in human rights protections within Europe. Given the fact that the EU is not a signatory to the ECHR, it cannot at present be held accountable for human rights violations under the ECHR.

This problem is illustrated in ***Confederation Française Démocratique du Travail***.[684] The case was declared inadmissible *ratione personae*, as applications brought against the Council of the European Communities fall outside the European Commission of Human Rights' competence.

This gap in European human rights protection has led scholars to claim that EU acts enjoy some kind of 'immunity from the convention'.[685] Indeed, EU institutions are not subject to an external and independent review by the European Court of Human Rights (Hereinafter referred to as 'ECtHR') whilst Member States that are both members of the Council of Europe and of the EU

679 Case 4/73 J. Nold v Commission of the European Communities [1974] ECR 1974 - 00471.
680 ibid para. 13.
681 ibid para. 12.
682 Treaty on European Union (Maastricht Treaty) art 6 (3).
683 Charter of Fundamental Rights of the European Union [2000], OJ C 364/01, art 52 (3).
684 *Confederation Francaise Democratique du Travail vs. The European Communities* (1978) App no 8030/77 [Commission Decision,10 July 1978].
685 Ioanna Kosmidou, 'The Accession of the European Union to the European Convention on Human Rights: Accountability for Human Rights Violations before and after the Accession' (MA in Human Rights, Central European University 2012) <http://www.etd.ceu.hu/2013/kosmidou_ioanna.pdf> accessed 27 November 2016.

remain liable to the ECtHR to ensure that their human rights obligations, as signatories to the ECHR, are continuously met.

The European Commission of Human Rights first attempted to address this issue in ***X vs. Germany,***[686] where the Commission conveyed the message that obligations undertaken by a State under the ECHR cannot be undermined by other international agreements.[687] It stated that even if a State is unable to perform its obligations due to other international agreements, it will nevertheless be answerable for any resulting breach under the ECHR.[688]

Moreover, in ***M & Co vs. the Federal Republic of Germany,***[689] the European Commission of Human Rights reiterated that,

> [A] transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character[690]

The European Commission of Human Rights also pointed out that the ECHR, as an instrument for the protection of the fundamental rights of individual human beings, requires an interpretation and application of its provisions that renders its safeguards both practical and effective. Most importantly, the Commission stated that the transfer of powers to an international organisation is not incompatible with the ECHR provided that within that organisation fundamental rights receive an equivalent protection.[691]

The relationship between the judges of the CJEU and ECtHR is one of mutual respect, however, the EU's absence from the ECHR has inevitably led to certain inconsistencies in the case law of the two Courts. Instances of differing interpretations of human rights norms have been scarce, yet are nevertheless significant as they exemplify a different standard of protection. One illustration

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686 *X vs. Germany* (1958) App no 235/56 [Commission Decision, 10 June 1958].

687 The European Commission of Human Rights was a special tribunal of the ECHR, whose mandate to determine whether individuals' cases were well-founded, and to pursue a case before the ECtHR on behalf of the individual if the case indeed is well-founded, continued in force until the coming into force of Protocol 11 of the ECHR in 1998 which allowed individuals to apply directly to the Court.

688 European Court of Human Rights, Press Unit, Factsheet – Case-law concerning the EU [July 2015] <http://www.echr.coe.int/Documents/FS_European_Union_ENG.pdf> accessed 30 October 2015.

689 *M & Co vs. the Federal Republic of Germany* (1990) App no 13258/87 [Commission Decision, 9 February 1990].

690 ibid.

691 ibid.

of such an occurrence can be seen in the judgments of ***Hoechst***,[692] and ***Niemietz***,[693] which centred on the right to private and domestic life as protected under Article 8 of the ECHR. Whilst the CJEU in ***Hoechst*** decided that this Article should be interpreted as excluding activities of a professional or business nature, the opposite approach was taken by the ECtHR in ***Niemietz***.

Furthermore, ***Matthews vs. United Kingdom*** illustrates an instance where the ECtHR found that EU law did not provide equivalent protection with the ECHR concerning the right to participate in the elections for the European Parliament.[694] In this case the UK was condemned for something decided at European Community level. It is important to note that since the violation had its source in primary EU law, the UK alone could not in principle decide to comply with the judgment of the ECtHR.[695] For this reason, this case brings to the fore the potential problems arising from the absence of direct accountability of EU institutions to the ECtHR.

The doctrine of equivalent protection was further elaborated in ***Bosphorus vs. Ireland***.[696] In ***Bosphorus***, the ECtHR held that the protection given by the EU is equivalent to that of the ECHR and specified that *'equivalent'* should be interpreted as meaning *'comparable'*, not *'identical'*.[697] The position taken by the Court means that a Member State can in principle presume that it is not breaching the ECHR by fulfilling its international obligations, provided the international organisation itself ensured adequate protection of human rights.[698] In exceptional cases, where the protection is manifestly deficient, this presumption can be rebutted.[699]

This doctrine was created in the framework of international co-operation between the two Courts and represents the most important contribution of the ECtHR towards the maintenance of legal certainty and harmony with CJEU jurisprudence by taking a default position that the EU's protection of human

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692 Joined cases 46/87 and 227/88 *Hoechst AG vs. Commission of the European Communities* [1989].

693 *Niemietz vs. Germany* (1992) App no. 13710/88 (ECHR, 16 December 1992).

694 *Matthews vs. United Kingdom* (1999) App no. 24833/94 (ECHR, 18 February 1999).

695 Olivier De Schutter, 'Accession of the European Union to the European Convention on Human Rights' (2007) <http://www.statewatch.org/news/2007/sep/decchutte-contributin-eu-echr.pdf> accessed 23 October 2015.

696 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi vs. Ireland* (2005) App no. 45036/98 (ECHR, 30 June 2005).

697 ibid para. 155.

698 Martin Kuijer, 'The Accession of the European Union to the ECHR: A Gift for the ECHR's 60th Anniversary or an Unwelcome Intruder at the Party?' [2011] 3 Amsterdam Law Forum 17, 17-32.

699 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2005) App no. 45036/98 (ECHR, 30 June 2005) para. 156.

rights is equivalent to that of the ECHR.[700] It must be noted that the doctrine of equivalent protection as it stands today serves to avoid holding a state accountable for following a rule created by an International organisation, even without the consent of the specific state and also to avoid reviewing EU law. Accordingly, the doctrine is not to be applied in cases where the Member State has a large margin of discretion regarding the implementation of EU law.

The doctrine can be criticized as shielding EU law from ECtHR scrutiny. Indeed, this presumption of equivalence, that is rebuttable only by a manifestly deficient protection of rights, only considers an abstract review of the circumstances of the case. As a group of concurring judges pointed out in ***Bosphorus***,[701] this was 'in marked contrast to the supervision generally carried out by the ECHR'.[702] Moreover, it is important to note that through this doctrine the ECtHR does not take into consideration the fact that the access of individuals to the CJEU is limited. Individuals are characterised as non-privileged applicants by the CJEU and must thereby satisfy strict criteria in order to challenge EU measures. Additionally, CJEU decisions are not scrutinised by any other independent body thus adding to the feeling that the EU is immune. In accordance with the ***Plaumann*** test (which has been criticized as overly restrictive and challenged without success), in order for an individual to be able to have *locus standi* in front of the CJEU he must have a direct and individual concern. This means that applicants must be affected by the measure by: 'reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.'[703]

This makes it very difficult for individuals who wish to challenge EU measures of general application to be awarded *locus standi*. In fact, Craig and De Burca state that the Plaumann test has made it impossible for an applicant to succeed in obtaining standing before the CJEU, except in very limited cases.[704]

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700 Viktoria Tsvetanova, 'The EU's Accession to the ECHR: The Courts' Relationship Prior to Accession' (2014) <http://www.gulawreview.org/entries/eu/the-eu%E2%80%99s-accession-to-the-echr-the-courts%E2%80%99-relationship-prior-to-accession> accessed 23 October 2015.

701 Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki.

702 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi vs. Ireland* (2005) App no. 45036/98 (ECHR, 30 June 2005)., Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, para 4.

703 Case 25-62 *Plaumann & Co. vs. Commission of the European Economic Community* [1963] ECR 1963 - 00253.

704 Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 494-496.

These lacunae are evident and it is for this reason that the discussion on the EU's accession to the ECHR is not a new one – it was first proposed over thirty-five years ago by the European Commission in 1979.[705] Many obstacles have nonetheless stood in the way of accession. One such obstacle was Opinion 2/94. On the 30 November 1994, the Council decided to seek the advice of the CJEU regarding the issue of accession. However, in Opinion 2/94 the CJEU observed that accession was impossible in the light of Community law as it existed at the time, since there was no firm legal basis for it: 'as Community law now stands, the Community has no competence to accede to the Convention.' [706]

The matter resurfaced in 2002 when President of the Court M. Gil Carlos Rodriguez Iglesias declared himself to be personally in favour of accession and observed that accession would: 'reinforce the uniformity of the system for the protection of fundamental rights in Europe.'[707]

This can be seen to have led to the obligation of the EU to accede to the ECHR as drafted in the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community.

2. A New Era for the EU after the Treaty of Lisbon

There can be no doubt that today, close to six years after the coming into force of Europe's new treaty framework, the Treaty of Lisbon has fundamentally amended the character of the EU, albeit not without having first trudged through lengthy political hurdles until reaching its final form. Among the significant changes brought about by the Treaty of Lisbon, a string of new provisions that on the face of it enhance human rights protection in the EU can be traced. Accession to the ECtHR has been rendered more feasible than ever.

The term *'Community'* was replaced by *'Union'* throughout the treaty texts, and the treaty now makes the EU one single legal entity at international law. In addition, the Treaty of Lisbon notably incorporated the Charter as EU primary law, thereby resolving an issue that had been left unanswered since the Charter was first drafted and published in the Official Journal of the European Communities in 2000.[708] The politico-legal consequences of the Lisbon

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[705] Bulletin of the European Communities, Supplement 2/79, Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, COM (79) 210 final, 2 May 1979.

[706] Court of Justice, Opinion 2/94 (28 March 1996), para 39.

[707] Address given by Gil Carlos Rodríguez Iglesias (31 January 2002) <http://www.cvce.eu/content/publication/2003/9/23/c201f6b4-21c4-408b-9a72-3b083048d5ec/publishable_en.pdf> accessed 30 October 2015.

[708] Charter of Fundamental Rights of the European Union [2000] OJ C 364/01.

developments in relation to human rights throughout the EU polity are several, and shall be analysed with due care in this article.

Article 6 of the TEU has a tripartite structure. Firstly, the text recognises the principles contained within the Charter and gives it binding force, which had since its proclamation in 2000 been overshadowed by an 'apparent lack of importance'.[709] The Treaty of Lisbon does not itself incorporate the Charter, however, it accords the Charter with a legal standing that is on par with that of the treaties. In a separate Declaration annexed to the Treaty of Lisbon,[710] Member States have additionally reiterated that the Charter does not broaden the scope of EU law beyond the powers already conferred to the EU, nor does it establish any new task or prerogative other than those in the Treaties. The deliberate decision to exclude the Charter from being a part of the Treaty fabric itself, however, demonstrated a conscious reluctance to endow the Charter with a constitutional status,[711] regardless of the fact that it has been accorded the same legal value as the treaties, and hence any political adviser or legal draftsman would necessarily be bound to bear due attention to the Charter text in the EU law-making process or in considering the legality of national law that implements EU law.[712]

In the post-Lisbon years, it has become notable that the CJEU increasingly chooses to refer to the Charter in pronounced judgements, to the detriment of mention of human rights protection as arising in the context of the ECHR.[713] This observation is itself supported by an analysis of all cases decided by the CJEU since the Charter became binding until the end of 2012 carried out by Gráinne de Búrca,[714] in which she presented figures demonstrating that in the 122 cases in which the Charter was referred to, only 18 of these cross-referred to the ECHR.

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709 Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' [2011] 11 HRLR 650.

710 Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, Declaration concerning the Charter of Fundamental Rights of the European Union, (13 December 2007).

711 Sionaidh Douglas-Scott, 'The Relationship Between the EU and the ECHR Five Years on from the Treaty of Lisbon' [2015] Bernitz, de Vries, Weatherill eds, Five Years Legally Binding Charter of Fundamental Rights <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207> accessed 30 October 2015.

712 Paul Craig, *The Lisbon Treaty: Law Politics, and Treaty Reform* (OUP 2010) 200.

713 Sionaidh Douglas-Scott, 'The Relationship Between the EU and the ECHR Five Years on from the Treaty of Lisbon' [2015] Bernitz, de Vries, Weatherill eds, Five Years Legally Binding Charter of Fundamental Rights <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207> accessed 30 October 2015.

714 Gráinne De Búrca, 'After the EU Charter of Fundamental Rights: the Court of Justice as a human rights adjudicator?' [2013] Maastricht JI European and Comparative Law, 168 <http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0168.pdf> accessed 30 October 2015.

The implications of this is a pattern of divergence and autonomy between the EU human rights protection regime as opposed to the protection regimes derived from other human rights instruments, not least the ECHR. This is a reflection that confirms the findings of the CJEU in the ***Kadi*** ruling, wherein it was held that,

> the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.[715]

Further observation may be drawn with respect to the fact that the EU's role over human rights remains somewhat ambivalent, in that the EU's competence over human rights is at present solely limited to oversight of actions undertaken by EU institutions, and to Member States in certain circumstances.[716] Arguably, ensuring EU competence in the field of human rights protection is acquiring more pressing importance than ever before. The EU's competence 'creeps' further with every treaty extension, from its inception under the European Coal and Steel Community having competence to facilitate inter-state trade in coal and steel, to the EU as we know it today having undergone a functional spill-over allowing it to legislate not only in relation to trade and the internal market, but also in various matters ranging from environmental and fisheries policies, to data protection and citizen privacy, to toy safety and consumer rights standards.

Accession of the EU to the ECHR is envisaged in the Treaty of Lisbon where the chosen wording foresees an EU that has become a fully-fledged member of the ECHR in the very manner in which the treaty-drafters selectively utilised the imperative 'the Union shall accede'. The chosen wording in the second part of the Treaty of Lisbon's Article 6 thus evidently goes beyond providing a mere legal basis for accession, but inherently implies that a failure to proceed with accession would constitute a breach of the treaty.

3. Measures Taken to Enable the EU to Accede to the ECHR

The Fourteenth Protocol to the ECHR, which entered into force on 1 June 2010, just over six years after it was opened for ratification by Member States, arriving

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715 Case C-402/05 *Yassin Abdullah Kadi et. vs. Council of the European Union* [2008] ECR I-06351, paras. 298-299.

716 Sionaidh Douglas-Scott, 'The Relationship Between the EU and the ECHR Five Years on from the Treaty of Lisbon' [2015] Bernitz, de Vries, Weatherill eds, Five Years Legally Binding Charter of Fundamental Rights <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207> accessed 30 October 2015.

at the culmination of a lengthy process of deliberation aimed at reforming the Convention system by preserving its long-term effectiveness through mechanisms that will seek to alleviate the current backlog of applications to the Court, and to pre-empt the foreseen increased caseload should the EU eventually accede to the ECHR. Most crucially, it paved the way for EU accession to the ECHR, by amending Article 59 to state that, 'The European Union may accede to this Convention'.[717]

The process of accession of the EU, according to the text of the Treaty of Lisbon, entails the carrying out of a highly technical and complex procedure, under Article 218 of the Treaty on the Functioning of the European Union (Hereinafter referred to as the 'TFEU'), that governs all EU agreements with third countries and international agreements. In order for the EU to conclude such an agreement, this Article mandates the unanimity of the Council of Ministers, the consent of the European Parliament through a qualified majority vote of two thirds, and the subsequent ratification in all EU and Council of Europe Member States. In the light of this contextual background, in April 2013 a draft and revised accession agreement (Hereinafter referred to as the 'DAA') was signed on behalf of the Council of Europe and the European Commission.[718] This agreement was reached despite initial reservations from some Member States on the particular terms of the EU's participation within the ECHR and has been described as an 'achievement'.[719]

Possibly the most significant innovation in the DAA is the introduction of the co-respondent mechanism. The intended purpose of this mechanism is to aid in the determination of which particular Member State or other body is to be held responsible in the ECtHR for a human rights violation in the context of EU law. Thus, allowing for the joint participation of the EU and of the EU Member State or States concerned in the alleged breach. Inclusion of such a provision is a logical solution where the majority of EU legislation is implemented by the Member States themselves, yet simultaneously Member States may or may not, in specific circumstances, be able to exercise discretion as to how a law is to be

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[717] The Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 14, art 17.

[718] Fifth Negotiation Meeting Between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, 'Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' (10 June 2013), <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf> accessed 30 October 2015.

[719] Sionaidh Douglas-Scott, 'The Relationship Between the EU and the ECHR Five Years on from the Treaty of Lisbon' [2015] Bernitz, de Vries, Weatherill eds, Five Years Legally Binding Charter of Fundamental Rights <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207> accessed 30 October 2015.

implemented and the problematic rule may originate from the EU measure. On the other hand, a possible breach may arise from the Treaties themselves, which owing to their very nature as primary law of the EU cannot be easily amended following a finding of a human rights breach without the unanimous consent of the Member States. The determination of the appropriate respondent has proved to be a controversial point,[720] and a key question to be answered after having been raised in Article 1(b) of Protocol No. 8 to the Treaty of Lisbon which requires the accession agreement to make provision: 'in particular with regard to: [...] the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate."

The provisions within the DAA that set out to deal with this concern do so by stipulating that a 'High Contracting Party shall become a co-respondent only at its own request and by decision of the Court',[721] and where an application is directed against one or more Member States of the Union, the EU may itself become a co-respondent where the allegation calls into question the compatibility of a provision of EU law with the ECHR. In the case of allegations relating to the Treaties or of any other provision having the same legal value as the Treaty instruments, the DAA further provides that the EU Member States may all become co-respondents.[722] As amendments cannot be carried out to the Treaties by the EU institutions acting alone, Member State involvement is required *ad necessitatem.*

Under EU law, the CJEU has historically only had very limited jurisdiction to review Common Foreign and Security Policy (Hereinafter referred to as 'CFSP') acts, and even after the enactment of the Treaty of Lisbon, the competence of the EU itself to legislate in this field remains limited and subject to special rules and specific procedures.[723] Judicial actions undertaken pursuant to Article 275 TFEU do not apply with respect to CFSP. This is subject to two exceptions in relation to the delimitation of EU competences and the CFSP, and where actions for annulment are brought against decisions providing for restrictive measures against natural or legal persons adopted by the Council in connection with, for instance, terroristic acts. However, while the CJEU has declared that certain acts adopted in the context of the CFSP fall outside the ambit of judicial review

720 Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 HRLR 664.

721 Fifth Negotiation Meeting Between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, 'Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' (10 June 2013), art 3(2).

722 ibid art 3(3).

723 Bríd Moriarty and Eva Massa, *Human Rights Law* (4th edn, OUP 2012) 173.

allowed to the Court under EU law, it has never clearly defined the extent to which its jurisdiction is limited in CFSP matters.[724]

Human rights breaches unfortunately occur in foreign policy operations, ranging from violations of the right to life, to arbitrary detention, and to human trafficking by foreign forces. It is generally recognised that CFSP acts themselves are not immune to possibly breaching human rights protection enshrined within the ECHR, and it is for this reason that the DAA includes rules to allow for the review of: 'acts, measures, or omissions, regardless of the context in which they occur, and including with regard to matters relating to the EU CFSP'.[725]

Other points of contention requiring some measure of attention which were dealt with within the DAA include draft rules on the appointment of the EU judge to the ECtHR, which judge is upon appointment to have equal status to that of the other judges, and whose election is also to involve the European Parliament.[726] According to this same Article, the EU shall be 'entitled to participate in the Committee of Ministers'. The DAA also establishes that the EU is to contribute to expenditure undertaken by the Council of Europe towards the proper functioning of the ECtHR. Fundamentally, throughout the entire text of the DAA and the negotiations that surround it, a demonstrable intrinsic complexity arising from the simple fact that the ECHR was not originally intended to cater for the accession of a large supranational entity, and as a result of which providing for EU accession shall continue to be fraught with stumbling blocks for years to come, not least after the publication of Opinion 2/13, and until which time the EU shall continue to lack a source of external human rights accountability.

4. Court of Justice: Opinion 2/13

The CJEU was tasked by the European Commission to give its opinion on the compatibility of the DAA with EU Law, in accordance with Article 218(11) of the TFEU, which it carried out through its Opinion 2/13, delivered on the 18 December 2014. Unexpectedly, it was held by the judges in Luxembourg that the

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724 The CJEU has the opportunity to properly define the contours of its jurisdiction in CFSP matters in the cases of *Rosneft Oil Company OJSC vs. Her Majesty's Treasury* (Case C 72/15) and *H vs. Council of the European Union, European Commission* (Case C 455/14 P)

725 Fifth Negotiation Meeting Between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, 'Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms', (10 June 2013), para 23 <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf> accessed 30 October 2015.

726 ibid art 7.

DAA as presented was not compatible with the EU treaties and that it undermined the autonomy of EU law. Although several experts had voiced concerns over certain aspects of the DAA, an opinion as critical and uncompromising as Opinon 2/13 was hardly expected.

The CJEU took a strong and decisive stance on the matter, going against the opinions of major EU institutions as well as EU Member States. The Judges in Luxembourg were heavily criticised for their unyielding stance. The arguments of the CJEU where divided under the following headings,

a) The specific characteristics and the autonomy of EU law;
b) Article 344 TFEU;
c) The co-respondent mechanism;
d) The procedure for the prior involvement of the Court of Justice; and
e) The specific characteristics of EU law as regards judicial review in CFSP matters.

These will each be considered in turn, however, it is apparent that the key theme in Opinion 2/13 is the autonomy of EU law.

5. The Specific Characteristics and the Autonomy of EU Law

First, the CJEU was concerned that Article 53 ECHR might compromise EU law. This Article allows Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR. Although Article 53 of the Charter appears to state something very similar to Article 53 ECHR, its scope was curtailed by the CJEU in the 2013 ***Melloni*** judgement where the Court held that Member States could not adopt higher standards than the Charter in cases where the EU has fully harmonized the relevant law.[727]

The CJEU opined that Article 53 ECHR should be coordinated with Article 53 of the Charter, as interpreted by the CJEU.[728] This means that where the rights recognised by the Charter correspond to those guaranteed by the ECHR, the power granted to Member States to exceed the level of protection in the ECHR must be limited to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised. The CJEU is seeking to prevent the scenario where the EU

[727] Joakim Nergelius, 'The accession of the EU to the European Convention on Human Rights' [2015] SIEPS <http://www.sieps.se/sites/default/files/Sieps%202015_3%20web.pdf> accessed 20 September 2015.
[728] Court of Justice, Opinion 2/13, para 189.

Member States use Article 53 ECHR to adopt higher standards in areas covered by harmonised EU law.[729]

Secondly, the CJEU was concerned that the principle of mutual trust under EU law established earlier in ***Melloni*** could be undermined.[730] According to this principle, a Member State may only check whether another Member State has observed fundamental rights guaranteed by the EU in 'exceptional circumstances'.[731] The principle of mutual trust therefore consists in an assumption that fundamental rights are being respected in other Member States. The reasoning laid down in ***Melloni*** has elicited controversy, and indeed some authors are of the opinion that fundamental rights standards in the EU were lowered due to this principle. Nevertheless, the CJEU continues to stress in Opinion 2/13 that it considers this principle to be of fundamental importance for EU Law.[732] Moreover, a recent judgment concerning the European Arrest Warrant has prompted the CJEU to revaluate and restate the importance of mutual trust between Member States for the creation and maintenance of an area without frontiers. While referring to the case law of the ECtHR, the CJEU stated that when evidence of a real risk of inhuman and degrading treatment exists, that risk must first be ascertained and it is necessary to demonstrate that there are substantial grounds for believing that the individual concerned will in fact be exposed to inhuman or degrading treatment because of detention conditions.[733]

The CJEU has clearly attached great importance to the notion of mutual trust, as it is one of the common values on which the EU is founded. The DAA was considered by the CJEU to endanger this principle due to Member States being required to check that another Member State is observing its fundamental rights obligations. This according to the CJEU would upset the underlying balance of the EU and undermine the autonomy of EU law. According to the Court the key flaw lies in the fact that the EU's intrinsic nature is being disregarded in order for it to be given a role identical to that of other contracting parties. In the Court's opinion, the DAA fails to take into consideration the fact that the Member States have, by reason of their membership to the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of

729 Jed Odermatt, 'A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights' (2015) Leuven Centre for Global Governance Studies <https://ghum.kuleuven.be/ggs/wp150-odermatt.pdf> accessed 20 September 2015.

730 Court of Justice, Opinion 2/13, paras 191-195.

731 Jed Odermatt, 'A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights' (2015) Leuven Centre for Global Governance Studies <https://ghum.kuleuven.be/ggs/wp150-odermatt.pdf> accessed 20 September 2015.

732 Court of Justice, Opinion 2/13, para 191.

733 Joined Cases C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru vs. Generalstaatsanwaltschaft Bremen* [2016] (Grand Chamber, 5 April 2016) para 78.

any other law.[734]

The Court further noted that Protocol No. 16 to the ECHR permits the Highest Courts and Tribunals of the Member States of the EU to seek advisory opinions from the ECtHR on questions of interpretation or application of the rights and freedoms guaranteed by the ECHR and its Protocols.[735] The mechanism established by the Protocol was seen as a threat to the autonomy of EU Law as a preliminary reference might be made to the ECtHR rather than the CJEU.[736] Interestingly, Protocol 16 has not entered into force and the EU is not a party to it. In its Opinion, the CJEU cautiously opted for an *ex ante* attack, fearing the circumvention of the preliminary ruling procedure under Article 267 TFEU. The Court's concerns indicate a level of misunderstanding by the Court, since Article 3(6) DAA shows that the prior involvement mechanism is only possible where there is a co-respondent.[737]

6. Article 344 TFEU

Article 344 TFEU safeguards the CJEU's monopoly of dispute settlement as it prohibits EU Member States from submitting any dispute concerning the interpretation of EU law to any method of dispute settlement other than those provided in the EU Treaties.

There is a clear tension between Article 344 TFEU and Article 55 ECHR. The former calls upon Member States to bring disputes concerning EU law before the CJEU, whereas Article 55 ECHR demands a settlement of disputes relating to the ECHR before the ECtHR by means of the ECHR's inter-State procedure under Article 33.[738] According to the CJEU's interpretation, Article 33 ECHR could also be applied to disputes between the Member States, or between those Member States and the EU, even though it is EU law that is in issue.[739]

Article 5 of the DAA reduces the scope of the obligation laid down in Article 55 of the ECHR but still allows for the possibility that the EU or Member States might submit an application to the ECtHR under Article 33 ECHR, concerning an alleged

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734 ibid para 193.
735 ibid para 196.
736 ibid paras 198-199.
737 Tobias Lock, 'The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?', (2015) European Constitutional Law Review 239-273.
738 Adam Łazowski and Ramses A. Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) No.1 German Law Journal <https://www.utwente.nl/bms/pa/research/wessel/wessel108.pdf> accessed 20 September 2015.
739 Court of Justice, Opinion 2/13, para 205.

violation thereof by a Member State or the EU, respectively, in conjunction with EU law.[740] However, it must be noted that the procedure under Article 33 is not mandatory and that the EU and its Member States may continue to bring before the CJEU any disputes arising out of interpretation and application of the ECHR. Nevertheless, this was not enough according to the CJEU, which considered it a threat to the CJEU's exclusive jurisdiction and it was thus considered to be in violation of Article 344 TFEU.[741]

The CJEU demands the inadmissibility of all State complaints in front of the ECtHR as far as the relevant provisions of the ECHR also fall within the scope of EU law and on the applicant and the respondent side there are Member States of the EU or the EU itself. However, this demand does not seem to consider the agreements already concluded by the EU which do not contain exception provisions as noted by the Advocate General.[742]

Advocate General Kokott traced a problem in regards to Article 344 TFEU, yet stated that it would be sufficient to start infringement proceedings in accordance with Articles 258 to 260 TFEU against EU Member States if they settle their disputes before other international instances.[743] Moreover, the same Advocate General envisaged that if a higher degree of protection was required to ensure the effectiveness of Article 344 TFEU, then EU Member States could be required, prior to accession, to declare with binding force under international law, that they will not engage in proceedings under Article 33 ECHR where the object of dispute falls within the material scope of EU law.[744] This would ensure that Member States would be bound and liable to respect the exclusive jurisdiction of the CJEU.

6.1 *The Co-Respondent Mechanism*

The Court found fault in two aspects of the co-respondent mechanism: the procedure for involvement and the allocation of responsibility.

Firstly, in regards to the procedure for involvement, if the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must prove that certain conditions are met, with the ECtHR deciding on that request in the light of the reasons given. In order to review this matter, the ECtHR would necessarily be required to assess rules of EU law, falling within the

740 ibid para 207.
741 ibid paras 212-214.
742 Court of Justice, Opinion 2/13, View of Advocate General Kokott, para 117.
743 ibid para 118.
744 Ibid para 120.

exclusive domain of the CJEU.[745] Furthermore, the ECtHR could adopt a final decision that would be binding on the Member States as well as the EU.[746] The Advocate General took a similar standpoint to that taken by the CJEU as both considered the design of the co-respondent mechanism to be problematic. However, the Advocate General was of the opinion that appropriate safeguards could be put in place to remedy the situation.[747]

Secondly, the DAA conferred upon the ECtHR the right to allocate responsibility in accordance with Article 3(7). This in the eyes of the CJEU would risk adversely affecting the division of powers between the EU and its Member States. A further problem was also identified by both the CJEU and the Advocate General, as Article 3(7) of the DAA does not account for situations in which Member States have made a reservation.[748] In their view, this could lead to a scenario in which a Member State is held responsible despite having made a reservation. Admittedly, this would be a rare problem due to the very nature of the procedure, yet the fact remains that the DAA is silent as to the effect of reservations on the co-respondent. It may be argued, as has been done by Tobias Lock, that when the DAA is silent, the standard rules of the ECHR would be applied, which would mean that the reservation would be given effect.[749] However, the CJEU has clearly required the modification of the procedure envisaged in the DAA.

6.2 *The Procedure for the Prior Involvement of the Court of Justice*

The 'Prior Involvement' procedure is a mechanism that was demanded by the CJEU itself. Nevertheless, the mechanism as envisaged in the DAA did not survive the Court's scrutiny and was considered to be incompatible with the treaties. According to the CJEU there are essentially two reasons for this. Firstly, it was considered that it was not for the ECtHR to decide whether prior involvement should take place but for the competent EU institution. According to the CJEU, allowing the ECtHR to decide whether the CJEU has already given a ruling on a question of law would be tantamount to conferring to the ECtHR jurisdiction to interpret the case law of the CJEU.[750] Consequently a procedure that ensures that in any case pending before the ECtHR, the EU is informed so that the competent institution can inquire whether the Court has already given a ruling on the

745 Court of Justice, Opinion 2/13, para 221.
746 ibid para 224.
747 Court of Justice, Opinion 2/13, View of Advocate General Kokott, para 235.
748 Court of Justice, Opinion 2/13, paras 226-235.
749 Tobias Lock, 'The future of the European Union's accession to the European Convention on Human Rights after Opinion 2/13: is it still possible and is it still desirable?' (2015) European Constitutional Law Review 239-273.
750 Court of Justice, Opinion 2/13, para 239.

question at issue or whether the prior involvement procedure should be initiated, is required.

Secondly, the CJEU considered that the agreement envisaged excluded the possibility of bringing a matter before the CJEU in order for it to rule on a question of interpretation of secondary law through the prior involvement procedure. This was considered to adversely affect the competences of the EU and the powers of the CJEU. [751]

7. The Specific Characteristics of EU Law as Regards Judicial Review in CFSP Matters

In regards to CFSP, it has already been noted that the CJEU's jurisdiction is generally excluded. At the time of writing, the CJEU has only considered within the remit of its jurisdiction the monitoring of compliance with Article 40 TEU and the reviewing of the legality of certain decisions as provided for by Article 275(2) TFEU. The ECtHR on the other hand, would be empowered by the DAA to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of CFSP. This would lead to a situation whereby exclusive judicial review would be given to a non-EU body. This was rejected by the Court and considered prejudicial to the EU's framework.

Nonetheless, it must be questioned whether this discrepancy between the jurisdictions of the two courts would *de facto* violate the autonomy of EU Law. Advocate General Kokott also referred to the issue when arguing that accession would undoubtedly mean that the EU must respect the fundamental rights protection stemming from the ECHR and thus also the requirement of effective legal protection in all its spheres of activity, including the CFSP. The Advocate General further stated that the principle of autonomy does not preclude the EU joining an international judicial mechanism which extends further than that of the CJEU.[752] Indeed the principle of autonomy has only ever arisen in cases in which there was reason to fear a conflict between the two Courts and not in a case in which the powers of the CJEU were less extensive than those of an international court.[753] Furthermore, it should be noted that like the Advocate General, the Member States, the Council and the European Commission all agreed that such discrepancy did not violate the EU's autonomy, albeit for different reasons.[754]

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751 ibid paras 242-247.

752 Court of Justice, Opinion 2/13, View of Advocate General Kokott, paras 189-191.

753 Jed Odermatt, 'A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights' (2015) Leuven Centre for Global Governance Studies <https://ghum.kuleuven.be/ggs/wp150-odermatt.pdf> accessed 20 September 2015.

754 ibid.

Through its rejection, the CJEU is essentially demanding that CFSP be excluded from the remit of the ECtHR, or that Treaties are amended to provide the CJEU with jurisdiction over CFSP acts. The authors consider the first option to be unsatisfactory for the proper protection of human rights in an area where it is questionable whether the EU can provide effective legal protection. A proposal in 2013 to introduce this exclusion by way of specific clause or reservation was in fact rejected.[755] The latter option, as noted by Jed Odermatt, also causes difficulties due to the sensitive political nature of CFSP and the reluctance of the Member States to allow the CJEU to exercise judicial review in that field.[756]

8. The Reaction to Opinion 2/13

The general reaction to Opinion 2/13 was overwhelmingly negative. Indeed, even President Spielmann was critical of the Opinion calling it a 'great disappointment' and stated that it is the citizens of EU who will be the principal victims.[757] Others, in their disapproval, went as far as to claim that the CJEU's decision was actually a political decision disguised in legal arguments. This opinion is shared by many yet the authors of this article do not believe this is the correct position. The Court did in fact concede in Opinion 2/13 that it was open to subjecting itself and EU law to external review.[758]

The criticism that surrounds Opinion 2/13 is understandable given the importance tied to accession and the fact that the view of Advocate General Kokott demonstrated that a different solution was indeed possible. Despite her criticism of certain points, the Advocate General suggested that the CJEU ought to avoid pronouncing the DAA incompatible with the Treaties, but instead hold that it was compatible if certain amendments were undertaken following the Court's opinion.[759]

It may also be questioned if the Court's approach is justifiable in light of Article 6 of the Treaty of Lisbon which can be read as encompassing a duty of best efforts

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755 Council of Europe, Fourth Negotiation Meeting Between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights (2013).

756 Jed Odermatt, 'A Giant Step Backwards? Opinion 2/13 on the EU's Accession to the European Convention on Human Rights' (2015) Leuven Centre for Global Governance Studies <https://ghum.kuleuven.be/ggs/wp150-odermatt.pdf> accessed 20 September 2015.

757 Tobias Lock, 'Will the empire strike back? Strasbourg's reaction to the CJEU's accession opinion', (Verfassungs Blog 30 Jan 2015) <http://www.verfassungsblog.de/en/will-empire-strike-back-strasbourgs-reaction-cjeus-accession-opinion/> accessed 12 October 2015.

758 Court of Justice, Opinion 2/13, para 182.

759 Court of Justice, Opinion 2/13, View of Advocate General Kokott, para 279.

towards accession.[760] The Opinion does indeed present a significant obstacle in carrying out the commitment undertaken under the Treaty of Lisbon. Nonetheless, it must be noted that although Article 6 provides an obligation to accede, this is subject to conditions laid down in Article 6(2) and Protocol No. 8. Indeed, the CJEU in Opinion 2/13 did not seem to emphasise its obligation but rather that accession is subject to limitations. These limitations essentially consider that accession must not affect the EU's competence as defined by the Treaties or interfere with the specific characteristics of the EU.

9. Is the Accession of the EU to the ECHR Still Being Sought?

The EU could not simply ignore the Court's opinion and accede to the ECHR as this would be in violation of Article 218(11) TFEU. In accordance with this article, the EU had two options if it wished to continue to seek accession: the re-negotiation of the DAA or changing the founding treaties to accommodate the CJEU's views. An extreme version of the latter option was considered by Besselink who proposed to draft a 'Notwithstanding Protocol'. According to Besselink the following text would be advisable:

> The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014.[761]

Although this is interesting from an academic perspective, sidelining the CJEU's opinion is not the best course of action. Indeed, this would be an extreme response and would show disrespect towards the judicial branch. Moreover, not all EU Member States would be likely to agree with this measure.

The EU chose to proceed with what the authors consider to be the most sensible option: renegotiating the DAA in order to make it compliant with the requirements set out in Opinion 2/13. In Council Meeting 3401 of 23 June 2015, the Council reaffirmed its commitment to the accession to the ECHR and invited the European Commission as the EU negotiator to bring forward its analysis on ways to address Opinion 2/13. Moreover, on the 20 of April 2016 the European

[760] Stefan Reitemeyer and Benedikt Pirker, 'Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR – One step ahead and two steps back' (European Law Blog, 31 March 2015) <http://europeanlawblog.eu/?p=2731> accessed 10 September 2015.

[761] Adam Łazowski and Ramses A. Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) No.1 German Law Journal <https://www.utwente.nl/bms/pa/research/wessel/wessel108.pdf> accessed 20 September 2015.

Parliament hosted a meeting with representatives of the institutions to discuss the way forward following Opinion 2/13. Juncker has himself held that accession is a political priority for the Commission, and that the Commission will not rest until a solution is found for the EU's accession to the ECHR.

However, it may come as a surprise to none that the re-negotiation of a new agreement is likely to be a timely and convoluted exercise in political discourse. This will in turn give the CJEU a chance to continue building its line of judgments based on the Charter and in the long run minimise the direct impact of accession.[762]

9.1 *Would Accession be Beneficial Under the Conditions Imposed by the CJEU in Opinion 2/13?*

It is prudent to question whether accession under the Court's terms would be beneficial in strengthening the human rights protection in Europe, if the CJEU's demands can be met. All this is far from certain, due to the fact that Opinion 2/13 requires the sacrifice of certain elements that have led to current human rights standard, and would have the overall effect of possibly shielding the EU from human rights claims being brought against it, most importantly within the CFSP and Area of Freedom, Security and Justice. These amendments must be questioned and closely scrutinised due to their sensitive political nature and the consequent negative impact on human rights protection should they indeed come to fruition. From a human rights perspective, excluding CFSP is non-justifiable as it disallows the ECtHR from remedying potential violations of the ECHR. It is for this reason that the authors believe that the Council of Europe cannot accept all the amendments proposed by the CJEU in order to properly protect the existing safeguards for fundamental human rights.

The authors of this article consider that the requirement to protect the principle of mutual trust is one of the thorniest points raised in Opinion 2/13, due to it requiring a far-reaching exclusion of the ECtHR's powers. It must be emphasised that there is no effective internal EU mechanism allowing it to compel Member States to comply with ECHR standards. Creating the impossibility for the ECtHR to hold a Member State of the EU responsible for extraditing a person to another Member State where they would be facing a real risk of human rights violations would clearly deteriorate the current safeguards set forth in the ECHR. Indeed, the amendment would most evidently prevent the ECtHR from interfering in

[762] Adam Łazowski and Ramses A. Wessel, The European Court of Justice blocks the EU's accession to the ECHR' (2015) <http://aei.pitt.edu/59218/1/CEPS_Commentary_Lazowski_and_Wessel_on_ECHR._docx.pdf> accessed 12 September 2015.

Dublin Regulation cases and thus reduce the human rights protection of asylum seekers. Furthermore, in its recent revisitation of the Bosphorus doctrine, the ECtHR found that the CJEU's stance that review of observance of fundamental rights by the state of origin must be limited to exceptional cases was unacceptable. The ECtHR held that the domestic court being requested to trust the acts of another State must at the very least be empowered to conduct a review of any serious allegations of fundamental human rights brought to its attention, in order to ensure that the protection of those rights is not manifestly deficient.

10. Conclusion

Irrespective of the stumbling blocks delaying the progression of the EU towards ECHR accession, the European Commission has confirmed its commitment to accession,[763] in the firm belief that it will strengthen fundamental rights protection, improve the effectiveness of EU law, and enhance the coherence of fundamental rights protection in Europe.

The legal obligation for the EU to take affirmative steps to conclude an accession agreement to comply with the requirements laid down in the Treaties still stands. It is however self-evident that the conditions for accession which the CJEU laid down in Opinion 2/13 will be both legally and politically challenging to meet. The difficulties surrounding accession have also been acknowledged by President Spielmann, who has recognised that a possible manner with which to alleviate the concerns raised in Opinion 2/13 is by carrying out amendments to Treaties of the EU.[764]

The CJEU focused its Opinion largely on the EU legal order, without expressly acknowledging that the full implications of the accession of a supranational body such as the EU alongside individual State parties to the ECHR. In sum, the DAA together with the intricate complexities revealed in Opinion 2/13 have together shown that the original intention of acceding to the ECHR is very far from straightforward. The creation of a single, comprehensive and coherent human rights framework has given rise to complex legal problems which can only be solved through careful analysis by specialist legal minds, however, the *status quo* is inefficient for the proper protection of fundamental human rights.

The EU's accession to the ECHR would complete,

[763] European Commission, 2014 Report on the Application of the EU Charter of Fundamental Rights, COM(2015) 191 final.

[764] Andrew Duff, 'EU Accession to the ECHR: Politicians to the Rescue?' (14 March 2015) <http://andrewduff.blogactiv.eu/2015/03/14/eu-accession-to-the-echr-politicians-to-the-rescue/> accessed 30 October 2015.

> a cycle begun at the end of the second world war when human rights visionaries, such as French lawyer and Nobel prize winner Rene Cassin, drew up the world's first international texts and the Council of Europe began its work to establish democracy and the rule of law across the continent.[765]

Should the EU accede to the ECHR, it will join a family of 47 countries, including non-EU members and global powers such as Russia and Turkey, in a system that brings them all under the same legal standards, to be monitored by the same Court. Furthermore, on a symbolic level, the EU's accession to the ECHR would give a strong political signal of coherence between the EU and Europe thereby increasing the EU's credibility at a time when it is most needed. This may allow the EU to connect with members of population that have criticized its competences.

Despite the arduous power struggle between the different Courts' competences and the intricacies tied to the points of contention in the DAA, the CJEU shall continue to take ECtHR judgements into account when interpreting corresponding Charter provisions, and all EU Member States are bound at international law to continue to adhere to the provisions of the ECHR and the jurisprudence of its Court, in the same manner as they did before the delivery of Opinion 2/13.

The current geo-political context of an increasingly divided Europe also plays a significant role in this power struggle, particularly in the light of the unfortunate outcome which the non-accession of the EU could have on the human rights perceptions across the different Member States.[766] Due to the fact that at present it is widely agreed that the Council of Europe remains the yardstick for human rights,[767] it would be in the EU's interest as much as it is in the interest of the ECtHR and of victims of human rights breaches to accord the Strasbourg Courts with the competence to look into matters of EU law and its institutions' competences.

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765 Thorbjørn Jagland, 'We must look deeper for Europe's future' (4 July 2010), <http://www.coe.int/en/web/secretary-general/opinion-articles-2010/-/asset_publisher/Ihk8YVHjRPzN/content/we-must-look-deeper-for-europe-s-future?inheritRedirect=false> accessed 30 October 2015.

766 Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial dialogue: Autonomy or Autarky?' (2015) JMWP 01/15, <http://jeanmonnetprogram.org/wp-content/uploads/2015/04/JMWP-01-Eeckhout1.pdf> accessed 30 October 2015.

767 The Juncker Report, published in March 2006, for instance, saw the Council of Europe as having a distinct pioneering role.

ENFORCEABILITY OF CERTAIN COMMERCIAL CONTRACT CLAUSES IN TERMS OF MALTESE LAW AND A CONSIDERATION OF PUBLIC POLICY

Mr Luca Zahra and Ms Roberta M. Aquilina

ABSTRACT[768]

The Maltese position regarding commercial clauses is rather ambiguous due to lack of both local legislation and jurisprudence. In today's global economy, with individual shifting from one employment to another at a rate which has never been seen before, when a contract of employment is entered into, there are certain clauses which are increasingly included. This article deals with a couple of such clauses, that is, non-compete clauses, non-solicitation clauses and severability clauses. The aim of these clauses is to create an ambit of fair competition between the contracting parties by striking a balance between the legitimate interests of both. This approach is key in preserving and strengthening trade in general. Despite the vagueness of the Maltese legal order on the topic, latent trends in the Maltese Courts' reasoning when dealing with commercial matters, seem to indicate that our justice system does appreciate the significance of the above-mentioned clauses which is crucial in today's everincreasing competitive industries. However, it is important to outline that, in principle, for contractual provisions to be enforceable, these should be reasonable in nature and do not breach public policy. Under Maltese law, public policy is still a rather abstract concept, a matter which is dealt with in this article, in an attempt to provide a non-exhaustive collection of principles which appear to constitute public policy according to the Maltese courts.

KEYWORDS: COMMERCIAL CLAUSES – NON-COMPETE – NON-SOLICITATION – SEVERABILITY – PUBLIC POLICY

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ENFORCEABILITY OF CERTAIN COMMERCIAL CONTRACT CLAUSES IN TERMS OF MALTESE LAW AND A CONSIDERATION OF PUBLIC POLICY

Luca Zahra and Roberta Marie Aquilina

Non-compete clauses

1. Introduction

In today's world, with the emergence of the global economy and the advancements in technology, when a contract of employment is terminated, there are factors to be considered. When it comes to protecting confidential information, it is not only the technological aspect that needs to be considered, but there are the employees, who with the ever-increasing developments in technology, can pose a serious threat to an ex-employer.[769]

Therefore, employers are increasingly making use of restrictive covenants in their employment contracts with their employees, in order to safeguard their interests. Restraint of trade clauses are an,

> attempt to prevent the worker from disclosing the secrets which he would have undoubtedly got to know about through his employment, especially if he would have been employed in a position of trust as well as to possibly prevent that that same worker would provide competition to his ex-employer when he leaves work. These clauses incorporated within a contract attempt to protect an employer from 'poaching'. They attempt to restrict the activities which an employee may carry out after the said employee would have terminated his employment for whatever reason.[770]

One prominent clause is the non-compete clause. Although an employee post-termination of employment is restricted from exposing trade secrets gained

[769] Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

[770] Dr Joseph Bonello, 'Clauses in restraint of trade' (Department of Industrial and Employment Relations Issue 1, 2006) <https://dier.gov.mt/en/About-DIER/Publications-and-Archives/Newsletter/Documents/IReview_Issue1.pdf> accessed 23 October 2016.

during employment, employers do not only rely on such obligation not to divulge information.[771]

As Michael Whincup holds, non-compete clauses are used in order to prevent employees 'using (confidential) knowledge to the detriment of their employers either in subsequent business on their own account or in someone else's employment'.[772] This way there is the protection of the business investment along with the restriction of competition.[773] The employer is protected in that the trade secrets are safeguarded for a duration of time, and when the ex-employee is permitted to compete in the market, the value of those secrets is reduced, in that, more often than not the trade secrets would have a lesser value because of technological advancements that would have occurred in the field since the employee would have terminated his employment with the former employer. [774] When it comes to restrictive covenants, the situation in jurisdictions around the world differs significantly from one to another. Considering the subject from a global perspective, the position ranges from restrictive covenants being completely unlawful in particular systems, while completely legal in others. However, in certain instances, there is some overlap as is the position in Europe, with certain requirements and criteria being common to diverse jurisdictions.[775] For instance, compensation is a *sine qua non* requirement in certain jurisdictions such as Spain, France, Italy and Belgium, in order to have a valid non-compete agreement. [776]

The common stance in Europe is that restrictions are to be reasonable, without exceeding what is necessary in order to protect an employer's interests. Therefore, employers should pay more attention to factors like the duration and the scope of the restraints. The European Union is currently undergoing the legislative process of drafting a European Union Directive for trade secret protection, in order to have a level-playing field of protection.[777]

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771 Ralph Agius Fernandez, 'The Truth behind Trade Secrets' (Doctor of Laws thesis, University of Laws 2012) 57.

772 Michael Whincup, *Modern Employment Law* (6th edn, Heinemann Professional Publishing 1988) 71.

773 Ralph Agius Fernandez, 'The Truth behind Trade Secrets' (Doctor of Laws thesis, University of Laws 2012) 58.

774 ibid.

775 Seyfarth Shaw, 'Webinar recap! International trade secret and non-compete law update' (*LEXOLOGY*, 2015) <http://www.lexology.com/library/detail.aspx?g=aafaf547-f85f-4b2a-b715-a88d266590ed> accessed 23 October 2016.

776 Ralph Agius Fernandez, 'The Truth behind Trade Secrets' (Doctor of Laws thesis, University of Laws 2012) 58.

777 Seyfarth Shaw, 'Webinar recap! International trade secret and non-compete law update' (*LEXOLOGY*, 2015) <http://www.lexology.com/library/detail.aspx?g=aafaf547-f85f-4b2a-b715-a88d266590ed> accessed 23 October 2016.

2. Comparative analysis of non-compete clauses

If one analyses the approaches adopted in the United States and in the European Union, one immediately realises that there are considerable variations, not only between the European Union and the United States, but also between the different Member States themselves.[778]

2.1 *The United States*

In order to give an overview of the position in the United States, one may analyse the position in Delaware, because the majority of the other states take the same stance. Non-compete agreements are considered to be restrictions on trade but courts will

> generally enforce them if they are part of valid agreements supported by consideration, are reasonable in time and scope, and serve to protect the employer's legitimate economic interests, which generally include the employer's confidential information and goodwill developed through customer relationships.[779]

Delaware Courts have adopted the 'reasonable alteration' approach, whereby if a non-compete agreement goes beyond what is proportional in the circumstances, the Court will enforce it only to the extent that is proportional.[780]

California, as well as a number of other states, adopts a more restrictive approach which is based on the principle that 'every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.'[781] This approach gives greater importance to the interests of the employee rather than to the interests of the employer.[782]

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778 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

779 *TriState Courier & Carriage, Inc. v. Berryman,* No. C.A. 20574-NC, 2004 WL 835886 (Del. Ch. Apr. 15, 2004).

780 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

781 California Business and Professions Code, art 16600.

782 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

In Virginia, Courts interpret restrictive covenants as restrains of trade that are to be scrutinised.[783] According to the Virginia Supreme Court, a non-compete agreement is valid if the employer demonstrates that such agreement is no more than is necessary to protect his business interests, does not preclude the employee from earning a living, and is in accordance with public policy.[784] In Virginia, the 'reasonable alteration' approach has not been taken up.[785]

2.2 *France*

In France, the Courts pay particular attention to factors such as 'duration, geographical scope and the particular activity, the conditions in which the employer releases the employee from such obligation, the employee's role, the interests of the company and the financial compensation provided by the clause'.[786]

For a non-compete clause to be enforceable, it must,

> be limited to what is reasonably necessary to protect the employer's business; not unreasonably restrict the legitimate rights of the employee to find a new job; be reasonably limited in time and place; and oblige the employer to provide financial compensation for the restrictive covenant.[787]

The factor that the Courts in France give paramount importance to is whether the employee is precluded from earning a living in the same field or area of expertise. Therefore, even if the restriction is justified by the fact that it is protecting the legitimate interests of the employer, if such restriction would prevent the employee from working in the same field, the restrictive covenant would not be enforced.[788]

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783 *Northern Virginia Psychiatric Group, P.C. v. Halpern*, 19 Va. Cir. 279, 282 (1990) (non-solicitation agreement case); *Richardson v. Paxton Co.,* 203 Va. 790, 795 (1962).

784 Paramount Termite Control Co. vs. Rector,238 Va. 171, 174 (1989).

785 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

786 Seyfarth Shaw, 'Webinar recap! International trade secret and non-compete law update' (*LEXOLOGY*, 2015) <http://www.lexology.com/library/detail.aspx?g=aafaf547-f85f-4b2a-b715-a88d266590ed> accessed 23 October 2016.

787 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

788 ibid.

To confirm that there is a legitimate interest in enforcing the clause, it must be proven that through a breach of the non-compete clause, there is an actual risk of damage. The French Courts arrived to such conclusion after assessing whether there is competition between the two employers and whether there is really an actual threat imposed by the employee.[789]

Trade secrets are protected after the termination of employment subject to certain conditions. Unlike in confidentiality clauses,[790] there needs to be compensation for restrictive covenants, such as non-compete clauses, in order for these to be deemed enforceable.[791] This is clearly stated in several cases of the Labour Law Division of the French Supreme Court.[792]

2.3 *Germany*

In Germany, five conditions must be satisfied in order for non-compete clauses to be valid,

a) The restraint is to be imposed solely in order to protect the ex-employer's legitimate business interests;
b) the restrictive covenant is not to impose an unreasonable impediment for the employee to earn a living;
c) the non-compete clause is enforceable if the employer binds himself to pay financial compensation the employee which matches half the income earned prior to the termination of the employment;
d) the maximum duration of the clause is two years, and if a longer duration is agreed, the excess is invalid;
e) the restrictive covenant is to be in writing and the employer has the duty to prove that the employee is in possession of a copy of the signed contract.[793]

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789 ibid.

790 Seyfarth Shaw, 'Webinar recap! International trade secret and non-compete law update' (*LEXOLOGY*, 2015) <http://www.lexology.com/library/detail.aspx?g=aafaf547-f85f-4b2a-b715-a88d266590ed> accessed 23 October 2016.

791 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

792 See *Vasilescu v. SARL Argo Hytos* (Labor Law Division, French Supreme Court, June 13, 2007), *X vs. Societe Publications Pierre Johanet* (Labor Law Division, French Supreme Court, March 7, 2007), *X. v. Societe Allegre* (Labor Law Division, French Supreme Court, February 27, 2007).

793 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

2.4 *Italy*

Non-compete clauses are enforceable if three conditions are satisfied, namely (i) if they are founded in writing; (ii) if compensation is agreed to; and (iii) if the clause is limited to a particular purpose, time and location, as referred to in a local Maltese judgment ***Vassallo Cesareo vs. Cilia Pisani***.[794]

The applicable duration of the clause cannot exceed five years for employees holding an executive position, and three years in other situations. The compensation is to be fair and in proportion to the level of restriction imposed on the employee. Factors taken into consideration when quantifying the compensation are the duration of the clause, the geographic area covered by the clause, and the salary and position held by the ex-employee.[795]

2.5 *United Kingdom*

Restrictive covenants are more often than not void due to being considered as an unlawful restraint of trade. This is because *prima facie* they are against public policy.[796] According to Seyfarth Shaw,

> In practical terms, this means that such covenants are only likely to be enforceable where they are fairly short in duration, the restriction is narrowly focused on the employee's own personal activities (e.g. by geographical scope) and is specific to the commercial environment.[797]

The use of non-competition clauses in the United Kingdom is common. Generally speaking, they are enforceable if they are deemed to be reasonable, as long as regard is had to the employer, the employee and to the general public.[798] When it

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794 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

795 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

796 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

797 Seyfarth Shaw, 'Webinar recap! International trade secret and non-compete law update' (*LEXOLOGY*, 2015) <http://www.lexology.com/library/detail.aspx?g=aafaf547-f85f-4b2a-b715-a88d266590ed> accessed 23 October 2016.

798 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

comes to reasonableness, there are two factors to consider: firstly, that only the legitimate proprietary interests of the ex-employer are protected through such agreement;[799] and secondly, that the restraint is not in excess to what is necessary to protect the employer's interests.[800]

Whether financial compensation is provided is not taken into consideration in the United Kingdom when assessing the lawfulness of such clauses. What is important to the Court is the actual wording of the restrictive clause, irrespective of the intention of the parties.[801]

Since only the narrowly-interpreted trade secrets are safeguarded post-employment in the United Kingdom, employers provide all-encompassing employment contracts to protect information.[802]

Today, non-competition clauses focus more on the sphere of influence that an employee had rather than a particular geographical area. The restriction is to be only in such activities that the ex-employee was involved in with his ex-employer, and in those areas in which the previous and the present employer are in direct competition with each other. The lower the ex-employee is on the employment ladder of the ex-employer and the longer the duration of the covenant, the more hesitant the Court is to enforce such a restrictive non-compete clause.[803]

2.6 *Malta*

Currently there is no specific law that caters for restrictive covenants between an employer and an employee. As a result of this lacuna, financial compensation is not legally mandatory in such contracts, and therefore whether or not financial compensation is offered to the employee is to be decided between the employer and the employee. The loss suffered by the employer will be the main factor in determining whether the covenant is enforceable or not. Naturally, the enforceability of such clauses is in the discretion of the Court.[804]

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799 Stenhouse Ltd vs. Phillips [1974] AC 391.

800 Herbert Morris Ltd v. Saxelby [1916] AC 688

801 Seyfarth Shaw, 'Webinar recap! International trade secret and non-compete law update' (*LEXOLOGY*, 2015) <http://www.lexology.com/library/detail.aspx?g=aafaf547-f85f-4b2a-b715-a88d266590ed> accessed 23 October 2016.

802 ibid.

803 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 23 October 2016.

804 Ann Bugeja, 'Protecting Business Interests Following Termination' (*GVZH Advocates*, 2013) <http://www.csb-advocates.com/malta-law-articles/protecting-business-interests-

The Constitution of Malta contains clauses on the freedom of occupation,[805] and freedom of property,[806] but there are no specific clauses governing the freedom to contract, intellectual property rights or trade secrets. Since there is no applicable statute relating to the enforceability of restrictive covenants, such issue must necessarily be analysed through local jurisprudence on the matter.[807] Non-compete clauses in Malta are enforceable according to certain criteria and conditions. It is common practice that in an employment agreement the employer inserts a non-compete clause, together with the applicable penalty should such a clause be breached. The Director responsible for Employment and Industrial Relations needs to approve the terms of the contract according to some local cases.[808] Other than that, damages can be sought by the employer for the breach of the non-compete clause in terms of the Civil Code.[809] An employer's protected interests mainly consist of trade secrets, together with customers/clients and business connections.[810]

There are several factors which one has to take cognisance of when it comes to determining the enforceability of the non-compete clause. Firstly, the clause needs to be in writing. The Court will then look at the duration of the restriction, the geographical area covered by the restriction, and other relevant factors. Moreover, to uphold the clause, the Courts must be convinced that the reasonableness test is met. The principle of freedom from restraints of trade is duly considered in Malta.[811]

In ***Patrick Jean vs. Omegachem Inc.***[812] the Court quoted Article 2089 of the Civil Code of Québec,[813] which provides that the clause needs to be in writing, and that factors such as time, place and type of employment are considered. Similar to Malta, blanket restrictive clauses are 'unacceptable at law'.[814]

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following-termination-icgl-employment-labour-law-2013-edition> accessed 23 October 2016.

805 See Constitution of Malta, Chapter 0 of the Laws of Malta, arts 7, 12.

806 ibid art 32.

807 ibid.

808 *Paul Pisani bhala Managing Director ghan-nom tas-socjetà Leisure Marketing Limited vs. Reuben Vella Bray*, per Mr Justice Said Pullicino, First Hall Civil Court, 5 October 1994.

809 Judge Abigail Lofaro, 'Non-competition clauses in labour contracts' (XIVth Meeting of Europoean Labour Court Judges, Cour de Cassation de Paris 2006) <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_159967.pdf> accessed 23 October 2016.

810 ibid.

811 ibid.

812 2012 QCCA 232 (C.A.).

813 Civil Code of Québec, art 1089.

814 Élodie Brunet, 'Can the refusal to sign a non-competition clause constitute just and sufficient cause for dismissal?' (In Fact and In Law, Lavery 2012) <http://www.lavery.ca/en/publications/our-publications/1532-can-the-refusal-to-sign-a-

Therefore 'a non-competition clause must be stipulated in writing and in express terms',[815] and the contractual obligation must be determinate or determinable, as per contract law.[816]

If a Maltese Court determines that a restrictive covenant is too broad, it will normally not modify it, neither will it enforce such an agreement. Temporary preliminary injunctions may be issued by the Maltese Courts on occasions of a breach of a non-compete clause, but only if the 'reasonable test' criteria is satisfied. In cases of such breaches, the Court can order the payment of the fine agreed in the employment contract or liquidate damages to be paid to the employer. In Malta, the Courts that are vested with the authority to deal with such cases are the Industrial Tribunal, the First Hall of the Civil Court, and the Court of Appeal.[817]

In ***Pisani nomine vs. Vella Bray***,[818] the Court held that clauses in restraint of trade are not to contain any phrases suggesting that the restraint is to be applied subsequent to the termination of employment 'for any reason whatsoever'. The Court stated that in order for a restrictive clause not to compete to be enforceable, it needs to be in line with its object, expressly mentioning the prohibited work to be carried out post-termination. Therefore, the restraint is to be proportional, with no overboard measures than necessary to protect the interests of the employer. Moreover, ex-employer and the employer do not compete, then there are no employer's interests to protect.[819]

Vassallo Cesareo vs. Cilia Pisani[820] stated that restrictive covenants are considered to be 'almost unenforceable against all classes of employees'.[821] Alterations in position, salary or responsibilities do not affect enforceability, but

non-competition-clause-constitute-just-and-sufficient-cause-for-dismissal-.html> accessed 23 October 2016.

815 ibid.

816 ibid.

817 Judge Abigail Lofaro, 'Non-competition clauses in labour contracts' (XIVth Meeting of Europoean Labour Court Judges, Cour de Cassation de Paris 2006) <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_159967.pdf> accessed 23 October 2016.

818 *Paul Pisani bhala Managing Director ghan-nom tas-socjetà Leisure Marketing Limited vs. Reuben Vella Bray*, per Mr Justice Said Pullicino, First Hall Civil Court, 5 October 1994.

819 Judge Abigail Lofaro, 'Non-competition clauses in labour contracts' (XIVth Meeting of Europoean Labour Court Judges, Cour de Cassation de Paris 2006) <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_159967.pdf> accessed 23 October 2016.

820 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

821 Matthew Brincat, 'Labor and Employment Practice Group Non-Competition' (Lex Mundi Publication 2010) <http://www.lexmundi.com/document.asp?docid=1504> accessed 23 October 2016.

before this decision, cases were considered according to the reasonableness test. Judgments decided before this decision stated that an employee ought to be compensated for abiding with a restrictive covenant, with the reason based on equity, but such a reason was declared to be contrary to Malta's public policy.[822]

3. Overview of the position in Malta through Jurisprudence

In ***Joseph Xerri nomine vs. Brian Clarke***, the defendant was subjected to a non-compete clause reading,

> You will be required to guarantee, that if you leave this employment you will not work for any other research organization or any other organization in Malta, whose activities are in competition with those of this Company, before the lapse of at least three years.[823]

The Commercial Court in 1969 proceeded to state,

> There is no specific provision of codified law in Malta about clauses in restraint of trade as such, and jurisprudence or judicial precedent is not apparently abundant, but it may safely be asserted that if clauses in restraint of trade may be impugned at all - and they certainly can in deserving cases - the heading under which an exercise of this sort may be attempted is section 1028 (today Article 985) of the Civil Code which provides that things which are impossible, or prohibited by law, or contrary to morality, or to public policy, may not be the subject-matter of a contract.[824]

One has to take into consideration that this judgment was handed down some time ago and since then there have been several cases addressing the issue of restrictive covenants. Nevertheless, it accepts the notion of non-compete clauses in particular cases and subject to the mentioned criteria.
Several cases, including the ***Joseph Xerri nomine vs. Brian Clarke*** case refer to ***Carmelo Zammit La Rosa vs. Franco Facchetti***,[825] where the Court stated that 'clauses which restrict a man's working activities to a limited space or time are not, on the test of reasonableness, to be held null and void'.[826] The Court enforced such clause because the employee was not precluded entirely from

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822 ibid.
823 *Joseph Xerri nomine vs. Brian Clarke*, per Mr Justice Caruana Demajo, Commercial Court, 31 July 1969.
824 ibid.
825 *Carmelo Zammit La Rosa vs. Franco Facchetti*, per Mr Justice Mamo, Mr Justice Montanaro Gauci, Mr Justice Harding, Court of Appeal (Superior), 15 December 1961.
826 ibid.

working in his profession, but he could only not work with any competitors of his ex-employer.[827]

In ***Pisani vs. Vella Bray***,[828] the Court analysed a contract of employment containing a clause providing that if for whatever reason, employment is terminated, the ex-employee would be unable to work with a competitor for a period of three years, while a pre-determined sum of money was to be paid if the non-compete clause was breached.[829] The Court stated, 'Huwa dan it-test tar-raġonevolezza fl-imkien mal-prinċipji tal-ordni pubbliku, wkoll maġistralment elaborata f'din is-sentenza, li għandhom ikunu determinanti għall-validità o meno ta' klawsoli simili'.[830]

In several cases, including in the above-mentioned case, Article 987 and 990 of the Civil Code were taken into consideration, whereby obligations without consideration or founded on a false or an unlawful consideration are without effect,[831] while a consideration which is prohibited by law, or contrary to morality or public policy is unlawful.[832] In ***Vassallo Cesareo vs. Cilia Pisani***,[833] the Court started with the premise that whatever is agreed between two parties is the law,[834] thus any breach results in a contractual breach remediable through payment of damages or penalties. However, that alone does not make non-compete clauses enforceable. As Baudry holds, non-compete clauses have to be interpreted in favour of the employee.[835]

In ***Vassallo Cesareo vs. Cilia Pisani***,[836] the Court stated that there is the right of the employer to protect its commercial interests such as trade secrets, in order to preclude misuse by employees. The restriction is to be related to the nature of employment. The employer is given more protection in the case of employees in a high position. The restrictive clause is to limit the activity of the employee for a duration and geographic area that is within reason. The Court stated that

827 ibid.

828 *Paul Pisani bhala Managing Director ghan-nom tas-socjetà Leisure Marketing Limited vs. Reuben Vella Bray*, per Mr Justice Said Pullicino, First Hall Civil Court, 5 October 1994.

829 ibid.

830 ibid.

831 Civil Code, Chapter 16 of the Laws of Malta, art 987.

832 ibid art 990.

833 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

834 Civil Code, Chapter 16 of the Laws of Malta, art 922(1): Contracts legally entered into shall have the force of law for the contracting parties.

835 Gabriel Baudry-Lacantinerie, *Trattato Teorico-Pratico del Diritto Civile*, vol 21 (Larose 1907) 51 para 1712.

836 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

restricting the employee post-employment was justified, to safeguard the employer's patrimonial interests. However, the rights of the employee were not catered for adequately. The Court mentioned financial compensation aimed at making up for the sacrifice borne by the employee.[837] Moreover, when considering the reasonableness test, the geographic criterion in Malta fails due to Malta being a small island.[838]

In ***Vassallo Cesareo vs. Cilia Pisani***[839] the Court held,

> Filwaqt li ġie rikonoxxut id-dritt ta' min iħaddem illi jipproteġi l-interessi kummerċjali tiegħu għad dawk li huma 'trade secrets' u li jinibixxi 'the misuse by the employee of his acquaintance with the employer's clients or customers' eppure il-kostringiment irid ikun relatat man-natura ta' l-impjieg fejn allura min iħaddem jiġi akkordat ħarsien akbar fil-każ ta' impjegat f'kariga għolja, ad exemplum, 'managing director'. Inoltre l-patt tar-restraint irid jillimita l-attivita` lavorattiva jew industrijali ta'l-mpjegat għal żmien jew ċirkondarju determinat li ma jkunx irraġjonevoli[840]

The Court of Appeal in ***Vassallo Cesareo vs. Cilia Pisani*** stated that the position in other legal systems does not influence local decisions. Consequently, references to compensation under Italian law are inapplicable, as they are not provided for under Maltese law.[841] The Court of Appeal focused on Articles 987 and 990 of the Civil Code, along with the Conditions of Employment (Regulations) Act (Hereinafter referred to as 'CERA').[842] Articles 38 and 26 of the CERA are aimed at safeguarding the interests of the employee because conditions which are less favourable than those which the Act establishes cannot be imposed and to see that no penalties are included in a contract without the authorisation of the Director. The Act limits the will of the contracting parties in the interest of the public, and what is in excess is thus without affect. In this case

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837 As required by the Civil Code of Italy.

838 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

839 ibid.

840 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

841 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice De Gaetano, Mr Justice Depasquale, Mr Justice Magri, Court of Appeal (Superior), 3 March 2006.

842 Conditions of Employment (Regulations) Act, Chapter 135 of the Laws of Malta.

the non-compete clause and the penalty clause were found to be illicit and prohibit by law as the Director did not authorise the penalty.[843]

In ***Cascun vs. Healthcare Services Limited***, the Court analysed post-employment restraints and stated that such clauses,

> huma marbutin bil-limitazzjoni li jistgħu jitħallew isiru biss jekk kemm-il darba l-prinċipal ikun jeħtieġlu jħares l-interessi kummerċjali tiegħu u li f'kull każ dan ma jkunx bi ksur tal-ħarsien tal-jedd tal-impjegat għad-dritt li jaħdem b'mod produttiv.[844]

In ***Portelli vs. Air Malta***, the Court stated, 'Il-klawsola tista' titqies irraġonevoli li kieku kienet miftuħa għal żmien li ma jagħlaqx, jew jekk l-ammont ikun wieħed sproporzjonat, jew imur kontra l-ordni pubbliku'.[845]

The special laws on conditions of employment are heavily scrutinised by the Maltese Courts when non-compete clauses along with penalties are utilised by employers. In ***Pisani vs. Vella Bray***, the Court stated that where the penalty is considered, employment laws kick in – at that time through Chapter 135 of the Laws of Malta.[846] Where penalties are concerned, they may be enforced but with the permission of the Director.[847] Since the Director did not authorise the penalty imposed in the non-compete clause of this case, such a clause was determined to be contrary to the spirit of the law.[848] The applicable law is the law at the time of entry into contract, and no subsequent law.[849] Having clauses breaching the Act would render such clause or the whole agreement as null.[850]

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843 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice De Gaetano, Mr Justice Depasquale, Mr Justice Magri, Court of Appeal (Superior), 3 March 2006.

844 *Lorenza sive Lora Cascun vs. Healthcare Services Limited*, per Mr Justice Micallef, First Hall Civil Court, 6 March 2008, p. 13.

845 *Ramon Portelli, Joseph Xuereb, Simon Warrington u Ian Alexander Micallef vs. Air Malta p.l.c.*, per Mr Justice Micallef, First Hall Civil Court, 5 March 2013, p. 11.

846 The Conditions of Employment (Regulations) Act, Chapter 135 of the Laws of Malta, was consolidated into the Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, in 2002.

847 Employment and Industrial Relations Act 2002, Chapter 452 of the Laws of Malta, art 19.

848 *Paul Pisani bhala Managing Director ghan-nom tas-socjetà Leisure Marketing Limited vs. Reuben Vella Bray*, per Mr Justice Said Pullicino, First Hall Civil Court, 5 October 1994.

849 *Neg. Victor Salamone nomine vs. Dr Giuseppe Mifsud Speranza et noe*, per Mr Justice Ganado, Commercial Court, 12 November 1934.

850 *Avukat Dr. Hugh Peralta nomine vs. Vincent Falzon et nomine*, per Mr Justice Agius, Mr Justice Harding, Mr Justice Schembri, Court of Appeal (Commercial), 19 May 1986.

In ***Bugeja pro et nomine vs. Grech,***[851] the First Court stated that if a contract satisfies Article 966 of our Civil Code, in that, the capacity, consent, object and consideration, it cannot be declared null and void because the will of the contracting parties is demonstrated.[852] As declared in other cases, where penalties and conditions less favourable than those found in the law are imposed, there has to be the authorisation of the Director of Works, and if not, this renders the clause as null and void.[853]

However, the Court of Appeal stated that the agreed sum was a pre-agreed amount, thus pre-liquidated damages, and therefore not the same as fines. Therefore, Article 19 of the Employment and Industrial Relations Act was deemed to be inapplicable. The Court concluded that the clause was not a restraint of trade. The reasons for finding the clause to be reasonable include the agreed duration of the clause, the voluntary acceptance by the employee, the reasonable damages to be paid in the eventuality of breaching the clause, and the fact that the employee is not inhibited from earning a living or working from competitors, only not to work with clients of the company.[854]

Blanket clauses which aim to cover every circumstance possible, such as those which disregard the manner in which the employment is terminated, and those providing that the employee cannot engage in a similar activity to that of his previous employer, are considered to beyond what is reasonable.[855]

4. Foreign positions on non-compete clauses as analysed through local jurisprudence

Since local law on the subject is lacking, foreign jurisprudence plays a fundamental role when considering non-compete clauses in Malta and several cases discuss foreign positions at length. In ***Vassallo Cesareo vs. Cilia Pisani,***[856] the position in the United Kingdom was referred to, where initially such clauses were deemed invalid, but later the concept of 'partial restraint if reasonable and

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851 *Mark Bugeja, Martin Bonello Cole, Austin Demajo u Joseph Pullicino f'isimhom proprju u f'isem u fl-interess tad-ditta Grant Thornton vs. Melljora Grech*, per Magistrate Scerri Herrera, Court of Magistrates (Civil Jurisdiction), 20 June 2012.

852 ibid p. 12.

853 *Brian Richard Andrews et vs. Alfred Borg*, per Mr Justice Cuschieri, First Hall Civil Court, 31 October 2003.

854 *Mark Bugeja Martin Bonello Cole, Austin Demajo u Joseph Pullicino f'isimhom u fl-isem u fl-interess tad-ditta Grant Thornton vs. Melljora Grech*, per Ms Justice Grima, Court of Appeal (Inferior), 27 May 2015.

855 *Paul Pisani bhala Managing Director ghan-nom tas-socjetà Leisure Marketing Limited vs. Reuben Vella Bray*, per Mr Justice Said Pullicino, First Hall Civil Court, 5 October 1994.

856 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

not contrary to the public interest' was accepted.[857] In ***Pisani vs. Vella Bray***, the Court referred to the concept of restraints of trade as defined by English jurists as,

> *a legal device to attempt to hold the balance between two competing features, an employee's freedom to take employment as and when he wishes, and an employer's interest in preserving certain aspects of his business from disclosure or exploitation by an employee or more usually by an ex-employee...*[858]

In the ***Nordenfelt case***,[859] four particular points are raised. Firstly, restraints of trade, unless justified, are against public policy, and thus are void. Secondly, it is the Court that decides whether a restraint of trade is justified or not, and, if it is found not to be justifiable, then the Court will not enforce it. Thirdly, a restraint is justifiable if it is reasonable in the interests of both contracting parties and in the public's interest. Fourthly, the burden of proof to justify a restrictive clause is on the party alleging that it is reasonable.[860]

Lord Wedderbum mentions the reasonableness test, on whose failure a restrictive clause would be unenforceable. The test is 'by reference to the interests of the parties to the contract'.[861] Factors considered include the area and the duration of the clause, as long as in the public interest. It is only the 'employer's proprietary interests' that can be safeguarded. [862]

CRC - Evans Canada Ltd vs. Pettifier,[863] holds that the employee is to be honest and faithful. Moreover, 'The employee shall not follow a course of action that harms of places at risk the interests of the employer.'[864]

The Court of Appeal of Manitoba, Canada holds that, 'There is nothing to prevent an ordinary employee from terminating his employment, and normally that employee is free to compete with his former employer. The right to compete freely may be constrained by contract.'[865]

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857 Jack Beatson FBA, Andrew Burrows FBA and John Cartwright, *Anson's Law of Contract* (23rd edn, Oxford: Clarendon Press 1969) 333.
858 J. T. Smith & J. C. Wood, *Industrial Law* (London 1989) 132.
859 *Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Co. Ltd*, [1894] AC 535.
860 Jack Beatson FBA, Andrew Burrows FBA, and John Cartwright, *Anson's Law of Contract* (23rd edn, Oxford: Clarendon Press 1969) 335-336.
861 Baron Kenneth William Wedderburn Wedderburn of Charlton, *The Worker and the Law* (Penguin 1986) 146.
862 ibid.
863 *CRC – Evans Canada Ltd vs. Pettifier* ((1997), 197 A. R. 24 (Q.B.)).
864 ibid.
865 *W.J. Christie & Co. vs. Greer* ((1981), 121 D.L.R. (3d) 472 (Man. C.A.).

5. Conclusion

Maltese law is silent on the matter of non-compete clauses and therefore one must look to relevant provisions on contracts in the Civil Code, as well as the special laws governing conditions of employment. Due to this lacuna, Malta also takes cognisance of the position in other countries when coming to decisions for local cases, particularly the positions of the United Kingdom and Italy.

There are two interests at stake when determining the enforceability of non-compete clauses; the interests of the employer – to safeguard his legitimate patrimonial interests; and the right of the employee to work. Sometimes, these interests overlap and therefore such clauses have to be subjected to the reasonableness test in order to be justified. Baudry holds that a clause in restraint of trade should be interpreted in a way as to favour the employee.[866] It is a general principle that contract clauses in breach of public policy cannot be enforced.

Norman Selwyn states that there are 'four legitimate interests in respect of which the employer is entitled to limited protection, namely (a) trade secrets and confidential information, (b) existing customers and connections, (c) working for competitors, and (d) enticing existing employees'.[867]

Non-compete clauses in Malta can be seen from two points of views. Firstly, there are employment laws which have to be safeguarded, especially if the application of penalties is involved; although it always is up to the Court to decide whether such special laws are applicable or not. Secondly, the Maltese Courts use the reasonableness test, as advocated by other jurisdictions, as well as the doctrine and jurisprudence of other systems, particularly those of the United Kingdom and Italy.[868]

The position in Malta on non-compete clauses is best summarised in ***Portelli vs. Air Malta***, 'Il-klawsola tista' titqies irraġonevoli li kieku kienet miftuħa għal

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866 Gabriel Baudry-Lacantinerie, *Trattato Teorico-Pratico del Diritto Civile*, vol 21 (Larose 1907) 51 para 1712.

867 Norman Selwyn, *Selwyn's Law of Employment* (15th edn, OUP 2008) 19-24.

868 Dr Joseph Bonello, 'Clauses in restraint of trade' (Department of Industrial and Employment Relations Issue 1, 2006) <https://dier.gov.mt/en/About-DIER/Publications-and-Archives/Newsletter/Documents/IReview_Issue1.pdf> accessed 23 October 2016.

żmien li ma jagħlaqx, jew jekk l-ammont ikun wieħed sproporzjonat, jew imur kontra l-ordni pubbliku'.[869]

A non-compete clause covering the whole of Malta was once declared invalid in relation to a Maltese citizen.[870] The duration in such clauses has to be definite and not open-ended or too broad.

Bugeja et vs. Camilleri, is one of the most recent decided cases on such clauses, thus it deserves scrutiny. The Court stated: 'illi l-linja gwida ta' kull kundizzjoni li timponi r-restrizzjoni lavorativa ta' impjegat huma r-raġonevolezza tal-kundizjoni f'sens ampju u l-iskop limitat fi spazju u żmien tar-restrizzjoni'.[871]

The Court declared that the imposed limitation in the contract was a condition that was not unreasonable, capricious or generic, that completely restricts the capacity of the employee to work in the particular field. The employee was only precluded from working with clients of the ex-employer. Therefore, the ex-employee was in a position to work alone, with a company or other persons in the same field, even if competitors, unless they were clients of the ex-employer. This Court referred to the clause analysed in ***Vassallo Cesareo noe vs. Cilia Pisani***, because in such a case the condition was a generic restriction and therefore the employee was precluded from working anywhere for the duration of the restriction.

The Court referred to the period of two years agreed to in the condition as being a short one, thus reasonable. The penalty agreed to was an amount of damages intended as a deterred so that the employee does not breach the condition, and the quantum of pre-liquidated damages was also reasonable in itself.[872]

As regards penalty clauses, the same Court mentioned several factors to take into consideration, among which is that the penalty amount must not eliminate the employee's freedom to take up employment somewhere. The role and the salary of the employee and the level of trust placed on an employee are to be considered as well. Finally, the amount must be generally fair and reasonable in the context of the employment in question.[873]

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869 *Ramon Portelli, Joseph Xuereb, Simon Warrington u Ian Alexander Micallef vs. Air Malta p.l.c.*, per Mr Justice Micallef, First Hall Civil Court, 5 March 2013, p. 11.

870 *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

871 *Mark Bugeja, Martin Borg Bonello Cole, Austin Demajo u Joseph Pullicino f'isimhom proprju fl-isem u l-interess tad-ditta Grant Thornton vs. Geoffrey Camilleri*, per Mr Justice Chetcuti, Court of Appeal, 13 February 2014, p. 7.

872 ibid p. 9.

873 ibid.

To conclude, Maltese Courts seem to understand the importance of non-compete clauses and penalty clauses in contracts, in order to safeguard the legitimate interests of the employer in today's increasingly competitive industries.

Non-solicitation clauses

1. Introduction

Non-solicit and non-compete clauses are less likely to be enforced by a Court than confidentiality agreements because they are more onerous to the ex-employee.[874]

In ***First United Insurance Brokers Limited vs. Farrugia Wismayer***,[875] one may find a typical non-solicitation clause and a corresponding penalty clause catering for such breach,

> (a) Should the employment of the Employee be terminated for any reason by the Employer or the Employee, the Employee undertakes as of now that for a period of twenty-four months after the termination of his employment, he shall not for his account or for any other person, firm or company, solicit or interfere or endeavour to entice away from the Employer any person who may be employed with the Employer or may be a client of the Employer.
> (b) In the event that a breach of sub-clause 12(a) above, the employee agrees that he will be liable for damages, which are being pre-agreed now by the parties, in the sum of Lm 5000 (five thousand Maltese Liri) for every such breach.[876]

In the case ***Gilford Motor Co. Ltd vs. Horne*** Romer LJ stated,

> It is in my opinion established that when an employee is being offered employment which will probably result in his coming into contact with his employer's customers, or which will enable him to obtain knowledge of names of his employer's customers, then the covenant against solicitation is reasonably necessary for the protection of the employer. [877]

However, such a stance was criticised because the fact that an employee is in contact with his customers does not automatically translate into those customers being ready to follow him.[878]

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874 Mary L. Mikva, 'Drafting Confidentiality, Non-Compete and Non-Solicitation Agreements: the Employee's Wish List' (2004) 50 Practical Lawyer 11.
875 *First United Insurance Brokers Limited vs. Karl Farrugia Wismayer*, per Mr Justice Zammit McKeon, First Hall Civil Court, 30 November 2010.
876 ibid p. 6.
877 *Gilford Motor Co. Ltd vs. Horne* [1933] Ch 935.
878 ibid.

According to the Illinois Appellate Court in ***Coady vs. Harpo***,[879]

> A post-employment restrictive covenant will be enforced if its terms are reasonable. ...The reasonableness of some types of restrictive covenants, such as non-solicitation agreements, also is evaluated by the time limitation and geographical scope stated in the covenants.[880]

There are two types non-solicitation agreements, firstly, agreements not to solicit employees, and secondly, agreements not to solicit clients.[881]

2. Agreements not to solicit clients

Agreements not to solicit clients function, to some extent, as non-compete agreements and may likewise impact the employee's capability of finding employment elsewhere in the same sector. Therefore, for the clause to be considered enforceable in employment contracts, the geographic area, duration, and scope have to be reasonable in order to be upheld by a court of law.[882] This was confirmed in ***Bugeja et vs. Camilleri***.[883]

Norman Selwyn in *Law of Employment* states,

> An employer is entitled to have a limited protection against an ex-employee dealing with existing customers for this is part of the goodwill which has been built over the years. A covenant can restrict the right to solicit or endeavour to entice away former customers, or to have post-employment dealing such customers, but it is likely that such clauses should be limited to customers with whom the ex-employee had some dealings for otherwise the restraint is likely to be regarded as to be designed to prevent competition (Marley Tile Co Ltd vs. Johnson – 1982 IRLR 75, CA).[884]

Selwyn adds, 'A restrictive covenant that prevents an employee from soliciting or accepting business from his former employer's customers will be unenforceable

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879 *Coady vs. Harpo*, 719 N.E.2d 244 250 (Ill. App. Ct. 1999)

880 ibid.

881 Mary L. Mikva, 'Drafting Confidentiality, Non-Compete and Non-Solicitation Agreements: the Employee's Wish List' (2004) 50 Practical Lawyer 11.

882 Baron Kenneth William Wedderburn Wedderburn of Charlton, *The Worker and the Law* (Penguin 1986) 146.

883 *Mark Bugeja, Martin Borg Bonello Cole, Austin Demajo u Joseph Pullicino f'isimhom proprju fl-isem u l-interess tad-ditta Grant Thornton vs. Geoffrey Camilleri*, per Mr Justice Chetcuti, Court of Appeal, 13 February 2014, p. 7.

884 Norman Selwyn, *Selwyn's Law of Employment* (19th edn, OUP 2016) 510.

if it extends to customers with whom the employee personally had no dealings'.[885]
Therefore, according to Selwyn non-solicitation clauses ought to be restricted to customers that the ex-employee dealt with personally, since in any other case, such clause would be posing an obstacle to competition.[886]

In fact, in ***First United Insurance Brokers Limited vs. Farrugia Wismayer***, the Court reiterated this principle and although the employee was employed as a Development Manager, the clause in question was not specific enough and it was therefore interpreted in favour of the employee. In order for such clause to be enforceable by a court of law, it must be specific, that is, it must refer to the clients with whom the employee had dealings. As a result, the Court decided to render the clause ineffective and unenforceable.[887]

3. Agreements not to solicit employees

Regarding the second type of non-solicitation clause, Selwyn holds, 'A covenant which purports to restrict the right of an employee to solicit or entice other employees to leave the employer`s employment and to work for another employer is generally void.'[888]

In ***Hanover Insurance Brokers Ltd vs. Schapiro,***[889] a restrictive covenant stipulated that for the duration of a year post-employment, the ex-employee would not 'solicit or entice any employees of the company to the intent or effect that such employee terminates that employment'.[890] When the employer attempted to restrain the ex-employee for breaching the clause, the Court held that an employee is entitled to work with whoever provides employment, and therefore an employee is not to be compared with any other assets of the employer, like stock in trade and customers.[891]

In ***TCS Europe UK Ltd vs. Massey***[892] the Court stated,

> A restriction which is sought to prevent a person from poaching employees irrespective of their expertise, technical knowledge and/or juniority, and which could also apply to employees who were not in the

885 *WRN Ltd vs. Ayris*, 2008 152(23) SJLB 29
886 Norman Selwyn, *Selwyn's Law of Employment* (19th edn, OUP 2016) 511.
887 *First United Insurance Brokers Limited vs. Karl Farrugia Wismayer*, per Mr Justice Zammit McKeon, First Hall Civil Court, 30 November 2010, p. 12, 13.
888 Norman Selwyn, *Selwyn's Law of Employment* (19th edn, OUP 2016) 511.
889 Hanover Insurance Brokers Ltd vs. Schapiro (1994 – IRLR 82, CA).
890 ibid.
891 ibid.
892 *TCS Europe UK Ltd vs Massey* [1999] IRLR 22.

> particular employment when the defendant left was clearly a restriction against competition and therefore void.[893]

In ***Anthony Caruana & Sons Limited vs. Christopher Caruana***,[894] the defendant was an ex-employee of the plaintiff company and after his employment was terminated, a contract was entered into, whereby he promised his 'continued goodwill' towards the company. However, no non-compete or non-solicitation clauses, and consequently, no penalty clauses, were agreed between the parties. Caruana was accused of approaching brands with whom the company conducted business, in order for them to cease such trade and be represented by him, after he left the plaintiff company. Moreover, Caruana allegedly solicited other employees of the plaintiff company. The issue of fiduciary obligations was raised in front of the Court, that is, whether the defendant was considered to be a fiduciary, and if so, whether he had breached such obligations.

When analysing breaches of fiduciary obligations, the Court quoted Article 1124A(1) of the Civil Code,

> 1124A. (1) Fiduciary obligations arise in virtue of law, contract, quasi-contract, trusts, assumption of office or behaviour whenever a person (the "fiduciary") –
> (a) owes a duty to protect the interests of another person; or
> (b) holds, exercises control or powers of disposition over property for the benefit of other persons, including when he is vested with ownership of such property for such purpose; or
> (c) receives information from another person subject to a duty of confidentiality and such person is aware or ought, in the circumstances, reasonably to have been aware, that the use of such information is intended to be restricted.[895]

A fiduciary is obliged to retain information that is passed on to him in a professional manner. There exists a duty of loyalty while at the same time safeguarding the interests of the employer. A fiduciary is to act with honesty, accountability and loyalty, and with the diligence of a *bonus paterfamilias*.[896]

In ***Anthony Caruana & Sons Limited vs. Christopher Caruana***, the Court of Appeal acknowledged that Article 1124A entered into force in our law in 2005,

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893 ibid.

894 *Anthony Caruana & Sons Limited (C 7512) vs. Christopher Caruana*, per Mr Justice Camilleri, Mr Justice Mallia, Mr Justice Azzopardi, Court of Appeal (Superior), 28th February 2014.

895 Civil Code, Chapter 16 of the Laws of Malta, art 1124A(1).

896 *Anthony Caruana & Sons Limited (C 7512) vs. Christopher Caruana*, per Mr Justice Camilleri, Mr Justice Mallia, Mr Justice Azzopardi, Court of Appeal (Superior), 28th February 2014, p. 37.

but it is a reproduction of principles dating back to Roman law.[897] Through a quotation of a 2007 case, ***Cordina vs. Cordina***,[898] this was further substantiated, because it was said that after the introduction of Article 1124A, the position in Malta 'ġiet ħafna aktar iċċarata'.[899] As stated in ***Messina vs. Galea*** [900] Roman law is still the ius commune, and 'nei casi non proveduti dalle nostre leggi, dobbiamo ricorrere alle leggi Romane'.[901]

The manager is still a fiduciary, even if not responsible for policy-making, and thus has to act with loyalty and good faith.[902] This is paralleled with the agreement between the plaintiff and the defendant in that the ex-employee acts with 'continued goodwill towards the company'.[903] Therefore, the Court of Appeal liquidated damages due to the company as a result of the breach of Caruana's fiduciary obligations.

4. Conclusion

One may reach the conclusion that, in order for non-solicitation clauses to be enforced by a court of law, they must satisfy the reasonableness test. In other words, they must be reasonable in terms of scope, duration, and geographic area. Both types of non-solicitation clauses are based on the principle that the interests of the employer and those of the employee are balanced, as stated in ***Zammit La Rosa nomine vs. Facchetti***.[904] This results in clauses ensuring that ex-employees do not siphon clients from ex-employees or attract other employees to start working with such employee, provided that such clauses are proportionate and reasonable, in that, they are tailor-made for the particular employee and are not too generic in scope.

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897 R. W. Lee, *The Elements of Roman Law* (4th edn, Sweet & Maxwell 1956).

898 *Joanne Cordina vs. Charles Cordina*, per Mr Justice Ellul, First Hall Civil Court, 26 September 2007.

899 ibid p. 10.

900 *Messina vs. Galea*, First Hall Civil Court, 5 January 1881.

901 ibid.

902 David J. Hayton, *The Law of Trusts* (Sweet and Maxwell 1998) 760.

903 *Balkiah vs. KPMG* [1999] 1AllER 517.

904 *Carmelo Zammit La Rosa vs. Franco Facchetti*, per Mr Justice Mamo, Mr Justice Montanaro Gauci, Mr Justice Harding, Court of Appeal (Superior), 15 December 1961.

Severability Clauses

1. Introduction

A classic example of a severability clause, also known as ***Salvatorius*** clause,[905] will read as follows, 'the provisions of this agreement are severable. If any provision is deemed to be invalid, void or unenforceable, the remaining provisions shall not as a result be invalidated.'[906]

2. Definition

Cheshire and Fifoot define the doctrine of severance as 'the rejection from a contract objectionable promises or the objectionable elements of a particular promise, and the retention of those promises or those parts of a particular promise that are valid'.[907]

Therefore, severability clauses promote the idea that provisions constituting a contractual agreement are independent of one another.[908] Consequently, if one or more of the aforementioned provisions, for some reason or other, are deemed to be illegal by a Court or competent authority, hence unenforceable; the residual agreement will remain valid and effective nonetheless.[909] These clauses do not only appear in a context of contracts, but also in the ambit of legislation[910] since their presence will prevent the revocation of the whole contract or statute.

This doctrine may operate in two manners. Firstly, when the Court rules out the entire restraint, retaining the valid residual part of the contract, as occurred in ***Scorer vs. Seymour Jones.***[911]

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905 'Salvatorius Clause Law & Legal Definition' (*USLegal*) <http://definitions.uslegal.com/s/salvatorius-clause/> accessed 28 October 2016.

906 Fisher Philips, 'Caution required: severability clauses in non-compete agreements' (*Lexology*, 31 August 2010) <http://www.lexology.com/library/detail.aspx?g=928b9886-3db5-4709-b1f3-9a039f949041> accessed 8 October 2015.

907 Cheshire and Fifoot, *Cheshire and Fifoot's Law of Contract* (16th edn, OUP 2012) 112.

908 'Severability' (*ContractStandards*) <http://www.contractstandards.com/clauses/severability> accessed 28 October 2016.

909 Chadbourne & Parke LLP (*Lexology*, 29 May 2012) 'Boilerplate matters: severability clauses' <http://www.lexology.com/library/detail.aspx?g=b23155c6-add5-4aa6-b6bc-a5ebc63f5539> accessed 28 October 2016.

910 Fisher Philips, 'Caution required: severability clauses in non-compete agreements' (*Lexology*, 31 August 2010) <http://www.lexology.com/library/detail.aspx?g=928b9886-3db5-4709-b1f3-9a039f949041> accessed 8 October 2015.

911 *Scorer vs. Seymour-Johns* [1966] 1 WLR 1419.

Or else, when the Court deletes or modifies the restraint making it reasonable and enforceable, as exemplified in the ***Nordenfelt case***[912] and ***Bromley vs. Smith***.[913]

3. Local Jurisprudence

Intertwined with the above is the enforceability of non-compete covenants. In Malta, this is governed by jurisprudence.[914] There are various Maltese judgments which revolve around the anti-competitive nature of a specific provision in a given contract. As a general rule, anti-competitive covenants are unlawful as these would, in turn, impose restrictions to trade; something which is of detriment to the public and the economy in general.[915] These principles were outlined in great detail in a number of cases.

The judgment ***First United Insurance Brokers Ltd vs. Karl Farrugia Wismayer***[916] revolved around the non-compete clause which stated that upon termination of employment, the employee (who had the role of a development manager)'shall not for his account or for any other person, firm or company, solicit or interfere or endeavour to entice away from the Employer any person who may be employed with the employer or may be a client of the employer'.[917] The plaintiff raised the plea of *pacta sunt servanda* since it was held that the defendant defaulted in his obligation as agreed in clause 13 of the labour agreement in question. However, the Court emphasised that, *prima luogo*, the clause must be valid at law. Needless to say, the defendant accentuated this issue of validity so as to render the provision null and without effect; which is what the Court, following an in-depth analysis of the clause, ultimately decided.

What is noteworthy at this point is the fact that this judgment was based, in its entirety, upon a single clause, namely, the non-compete clause. The Court held that the said clause was in restraint of trade '...għalhekk din il-Qorti tqis li l-klawsola in kwistjoni, fejn din tittratta l-klijenti tal-kumpannija attriċi, għandha

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912 *Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535.

913 *Bromley vs. Smith* [2 Biss. 511;1 5 N. B. R. 152; 3 Chi. Leg. News] 297.

914 Judge Abigail Lofaro, 'Non-competition clauses in labour contracts' (XIVth Meeting of Europoean Labour Court Judges, Cour de Cassation de Paris 2006) <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/meetingdocument/wcms_159967.pdf> accessed 28 October 2016.

915 Ann Bevitt and Daniel P. Westman, 'Employment and Privacy Issues in Non-Competition Agreements' (*Mondaq*, 2008) <http://www.mondaq.com/unitedstates/x/58880/Human+Resources/Employment+And+Privacy+Issues+In+NonCompetition+Agreements> accessed 28 October 2016.

916 *First United Insurance Brokers Limited vs. Karl Farrugia Wismayer*, per Mr Justice Zammit McKeon, First Hall Civil Court, 30 November 2010.

917 ibid p. 6.

titqies mingħajr effett għall-finijiet u effetti kollha tal-liġi',[918] which constitutes a breach of public policy, hence reckoned to be invalid. The issue of validity was greatly evaluated in the pre-dated judgment of ***Vassallo Cesareo vs. Cilia Pisani***.[919]

A key observation here is that, in spite of the nullification of clause 13, at no point did the Court consider the remainder of the contract as null. The resultant agreement remained intact and thus, still effective and very much enforceable.[920] A case which was decided in a similar manner as the previous one, due parallel facts, is ***Alberta Group vs. Mark Mifsud***.[921]

4. The current Maltese position: Hidden Trends

At this juncture, it is also essential to note that locally, to-date, there has not been a judgment which has declared a whole contract to be null and void simply because one of its clauses is held to be unenforceable. The tendency in Maltese jurisprudence is that usually it is only the clause in question which is deemed to be ineffective but the rest of the contract remains valid.

In light of all the above, therefore, one could deduce that the principle of severability is very much alive in the Maltese jurisprudence, at least indirectly, even though the Courts do not expressly refer to it in any way. The *raison d'etre* behind this line of thought is founded on the fact that in every decision, the Courts have time and time again analysed the illegality or otherwise of a specific provision/s (usually the non-compete clause followed by its consequent penalty clause) segregated from the rest of the agreement.

Two subsequent questions would follow therefore: what would happen if the invalidated clause is a key provision, thus carrying significant weight? So much so, that a fundamental concept or matter would be permanently eliminated, rendering the remainder of the contract practically worthless? In one case, before a United States Court, it was held that if the ineffective provision forms an integral part of the consideration, the whole agreement would fall.[922]

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[918] ibid p. 12.

[919] *Attilio Vassallo Cesareo u Saviour Coppini ghan-nom u in rapprezentanza tas-socjetà International Machinery Limited vs. Anthony Cilia Pisani*, per Mr Justice Sciberras, First Hall Civil Court, 31 January 2003.

[920] *First United Insurance Brokers Limited vs. Karl Farrugia Wismayer*, per Mr Justice Zammit McKeon, First Hall Civil Court, 30 November 2010.

[921] *Alberta Fire & Security Equipment Ltd (C-6606) et vs. Mark Mifsud*, per Mr Justice Zammit McKeon, First Hall Civil Court, 7 January 2014.

[922] 'Website about Contracts Management – Severability' (*Contracts*) <http://www.contracts.com/id103.html> accessed 28 October 2016.

5. The Common Law Tradition

The realm of severability clauses is rather unclear under Maltese law. This is due to shortage of legislation and case-law regarding the matter. As an attempt to resolve this pitfall, Maltese Courts could refer to English law, a major source of Maltese commercial law principles.

In order to establish whether an invalid provision can be separated from the rest of the contract, the English Courts apply the 'Traditional Blue Pencil Test'.[923] Through this exercise, the Courts examine the sensibleness of the contract. If, upon removal of the unreasonable portion, the consideration of the contract remains intact, then, the remainder will still hold. On the other hand, if the consideration does change, however, the contract tout ensemble will fail.[924] This was discussed in the classic judgment of ***Goldsoll vs. Goldman***.[925]

The aforementioned test is subject to a limitation, in the sense that the Courts will not set up a fresh agreement, as established in ***Beckett Investment Management Group Ltd. vs. Hall***.[926] The Courts will merely sever the invalid section from the rest of the contract. This segregation will not take place however provided that it would 'alter entirely the scope and intention of the agreement', as held in ***Atwood vs. Lamont***.[927]

6. The Civil Law Tradition

In the course of discussing the subject-matter at hand, which revolves around the law of contracts, one cannot disregard the position taken by the French legal system. This is because the Civil Code, which is the major source of contract regulation in Malta, has its roots in the French Code Napoleon.

Broadly-speaking, under French law, a severability clause cannot prevent the while contract from becoming null and void.[928]

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923 Michael Polkinghome, 'Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions' (White & Case 2013) 4 <http://documents.jdsupra.com/1bcd32c3-b612-4811-aec2-46b0078d838b.pdf> accessed 28 October 2016.

924 ibid.

925 *Goldsoll vs. Goldman* [1915] 1 Ch 292.

926 *Beckett Investment Management Group Ltd. vs. Hall* [2007] IRLR 793.

927 *Attwood vs. Lamont* [1920] 3 KB 571.

928 Michael Polkinghome, 'Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions' (White & Case 2013) 5 <http://documents.jdsupra.com/1bcd32c3-b612-4811-aec2-46b0078d838b.pdf> accessed 28 October 2016.

Correspondingly to the English position, French law is mostly concerned with the "cause" of the contract, which, must still be reflected even post-removal of the invalid clause. The French approach is more focused on the fact that the *cause*, which is an essential requisite for the validity of the contract, will be present. Furthermore, it is up to the French Courts to decide what constitutes the cause or otherwise of the agreement. Another principle followed under French law is that of economic balance of the contract, that is, the balanced protection of both parties' interests.[929]

7. The Severability Clause at EU level

In this scenario, a provision will only be deemed invalid if it falls under the prohibition contained in Article 101(1) of the Treaty of the Functioning of the European Union (TFEU). A contract will be voided as a whole only when it is impossible to separate the nullified clause from the residual provisions of the agreement.[930] Otherwise, if the alternative were to occur, that is, there being no severability, upon the removal of the said clause, the rest of the agreement would have no 'autonomous legal content'.[931] Whether or not the rest of the provisions will be considered as being valid or otherwise, is subject to the severability rules under national law.[932]

8. Conclusion

The motivation behind severability clauses is to mirror the parties' goals, protecting both their interests.[933] Proper attentiveness while drafting would ascertain that the parties' initial objectives are safeguarded.[934] This is also crucial as it would minimize the frequency of future complications and unnecessary disputes in Courts.[935] When applied in a strict manner, a severability clause could be considered as being a shortcoming since upon the invalidation of a provision, which would be of particular benefit to one of the parties, the balance of interests would be disrupted.[936]

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929 ibid.

930 Moritz Lorenz, 'An Introduction to EU Competition Law' (Cambridge University Press) 214.

931 ibid.

932 ibid.

933 Chadbourne & Parke LLP (*Lexology*, 29 May 2012) 'Boilerplate matters: severability clauses' <http://www.lexology.com/library/detail.aspx?g=b23155c6-add5-4aa6-b6bc-a5ebc63f5539> accessed 28 October 2016.

934 ibid.

935 Simon Stokes, 'Commercial Law Briefing: Getting the Boilerplate Right' (*Blake Morgan*, 22 September 2014) <http://www.blakemorgan.co.uk/training-knowledge/guides/2014/09/22/commercial-law-briefing-getting-boilerplate-right/> accessed 28 October 2016.

936 Michael Polkinghome, 'Beware of the Boilerplate – The Risks of Standard-form Clauses in Common and Civil Law Jurisdictions' (White & Case 2013) 5

After having analysed the main points linked to severability clauses, and their implications thereof, including strengthened economy and trade in general, it is extremely necessary that the Maltese legislator comes up with a clear and comprehensive standpoint regarding the matter. Even though a consistent pattern has in fact been identified, there are no reliable local instruments clearly reflecting the legislator's will in this regard. Enacting legislation tied with this subject matter is extremely relevant nowadays. Considering the ever-increasing complexity of agreements and the large amounts of commercial contracts concluded daily via electronic means, clarity and certainty in this regard are indispensable.

9. Public Policy

In the case ***Beacom et vs. Spiteri Staines***, the Court held, 'Il-prinċipju kardinali li jirregola l-istatut tal-kuntratti jibqa' dejjem dak li l-vinkolu kontrattwali għandu jiġi rispettat u li hi l-volontà tal-kontraenti kif espressa fil-konvenzjoni li kellha tipprevali u trid tiġi osservata. Pacta sunt servanda'.[937]

Where public policy is concerned, it has to be noted that it is an ambiguous concept, due to the fact that the law does not provide any definition as to what public policy consists of. The Civil Code states that 'things which are impossible, or prohibited by law, or contrary to morality, or to public policy, may not be the subject-matter of a contract'.[938] Therefore although a contract is governed by the will of the contracting parties, such contract needs to be within the parameters of the law, and if it breaches a principle considered to be public policy, then such contract would be unlawful, and unable to be upheld.

In ***Erika Gertrud Selma Menestret vs. Dr Georgine Schembri***,[939] the Court dealt with a case where due to Government policy not allowing the issue of an acquisition of immovable permit to two foreign persons of the same sex who desired to acquire immovable property, either in Malta, or in Gozo, an immovable was purchased in the name of one of the two foreigners. The intention was that the property would be co-owned between the two in equal and undivided shares between them, therefore, the purchaser was acting as a mandatory *prestanome* on behalf and in the interest of the other foreigner, in so far as the other one-half undivided share of the property was concerned. When the purchaser entered

<http://documents.jdsupra.com/1bcd32c3-b612-4811-aec2-46b0078d838b.pdf> accessed 28 October 2016.

937 *Gloria mart Jonathan Beacom et vs. Anthony Spiteri Staines*, per Mr Justice Said Pullicino, Mr Justice Agius, Mr Justice Camilleri, Court of Appeal (Superior), 5 October 1998, p. 13.

938 Civil Code, Chapter 16 of the Laws of Malta, art 985.

939 *Erika Gertrud Selma Menestret vs. Dr Georgine Schembri*, per Magistrate Demicoli, Court of Magistrates (Gozo), 28 March 2014.

into a promise of sale agreement, the other foreigner filed a warrant of prohibitory injunction in order to prevent being defrauded, and sued in order to safeguard her share.

One of the defences raised was that since the intention was to acquire the house in the foreigners' name, it was claimed that there was an illicit cause since the *prestanome* mandate was given to avoid public policy rules. Quoting the judgment ***Andrews vs. Borg***, the Court reiterated that,

> hija bla effett kwalunkwe obbligazzjoni magħmula fil-kawża illeċita u l-kawża hija illeċita meta hija pprojbbita mill-liġi jew kuntrarju għall-għemil xieraq jew għall-ordni pubbliku u l-konvenzoni hija kontra l-ordni pubbliku meta hija kontra l-interess ġenerali.[940]

As Laurent holds, 'Quando il fatto è illecito la legge non riconosce alcun effetto alla convenzione, è una obbligazione fondata su causa illecita, poiche' la causa si confonde con l'oggetto dei contratti; e quando la causa è illecitia l'obbligazzione è inesistence e non puo' avere alcun effetto.'[941]

In fact, in ***Haynes et vs. Schembri et***,[942] a *prestanome* mandate was considered as contrary to public policy because it was intended to circumvent the law, due to its illicit cause, in that the *prestanome* mandate did not concern a cause which would have been possible for the mandatary to do. On the contrary, the *prestanome* mandate in ***Menestret vs. Schembri***[943] was not deemed as being contrary to public policy because it was only a department policy that persons of the same sex and who were foreigners were not given an AIP permit, and therefore nothing in the law prohibited such purchase, thus the *prestanome* mandate was not intended to by-pass any law.

Furthermore, in congruence with the above cases, in ***Grech vs. Balzan et***,[944] the court stated that if parties enter into a contract whereby particular criteria required by law to be observed in a contract are in some way avoided or by-passed, then that contract is not to be given effect, and such an act goes contrary

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940 *Brian Richard and Devonia konjugi Andrews vs. Alfred Borg*, per Mr Justice Cuschieri, First Hall Civil Court, 31 October 2003, p. 9.

941 Laurent, *Principii di Diritto Civile*, vol 27 (1904) para 402.

942 *John William Haynes et vs. Michelle Schembri*, per Mr Justice Zammit McKeon, First Hall Civil Court, 28 February 2011.

943 *Erika Gertrud Selma Menestret vs. Georgine Schembri noe*, per Ms Justice Demicole, First Hall Civil Code, 28 March 2014.

944 *Avukat Leslie Grech vs. Nazzareno Sive Ronnie Balzan*, per Mr Justice Agius, Mr Justice Herrera, Mr Justice Mifsud Bonnici, Court of Appeal (Commercial), 11 June 1993.

to the public policy of Malta, and the court is not to enforce such contracts, since against constitutional doctrine.

These cases illustrate the intention of Article 995 of the Civil Code, as well as delineating the fine line between a lawful and an unlawful cause.

In order to decipher what public policy encompasses as a concept, one has to analyse the laws of other States, as well as examine local judgments which from time to time have had the opportunity on deciding matters of public policy.

In ***Paris et vs. Maltacom plc***,[945] the First Hall of the Civil Court attempted to define such term. The Court referred to Galgano's *Diritto Privato*, whereby it is said,

> Nel suo insieme la formola legislativa esprime una esigenza di difesa dei valori fondamentali della società: di difesa sia dei valori di natura collettiva, che attengono cioe' all pacifica e civile convivenza fra gli uomini e al loro progresso economico e sociale, sia di valori di natura individuale, relativi alla libertà, alla dignità, alla sicurezza dei singoli. L'ordine pubblico è costituito da quelle norme, anch' esse imperative, che salvaguardano i valori fondamentali sopra menzionati e che, tuttavia, non sono esplicitamente formulate dalle legge, ma che si ricavano per implicito dal sistema legislativo: dai codici e dalle altre leggi ordinarie e, sopratutto, dalla Costituzione.[946]

Therefore, Galgano refers to those fundamental values of society, values of an individual nature relating to freedom, dignity and security of others, as falling under the public policy umbrella. Such rules include national mandatory laws, whether found in codes, ordinary laws or in the Constitution.[947]

Moreover, the Court quotes Trabucchi where it is said that principles of public policy are not only those written down and expressed in rules, because they might be obtained also from mandatory provisions of both codes as well as from other norms.[948]

The importance of public policy is not only of significance to Maltese law but to the laws of different countries and States. In various European Union regulations,

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945 *Paris Francis vs. Maltacom plc*, per Mr Justice Mallia, First Hall Civil Court, 7 October 2004.
946 Galgano, *Diritto Privato* (2nd edn, CEDAM) 251 para 13.2.
947 *Paris Francis vs. Maltacom plc*, per Mr Justice Mallia, First Hall Civil Court, 7 October 2004, p. 16.
948 Trabucchi, *Istituzioni di Diritto Civile* (29th edn, CEDAM) 170 para 74.

public policy is given such importance that the recognition of a judgment shall be refused 'if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed'.[949] Therefore if a foreign judgment breaches public policy, then this would be a defence against recognition and enforcement of a judgment, as evident in Article 827(1) COCP.[950]

European Court of Justice (Hereinafter referred to as 'CJEU') judgments may be resorted to in order to compile a list of matters that according to this Court are to be considered as matters of public policy. However, according to the CJEU, public policy is not to be given a wide interpretation. Therefore, the following cases illustrate matters which are likely to be considered as matters of public policy under Maltese law, but are not necessarily restricted to this list, given that a wider interpretation might be given to public policy by Maltese Courts and Maltese Law.

The CJEU, in the ***Krombach*** case, held that not all rules of national law are to be considered as rules of public policy, but must be fundamental and necessary in order to be applied. From this case it may be extracted that a breach of Article 6 of the European Convention on Human Rights (Hereinafter referred to as 'ECHR'), that is, the right to a fair hearing, is a breach of public policy.[951] In fact, in ***Maronnier vs. Larner***, a breach of Article 6 ECHR was considered as a sufficient reason for English courts to possibly raise the plea of public policy.[952] Maltese judgments reflect the same line of thought, because in several judgments, including ***Mary Zarb vs. Emma Azzopardi et***,[953] and ***Renato u Jaice Vidal vs. U.C.I.M. Co. Ltd***,[954] it was held that matters relating to the principles of *audi alteram partem* and *nemo judex in causa propria* are of a public policy nature.

In ***Elf Aquitaine vs. Andrea Guelfi***, the plaintiff demanded that a judgment from the Paris Court of Appeal was not to be recognised and consequently, not enforced, in Malta because it was manifestly contrary to Maltese public policy. This was based on the fact that a criminal court had ordered the payment of civil damages. According to Aquitaine, 'huwa principju bażilari tal-proċedura legali Maltija illi l-azzjoni kriminali u dik ċivili jitmexxew b'mod distint u indipendenti

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949 Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] OJ L 351/1, art 45.

950 Code of Organisation of Civil Procedure, Chapter 12 of the Laws of Malta, art 827(1).

951 Case 7/98 *Krombach v. Bamberski* [2000] ECR I-1935.

952 *Maronnier vs. Larner* [2002] 3 WLR.

953 *Mary Zarb vs. Emma Azzopardi noe*, per Mr Justice Sciberras, Court of Appeal (Inferior), 28 March 2007.

954 *Renato u Janice Vidal vs. U.C.I.M. Co. Ltd.*, per Mr Justice Sciberras, Court of Appeal (Inferior), 11 June 2010.

minn xulxin',[955] and therefore if the Maltese court enforced the payment of civil damages, such enforcement would be a manifest breach to local public policy.

The Maltese Court held that a matter is manifestly contrary to Maltese public policy 'jekk tkun tikkozza ma' xi prinċipju ta' dritt tant fondamentali, jew ma' xi prinċipju morali, li għandu neċessarjament iwassal lill-qorti [...] li tirrifjuta li tirrikonoxxi dik is-sentenza barranija'.[956]

With regard to the plea raised by Aquitaine, the Maltese courts held that although it is a basic procedural principle that a penal action and a civil action proceed separately, this is not fundamental, that is, a criminal judgment of a foreign court which had awarded civil damages in the same judgment, is not to be interpreted as being unable to be recognised in Malta. In fact, Maltese law provides situations where the penal aspect and the civil aspect are merged together, the Customs Ordinance, wherein an individual found guilty of a breach of Article 62 may be required to pay a fine for each wrongful act done, which fine amounts to three times more than the custom duty that was to be paid on that object, or a particular sum of money, whichever the greater, and a third of that amount is to be considered as a civil debt, to be paid to the Customs Department. Therefore, in the Aquitaine judgment, the Maltese Court considered that with regard to the civil aspect of the action and the ordering of the payment of damages, there was no breach of Maltese public policy.

In ***Cassar Pullicino vs. Valfracht Maritime Co. Ltd et***,[957] the Court referred to the issue of interests, whereby if interests are agreed to which are more than the 8% rate specified by our laws,[958] then it goes contrary to public policy. Moreover, in ***Cassar noe vs. Farrugia noe et***,[959] the Court not only mentioned the 8% interest rate capping as falling under public policy, but also the issue of compound interest, and the fact that such interest is not due for a time less than one year,[960] and this was also stated in ***Galea vs. Busuttil Naudi***.[961] Public policy in Malta encompasses the interest regime *en toute*, and no one aspect in particular only.

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955 *Elf Aquitaine vs. Andrea Guelfi*, per Mr Justice De Gaetano, Mr Justice Magri, Mr Justice Felice, Court of Appeal (Superior), 13 May 2008, p. 6.

956 ibid.

957 *Losinjska Plovidba Brodarstvo D.D. vs. Valfracht Maritime Co. Ltd u Valfracht Roro Line Ltd*, per Mr Justice De Gaetano, Mr Justice Depasquale, Mr Justice Magri, Court of Appeal (Superior), 29 October 2004.

958 Civil Code, Chapter 16 of the Laws of Malta, art 1139.

959 *L-Avukat Dr. Dominic A. Cassar nomine vs. Lawrence Farrugia nomine et*, per Mr Justice Mifsud Bonnici, Commercial Court, 19 June 1989.

960 Civil Code, Chapter 16 of the Laws of Malta, art 1850.

961 *Angelo Galea vs. Emmanuele Busuttil Naudi pro et noe*, per Mr Justice Harding, First Hall Civil Court, 31 October 1935.

In ***Dr Renato Cefai nomine vs. Valletta Freight Services Ltd***, a foreign tribunal ordered a payment of a sum of money in consequence of a dispute, as well as 10% interest *per annum*. When the decision of the tribunal was in the stages of being recognised, and later enforced in Malta, one of the arguments raised was that since the interest exceeded the rate of 8%, the rate specified by our laws in the Civil Code,[962] then such recognition and enforcement would be contrary to Maltese public policy. The court stated that although the according to the applicable law chosen by the parties in the dispute, the tribunal in question was not restricted by any particular rate, and could therefore order interests which are higher than those given according to Maltese law. This does not breach Maltese public policy, because Maltese law allows exceptions as to when interests higher than eight per cent, and because in the case in question, the rate of interest higher than eight per cent was not imposed as usury but as *officio iudicis*.

Reference may be made to ***Schoeller International GmbH vs. Mario Ellul et***,[963] where public policy was defined as 'prinċipji ewlenin tal-ordni ġuridiku li huma l-qofol tas-sistema billi jharsu l-valuri l-aktar fundamentali tas-socjetà'.[964] The Court stated that the principle of separate judicial personality of companies is a principle of public policy, since companies are to be liable for their obligations, without exposing the shareholders to liability.

In ***Avukat Dr Joseph Zammit McKeon vs. Laferla Insurance Agency Ltd***, the court held that the fact that a foreign law is different than Maltese law, does not result in a foreign judgment based on such different law to be deemed contrary to public policy and therefore unenforceable.[965] Similarly, as held in ***Attard noe vs. Cremona et noe***,[966] the court stated that when a party submits itself for the jurisdiction of a foreign court, then it cannot later be alleged that the judgment by the foreign court is contrary to the public policy of Malta due to a discrepancy between the procedural systems of Malta and of that particular State in question.[967]

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962 Civil Code, Chapter 16 of the Laws of Malta, art 1139.

963 *Schoeller International vs. Mario Ellul et*, per Mr Justice Giannino Caruana Demajo, First Hall Civil Court, 26th October 2001.

964 ibid 3.

965 *Avukat Dr Joseph Zammit McKeon vs. Laferla Insurance Agency Ltd*, per Chief Justice Silvio Camilleri, Mr Justice Tonio Mallia, Mr Justice Joseph Azzopardi, Court of Appeal (Superior), 25th October 2013.

966 *Joseph Attard nomine vs. Av. Dr. Rene A. Cremona et nomine*, Commercial Court, 26 March 1965.

967 ibid.

In ***Xuereb noe vs. Degabriele***,[968] the Court stated that issues relating to peremptory terms are considered to be based on public policy, and therefore commercial clauses not observing such terms would not be enforced due to be being contrary to public policy. Peremptory terms are based on public policy because otherwise rights of action based on such terms, including appeals, would be created by the parties and not by law.

Bond vs. Mangion et holds that commercial contracts concerning architects and contractors are based on public policy, and the Court quotes Laurent, Mortara and Aubry and Rau, who all are in consensus regarding such issue.[969] Professor Caruana Galizia states, 'It is to be noted, however, that the responsibility of the architect and of the contractor is regarded by jurists as indivisible and as of public policy, so that it cannot be derogated from, because the solidarity of buildings is required in the interests of the public'.[970]

The court in ***Mula vs. Cassar*** stated that stipulations *quotae litis* are governed by public policy, and as a result contractual clauses on stipulations *quotae litis* are deemed unenforceable in Malta.[971]

In ***Cassar noe vs. Farrugia***,[972] the Court directly stated if the Commercial Code, commercial customs and the Civil Code are in contradiction with the principle of public policy, it is the latter which is to prevail.[973]

In ***Attard noe vs. Cremona et noe***[974] the Court stated that when a party submits itself for the jurisdiction of a foreign Court, then it cannot later be alleged that the judgment by the foreign Court is contrary to the public policy of Malta just because there is a discrepancy between the procedural systems of Malta and of that particular State in question.[975]

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968 *Joseph Xuereb noe vs. Dolores Degabriele*, per Mr Justice Mifsud Bonnici, Mr Justice Herrera, Mr Agius, Court of Appeal (Superior), 14 May 1993.

969 *Michelangelo Bond vs. Carmelo Mangion and Joseph Camilleri Galea*, per Mr Justice Mifsud Bonnici, Mr Justice Herrera, Mr Agius, Court of Appeal (Superior), 27 May 1991.

970 Professor Caruana Galizia notes, p. 765.

971 *Paula Mula vs. Pietro Paolo Cassar*, per Mr Justice Mercieca, Mr Justice Agius, Mr Justice Camilleri, Court of Appeal, 15 May 1925.

972 *L-Avukat Dr. Dominic A. Cassar nomine vs. Lawrence Farrugia nomine et*, per Mr Justice Mifsud Bonnici, Commercial Court, 19 June 1989.

973 ibid.

974 *Joseph Attard nomine vs. Av. Dr. Rene A. Cremona et nomine*, Commercial Court, 26 March 1965.

975 ibid.

In ***Alberta Fire & Security Equipment Ltd vs. Mark Mifsud***[976] the Court stated that a clause which attempts to create relationships with third parties, parties with whom the contracting party to such clause was not involved with, neither *ex contractu*, nor in any other manner, was considered as contrary to public policy.

[976] *Alberta Fire & Security Equipment Ltd (C-6606) vs. Mark Mifsud*, per Mr Justice Zammit McKeon, First Hall Civil Court, 1 January 2014.

LIMITATION CLAUSES: A HISTORICAL AND COMPARATIVE ANALYSIS UNDER BOTH NATIONAL AND FOREIGN LAWS

Marija Cachia

ABSTRACT[977]

This article seeks to analyse grounds of validity of limitation clauses under both Maltese law and foreign law. Lack of uniformity in both local and foreign law highlights the importance of court judgments on the matter.

An outline of the historical and philosophical development of European contract law is given in the first section in order to determine when and for what reasons limitation clauses began to be inserted in contracts on a regular basis. The second section focuses on case law and pieces of legislation of the respective States, together with works of various jurists and legal authors on the matter. Moreover, EU law is examined, since its scope of harmonization of the laws of its Member States creates the possibility of bridging any differences in existence between said Member States in relation to limitation clauses. The third section deals with Maltese court practice and pieces of legislation emphasises the grounds of validity found under Maltese law and which legal system, if any, is the major influence vis-à-vis limitation clauses.

This study comes to the conclusion that, in some cases, Maltese law follows other legal systems mentioned in the legal analysis and that, in some other cases, it takes the lead in providing grounds to determine the validity of limitation clauses. It highlights the importance of uniformity and regulations to create congruency in judgements. This study is adapted from a Research Project, entitled 'Limitation Clauses Reducing and Excluding Liability', submitted by the author in April 2016.

KEYWORDS: LIMITATION CLAUSES – EXCLUSION OR REDUCTION OF LIABILITY – STANDARD FORM CONTRACTS – VOLONTA THEORY – AFFIDAMENTO THEORY – COMPARATIVE LAW

[977] This article was reviewed by Dr Jonathan Thompson LL.D.

LIMITATION CLAUSES: A HISTORICAL AND COMPARATIVE ANALYSIS UNDER BOTH NATIONAL AND FOREIGN LAWS

Marija Cachia

1. Introduction

Limitation clauses are commonly found in most commercial contracts used in everyday trade.[978] The aim of such clauses is that of excluding or reducing liability of one or more parties in a contractual agreement, thereby encouraging the party in whose favour the clause is inserted in the contract to enter into such an agreement. The historical and philosophical development of contractual law throughout Europe has however led to issues regarding the validity or otherwise of this clause especially within the ambit of protection of the weaker party and the increased usage of Standard Form Contracts.

2. Historical and Philosophical Development

Historical and philosophical development of contractual law in Europe has affected a number of States in different ways, causing particular States to promulgate specific legislation or to have their respective judges develop different methods to cater for the validity of limitation clauses. In certain cases, the historical and philosophical development of a number of States was analogous, thus resulting in similar rules and court decisions to be present within said States, as will be discussed in more detail below.

The first historical and philosophical development concerns the advent of *La Teoria della Volontà*, known also as the *Will Theory*. This theory enshrined the principle of *pacta sunt servanda*: parties are deemed to be equal and bound by the contract presumed to have the power of law. Therefore, whatever is contracted between the two parties is deemed to have been consented to by both. In fact, the traditional viewpoint of contractual law is that the agreement reached contains terms and conditions which are deemed satisfactory by both parties, and this is why limitation clauses were deemed to adhere to this theory.

[978] Philippe Le Tourneau, *Droit de la Responsabilité et des Contrats* (6th edn, Dalloz Action 2006) 345: One must note at the outset that limitation clauses and exemption clauses are not synonymous. Whilst limitation clauses essentially limit the liability of the party, or the compensation one party would be liable to pay to the other in cases of contractual breach, exemption or exculpatory clauses fully exempt from liability or compensation the party in whose favour the clause has been inserted in the contract. Limitation clauses and exemption clauses have not been used interchangeably throughout this article. However, the cited cases and doctrine which make reference to either type of clauses are to be taken to apply to both types of clauses, since any academic viewpoint or judgment dealing with invalidity of one, may, in practice, invalidate the other.

In fact, liberalism in the 18th century signified the shift in focus from the authority of the ruler, to the word of the individual, and allowed clauses excluding or reducing liability to flourish under the 'protective umbrella of freedom of contract.'[979] Since the French political philosopher Jean-Jacques Rousseau emphasised the 'birth of modernity' in Europe,[980] and his teachings influenced in part the thought process that made the French Revolution possible, it is clear that the *Volontà* Theory signified as well the birth of modernity within the ambit of contractual law.

The use of limitation clauses was accentuated in the 19th century by the Industrial Revolution and rapid development of mass contracts, generally called standard form contracts, which were often used by traders and included non-negotiable terms and conditions applicable to all persons who would enter into a contractual agreement with the said trader. As stated by Eörsi: 'the exculpatory clause was being increasingly used not only for standardisation of contract terms but also for exploitation of economic power.'[981] Since such contracts facilitated trade in general and were a business necessity, their validity came to be accepted by courts of law. The Maltese judgment of ***Rizzo vs. Dawson*** highlights the fact that standard form contracts were accepted in Malta and that the debate on the validity of these contracts under Maltese law was present here as well.[982]

Although theoretically every person was deemed to be free, the new superior professional class of traders had the resources, the money and the power to infiltrate the political class and therefore had the means to impose its will on the rest of the people. Hence, the equality advocated by the *Volontà* Theory was practically non-existent, especially through the use of unfair contractual terms. Therefore, a social policy was needed to take into consideration the severe impact businesses were having on the weaker party; whilst trying to mitigate the said impact on the consumers and cater for their protection. Hence, philosophers and legal jurists began to question the *Volontà* Theory and the *Affidamento* Theory started to spread across Europe. Whereas the *Volontà* Theory is justified in terms of liberal teachings, the *Affidamento* Theory is in line with socialist teachings. Wilson adds that the principle of freedom of contract is in line with utilitarian principles of legislation, thus 'freeing the individual from the needless

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979 Gyula Eörsi, 'The Validity of Clauses Excluding or Limiting Liability' [1975] 23 *The American Journal of Comparative Law* 215.

980 David Boucher and Paul Kelly (eds), *Political Thinkers: From Socrates to the Present* (2nd edn, OUP 2009) 185.

981 Gyula Eörsi, 'The Validity of Clauses Excluding or Limiting Liability' [1975] 23 *The American Journal of Comparative Law* 215.

982 *Edward Rizzo ne vs. Lt. Col. Charles E. Dawson ne*, Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XXXVII (1953) Pt 1, p 188.

restraints imposed upon him.'[983] However, he opines that a major flaw of this Benthamite theory is that, since this freedom is obviously unregulated, it is easily abused. In fact, 'liberty and equality before the law... may, where there is great economic disparity between individuals, operate as instruments of oppression.'[984]

The existence of both theories was in itself a divergence of views, with emphasis on individual autonomy on the one hand,[985] and social welfare on the other. The Theory of Trust means that the contracting parties are fair with each other and disclose everything that needs to be disclosed before they enter into the contractual obligation. In fact, the validity of the limitation clauses, the sole purpose of which used to be to prioritise the needs of the traders and put the weaker party at a virtual disadvantage, was now questionable. 'Disclaimers belong to the era of free enterprise, the rejection of disclaimers to the era of social welfare.'[986] With most European codes embracing the *Affidamento* Theory, such as the German Bürgerliches Gesetzbuch (Hereinafter referred to as 'BGB'), the 1907 Swiss Civil Code, the 1966 Portuguese Civil Code and, more importantly, the subsequent change of the Old Italian Civil Code into the 1942 version of the Code, made it clear that the *pacta sunt servanda* principle was no longer crucial.

The *Affidamento* Theory is different from the *Volontà* Theory, since it awards discretionary powers to judges in deciding cases dealing with contractual agreements and obligations. The courts were not only given the power to apply the law but even to analyse good faith and the social effect of a contract before declaring whether such contract was enforceable or not. Thus the limitation clauses could in theory be used but, if limitation of liability was made possible only to serve egoistic interests of the stronger party, the clause would be deemed null and void by a court. Consequently, the *Affidamento* Theory goes beyond the *Volontà* Theory. It is good faith and not freedom of contract that is deemed to govern the validity of contracts and contractual terms.

3. Foreign Laws

983 Nicholas S Wilson, 'Freedom of Contract and Adhesion Contracts' [1965] 14 The International and Comparative Law Quarterly 172, 173.

984 ibid 174.

985 Gulio Alpa and Vincenzo Zeno-Zencovich, *Italian Private Law* (Routledge-Cavendish 2007) 158.

986 Gyula Eörsi, 'The Validity of Clauses Excluding or Limiting Liability' [1975] 23 The American Journal of Comparative Law 215 citing John G Fleming, *An Introduction to the Law of Torts* (2nd edn, Clarendon Law Series 1985) 106.

It is of relevance to analyse how the gradual historical and philosophical development described above created the current different legal regimes catering for the validity or otherwise of limitation clauses. One should also see how the differences between the said regimes are the result of a State's adherence to one contractual legal theory rather than to the other, thus causing a particular court to be stricter or more lenient than another when deciding cases dealing with limitation clauses.

3.1 *Discretionary Powers of the Courts of Law*

The basic notion of limitation clauses is that they 'change the general and normal allocation of risks between the parties, as it has been worked out by the courts and the legislatures, in favour of one party.'[987] It is not the inequality of bargaining power *per se* that creates controversy, but it is the way the stronger party abuses its position through the use of unfair limitation clauses to the detriment of the weaker party that brings into question the validity of these clauses.

Unfairness may be projected to cases where a court decision is far from being fair, even if the limitation clause in question is technically legal. In the Massachusetts Case ***Hall vs. Everett Motors***,[988] the case was decided in favour of the defendant, since the manufacturer's warranty '[limiting] the liability of the dealer and of the manufacturer for a breach of warranty to the replacement of defective parts'[989] was deemed valid. Despite this outcome, '[The courts] hope that should a similar case arise under the Uniform Commercial Code [the courts] shall not be bound by precedent.'[990]

Conversely, in ***Henningsen vs. Bloomfield Motors Inc***,[991] the clause limited liability for breach of warranty in case of replacement of defective parts, yet public policy was used to invalidate the clause since the latter went against the former, and a fair result was gained. The court stressed: 'An instinctively felt sense of justice cries out against such a sharp bargain.'[992]

Courts have discretionary powers to enforce justice and fairness when deciding their cases, even with regard to cases on validity of limitation clauses. Moreover,

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987 Eike von Hippel, 'The Control of Exemption Clauses: A Comparative Study' [1967] 16 The International and Comparative Law Quarterly 591, 592.
988 (1960) 165 N E 2d 107 (Mass).
989 Eike von Hippel, 'The Control of Exemption Clauses: A Comparative Study' [1967] 16 The International and Comparative Law Quarterly 591, 592.
990 ibid.
991 (1960) 161 A 2d 69; this case concerned remuneration for personal damages.
992 ibid.

the need for the validity of limitation clauses to be in line with principles of public policy and for cases to have a fair outcome is prominent in most European States and not limited to US case law, as will be seen hereunder. Furthermore, certain States abide by rules particular to their respective legal system, thus showing differing issues arising in different legal systems and differing solutions used by the courts in their discretionary powers to solve issues on validity of limitation clauses in their juridical territory. The legal systems analysed hereunder are usually used as sources in our local jurisprudence. The resulting inventory of this comparative analysis will indicate to what extent, if any, the basic principles of limitation clauses and the leading problems thereof have in some way or another been transferred to the local legal context and practice.

3.2 *France*

Clauses excluding or reducing liability are accepted under French law since it abides by the *pacta sunt servanda* principle.[993] Damages under French law are liable only when foreseen or could have been foreseen when entering into the contract, provided that there was no intentional breach that caused the non-fulfilment of the obligation.[994] The French Civil Code also states that contractual agreements must be performed in good faith.[995] Thus there exists no strict adherence to the *pacta sunt servanda* principle since good faith must be observed when performing the contract and the clauses thereof.

Although the Code states that damages are to be paid either due to non-performance or delay in performing the contract, provided there being no *force majeure*,[996] limitation clauses are the exception to this rule, since they are allowed by Article 1150. However, limitation clauses may be considered invalid for various reasons. For example, '[c]lauses excluding [or limiting] liability in delict have always been held to be invalid on the ground that delictual liability is a matter of *ordre public*.'[997] Invalidity in relation to public policy is nevertheless questionable since it would arguably be hindering the liberty of the parties to contract in whichever way it pleases them, thus constituting a serious legal contradiction.[998] Nevertheless, the rule that invalidity may occur on grounds of *ordre public* remains the norm abided to by the courts.

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993 Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe: A Comparative Study* (European Law Publishers 2004) 161.

994 Code civil de France, art 1150.

995 ibid art 1134.

996 ibid art 1147.

997 Barry Nicholas, *French Law of Contract* (Butterworths 1982) 227.

998 Jean Carbonnier, *Droit Civil: Les biens; Les obligations*, vol 2 (Presses Universitaires de France 2004) 2230.

Other reasons for invalidity are if limitation clauses are unknown and unaccepted by the party against whom these clauses are inserted in the contract,[999] in case of disguised disclaimers, called *indemnités dérisoires,*[1000] when the victim is not allowed reasonable time to exercise his rights,[1001] and in cases of injury to the person. In the latter cases, *liber homo non recipit oestimationem*.[1002] However, under French law, such clauses are allowed in particular agreements between surgeons and patients.[1003] This is an exception to the rule, as the exemption clause does not give the debtor the right to hurt the creditor but aims to limit damages and interests due to a victim in the case of an accident.[1004]

Were the clause to specifically limit or exempt liability in cases of *faute dolosive,*[1005] or *faute lourde,*[1006] the court would deem such clause to be null and void.[1007] Nicholas opines that the nullity in case of gross negligence is probably 'a residue of the original dislike of [limitation] clauses, based on the fear that the removal of the risk of liability would encourage negligence or recklessness.'[1008] The reluctance to deem limitation clauses valid is evident not only through French case law,[1009] but also through French legislation, as seen in specific types of contracts, such as contracts in maritime transport and hotel contracts.[1010] Rather than working on Article 1150 to clearly validate limitation clauses, and showing exactly how and to what extent they are valid exceptions to the rule under Article 1147, the regulation of the few instances of non-validity of limitation clauses was preferred.

In 1978, a more general approach provided that in all contracts of sale between professionals and consumers, any limitation of liability clause is void, as per Article 35 of the *Loi Scrivener*.[1011] This is due to the fact that a limitation clause which grants an excessive advantage to its beneficiary due to his economic

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999 Cass com 24 janv 1984 Bull civ IV n 23 Gaz Pal 1984, 1 pan 57, note Chabas.
1000 Cass com 4 mai 1959 Gaz Pal 1959 2 191.
1001 Le Tourneau (n 1) 347.
1002 Henri Roland and Laurent Boyer, *Adages du droit français* (4th edn, Litec 1999) 191: Free man is not susceptible of appraisement.
1003 Cass com 19 oct 1965 D 1966 238; RTD civ 1966 308 obs Rodière.
1004 Philippe Le Tourneau, *Droit de la Responsabilité et des Contrats* (6th edn, Dalloz Action 2006) 339.
1005 Willful damage.
1006 Gross negligence.
1007 Barry Nicholas, *French Law of Contract* (Butterworths 1982) 228, citing Cass com 25 6 1959, D 1960 97.
1008 ibid 228.
1009 Joanna Schmidt-Szalewski, *Droit des contrats* (Litec 1989) 577.
1010 Jean Carbonnier, *Droit Civil: Les biens; Les obligations*, vol 2 (Presses Universitaires de France2004) 2224.
1011 Barry Nicholas, *French Law of Contract* (Butterworths 1982) 228.

power might be considered abusive.[1012] Nevertheless, the generality of this regulation is debatable, since the prohibition is effectively present only vis-à-vis one type of contractual transaction.

Besides the limited number of cases in which the law assimilates *faute professionnelle*[1013] to *faute dolosive*, judicial practice tends to bring slight negligence closer to gross negligence where professionals are involved. Therefore the efficacy of limitation clauses in this area diminishes considerably.[1014]

French law in relation to limitation clauses is still evolving. In 2010, in the ***Faurecia*** case,[1015] it was stated that a limitation clause is deemed invalid when it contradicts the essential scope of the obligation assumed by the debtor.[1016] Up to this point, there had been no clarification whatsoever on whether the mere breach of an essential obligation of the contract was sufficient to deem a limitation clause unwritten. A previous 1996 case, ***Chronopost***,[1017] held that the mere breach was equal to a contradiction of the scope of the contractual agreement. The Cour de Cassation in ***Faurecia*** pronounced that the mere breach is not enough. The clause has to devoid the essential obligation of the contract of all substance in order for it to be deemed invalid. This may be linked to the Doctrine of Fundamental Breach, to be discussed in more detail below.

The ***Faurecia*** case also emphasised that gross negligence may also render a limitation clause null and void. In such case, the gross negligence cannot result solely from the breach of the contract, but must be deduced from the gravity of conduct of the debtor.

3.3 *Italy*

Italian law, like French law, adheres to the Roman axiom of *culpa lata dolo aequiparatur*:[1018] Gross negligence is equal to fraud, thus considering null those clauses limiting liability in cases of gross negligence. The 1942 Italian Civil Code holds that any agreement which preventively excludes or limits the

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1012 Jean Carbonnier, *Droit Civil: Les biens; Les obligations*, vol 2 (Presses Universitaires de France 2004) 2224.

1013 Professional negligence.

1014 Philippe Le Tourneau, *Droit de la Responsabilité et des Contrats* (6th edn, Dalloz Action 2006) 341.

1015 *Sté Faurecia sièges d'Automobiles c/ Sté Oracle France* [2010] IV Bull 115 (Cour de Cass Ch Commerciale).

1016 ibid.

1017 *Sté Banchereau c/ Sté Chronopost* [1996] IV Bull 261 (Cour de Cass Ch Commerciale).

1018 Gyula Eörsi, 'The Validity of Clauses Excluding or Limiting Liability' [1975] 23 The American Journal of Comparative Law 218.

responsibility of the debtor for wilful damage or gross negligence is null.[1019] This particular provision also invalidates limitation clauses that violate duties arising from rules of public policy.[1020] The latter source of invalidity is generally adhered to under Italian law since *l'ordine pubblico* encompasses interests of persons other than the debtor and the creditor in the contractual agreement,[1021] thus providing a minimum degree of protection of rights. In fact, Article 1229(2) is commonly used in cases regarding medical negligence and family law contexts.[1022] This concept however raises debates, mostly because of the difficulty in identifying the exact scope of application of the concept of *ordine pubblico*.[1023] This concept is also used in cases of limitation clauses where violation of personal or physical integrity is involved, since the validity of such clauses would be in breach of *l'ordine pubblico*, as found under French law.[1024]

Article 1229 in itself caters for various situations, some of which are not expressly found under French law. Firstly, clauses limiting liability of producers for damages resulting from dangerous goods are null.[1025] Secondly, Italian courts deem as valid those limitation clauses providing for *force majeure* specifically in contracts of carriage of goods.[1026] Additionally, although wilful damage or gross negligence are absolutely prohibited from being catered for by a limitation clause, the same prohibition is not extended to cases of vicarious liability.[1027] Moreover, it may be possible for null clauses to be converted into valid clauses in the case of partial irresponsibility, depending on the nature of the parties' contractual will. This possibility seems solely present in Italy.[1028] However, similar to French law is the vexatious nature and nullity of limitation clauses in consumer contracts whose aim is to damage the consumer.[1029]

1019 Codice Civile Italiano 1942, art 1229(1).

1020 ibid, art 1229(2).

1021 'Clausole di esonero da responsabilità' (2011) Brocardi <http://www.brocardi.it/codice-civile/libro-quarto/titolo-i/capo-iii/art1229.html> accessed 17 July 2016.

1022 Rita Fera, 'Clausole di esonero della responsabilità, clausole di manleva e i gentleman's agreements art 1229' (2009) Diritto-Civile <http://www.diritto-civile.it/Le-Obbligazioni/Clausole-esonero-responsabilita.html> accessed 17 July 2016.

1023 Germana Carlotta Adriano, *Clausole di esonero e di limitazione della responsabilità civile* (ARCANE editrice Srl 2009) 25, citing Cass, 24 aprile 1962, n 818, in Riv dir nav, 1963, II, p 120, con nota di A Cassese.

1024 Mario Bessone, 'Les Clauses de Limitation et d'Exclusion de la Responsabilité en Droit Italien' in Assocazione italiana di diritto comparato (ed) *Rapports nationaux italiens au IXe Congrès international de droit comapré* (Giuffrè 1975) 145-146.

1025 ibid.

1026 David Lucas, *Shipping & International Trade Law* (2nd edn, Practical Law 2014) 202.

1027 Gyula Eörsi, 'The Validity of Clauses Excluding or Limiting Liability' [1975] 23 The American Journal of Comparative Law 218.

1028 Oscar Boschetti, 'Notes on Exemption Clauses under Italian Law' (1985) Int'l Bus L J 487.

1029 Rita Fera, 'Clausole di esonero della responsabilità, clausole di manleva e i gentleman's agreements art 1229' (2009) Diritto-Civile

3.4 *Germany*

As already discussed above, Germany shifted away from the *pacta sunt servanda* principle towards the *Affidamento* Theory. In fact, statutory prohibitions in the BGB in relation to limitation clauses constitute a perfect example of the departure of German law from the principle of freedom of contract:[1030] 'A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.'[1031] Clauses limiting liability for damage to the person of another party and clauses limiting liability for instances of gross negligence are deemed to be null.[1032]

Therefore, it is not surprising that the German courts are reluctant to accept the validity of limitation clauses. Nevertheless, they have accepted their usage and their validity in certain cases, for example when a bank makes use of such clause to exclude its liability for damages caused by a subsequent loss of capacity of the customer.[1033] Interestingly, the BGB contains various provisions that legalise and regulate a number of limitation clauses in different contracts, including innkeeper contracts,[1034] travelling agreements,[1035] public auction brochures,[1036] and limitation of liability in the filing of an inventory by a co-heir.[1037]

Similarities obviously exist between Italian and German law, given their shared history. Even under German law, vicarious liability does not make a limitation clause invalid,[1038] while breaches of public policy invalidate the limitation clause.[1039] However, no adherence to the Roman axiom *culpa lata dolo aequiparatur* was present in West Germany.[1040] Conversely, in a particular judgment,[1041] it is expressly provided that in modern contracts, where the debtor acts wilfully or is grossly negligent, the limitation clause is ineffectual especially

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<http://www.diritto-civile.it/Le-Obbligazioni/Clausole-esonero-responsabilita.html> accessed 17 July 2016.

1030 Norbert Horn, Hein Kötz, Hans G Leser, *German Private and Commercial Law: An Introduction* (Clarendon Press 1982) 85.

1031 German Civil Code BGB, art 134.

1032 ibid art 309.

1033 Norbert Horn, Hein Kötz, Hans G Leser, *German Private and Commercial Law: An Introduction* (Clarendon Press 1982) 85.

1034 German Civil Code BGB, art 651h.

1035 ibid art 702.

1036 ibid art 445.

1037 ibid art 2063 BGB; Ian S. Forrester, Simon L. Goren, Hans-Michael Ilgen, *The German Civil Code* (Fred B Rothman & Co 1975) 313.

1038 Gyula Eörsi, 'The Validity of Clauses Excluding or Limiting Liability' [1975] 23 The American Journal of Comparative Law 219.

1039 ibid 227.

1040 ibid.

1041 BGH, NJW 1976, 959 (Ls).

due to the need for performance to be executed in good faith.[1042] This makes Germany's position at par with French and Italian law.

In another case,[1043] the German court concluded that the defendant's conditions of sale did not effectively exclude liability for his fault in breaching his duty to inform. Applying the interpretational rules of uncertainty to the conditions of sale as a whole, and the wording of the exclusion clause, the court concluded that the exclusion clause did indeed cover claims for positive breach of contract. In order to obtain protection from liability, the defendant must exclude such claims in a manner clearly comprehensible to the customer.

German courts also refrain from applying limitation clauses when such clauses are used in an attempt to frustrate the contract in question.[1044] Like the French ***Faurecia*** case, this too echoes the Doctrine of Fundamental Breach, as will be discussed below.

3.5 *England*

There are basically three different types of exclusionary clauses under English law: true exclusion clauses which exempt liability in cases of contractual breach, limitation clauses which limit the amount of compensation to be paid in cases of such breach, and time limitation clauses which act as a form of prescription, given that actions in case of breach not brought during a stipulated amount of time are extinguished. As seen above, French courts are reluctant to recognise as legally valid the last type of limitation clause.

English law deems it necessary for limitation clauses to be examined as part of an entire contract.[1045] As in German law, wording is given great importance. If the limitation clause were to have an ambiguous meaning, the *contra proferentem* rule would apply,[1046] which means that the clause would be construed against the person who inserted it in the contract.

Interestingly, in ***Canada SS Lines Ltd vs. The King***,[1047] the English court stated that since it is unlikely that a party would include a clause reducing or excluding liability in the case of negligence, when negligence is specifically excluded or where the wording is wide enough for negligence to be excluded, the exemption

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1042 German Civil Code BGB, art 242.
1043 BGH, NJW 1967, 1805.
1044 Basil S. Markesinis, Werner Lorenz, Gerhard Dannemann, *The German Law of Obligations*, Vol 2 (2nd supp, Clarendon Press 2001) 464.
1045 *Darlington Futures Ltd vs. Delco Australia Pty Ltd* (1986) 161 CLR 500.
1046 *R & B Custom Brokers Co Ltd vs. United Dominions Trust Ltd* [1988] 1 WLR 321.
1047 [1952] AC 192.

clause would essentially be valid. This shows a departure from the position taken by the laws of the other States analysed above, naturally posing the question as to which States influenced Malta most in this context.

Limitation clauses are intrinsic to the UK consumer protection regime, specifically linked to the possibility of existence of unfair contractual terms in standard form contracts.[1048] Besides being a Hobson's choice, further abuse may be found where the clauses are written in small print, where they are written in a legal language which the non-professional party might not understand, or, as under French law, where the consumer is unaware of the existence of the clause.[1049] Such cases are catered for in the Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999,[1050] pursuant to Directive 93/13/EEC.[1051] What is stated to be an unfair term under these regulations is to be applied to exemption clauses, since these clauses feature in Schedule 2 of UTCCR 1999 which contains a non-exhaustive list of what is to be deemed unfair terminology. A similarity with Italian law is found under this provision since the invalidity of the term does not automatically void the contract as a whole.

The adherence of English law to the *Affidamento* Theory is clear by the invalidation of a clause if it is contrary to principles of good faith, thus causing an unfair imbalance in the rights of the parties in the contract to the detriment of the consumer,[1052] as seen in ***Director General of Fair Trading v First National Bank plc.***[1053] Despite having detailed provisions regarding the invalidity of unfair terms and intrinsically abusive limitation clauses, English case law aids in creating more solid grounds which the Doctrine of Precedent will force every court to utilise in reaching its decision. In ***Office of Fair Trading v Ashbourne Management Services Ltd***, Kitchin J sets three elements to establish unfairness: that the term causes 'a significant imbalance in the parties' rights and obligations; [that it is] to the detriment of the consumer; [that it is written] in a manner which is contrary to good faith.'[1054]

1048 Lee Mason, 'Protecting Consumers from Unfair Terms in Standard Form Contracts: The UK Approach' [2015[EBRL 335.

1049 ibid.

1050 Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999): prior to the implementation of this law, the invalidity of limitation clauses was always possible under the Unfair Contract Terms Act 1977, the Supply of Goods and Services Act 1982, and the Misrepresentation Act 1967.

1051 Council Directive (EEC) 93/13 of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L095/29 (Unfair Contract Terms Directive).

1052 ibid reg 5(1).

1053 [2001] UKHL 52 17.

1054 [2011] EWHC 1237 (Ch) 123.

Despite the implementation of UTCCR 1999, the Unfair Contract Terms Act (Hereinafter referred to as 'UCTA') 1977 is still relevant.[1055] Further similarities may be drawn between English law and Italian law, since a clause restricting liability for death or personal injury caused by negligence is null,[1056] whereas under the Directive and the UTCCR 1999, there is only a grey list involved, meaning the terms are not automatically voided.[1057] Interestingly, the UTCA 1977 further caters for the possibility of having two contracts: the main contract and the secondary contract. Limitation clauses cannot be inserted in the secondary contract if they cannot be inserted in the main contract.[1058]

3.6 *Unfair Contract Terms Directive*

Since standard form contracts feature in most Member States, enforcement through EU law was needed in order to fully protect the non-professional parties to the contract.[1059] In the Second Recital to the Preamble, the Directive makes reference to the fact that the contractual laws of the Member States differ greatly, and this difference may jeopardise the citizen 'in his role as consumer when acquiring goods and services under contracts which are governed by the laws of the Member States other than his own.'[1060] Thus the aim of this Directive is to fully protect said citizen by making Member States that transpose said Directive legislate effectively in order to prevent unfair contractual terms from being present in any contractual agreement.

In fact, the Directive tried to reach a compromise between French law and German law. Individually negotiated terms are not within the scope of the Directive,[1061] and this is not in compliance with French law. Moreover, the Directive accepts the *Affidamento* Theory by making it mandatory for contracts to be entered into and performed in good faith,[1062] and due regard is given to the bargaining power of the parties involved.[1063] Conversely, contrary to German law, 'it is unnecessary for the contract terms to be pre-formulated for a multitude of contracts, so that in addition to standard terms also pre-formulated individual

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1055 Unfair Contract Terms Act 1977 (UCTA 1977).
1056 ibid s 2(1).
1057 Martin Ebers, 'Comparative Analysis' in Prof Dr Hans Schulte-Nölke (ed), *Consumer Law Compendium* (Universität Bielefeld 2008) 397.
1058 Unfair Contract Terms Act 1977 (UCTA 1977) ss 10 and 23.
1059 Lee Mason, 'Protecting Consumers from Unfair Terms in Standard Form Contracts: The UK Approach' [2015[EBRL 345.
1060 Unfair Contract Terms Act 1977 (UCTA 1977) Sixth Recital to the Preamble.
1061 ibid art 3(1) and (2).
1062 ibid Sixteenth Recital to the Preamble.
1063 'Unfair Contract Terms' European Commission <http://ec.europa.eu/consumers/consumer_rights/rights-contracts/unfair-contract/index_en.htm> accessed 17 July 2016.

contracts for single use, but not individually negotiated terms, are subject to control of the Directive.'[1064]

The most common legislative instrument created at EU level to cater for consumer protection is the Directive. Such a Directive in this context is usually a minimum harmonisation Directive, thus creating a minimum threshold of harmonisation which must be achieved, thereby giving great discretionary powers to Member States to transpose the Directive into their domestic law.[1065] Problems have arisen due to different implementations of this Directive,[1066] resulting in having different levels of protection given to consumers depending on which Member State the said consumers reside in.[1067] It is yet to be seen whether this situation is going to be fixed by future enactments of EU legislation or future rulings of the Court of Justice of the European Union (Hereinafter referred to as 'CJEU').

It is to be noted that this Directive offers to the consumer remedies not usually found under contract law. In fact, the Unfair Terms Directive may be deemed to 'impinge on the very nature and substance of the contract.'[1068] The proper use and implementation of this Directive into domestic law would therefore guarantee the consumer a right to use the extraordinary remedies and better balance the powers between the professional party and the consumer in a contractual agreement. The impact on Maltese domestic law will be discussed in further detail below.

4. Maltese Jurisprudence on Limitation Clauses

Malta is a legal hybrid. Our Public law is mainly influenced by English law, whilst our Private law is usually influenced by Continental legal systems. It is important therefore to put limitation clauses under Maltese law in context and to analyse the impact of Continental law and Common law on the way Maltese courts have deemed these clauses to be valid or otherwise.

[1064] Martin Ebers, 'Comparative Analysis' in Prof Dr Hans Schulte-Nölke (ed), *Consumer Law Compendium* (Universität Bielefeld 2008) 352.

[1065] Annalies Azzopardi, 'Defining the consumer in order to protect him – the continuous duel between the notion of 'consumer' in EU directives and in the Court of Justice's free movements decisions' (2012) 22 Id-Dritt 137, 138-139.

[1066] Especially Czech Republic and the Netherlands.

[1067] Peter Rott, 'Minimum Harmonization for the Competition of the Internal Market? The Example of Consumer Sales Law' [2003] 40 Common Market Law Review 1107.

[1068] Annalies Azzopardi, 'Defining the consumer in order to protect him – the continuous duel between the notion of 'consumer' in EU directives and in the Court of Justice's free movements decisions' (2012) 22 Id-Dritt 137, 158.

4.1 *Specific Awareness of the Limitation Clause*

It is important to discuss consent as a condition for the contractual agreement to subsist since under Maltese law, consent is by itself an essential factor for the validity of a contract. Consent *per se* implies that when a party agrees to the contractual terms and clauses in a particular contract, then that party is fully aware of and agrees to all the terms and conditions therein.

The Maltese courts have invalidated limitation clauses in cases where, despite being technically fair and valid in their own respect, the clauses were simply not brought to the attention of the weaker party who thus agreed to the same without having had the contents thereof explained to him. This echoes French and English law where limitation clauses written in small print are deemed to be null by the courts of law. It is clear that Maltese law gives great importance not only to consent properly given by the parties, but also to the fact that the parties are fully aware of what they are consenting to.

In ***Borg vs. Calascione***,[1069] the Court said that the inclusion of clauses in a contract which exempted the defendant from responsibility if the product he delivered was not up to standard is not enough. Such clauses have to be brought to the specific attention of the other party.

Limitation clauses in a Maltese contractual scenario may be present in different shapes and sizes, not just standard contracts, and the Courts still oblige the party in whose favour the limitation clause is inserted to point it out to the other party. Terms and conditions in a contract between a hotel keeper and a guest may contain a limitation clause which has to be acknowledged by the guest in question.[1070] Even particular clauses in a brochure could be deemed to be exemption clauses, for instance that the tour agent could cancel or change any part of the tour without incurring responsibility.[1071]

In ***Micallef vs. Baldacchino***,[1072] the parties chose to remove the warranty for latent defects, which is *per se* an exemption clause. The court did not accept the validity of the exemption clause as the vendor had not referred directly to such clause when the contract was entered into, and decided that the seller was still responsible for this latent defect despite the exclusion of the warranty.

[1069] *Valhmour Borg vs. Major Alfred Calascione*, Commercial Court per Mr Justice Tancred Gouder 25 May 1961.

[1070] *Rosa Gemma Giordano vs. Carmelo Grech*, Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XXVIII (1933) Pt III.

[1071] *Anna Maria Sammut vs. Stanley Sullivan*, Civil Court, First Hall, 16 October 1995.

[1072] *Dennis Micallef vs. Anthony Baldacchino*, Court of Appeal, Commercial Jurisdiction, 20 January 1992.

Regarding this duty to bring the clause to attention, the court takes into account certain situations, including that of traders who deal with each other on a regular basis. In such circumstances, it is unnecessary for a common clause to be pointed out each and every time.

4.2 *Culpa lata dolo aequiparatur*

Fraud invalidates the contract as a whole, including the limitation clauses.[1073] Hence, Maltese law adheres to the Roman axiom of *culpa lata dolo aequiparatur*, and this is confirmed in ***Borg vs. Calascione*** where the court ruled that:

> Klawsola [ta' eżoneru ma kienx ikollha l-valur] li teżonera lid-debitur mid-dolo, mill-kolpa gravi, ekwiparata għad-dolo, u mill-kolpa ljevi... ll-klawsola ta' irresponsabbilita' bħal dik in eżami ma teżimix mir-responsabilita' meta jkun hemm vjolazzjoni ta' kuntratt jew ta' dover; u jekk jiġu stipulati espressament biex jeżoneraw mid-dolo u miż-żewg gradi ta' kolpa fuq riferiti, ikunu nulli, billi kuntrarji għall-prinċipju ġenerali tal-morali, bażi tal-ordni pubbliku.[1074]

This case also brought out the similarity between Maltese, French and Italian law, in that clauses exonerating the party from *dolo* and gross negligence are deemed to be contrary to public policy. Whereas English courts may allow validity in case of negligence in certain instances, Maltese law does not.

In ***Camilleri vs. Mifsud***,[1075] the Court stated that the doctrine followed by Maltese jurisprudence does not deem all limitation clauses to be valid, especially not to the extent that they allow the *assicurazione delle colpe proprie*.[1076] This point is followed by ***Rizzo vs. Ellul Sullivan***,[1077] and later by ***Spiteri vs. Abela***.[1078]

[1073] Civil Code, Chapter 16 of the Laws of Malta, s 981.

[1074] *Valhmour Borg vs. Major Alfred Calascione*, Commercial Court per Mr Justice Tancred Gouder 25 May 1961 p 816: 'Exemption clause would not have the power of exempting the debtor from dolo, gross negligence, equivalent to dolo, and from slight negligence... the exclusionary clause as in this case does not exempt from responsibility when there is violation of contract or duty; and if expressly stipulated to exonerate from dolo and the other two grades of negligence referred to above, they are null since they are contrary to general principles of morality, the basis of public order.'

[1075] *Paul Camilleri et noe vs. Paul Mifsud et*, Court of Appeal, Commercial Jurisdiction per Mr Justice William Hardin, Mr Justice A. J. Montanaro Gauci and Mr Justice Luigi A. Camilleri 8 March 1957.

[1076] ibid p 621.

[1077] *Joseph Rizzo noe vs. Edward Ellul Sullivan* noe, Court of Appeal, Commercial Jurisdiction per Mr Justice Carmel A. Agius, Mr Justice Hugh Harding and Mr Justice Carmelo Scicluna14 October 1987, p 472.

[1078] *Frans Spiteri noe vs. Godwin Abela noe et*, Civil Court, First Hall per Mr Justice Philip Sciberras 31 January 2003, p 8.

Interestingly, in ***Causon vs. Abela,***[1079] the Court stressed that cases in which the defendant had to use the diligence of a *bonus paterfamilias* could never be catered for by a limitation clause.[1080] Negligence also invalidated the limitation clauses in ***Atlas Insurance Limited vs. Schembri Bros (Burdnara) Ltd,***[1081] and ***Camilleri vs. Pisani noe et***.[1082]

4.3 *Doctrine of Fundamental Breach*

Our Courts have tried to limit the effect of limitation clauses in contracts by also referring to the Doctrine of Fundamental Breach,[1083] which originates from English law. Despite not having a specific name under Maltese law, our Courts have used this method in a way which is synonymous with English court practice. In fact, our Courts quote Charlesworth in saying,

> If you undertake to do a thing in a certain way... and have broken the contract by not doing the thing contracted for in the way contracted for... you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it.[1084]

The basis of this doctrine is disallowing the clause limiting or excluding liability to be used as a means of avoiding the performance of the contract in question. Minor breaches do not invalidate the clause. However, a fundamental breach would force the courts to ignore the existence of the limitation clause, since one cannot fail to perform the contract on the strength that one shall not be responsible for damages due to the existence of such clause.[1085]

1079 *Leslie Causon noe vs. Godwin Abela noe*, Civil Court, First Hall per Mr Justice Joseph R. Micallef 7 October 2004, p 18.

1080 This was also stated in *Dr Simon Micallef Stafrace noe vs. Godwin Abela noe et* per Mr Justice Phillip Sciberras, Civil Court, First Hall, 9 December 2002.

1081 *Atlas Insurance Limited vs. Schembri Bros (Burdnara) Ltd*, Court of Magistrates per Mr Justice Michael Mallia 28 November 2005, p 4.

1082 *Silvan Mart Raymond Camilleri v Alfred Pisani noe et*, Civil Court, First Hall per Mr Justice Geoffrey Valenzia 13 November 1995, p 1321: The court here referred to a number of UK judgments and the Italian Civil Code, and held that an exemption clause (even if implied and not written) is never acceptable when the harm is the result of *dolo* or gross negligence.

1083 *Eucaristico Zammit vs. Eustrachio Petrococchino CBE ne*, Kollezzjoni ta' Decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XXXVI (1952) p 324.

1084 ibid p 324, citing James H. Charlesworth, *The Law of Negligence* (2nd edn, Sweet & Maxwell 1947) 615.

1085 *John Bonello noe vs. John Ripard noe*, Court of Appeal per Chief Justice Silvio Camillero, Mr Justice Tonio Mallia, Mr Justice Joseph Azzopardi 25 October 2013: this was also stated in *Biagio Muscat v Anthony Falzon*, Court of Appeal, Inferior Jurisdiction per Mr Justice Phillip Sciberras 12 May 2003.

In ***Farrugia vs. Camilleri***,[1086] the defendant pleaded an exemption clause which stated that he was not responsible for any natural defect in the marble tiles which he delivered to the plaintiff. However, in this case, the defect was so significant that it amounted to the non-performance of the contract by the defendant and therefore he was not entitled to utilise that clause.[1087]

Other cases offer a more original twist to the general situation of non-performance of a contract. In ***Demajo vs. Santucci,***[1088] the Court adhered to this doctrine because the painting sold at an auction, believed to be the works of a particular painter, had in fact been painted by another artist. The exemption clause pleaded by defendant, declaring that the auctioneer was not to be held responsible for the truth of the description of the item auctioned, was deemed to be not applicable by the Court, since there was a difference between what had been offered in the catalogue and what had actually been given. This was equated with non-performance of the contractual obligation.

The doctrine of fundamental breach is also to be linked with the duty to bring the effects of limitation clauses to the attention of the individual. In ***Camilleri vs. Pisani***,[1089] the Court ruled that, when there is a high element of risk, the plaintiff was duty-bound to ask the client to fully accept the conditions of risk. In this case there was non-performance of the obligation, thus the doctrine was applied and the plaintiff could not rely on the clause. The same result was obtained in ***Grixti vs. EUROSAT Malta Ltd***,[1090] notwithstanding the fact that the defendant had warned the plaintiff that there was no guarantee that all channels could be viewed by making use of the sky card he sold him.

This position is therefore linked to English law, where, if a person is in fundamental breach of contract, he could not rely on a limitation clause 'otherwise apt to protect him'.[1091] In ***Harbott's 'Plasticene' Ltd vs. Wayne Tank & Pump Co Ltd,***[1092] Lord Denning said that if 'the breach frustrates the contract' the contract is null. Automatically the limitation clause is null as well. However, this particular ruling was controversial. The doctrine of fundamental breach was

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1086 *Angelo Farrugia vs. Louis Camilleri*, Court of Appeal, Commercial Jurisdiction per Mr Justice Carmel A. Agius, Mr Justice Joseph A. Herrera, and Mr Justice Giuseppe Mifsud Bonnici 1 June 1993.

1087 ibid p 9.

1088 *Pascal Demajo vs. Albert Santucci*, Court of Appeal, Commercial Jurisdiction, 7 November 1994.

1089 *Silvan Mart Raymond Camilleri vs. Alfred Pisani noe et*, Civil Court, First Hall per Mr Justice Geoffrey Valenzia 13 November 1995, p 1320.

1090 *George Grixti vs. EUROSAT Malta Limited*, Court of Appeal, Inferior Jurisdiction per Mr Justice Joseph Said Pullicino 10 January 2000.

1091 J. A. Weir, 'Nec Tamen Consumebatur... Frustration and Limitation Clauses' [1970] 28 Cambridge Law Journal 189, 190.

1092 [1970] 1 QB 447.

not applicable since the parties had discussed and catered for the specific eventuality of a fire breaking out in their contractual agreement,[1093] and therefore the ruling resulted in the departure from the English law adherence to the freedom of contract. Moreover, it was concluded that a limitation clause can be ignored if fundamental breach is proved. It is argued that such a conclusion would in practice void the limitation clause even in cases of minor breaches.[1094]
In ***Hong Kong Fir***,[1095] it was stated that a party cannot withhold its performance if the other party is in breach, unless said breach actually frustrated the contract. Since a disaster is necessary to release a contractor, then arguably a disaster is sufficient to discharge a limitation clause. This goes against the very function of a valid limitation clause whose function is to guard against liability even for disasters. Furthermore, in ***Camilleri vs. Pisani***, reference was made to UCTA 1977, whose test of reasonableness in the context of exemption clauses limited drastically the use of this doctrine in practice.[1096]

Our courts have applied the said doctrine with no apparent difficulty, despite the source being essentially English case law. However, since the Maltese judgments dealing with limitation clauses examined in this particular study in relation to this doctrine occurred mainly post 1990's, and the English cases that created legal uncertainty are from an earlier date, it may be that Maltese jurisprudence simply followed English court practice once the matter was not controversial anymore, or else, despite having English law as a source, the Maltese courts adapted the doctrine to its own legal scenario, rather than fully implemented and strictly followed the English doctrine.

4.4 *Limitation Clauses and International Legal Instruments*

Recent cases show that certain international legal instruments, other than English and French, are adhered to by our Courts, especially in cases of carriage by sea or by air. One of the most recent judgments is ***Lloyds (Malta) Limited vs. Air Malta plc***,[1097] where the Warsaw Convention,[1098] and Montreal Agreement,[1099] were pivotal international legal instruments used to validate the

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1093 J. A. Weir, 'Nec Tamen Consumebatur... Frustration and Limitation Clauses' [1970] 28 Cambridge Law Journal 189, 192.
1094 ibid 194.
1095 [1962] 2 QB 26.
1096 *Silvan Mart Raymond Camilleri vs. Alfred Pisani noe et*, Civil Court, First Hall per Mr Justice Geoffrey Valenzia 13 November 1995, p 1320.
1097 *Lloyds (Malta) Limited vs. Air Malta plc*, Court of Appeal, Inferior Jurisdiction per Mr Justice Gino Camilleri 27 June 2014, p 3.
1098 Convention for the Unification of Certain Rules for International Carriage by Air (adopted 12 October 1929, entered into force 13 February 1933) 137 LNTS 11 (Warsaw Convention).
1099 Montreal Convention for the Unification of Certain Rules for International Carriage by Air (adopted 28 May 1999, entered into force 4 November 2003) 2242 UNTS 309 (Montreal Convention).

existence of the package limitation clause present in the contract which was analysed in this case.

Article 22 of the Convention 'establishes liability limitations for international air carriers of baggage, cargo and passengers.'[1100] The Court took the wording of the clause quite seriously, and stated that the limitation clause was inapplicable since the defendant was an air 'handler' and not an air 'carrier'. Only the latter could be favoured by the package limitation clause. The ruling echoes the English and German position vis-à-vis wording of the limitation clause. The same was affirmed in ***Alexander Nandweni vs. Joseph N. Tabone nomine***,[1101] and in ***SMS Insurance Agency Limited noe vs. Air Malta et***,[1102] in line with both the Convention and Maltese Civil law.[1103] According to the court, in these three cases, the defendants: 'Huma obbligati għat-telf tal-ħaga fdata lilhom, u għall-ħsarat li jiġru fiha, meta ma jippruvawx li l-ħaġa ntilfet jew ġratilha ħsara b'aċċident jew b'forza maġġuri u mingħajr ħtija tagħhom.'[1104]

There are other situations where the Court gives a strict literal interpretation of the limitation clause. Arguably this might be due to a strict adherence to *pacta sunt servanda,* thus binding one party vis-à-vis one specific interpretation of the clause, since an extended interpretation of the limitation clause would go beyond what the parties intended and agreed to when entering into the contractual agreement. In ***Chircop vs. Dingli***,[1105] the limitation clause found in the Hague Rules was quoted: 'Neither the carrier nor the ship shall be responsible for the loss or damage arising or resulting from: (c) Perils, dangers, and accidents of the sea or other navigable waters.'[1106] In this case, the court quoted other judgments to support its decision that this particular provision containing this limitation clause concerned bulk cargo and that cars could not be protected by the clause,[1107] and neither was machinery, as in the given case. The court, in quoting

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1100 Thomas J. Dolan, 'Warsaw Convention Liability Limitations: Constitutional Issues' [1984] 6 Northwestern Journal of International Law and Business 896, 896-897.

1101 *Alexander Nandwani vs. Joseph N Tabone nomine*, Commercial Court per Mr Justice Joseph A. Filletti, 16 March 1993.

1102 *SMS Insurance Agency Limited noe v Air Malta et*, Court of Appeal, Inferior Jurisdiction per Mr Justice Raymond C. Pace, 1 June 2009.

1103 Civil Code, Chapter 16 of the Laws of Malta, s 1133.

1104 *SMS Insurance Agency Limited noe vs. Air Malta et*, Court of Appeal, Inferior Jurisdiction per Mr Justice Raymond C. Pace, 1 June 2009, p 24: 'They are liable to compensation the loss of an object entrusted in their care… when they do not prove that this object was lost/damaged by accident or force majeure and without any blame of theirs'; this is in line with Civil Code, Chapter 16 of the Laws of Malta, s 1628.

1105 *Dr Carmel Chircop vs. Kevin Dingli*, Civil Court, First Hall per Mr Justice Raymond C. Pace, 9 January 2001, p 12-13.

1106 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (adopted 25 August 1924, entered into force 2 June 1931) 120 LNTS 187 (Hague Rules 1924), art 4(2)(c).

1107 *Avukat Dr Robert Staines nomine vs. Joseph Apps nomine et*, Court of Appeal, 24 April 1998.

John F. Wilson, emphasised this reasoning.[1108] In the case of pallets, however, the limitation clause is applicable.[1109]

Even negligence and imprudence may render the package limitation clause inapplicable to the case at had,, albeit valid *per se*, as seen in ***Atlas Insurance Limited vs. Schembri Bros (Burdnara) Ltd***.[1110]

4.5 *Maltese legislation*

Even domestic law provides pieces of legislation that create limitation clauses and validate their use. One such example is the Examination of Title Regulations 2012.[1111] The limitation clause found in Regulation 13 states that: 'A notary's responsibility for the examination of title shall be limited to what results from the searches, and shall be subject to any disclaimer or limitation agreed upon in a contract of engagement, or as may result from the report.'[1112] In this case, the parties that are clients to the notary with regard to a particular contract give their consent to this limitation, and the notary inserts this limitation clause in the said contract.

It is clearly a limitation clause since if there exists some information which was not uncovered by the notary during his researches and which may be detrimental to the clients, the limitation clause would kick in and the liability of the notary would be limited or exempted, as the case may be. The law is silent on this point and, to date, no actions in court have been brought regarding this issue; so it can potentially be argued that, notwithstanding the quoted law, gross negligence could still invalidate the clause.

Additionally, Regulation 14 creates another limitation clause in the case of a registration of an immovable made by the Land Registrar in the name of an ecclesiastical entity or of the Government of Malta:

> A notary shall not be responsible for a registration of an immovable made by the Land Registrar in the name of an Ecclesiastical Entity or of the Government of Malta... if, pursuant to an application for its first registration or dealing therewith lodged in the Land Registry by the Joint

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1108 *Dr Carmel Chircop vs. Kevin Dingli*, Civil Court, First Hall per Mr Justice Raymond C. Pace, 9 January 2001,p 20, citing John F Wilson, *Carriage of Goods by Sea* (3rd edn, Longman) 196.

1109 *Dr Riccardo Farrugia nomine vs. Albert Mizzi et nomine*, Commercial Court, Superior Jurisdiction, 18 April 1977.

1110 *Atlas Insurance Limited vs. Schembri Bros (Burdnara) Ltd*, Court of Magistrates per Mr Justice Michael Mallia 28 November 2005, p 4.

1111 Examination of Title Regulations, SL 55 06.

1112 ibid reg 13.

> Office in the name of the Ecclesiastical Entity or of the Government of Malta as the case may be, the Land Registrar registers the immovable or the dealing less than two months prior to the date of publication of the notarial act, notwithstanding that in terms of the aforesaid law the date of registration is deemed to be a date earlier than the date when such application was lodged.[1113]

An exemption clause is also found in Article 593(3) of the Civil Code, where the notary is obliged to explain the effects of certain provisions of the law to the testators of a will *unica charta* and enter a declaration to that effect in the said will.[1114] The declaration would be exempting the notary from liability.

Another important piece of legislation is Chapter 378.[1115] The protection afforded to the weaker parties by the aforementioned Directive 93/13/EEC was included in Maltese law by means of this Act. Through this introduction, it is clear that our legal system is slowly allowing the *Volontà* Theory to be diluted through specific legislation and is adopting the *Affidamento* Theory instead.[1116] In fact, in ***F Advertising Ltd vs. Tabone,***[1117] the Court stated that the question of unfairness of a particular clause in a contract is independent of the will of the parties.

This Act applies only to consumer transactions and not to a wholesaler and retailer type of contract. Article 44 protects consumers from contracts containing unfair terms and includes a long list of prohibited terms comparable to the equivalent provisions found under the Directive and the applicable English Act discussed above. If such terms are included in a consumer contract, then such terms are deemed to have never been inserted. Moreover, the list is not exhaustive and the Courts may nullify other terms included in contracts if these are deemed to be unfair.[1118] This term therefore gives great discretionary powers to the Courts.

[1113] ibid reg 14.

[1114] Civil Code, Chapter 16 of the Laws of Malta, s 593(3): 'The notary drawing up a will *unica charta* is bound on pain of a fine of two hundred and thirty-two euro and ninety-four cents (232.94) to be imposed by the Court of Revision of Notarial Acts to explain to the testators in a will *unica charta* the meaning and effect of this article and of Article 594, and enter in the will a declaration to that effect'.

[1115] Consumer Affairs Act, Chapter 378 of the Laws of Malta.

[1116] This is evident by the insertion of condition of existence of good faith in Article 45 for unfairness not to be present.

[1117] *F Advertising Ltd vs. Anthony Tabone*, Court of Appeal, Inferior Jurisdiction per Mr Justice Phillip Sciberras, 9 January 2009.

[1118] Consumer Affairs Act, Chapter 378 of the Laws of Malta, s 44(4).

The result of such provisions is that such limitation clauses are strictly regulated, again shifting away from the freedom of contract principle by allowing the Courts to invalidate the clauses in cases of abuse. This is innovative because there is no specific power given to the court under the general law enabling the courts to strike down a particular clause on the basis of its unfairness. Unfairness is defined under Article 45,[1119] and limitation clauses may easily fall within one of the conditions found therein.

It is arguable whether the limitation clause creating an imbalance between the rights of the contracting parties to the detriment of the consumer is deemed null simply because the imbalance is deemed 'significant'.[1120] The definition of 'significant' is unclear, since it is by their very nature that limitation clauses create an imbalance. Hence, the terminology the legislator used in this context forces the courts to regulate the manner on a case-by-case basis.

5. Conclusion

It is clear that Maltese contract law has been heavily influenced by the adherence of European States to either the *Volontà* Theory or the *Affidamento* Theory and that the legal influence of these States on the Maltese legal system has heavily affected the manner in which our courts have dealt with limitation clauses throughout the years. A number of similarities between Maltese law and other States have clearly arisen throughout this study, for instance the way Maltese law echoes French and English law where limitation clauses written in small print are deemed to be null. Like German, French and Italian law, Maltese law adheres to *culpa lata dolo aequiparatur*, and its similarity to French and Italian law is evident since clauses exonerating the party from *dolo* and gross negligence are also deemed to be contrary to public policy.

Despite the clear influence of various different foreign legal systems, it is interesting to note that the Maltese judgments analysed are consistent when dealing with limitation clauses. The ruling in the French ***Faurecia*** case, may be equated to the doctrine of fundamental breach adhered to by our courts, since its ruling is similar to the doctrine's premise of having a breach frustrating the entire contract. What is interesting about this is that, besides having Maltese case law seemingly unperturbed by the English controversial cases regarding the topic, French jurisprudence solved its own controversy as late as 2010, whilst the position in Maltese courts has been consistent since the early 1990's.

[1119] ibid s 45.
[1120] ibid s 45(1)(a).

This point draws attention to another important conclusion. In the introduction to this article it has been argued that there is lack of legislative intervention in relation to limitation clauses given that these are the exception to the rule of having a party liable for contractual breach, and reference to this exception is found even in Maltese case law.[1121] This argument, together with the reality of Maltese courts applying the remedies in a uniform and consistent manner, further highlights the lack of need of actually having legislative intervention on the topic at hand. Were our courts to face legal uncertainty as faced by French courts in ***Faurecia***, the idea of having express regulation in relation to limitation clauses might have been more tempting for our legislator. Arguably, Maltese law, despite its hybrid nature, may in reality be more stable than other States when regulating limitation clauses, thus empowering the idea of Maltese courts being a step ahead of other courts in maintaining their *jurisprudence constante* vis-à-vis limitation clauses.

Additionally, the acceptance of international legal instruments catering for the regulation of limitation clauses by our domestic courts further signifies this apparent lack of need for domestic legislative intervention. It is a situation of having cooperative measures being decided upon by other States and the subsequent adherence of our courts to these measures provided they do not run counter to our public policy. It is clear that where transposition in our domestic law is necessary, as was clearly the case vis-à-vis Directive 93/13/EEC and Chapter 378 of the laws of Malta, such transposition also helps to modernise our laws, since such directives cater for present day realities. Moreover, subsidiary legislation such as Legal Notice 355 of 2012 catering for specific situations regarding limitation clauses creates more security and a stable position for our courts, whilst curbing their discretionary powers and securing uniformity of judgment through their adherence to written law.

It is therefore to be concluded that more studies are to be encouraged on limitation clauses, especially with regard to future court judgments that may be decided dealing with the most recent additions to our domestic law. More scrutiny is to be given to the European legal scenario, more so within the ambit of social developments, since it is an area of constant development. The EU is becoming increasingly protective of consumers and contractual agreements concerning consumers and contract law. It is therefore inevitable that new laws will ultimately be created, shaping European law in new forms, and ultimately affecting Maltese law and Maltese jurisprudence in new and challenging ways.

[1121] *Formosa & Camilleri Ltd vs. Sea Malta Co Ltd*, Civil Court, First Hall per Mr Justice Joseph R. Micallef, 13 November 2008, p 7.

THE OATH: GENESIS, DEVELOPMENT AND AUGISTINIAN ORIENTATION - A REVISITATION IN THE LIGHT OF RECENT SCHOLARSHIP

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ABSTRACT[1122]

Observing that oaths are commonplace and that they are utilized in a variety of situations, the paper attempts to throw some light on the phenomenon of the taking of oaths to attempt to come to grips with its widespread use. In order to fully understand this social reality it embarks on a short systematic synthesis of the theoretical basis which has been employed both, to justify the use of this singular institute, and conversely, to uphold and solicit its total abolition. After focusing on a short exposition of various types and categories of oaths, the paper proceeds with a short outline of the institute's chequered history discussing its genesis, evolution and interpretation under various cultures. Finally, it analyzes Saint Augustine's outlook based as it is both on sound philosophical and theological premises, and on his unique practical exposition of the subtleties involved as based on his particular interpretation of Christian love. This outlook may be said to have ultimately rehabilitated this phenomenon in the Christian world.

KEYWORDS: OATHS – PHILOSOPHY OF LAW – SAINT AUGUSTINE

[1122] This article was reviewed by Dr Jean-Paul De Lucca B.A. (Hons.), M.A., Ph.D.

THE OATH: GENESIS, DEVELOPMENT AND AUGUSTINIAN ORIENTATION

Silvio Meli

1. Introduction

The taking of oaths or of solemn affirmations[1123] is commonplace, almost routine. Generally speaking, it can easily be observed in; judicial proceedings, where witnesses and court appointed experts are invited to have their say; the profession of solemn vows by members of religious orders and of vows of other secular professions;[1124] varying degrees of official pomp and circumstance, when state and public officials are sworn into public office; as well as when effecting a change in one's personal civil status.

But, why is this particular action – *the taking of an oath* – deemed essential for the validity of whatever is being affirmed? Why does civil society deem it necessary to resort to this particular device when other approaches may achieve the same effects but with less draconian sanctions? Why has this institute found common fertile ground and consequent sound adoption and adaptation in both lay and secular institutional arrangements, and this, in various historical epochs, and at the same time, against authoritative advice to the contrary? Surprisingly, the present all-pervasive acceptance of the oath, or its substitute, as a binding legal instrument, has not always been as widely appreciated. Even within the present unsympathetic social environment, one's recourse to the oath or, to its more recent substitute, still seems to solicit further re-thinking as to its pervasive utility.

Before achieving the extant pervasive standing witnessed today, this institute has had to pass through the sieve of strict intellectual disquisition in order to see what it exactly is. Experience shows that its extensive use was generally deemed crucial in order to reap the benefits it offers. Through proven positive results witnessed by past generations, civil society opted in its majority to somehow recover, and perhaps at times, re-invent, this institute by adapting it to a variety of circumstances for the benefit of social cohesion.

[1123] In Malta *Oaths* and *solemn affirmations* may now be used interchangeably as per Affirmations Act, Chapter 245 of the Laws of Malta. The latter obviously avoids reference to the Divinity and relative moral consequences. What is solemnly affirmed is limited to one's own conscience.

[1124] A well-known example is the taking of the Hippocratic Oath, (dating to the IV Century B.C.E.), by medical doctors.

This necessity simply grew because of the realization that very often, ordinary statements are considered unreliable. The simple remedy offered by this institute proves to be necessary and crucial. Indeed, common worldly wisdom shows that very often, mankind tends to fib. Experience has shown that people simply do not trust each other and do not always believe in the truthfulness of statements uttered. As Martenson says, 'Lying and mutual distrust are with us, and so from ancient times the oath has been used as a guarantee for truthfulness.'[1125]

Succinctly, the taking of an oath is merely an attempt to overcome this innate immobilizing effect that statements have over mankind until such statements are accepted as *certain*, *accurate*, and *truthful*. In essence, an oath is merely tantamount to the summoning up of divine presence to be witness to the binding effect of a promise or, to the truth of a statement of fact. The divinity is invoked to act as guarantor of the oath-taker's honesty and integrity.

As Prodi emphasises, the oath occupies a particular place in our social reality nestled as it is between the specific spheres of *religion* and *politics*. Accordingly, he emphasises that the oath's intimate connection with these dual social realities actually goes so far as to define the 'specificity and vitality of Western Christian culture'. [1126] Language is therefore seen and utilised as the basis for consolidating the resultant political pact which emerges as central to the history of the West. Yet, notwithstanding all this, today things seem to be changing. One seems to be witnessing a slow but dynamic shift within our collective realities whereby society seems to be gradually moving away from upholding the centrality of the oath as being the beacon of political commitment.

2. The Essential Function, Forms and Categories of the Oath

A quick reference to authoritative writings is essential to be able to help us orient ourselves in this regard. The author of the Letter to the Hebrews clearly emphasised that 'Men, of course, swear an oath by something greater than themselves, and between men, confirmation by an oath puts an end to all dispute.'[1127] Hierocles,[1128] a Neoplatonic philosopher, goes so far as to actually affirm that the oath completes the Law. He held,[1129]

[1125] Neff, Christian, Harold S. Bender and William Klassen, 'Oath' 3.

[1126] Paolo Prodi, *Il sacramento del potere: Il giuramento politico nella storia costituzionale dell'Occidente* (Il Mulino 1992) 52.

[1127] Hebrews 6: 16.

[1128] Greek Stoic philosopher of the 2nd century.

[1129] Rudolf Hirzel, *Der Eid: Ein Beitrag zu seiner Geschichte* (Hirzel 1902) 74; Noël Aujoulat, *Le neoplatonisme alexandrine: Hierocles d'Alexandrie: Filiations intellectuelles et spirituelles d'un neoplatonicien* (Brill 1986) 109-10.

> We have previously shown that the law (nomos) is the always uniform operation by means of which God eternally and immutably leads everything to existence. Now we call oath (horkos) that which, following this law, conserves all things in the same state and renders them stable in such a way that, as they are held in the guarantee of the oath and maintain the order of the law, the immutable stability of the order of creation is the completion of the creating law.

By implication, it seems obvious that the oath does not create anything original. All it seems to do is that it conserves something which is already existent. In his *De Officiis* Cicero defines the word oath as,

> Sed in jure jurando non qui metus, sed quae vis sit, debet intellegi; est enim jus jurandum affirmation religiosa; quod autem affirmate quasi deo teste promiseris, id tenendum est. Iam enim non ad iram deorum, quae nulla est, sed ad justitiam et ad fidem pertinent...[1130]

He emphasises that the true function of the oath is the stability it generates when it guarantees that which is being affirmed. And it does so, not because it infuses the temerity of the gods – *quae nulla est*, but because through the affirmation or pronouncement that is made, one creates a just obligation which has to be fulfilled in good faith. Synthetically, what is promised is to be fulfilled.

Benveniste clearly held that the oath,

> ... is a particular modality of assertion, which supports, guarantees, and demonstrates, but does not found anything. Individual or collective, the oath exists only by virtue of that which it reinforces and renders solemn: a pact, an agreement, a declaration. It prepares or concludes a speech act which alone possesses meaningful content, but it expresses nothing of itself. It is in truth an *oral rite*, often completed by a manual rite whose form is variable. Its function consists not in the affirmation that it produces, but in the *relation* that it institutes between the word pronounced and the potency invoked. [1131]

The swearing of oaths is therefore seen as an action whereby certainty as to the content held within the statement under review is achieved. In this way, the common good is attained with confidence and social stability is ensured.

[1130] Marco Tullio Cicerone, *De Officiis: Quel che e' giusto fare* (Einaudi 2012) 292-293.

[1131] Emile Benveniste, 'L'expression du serment dans la Grece ancienne' (1947) 134 Revue de l'Histoire des Religions 81, 81-82.

In this particular regard St. Thomascomes in very handy as he distinguishes between scientific truth and the truth of man-made statements.[1132] Succinctly, he emphasises that in matters of *science*, confirmation of a statement is achieved by reasoning from premises of natural knowledge that are infallibly true and provable. There can therefore be no discordant dispute in this regard. However, in matters concerning particular facts of the contingent doings of man, confirmation cannot necessarily depend on reasoning alone. Before being wholeheartedly accepted as truthful, these so-called facts usually require further confirmation through independent extrinsic means necessarily involving the introduction of witnesses. However, here too St. Thomas wisely offers a word of caution. He emphasises that even human testimony may again not be sufficient for such confirmation of the truth, and this, because of lack of truthfulness in man, as very many fall into lying, and lack of knowledge, as man can neither know the future; nor the secret thoughts of the heart; nor yet, that which is distant or far away.

St. Thomas concludes that notwithstanding these inherent pitfalls, it is still expedient that *certainty*, *accuracy* and *truthfulness* should be established in this specific realm of human relationships. Through oaths, human beings overcome the deficiencies of the faith they might have in others. Therefore, in this particular respect, he argues, it is still necessary to recur to the witness of God to vouch for the truth of one's statement, for it is only God who cannot lie and from whom nothing can be hidden. It is because mankind craves for security in human relationships that it may overcome this innate limitation by taking recourse to Divine witness.

However, although actions may be good in themselves, as always, much depends on the actual use that is made of these actions. Any action, although good in itself, may be turned into evil if not used properly. So is the case with oaths! It therefore goes without saying that an oath must therefore never uphold a falsehood. It may likewise never be used to bear witness to anything that is not lawful. Otherwise, it would be a contradiction in terms.

An oath therefore usually occurs at that solemn moment where, through some particular formula or invocation, one summons none other than *God* Himself as witness to the *truth* of the statement that is being uttered. In so doing, one is calling upon the strongest possible confirmation of the truth of what is being affirmed, calling upon none other than God Himself to be at one and the same time:

[1132] Aquinas, *Summa Theologica*, IIa-IIae, 1274.

a) *Witness*: to the truth of what is being uttered;
b) *Protector*: of the truthfulness of the statement being made; and finally,
c) *Avenger*: in case of the uttering of an untruth.

However, it is also fair to point out that as Simon Greenleaf warned, and this is diametrically opposite to the position held by Cicero, 'The design of the oath is not to call the attention of God to man; but the attention of man to God; - not to call Him to punish the wrong-doer; but on man to remember that He will.' [1133]

That an oath is a lawful or virtuous thing in itself is evident in its origin and end. Originally, oaths were resorted to in the belief that God, (or the Divine), is the depositary of infallible truth; possesses a universal knowledge; and, exercises a universal providence over all things. As to its finality, an oath should only be taken to justify man when man's mind is made up and to put a definite end to disputes. Furthermore, oaths should never be taken lightly. A cavalier attitude would betray a serious lack of reverence towards God.[1134] This is so as when oaths are resorted to, it is actually the reverence of the witness of God that is invoked. The person making use thereof is bound to use his willed discretion and make true what he has sworn. Furthermore, with oaths there is always the lurking danger of committing perjury!

Even etymologically, the closely linked verb 'to *swear*', though not quite linguistically clear, still betrays its Old Teutonic connection with the verb 'to answer', in this particular case, to the Divinity invoked. Interestingly enough, the Latin *jurare* – 'to swear' – evokes the English word 'jury' which has evolved into a particular legal institute whereby common citizens are sworn into a particular office of responsibility so that they may determine, as peers, whether an accused who is facing criminal[1135] proceedings may be declared guilty as indicted.

Oaths are therefore more than simple instruments. They establish subtle terms of interaction, determine the language of the community, and delineate the limits of trust between individuals and groups.

An oath is that act or word which is used to promise or ascertain something in the name of the Divine. Such act, like all other conscious behaviour of man, equally requires that same exercise of the perpetrator's will before acquiring that validity so necessary to assume or be labelled with the responsibility for

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[1133] Simon Greenleaf, *A Treatise of the Law of Evidence* (16th edn, Boston, Little, Brown and company 1889) 50.

[1134] As Ecclesiasticus 23: 9 warns 'Do not accustom your mouth to swearing,
nor get into the habit of naming the Holy One.'

[1135] In common law countries, this also applies to civil cases.

one's actions. This *foro interno* is then reflected in the external activity under discussion where one knowingly, wilfully, and conscientiously, invokes the testimony of God to attest to the statement made. This internal disposition therefore, requires in addition, a word or sign, by which this specific intention is externalized and manifested.

Oaths may be in an express or direct form, that is, when one swears by God Himself in a clear and manifest manner and, if written, they are duly signed. They may also be solemn if undertaken during a particular ceremony. There also exist implicit or tacit forms which is when one swears by created things in a manner which is outwardly unexpressed – as these bear a special relationship with the Creator. They manifest God's Majesty and the attestation of the supreme truth that He represents in a special way.

It may be interesting to note that there are also various categories of oaths - all necessarily bearing on the fidelity of the person undertaking the oath and on the supernatural element that is consequently invoked. The different types of oaths will be briefly examined below.

Through the assertory oath, one calls upon God as witness to an assertion of a past or present fact. These types of oaths are therefore affirmative statements of fact.

The promissory oath is a call upon God as witness to a resolution which one binds oneself to execute - future performance. In so doing, one makes God the guarantor of the oath's future execution therefore binding oneself before God, under pain of sin against the virtue of religion, to do what one promises to execute in the presence of God. This pledge may take several forms: a vow to God to do something in case one's request is acceded to - a *do ut des* situation; and a vow to God in favour of a third party - if one wins the lottery one allocates a substantial sum for charitable purposes. Every promissory oath necessarily includes an assertory oath as both call upon God to witness one's desire to fulfil the promise one makes; and to guarantee and pledge the future execution of the promise. Failure to perform according to the pledged promise is tantamount to sin.

The contestary oath is a simple invocation of Divine testimony which may either be imprecatory or execratory. Usually, in the former, one will end up with words like: 'So help me God', whilst in the latter, one will call upon God to be one's judge and avenger in case one commits perjury, often offering one's property; life; or even eternal salvation as pledge to one's sincerity.

There is also a difference in between a private oath and a public oath. In the former case, the oath would occur in between private individuals. An oath is public if it is required by public authorities. It may take the doctrinal form, that is, by which one declares that one upholds a given doctrine, or by which one upholds that one promises to be faithful, teach and defend a given doctrine in the future. Another form of the public oath is political. The oath here has as its object the exercise of any authority whatsoever and shows the submission one owes to such an authority. Meanwhile, oaths taken in judicial proceedings by parties to a law suit; witnesses; court experts; the confirmation, before Inquiring Magistrates, of the police statement submitted by drug users, are known as public judicial oaths.

A decisory oath is an oath by which one of the parties to a civil law suit refers back to the other party for the decision of the cause, as in the case of a plea of prescription, where the defendant swears that he does not recall being duly notified with the all-important document at issue within the legally requested time.

Other types of oaths include,

a) *Oath ad Litem*: In case of failure of any other proof as to the value of any given object, an oath is taken on the value of the thing in dispute.

b) *Purgatory Oath*: An oath by which one destroys the presumptions which are brought against him. By this particular means one *purges* oneself, i.e. removes all suspicions which were leveled in one's regard.

c) *Perjury*: This occurs when one makes a promise under oath with the intention of not withholding it. It is therefore the willful and absolute violation of a just, licit and legitimate oath. By swearing to a falsehood one would be grossly disrespecting the Divine name, thereby attracting severe legal[1136] and moral sanction.

Generally speaking, no one can dispense someone from swearing to the truth about things past or present. So too, no one can dispense someone from making true that which one has promised by oath to do in the future. Yet, the necessity of

[1136] Criminal Code, Chapter 9 of the Laws of Malta, arts 104-109. These articles delimit and determine the scale of punishment when perjury is proved in criminal and civil proceedings. The range of punishment varies from seven (7) months to five (5) years, subject to aggravations and depending on the gravity of the case. Punishment automatically includes *general interdiction*, as well as *interdiction* from acting as witness, except in a court of law, or from acting as referee. In this latter case the period of interdiction may range from five (5) to twenty (20) years.

dispensation arises from the fact that experience teaches that what is right and useful in itself and considered in general terms, may however at times, prove to be wrong and harmful in respect to a particular given set of circumstances. Indeed, anything morally evil is incompatible with the matter of an oath. It goes without saying that if it is evil, it is incompatible with *justice*, and can therefore never be vouch-saved. Such a case would therefore admit of dispensation. Furthermore, when dispensation is admitted, the effects of what hitherto came under the oath are no longer binding. Several causes may therefore put an end to an oath. These causes may be intrinsic which include, changes taking place after the oath had been taken; and the cessation of the final cause of the oath. There may also be extrinsic causes which are to be granted by a competent authority. These include annulment; dispensation; commutation; and relaxation.

3. Historical Origins: A Brief Overview

Oaths have had a very chequered history and can be traced from biblical, right through to modern times. For reasons of space, method and structure, it is impossible to delve into a detailed analysis of the historical development of this institute. A mere cursory *excursus* will have to suffice.

3.1 *From Mesopotamia and Egypt to Ancient Rome*

Mesopotamian and Egyptian cultures identified the Sovereign with the Divine. Remnants of this outlook prevailed till relatively modern times where the doctrine of the Divine Right of Kings was still extensively adopted. Succinctly, this doctrine led to the identification of the oath with the name of the King or Pharaoh, and eventually, with that of the name of God. The oath therefore, soon became the fulcrum of public life and the binding force of communal existence, and was widely adopted in the various civilizations of the period.

Greek thought considered that the three basic elements to sound political life, namely, the Sovereign, the Judge and the Common Man, were each subject to the same faith. *Licurgus*,[1137] a product of his culture, consequently held that the oath was so important to the serenity of communal life that, 'The oath is that which holds democracy together.'

The Greek *polis* did not understand individual freedom as we do today and furthermore, did not have a sense of separation of the religious from the political sphere as we should have today. The two were then inextricably intertwined! Notwithstanding this, Greek culture did not identify the Divine with the holders

[1137] Spartan law-maker of the VIII Century B.C.E.

of Political Power and this made it possible for the gradual but long process of development towards the actual value of the oath from the political point of view.

In Ancient Rome, oaths were sworn upon the *Iuppiter Lapis*[1138] found in the Temple of Jupiter on the Capitoline Hill. It must be remembered that in Greco-Roman mythology, Jupiter was held to be the supreme divine law-maker responsible for law and order. An aspect of this role was that of having nominees to high office swear before this stone upon investiture. Failure to do so within the legally prescribed time disqualified incumbents from assuming the functions of the office to which they had been appointed. Roman Magistrates had to take the Oath of Office before assuming their powers. This they had to do to publicly thereby affirming that they would faithfully carry out the functions of their office for the good of the State, and had to do so within five days of their appointment. Conversely, upon leaving their appointment, they were made to take a further oath affirming that *nihil contra leges fecisse*. Therefore, even though elected and proclaimed, Magistrates in Roman times could not exercise any powers appertaining to the office, like recalling a meeting of the Senate, unless they had first proclaimed the oath *in leges* fully establishing them formally in office. If one refused to take this prescribed oath, one would lose all his rights to exercise the functions of his office.[1139]

An interesting incident is that relative to this illustrious Roman general. During the First Punic War[1140] he was defeated in Africa and taken prisoner by the Carthaginians. Briefly, as the war was heavily dissipating its resources, Carthage wanted to sue for peace. The Carthaginians decided to include Regulus to the delegation they sent to Rome to negotiate a treaty and at the same time conclude an exchange of prisoners. However, before leaving Regulus was made to swear that he would return to his imprisonment in case these negotiations failed. When the Carthaginian delegation arrived, Regulus neither wanted to enter Rome nor to address the Senate as he considered himself to be a mere slave to the Carthaginians. The Senate then resolved to go to him and discussions were held in the Campania region. He exhorted this august body to reject Carthage's proposals and instead, to continue the war, as at this point Carthage was not as powerful as it was when the war was started. He further urged the Senate not to release any prisoners in conjunction to his release as the Carthaginian prisoners were all in a better physical and mental condition. Regulus gave this advice when

[1138] The Jupiter Stone.

[1139] Interestingly enough, as late as 1880, Charles Bradlaugh was denied a seat in the Houses of Parliament in the United Kingdom since because of his professed atheism, he was judged unable to swear the Oath of Allegiance in spite of his proposal to swear the oath as a "matter of form."

[1140] 264 - 241 B.C.E.

he was conscious of the fact that this would land him into serious trouble on his return to Carthage. Indeed, his friends and relatives exhorted him not to return to Carthage and instead, to return with them to Rome. Furthermore, even the chief priest declared that as the oath had been extorted from him by force, he was not bound by its constrictions. However, he preferred to return to certain death rather than not to live up to the word he had given to his enemy. This made him one of the noblest characters in history!

The *promissio iurata liberti* is another interesting occurrence which throws further light on how Rome viewed this particular institute. This was the oath by which a slave bound himself to give service to his master *after* the latter would have emancipated him. One must immediately recall that the slave was legally deprived of juridical personality and therefore could in no way enter into the legal sphere and be recognized as being the subject of rights. He could not therefore, validly bind himself under the *jus civile*.

However, to be able to surmount this grave legal obstacle, Roman law utilized this particular legal fiction offered by this institute.[1141] Through the use of religion, even slaves became recognized as legally fully *capax* as the slave was now bound in *conscience* to live up to his word. Repeating the oath immediately upon emancipation, he then gave rise to a valid obligation duly recognized at civil law. This meant that the master could then enforce such obligations against the slave by means of a particular action, the *legis actio per conditionem*.

It is therefore evident that Roman law held the oath in high esteem. The following maxims throw further light on this perception.

'*Juramentum est indivisibile; et non est admittendum in parte verum et in parte falsum*.'[1142]	An oath is indivisible; it is not to be held partly true and partly false.

1141 The *Iusiurandum Liberti*.
1142 4 Inst. 279.

'*Jurare est Deum in testem vocare, et est actus divini cultus.*'[1143]	To take an oath is to call upon God as witness and is an act of religion.
'*Jurato creditur in judicio.*'[1144]	Credence is to be given to one who takes the oath.
'*Sed in jure jurando non qui metus, sed quae vis sit, debet intelligi; est enim jus jurandum affirmatio religiosa; quod autem affirmate, quasi Deo teste promiseris, id tenendum est. Iam enim non ad iram deorum, quae nulla est, sed ad justitiam et ad fidem pertinet.*'[1145]	One ought to understand not what fear there is in such an oath, but what force: for a sworn oath is a religious affirmation; and if you have promised something by affirmation with the god as witness you must hold to it. What is relevant here is not the anger of the gods, which does not exist, but justice and faith.

3.2 *The Jewish Tradition and the Old Testament*

The very concept of oaths is deeply rooted in Judaism and betrays specific undertones as the Jewish faith is centred on a *personalised* God. Therefore, for the Jews, an oath has a much deeper religious meaning than amongst pagans. Oaths were mostly used as a sort of oath of purification in case of injury or theft, or in case of some entrusted or found property. Indeed, oaths before judicial tribunals seem to have been very rare. The most widely used method of affirming an oath was usually that of holding a sacred object in one's hand or, that of raising one's hand high in doing so. Originally, as circumcision was the first commandment Abraham performed as a sign of subservience to God, this

[1143] 3 Inst. 165.
[1144] 3 Inst. 79.
[1145] Cicero, *De officiis*, III, [104] (see Cicero, *De officiis*, in *The Latin Library*: <http://www.thelatinlibrary.com/cicero/off3.shtml#104> accessed 29 November 2016; and Cicero, 'On Duties' in M.T. Griffin and E.M. Atkins (eds), *Cambridge Texts in the History of Political Thought* (Cambridge University Press 1991) 140).

particular intervention was taken as the way to outwardly manifest personal recognition and approval to be subservient to God.[1146]

Reference to the oath is indeed found very early in Genesis after Noah and his family survived the flood. It is recorded that the first thing the survivors did was to offer some clean animals in sacrificial thanksgiving to God. On seeing this God was moved, blessed Noah, and seems to have had second thoughts as to His previous rash behaviour.

> Never again will I curse the earth because of man, because his heart contrives evil from his infancy. Never again will I strike down every living thing as I have done...When the bow is in the clouds I shall see it and call to mind the lasting Covenant between God and every living creature of every kind that is found on the earth [1147]

The words *never again* are commonly interpreted by scholars as serving as an oath.

Another episode from the Old Testament concerns the relationship that emerged between Abraham and Abimelech, king of the Philistines. The latter, accompanied by Philcol, commander of his army, requested a peace treaty from Abraham as the Philistines were afraid that as God was always on Abraham's side, Abraham would feel strong enough to deal falsely with them and notwithstanding the treaty, annihilate the Philistines just the same. The Philistine king wanted concrete assurance that this would not happen. He wanted to be certain that Abraham would keep his word. Abimelech therefore requested him to confirm this undertaking and,

> Swear by God to me here and now that you will not trick me, neither myself nor my descendants nor any of mine, and that you will show the same kindness to me and the land of which you are a guest as I have shown to you.
>
> Abraham acquiesced.
>
> Soon, a minor incident concerning a well broke the peace between the two factions. Things were coming to a head until Abraham took the unprecedented step of rendering testimony to the previous oath by confirming it with consummate showmanship.

1146 Genesis 17: 9 – 14.
1147 Genesis 8: 21; 9: 16.

> Then Abraham took sheep and cattle and presented them to Abimelech and the two of them made a covenant. Abraham put seven lambs of the flock on one side. 'Why have you put these seven lambs on one side?' Abimelech asked Abraham. He replied, 'You must accept these seven lambs[1148] from me as evidence that I have dug this well'.[1149]

This is why they call this place Beersheba, because the two of them swore an oath.

Without going into further detail suffice it to say that in the Old Testament, the presumption concerning the oath is complete unadulterated faith in the living personal God. Only the oath to God is expressly commanded[1150] whilst, on the other hand, only the oath by false gods is specifically prohibited.[1151] The oath is seen as a sign of faithful attachment to God.[1152] Therefore, whilst a special blessing from God is assured to those who faithfully swear to Him,[1153] refusing to live up to one's oath would lead the recalcitrant into sin[1154] as the obligation attached to an oath leaves no room for ambivalence. This obligation is absolute.[1155] One who does not live up to his own oath attracts God's wrath.[1156] It is far better not to swear at all than to swear and not live up to one's words.[1157]

3.3 *The New Testament and Christianity*

[1148] It is interesting to note that this is the origin of the Hebrew word for swearing i.e. *to affirm something with seven sacrifices*. As Maltese is, like Hebrew, part of the Semitic linguistic branch, the seven lambs - *sebat iħrief* – might have given origin to the word *ħalef* in Maltese as the '*r*' and '*l*' are easily interchangeable. Obviously, linguists should look further into this intuition.

[1149] Genesis 21: 27-30.

[1150] Exodus 22: 10 'When a man has entrusted to another's keeping a donkey, ox, sheep, or any beast whatever, and this dies or is injured or carried off, without a witness, an oath by Yahweh shall decide between the two parties whether one man has laid his hands on the other's property or not.'

[1151] Exodus 20: 7 'You shall not utter the name of Yahweh your God to misuse it, for Yahweh will not leave unpunished the man who utters his name to misuse it.'

[1152] Deuteronomy 6: 13 'You must fear Yahweh your God, you must serve him, by his name you must swear.'

[1153] Psalm 24: 3, 4 'Who has the right to climb the mountain of Yahweh,
who has the right to stand in his holy place?
He whose hands are clean, whose heart is pure,
whose soul does not pay homage to worthless things
and who never swears to a lie.'

[1154] Deuteronomy 23: 21 'If you make a vow to Yahweh your God, you must not be lazy in keeping it; be sure that Yahweh your God requires it, and to withhold it would be a sin.'

[1155] Numbers 30: 2 'If a man makes a vow to Yahweh or takes a formal pledge under oath, he must not break his word: whatever he promises by word of mouth he must do.' – Unmarried or married woman these are treated equally unless respectively, the father or the husband, on hearing of the oath, expresses his disapproval. Then: 'Yahweh will not hold her to it.'

[1156] Psalm 15.

[1157] Ecclesiastes 5: 4 'Better a vow unmade than made and not discharged.'

The New Testament represents a definite break with the past. The oath is here presented in a light which is completely different from that in which it was expounded in the Old Testament. Whilst previously the oath was seen as a religious duty, it is instead now expressly forbidden in no uncertain manner.

In this respect, two important episodes deserve mention, each reflecting Christ's central admonition that, 'Do not imagine that I have come to abolish the Law or the Prophets, I have come not to abolish but to complete them.'[1158]

The first is that clear and explicit rebuke uttered by none other than Christ Himself as reproduced by Matthew in the Sermon on the Mount,

> Again, you have learnt how it was said to our ancestors: 'You must not break your oath, but must fulfil your oaths to the Lord.' But I say this to you: do not swear at all,[1159] either by heaven, since that is God's throne; or by the earth, since that is his footstool; or by Jerusalem, since that is the city of the great king. Do not swear by your own head either, since you cannot turn a single hair white or black. All you need say is "Yes" if you mean yes, "No" if you mean no; anything more than this comes from the evil one.[1160]

The second is that reproduced in James where he echoes Christ's same caution, 'Above all, my brothers, do not swear by heaven or earth, or use any oaths at all. If you mean 'yes', you must say 'yes'; if you mean 'no', say 'no'. Otherwise you make yourselves liable to judgement.'[1161]

These two episodes are clear and explicit rebukes. They do not really leave any room further argument. Man's deep reverence for God, coupled with his changed essence after absorbing Christ's teachings, have revealed the proper orientation that there should be in this regard. In this way, man must restrain himself from using the absolute essence as witness to his statements. The taking of an oath is therefore expressly forbidden. It is perhaps even suggested that to take an oath is even punishable as sinful. Therefore, even if one feels ever so sure that one is telling and affirming the truth, it is very easy to be in error, and therefore, in *sin*. This then implies that by taking an oath one would be involving none other than

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1158 Matthew 5: 17.

1159 '*...noilite omnino jurare...*'

1160 Matthew 5: 33 – 37. It must be remembered here that Christ goes much further than this and makes earth shattering reference to the "Lex Tallionis", (eye for eye principle), which He condemns in no uncertain manner, commanding that when one is slapped on the face one should not retaliate but should instead unorthodoxly offer the 'other cheek'; to those who take one's tunic, one should also give them one's cloak; to those who order that one should go a mile, to go two; to those who hate their enemy, to love one's enemy and to pray for one's persecutors.

1161 James 5: 12.

God Himself in one's sin! This would then really amount to presumptuous behaviour as one is actually asserting extreme trust in one's ability to be truthful, so much so, that one even calls upon oneself the judgement of God. This is a wrong towards God and is therefore subject to His punishment.

Christ's realignment indicates that man should not willingly sin against God's commandments. Instead, what Christ is inviting us to do is that we should always have God for a witness wherever we are and whatever we do. There is no need for the reformed man to make a special attempt to be truthful before the Courts or in other everyday circumstances. One should always strive to live to the highest standards of truth regardless. The oath therefore dulls this sense of commitment and actually betrays a demoralising, rather than a morally elevating, effect.

Christ's banning of the oath is therefore not granted on a legalistic orientation but instead, on a profound religious and ethical foundation soliciting us always to testify in complete truthfulness. This particular orientation therefore binds the believer to absolute obedience to Christ in full discipleship – always to live and testify in complete truthfulness – as *love* is the central feature of His religion.

Acceptance of the oath in Christianity was only achieved after considerable struggle, and even then, its acceptance was not unqualified. Indeed, the taking of oaths clearly pre-dates Christianity however, on adopting this institute it gave it a new meaning. As David Mellinkoff says,

> The Church did not bring heaven and hell into England. They were already there as Old English words: Heofen as the sky and residence of the gods, hell as a place of life after death. Christianity gave new meaning to both words. Hell became a place of torment, inhabited by devils, oath breakers and other condemned souls. And it was now understood that good man might live forever in heaven. This shift of emphasis put considerable wallop into the oath.[1162]

> Notwithstanding this, the leading Church Fathers, such as Origen, Gregory of Nazianzus, Tertullian, and Chrysostom, all rejected the taking of oaths most vigorously. In this regard it is perhaps Chrysostom who goes furthest calling the oath the 'snare of Satan.'[1163] Only St. Jerome left some space for manoeuvring. He claimed that as Christ only expressly prohibited swearing by heaven, earth, Jerusalem, or by one's own head, this left room for some

[1162] David Mellinkoff, *The Language of the Law* (Boston: Little, Brown & Co. 1963) 49.
[1163] Chrysostom: 'Do as you choose; I lay it down as a law that there be no swearing at all. If any bid you swear, tell him, Christ has spoken, and I do not swear.' (Homil. ix. in Act. Apostol.).

> limited action and some oaths could therefore be made. This outlook was later adopted by a *decretum* of Gratianus and eventually even by the Popes. Athanasius, following St. Paul, further elaborated, 'I stretch out my hand, and as I have learned of the apostle, I call God to witness on my soul.'[1164]

Further development could only take place after the revolutionary changes that occurred in the IV Century. During this particular century Christianity was then recognized as a fully-fledged religion within the Roman Empire[1165] with the Emperor[1166] himself outwardly professing to have converted to the Catholic Church. Some years later, Christianity found itself transformed from an under-ground congregation of believers to the powerful status of being the official Religion[1167] of the dominating Empire of the era.

As regards the oath, Constantine's laws were subsequently absorbed and codified in the Code of Justinian.[1168] These now required every witness involved in judicial procedures to give evidence on oath. In this way, because of its social significance, the oath was soon rehabilitated amongst Christians as it was soon evident that it was in the state's very interest to reinstate it. The Church, as willing servant of the powerful state, supported and sanctioned the state's demands. The oath had by then deeply penetrated the Christian tradition and a specific coherent procedural attitude started to develop. In this way, a new political order started to evolve, with it, the positive doctrine of the Christian oath.

Meanwhile, the Germanic Tradition was based on oaths of *fealty* – loyalty – and is a direct progenitor to the notion of chivalry as this emerged later in the Middle-Ages.

4. Augustine's Orientation

Throughout his episcopal life Augustine was unable to keep his original theoretical position against oaths separate from the persistent demands of his faithful where oaths were manifestly commonplace in their daily lives.[1169] In his earliest writings he pursued hard-line arguments against swearing in line with the Fathers of the Church. However, handling matters of trust and uncertainty on

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1164 Apol. Ad Imp. Const.
1165 Edict of Milan 313.
1166 Constantine the Great: 312-337.
1167 In 391 Emperor Theodosius declared that Catholic Christianity was the only religion to be permitted throughout the Roman Empire.
1168 Codex Justinianus.
1169 Kevin Uhalde, *Expectations of Justice in the Age of Augustine* (University of Pennsylvania Press 2007) 13.

a daily basis as part of his episcopal mission, he was soon forced to reconcile the *theoretical* and *practical* aspects of this issue by establishing a sensible fool-proof doctrine based on solid theological foundations which both reflected his sensibilities on the issue, and the stark reality that he witnessed daily because of his duties. He was quite aware of the objections to the use oaths and hence, urged their use only in urgent situations.

His contribution to this particular sphere of activity therefore portrays him as a singular *mediator*. He not only helped in no small measure to bring about Christianity's final general acceptance of this particular institute, but in so doing, he also put an end to the considerable struggle that this issue often gave rise to. Yet, notwithstanding this, such acceptance is not unqualified.

Following in St. Paul's footsteps, who taught that oaths may only be made for *grave* and *just* reasons, and the eye opener that: 'When God made the promise to Abraham, He swore by His own self, since it was impossible for Him to swear by anyone greater…' [1170]

Augustine argued, in exquisite Augustinian logic, that if God Himself took oaths, how was it possible for Him to prohibit man from doing the same? He argued that an oath too could contribute to the glory of God and could also be useful both to state and neighbour. It was therefore *permissible*, he concluded, to take oaths. It was only oaths taken in falsehood or without necessity, i.e. *falsum, vel sine necessitate*, that were prohibited. Furthermore, for Augustine the gravest oath one could utter was a curse against oneself, the "*exsecratio*" which takes place when one utters words like, 'If I do this, let me suffer the same.'[1171]

By addressing the practical concerns of his flock Augustine turns the tables on the detractors of oath-taking. Through his subtle intellectual nuances, he distinguishes between acts that are merely acts of imperfection from acts that are instead acts of iniquity. In general terms he thus advanced the principle that abstention from taking oaths was always recommendable. In this regard, in answering the second objection to the question of whether it is at all lawful to swear, which become apparent from the logical *dictum* that whatever comes from evil seems to be unlawful,[1172] St Thomas[1173] answers that oaths are required because people need to be ascertained and rests his argument by quoting none other than Augustine who held,

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[1170] Hebrews 6: 13.

[1171] Augustine, *Enarrationes in Psalmos*, 7.3.

[1172] Matthew 7: 18: '…neither can an evil tree bring forth good fruit.' In legal terms, this would be equivalent to what has become known as the theory of '*the forbidden fruit*'.

[1173] Aquinas, *Summa Theologica,* IIa-IIae, q.89, a.1, *ad* 2.

> If you have to swear, note that the necessity arises from the infirmity of those whom you convince, which infirmity is indeed an evil. Accordingly, He did not say: 'That which is over and above evil,' but 'is evil'. For you do no evil; since you make good use of swearing, by persuading another to a useful purpose: yet it 'comes of the evil' of the person by whose infirmity you are forced to swear.[1174]

Hence, for Augustine, the requisites for the taking of oaths are very rigorous. He concedes that an oath may be taken only if there is a necessity for its use assimilating this use to medicine – which though disagreeable, is at times indispensable! Hence, the oath, like medicine, has to be used with *judgement* and *discretion*, and only when some necessary cause arises!

One should also refrain from taking an oath if whatever one is asserting is not according to *Truth*, *Prudence* and *Justice*. The sanctity of the Divine name requires that the oath is not taken for futile reasons. In addition, if required by illegitimate civil authorities, it may also be refused.

Furthermore, oaths always involve the possibility that man may commit perjury. To avoid this grave sin Augustine holds that it is therefore just that man may be prohibited from taking oaths because of this very fact itself. The further man is from taking an oath, the further man is from committing perjury. One who takes an oath may affirm a falsehood or the truth, but one who does not take an oath can never affirm a falsehood. It is a safer stance!

This logical standpoint found widespread application even in later epochs. Canonists followed in Augustine's footsteps and held that oaths should be used only *in dubiis et necessariis*. This clarification subsequently even found place in a decree of Pope Alexander III disapproving the practice of tendering the oath to a party who had previously established his claim by documents or witnesses.

4.1 *Publicola's Requests and St Augustine's Replies*

Publicola was a Christian landowner who had strong commercial interests in Roman North Africa. In order for him and his estate administrators to ensure that their commercial interests would not flounder but run on solid commercial lines they had to compromise and act according to the customs of their 'barbarian' interlocutors. These employees were engaged mostly in the carriage of baggage and, in protecting extensive territories reserved for the cultivation of

[1174] Augustine, *De Sermone Domini in Monte*, i. 17.

crops. They were thereby utilized mostly in ensuring that crops were not lost, and that time-frames for deliveries were guaranteed.

At the same time however, this relationship created a particular dilemma! In accepting the word of these people coming, from the country of the *Arzuges*,[1175] Publicola and his administrators became unwilling accomplices in accepting that their commercial success would be guaranteed by means of oaths made to a false god, or even to 'demonic spirits.'

It seems that Publicola could no longer carry this issue of conscience on his own and although he seems not to have been one who relished epistolary communication, he nonetheless decided to write directly to Augustine for advice.[1176] This letter is unique and betrays a rather paranoiac writer who tried to solicit as many possible answers as he could manage. Augustine's reply[1177] speaks volumes on the saint's tactful behaviour and his willingness to be of complete service to his flock, regardless.

Publicola's letter contained a plethora of queries but here, the analysis is obviously limited to issues concerning oaths. He is worried that after the barbarians take their oaths by their gods they are then engaged by Roman Christian citizens as if they are trustworthy. For Publicola this created a moral dilemma. In this respect the trustworthiness and fidelity of these barbarians only resulted from this oath - an oath which in itself was considered blasphemous!

Publicola's grievous doubts emerged from the fact that this oath of the barbarians made Roman Christian citizens who engaged them, together with the crops committed to their charge, and the profits that were made from their sale, participate in the sinfulness of the barbarian oath as this very same oath is the very basis of the commercial transactions referred to. Does not this sinful oath by the false gods by which the stewards and agents secure protection of the crops defile the very crops that were intended to be protected? Subsequently, if a Christian uses the crops, or even takes the money from their sale, is he not himself defiled? And what if one comes to know of this despicable oath indirectly, how is one to behave? What type of investigation is he to undertake? Does not this oath involve mortal sin? What if the Christian entrepreneur subsequently comes to know that some portion of the wheat, beans, wine or oil, was offered in sacrifice to false gods? What if wood is taken from an idol's grove? Could a Christian buy meat when in doubt whether it had already been offered to false

[1175] The people inhabiting this area probably lived around the border of modern Tunisia and Libya.

[1176] This letter was written between 396 and 399.

[1177] Letter 47 (also written within the same time-frame).

gods? What if some consignment of meat was thought to have been originally offered to false gods, but later someone confesses that this was not so, could a Christian use or sell that meat and keep the price? When one is overcome by hunger and finds food in an idol's temple, should he eat the food, or die?

Although some of these questions seem legitimate, the sensation the modern reader gets is that the queries adduced seem quite tendentious by modern standards. However, this might be quite an erroneous impression as one must have a full grasp of the particular cultural and historical background before coming to certain conclusions. Yet, this feeling itself seems buttressed by Augustine's opening paragraph in his reply. Be that as it may, these questions must have certainly tested this busy saint's patience to the full.

Notwithstanding this, and notwithstanding the fact that Augustine had only been bishop for some two years, he still lovingly[1178] answered Publicola in a diplomatic and masterly fashion. He started by assuring Publicola that the perplexities he presented him with had become his own – however *not* because all the queries he submitted disturbed him, but because he had to answer in a way that would cancel those perplexities, thereby implying that most of the queries were not really issues of conscience that merited a reply. In this respect Augustine also seems to admonish Publicola telling him that he cannot resolve all his queries by giving him conclusive answers to everything. He even cautions him by telling him that although he might answer him to the best of his ability and 'write things which appear to me most certain,'[1179] yet, Publicola might end up being more confused than before 'and though it is in my power to use arguments which weigh with myself, I may fail of convincing another by these.'[1180]

a) The service of one who guaranteed his fidelity by swearing by his false gods

Augustine is very pragmatic. He asks his interlocutor to consider what he would do in case one failed to keep his word after pledging himself by false gods. Would he regard this man as guilty of a two-fold sin? For if he kept his engagement which he confirmed by swearing by false gods, he would be guilty in this only. If he swore by false gods and did not keep his word, he would be guilty of two sins, i.e. that of swearing by false gods and of not keeping his word. In his conclusion, which Augustine qualifies as *obvious*, he says,

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1178 ibid para 1.
1179 ibid para 1.
1180 ibid para 1.

'...sine ulla dubitatione minus est per deum falsum iurare veraciter, quam per Deum verum fallaciter.'	'that in using, not for an evil work, but for some good and lawful end, the service of a man whose fidelity is known to have been confirmed by an oath in the name of false gods, one participates, not in the sin of swearing by the false gods, but in the good faith with which he keeps his promise...it is beyond all doubt, worse to swear falsely by the true God than to swear truly by the false gods for the greater the holiness by which we swear, the greater is the sin of perjury.'

b) The service of one who requires others to pledge themselves by taking oaths in the name of their false gods

Here, Augustine refers to the example of Laban and of Abimelech, (the former swearing by his god Nahor; the latter by his gods), reproduced by Publicola himself in his letter. Referring to Christ when he is reported to have said *'...noilite omnino jurare...'*[1181] Augustine emphasises that these words were, 'spoken, not because it is a sin to swear a true oath, but because it is a heinous sin to forswear oneself: from which crime our Lord would have kept us at a distance, when He charged us not to swear at all.'

At this point he even reminds Publicola that he does not remember reading anything in the Scripture that one is not to take another's oath!

c) Whether social harmony is established by exchanging oaths

In his reply Augustine holds that if one were to answer in the negative, then it will be well impossible to find a place on earth where one could live. This is so because the security of peace only rests on the oaths of barbarians. In fact, it is not only at the frontier, he says, but also in the provinces that peace is

[1181] ibid para 2.

established through the oaths submitted by the barbarians. Their oath was not only, not a cause of any damage but, was actually beneficial.

> And from this it would follow, that not only crops which are guarded by men who have sworn fidelity in the name of their false gods, but all things which enjoy the protection secured by the peace which a similar oath has ratified, are defiled.[1182]

As Pietro di Giovanni Olivi held, one had to distinguish between *faith* and *good faith*. The former was to be understood as a *cult,* the latter, as *fidelity* to what was promised. Therefore, one who swears by false gods commits the sin of idolatry but, at the same time expresses good faith which might have in it some positive consequence. To clarify this outlook, he compares the oath to conjugal love. The latter, he maintains, contains three goods: generation of off-spring; extinction of conjugal debt; and remedy to worse evils. The former, may also contain three goods; confirmation of the oath; voluntary obligation, or custom, to bear witness to the truth of what one says; sentiment of reverence that exists when one calls God as witness.

d) Concerns on the fruits, (wheat, oil, meat, olives, and revenue arising from their sale), offered to false gods

If anything is taken with the permission of their Christian owner to be offered to false gods, then he is guilty in permitting this to be done. If he could have prevented such utilization but did nothing to stop such use, then he is guilty. If, on the other hand, this had happened without his knowledge or that when this happened he had no power to prevent it, then he should not scruple from using the rest. Here, Augustine seems to be reaching the limits of his prudent patience when he says,

> For we have no scruple about inhaling the air into which we know that the smoke from all the altars and incense of idolaters ascends…when… the spoils of these places are applied to the benefit of the community or devoted to the service of God, they are dealt with in the same manner as the men themselves when they are turned from impiety and sacrilege to the true religion.[1183]

He finally admonishes Publicola and instructs him to study St. Paul reminding him that the Apostle himself had no scruples in eating while in Athens even though the city was consecrated to Minerva. He finally warns him to be aware of

[1182] Letter 47 para 2.
[1183] ibid para 3.

holding as good what is evil as this would be a sin of ignorance in which one thinks to be right that which is objectively wrong.

5. Conclusion

As oaths already formed part of man's psyche well before Christianity appeared in history, Augustine's practical outlook on the whole issue positively mitigated his original theoretical position. In practice, he realised that all that mattered was the active bond that existed between the human and the Divine. This bond helped to protect fidelity, uncover deception and punish transgression for the common good which is that benefit society acquires in this regard from the social cohesion that results – a *socialis necessitudo*.

When St. Thomas[1184] analysed this exchange of letters between Publicola and Augustine he concluded that Christians did not have to worry about sharing someone's sin. Augustine emphasized all along that the most important issue in this institute was that it stood for public credit. What people of different creeds were doing when they accepted their reciprocal oaths by their different deities was to exchange the same currency of fidelity.

The legacy that Augustine has transmitted to future generations is that in this sphere one had to focus on the sanctity attached to the Christian oath as this involves none other than God Himself bringing Him squarely into the human equation. Through his almost paranoiac letter Publicola might have been uncompromisingly assiduous but, all the same, he helped to give Augustine the opportunity to draw the notion of the taking of oaths out of the theoretical sphere and project it into the practical realm of everyday life. Luckily, Augustine felt obliged, in love, to analyse the issues presented before him – enriching us without end.

[1184] Aquinas, *Summa Theologica*, IIa-IIae, q.78, a.4, r.

DATA PRIVACY IN JAPAN: DO RECENT AMENDMENTS WEAKEN PRIVACY TO FOSTER 'BIG DATA'?

Dr Rachel-Marie Vella-Baldacchino LL.D.

ABSTRACT[1185]

This article shall examine two principal themes which each bear a reflection on the other. The first of these is the manner in which data protection and data privacy has evolved in Japan over time and how the Asian cultural context of respect towards the community has played a significant role in the formation of values relating to the protection of private life, including inter alia norms relating to data protection. In this respect, the second stream of this article shall reflect upon recent amendments to the Japanese Act of the Protection of Personal Information of 2003 and their implications on privacy and on the collection and commercialization of 'Big Data', in the context of the growing importance of Big Data in the entire world but also in Japan, which is linked to increasing computing power and more complex algorithms that allow for deeper data mining and information analysis.

KEYWORDS: DATA PROTECTIONS – DATA PRIVACY – BIG DATA – JAPANESE LAW – COMPARATIVE LAW – IT LAW

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DATA PRIVACY IN JAPAN: DO RECENT AMENDMENTS WEAKEN PRIVACY TO FOSTER 'BIG DATA'?

Rachel-Marie Vella-Baldacchino

1. Introduction

Big Data has been spoken of as 'something new and important taking place to the role of data in business and society'.[1186] Information flows in an era of abundant data are changing the relationship between technology and the role of the state, and it could be said to be universally agreed that most current laws relating to privacy were conceived with paper records in mind and were not originally intended for networks and largescale data sets. In a world where all information is interconnected, there is a broad scope for the analysis of principles that do in fact take into account vast quantities of data, even if these are emerging from legal cultures that are geographically distant from the European Union and its general harmonised European framework for data protection.

In today's world, the right to a private life is widely recognized as a universal human and fundamental human right, enshrined within the Universal Declaration on Human Rights[1187] and the European Convention of Human Rights.[1188] Despite this, different cultures and different peoples within such cultures each have their own understanding of what is privacy, and how far should a country's or society's norms protect privacy. One of the main goals of this paper is to look closely at the legal and societal culture existing in Japan, which manifests itself in the law that regulates the protection of personal data, namely, the Act on the Protection of Personal Information of 2003 and the recent significant recent amendments to this law which reflect a discernible intention on the part of the legislator to foster the use of Big Data by allowing businesses to exploit the economic value of such information, as shall be seen in greater detail throughout the course of this paper.

2. A Socio-Historical Context to Data Privacy in Japan

1186 'Elusive big data: The thing, and not the thing' (The Economist, February 18 2013) <http://www.economist.com/blogs/graphicdetail/2013/02/elusive-big-data> accessed 23 July 2016.

1187 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 12, No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

1188 European Convention on Human Rights (ECHR) art 8(1), Everyone has the right to respect for his private and family life, his home and his correspondence.

The very notion of privacy can trace its roots in a Western culture,[1189] where the understanding of privacy itself differs between Europe and North America. Whereas European data protection and privacy law is the natural outcome of centuries-long revolt against privileges of status as epitomised by the French Revolution of 1789 and emphasises respect and dignity of the person,[1190] the USA understanding emerges from leading cases such as ***Katz v United States***,[1191] where the US Supreme Court held that the police needed a warrant under the Fourth Amendment to the Constitution to carry out wiretapping activities. The judicial thinking in this ruling pivots on concepts of liberty from social anxieties and from the powers of police and other government officials. The Japanese understanding of the concept of privacy and the protection of private life, which is similar to a certain extent to the general Asian culture, has been traditionally regarded as a symbol of selfishness or of self-centredness. The extension of this statement to the diversity of Asian peoples across the great Asian continent could easily be construed as being an excessively broad generalisation, however the author does so with caution and the support of academic writers.[1192] Japanese society boasts of a long history that is built around respect and prestige of the community and the public, as reflected in the Japanese historical concept of the *Bushi-do*, according to which samurai fight in the interest of their *Syo-gun,* or the head of the community, rather than for their own individual interest.[1193] Japanese awareness of privacy has been relatively small as a result of deeply-rooted values such as *meshi-hoko*, which refers to the belief that one should 'devote oneself to the public, sacrificing one's private realm'.[1194] Yet, although the tradition of communitarianism has in turn prevented the development of an elaborate culture of the protection of privacy as a legal matter in Japan, the rapid proliferation of technology and communications in all sectors of life, work and commerce within this same community has in turn led to a growing public concern to enact measures that have the protection of privacy as their overreaching aim.

The first Japanese court to make considerations towards the concept of privacy was the Toyko District Court in 1964, acknowledging that the 'right to privacy is recognized as the legal or protection of the right so as not to be disclosed of private life'.[1195] Further cases in subsequent years continued to recognise the

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1189 Hiroshi Miyashita, 'The evolving concept of data privacy in Japanese law' (2011) 1 International Data Privacy Law229, 230.

1190 James Q Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 Yale Law Journal 1151, 1163.

1191 389 US 347 (1967).

1192 Hiroshi Miyashita, 'The evolving concept of data privacy in Japanese law' (2011) 1 International Data Privacy Law 229, 230.

1193 ibid.

1194 ibid.

1195 Judgement of the Tokyo District Court, 28 September 1964, *Hanrei-jiho* vol 385, 12.

importance of the protection of private life, gradually overcoming the traditional cultural aversion towards a private life and moving towards a recognition of privacy as a right and interest, in spite of there being no written law at the time providing for such right. Indeed, the first piece of legislation dealing with privacy was enacted in 1988, in the form of the Act on the Protection of Computer Processed Personal Information Retained by Administrative Organs. This law was considered to be a reaction against the advancement of technology, enacted for the purpose of the protection of personal information processed by administrative organs.[1196]

Present-day privacy legislation to protect personal data was passed by the Japanese Diet in 2003 through the Act on the Protection of Personal Information (Hereinafter referred to as 'PIPA' or the 'Act'), following two years of controversy and after having been defeated once in the Diet due to fierce resistance by the mass media.[1197] The Act came into force in 2005 and is firmly rooted in the data protection principles enshrined in the OECD Guidelines of 1980,[1198] however it has been noted in a detailed 2009 analysis that the data privacy principles rarely go beyond the OECD model to achieve the higher standards set by the European data protection Directive.[1199] Since 2003, the Act has been amended in a few instances, being initially reviewed based on the supplementary resolution of the National Diet, by both the House of Representatives (*Shugiin*) and the House of Councillors (*Sangiin*). At the time, the Quality-of-Life Council discussed major issues relating to the Act, albeit deciding against carrying out any amendments; this opinion was submitted to the Prime Minister of Japan. The main goal of the Act's review was to deal with the many cases of 'overreaction' that arose from overzealous applications of the privacy and protection of personal information that were rendered necessary ensure compliance with the provisions of the Act, leading to reported cases where local governments were reported to have refrained from releasing personal information following an earthquake even when this was necessary in order to provide effective assistance to vulnerable persons such as the elderly or disabled persons.[1200] Other cases included instances whereby apartment buildings stopped listing names of residents at

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[1196] Hiroshi Miyashita, 'The evolving concept of data privacy in Japanese law' (2011) 1 International Data Privacy Law 229, 232.

[1197] ibid.

[1198] OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (*OECD*) <http://www.oecd.org/internet/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm> accessed 23 July 2016.

[1199] Graham Greenleaf, 'Country Studies—B5 Japan' in D Korff (ed), *Comparative Study on Different Approaches to New Privacy Challenges, in Particular in the Light of Technological Developments* (European Commission, Directorate-General Justice, Freedom and Security 2010) <http://ssrn.com/abstract=2025557> accessed 23 July 2016.

[1200] Hiroshi Miyashita, 'The evolving concept of data privacy in Japanese law' (2011) 1 International Data Privacy Law 229, 234.

their doorbells, and hospitals stopped posting patient names outside hospital rooms.[1201] Such issues dealt with through amendments to the Basic Policy on the Protection of Personal Information issued under the Act and certain guidelines, rather than by amending the text of the Act itself, which by now incorporates commitments by the government to curb problems of 'overreaction', considers the possibility of contributing to cross-border cooperation in international fora such as the OECD, encourages the publication by businesses of their privacy policies, and exempts security measures from publicly available information.[1202]

Today's generation of Japanese citizens are well aware of the importance of privacy protection and understand the importance of the safeguarding of personal information as an aspect within the notion consumer protection. Moreover, within the context of modern-day Japan, it is noteworthy to observe at this stage of the discussion that the post-war generation in Japan has mostly experienced economic prosperity, marred by a short intermediate period of economic stagnation since the 1990s. Nonetheless, incumbent Japanese Prime Minister Shinzō Abe, re-elected to power in 2012, believes that his 'Abenomics' strategy will reverse this trend; a crucial political and economic issue which is interesting to note in view of the current developments in data privacy rules that touch upon Big Data.

3. 'Big Data': a Digital Sea of Information Ripe for the Taking?

3.1 *Defining 'Big Data'*

Big Data is a term that has carried some hype in recent years and is being adopted in everyday language and news-items often without second thought as to its meaning. However, in reality, it is a term which has been in use since the 1990s, most likely originating in Silicon Valley.[1203] Before the advent of the current decade's generation of computing power, the term Big Data was used during the era of mainframe computers to refer to a quantity of information that was too large to be processed. Over time, the definition of this term has evolved to refer to the massive quantities of data that can be effectively analysed create a benefit towards society or for a particular economic activity or interest.[1204] Among the generally accepted definitions of Big Data is that offered by IBM,

[1201] Sekiguchi Waichi, '"Big Data" Raises Big Legal Questions in Japan' (*Nippon*, 28 November 2014) <http://www.nippon.com/en/in-depth/a03602/> accessed 30 July 2016.

[1202] Hiroshi Miyashita, 'The evolving concept of data privacy in Japanese law' (2011) 1 International Data Privacy Law 229, 234.

[1203] S Arbesman, 'Deflating the hype on big data' (*The Japan Times*, August 21 2013) <http://www.japantimes.co.jp/opinion/2013/08/21/commentary/world-commentary/deflating-the-hype-on-big-data/#.Vo5vjH1mp7t> accessed 30 August 2016.

[1204] Sekiguchi Waichi, '"Big Data" Raises Big Legal Questions in Japan' (*Nippon*, 28 November 2014) <http://www.nippon.com/en/in-depth/a03602/> accessed 30 August 2016.

which characterizes it by the three V's of volume, variety and velocity, and the additional two V's of veracity and value.[1205] Research firm International Data Corporation Japan offers a narrower definition, 'data amounting to 100 terabytes or more,' 'streaming data, including voice, music and images' or 'data whose amount grows by 60 percent or more every year'[1206] but the essential conclusion that may be drawn from the differing definitions remains the same.

Data cannot any longer be regarded as a static tool whose usefulness is finished once the purpose for which it was collected was achieved (such as once a search query has been processed by a search engine such as Google) but rather, it has become an essential raw material of business, a vital economic input, used to create a new form of economic value 'to become a fountain of innovation and new services'.[1207] Once the volume of information available became so large that the quantity being examined no longer could be processed by the computers typically used for this purpose, new tools were developed to facilitate the achievement of the data's potential, such as Google's MapReduce and its open-source equivalent, Hadoop, originally developed by Yahoo.

3.2 *Big Data, its Emergent Growth, and Privacy Concerns in Japan*

Japan and its IT industry, home to technology giants such as Sony, Nintendo, and FujiSoft amongst many others, is no stranger to the vast quantities of data and the potential which this, if properly processed, can accrue. Abe's government has expressed its intention to turn Japan into one of the world's leading IT nations, and it has been demonstrated that a part of the way to achieve this goal is to provide a strategy for 'Big Data'. This emerged clearly with the publication of the government's proposals for the first significant changes to the PIPA,[1208] which upon reading leave little doubt of the intention to make it easier for 'Big Data' processing of personal information and thereby harness the potential of such data. It has been reported in the Japanese press that spending on Big Data in

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1205 'What is big data?' (*IBM*) <https://www-01.ibm.com/software/in/data/bigdata/> accessed 24 July 2016.

1206 Hiroko Nakata, "Big data' – a digital sea of personal info ripe for the taking?' (*Japan Times*, 18 June 2013) <http://www.japantimes.co.jp/news/2013/06/18/reference/big-data-a-digital-sea-of-personal-info-ripe-for-the-taking/#.Vo-M3PkrLIU> accessed 24 July 2016.

1207 Viktor Mayer- Schönberger and Kenneth Cukier, *Big Data: A Revolution that Will Transform how we Live, Work and Think* (Houghton Mifflin Harcourt 2013) 5.

1208 Government of Japan, Strategic Headquarters for the Promotion of an Advanced Information and Telecommunications Network Society (IT Strategic Headquarters), 'Outline of the System Reform Concerning the Utilization of Personal Data' (24 June 2014) - <http://kipis.sfc.keio.ac.jp/wp-content/uploads/2014/07/English-Translation-of-Japanese-Government-Proposal-on-Privacy.pdf> accessed 30 August 2016.

Japan is expected to grow by an average of 39.9 percent each year until 2016,[1209] and it has been reported by IDC that the Big Data technology and services market is forecasted to grow to $48.6 billion by 2019.[1210]

There exists an evident growing tension between individuals' interest in protecting their privacy and companies' interest in making commercial use of anonymised personal information obtained by them and which constitutes Big Data. This concern is not particularly tied to any one country, however recent events happening in Japan have certainly helped to bring this unease to the fore there. In July 2014, for instance, a scandal emerged when personal information on elementary school children and their parents held by Benesse Holdings Inc, a major Japanese correspondence education and publishing firm, was leaked. Observers of this incident noted that the scandal could be said to have been the unintended outcome of the inability to obtain information legitimately from the state's Basic Resident Registers. This consequently led to the sale of information 'through the back door' by organisations or name-list traders who compiled or obtained databases of personal information and then illicitly sold this to marketers or other interested parties. A further data privacy incident that occurred before the passing of these new amendments came about when a partnership between the East Japan Railway Company, a major passenger railway company in Japan, and Hitachi Ltd, a Japanese multinational conglomerate company headquartered in Tokyo, became subject of public outcry. In the course of this partnership, East Japan Railway Company collected and anonymized passenger data collected form the railway's contactless smart card and e-money terminals, and then sold this collection of 'big data' to third party companies without passengers having been informed of this arrangement. East Japan Railway Company insisted that identification numbers had been deleted so as to render the information, containing birth dates, gender, stations travelled to and from, train times and train fares, anonymous. The supplied data was then used by Hitachi to start a new service which provides marketing information relating to the areas around the train stations concerned, raising doubts among several customers as to whether it had been operating in good faith.[1211] This case signalled a growing need to address the legitimate concerns of

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[1209] S Arbesman, 'Deflating the hype on big data' (*The Japan Times*, August 21 2013) <http://www.japantimes.co.jp/opinion/2013/08/21/commentary/world-commentary/deflating-the-hype-on-big-data/#.Vo5vjH1mp7t> accessed 30 August 2016.

[1210] 'New IDC Forecast Sees Worldwide Big Data Technology and Services Market Growing to $48.6 Billion in 2019, Driven by Wide Adoption Across Industries' (*IDC*, 9 November 2015) <http://www.idc.com/getdoc.jsp?containerId=prUS40560115> accessed 30 July 2016.

[1211] 'Privacy rights and 'Big Data' (*The Japan Times*, 31 July 2014) <http://www.japantimes.co.jp/opinion/2014/07/31/editorials/privacy-rights-big-data/#.Vo42jH1mp7u> accessed 30 July 2016; Sekiguchi Waichi, '"Big Data" Raises Big Legal Questions in Japan' (*Nippon*, 28 November 2014) <http://www.nippon.com/en/in-depth/a03602/> accessed 30 July 2016.

the persons on whom data is held by crafting rules that regulated the commercial use of personal data, ensuring that persons are informed of what information is being supplied to others, even if this is done anonymously, and to set up an independent third-party data protection organ that would be empowered to supervise the implementation of rules whilst having sufficient power to effect enforcement against breaches of such rules.

4. Amendments to the PIPA

4.1 *Overview*

The Japanese Diet passed amendments to the PIPA on September 3, 2015, following an original proposal issued earlier in June 2014, and which will come into effect within two years from them being passed into law. The amendments may be observed to be based on three pillars, namely, the utilisation of personal data in 'the age of Big Data; the protection of privacy to meet with the expectations of individuals; and revisions related to globalisation.[1212] The earlier 2003 enactment of the Japanese data privacy law had in effect been deemed to be among the weakest laws of any Asia-Pacific country that has such type of legislation;[1213] such criticisms have now been countered through the amendments that have created restrictions on overseas transfers of personal data without the consent of the data subject; requirements for disclosure of personal data; correction and deletion of such data upon request or where no longer necessary; a definition of and stricter rules applying to sensitive personal information; and provisions explicitly catering for cooperation with overseas enforcement agencies. A thorough examination of these changes to Japanese privacy law is however somewhat beyond the scope of this article, save the necessity to note here that once these provisions come into force, Japanese data protection law will be brought to a position that is similar to that in the majority of other Asian or Asian-Pacific countries, that is, a position stronger than the basic OECD principles, but not as stringent as the requirements laid down by the European Union Directive and forthcoming Regulation.

These amendments were described in an ambiguous 'Outline'[1214] which accompanied the proposed amendment text. Greenleaf notes that 'the underlying

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[1212] Graham Greenleaf and Fumio Shimpo, 'The Puzzle of Japanese data privacy enforcement' (2014) 4 International Data Privacy Law 139, 154.

[1213] Graham Greenleaf, *Asian Data Privacy Laws: Trade and Human Rights Perspectives* (OUP 2014) 25.

[1214] Government of Japan, Strategic Headquarters for the Promotion of an Advanced Information and Telecommunications Network Society (IT Strategic Headquarters), 'Outline of the System Reform Concerning the Utilization of Personal Data' (24 June 2014)

purpose of the reforms is primarily to facilitate businesses and government to be able 'to utilise personal data [...] which has a high usage value'. The intended aim of the reform is evidently to allow Japanese businesses to fully use and exploit emerging Big Data analysis methods, and to support 'the ongoing creation of innovation in Japan through the emergence of new industries and services'.[1215] This political intention behind the amended legislation is also in line with the Abe administration's position to facilitate the businesses' use of Big Data for development, sale and advertising of new products and services, with a view of contributing to the stimulation of large economic benefits.[1216]

4.2 *The Regulation of 'anonymous' Big Data*

The noted highlight of this amendment is that it creates a new category of personal information which has been rendered anonymous. This in effect is a category of 'reduced identifiability' to which a modified set of rules applies, and which prior to these new rules was widely perceived to be a "Grey Zone" of regulation. The fundamental piece of this new rule is that "anonymised" personal data that has been stripped of all personal identifiers such as names and dates of birth may not be freely transferred to third parties, including companies who would proceed to use this data for marketing and business purposes, without the subject's consent. The law safeguards the consumer by requiring that the transfer of anonymised information complies with specific stringent requirements when disclosing and processing the data. Such conditions include publicising the nature of the information disclosed as well as the manner through which the data has been provided to a third party, and by making a report on this disclosure to the Personal Information Protection Committee (Hereinafter referred to as 'PIPC'), and which shall be discussed in greater detail below. The third parties receiving the anonymised data must be informed that they are receiving this particular type of information. Any individual making use of such data is forbidden from comparing it with other information in order to attempt to re-identify it, and appropriate security measures must be adopted.[1217]

This new measure intends to replace a previous rule which required an individual's prior consent before the disclosure of such person's personal

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<http://kipis.sfc.keio.ac.jp/wp-content/uploads/2014/07/English-Translation-of-Japanese-Government-Proposal-on-Privacy.pdf> accessed 30 August 2016.

[1215] Graham Greenleaf, 'Japan's Proposed Changes: Weaken Privacy to Foster 'Big Data'' (2014) 130 Privacy Laws and Business International Report 23, 25.

[1216] 'Privacy rights and 'Big Data'' (*The Japan Times*, 31 July 2014) <http://www.japantimes.co.jp/opinion/2014/07/31/editorials/privacy-rights-big-data/#.Vo42jH1mp7u> accessed 30 July 2016.

[1217] Graham Greenleaf, 'Japan's Proposed Changes: Weaken Privacy to Foster 'Big Data'' (2014) 130 Privacy Laws and Business International Report 23, 23-25.

information to a third party occurred, and also allowed the individual the power to withdraw such prior consent so as to stop or discontinue the data transfer. Consequently, this position led to severe administrative problems in the context of outsourcing and upon adoption of data analysis techniques. Due to this, amendments to the Act distinguish between personal information and anonymised or pseudonymised personal information. This new category of information no longer requires prior consent when it is being disclosed or processed.

The new concept of 'anonymised personal information' in the Act is defined as 'information related to an individual that was obtained by processing personal information such that a specific individual cannot be identified, and so that such personal information cannot be restored'.[1218]

The new amendments have transformed the small authority solely supervising Japan's new ID number system set up in 2014 known as the Specific Personal Information Protection Commission (Hereinafter referred to as 'SPIPC') into a new authority having a broader scope, to be known as the PIPC. The PIPC will now have jurisdiction in relation to the entire private sector, excluding the supervision of the public sector; a power which will remain within the Ministry of Internal Affairs and Communications, with the exception of the residual power of the PIPC to ask for reports to be drawn up by the Ministry in question. As seen above, this is the authority to which disclosures of the transfer of anonymised sets of data has be made. It has been constituted with strong provisions concerning its independence, and its members are to be appointed by the Prime Minister with the consent of both houses of the Diet. Much of the delegated legislation concerning data privacy will emanate from the independent authority of the PIPC, and among its most important tasks is its role of formulating the PIPC Rules, which will serve to implement the Act itself.

The PIPC is also accorded significant powers of enforcement, although it is noteworthy here to point out that Greenleaf seemingly expresses doubt as to whether it will actually choose to make use of such powers.[1219] Indeed, there has been little to no enforcement of Japanese data privacy law throughout this past

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[1218] G Greenleaf, *Japan: towards international standards, except for 'big data'*, Privacy Laws & Business International Report 135, 136, 9 June 2015. The translation of the new law quoted within this article is based on an unofficial English translation, checked by Japanese experts of the 2003 Act, as amended by the proposed Bill.

[1219] Graham Greenleaf, 'Japan: Toward International Standards – Except for 'Big Data'' (2015) 135 Privacy Laws & Business International Report 12, 13; 'the PIPC has significant powers, if it chooses to use them'.

decade since the original enactment of the PIPA in 2003,[1220] and despite the potential to start afresh, as is evident in the wide reach of the new enforcement powers, this cannot be said to be reflected with the penalty levels. Among its functions are its powers to mediate complaints, investigate, give advice, find breaches, make recommendations, and if these are not followed, give orders that must be followed.[1221] However, the same authority cannot issue administrative penalties, unlike its counterparts in many EU Member States, as this depends on prosecution, whereupon fines for breaches of the provisions of the Act will have a relatively trivial cap of ¥300,000 (US$2,500 or €2,300). This contrasts sharply with the quantum of fines imposed in the USA or within individual EU Member States. For instance, in Malta, the maximum penalty for a breach of a provision contained in Maltese data protection laws may amount to up to €23,300, or six months imprisonment, or in certain circumstances, both.[1222]

Arguably, should the procedures required by the law ensure that anonymisation is complete and identification of the individuals concerned is impossible, then it may not be cause for concern about an invasion into personal privacy. The procedures require deletion of 'all individual identification codes contained in the personal information (including by replacing such individual identification codes with other individual identification codes in a random manner that will not allow the restoration of the individual identification codes)' wherever any piece of information contains 'an individual identification code'. On the other hand, where the information concerned does not contain this 'individual identification code', anonymisation is to be achieved by 'deleting a part of the description contained in the personal information (including replacing such descriptions with other descriptions in a random manner that will not allow the restoration of the part of the descriptions).'[1223] If it can be widely agreed among digital forensic and identification experts that such measures will indeed succeed in achieving the required standard of anonymity required by the law, that is, that 'a specific individual cannot be identified, and so that such personal information cannot be restored', then the new law could prove itself to be a ground-breaking means of regulating the proliferation of Big Data in business, and a role model for other countries seeking to enact legislation in this area. However, the caveat to all of this is that it is likely 'questionable',[1224] to use the words of Greenleaf, that

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[1220] Graham Greenleaf and Fumio Shimpo, 'The Puzzle of Japanese data privacy enforcement' (2014) 4 International Data Privacy Law 139, 139-154.

[1221] Graham Greenleaf, 'Japan: Toward International Standards – Except for 'Big Data'' (2015) 135 Privacy Laws & Business International Report 12, 13.

[1222] Data Protection Act, Chapter 440 of the Laws of Malta, art 41.

[1223] Graham Greenleaf, 'Japan: Toward International Standards – Except for 'Big Data'' (2015) 135 Privacy Laws & Business International Report 12, 15.

[1224] Graham Greenleaf, 'Japan: Toward International Standards – Except for 'Big Data'' (2015) 135 Privacy Laws & Business International Report 12, 15

anonymisation could be so highly guaranteed. Indeed, as it has already been pointed out by certain authors, trained experts could identify individuals from the seemingly anonymous data by comparing it with other sets of data,[1225] thus calling into question the lofty and possibly even naïve ambitions of the Abe administration.

5. Conclusions

The reforms to Japanese data protection law promise an effective fresh push to current privacy rules, and could be regarded as a 'second generation' data protection law that takes into account considerations that did not yet exist in 2003, tackling teething problems that have arisen in its first 10 years of operation. By making it clear that the Japanese government wishes to assist businesses and bolster those companies that are prominent in e-commerce in Japan by rendering it straightforward to transfer and acquire large chunks of Big Data, it might fall into the tricky position of trading off consumer protections and the privacy of the individual data subjects at the expense of larger businesses, echoing the traditional Japanese mentality of the community above the individual. The new rules on anonymised personal information have been widely criticised as an 'ill-considered approach' and many have called upon the Japanese government to seek better ways to improve the socially valuable utilisation of personal data.[1226] It is the view of the author of this paper however that the stance taken towards achieving the full potential of vast valuable data held by many companies is a welcome perspective that differs from the prevailing status quo in Europe, where heavy administrative burdens imposed by EU law, and which will become even more stringent with the coming into force of the new Data Protection Regulation, create high compliance costs and discourage digital innovation and competitiveness, rather than encouraging it. The real effectiveness of the new Japanese laws and the end result of the tricky trade-off between individual privacy and economic growth will depend a great deal on whether the new rules, standards and levels of enforcement of the PIPC will match up to international expectations, and the answer to whether the operations of these rules will be truly beneficial for all stakeholders, and potentially influence similar laws elsewhere in the world, remains yet to be seen.

[1225] 'Privacy rights and 'Big Data' (*The Japan Times*, 31 July 2014) <http://www.japantimes.co.jp/opinion/2014/07/31/editorials/privacy-rights-big-data/#.Vo42jH1mp7u> accessed 30 July 2016.

[1226] Greenleaf, 'Japan's Proposed Changes: Weaken Privacy to Foster 'Big Data'' (2014) 130 Privacy Laws and Business International Report, 23-25, 25.

BOOK REVIEW OF PRESIDENT EMERITUS DR. UGO MIFSUD BONNICI, *AN INTRODUCTION TO THE LAW OF EDUCATION* (Malta University Press 2013)

Kevin Aquilina

ABSTRACT[1227]

This article shall examine two principal themes which each bear a reflection on the other. The first of these is the manner in which data protection and data privacy has evolved in Japan over time and how the Asian cultural context of respect towards the community has played a significant role in the formation of values relating to the protection of private life, including inter alia norms relating to data protection. In this respect, the second stream of this article shall reflect upon recent amendments to the Japanese Act of the Protection of Personal Information of 2003 and their implications on privacy and on the collection and commercialization of 'Big Data', in the context of the growing importance of Big Data in the entire world but also in Japan, which is linked to increasing computing power and more complex algorithms that allow for deeper data mining and information analysis.

KEYWORDS: LAW OF EDUCATION – TYPOLOGY OF NORMS – HISTORY OF EDUCATION LAW – EDUCATION ACT 1988 – MALTESE LEGAL SYSTEM

[1227] This book review was reviewed by Dr Georgine Schembri

BOOK REVIEW OF UGO MIFSUD BONNICI, *AN INTRODUCTION TO THE LAW OF EDUCATION* (MALTA UNIVERSITY PRESS 2013)

Kevin Aquilina

An *Introduction to the Law of Education* is President Emeritus Ugo Mifsud Bonnici's latest introductory monograph on a specific branch of Maltese Law – the Law of Education. His previous books in this series include: An *Introduction to Cultural Heritage Law*, published in 2008 by Midsea Books and *An Introduction to Comparative Law* published earlier in 2004 by Malta University Press. He has also written various other scholarly works which are studied by students at the Faculty of Laws such as the authoritative *Il-Manwal tal-President* ("The President's Manual") written while Dr Mifsud Bonnici served as President of Malta, and *Kif Sirna Repubblika* ("How We Became a Republic") published in 1999 which both provide an insightful account of the post-independence development of constitutional law. In his career, President Emeritus Dr Mifsud Bonnici has been inextricably associated with education not only through his various academic and popular writings on the subject, but also because as a seasoned politician he has always covered the sector of education both as Shadow Minister for Education between 1972 and 1987, and Education Minister from 1987 till 1994. A number of the matters referred to in the book being reviewed are known to him, *di scienza propria*, as a painstaking researcher and eminent scholar, and because of his past political activism. Although President Emeritus Dr Mifsud Bonnici has authored excellent books on Maltese cultural heritage law, comparative law and others, I would hazard a guess and state that this latest book on the law of education is probably the one he cherishes most, given that during his eminent political career, he has lived and been inseparably linked to this subject; so much so that his name is synonymous to education. He now fascinatingly narrates all this in his latest *oeuvre*. His knowledge of the subject is not only comprehensive, but also personal. He has been directly involved as a key protagonist in the drafting, making and unfolding of the law on the subject in question. This places him in a very advantageous situation when compared to other writers, more so that he has authored the Education Act 1988 himself and was directly involved in its promulgation, in different areas of education such as University, primary schools, secondary schools, etc. These experiences assisted him in providing the reader with certain facts which he was directly privy to due to the various offices he has occupied in his very successful political career. This added value that the author brings in writing this volume and makes this contribution more interesting to read and more revealing of the actual reasoning behind the provisions of the Education Act, 1988 and as subsequently amended. The insight which he provides in the development of the

law of education is therefore original and provides more information than one would normally find in a government file or any other primary historical source. In this respect, to a certain extent, this book can be viewed as the first attempt by President Emeritus Dr Ugo Mifsud Bonnici at writing an autobiography. This is undoubtedly, the added value of this book.

In 2013 the Faculty of Laws carried out a review of all study-units offered in its law course and noted that a *lacuna* existed given that prior to October 2013 there was no study-unit dealing with the Law of Education offered in the Bachelor of Laws (Honours) degree course programme of studies. The volume written by President Emeritus Dr Ugo Mifsud Bonnici, *An Introduction to the Law of Education*, undoubtedly fills in this gap in legal literature and constitutes an indispensable tool of acquiring the necessary knowledge and legal formation on the law of education. This makes it a very welcome addition to Maltese legal literature. Following the publication of this book, the Faculty of Laws has introduced, in October 2013an elective study-unit on the law of education. Indeed, this monograph is the best textbook to accompany such a study-unit. The Faculty of Laws is thus very keen to see this book in print and read by our academics and students. It is indeed a learned and original contribution to legal and human knowledge.

In so far as the book's layout is concerned, it is divided into an introduction, five chapters and a conclusion. In the Introduction, President Emeritus Mifsud Bonnici provides the reader with a discussion of the philosophies inspiring the law of education, the evolution of education throughout the centuries, starting from 2200 BC to more recent times. He contextualises the role played by international human rights instruments in the development of the law of education, and studies the influence of Canon Law on secular educational law from the period when President Emeritus Dr Ugo Mifsud Bonnici served as Minister responsible for education and beyond till to date.

Chapter One provides a typology of norms in the education sector and Chapter Two is a historical chapter that narrates how the law of education evolved under the period of the Knights of St John till the current Education Act of 1988. Chapter Three is devoted entirely to a study of the Education Act as enacted in 1988 and as subsequently amended to date, including all subsidiary legislation made thereunder. Chapter Four provides an international dimension to the law of education. And, Chapter Five is a shorter chapter concentrating on education at civil law.

Lastly, in the Conclusion, President Emeritus Dr Ugo Mifsud Bonnici stresses the need for the law to be universally taught and studied. He states that for homo

sapiens, law provides the backbone to rational governance and links law to values when he opines that law has to comply with reason and the ethical imperative and that ethics cannot be put aside. Notwithstanding its importance to society, he laments that education law is not given its due importance within the curriculum of advanced school systems. The state is thus encouraged to see that the law be taught to those who are starting to learn their civic duties; and what better way and tool to use to teach the law of education to all and sundry than by reading President Emeritus Dr Ugo Mifsud Bonnici's *An Introduction to the Law of Education?*

The Salient Points of the Book under Review

I now address – specifically – some additional salient points of the book. This is the first book written on the Maltese law of education though surely not the first manuscript related to education in general and the law of education in particular as the book's Bibliography well illustrates. It is a very comprehensive publication spread over four hundred pages of text and it covers all the manifold aspects of the law, whether primary or secondary. It is illustrated with case law which has never been compiled or published before in a single work. The monograph has an international dimension and studies also the law of education from an administrative perspective. However, this *opus* is not only a compilation of relevant education laws. It goes beyond that as, in addition thereto, it also contains a theoretical part which places the law of education within a doctrinal framework. It is up to date book as can be evidenced from the analysis provided in Chapter Four related to European Union law; for even in the realm of education the European Union has left its mark. The book flows well, and is consistently organised and is written in an accessible language which makes it easy to follow even for a person who does not necessarily have a legal background. It is one of those books on a legal subject which is not specifically addressed to the legal profession but to the intelligent man and woman keen to learn a subject that concerns society At the same time, the book can be of immense assistance to educators, schools administrators, historians of education law, the judiciary, advocates, law students and public officers who carry out their duties in the realm of education, teachers, University of Malta lecturers and the general public who nurture a keen interest in educational affairs.

President Emeritus Dr Mifsud Bonnici expresses his thoughts clearly. He goes straight to the point and does not waste time in excessive verbosity or in difficult passages of comprehension. The book contains references to Maltese and foreign cases on educational law which gives it an empirical tinge when contrasted to the theoretical background set out in the first chapter of the monograph that deals with the philosophy of education law. Given its content, this contribution fits

nicely not only under the categories of education law, education and law but also within the ambit of Maltese *melitensia* and international and European Union Law.

This publication has a high academic value. It appeals to foreign academics and students who want to know about the law of education in Malta, and its comparative aspects to other nations' laws of education.

One significant feature of this book is that it brings two important aspects of social life together – law and education. Edmund Burke once wrote that 'In no country perhaps in the world is the law so general a study ... that renders men acute, inquisitive, dexterious, prompt in attack, ready in defence, full of resources ... They augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze'.[1228] The book has gone beyond all this in so far as the depth of knowledge on the law of education is concerned while, at the same time, embodying all the skills listed by Burke above in regard to education. According to B.F. Skinner, 'education is what survives when what has been learnt has been forgotten.'[1229] To a certain extent, this happens in the study of the law. For what remains in one's mind after six years of study of law at University is really not much the detail of the law, but the principles behind that detail. It is the norm behind a legal provision which brings about the values enshrined by society as written down in the law. This is what President Emeritus Dr Ugo Mifsud Bonnici's book achieves superlatively when it identifies legal values as incorporated in one branch of the law, namely that of the law of education. For without values there can be no democratic society and civilization, and where there is no democratic and civilised society than can be no rule of law. Asthe Roman adage runs: *ubi societas ibi ius* – where there is society, there is law. Three ingredients are thus necessary for a study of the law, including the law of education – a society, civilization and values. It is these indispensable elements which make the law of education worth studying and it is exactly what the book we are launching today achieves.

The Education Act and Educational Law are not one and the same thing, however. The latter comprises the former but not vice-versa. Education Law goes beyond the Education Act. This is because Maltese Education Law is not only found in the Education Act but is spread all over the Maltese statute book and contained in various laws. This monograph thus provides a good grounding to Education Law both in the Education Act and other spectra of branches of the law; ranging from constitutional law to employment law, public international law to comparative law, legal history to philosophy of law, and from civil law to

[1228] Elizabeth Knowles, *The Oxford Dictionary of Quotations* (3rd edn, OUP 1980) 109.
[1229] ibid 508.

administrative law. In a nutshell, it can be safely stated that this book which covers in great depth the Education Act has a spill over effect into other branches of Law which are nonetheless irremediably intertwined with Education Law. This is what makes the book a very interesting one to own and to read as it covers Education Law in its wholeness and uniqueness.

Thank you President Emeritus Dr Ugo Mifsud Bonnici for your invaluable services and for enriching us with a wonderful book which you have regaled us like this!

THE FOURTH EU ANTI-MONEY LAUNDERING DIRECTIVE: AN ACADEMIC OVERVIEW

Ms. Leanne Debattista, Ms. Charlene Chircop, and Ms Mariah Mula

ABSTRACT[1230]

'Flows of illicit money can damage the integrity, stability and reputation of the financial sector, and threaten the internal market of the Union as well as international development. Money laundering, terrorism financing and organized crime remain significant problems which should be addressed at Union level.'[1231]

This legal analysis is geared towards showcasing the major concerns which arise from the crime of money laundering and its intrinsic link with terrorism-financing. Recent global enforcement actions against financial institutions highlight the importance of compliance with anti-money laundering and terrorism-financing regulations. Such enforcement actions are clear proof that despite the considerable progress made in mitigating risks posed by money laundering and rooting out prior wrongdoing, financial institutions are still falling short of regulators' expectations.

The focal-point of this study is the recently-enacted Fourth EU Anti-Money Laundering Directive. Salient aspects of this Directive shall be addressed all throughout and a comparative analysis shall be carried out with regard to the changes it has brought about from previous EU anti-money laundering Directives, specifically the Third AML Directive. Apart from analyzing the impact of the new AML provisions on Maltese legislation, other jurisdictions shall also be taken into consideration, so as to better highlight the effect of this new Directive on cross-border jurisdictions and businesses. Furthermore, the main pitfalls of AMLD4 shall be examined and possible solutions for future ameliorations shall be put forward.

KEYWORDS: FOURTH EU ANTI-MONEY LAUNDERING DIRECTIVE – DOMESTIC INTERPRETATION – TERRORISM FINANCING – FUTURE ANTI-MONEY LAUNDERING CHALLENGES

[1230] This policy paper was reviewed by Diane Bugeja, currently reading for a PhD degree in Law at King's College, London.

[1231] Directive EU 2015/849 para 1.

THE FOURTH EU ANTI-MONEY LAUNDERING DIRECTIVE: AN ACADEMIC OVERVIEW

Charlene Chircop, Leanne Debattista, Mariah Mula

1. General Introduction

Money laundering is a reality which has become of primary concern for every government due to the negative repercussions that it may have on the integrity of the financial and economic system.[1232] The Fourth EU Anti-Money Laundering Directive (Hereinafter referred to as 'the Directive' or 'the Fourth Directive') has recently been published in May 2015 and it focuses on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing; already, plans are in the pipeline for further revisions to this Directive. But what exactly do these crimes constitute?

In the words of Min Zhu, Deputy Managing Director of the International Monetary Fund (Hereinafter referred to as 'IMF'),

> Money Laundering and the financing of terrorism are financial crimes with economic effects. They can threaten the stability of a country's financial sector or its external stability more generally. Effective anti-money laundering and combating the financing of terrorism regimes are essential to protect the integrity of markets and of the global financial framework as they help mitigate the factors that facilitate financial abuse. Action to prevent and combat money laundering and terrorist financing thus responds not only to a moral imperative, but also to an economic need.[1233]

Indeed, this new Directive is geared towards benefitting businesses, government and law enforcement by ensuring that resources can be targeted towards the areas of higher risk. Mainly, it aims to achieve a more risk-based approach, with greater consistency of rules across the EU, simplifying cross border trade and implementing the Financial Action Task Force (Hereinafter referred to as 'FATF') recommendations.

[1232] Peter Reuter and Edwin M. Truman, *Chasing Dirty Money: The Fight Against Money Laundering* (Institute for International Economics 2004) 130.

[1233] The IMF and the Fight against Money Laundering and the Financing of Terrorism Factsheet (*International Monetary Fund*, 6 October 2016) <http://www.imf.org/external/np/exr/facts/aml.htm> accessed 6 November 2016.

2. Historical Background

In the past, the definition of what entails a criminal activity for the purposes of money laundering was very restrictive as it entailed robbery, fraud, as well as dealing in drugs or other illicit substances. Therefore, handling the proceeds from any such activity would amount to money laundering. Traditionally, the crime of money laundering has been described as being a process whereby criminals attempt to hide the origins and ownership of the profits earned through criminal activities. Such methods would enable these criminals to retain control over the proceeds and provide them with an alibi for their profits.

It is essential to note that the crime of money laundering is not a new phenomenon. Indeed, Sterling Seagrave, a British historian, wrote about how Chinese merchants over three thousand years ago, laundered the profits they made due to the prohibition imposed by the regional governments on many forms of commercial trading.[1234] Thus, Chinese traders used to hide their wealth out of fear of being robbed of their assets by the respective governments. The Chinese merchants used to employ a technique, which is still popular up to this day, whereby the money launderers' profits would be invested in offshore financial centers. The term '*laundering*' is said to have originated around the time Chicago gangster, Al Capone, embarked on his crime spree. In fact, he used the profits of the intense business of launderettes to disguise the illegal proceeds he earned from alcohol he imported in times of prohibition in the 1920s.[1235] However, the term '*money laundering*' was first used in a newspaper reporting about the Watergate scandal of 1973 in the United States.[1236]

Anti-money laundering issues have undeniably attracted more worldwide attention in the late 20th century and the beginning of the 21st century due to the ever-increasing complex systems of money laundering. As Healy rightly argues, the September 11 terrorist attacks on the United States of America have highlighted new challenges to law enforcement agencies around the world in detecting and combatting elaborate money laundering systems used to finance international terrorism.[1237] Indeed, in the Unites States, prior to 2001 terrorist attacks, the crime of money laundering was regulated by the Bank Secrecy Act, but since 2001, there has been the introduction of the USA Patriot Act which was

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[1234] Inter-American Development Bank (2004), *Unlocking Credit: The Quest for Deep and Stable Bank Lending*, 241.

[1235] B. Unger and D. Van der Linde, *Research Handbook on Money Laundering* (Edward Elgar 2013) 3.

[1236] J. Richards (1999), Transnational Criminal Organizations, Cybercrime, and Money Laundering, CRC Press, 43.

[1237] NM Healy, 'The impact of September 11th on Anti-Money Laundering efforts, and the European Union and Commonwealth gatekeeper initiatives' (2001) 26 The International Lawyer 733.

stimulated by the 9/11 terrorist attack.

3. An Attempt to a Definition

The IMF defines money laundering as the '*process by which the illicit source of assets obtained or generated by criminal activity is concealed to obscure the link between the funds and the original criminal activity*'.[1238] Even though money laundering may seem to be a linear process, the process can be complicated as it involves a number of actors and methods which makes it also very difficult to be traced by the relevant authorities. Indeed, according to the Fourth European Anti-Money Laundering Directive, the crime of money laundering can be committed intentionally in the following ways:

a) The conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an activity to evade the legal consequences of that person's action;

b) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such an activity;

c) The acquisition, possession or use of property, with full knowledge upon receipt that such property was derived from criminal activity or from an act of participation in such an activity;

d) Participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the above-mentioned actions.[1239]

Hence, it is very clear that the European Union is aware of the constant threat being imposed by this crime and acknowledges the various shades the crime can take so as to manifest itself. Indeed, this latest EU Anti-Money Laundering Directive was stimulated by the fairly recent terrorist attacks which took place in

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[1238] The IMF and the Fight against Money Laundering and the Financing of Terrorism Factsheet (*International Monetary Fund*, 6 October 2016) <http://www.imf.org/external/np/exr/facts/aml.htm> accessed 6 November 2016.

[1239] Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2015] OJ L141/73, art 1(3).

Copenhagen, Paris and Brussels, and which were all triggered through money-laundering.[1240]

4. The Directive's Implications

In general, the Directive, which is to be transposed into local legislation by 26 June 2017, strives to ensure consistency across borders. The Third Directive was not implemented consistently by Member States and thus, the intention of this Fourth Directive was mainly that of creating a more coherent cross-border approach, which will simplify cross-border trade by ensuring that legislation is adopted consistently in each Member State. Consequently, businesses should be able to operate more effectively between jurisdictions because the inconsistencies in legislation would be reduced, allowing organisations to streamline systems and reduce costs.

In relation to the gaming sector, the Directive proposes to bring all providers of gambling services within the scope of the regulation, including online gambling, and not just land-based casinos. In addition, for the gambling sector, Customer Due Diligence (Hereinafter referred to as 'CDD') will henceforth be required for single transactions of €2,000 or more.[1241] The Fourth EU Anti-Money Laundering Directive allows discretion to Member States to make a case for scoping out certain gambling services providers on the basis of these presenting a low risk of money laundering, although any such arguments are likely to be difficult to justify in light of the anonymity, remoteness, multi-jurisdictional reach and other similar factors that make the gambling sector prone to being exploited by criminals in their furtherance of their money laundering activities. As a result of such a requirement, businesses in the gambling sector which are now within the scope of the Directive will have to implement systems and controls to prevent money laundering, including undertaking CDD, training staff, monitoring transactions, keeping records and reporting suspicious transactions; equally, regulators will have to become conversant with the specific money laundering risks presented by the online gambling sector and up their resources to cater for the wider reach of the Directive.

A second area tackled by this new Directive is that of tax crimes, which are now to be included within the definition of an offence. Indeed, tax evasion and other serious fiscal crimes will become criminal offences in all EU member states. The impact of this will be that businesses operating in jurisdictions in which tax

[1240] Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Agenda on Security' (COM 2015) 185 final.

[1241] Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2015] OJ L141/73, art 11.

evasion is not currently a crime will need to review their current systems to ensure compliance.

The Directive has also repealed the 'white-list' of jurisdictions outside the EU which the Third Anti-Money Laundering Directive had implemented. Indeed, this Fourth EU Directive now requires each obliged person (i.e. those persons subject to the requirements of the Directive) to conduct a risk assessment for that specific country outside of the EU where business is to be done[1242], therefore placing additional responsibility on obliged persons in deciding whether a particular jurisdiction is to be considered reputable or otherwise.

Simplified Due Diligence (Hereinafter referred to as 'SDD') is another area in respect of which changes are being made in the Fourth Directive. The risk-based approach adopted by this Fourth EU Directive includes more stringent CDD measures. Previous Anti-Money Laundering regulations permitted certain customers and products to qualify for the due diligence procedure when they fell within a certain category. The Fourth Anti-Money Laundering Directive now requires obliged persons to determine the level of money laundering risk posed by any customer prior to the due diligence status, providing a justification for qualification.[1243] Indeed, previously, businesses could apply simplified due diligence in certain situations, which reduced the regulatory burden; such blanket exemptions were considered by the EU as being too permissive and lenient. With the introduction of this Directive, it is expected that obliged persons will be required to assess whether a transaction or customer relationship is low risk on the basis of certain risk-related criteria and act accordingly. Hence, obliged persons may be able to apply SDD only if they are satisfied that the customer or transaction presents a lower degree of risk and can evidence this through supporting documentation which may eventually be challenged by the regulator. The Directive lists potentially lower risk factors which obliged persons should consider in making their assessment.

On the other hand, the Directive introduced a requirement to conduct Enhanced Due Diligence (Hereinafter referred to as 'EDD') for domestic Politically Exposed Persons (Hereinafter referred to as 'PEPs') (e.g. MPs, judges or high ranking army officials) as well as foreign PEPs.[1244] Thus, businesses will need to amend their systems and controls to ensure that they can identify domestic PEPs. The policies and procedures will need to be revised so employees know what the EDD requirements are for such clients. The Directive also provides a non-exhaustive list of higher risk factors that obliged persons are bound to consider

[1242] ibid art 7.
[1243] ibid art 10 and art 13(5).
[1244] ibid art 18.

in addressing business relationships or occasional transactions that may present a higher risk of money laundering and in respect of which EDD measures may be appropriate.

Moreover, the Directive introduced increased due diligence for employees. Indeed, there is a provision in the Directive requiring businesses to have policies, controls and procedures which cover employee screening.[1245] Hence, businesses that do not screen employees at present will need to consider how to verify employees, which could be costly and time consuming. Automated screening systems may provide a solution while providing reassurance for the business, particularly if the checks include the asylum and immigration requirements.

The new Directive also introduced a reduction in the threshold for cash transactions. Under the current regime, a €15,000 threshold for cash transactions is applicable, i.e. persons dealing in cash above this threshold in connection with a single transaction or a series of linked transactions, is considered to be engaging in a 'relevant activity' and must comply with the requirements set forth in the anti-money laundering regime; this threshold has been lowered to €10,000 under the new Directive.

Increased level of transparency of beneficial ownership and record retention is another aspect featured in this new Directive, which shall apply for both companies and trusts. Businesses should be aware of this implementation and that it is likely to impose significant administrative burdens on companies and trusts. Indeed, similarly to the Third EU Anti-Money Laundering Directive, obliged persons are requested to identify and manage due diligence on any customer that controls more than 25% of the shares or voting rights (or other elements which may be indicative of a controlling position) of a customer.[1246] However, through the Fourth EU Anti-Money Laundering Directive, a more rigorous record retention requirement for beneficial ownership is put in place. Now, each Member State will be required to maintain a registry containing information about beneficial owners.[1247] This new Directive provides that the mentioned registers ought to be accessible to the authorities of each Member State and their Financial Intelligence Units without any restriction.[1248] The registers are also to be available to obliged persons and also to the public through registration.

1245 ibid art 8 (4)(a).
1246 ibid art 13
1247 ibid art 30.
1248 ibid art 30(5).

This new Directive provides for three levels of risk assessment – a supra-national risk assessment, a national risk assessment, and a risk assessment process at the level of each obliged person, each of which should identify and locate the main risks relating to anti-money laundering. Such risk assessments are expected to assist the Member States' obliged persons in developing their own procedures for anti-money laundering risk assessments. Malta has followed closely with the risk assessment procedure and towards the end of 2013, the Maltese Government had entrusted the task to lead the national risk assessment in question to the Financial Intelligence Analysis Unit (Hereinafter referred to as 'FIAU').[1249] The National Risk Assessment should provide regulated businesses with a clear picture of the risks and threats in their country which will help them to identify, manage and mitigate their own risks. Indeed, this risk assessment is necessary to identify the risks of money laundering and terrorist financing affecting the internal market. Obliged persons are already required, under the current regime, to undertake written risk assessments which will have to be made available to the regulator upon request. Those businesses which do not have a clear picture of their risks and how to mitigate them, should undertake a risk assessment process henceforth. This is also regarded as a good business practice.

When it comes to the issue of data protection, it is generally accepted that there is a need to balance the requirements of the anti-money laundering/counter terrorist financing regimes with the data protection rights of individuals. Member States will now have to consider how to transpose the requirements into national legislation particularly around data. Businesses should review what data they hold and for how long so they comply with the existing data protection obligations, which will help to prepare for the new requirements.

Under the Directive, it is proposed that administrative sanctions for breaches of the key requirements of the Directive are strengthened, including a proposal to impose a fine of up to ten percent (or even twenty percent) of the total annual turnover of a business and twice (or even ten times) the amount of profit gained (or losses avoided) through the breach.[1250] These proposals demonstrate the need for businesses to ensure that they have robust procedures, systems/controls and resource (including staff) in place to ensure compliance.

[1249] 'Analysis to consider risks of money laundering and terrorist financing in Malta' *Times of Malta* (Malta, 18 December 2013) <http://www.timesofmalta.com/articles/view/20131218/local/analysis-to-consider-risks-of-money-laundering-and-terrorist-financing.499524> accessed 27 August 2015.

[1250] Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [2015] OJ L141/73, art 59.

Following the recent terrorist attacks in Copenhagen, Paris and Brussels, the European Commission together with the Council agreed to take strong decisive action against any form of terrorist-financing. Indeed, so as to enhance the efficiency of these new anti-money laundering regulations, these two EU institutions have called for further efforts towards speeding up the national processes of implementation of the Fourth Anti-Money Laundering Directive. This will in turn strengthen cooperation on the combat against terrorist-financing between the various Member States' Financial Intelligence Units (Hereinafter referred to as FIU). Any terrorist-financing risks are then to be addressed via the EU supranational risk-assessment. Indeed, the EU constantly stresses upon the fact that coordinated action at international, European and national level is essential so as to truly tackle the threats posed by money laundering and terrorist-financing as effectively as possible. The Commission shall also be examining further actions and initiatives that may be adopted on countering terrorist-financing in the context of implementing the recently adopted European Security Agenda.[1251]

Even though the Directive has not yet been implemented by the EU Member States, the European Commission has already geared its direction towards new steps and procedures to tackle the identified loopholes of this new Directive. It has in fact issued an Action Plan aimed on two main focal strands of action, namely, (i.) tracing any threatening terrorists through their financial movements and preventing them from transferring any funds or other assets; and (ii.) disrupting the roots and sources of revenue known to be used by terrorist organisations, by targeting and distorting their capacity to raise funds.[1252] As regards the first strand of action, the Commission has called upon all EU Member States to commit to implement the Fourth Anti-Money Laundering Directive into their domestic laws by the end of 2016 instead of June 2017. As had been requested during the extraordinary Justice and Home Affairs Council of the 20 November 2015, the Commission recently proposed a number of targeted amendments to the Fourth Anti-Money Laundering Directive. Such proposed amendments include both short-term and long-term initiatives, namely,

a) including a list laying down all compulsory checks and CDD measures that financial institutions ought to carry out on financial flows from third States having high-risk strategic deficiencies in their national anti-money

[1251] 'European Parliament backs stronger rules to combat money laundering and terrorism financing' (*European Commission*, 20 May 2015) <http://europa.eu/rapid/press-release_IP-15-5001_en.htm> accessed 20 March 2016.

[1252] Peter Snowdon and Lisa Lee, 'Commission presents Action Plan to strengthen the fight against terrorist financing' (*Financial Services: Regulation Tomorrow*, 3 February 2016) <http://www.regulationtomorrow.com/eu/commission-presents-action-plan-to-strengthen-the-fight-against-terrorist-financing/> accessed 2 April 2016.

laundering and counter-terrorism financing (Hereinafter referred to as 'CTF') regimes;

b) widening the scope of information and data accessible by the national FIUs;
c) enabling faster and easier cooperation and communication methods for the various EU FIUs to access information on the holders of bank and payment accounts by introducing centralized bank and payment account registers;
d) bringing virtual currency exchange platforms under the scope of the Fourth Directive and the control of competent national authorities so that such platforms too would have to apply CDD controls when exchanging virtual currency for real currency, and potentially including virtual currency 'wallet providers';
e) widening customer verification requirements for prepaid instruments and lowering the thresholds for identification.[1253] Gaps in the EU-US Terrorism Financing Tracking Programme (Hereinafter referred to as 'TFTP'), which has been in force since August 2010, will also be tackled. In addition, the Commission has claimed that in 2017 it will table a legislative Proposal geared to reinforce the powers of customs authorities and thereby address terrorism-financing through trade in goods. Another Commission Proposal is envisaged to address the illicit trade in cultural goods and wildlife. The Commission has also urged all Member States and their relevant AML authorities to work hand-in-hand with third countries so as to create stronger cooperation and ensure a global response to tackling sources of terrorist-financing. Indeed, as Dr. Jean-Claude Juncker, the President of the European Commission himself, validly propounded, 'The recent terrorist attacks on Europe's people and values were coordinated across borders, showing that we must work together to resist these threats.'[1254]

As has been evidenced during the recent Paris terrorist attacks, prepaid cards are very often used as a major tool by terrorists to anonymously finance their attacks. Whilst acknowledging the benefits of such prepaid cards to many citizens, the Commission is also aware of the many risks stemming from the anonymity of some of these prepaid instruments and intends to amend Fourth Anti-Money Laundering Directive so as to specifically address these concerns without doing away with the potential benefits of such cards when used normally. Indeed, a timeline to implement these actions has also been published

[1253] ibid.

[1254] Jean-Claude Juncker, 'Action Plan to Strengthen the Fight Against Terrorist Financing' (European Agenda on Security Factsheet, European Commission February 2016) <http://ec.europa.eu/justice/criminal/files/aml-factsheet_en.pdf> accessed 13 April 2016.

by the Commission, highlighting the targeted deadlines.

Thus, as has been constantly reiterated throughout this analysis paper, all obliged entities should now start considering how the Directive might impact their businesses and their customers, while onboarding employees with the new anti-money laundering compliance requirements. Given the problematic issues created by the late implementation of Third Anti-Money Laundering Directive in certain Member States such as Ireland, it is hoped that the Fourth Directive will be implemented on time by June 2017 and that financial institutions would have by then updated their compliance programs in readiness for that date.

5. The Current Maltese Situation

Malta's commitment in the fight against money laundering is essential for the country in protecting its role as a reputable financial services center and an international hub for gaming companies to operate. Under current Maltese law, the main regulatory Act governing money laundering is the Prevention of Money Laundering Act[1255] (Hereinafter referred to as 'PMLA'), which was introduced in 1994 so as to augment the effectiveness of other legal provisions found in the Criminal Code,[1256] namely, Sub-Title IV which deals with acts of terrorism, funding of terrorism and ancillary offences. In addition, the PMLA and the Criminal Code's relevant provisions are further supplemented by the Prevention of Money Laundering and Funding of Terrorism Regulations (Hereinafter referred to as 'PMLFTR'). It is to be noted that whilst the PMLFTR list out the substantive provisions and procedures to be adopted relating to the offences in question, the Act establishes the foundations for the legal framework regulating money laundering. The PMLA lays down the procedures for the investigation and prosecution of money laundering offences as well as establishing the FIAU.

The term '*money laundering*' is defined in Article 2 of the PMLA, whereby the material element of the crime is laid down, accompanied with the intentional element,

a) Converting or transferring property, with the knowledge that such property is derived from criminal activity or participation in such activity, for the purpose of concealing or disguising the origin of the property or assisting a person involved in criminal activity.

b) Concealing or disguising the true nature, source, location, disposition, movement, right over or the ownership of property with the knowledge

1255 Prevention of Money Laundering Act, Chapter373 of the Laws of Malta.
1256 Criminal Code, Chapter 9 of the Laws of Malta.

that such property is derived from criminal activity or any participation therein.

c) Acquiring property with the knowledge that such property is derived from criminal activity or any participation therein.

d) Retaining without reasonable excuse property with the knowledge that such property is derived from criminal activity or any participation therein.

e) Any attempt at or complicity in any of the above matters or activities.

Following the implementation of the Third EU Anti-Money Laundering Directive, the PMLA has been amended to define the term *'criminal activity'* for the purposes of money laundering as any criminal offence or acts of terrorism as defined under the Maltese Criminal Code. Therefore, Malta adopts an 'all-crimes' regime in respect of money laundering offences, such that the handling of profits from any activity that is considered to be a crime under Maltese Law would amount to money laundering.

It is fundamental to note that, in addition to the position adopted in the Third EU Anti-Money Laundering Directive, the recent Fourth EU Anti-Money Laundering Directive has broadened the definition of what *'criminal activity'* would amount to money laundering. As indicated earlier, the newly-enacted Directive now also includes tax crimes, relating to both direct and indirect taxes.[1257] This new step in this Fourth EU Anti-Money Laundering Directive aims at developing a harsher fight against tax crimes and terrorist financing.

According to Article 4 of the PMLA, the Attorney General may, if he has reasonable cause to suspect that a person is guilty of an offence involving money laundering, apply to the Criminal Court requesting the issue of an investigation order, so as to provide access to any place for the purpose of searching for any material relevant to the said suspected offence. Such an investigation order cannot be countered by the issue of a warrant of prohibitory injunction. The Attorney General may also apply for an attachment order in the same circumstances, which may be issued together with an investigation order and has the effect of attaching, in the hands of the garnishees, all money and other

[1257] Proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM/2013/045 final.

movable property due or belonging to the suspect. [1258]

In addition, according to Article 4B of the PMLA, the Attorney General may request a monitoring order, whereby he may apply to the Criminal Court for such a monitoring order to be issued, on the basis of a reasonable suspicion that a person or legal entity is guilty of a money laundering offence. The order, if upheld by the Court, would require the relative bank/s to monitor the transactions or banking operations being carried out through the bank account(s) of the suspected person/s. This order may be requested at any time before, during, or after the commission of the suspected offence and has thereby proved to be a successful tool available to the Attorney General in tackling money laundering related crimes. [1259]

As hinted earlier on, the PMLA also sets up the FIAU which is a body corporate having a distinct legal personality, and the national central agency charged with enforcing the provisions of the PMLA in Malta. It is responsible for the collection, collation, processing, analysis and dissemination of information of suspected money laundering or terrorist financing-related activities, thereby supporting the domestic and international prevention of money laundering and terrorist financing law enforcement effort.[1260] Nonetheless, it is important to note that Maltese legislation will soon undergo a major shift due to the transposition and harmonization of the Fourth EU Anti-Money Laundering Directive into domestic law, mostly in relation to the establishment of a risk-based customer due diligence as well as risk-based supervision. Indeed, Implementing Procedures issued by the FIAU are binding on subject persons and are divided into two parts; namely, Part I includes general obligations mandatory on all subject persons, whereas Part II contains sector-specific guidance.

Moreover, Malta is also part of MONEYVAL, which is a committee of experts on the evaluation of anti-money laundering measures and the financing of terrorism which was established in 1997 by the Committee of Ministers of Europe and which continues to enhance the protection awarded to combat crimes related to money laundering and the financing of terrorism.

6. Conclusion

It may be concluded that the overall idea of the Fourth EU Anti-Money

[1258] 'Prevention of Money Laundering and Funding of Terrorism Activities in Malta' (*GVZH Advocates*, 16 January 2011) <http://www.csb-advocates.com/malta-law-articles/prevention-money-laundering-and-funding-terrorism-activities-malta> accessed on 27th August 2015.

[1259] ibid.

[1260] ibid.

Laundering Directive is consistent with the EU Directives which had been published earlier, mainly the Third EU Directive. However, as has been highlighted throughout this legal paper, through this new Directive there have been various new developments which strongly favour the risk-based approach and a greater level of transparency when it comes to the origin and circulation of money, especially across EU frontiers. For instance, when considering the national gaming sector, the current Remote Gaming Regulations established by the Malta Gaming Authority already provide for anti-money laundering measures, including an obligation on licensees to verify the identity, age and residence of a player before making a payment exceeding €2330. Hence, the Fourth Directive's reduction of the single transaction threshold to €2000 should not pose a major impact on operators of the remote gaming industry that are licensed in Malta. Thus, although under the Fourth Directive all remote gaming operators will be considered as obliged entities for the first time in the history of EU anti-money laundering legislation, under Maltese law remote gaming operators have already been subjected to some form of anti-money laundering regulations, such as those established in terms of the Remote Gaming Regulations and the Lotteries and Other Games Act.[1261] However, the anti-money laundering measures which will eventually be enacted to transpose the Fourth Directive go into much further detail and stipulate more onerous obligations when compared to current anti-money laundering obligations.

When it comes to the national risk-assessment requirement imposed by the Fourth Directive, towards the end of 2013, the Maltese Government had already initiated and entrusted the task of leading a national risk-assessment procedure upon the domestic FIAU. Once this project is concluded the Government would be expected to take all the necessary measures to offset any risks identified in such national risk-assessment. Moreover, the Directive now also imposes the requirement that all assessments carried out by financial entities need to be based on a risk-based approach. Thus, all obliged entities must now carry out their risk-assessments and CDD on the basis of the type of transaction in question and the degree of risk posed by the customer or third State being dealt with. Such entities will then be held accountable by the national regulators for any decisions they may take under such a risk-based approach. Although the carrying out of risk-assessments is not a novel concept under Maltese legislation, the Fourth Directive's shift towards a risk-based approach is envisaged to leave a considerable impact on the application of anti-money laundering and CTF procedures by national subject-persons. In addition, the Fourth Anti-Money Laundering Directive will surely leave a huge impact on Maltese anti-money laundering legislation in relation to the new requirements imposed on corporate

[1261] Lotteries and Other Games Act, Chapter 438 of the Laws of Malta.

entities and trusts with regard to the recording of beneficial ownership information.

Hence, it is very evident that the enhanced focus on a risk-based approach and the stronger emphasis placed on strengthening the cooperation between the various FIUs clearly shows that previous errors have been taken into consideration whilst drafting this new Directive, and possibly also improved upon. Indeed, it is an undisputed fact that a proactive implementation strategy will aid in ensuring that global financial and business institutions understand, at an early stage, the challenges posed by this implementation procedure and can thereby bring their current existent global anti-money laundering programs in conformity with the Fourth Directive in a timely and efficient manner. As held by Stuart Gulliver, Chief Executive of HSBC, at the Parliamentary Commission on Banking Standards 2013, 'our [bank's] geographic footprint became very attractive to trans-national criminal organisations, whether they are terrorist in origin or criminal in origin.'[1262] Hence, each State must do its utmost to collectively combat such trans-national criminal activities and ensure better safeguards for their prevention.

> Money laundering is a very sophisticated crime and we must be equally sophisticated.[1263]

[1262] Steve Slater, 'HSBS's global spread left it open to crime: CEO' (*Reuters*, 6 February 2013) <http://www.reuters.com/article/us-hsbc-inquiry-idUSBRE9150DZ20130206> accessed 13 April 2016.

[1263] Janet Reno, while serving as Attorney General of the United States from 1993 to 2001.

IN LIGHT OF UPCOMING REVISION ON THE DUBLIN III REGULATION, HOW COULD THIS BE AMENDED TO ENSURE A FAIR SHARING OF RESPONSIBILITY?

Therese Lia

This essay was the winning submission in a competition held by ELSA Malta, in collaboration with the Office of MEP Roberta Metsola.[1264]

KEYWORDS: DUBLIN III REGULATION –PRIVATE INTERNATIONAL LAW – FAIR SHARING

[1264] This essay was reviewed by Dr Roberta Avellino Pulè LL.D., LL.M. (Int. Law) (Melit.), LL.M. (LSE).

IN LIGHT OF UPCOMING REVISION ON THE DUBLIN III REGULATION, HOW COULD THIS BE AMENDED TO ENSURE A FAIR SHARING OF RESPONSIBILITY?

Therese Lia

1. Introduction to the Dublin III Regulation

The Dublin Regulation,[1265] replacing the 1990 Dublin Convention as one of the 'cornerstones of the European Union's (Hereinafter referred to as 'EU') internal security acquis'[1266], assigns the responsibility for asylum claims to the different Member States (usually the country of first entry), in order to ensure the fair examination of each asylum claim and maintain an efficient system. The Dublin III Regulation and its amendment brought about the right to information, personal interview and access to remedies as well as a mechanism for early warning and crisis management. The Dublin III Regulation also provides more protection to asylum seekers who may be considered as irregular migrants to be treated under the Dublin Procedure and it creates more legally clear procedures between Member States.

Although the Dublin III Regulation grants more protection to those considered irregular migrants and to the migrants' family links,[1267] the Dublin Regulation lacks a mechanism which guarantees a fair distribution of responsibilities. This is because its underlying premise stipulates that the State that played the major part in the asylum seekers' entry into, or stay in the EU (taking account of his or her personal situation), is responsible for the asylum application. As the Draft Report on the situation in the Mediterranean and the need for a holistic EU

1265 Council Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (2013) OJ L 180/31

1266 Carolyn Armstrong and Eiko Thielemann, 'The Political Project of the European Union: Current State and Future Perspectives' (Universidade Nova de Lisboa 2011) <http://ifl.pt/file/uploads/197fd7e390a506f0c6f2b14efa50be5d.pdf> accessed 9 May 2016.

1267 The Regulation contains a 'sovereignty clause' allowing a Member State receiving an application to take responsibility for an asylum application even if not otherwise responsible (Article 3(2)) and a 'humanitarian clause' providing that a State may unite "family members as well as other dependent relatives" on humanitarian grounds by taking responsibility for an asylum seeker which does not fall under that MS's responsibility (Article 15 (2)).

approach on migration stated,[1268] the Dublin III Regulation has 'raised many questions linked to fairness and solidarity',[1269] since 'the current system does not take into sufficient consideration the particular migratory pressure faced by Member States situated at the Union's external borders'.[1270]

2. Are the EU's core principles of solidarity and unity being faithfully represented in the Dublin System?

The European Commission has claimed that 'Solidarity is part of how European society works...'[1271] In fact, solidarity, one of the EU core fundamental values to which the Member States subscribe to,[1272] is of utmost importance to the policy of the EU, which came about from the conscious effort to create some kind of unity in Western Europe after two subsequent wars. In this respect, after ten years in force, the European Commission's evaluation: 'the objectives of the Dublin system ... have, to a large extent, been achieved', is questionable. Responsibility, though assigned, is not being carried out, multiple claims and irregular movement are still commonplace and bureaucracy overshadows the European asylum system. The 'main problem' as identified by the Commission is the low transfer rates (which are rarely even carried out).[1273] The Commission's suggestion that Member States should annul 'the exchange of equal numbers of asylum seekers in well-defined circumstances' is absurd; disregarding sharing of responsibility should never be seen as a 'solution'.[1274] If it does in fact improve the efficiency of the system, then how successful is the whole system in terms of fair burden-sharing,[1275] and inter-state solidarity, which are supposedly the rationale behind the European asylum policy?

1268 Committee on Civil Liberties, Justice and Home Affairs, 'Draft Report on the situation in the Mediterranean and the need for a holistic EU approach to migration' (2015) 2015/2095(INI).

1269 ibid 14.

1270 ibid.

1271 Malcolm Ross and Yuri Borgmann-Prebil, *Promoting Solidarity In The European Union* (OUP 2010).

1272 Eurofund, 'Solidarity Principle' <http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/solidarity-principle> accessed 11 May 2016.

1273 The criteria established by the said Regulation are not always applied correctly or at all since complete and conformity with the criteria would not bring about the desired results.

1274 European Council on Refugees and Exiles, 'Sharing Responsibility For Refugee Protection In Europe: Dublin Reconsidered' (2008).

1275 Fair burden-sharing is also not being achieved in financial terms. This Regulation may be criticised for not sorting out the issue of multiple applications and for having a significant negative financial impact. (In spite of the assertion that 'Member States consider the fulfilling of the political objectives of the system as very important, regardless of its financial implications'.)
Source: Commission, 'Report from the Commission to the European Parliament and the Council on the evaluation of the Dublin system' COM (2007) 299 final.

According to the EU Observer, the EU's mantras of values and inter-state cooperation have been rendered meaningless in the refugee crisis.[1276] The Dublin system is guilty of shifting responsibility of refugees towards Europe's southern and Eastern States such as Greece, Jordan, Turkey, and Italy, which have been experiencing an overwhelming economic strain. Greece has in fact hosted 154,553 asylum seekers between January and April 2016 alone.[1277] With the insufficiencies of these migration centres including lack of space, and hygienic and health services, becoming more problematic, many rights groups have invoked Article 3 of the European Convention on Human Rights which cites the unlawfulness of 'inhuman or degrading treatment'. The situations are especially dire in Greece where lack of ventilation, access to clean water, and sanitation are punishing the overcrowded facilities.[1278] In the case of ***M.S.S vs. Belgium and Greece***,[1279] the applicant, an Afghan national entering Greece before arriving in Belgium, complained in particular about the conditions of his detention and his living conditions in Greece, which was held to be responsible according to the Dublin II Regulation. As the European Council on Refugees and Exiles (Hereinafter referred to as 'ECRE') puts it in Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered: 'The inefficiencies and contradictions of the Dublin system do not merely impact governments and public finances, but often harshly disrupt human lives as well.'[1280] The hotspots set up in Italy and Greece, the first reception facilities accommodating large numbers of migrants in place for the purposes of identification, registration and fingerprinting present an unfair sharing of responsibilities, costs and efforts,[1281] since Greece and Italy are responsible for the establishment of the hotspots even though they receive financial aid from the EU.[1282]

1276 Nikolaj Nielsen, 'EU Mantra of 'Solidarity' Lost on Asylum' (*euobserver*) <https://euobserver.com/migration/131966> accessed 9 May 2016.

1277 United Nations High Commissioner for Refugees, 'UNHCR Refugees/Migrants Emergency Response Mediterranean' (2016) <http://data.unhcr.org/mediterranean/country.php?id=83> accessed 20 May 2016.

1278 Khalid Koser, Deputy Director of the Geneva Centre of Security Policy, says: 'We used to think of migration as a human security issue: protecting people and providing assistance. Now we clearly perceive—or misperceive—migration as a national security issue. And the risk of securitizing migration is that you risk legitimizing extraordinary responses'.

1279 *M.S.S. v. Belgium and Greece* 30696/09 (2011).

1280 "States increasingly detain asylum seekers to try to complete transfers, families are kept apart, and refugees with serious health problems receive insufficient care. The application of the Dublin rules causes additional, unnecessary suffering to already traumatised refugees." (Source: ECRE (European Council on Refugees and Exiles), 'Sharing Responsibility For Refugee Protection In Europe: Dublin Reconsidered' (2008))

1281 Commission, 'The Hotspot Approach To Managing Exceptional Migratory Flows' <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf> accessed 15 May 2016.

1282 European Council on Refugees and Exiles, 'Sharing Responsibility For Refugee Protection In Europe: Dublin Reconsidered' (2008).

It is against the EU's policies for migrants to continue onward after Greece or Italy since the Dublin Regulation imposes the obligation on the receiving country to process the asylum claims. In light of this, the Commission proposed a scheme to have 20,000 resettlement places from Italy and Greece.[1283] The rationale behind the Commission's two-year plan of relocation was to reduce the difficulties state which are geographically disadvantaged face due to this global phenomenon by collectively combining efforts to have a holistic EU approach to migration. However, the majority of Member States have stressed that this scheme should be done voluntarily; proving the lack of inter-state cooperation in the current system. The implementation of the relocation scheme has brought about even greater tension between the States. On the 4th February 2016, the Commission announced that only 937 of the intended asylum seekers had been located from Italy and Greece.[1284]

The differences in the number of asylum applications Member States receive are significant. So is the fact that Member States deal with such applications differently in terms of reception and living conditions, length and quality of asylum process, and recognition rates,[1285] even though there are standards governing the treatment of asylum applications stipulated in binding EU directives.[1286] A brief look at the data on the actual asylum applications reveals a highly inequitable distribution of responsibilities between Member States and substantial differences between the Commission's proposed quotas for relocating migrants from Greece and Italy and the additional quotas later in September 2015. This goes to show that the Dublin procedure is not being successful in ensuring that the influx and strain are being shared accordingly.

[1283] Commission Recommendation C(2015) 3560 final on a European resettlement scheme [2015].

[1284] Commission, 'Communication From The Commission To The European Parliament, The European Council And The Council First Report On Relocation And Resettlement' (Communication) COM(2016) 416 final.

[1285] Steffen Angenendt, Marcus Engler and Jan Schneider, 'European Refugee Policy Pathways to Fairer Burden-Sharing' [2013] SWP.

[1286] Namely the Qualification Directive 2011/95, the Procedure Directive 2013/32, and the Reception Directive 2013/33

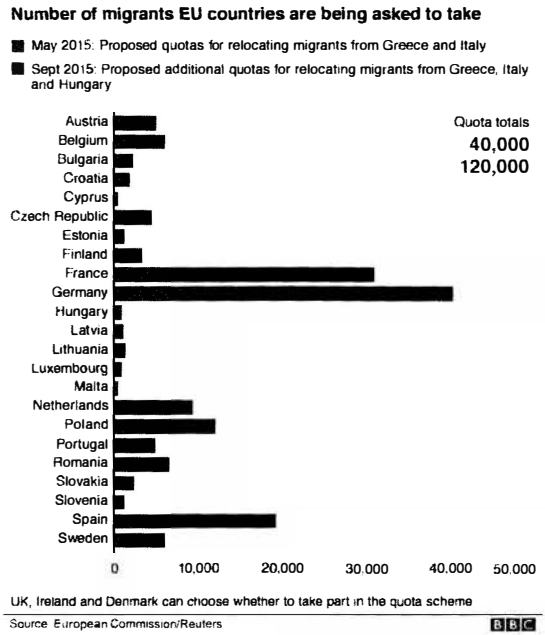

Figure 1: Number of migrants EU countries are being asked to take (Source: BBC)

Actual asylum applications in relation to the multi factor model, 2008–2012

	Fair quota	De facto applications	Deviation from fair quota (%)
Sweden	42,017	153,900	+266.3%
Belgium	32,017	95,720	+199.0%
Greece	27,189	64,970	+139.0%
Austria	31,960	71,510	+123.7%
Cyprus	7,193	13,680	+90.2%
Malta	6,457	9,060	+40.3%
France	170,953	232,680	+36.1%
Netherlands	51,954	62,080	+19.5%
Germany	205,974	201,350	−2.2%
Denmark	22,706	21,100	−7.1%
United Kingdom	150,457	137,940	−8.3%
Italy	140,580	107,800	−23.3%
Finland	27,905	19,960	−28.5%
Hungary	20,837	13,740	−34.1%
Ireland	16,629	10,730	−35.5%
Luxembourg	9,951	5,810	−41.6%
Poland	67,695	38,590	−43.0%
Bulgaria	16,568	4,750	−71.3%
Slovakia	12,738	3,140	−75.3%
Croatia	12,195	2,600	−78.7%
Lithuania	9,350	1,740	−81.4%
Czech Republic	25,262	4,570	−81.9%
Romania	39,924	7,100	−82.2%
Spain	108,289	16,260	−85.0%
Slovenia	9,622	1,240	−87.1%
Latvia	7,416	690	−90.7%
Portugal	23,860	1,040	−95.6%
Estonia	6,537	230	−96.5%

Sources: Eurostat, UNHCR, own calculations

Figure 2: Actual asylum applications in relation to the multi-factor model (Source: Eurostat, UNHCR)

The Dutch Research and Documentation Centre's study found that the recognition rates in the EU vary substantively, even after these had been fixed to suit the asylum populations in the European states.[1287]. This has in turn led to tensions within the EU. Vastly differing refugee recognition rates create an 'asylum lottery': for instance, over 80% of Iraqi asylum claims are accepted at first instance in some Member States, whilst in others they are not.

3. How can the Dublin III Regulation be amended to ensure a fair sharing of responsibility?

In light of these unequitable differences, one should consider the establishment of a permanent responsibility-sharing mechanism, founded upon the principle of inter-state cooperation. As the European Refugee Policy Paper[1288] states,

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1287 Ministerie van Veiligheid en Justitie, 'How (Un)Restrictive Are We? 'Adjusted' And 'Expected' Asylum Recognition Rates In Europe' (Research and Documentation Centre (WODC) 2015) <http://www.arjenleerkes.nl/How%20(un)restrictive%20are%20we%20-%20Adjusted%20and%20expected%20asylum%20recognition%20rates%20in%20Europe.pdf> accessed 25 May 2016.

1288 Steffen Angenendt, Marcus Engler and Jan Schneider, 'European Refugee Policy Pathways to Fairer Burden-Sharing' [2013] SWP.

> In view of these deficits, the EU member states need to find a new and fairer mechanism for receiving refugees and processing their applications. One obvious route would be to specify an equitable reception quota for each member-state, to be adjusted annually according to a transparent calculation method.

The European legal framework must hence be adjusted. Article 80 TFEU, which states that the asylum policy of the EU is based on the principle of solidarity and burden-sharing, needs to clearly delineate the content and meaning of 'solidarity'. Solidarity must be defined in terms of an international sphere and its binding power over States that must commit to the system of collective decision-making.

An equitable distribution mechanism should not be the exception, as was the case in the Commission's two-year plan of relocation, but the normal procedure. In light of this, Articles 3 and 13 of the Dublin Regulation require further revision in order to provide for the disproportionately large number of asylum seekers some Member States are confronted with, in which case it should authorise the compulsory transfer of a set quota of asylum seekers to a Member State which has a disproportionately low number of asylum seekers taking into consideration other factors such as the latter Member State's economy and population density.[1289] The problem with the Commission's two year relocation plan was the level of commitment Member States were willing to put in due to political difficulties with regard to burden-sharing for refugees. [1290] Thus if such a scheme is to work as Commissioner for Migration, Home Affairs and Citizenship Dimitris Avramopoulos highlighted, Member States need to deliver their commitments, as 'The lack of political will among Member States has been the most important factor in slowing down the process.'[1291]

The Council of Ministers should be given the power to implement a distribution key for a fair quota plan, which can be similar to the Commission's 2015

1289 Although such a proposal may limit the freedom of the asylum seeker to pick and choose a specific Member State, this lack of choice can be compensated by offering the prospect of mobility within the EU for persons who acquired international protection in one of the Member States, after a two-year period instead of five and subject to certain restrictions, such as an offer to work or possibility to study in another Member State.

1290 Jon Henley, 'EU Refugee Relocation Scheme Is Inadequate And Will Continue To Fail' (the Guardian, 2016) <https://www.theguardian.com/world/2016/mar/04/eu-refugee-relocation-scheme-inadequate-will-continue-to-fail> accessed 18 November 2016 (For exact figures see: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf)

1291 'Relocation And Resettlement: EU Member States Urgently Need To Deliver' (Europa.eu, 2016) <http://europa.eu/rapid/press-release_IP-16-829_en.htm> accessed 18 November 2016

relocation scheme,[1292] and which will annually determine the percentage of the total number of asylum applications each Member State should be responsible of. This can be done after the Commission has quarterly reports by EURODAC[1293] on the total number of asylum seekers registered in the EU and in each Member State in order to determine which States have received a disproportionate number of applications, and how many asylum seekers may be transferred by these Member States to those with disproportionately few applications,[1294] whilst taking into consideration factors such as the countries' resources, GDP, economic activity, unemployment levels, population density and future economic growth.[1295] A Member State may also indicate to the Commission a sudden rise of asylum applications for it to thus initiate the distribution mechanisms ad hoc. Such a system would serve as an incentive for Member States to register asylum seekers into EURODAC, as the more they register, the sooner they will reach their allocated number of asylum seekers, allowing the transfer for new asylum seekers to other Member States.

As previously stated although in terms of responsibility, the Commission's proposal has been seen as a step in the right direction, the efficiency of States to fulfil their obligations has been 'disappointing'.[1296] In light of this a more strategic enforcement approach for the Member States failing to meet their obligations is required by the Commission. This can be done by rewarding States that take active measures to increase asylum capacity with extra funding, whilst excluding the States which fail to meet their obligations from benefitting from the distribution mechanism. This can take the form of a 'Dublin compensation fund' which would be comprised of funds from Member States that repeatedly take in fewer asylum-seekers than their fair quota suggests, to set up a supplementary financial compensation arrangement. This fund can be similar to the new Asylum and Migration Fund 2014-2020, which provides a similar compensation mechanism for EU resettlement measures.[1297] Moreover, even

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1292 Commission Recommendation C(2015) 3560 final on a European resettlement scheme [2015]

1293 "The objective of this regulation is to establish a system for comparing fingerprints of asylum seekers" (Eur-Lex)

1294 European Council on Refugees and Exiles, 'Sharing Responsibility For Refugee Protection In Europe: Dublin Reconsidered' (2008).

1295 The UNHCR has developed a multi-factor model for calculating reception quotas based on the economic strength of the country (Gross domestic product), the population (Average mean of last 5 years), the area (geographical area in square kilometres) and the unemployment rate average over the last five years. Such a multi-factor model can be used in order to determine said quotas.

1296 'Roberta Metsola Maps Out EU Plan On Migration' (EPP Group, 19 January 2016) <http://www.eppgroup.eu/news/Roberta-Metsola-maps-out-EU-plan-on-migration> accessed 11 May 2016.

1297 Steffen Angenendt, Marcus Engler and Jan Schneider, 'European Refugee Policy Pathways to Fairer Burden-Sharing' [2013] SWP.

though it is the Member States' primary responsibility to implement EU legislation correctly and in a timely fashion, the EU should intervene so as to hold countries responsible in Council meetings. It is important to point out that for the permanent distribution mechanism to operate effectively there must be further harmonization of the Common European Asylum system as well as a revision of the Temporary Protection Directive.[1298]

4. Is amending the Dublin III Regulation enough?

In tangent with amending the Dublin III Regulation, there must be further integration strategies for the asylum seekers, as well as better safety measures in the Mediterranean Sea, and more emphasis on the external dimension of EU asylum policies. These all require a sense of fair burden-sharing which has been lacking in both the Dublin III Regulation as well as the European asylum procedure as a whole. As the Committee on Civil Liberties, Justice and Home Affairs' Report pointed out, Article 80 TFEU puts the principles of solidarity and fair sharing at the heart of the whole of the EU. This solidarity can have both an internal dimension including the proactive interpretation of the Dublin III Regulation and the Temporary Protection Directive, operational support measures and mutual relocation whilst the external dimension can feature sharing of responsibilities in search and rescue missions , in cooperating with third countries, amongst others.[1299]

After 3771 persons were reported dead or missing in the Mediterranean Sea in 2015, it became clear that there needs to be further cooperation between Member States in terms of disembarkation procedure and search and rescue.[1300] There must hence be more harmonization on the modalities for managing search and rescue zones and on the obligations of the State in whose search and rescue zone the rescue took place.[1301] Upon the recommendation of the Advisory Committee on Migration Affairs, the EU should work more on the external dimension of EU asylum by (i) cooperating with border countries and (ii) dealing with the main reason for which persons flee Europe.

1298 Council Directive 2001/55/EC

1299 The EU may provide incentives and support for measures taken by Member States to promote the integration of legally resident migrants however there is currently a lack of harmonisation of national laws and regulations.

1300 Committee on Civil Liberties, Justice and Home Affairs, 'Draft Report on the situation in the Mediterranean and the need for a holistic EU approach to migration' (2015) 2015/2095(INI).

1301 It is important to note that saving lives is not only an ethical issue and an act of solidarity, but also a legal obligation since Article 98 of the United Nations Convention of the Law of the Sea ratified by all Member States and the Union itself, entails assistance to be given to any person distress at sea.

4.1 *Cooperation with border countries*

Whilst noting that Syria, Afghanistan and Iraq are countries which have recognition rates of over 50% in EU States, further cooperation with border countries such as Jordan, Turkey and Lebanon seems to be essential to relieve some of the weight off the EU (whilst aiding such countries in order to have better asylum procedures and more harmonized asylum policy). In this respect, although agreements such as the EU-Turkey Joint Action, the EU-Jordan Association Agreement,[1302] and the EU-Lebanon Association Agreement have been helpful in this regard, the Global Approach to Migration and Mobility (Hereinafter referred to as 'GAMM') Pillar needs to be further developed so that there is greater involvement of third countries, so that the resettlement component of programmes (such as the Regional Protection Programmes (Hereinafter referred to as 'RPP's')) or Regional Development and Protection Programmes (Hereinafter referred to as 'RDPPs') are strengthened, and capacity building efforts and resettlement activities are improved and carried out with the countries hosting large refugee populations.

4.2 *The sustainable development of the countries of origin*

The sustainable development of the countries of origin, which some have referred to as a new 'Marshall Plan' for the Middle East and North Africa, could ultimately help the situation since prevention measures alone are not sufficient to deal with this current migration phenomena.[1303] As the UK Government has recognized: 'the solution to the crisis does not lie only in resettling and meeting the basic needs of existing refugees' since there must be 'further focus on interventions in source countries that build resilience, increase stability and enhance development in order to help reduce further mass migration'.[1304] The EU must hence adopt a long-term strategy to help counteract the 'push factor' in

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[1302] 'King Abdullah: ISIL "A war inside of Islam" that we need to fight together (Euronews, 11 November 2015) <http://www.euronews.com/2015/11/11/exclusive-king-abdullah-ii-on-syrian-refugees-in-jordan-and-the-islamic-state> accessed 25 May 2016:'...I think the issue of refugees arriving on the shores of Europe has been a wake-up call for all of us that we have to have better coordination ... I think here is the opportunity to put our differences aside and bring this new collective relationship together... ... Are we going to grab those opportunities or are we going to stick our heads in the sands and let these opportunities take us past? It is up to us.'

[1303] 'Tackling Migration's Root Causes' (British Council, October 2015) <https://www.britishcouncil.org/organisation/policy-insight-research/insight/tackling-migrations-root-causes> accessed 9 May 2016.

[1304] The UK's interventions vary from contributing to systematic reform in key countries; through boosting education and increasing employability. Ways of contributing to the sustainable development of said countries could be to boost the private sector, to promote economic growth, develop state capacity, as well as strengthen the rule of law and mechanisms of accountability (US academic Francis Fukayama) as well as strengthening and forcing asylum systems and helping in border control.

third countries (persecution, conflict, violence or extreme poverty) and to solve the geo-political issues that force people to flee, such as the Syrian war; the lack of employability in sub-Saharan Africa; and the deep-rooted conflicts in Nigeria, Sudan, Somalia and Democratic Republic of Congo.[1305]

5. Final suggestions and Conclusion

To sum up the suggestions that have been given in this paper are the following,

a) The establishment of a permanent-sharing mechanism;
b) The revision of European legal framework including Article 80 TFEU to delineate the content and meaning of 'solidarity' and Article 3 and 13 of the Dublin Regulation;
c) The implementation of a distribution key by the Council of Ministers through quarterly reports by EURODAC;
d) A more enforceable approach of this mechanism through the establishment of the 'Dublin Compensation Fund' to be comprised from funds from Member States that repeatedly take in fewer asylum seekers to set up a supplementary financial compensation arrangement;
e) Cooperation in the external dimension apart from the internal dimension; this should be done mainly by cooperating in search and rescue missions, cooperating with border countries and working together for the sustainable development of the countries of origin.

What is needed now is rapid and comprehensive reforms of the Common European Asylum System,[1306] a fair distribution system and a reliable mechanism for overburdened national asylum systems which can be implemented through a more proactive approach of the Dublin Regulation. The Dublin III Regulation should distribute costs more fairly as this has also been disproportionally placed on the EU's external border countries. This can be done without having to resort to a single centralised procedure.[1307] The nature of European asylum cooperation and European collective action regarding internal security is being undermined through the inequitable system, which renders it

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1305 Lawrence Peter, 'Migrant Crisis: How can EU Respond to Influx?' BBC (Europe, 7 September 2015) <http://www.bbc.com/news/world-europe-34139348> accessed 11 May 2016.

1306 The Common European Asylum System consists of three revised directives (the Asylum Qualification Directive, the Asylum Procedures Directive, and the Reception Conditions Directive) and two reworked regulations (EURODAC and Dublin-III).

1307 Mechanisms aiding cooperation and mutual support should be more prevalent, ensuring comprehensive training for officials, the exchange of best practices from the European Asylum Support Office and better dispute resolution mechanisms
Source: European Council on Refugees and Exiles, 'Sharing Responsibility For Refugee Protection In Europe: Dublin Reconsidered' (2008).

necessary for cooperation in this policy area to evolve.[1308] Quoting Migration, Home Affairs and Citizenship Commissioner, Dimitris Avramopoulo, 'While the number of migrants arriving to Europe remains high, we need to step-up the implementation of the agreed European response that strikes the balance between responsibility and solidarity',[1309] and MEP Roberta Metsola, 'If we are a union of shared values, we must now become a union of shared responsibility'. And in order to do this, 'Every Member State must play its part.'[1310]

[1308] Carolyn Armstrong and Eiko Thielemann, 'Understanding European asylum cooperation under the Schengen/Dublin system: a public goods framework' [2013] Volume 12, Issue 2, EU Internal Security as a Collective Action Problem 148.

[1309] European Commission, *State aid: Implementing the European Agenda on Migration: Progress on Priority Actions* (Press Release, Brussels, 10 February 2016, IP/16/271) <http://europa.eu/rapid/press-release_IP-16-271_en.htm> accessed 11 May 2016.

[1310] Roberta Metsola, 'Roberta Metsola Maps Out EU Plan on Migration' (*EPP Group*, 19 January 2016) <http://www.eppgroup.eu/news/Roberta-Metsola-maps-out-EU-plan-on-migration> accessed 11 May 2016.

THE ENFORCEMENT OF MALTESE JUDGMENTS IN OTHER EU MEMBER STATES UNDER THE EUROPEAN UNION'S 'BRUSSELS I' REGULATION, WITH PARTICULAR REFERENCE TO JUDGMENTS DELIVERED AFTER 1ST MAY 2004 IN CASES COMMENCED BEFORE THAT DATE

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KEYWORDS: BRUSSELS I REGULATION – RECOGNITION OF JUDGMENTS – ENFORCEMENT OF JUDGMENTS

[1311] This essay was reviewed by Dr Andria Buhagiar and Dr Ivan Sammut B.A.(Melit.), LL.D.(Melit.), M.Jur.(Melit.), M.A.(Birm.), LL.M.(Bruges), Ph.D.(Lond.)

THE ENFORCEMENT OF MALTESE JUDGMENTS IN OTHER EU MEMBER STATES UNDER THE EUROPEAN UNION'S 'BRUSSELS I' REGULATION, WITH PARTICULAR REFERENCE TO JUDGMENTS DELIVERED AFTER 1ST MAY 2004 IN CASES COMMENCED BEFORE THAT DATE

Julian Vella

1. Introduction

On 1 January 2012, some 17.2 million European Union (Hereinafter referred to as 'EU') citizens were living and officially residing in another Member State. In the same year, it was reported that some 6.5 million persons were working in another Member State. Moreover, 45% of individuals aged 16-74 had purchased goods online from within the EU.[1312]

These statistics are not only extraordinary in their own nature, but they evidence the increased importance that Private International Law has come to bear. In a world where the global, and especially the intra-Union, movement of persons, goods, services and capital is taking place at a rate that is higher than ever before, the European legislator anticipated the legal disputes and issues that could, and so often do, arise from such movement by introducing several legal instruments, most prominently the Brussels I Regulation (Hereinafter referred to as the 'Regulation').[1313]

These instruments, therefore, are both anticipatory and reactionary, in that the primary motive of such instruments, as often evidenced in the preambles themselves, is to ensure that the legal conditions in the Union are improved to allow the internal market to continue to grow, which motive is in turn based on the past experience and knowledge that a lack of legal approximation prevents such growth.[1314]

The Regulation, therefore, seeks to standardise both the determination as to which Court has jurisdiction over the particular issue and the determination as

[1312] 'EU Citizenship Statistics on Cross-Border Activities' (eurostat) <http://ec.europa.eu/eurostat/statistics-explained/index.php/EU_citizenship_-_statistics_on_cross-border_activities> accessed 13 August 2016.

[1313] Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2000] OJ L 12,

[1314] ibid Recital 2.

to how a judgement may be subsequently recognised and enforced by a Court in another Member State, should this be required.

This essay shall focus on the latter function of the Regulation. The purpose shall be not only to examine the procedure by which a Maltese judgement may be recognised and enforced in another Member State, but also to determine the kind of judgements that may be effectively enforced under the Regulation. This shall involve a discussion on the scope of the Regulation and the defences that could be raised by a defendant to stop such enforcement. It shall additionally examine the changes brought about by the recast Regulation.[1315]

2. Distinguishing Recognition from Enforcement

It should be noted that recognition and enforcement are not one and the same thing. As explained in the fourteenth edition of *Private International Law*,[1316] recognition is the prelude to enforcement. If the courts of a Member State are called upon to enforce the rights that one has acquired through a foreign judgement, those same courts must first recognise the decision of the foreign court, which is however automatic.[1317] Following recognition, the creditor must use the enforcement procedure laid out in the Regulation to bring about the enforcement of that judgement. 'National rules cannot be used as an alternative.'[1318]

Furthermore, the purpose of recognition is not merely enforcement. The recognition of a foreign judgement prevents the re-litigation of the merits on which the *res judicata* lies. This was made amply clear in the ***De Wolf vs. Cox case***,[1319] where it was held that the winning party to a case could not file an action on the same merits.

> The fact that there may be occasions on which, according to the national law applicable, the procedure set out in articles 31 et seq. of the [1968] convention may be found to be more expensive than bringing fresh proceedings on the substance of the case does not invalidate these considerations.[1320]

1315 Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] OJ L 351/1.

1316 Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008).

1317 ibid 603.

1318 ibid 605.

1319 Case 42/76 *Jozef De Wolf vs.. Harry Cox* [1976] ECR 1759.

1320 ibid para 14.

3. The Process of Enforcement

The Regulation dedicates the third chapter to the process by which a judgement delivered in a Member State may be recognised and enforced in another Member State. It creates a simple general rule,

> A judgement given in a Member State shall be recognised in the other Member States without any special procedure being required.[1321]

There are very limited instances where the recognition of a judgement delivered in a Member State may be blocked in another Member State. These instances shall be discussed further below. However, once the judgement has been recognised,

> A judgement given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.[1322]

The enforcement of a judgement, therefore, begins through an application submitted either to a court or to a competent authority, as the case may be.[1323] This is known as the Exequatur procedure, which is regulated by the law of the Member State in which enforcement is sought.[1324] The application for a declaration of enforceability requires that one present an authentic copy of the judgement in question along with a certificate issued by the Court of the Member State of origin that the said judgement is enforceable against the defendant.[1325]

It is important to note that the creditor has the right to apply for provisional, including protective, measures to the Court of the Member State where enforcement is sought without requesting a declaration of enforceability.[1326]

Once the judgement has been declared enforceable, the declaration is served on the defendant, who may then appeal the decision. Prior to this stage, the debtor does not seem to have any opportunity of making submissions. The appeal must be lodged within one month from the date on which service of the declaration is affected, which is extended by another one month if the defendant is domiciled in

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1321 Regulation 44/2001 art 33(1).
1322 ibid art 38(1).
1323 ibid art 39(1).
1324 ibid art40(1).
1325 ibid arts 53,54.
1326 ibid art 47.

a Member State other than that in which the declaration of enforceability was issued.[1327]

Once the appeal has been lodged, the Court of the Member State in which enforcement is sought may take one of two routes. Firstly, the Court may stay proceedings where an appeal from the judgement to be enforced has been filed before the Courts of the Member State of origin.[1328] Case law has shown that should the defendant appeal, the party seeking enforcement,

> may not, during that time, take any measures of enforcement properly so called but must confine itself to taking, if it considers that there is a need for them, protective measures against the property of the party against whom enforcement is sought.[1329]

Alternatively, the Court may proceed to determine whether or not to refuse a declaration of enforceability. The grounds on which the Court may refuse to enforce a judgement are the same as the grounds of non-recognition.[1330]

4. Grounds of Non-Recognition

Articles 34 and 35 of the Regulation provide the judgement debtor with some prospect of impeding the recognition and enforcement of a judgement. Given that the defences listed hereunder are exceptions to the general rule of recognition, they should be interpreted restrictively.

This was stated clearly in ***Case C-414/92***,[1331] a preliminary reference decided under the 1968 Brussels Convention.[1332] The question referred to the European Court of Justice (Hereinafter referred to as the 'ECJ') was whether a court settlement could fit within the definition of "judgement" under the Convention's Articles 25 and 27(3) (Articles 32 and 34(3), respectively, of the Regulation). The Court answered in the negative.

The Regulation provides four grounds of non-recognition.

4.1 *Ground 1: Public Policy*

1327 ibid art 43.
1328 ibid art 46(1).
1329 Case 119/84 *Capelloni vs. Pelkmans* [1985] ECR 3143, para 18.
1330 Regulation 44/2001 art 45(1).
1331 Case C-414/92 *Solo Kleinmotoren GmbH vs. Boch* [1994] ECR I-2253.
1332 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1968] OJ L299/32.

Article 34(1) of the Regulation states that a judgement shall not be recognised 'if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.'[1333]

In understanding the applicability of this defence, reference to the Jenard Report is apt.[1334] The report makes clear that this defence must be used not when the judgement itself is contrary to public policy, but rather when its recognition is contrary to public policy:

> It is no part of the duty of the court seised of the matter to give an opinion as to whether the foreign judgment is, or is not, compatible with the public policy of its country. Indeed, this might be taken as criticism of the judgment. Its duty is rather to verify whether recognition of the judgment would be contrary to public policy.[1335]

As explained in *Cheshire, North & Fawcett's Private International Law*, the wording of the provision suggests that each Member State is to apply its own notion of public policy, according to its own rules and customs. However, this could create discord in the application of the Regulation given that each Member State may have a unique understanding of the term. Therefore, the national Court must interpret 'public policy' in a sense that is 'appropriate in the context of the Regulation, and the Court of Justice may intervene if they fail to do so.'[1336]

Needless to say, this is a rather undesirable situation. It seems that the balance between ensuring legal certainty on the one hand and strengthening harmonisation among the Member States on the other has not been correctly struck. It would make it very difficult for any practitioner to comfortably advise one's client as to the true meaning of the term. There have, in fact, been various cases dealing with the interpretation to be given to the term.

In the ***Krombach case***,[1337] for instance, the referring Court asked whether the provisions on jurisdiction in the Brussels Convention could be interpreted as part of public policy for the purposes of Article 27(1) (Article 34(1) of the Regulation). The ECJ held that the Court before which enforcement is sought cannot refuse the recognition and enforcement of a judgement purely on the basis 'that the court of origin failed to comply with the rules of the Convention

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1333 Regulation 44/2001 art 34(1).

1334 Paul Jenard, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Signed at Brussels, 27 September 1968) [1968] OJ C 59/79.

1335 ibid 44.

1336 Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 611-615

1337 Case C-7/98 *Dieter Krombach vs. André Bamberski* [2000] ECR I-01935.

which relate to jurisdiction.'[1338] One could only have recourse to the public policy defence,

> where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order.[1339]

4.2 *Ground 2: Default of Appearance*

Article 34(2) of the Regulation states that the judgement shall not be recognised if it were delivered in default of appearance, where the defendant was not served with the documents instituting the proceedings in such a way as to allow him to prepare his defence, 'unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.'[1340]

The law generally presumes that any person served with a document that implies his liability at law would take positive action to fight such claims. Through this defence, the Regulation seeks to protect the rights of those persons who have not had the opportunity to defend themselves.[1341]

A close reading of the article shows that it is made up of several elements. Firstly, the judgement must have been delivered in default of appearance. In other words, the defendant must not have appeared to defend himself at any level, not even to contest the jurisdiction of the Court.[1342] One interesting issue arose in the ***Sonntag case***,[1343] where the defendant had been aware of the civil law claim made against him in the criminal proceedings to which he answered. The Court held that at the moment that the defendant answers to the charges brought against him in the criminal proceedings, he is presumed to have answered also to

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[1338] C-7/98 *Dieter Krombach vs. André Bamberski* [2000] ECR I-01935 para 32.
[1339] ibid para. 37.
[1340] Regulation 44/2001 art 34(2).
[1341] Case 166/80 *Klomps vs. Michel* [1980] ECR 1593.
[1342] Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 617.
[1343] Case C-172/91 *Volker Sonntag vs. Hans Waidmann* [1993] ECR I-01963.

the civil law claim made against him, unless he specifically declines to appear in the civil action.[1344]

Secondly, the defendant must not have been served with the documents instituting proceedings. The wording of the provision under the Brussels Convention had been slightly amended to eliminate the term "duly" and leave only 'served'. The resulting effect is that the Regulation would not condone the non-recognition and enforcement of a judgement on a mere technicality. Under the Regulation, if service was effected, albeit irregularly, and the defendant had sufficient time to prepare a defence, then this ground may not be relied upon.[1345]

The documents referred to in the provision have been interpreted as, 'the document or documents which must be duly and timeously served on the defendant in order to enable him to assert his rights before an enforceable judgment is given in the State of origin.'[1346]

Thirdly, the documents must have been served in such a time and in such a way to allow the defendant to arrange for his defence. Jurisprudence has consistently held that it is for the Court before which enforcement is sought to determine whether or not the conditions are satisfied.[1347]

4.3 *Ground 3: Irreconcilability #1*

Article 34(3) states that a judgement shall not be recognised 'if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought.'[1348]

This ground of non-recognition requires that a previous judgement has been delivered between the same parties in the Member State in which recognition is sought, and that this judgement is irreconcilable with the judgement that is sought to be enforced.

> It is therefore not necessary for the same cause of action to be involved. Thus, for example, a French court in which recognition of a Belgian judgment awarding damages for failure to perform a contract is sought will be able to refuse recognition if a French court has

[1344] ibid para 41.
[1345] Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 618.
[1346] Case C-474/93 *Hengst Import BV vs. Campese* [1995] ECR I-2113.
[1347] Case 49/84 *Debaecker and Plouvier vs. Bouwman* [1985] ECR 1779.
[1348] Regulation 44/2001 art 34(3).

> already given judgment in a dispute between the same parties declaring that the contract was invalid.[1349]

Needless to say, the bone of contention would lie with whether or not the two judgements are irreconcilable. In the ***Hoffman judgement***,[1350] the ECJ held that to determine whether the two judgements are irreconcilable, one must examine whether the judgements lead to legal consequences that mutually exclude one other. 'Applying this test, it was held that a German judgement ordering a husband to pay maintenance to his wife as part of his conjugal obligations was irreconcilable with a subsequent Dutch judgement pronouncing a divorce.'[1351]

4.4 *Ground 4: Irreconcilability #2*

Article 34(4) states that a judgement shall not be recognised,

> if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.[1352]

Whereas subarticle 3 was concerned with irreconcilable judgements delivered in the same Member State, subarticle 4 looks at irreconcilability arising out of judgements delivered in different Member States or in third States.

This is especially important in situations of lis pendens with third States. The *lis pendens* rules in the Regulation apply only to proceedings in two Member States. Thus, in a situation of *lis pendens* between the Court of a Member State and the Court of a third State, wherein neither Court stays proceedings in favour of the other, the judgement delivered earlier by the third State takes precedence, provided that it satisfies the conditions of being recognised in the Member State addressed.

4.5 *Ground 5: Judgement conflicts with Chapter II of the Regulation*

1349 Paul Jenard, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Signed at Brussels, 27 September 1968) [1968] OJ C 59/79, 45.

1350 Case 145/86 *Hoffman vs. Krieg* [1988] ECR 645.

1351 Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 623.

1352 Regulation 44/2001 art 34(4).

Sections 3, 4 and 6 of the Regulation provide for special jurisdiction rules. If a Court, in delivering judgement, ignores or otherwise breaches the provisions of these sections, then the Court of another Member State has the power not to recognise that judgement. Therefore, though this ground is not listed as a non-recognition ground under Article 34, the effects are ultimately the same.

The existence of this ground is understandable but somewhat difficult to apply given the existence of Articles 36 and 45(2),[1353] which explicitly state that the Courts before which recognition is sought shall not review the substance of the judgement to be recognised. Cheshire, North & Fawcett explains that, '[i]n examining jurisdiction, the recognising court is bound by the findings of fact on which the court which gave the judgement based its jurisdiction; this avoids unnecessary duplication of effort.'[1354]

5. Temporal Scope

One particular issue, which requires further examination, relates to the applicability of the Regulation itself. At what point do judgements of the Maltese Courts become enforceable in other Member States? The answer to this question emerges from Chapter VI of the Regulation, wherein Article 66(1) states simply that it applies only to proceedings instituted or documents formally drawn up or registered after the entry into force thereof.[1355]

In other words, the Regulation applies only to those proceedings that began after 1 March 2002,[1356] the latter being the date of entry into force of the Regulation. This simple answer, however, raises two major problems. Firstly, how is it to be applied in situations where a country, like Malta, joins the EU after the abovementioned date? Secondly, what happens where proceedings began prior to that date, but the judgement was delivered afterwards? Sub-Article 2 of the same Article provides some light to the second question,

> However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,
> (a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention

[1353] ibid.
[1354] Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 626.
[1355] Regulation 44/2001 art 66(1).
[1356] ibid art 76.

> both in the Member State or [sic] origin and in the Member State addressed;
> (b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.[1357]

In seeking to understand Article 66, one must undoubtedly refer to the preliminary reference of 21 June 2012, which defined the phrase 'entry into force'.[1358] A reference for a preliminary ruling was made by the Supreme Court of the Czech Republic in proceedings instituted by an Austrian company seeking the recognition and enforcement in the Czech Republic of a judgement delivered in Austria against the Czech defendant company.

Both the first and second instance Courts in the Czech Republic dismissed the plaintiff company's application on the ground that Regulation 44/2001 was binding on the Czech Republic as from the date that the country acceded to the EU (1 May 2004). The judgement that Wolf Naturprodukte sought to enforce was a judgement delivered on 15 April 2003, thus preceding the aforementioned date of accession.

The referring Court therefore asked whether Article 66(2) should be interpreted as meaning that for the Regulation to take effect for the purposes of recognition and enforcement of judgements, it must have been in force both in the State of origin and in the addressed State at the time of delivery of the judgement.

The Court concluded that the phrase 'entry into force' found in Article 66(2) must be interpreted as meaning the date from which the Regulation starts to apply in both the Member States concerned. Consequently, for the purposes of the recognition and enforcement of judgements, the application of the Regulation depends on whether it was in force both in the Member State of origin and the Member State addressed at the time that the judgement was delivered.

The rationale behind this interpretation lies in the safeguards that the Regulation contains to protect the interests of the defendant. As stated by the Court, there is a close link between the rules on jurisdiction and the rules on the recognition and enforcement of judgements. In fact, the simplification of the process to the recognition and enforcement of judgements,

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[1357] ibid art 66(2).
[1358] Case C-514/10 *Wolf Naturprodukte GmbH vs. SEWAR spol. s. r. o.* (ECJ, 21 June 2012).

> is justified only to the extent that the judgment which is to be recognised or enforced was delivered in accordance with the rules of jurisdiction in that regulation, which protect the interests of the defendant.[1359]

In this case, the defendant company was, at the time of the original proceedings, domiciled in a State that had not acceded to the EU. In light of this, the Austrian Court will have established jurisdiction on the basis of its own domestic rules, not the rules contained in Regulation 44/2001. Consequently, certain safeguards, such as those in Articles 26(1)[1360] and 26(2)[1361] of the Regulation, would not apply, thus jeopardising the fundamental principles upon which the Regulation was established. Had the defendant company been domiciled in Malta, the Court would have reached the exact same decision given that Malta and the Czech Republic acceded to the EU on the same day.

So how would this translate to Maltese judgements seeking enforcement in other Member States? Following this judgement, the first thing to note is that any foreign Court called upon to enforce a Maltese judgement must ensure that the judgement was delivered after the date of accession, not the date of entry into force of the Regulation.

Furthermore, if proceedings in Malta began prior to 1 May 2004 but the judgement was delivered after the aforementioned date, that judgement could be only recognised and enforced if the Court of the Member State addressed is satisfied that the rules upon which the Maltese Court established jurisdiction 'accorded' to those established in the Regulation.

It is the opinion of the author that the term 'accorded' is rather unsatisfactory and vague. An English dictionary definition of the term is, 'To be in agreement, unity, or harmony.'[1362] Does this mean that the bases of jurisdiction under national law must be the same as those established in the Regulation or that they are simply not contrary to the rules established therein? Needless to say, the consequences of each interpretation are different, with the

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[1359] ibid para 27.

[1360] Regulation 44/2001 art 26(1): "Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation."

[1361] ibid art 26(2): "The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end."

[1362] The Free Dictionary By Farlex <http://www.thefreedictionary.com/accorded> accessed 1 September 2016.

latter interpretation being less stringent than the former. The research carried out by the author did not throw light on the proper interpretation to be given.

The only other way that a Maltese judgement, delivered after the date of accession on proceedings that began before, may be recognised and enforced in another Member State is if a convention had been signed between the two States prior to the start of the proceedings.

Having clarified the issues relating to the temporal scope of the Regulation, it is important to note that the temporal scope is but one aspect of the applicability of the Regulation. Determining the actual scope of the Regulation is of paramount importance in determining how the enforcement of Maltese judgements in other Member States may take place.

6. Scope

The Regulation is not intended to govern the recognition and enforcement of all and any judgements delivered by the Courts of the Member States. In fact, one could argue that the applicability of the Regulation is indeed limited, which view is substantiated through an examination of the provisions of the Regulation and the relative jurisprudence.

The first chapter of the Regulation is devoted to its scope of application. The very first statement made by the Regulation is that it applies only to civil and commercial matters.[1363] In other words, any matter that falls within the realm of Criminal law, Public law or any law other than that which is civil or commercial in nature cannot be caught by the provisions of this Regulation.

What would be the resulting effect? If a judgement relates to a matter that falls beyond the scope of the Regulation, then the recognition and enforcement thereof must be regulated either by another EU legal instrument, by an international convention or else by the national laws of the Member State in which recognition and enforcement of that judgement is sought.

However, the nature of the Court itself has no bearing on the application of the Regulation.[1364] In other words, if a Criminal Court were determining a civil issue, the judgement delivered by it on that civil issue would still fall within the ambit of the Regulation. This was the case in ***Sonntag***, referenced earlier, where a Criminal Court determined a civil claim for damages.[1365]

[1363] Regulation 44/2001 art 1(1).
[1364] ibid.
[1365] Case C-172/91 *Volker Sonntag v Hans Waidmann* [1993] ECR I-01963.

Furthermore, certain matters that would normally be classified as civil or commercial, listed in Article 1, are specifically excluded from the ambit of the Regulation.[1366]

The ECJ has had ample opportunity to expound on the meaning of 'civil and commercial matters', which is to be given an autonomous interpretation.[1367] In the ***Ruffer case***,[1368] for instance, the claimant was the Netherlands State, which brought a claim for damages sustained by it after having to remove wreckage from a public waterway following a collision between Mr Ruffer's vessel and another vessel, which sank. The Court held that such removal was carried out in the exercise of public authority and, therefore, fell outside the scope of application of the Convention, and would likewise fall outside the ambit of Regulation 44/2001.

The ***Bayer case*** also provided some important insight into the understanding of this phrase.[1369] The question raised was whether the phrase 'civil and commercial matters' would include an order for the payment of a penal fine to the State for a breach of private intellectual property rights. The Court held,

> In the present case, even if [...] the fine at issue in the main proceedings is punitive and the reasoning in the order imposing it explicitly mentions the penal nature of that fine, the fact remains that, in those proceedings, there is a dispute between two private persons [...]. The action brought is intended to protect private rights and does not involve the exercise of public powers by one of the parties to the dispute. In other words, the legal relationship between Bayer and Realchimie must be classified as 'a private law relationship' and is therefore covered by the concept of 'civil and commercial matters' within the meaning of Regulation No 44/2001.[1370]

[1366] Regulation 44/2001 art 1: '1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
2. The Regulation shall not apply to:
(a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
(c) social security;
(d) arbitration.'

[1367] Case 10/77 *Bavaria vs. Germanair* [1977] ECR 1517.

[1368] Case C-814/79 *Netherlands State vs. Reinhold Ruffer* [1980] ECR 3807.

[1369] Case C-406/09 *Realchemie Nederland BV vs. Bayer CropScience AG* [2011] ECR I-9773.

[1370] ibid 41.

7. Abolition of the Exequatur Procedure

The main subject matter of this essay has been Regulation 44/2001. It should, however, be noted that the Regulation has now been repealed and replaced by Regulation 1215/2012, which has brought about major changes to the manner in which judgements in the EU are recognised and enforced in the Member States. Of course, Regulation 44/2001 retains an important position given that the recast Regulation applies only to legal proceedings instituted or instruments drawn up on or after 10 January 2015.[1371]

One major change brought in by the new Regulation is the abolition of the Exequatur procedure. In other words, any judgements delivered on or after 10 January 2015 will now be recognised and enforced in other Member States without any need for a declaration of enforceability.[1372] Needless to say, the procedure by which a Maltese judgement may be enforced in another Member State has been greatly facilitated.

A close reading of the Stockholm Programme leaves little doubt as to the reasons behind the introduction of these changes.[1373] The Stockholm Programme explains that one of the most fundamental tools in the increased cooperation between the Member States in the Area of Freedom, Security and Justice is that of Mutual Trust: 'Mutual trust between authorities and services in the different Member States and decision-makers is the basis for efficient cooperation in this area.'[1374] It is explained that,

> As regards civil matters, the European Council considers that the process of abolishing all intermediate measures (the exequatur), should be continued during the period covered by the Stockholm Programme. At the same time the abolition of the exequatur will also be accompanied by a series of safeguards, which may be measures in respect of procedural law as well as of conflict-of-law rules.[1375]

As indicated above, these changes have not eliminated the possibility of the defendant challenging the judgement, as the grounds for non-recognition remain the same.[1376] The safeguards, therefore, remain very much in force.

1371 Regulation 1215/2013 art 66(1).
1372 ibid art 39.
1373 The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C 115/1.
1374 ibid point 1.2.1.
1375 ibid point 3.1.2.
1376 Regulation 1215/2012 art 45(1).

8. Concluding Remarks

This essay has effectively analysed the recognition and enforcement of Maltese judgements in other Member States, exposing the issues that do arise in this process.

It is to be expected that business will continue to seek opportunities abroad, and EU citizens will continue to move to other Member States, be it for personal or professional reasons. Therefore, reliance on efficient judicial processes will continue to increase.

As a result, deeper integration in this area is highly probable. Undoubtedly, the question academics are asking is, to what extent will the result of the UK's referendum to leave the EU slow down this process? Given the uncertainty around the true meaning of 'Brexit', and the steps that the UK will take to effectively leave the EU, the answer to this question is even harder to determine.[1377]

[1377] Denis MacShane, 'We won't trigger Article 50 until after 2017 – and that means Brexit may never happen at all' *Independent* (19 August 2016) <http://www.independent.co.uk/voices/brexit-article-50-leaving-eu-wont-happen-after-2017-european-elections-france-germany-a7198736.html> accessed 2 September 2016.

THE ENFORCEMENT OF MALTESE JUDGMENTS IN OTHER EU MEMBER STATES UNDER THE EUROPEAN UNION'S 'BRUSSELS I' REGULATION, WITH PARTICULAR REFERENCE TO JUDGMENTS DELIVERED AFTER 1ST MAY 2004 IN CASES COMMENCED BEFORE THAT DATE

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KEYWORDS: BRUSSELS I REGULATION – RECOGNITION OF JUDGMENTS – ENFORCEMENT OF JUDGMENTS

[1378] This essay was reviewed by Dr Andria Buhagiar and Dr Ivan Sammut B.A.(Melit.), LL.D.(Melit.), M.Jur.(Melit.), M.A.(Birm.), LL.M.(Bruges), Ph.D.(Lond.)

THE ENFORCEMENT OF MALTESE JUDGMENTS IN OTHER EU MEMBER STATES UNDER THE EUROPEAN UNION'S 'BRUSSELS I' REGULATION, WITH PARTICULAR REFERENCE TO JUDGMENTS DELIVERED AFTER 1ST MAY 2004 IN CASES COMMENCED BEFORE THAT DATE

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1. Introduction

In today's highly globalised world, it is becoming increasingly common for cases to include elements from different jurisdictions. Naturally, the ultimate goal of obtaining a favourable judgment is to be able to successfully have that judgment recognised and enforced, either in one's own country, typically in the case of declaratory judgments, or, perhaps more frequently, in another country where the judgment debtor has his assets.

Owing to the difficulties arising from the incompatibilities of various legal systems, it was not always an easy task to have a judgment recognised and enforced by a foreign court which did not decide the dispute itself. The need was felt for an international instrument that regulates not only the question of jurisdiction pertaining to a court over a particular case, but more importantly the issue of recognition and enforcement of judgments once these have been delivered.

The aim of this essay is to provide an overview of the European Regime regulating recognition and enforcement of judgments across Member States, with a focus on Maltese judgments delivered after 1st May 2004, that is, after Malta became a member of the European Union; and to subsequently illustrate the procedure for enforcement of these judgments.

2. The Brussels Regime: Historical Background and Overview

The Brussels Convention of 1968 was the first European instrument to regulate the jurisdiction and recognition and enforcement of judgments across the Member States of (what was then) the European Community (Hereinafter referred to as 'EC').[1379] The competence of the EC to legislate in this sphere

[1379] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1968] OJ C 27.

stemmed from the Treaty of Rome.[1380] The Brussels Convention primarily aimed to facilitate the free movement of judgments throughout the EC. Such goal was achieved by establishing common rules on jurisdiction, thereby limiting the need for judgment review and creating an uncomplicated system of recognition and enforcement of sister-state judgments.[1381]

The Convention was amended several times as new States joined the Community. In 1988, a parallel convention was also brought into force; the Lugano Convention,[1382] which bound the states of the European Free Trade Area, and Iceland, Norway and Switzerland. As the process of amending an international convention is not a quick and simple task, a decision was made to allow the European Union (Hereinafter referred to as 'EU') to legislate in the manner of a Regulation, whereby the rules therein would be directly applicable in all Member States. A regulation entitled *Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (also known as the 'Brussels I Regulation'; Hereinafter referred to as the 'Regulation'), based upon, and largely replacing, the Brussels Convention and the Lugano Convention, came into force in 2002. The latter Conventions have since been amended and brought in line with the Regulation and only remained in force in limited circumstances for States that have not ratified the Regulation.
Various discussions to amend the Regulation have led to the adoption of the Brussels I Recast,[1383] which came into force in 2015.[1384] The most important amendment therein was the abolishment of the exequatur procedure. Although the amendments will be discussed further below, for the time being the focus of this essay will be on Regulation 44/2001 since it contains provisions addressing the issue of transition from pre-Regulation to post-Regulation, and the relevant dates concerned.

Since the United Kingdom (Hereinafter referred to as 'UK') has recently opted to leave the EU,[1385] upon the expiration of the two-year period under Article 50(3) TEU, the Brussels Regime will no longer be directly applicable to it. It is not yet clear what the consequences of this decision will be, but the UK has various

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[1380] Treaty establishing the European Economic Community, March 25 1957, 298 U.N.T.S. 11, art 220: 'Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: - the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals and of arbitration awards.'

[1381] Adrian Briggs, *The Conflict of Laws* (2nd edn, Oxford University Press 2008) 56.

[1382] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [1988] OJ L 319.

[1383] Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] OJ L 351/1.

[1384] ibid art 81.

[1385] United Kingdom European Union Membership Referendum, 23 June 2016.

options to consider. For instance, it might adopt the Recast Regulation by agreement, or ratify the Lugano, Hague, or Brussels Conventions. Alternatively, the UK could negotiate a new bilateral agreement with the EU Member States with similar effects to the Brussels Regime. At this stage it is impossible to predict the exact outcome, as this will all depend on the negotiations currently underway between the EU and the UK.[1386]

3. Aims of the Regulation

The motivating factors of the Brussels Regulation are largely the same as those of the previous Conventions, that is, to 'unify rules of conflict of jurisdiction in civil and commercial matters' and to 'simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States'.[1387] The Maltese Court in ***Elwira Maria Opateka vs. Andrew Francis Ciantar***[1388] expounded on the objectives of the Regulation,

> [I]r-Regolament irid li, fuq il-bażi tal-fiduċja reċiproka, sentenzi mogħtija fi Stat imsieħeb jingħataw għarfien awtomatiku bla ħtieġa ta' proċeduri għajr f'każ ta' kontestazzjoni. B'dan il-mod, ir-Regolament irid li d-dikjarazzjoni li sentenza mogħtija minn qorti ta' Stat imsieħeb hija eżegwibbli għandha tingħata kważi awtomatikament minn qorti ta' Stat imsieħeb ieħor, fuq il-bażi biss tal-eżami tad-dokumentazzjoni preskritta mressqa, u mingħajr ma din l-aħħar qorti tista' tqajjem minn rajha r-raġunijiet maħsuba fl-istess Regolament biex iżommu s-sentenza milli tiġi eżegwita, u mingħajr ma din l-aħħar Qorti terġa' tistħarreġ il-kwestjoni fil-mertu.[1389]

Cheshire, North and Fawcett mention two safeguards built into the Brussels Regime that increase the mutual trust among the Member States. The first is the

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1386 Sara Masters and Belinda McRae, 'What Would Brexit Mean for the Brussels I Regulation?' (*LEXOLOGY*, 20 June 2016) <www.lexology.com/library/detail.aspx?g=e7f973d8-44bf-408f-ba07-76a430e9e8a5> accessed 28 August 2016.

1387 Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2000] OJ L 12, Recital 2.

1388 *Elwira Maria Opatecka vs. Andrew Francis Ciantar*, Cout of Appeal (Superior), per Mr Justice De Gaetano, Mr Justice Depasquale, Mr Justice Magri, 27 January 2006.

1389 ibid 4, 'The Regulation aims that, on the basis of mutual trust, judgments delivered in Member States are recognised automatically without any additional procedures except in cases of contestation. In this way, the Regulation aims that the declaration that a judgment delivered by a court in a Member State is enforceable, is given almost automatically by another Member State, upon a mere examination of the documents provided, and without the possibility on the part of the Enforcing Court to ex officio raise any grounds in the Regulation on which a judgment may not be enforced, and also without examining the merits.'

fact that the rules of the Regulation on both jurisdiction and recognition and enforcement are directly applicable to the Member States, ensuring compliance and uniform application among all courts. Secondly, Member States retain a certain amount of discretion through defences that may be brought forward in the courts in the Member State addressed.[1390]

4. Temporal Scope of the Regulation

The Brussels I Regulation became directly applicable to Malta on 1st May, 2004, the date of Malta's accession to the EU, by virtue of Article 249 of the EC Treaty. Prior to this date, Maltese rules on Private International Law were always regulated by the Code of Organization and Civil Procedure (Hereinafter referred to as 'COCP'),[1391] and any *lacunae* were addressed by looking at rules of British Common Law. Nowadays, the COCP only regulates jurisdiction and recognition and enforcement of judgments that are not within the scope of the Regulation.

The Regulation deals with the recognition and enforcement of judgments, which naturally have already been delivered. Consequently, an issue arose as to whether it would apply retroactively to cases instituted and/or delivered by a Maltese Court before 1st May 2004, since before that date the Regulation was not directly applicable to Malta. The temporal scope of the Regulation is explained under Article 66, although the wording of this provision leaves much to be desired. Article 66 states that,

> 1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.
> 2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,
> (a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State or origin and in the Member State addressed;
> (b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and

[1390] Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 597.

[1391] Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, art 742 *et sequitur*.

> the Member State addressed which was in force when the proceedings were instituted.

There are three main possible scenarios that may arise when one is trying to have a judgment recognised and enforced under the Regulation. Firstly, a judgment may be both instituted and decided before the entry into force of the Regulation, that is, 1st May, 2004 in Malta (date of accession into the EU). Secondly, a judgment may have been initiated before the 1st May, 2004, but decided after that date. Thirdly, it may have been both instituted and delivered after 1st May, 2004.

From a reading of Article 66, the outcome of the third scenario is clear – the rules under the Regulation would apply, as they undoubtedly apply to proceedings instituted after the coming into force of the Regulation. However, the first and second scenarios are not as straightforward. Moreover, a further complication arises regarding whether the relevant date of entry into force should be of the Member State addressed (where the enforcement is sought) or of the Member State of origin (where the judgment was obtained), or of both.

This essay will focus mostly on the second scenario, that is, judgments delivered after 1st May, 2004, in cases commenced before that date. Nevertheless, for the sake of completeness, the situation in the case of the first scenario will first be briefly addressed. The European Court of Justice (Hereinafter referred to as the 'ECJ') has recently given a definite answer regarding the interpretation of Article 66 in such circumstances. In a preliminary reference by the Nejvyšší soud, the Supreme Court of the Czech Republic, submitted during the proceedings of ***Wolf Naturprodukte GmbH v SEWAR spol***, the issue arose whether 'for that regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the Member State of origin and in the Member State addressed'[1392].

The ECJ noted that Article 66 of the Regulation does not specify whether the date of entry into force refers solely to the Member State of origin, or to both the Member State of origin and the Member State addressed.[1393] In reaching its decision, the Court reasoned that the 'simplified mechanism of recognition and enforcement set out [in the Regulation] ... which leads ... to the lack of review of the jurisdiction of courts of the Member State of origin, rests on mutual trust between the Member States'.[1394] This mutual trust could only be present if the

[1392] Case C-514/10 *Wolf Naturprodukte GmbH vs. SEWAR spol. s r.o.* [2012] para 18.
[1393] ibid para 23.
[1394] ibid para 25.

Member States all abide by the same rules on jurisdiction, thereby guaranteeing the same safeguards to defendants.[1395] As a result, it follows that the simplified rules for recognition and enforcement should only be available to a claimant if the judgment sought to be enforced offered full protection to the interests of the defendant, that is, through the rules on jurisdiction implemented in the Regulation.

The ECJ thus concluded that in view of the above, the delivery of the judgment must have taken place after the entry into force of the Regulation. Moreover, the concept of 'entry into force' in Article 66 must be interpreted as the date of application of the Regulation 'in both the Member States concerned'.[1396]

The outcome of the second scenario (judgments delivered after 1st May, 2004, in cases commenced before that date) is perhaps more difficult to envisage. Although Article 66(1) states that proceedings must have been instituted before the entry into force of the Regulation, Article 66(2) makes an exception to this rule, if one of the two conditions specified therein are satisfied. These state that a judgment may be enforced in a Member State, despite the fact that proceedings were instituted before the relevant date, provided that the judgment follows the rules on jurisdiction set out either in Chapter II of the Regulation, or in another Convention between the Member State of origin and the Member State addressed, which was in force when the proceedings were instituted.

The Maltese Courts had to invoke this section in the judgment of ***Avukat Stephen Muscat nomine vs. Express Tours & Packages Limited***.[1397] The proceedings in question had been instituted in 2003, and the judgment was delivered in 2006 by a German Court. The Maltese Court quoted Article 66, and stated that for the German judgment to be enforced in Malta, the German Court had to have established its jurisdiction in line with the rules in the Regulation. It thus examined the establishment of jurisdiction in the German Court, and found that it did follow the same mechanism as the Regulation, hence enforcement was allowed.

Therefore, it seems clear that the exercise that the court of the Member State addressed must undergo, when faced with an application for recognition and enforcement of a judgment delivered after the entry into force of the regulation but instituted before that date, is to examine whether or not the judgment

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[1395] Case 125/79 *Bernard Denilauler vs. SNC Couchet Frères* [1980] ECR 01553 para 3.

[1396] Case C-514/10 *Wolf Naturprodukte GmbH vs. SEWAR spol. s r.o.* [2012] para 33, 34.

[1397] *Avukat Stephen Muscat nomine vs. Express Tours & Packages Limited*, First Hall Civil Court, per Mr Justice Valenzia, 30 June 2008. This was confirmed by the Court of Appeal (Superior) on 3 December 2010.

follows the same rules of jurisdiction, and affords the same safeguards to the defendant, as envisaged in the Regulation.

In a nutshell, the rules of jurisdiction under the Regulation are as follows. The general rule of jurisdiction is that if a defendant is domiciled in a Member State, regardless of his nationality, the plaintiff must bring his action in that Member State. The domicile of natural persons is not defined in the Regulation, so its meaning is left up to national law. The Regulation does however set out rules regarding the domicile of legal persons.

There are several exceptions to this general rule of domicile. Articles 5 and 7 respectively, regulate the jurisdiction arising from contractual and tortuous[1398] relationships. Moreover, the Regulation seeks to protect the weaker party, providing special safeguards for the insured, the consumer and the employee. The Regulation also recognises choice of court agreements, albeit their application may be limited when a weaker party is involved. In addition, a defendant may always submit voluntarily to the jurisdiction of a court, by entering an appearance without contesting the jurisdiction. Lastly, the Regulation also provides for the exclusive jurisdiction of certain courts, irrespective of the domicile of the parties, in some specific circumstances such as matters relating to ownership of immovable property.

Regulation 1215/2012 has by and large followed the same pattern of its predecessor in matters of jurisdiction. Nevertheless, there were some minor amendments, such as the addition of a new head of jurisdiction which facilitates the recovery of stolen or illegally removed works of art or similar items of historic, archaeological or cultural value.[1399] Moreover, an additional safeguard sought to protect the weaker party was added, whereby courts are now obliged to 'ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance'.[1400] The temporal scope of Regulation 1215/2012 is defined in Article 66,[1401] which is worded similarly to Article 66 of Regulation 44/2001 (except from the

[1398] The term 'tortuous' here includes matters relating to tort, delict, quasi-tort or quasi-delict, and has been interpreted autonomously by the ECJ. See cases: Case 34/82 *Martin Peters Bauunternehmung GmbH vs. Zuid Nederlandse Aannemers Vereniging* [1983] ECR 00987; Case C-172/91 *Volker Sonntag vs. Hans Waidmann and Others* [1993] ECR I-01963 and; Case C-271/00 *Gemeente Steenbergen vs. Luc Baten* [2002] ECR I-10489.

[1399] Regulation 1215/2012 art 7(4).

[1400] ibid art 21(2).

[1401] ibid art 66(1), 'This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015. (2) Notwithstanding Article 80, Regulation (EC) No 44/2001 shall continue to apply to judgments given in legal proceedings instituted, to

relevant date therein, which is now the 10th January, 2015). A comparison of the two articles of the Regulations, respectively, shows that the Recast does not include any exceptions to proceedings instituted after the relevant date. Therefore, Regulation 1215/2012 would not apply to the enforcement of a judgment delivered after its entry, if it has been instituted before the relevant date.

5. Scope of the Brussels Regime: Civil and Commercial Matters

One should however keep in mind that not all judgments coming from a Member State may be recognised and enforced in another Member State under the Brussels Regime. Apart from having a temporal scope, the Regulations are also limited by subject. A prerequisite to recognition and enforcement under the Brussels Regime is the ascertainment of whether the matter under consideration is civil or commercial in nature. Article 1 states that the Regulation applies to 'civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)'. The Regulation does not define the term 'civil and commercial matters', but it expressly excludes certain areas from its scope, such as social security and arbitration.[1402]

The ECJ has continuously held that the phrase 'civil and commercial matters' must be given an autonomous meaning, and must be regarded as an 'independent concept to be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the *corpus* of the national legal systems'.[1403] Therefore, the meaning of this phrase is not defined according to national law, but within the context of the Regulation.

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authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 which fall within the scope of that Regulation.'

[1402] Regulation 44/2001 art 2, 'This Regulation shall not apply to: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; (d) arbitration; (e) maintenance obligations arising from a family relationship, parentage, marriage or affinity; (f) wills and succession, including maintenance obligations arising by reason of death.' (There were a number of complexities with regard to the scenario for arbitration under Regulation 44/2001. Regulation 1215/2012 sought to clarify the situation. It kept the same provision, but added an explanation in the Preamble, Recital 12)

[1403] Case 133/78 *Gourdain vs. Nadler* [1979] ECR 733 para 3; Case 29/76 *LTU vs. Eurocontrol* [1976] ECR 1541 paras 3, 4; and Case 814/79 *Netherlands vs. Rueffer* [1980] ECR 3807 paras 7, 8.

Moreover, the nature of the court or tribunal is irrelevant to the ascertainment of whether the dispute falls within the scope of the Regulation. In fact, in the Jenard Report, it is stated that the Regulation 'covers civil proceedings brought before criminal courts, both as regards decisions relating to jurisdiction, and also as regards the recognition and enforcement of judgments given by criminal courts in such proceedings'.[1404] This situation arose in a Maltese judgment: ***Elf Acquitaine vs. Andre Guelfi***,[1405] wherein the Court of Appeal concluded that although the damages were awarded in criminal proceedings, they were still civil in nature, and hence fell within the scope of the Regulation.

6. Definition of a Judgment

The Enforcing Court must also ascertain that the nature of the judgment itself fits the definition provided in Article 2(a), which defines it as 'any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court.' This definition has been interpreted broadly by the ECJ, and even by the Maltese courts. The former has included in the definition even decisions given without the defendant being summoned to appear.[1406]

Another important question to ask in relation to the definition of a judgment is whether the pendency of an appeal is a bar to the recognition and enforcement of a judgment. In the Maltese case of ***Avukat Hugh Peralta vs. ZET Limited***, the Court of Appeal concluded that a judgment which is not *res judicata* may still be enforced under the Regulation. It overturned the decision of the First Hall Civil Court, which had reasoned that since the judgment of the Tribunal of Udine was not a 'definitive' judgment, it was not enforceable under the Regulation. The Court of Appeal noted that: 'sentenza mogħtija in prim istanza minn Qorti estera, hija enforzabbli f'Malta, anke jekk kontra dik is-sentenza ikun ġie intavolat appell u dan kemm-il darba kif il-Qorti estera tkun iddikjarat is-sentenza tagħha enforzabbli'[1407]. This reasoning was again confirmed in another Maltese case of

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[1404] Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Signed at Brussels, 27 September 1968) [1968] OJ C 59/79.

[1405] *Elf Aquitaine vs. Andre` Guelfi*, Court of Appeal (Superior), per Mr Justice De Gaetano, Mr Justice Depasquale, Mr Justice Magri, 28 July 2006, Court of Appeal.

[1406] Case 125/79 *Bernard Denilauler vs. SNC Couchet Frères* [1980] ECR 01553 para 11; See also Case C129/9 *Owens Bank Ltd vs. Fulvio Bracco and Bracco Industria Chimica SpA* [1994] ECR I-00117 217.

[1407] *Avukat Hugh Peralta vs. ZET Limited*, Court of Appeal, per Mr Justice Camilleri, Mr Justice Magri, Mr Justice Mallia, 31 January 2011: 'a judgment given by a foreign Court is enforceable in Malta, even if an appeal has been filed against such judgment, provided that the foreign Court would have declared its judgment enforceable'.

GIE Pari Mutuel (PMU) vs Bell Med Limited et.[1408]Apart from final judgments, one may also enforce 'provisional, including protective, measures ordered by a court or tribunal [... except if] ordered by such a court or tribunal without the defendant being summoned to appear, unless the judgment containing the measure is served on the defendant prior to enforcement'.[1409]

7. Other International Instruments for Recognition and Enforcement

Those judgments coming from Member States that do not fall within the remit of the Brussels Regime, due to its limited scope, might still be enforceable under another EU Regulation. For example, judgments concerning matrimonial matters and the matters of parental responsibility may be enforced under the Brussels II bis Regulation.[1410] For the purpose of this essay, only the manner of enforcement under the Brussels I Regulation and the Recast will be examined.

8. Enforcement Procedure under Regulation 44/2001

The exequatur procedure was firstly adopted by the Brussels Convention in 1968. The term 'exequatur' is Latin for 'let it be executed',[1411] and has been defined as 'a concept specific to the private international law and refers to the decision by a court authorising the enforcement in that country of a judgment, arbitral award, authentic instruments or court settlements given abroad'.[1412] In brief, it involves the requirement of an application to the Member State addressed in order for a judgment from another Member State to be declared enforceable. The Enforcing Court then assesses the application, and ensures that it follows all the formal requirements, in which case it would issue a declaration of enforcement.

The procedural formalities required when applying for this declaration of enforcement are listed under Article 53 of the Regulation. The party applying for recognition of a judgment needs to produce a copy of the judgment, and a copy of

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1408 *GIE Pari Mutuel Urbain vs. Bell Med Ltd and Computer Aided Technologies Ltd*, 28 September 2007, Court of Appeal 92/2006/1

1409 Regulation 44/2001 art 47.

1410 Council Regulation (EC) No 2201/2003 of 1 August 2004 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, OJ L 338, 1-29.

1411 Jeanella Grech., 'Abolishing Exequatur in the Brussels I Regulation (Recast) While Safeguarding Debtor's Rights' (Faculty of Law thesis, University of Malta 2013) 21.

1412 Glossary (*European Judicial Network in Civil and Commercial Matters*) <http://ec.europa.eu/civiljustice/glossary/glossary_en.htm#Exequatur> accessed 16 August 2016.

the certificate issued pursuant to Article 54.[1413] A translation of these documents may be requested by the court or authority of the Member State addressed. Once these formalities are complied with, the Enforcing Court must declare the judgment enforceable. In other words, 'the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents'.[1414]

Maltese judgments followed the same logic, confirming that the judgment must be declared enforceable 'immedjatament wara t-twettieq tal-formalitajiet rikjesti'.[1415] The Maltese Court of Appeal stated in another case that the only test that must be undergone at this stage is a 'sempliċi eżami tad-dokumenti esebiti, mingħajr ħtieġa li tisma' lid-debitur jew tara x'għandu xi jgħid fuq il-każ'.[1416]

Notwithstanding the foregoing, the Enforcing Court does not simply act as a 'rubber stamp'; it must ensure that the documents demonstrate the fulfilment of the following conditions,

a) that the case falls within Regulation 44/2001, or the Brussels or Lugano Conventions, as the case may be, both as to its subject matter and by reference to the transitional provisions;
b) that the judgment is one falling within the definition provided by Article 32;
c) that the judgment is at least provisionally enforceable in its state of origin; and
d) that the application for an order authorizing the enforcement is made by an 'interested third party'.[1417]

The applicant may also apply to the court for provisional or protective measures to avoid dissipation of assets.[1418]

9. Grounds on which Recognition and Enforcement may be denied

[1413] In Annex V; This should confirm inter alia the date of service of the document instituting proceedings in the case of a judgment delivered by default, and that such judgment is enforceable in the Member State of origin.

[1414] Case C-619/10 *Trade Agency Ltd v Seramico Investments Ltd* [2008] para 3.

[1415] *Advocate Dr Simon Cachia noe vs. Ancams Ltd,* First Hall Civil Court, per Mr Justice Meli, 24 April 2012.

[1416] *Advocate Hugh Peralta noe vs. ZET Limited*, Court of Appeal (Superior), per Mr Justice Camilleri, Mr Justice Magri, Mr Justice Mallia, 31 January 2011.

[1417] *Dr. John Refalo bħala mandatarju speċjali għan-nom u in rappresentanza ta' l-assenti John u Susan Gray vs. Garden of Eden Limited*, 13 March 2007 Court of Appeal. per Mr Chief Justice de Gaetano, Mr Magri, Mr Justice Mallia.

[1418] Regulation 44/2001 art 47.

Once the court has issued the declaration of enforceability, it orders the service of all the necessary documents, including its decree accepting the application for enforcement, to the judgment debtor. It is only at this stage that the latter has the opportunity to appeal from this decree, on very limited grounds found in the Regulation. Whilst 'any interested party' may apply to have a judgment recognised and/or enforced,[1419] the application for appeal may solely be filed by the 'party against whom enforcement is sought',[1420]; it may not be filed by co-defendants or any other interested party, unless the judgment is also being enforced against them. This limitation is meant to reduce challenges against the enforceability of judgments, since one may only contest such enforcement if the judgment is sought to be enforced against him personally.[1421]

The raison d'etre behind the availability of the defences stems from the Regulation's aim to strike a balance between, on the one hand, the principle of mutual trust and the reduction of costs and time-consumption, and on the other hand, the respect for the right of the judgment debtor to appeal if one of the grounds for non-enforcement is present.[1422] AG Kokott opined that respect for the right of the judgment debtor 'is a fundamental right forming part of the general principles of Community law'[1423].

Articles 34 and 35 list the defences, namely: a breach of public policy in the Member State addressed; default of appearance due to non-service; irreconcilability with a judgment between the same parties in the Member State addressed; or with an earlier judgment in another Member State or in a third State if certain conditions are fulfilled; and inconsistency with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72. These defences have been reasonably narrowed and restricted, compared to the ones found in the Brussels Convention.[1424]

9.1 *Public Policy*

The defence of public policy is not defined in the Regulation, leaving it up to the Member States addressed to adopt their own meaning. Nevertheless, the ECJ has intervened when the term is not defined appropriately in accordance with the

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1419 ibid art 33(2) and art 38 (1).

1420 ibid art 42 (2).

1421 Jeanella Grech, 'Abolishing Exequatur in the Brussels I Regulation (Recast) While Safeguarding Debtor's Rights' (Faculty of Law thesis, University of Malta 2013) 87.

1422 Case C-283/05 *ASML Netherlands BV vs. Semiconductor Industry Services GmbH (SEMIS)* [2006] ECR I-12041 paras 23-24; Opinion of AG Kokott in Case C-3/05 *Gaetano Verdoliva vs. J.M. Van der Hoeven BV and others* [2005] ECR I-01579 para 39.

1423 Opinion of AG Kokott in C-394/07 *Marco Gambazzi vs. Daimler Chrysler Canada Inc. and CIBC Mellon Trust Company Case* [2009] ECR I-02563, para 48.

1424 Brussels Convention art 27, 28.

Regulation. The ECJ emphasised the need to limit this defence to very 'exceptional cases' where the recognition or enforcement would lead to a 'manifest breach of an essential rule of law in the legal order of the State in which enforcement is sought'.[1425] This defence must not interfere with the primary aim of the Regulation which is to achieve free movement of judgments.

In the Maltese case ***Schoeller International vs. Mario Ellul***, the Court stated that just because a judgment would have been decided differently by a Maltese Court does not mean it should not be enforced. The defence of public policy can only be invoked if there is a conflict with 'il-prinċipji ewlenin ta' l-ordni ġuridiku li huma l-qofol tas-sistema legali billi jħarsu l-valuri l-aktar fondamentali tas-soċjetà'[1426]. The ECJ in ***Krombach vs. Bamberski*** specified that procedural irregularities, such as a breach of Article 6 of the European Convention on Human Rights, would also be caught under the defence of public policy.[1427]

9.2 *Default*

The second defence involves a scenario where the defendant was unable to defend the case as a result of not being served with the necessary documents. Cheshire, North and Fawcett, refer to this as the defence of natural justice.[1428] It may only be instated if the defendant did not appear. Moreover, the ECJ held in ***Sonntag vs. Waidmann*** that 'it is for the Court where enforcement is sought to determine whether service was effected in sufficient time and in such a way as to enable the defendant to arrange for his defence'.[1429]

9.3 *Irreconcilable Judgments*

The rules on irreconcilable judgments are very comprehensive, however the Regulation does not define the threshold for judgments to be considered irreconcilable. The ECJ has interpreted the meaning of irreconcilability as entailing 'legal consequences that are mutually exclusive'.[1430]

1425 Case C-145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] ECR 645; See also: Case C-78/95 *Hendrikman and Feyen v Magenta Druck & Verlag* [1996] ECR I-4943, and Case C-38/98 *Renault v Maxicar* [2000] ECR I-02973.

1426 *Schoeller International Gmbh noe vs. Ellul Mario et* 26 October 2001, First Hall Civil Court per Mr Justice Caruana Demajo.

1427 Case C-7/98 *Dieter Krombach v Andre Bamberski* [2000] ECR I-01935.

1428 Fawcett J & Carruthers J M, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) p 615.

1429 Case C-172/91 *Volker Sonntag v Hans Waidmann* [1993] ECR I-01963, para 39.

1430 Case C-145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] ECR 645, para 22; Case C-539/03 *Roche Nederland BV and others v Frederick Primus and Milton Goldenberg* [2006] ECR I-06535, para 23.

9.4 *Sections 3, 4, and 6*

Another defence may be invoked if a judgment conflicts with the rules of jurisdiction under sections 3 and 4 which protect the interests of insurers and consumers. This safeguard seeks to protect the interests of vulnerable groups. This defence runs counter to the general rule that the Enforcing Court cannot review the jurisdiction of the Court of Origin. A further exception to this prohibition is the defence relating to a breach of Section 6, which grants exclusive jurisdiction to specific courts in certain circumstances.

9.5 *Article 72*

The final defence involves conflict with Article 72, wherein a judgment may not be enforced due to there being a bilateral Convention between the Member States in question, which was ratified before the entry into force of the Regulation, if the enforcement of such judgment runs counter to the Convention.

9.6 *Possibility of Appeal*

The decision of the court, whether it upholds or rejects the defence/s brought forward by the judgment debtor, may be appealed against by either party. Articles 43 to 46 designate the procedure for appeal, including *inter alia* the time limit for lodging the appeal,[1431] and the possibility of staying the proceedings if there is an ordinary appeal from the judgment in the Member State of origin.[1432] The Appellate Court may not review the substance of the judgement,[1433] and may only refuse enforcement on the basis of one of the grounds in Articles 34 and 35.[1434]

1431 Regulation 44/2001 art 43(5): An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

1432 ibid art 46(1): The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.

1433 ibid art 45(2): Under no circumstances may the foreign judgment be reviewed as to its substance.

1434 ibid art 45(1): The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.

10. Changes to Recognition and Enforcement under the Recast Regulation

The Recast Regulation brought significant changes in the sphere of recognition and enforcement. It simplified the process considerably, by abolishing the exequatur procedure, eliminating the need to obtain a declaration of enforceability from the Enforcing Court. In addition, the Recast Regulation also allows a review of jurisdiction in case of a breach of Section 5 (regarding employees), which was not so in 44/2001. Nevertheless, it limits this defence in the sense that it may only be raised by the weaker party.

11. Conclusion

The EU has made great strides in the area of Private International Law, bringing to light a newfound freedom – the free movement of judgments – which, like other freedoms of the EU, is not absolute, and must operate within the diverse multicultural backgrounds of Member States. This is why a system of clear rules, applied uniformly among Member States is crucial to the attainment of mutual trust that is central to the functioning of the Brussels Regime.

The enforcement of Maltese judgments in other EU Member States has been substantially simplified by the Brussels I Regulation, but only for those judgments that are caught under its restricted scope, both as regards subject matter and also temporally. Judgments that were instituted before Malta's accession into the EU could potentially still be enforced under the Brussels Regime if decided after the entry into force of the Regulation, provided that the rules on jurisdiction which the judgment is based on are in line with those in the Regulation.

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