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POLICY DEPARTMENT **C**

CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

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Workshop on Upcoming issues of EU law

WORKSHOP FOR THE JURI COMMITTEE





DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

UPCOMING ISSUES OF EU LAW

COMPI LATION OF IN-DEPTH ANALYSES

WORKSHOP 24 SEPTEMBER 2014

Abstract

Upon request by the JURI Committee, five specific topics have been chosen for the workshop "Upcoming issues of EU law" on the afternoon of 24 September 2014 as being representative of different avenues for the future development of the law and aiming at giving Members of the European Parliament an overview of the work of the Legal Affairs Committee in several of its areas of competence. The workshop focuses both on work that has been accomplished in the past and on challenges that may be expected to arise in the course of the legislature 2014 -2019.

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AUTHORS

Dr. Wolfgang Heusel, Academy of European Law (ERA), Germany - Contributors: Dr Karine Caunes (ERA), Ramin Farinpour (ERA), Dr Angelika Fuchs (ERA), Florence Hartmann-Vareilles (ERA)

Ms Marta Ballesteros, Milieu, Belgium

Prof. Dr. Xandra Kramer, Erasmus University Rotterdam, The Netherlands

Prof. Lionel Bently (with thanks to Brad Sherman), Centre for Intellectual Property and Information Law at the University of Cambridge, United Kingdom, and
Alfred Radauer, Technopolis Group, Austria

Dr. Andrea Bertolini and Prof. Erica Palmerini, Scuola Superiore Sant'Anna, Pisa, Italy

RESPONSIBLE ADMINISTRATORS

Mr Udo Bux

Ms Roberta Panizza

Ms Rosa Raffaelli

Policy Department C: Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

E-mail: poldep-citizens@ep.europa.eu

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ABOUT THE EDITOR

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To contact the Policy Department or to subscribe to its monthly newsletter please write to:

poldep-citizens@ep.europa.eu

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APPLYING EU LAW AS NATIONAL LAW: ENFORCING EU LAW IN THE COURTROOM

Dr. Wolfgang HEUSEL¹,
Academy of European Law (ERA), Trier, Germany

Abstract

Upon request by the JURI Committee, this paper examines the role of national judges in applying EU law. The decentralised enforcement of EU law gives national judges a crucial role in making citizens' rights effective. Besides needing a command of substantive EU law, they have to handle specific procedures such as preliminary references and judicial cooperation instruments in civil and criminal matters. Differing national legal traditions, a multitude of languages and the complexity of the vast EU law acquis add to the challenge for national practitioners who in general lack a specific EU law qualification. Targeted training to keep track with the evolving acquis and to build mutual trust in the European area of justice is a precondition to apply EU law effectively in the national courtroom.

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¹ Dr Wolfgang Heusel, Director of the Academy of European Law (ERA) since January 2000. Born in 1955, Abitur in 1974. Military service, then studied law in Mainz and Dijon (1976-81). Second state law examination 1985. In 1983, postgraduate practical legal training at the German-Portuguese Chamber of Industry and Commerce in Lisbon. Research assistant, Mainz University and part-time representative for a practising lawyer between 1985 and 1989. Ph.D. in law with a dissertation on "Soft" International Law in 1989. Public prosecutor in Koblenz, Ministry of Justice of the State of Rhineland-Palatinate, member of the civil division of the Landgericht (Regional Court) of Mainz between 1990 and 1992; member of the civil division of the Koblenz Court of Appeal (1995). Publications on criminal law and public international law, inter alia. Worked part-time for ERA since June 1991, and full-time since January 1993.

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EXECUTIVE SUMMARY

Background

The key responsibility of national practitioners and in particular of national judges for giving effect to European law has been a commonplace since the origins of the Single Market in 1958. However, their training in European law has not kept pace with the evolution of EU law and judicial training has only become a major concern of EU policy in the context of the creation of the European Judicial Area following the entry into force of the Amsterdam Treaty in 1999. The three priorities highlighted in the Commission's 2006 Communication on judicial training,² which are still reflected in its subsequent 2011 Communication on the same matter,³ remain valid after the expiry of the Stockholm Programme at the end of this year: improve familiarity with EU legal instruments; improve language skills; and develop familiarity with the legal and judicial systems of other Member States.

Aim and concept

The aim of the present note is to provide an in-depth analysis of the role of the national judiciaries in applying and enforcing European law as part of the law of the land. Its concept is to depict the relationship between EU law and national law, to highlight the challenge which the complexity and constant evolution of the *acquis* present to the national practitioner and to emphasise the training needs resulting from this challenge.

Following a brief introduction explaining the character and dimension of EU law, the role and responsibility of the national judge in interpreting and enforcing EU law is analysed in detail in chapter 2. This chapter also presents the preliminary ruling procedure, the complementary roles of the Court of Justice of the European Union and the national courts, and the potential this procedure offers to national judges to stimulate the development of EU law.

While the second chapter deals with judicial cooperation in the vertical relationship between the CJEU and national courts, chapter 3 is devoted to the horizontal cooperation between the judiciaries of the 28 Member States. A multitude of EU instruments based on the fundamental principle of mutual recognition has been adopted since 1999 to facilitate judicial cooperation in civil, commercial, family and criminal matters. While again the complexity and heterogeneity of these instruments represents a challenge for the national practitioner, the varying degrees of their implementation into the national legal orders make their effective application even more complicated. The challenge is aggravated if national judges lack the necessary trust in other Member States' judicial practice.

Chapter 4 draws the conclusions from these findings for judicial training. It is not surprising that national judges, as first judges of EU law, require a deep understanding of the fundamental principles of the European legal system and the skills necessary to interpret and apply EU law as an autonomous legal order. National judges need in particular to know how to refer a case to the Court of Justice, how to apply EU law having direct effect, and how to apply the instruments of judicial cooperation. Given that the initial training of most national practitioners at best included a basic introduction to EU law, the need for ongoing judicial training keeping pace with the evolving *acquis* is obvious and calls for action not only by EU institutions on the basis of Articles 81 and 82 TFEU, but also by national and European training providers.

² Communication from the Commission to the European Parliament and the Council on judicial training in the European Union of 29.6.2006, COM(2006) 356 final, par. 24.

1. INTRODUCTION: THE APPLICATION OF EU LAW BY THE NATIONAL JUDICIARY

KEY FINDINGS

- National judges as first judges of European Union law have a crucial role in giving effect to the Treaties, the Charter of Fundamental Rights and the more than 21,000 legislative acts of the EU.
- Decentralised application of EU law means its application by the judiciaries of 28 Member States, all with their own judicial structures, different legal orders and traditions – and in the 24 official EU languages.
- National courtrooms are often the place for the main and most striking European experiences for Union citizens.
- A specific qualification in the application of EU law in all its complexity is still no primary criterion for the recruitment of national judicial staff.

Bringing the European Union closer to its citizens is an objective that the institutions, and the European Parliament in particular, have set for themselves for good reasons. Making the European Union a tangible asset for its citizens is key to its democratic legitimacy.

Law is the essential tool to meet citizens' needs and expectations and to achieve the policy goals enshrined in the Treaties. If legislation is the way to achieve these goals, its effective application is crucial to ensure that citizens can enjoy their rights deriving from EU law. Without effective application, EU law would remain dead letter and the EU's very existence and purpose would be called into question.

However, the effective application of EU law is a challenge in itself.

On the one hand, EU law, or the so-called *acquis*, constitutes an immense and diverse body of rights and obligations that is binding on and in all EU Member States. The *acquis* is constantly evolving. It comprises the Treaties; legislation adopted pursuant to the Treaties; the case law of the Court of Justice; decisions adopted under the Common Foreign and Security Policy; international agreements concluded by the Union, and agreements entered into by the Member States among themselves within the sphere of the Union's activities. To date, the *acquis* covers a wide array of fields, from classical internal market law to justice and home affairs; from the fundamental freedoms of the Single Market (free movement of persons, goods, services and capital) to the fundamental rights of the Charter; from specific and often very technical legislation in fields such as food safety, veterinary and phytosanitary policy, energy, taxation, transport, employment, fisheries or agriculture to judicial cooperation in civil, commercial and criminal matters. To illustrate, there are currently 21,885 EU legislative acts in force and 2,103 in preparation.⁴

³ Commission Communication to the European Parliament, the Council and others: "Building trust in EU-wide Justice – A new dimension to European judicial training" of 13.9.2011, COM(2011) 551 final.

⁴ Based on the data available on the EUR-Lex website "Acces to European Union Law", Directory of EU legislation, <http://eur-lex.europa.eu/browse/directories/legislation.html>, and Directory of EU preparatory acts, <http://eur-lex.europa.eu/browse/directories/legislation-preparation.html>.

On the other hand, EU law has to be applied in 28 Member States, each with its own legal culture, structure and language, to the benefit of more than 500 million European Union citizens, of its commercial actors and also of third-country nationals.

It took national legal practitioners a long time to understand that EU law is not a separate body of law beyond their reach, but it is part of the law of every Member State which they shall make use of for the benefit of their clients. It took national judges a long time to understand that EU law is not just a matter for the Court of Justice of the EU but that its enforcement is their own right and duty. The national judge has always been the first judge of Union [in the past, Community] law; access to justice on the grounds of EU law has in the first instance always meant access to the national courts.

In other words, and almost ironically, it is the Member States, masters of the Treaties, that have been endowed with the mission of applying EU law in their respective legal systems, and whose performance is monitored by the European Commission and the Court of Justice, guardians of the Treaties. The Lisbon Treaty is in fact the first EU Treaty to explicitly recognise the crucial role played by the national judiciaries in the enforcement of EU law. Article 19(1) TEU states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". This means that Member States' courts are at the forefront of the concrete and daily application of EU law to Union citizens. They are primary actors in providing Union citizens with the legal certainty that EU law will be effectively applied, in an equal⁵ and uniform manner, and that the legal rights they derive from EU law will be enforced. It is the national courts which, as first judges of EU law, make the idea of a Union based on the rule of law⁶ a reality, bringing the "community of law"⁷ to life. In this sense, national courtrooms are often the place of the main and most striking European experiences for Union citizens. The proper application of EU law by Member States' judiciaries is thus a key element in reinforcing the democratic legitimacy of the European Union and constitutes a democratic imperative to ensure respect for the rule of law.

However, members of national judiciaries are usually primarily recruited based on their knowledge of their own national law, not of EU law. For them, to apply EU law as they would apply national law is thus a challenge. Furthermore, the application of EU law to specific cases, which is the essence of judicial work, is sometimes complicated not only by the quantitative aspect of EU law but also by its quality. Indeed, the drafting of EU legislation is often the product of compromises among various political actors at European level and its application by national judges in concrete situations may sometimes highlight ambiguities or inconsistencies to an extent much less felt in domestic legislation. The expansion of EU law in terms of its volume and the fields covered has also translated into an accumulation of layers of legislative acts, making their application more complex. In order to fight against this phenomenon, the Union has launched a better⁸ and smart⁹

⁵ Art. 20 of the Charter of Fundamental Rights of the European Union explicitly recognises the principle of equality before the law.

⁶ Cf. Art. 2 TEU; case C-295/83, Order of the Court of 26.9.1984, *Les Verts v. Parliament*.

⁷ The concept of the European Communities as a community of law ("Rechtsgemeinschaft") is attributed to Walter Hallstein, first President of the Commission; cf. Pernice, I., *Der Beitrag Walter Hallsteins zur Zukunft Europas, Begründung und Konsolidierung der Europäischen Gemeinschaft als Rechtsgemeinschaft*, WHI-Paper 9/01, <http://whi-berlin.eu/documents/whi-paper0901.pdf>.

⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, "Smart Regulation in the European Union", Brussels, 8.10.2010, COM(2010)543 final; Inter-institutional Agreement on Better Lawmaking, OJ C 321, 31.12.2003, p. 1; European Parliament, Resolution of 4 February 2014 on EU Regulatory Fitness and Subsidiarity and Proportionality - 19th report on Better Lawmaking covering the year 2011 (2013/2077(INI)).

⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, "EU Regulatory Fitness", Strasbourg, 12.12.2012,

regulation strategy¹⁰, but this can unfortunately not solve all the problems national judges may encounter in their daily application of EU law.

2. THE ROLE OF NATIONAL JUDGES IN THE APPLICATION OF EU LAW

2.1. The role of national judges in enforcing a system of judicially protected rights

KEY FINDINGS

- The doctrine of direct effect of EU law developed by the Court of Justice allows citizens to directly invoke EU law before national courts, in all circumstances or, in the case of directives and primary EU law, if certain conditions are met.
- The doctrine of primacy also established by the Court of Justice enables and obliges national courts to set aside any rule of national law conflicting with EU law.
- National courts have to give full effect to EU law by attributing procedural conditions to the remedies available under national law which are no less favourable than in similar actions of a domestic nature.
- Where no remedy exists under national law to give effect to the rights of citizens deriving from EU law, such remedy has to be created, as in the case of State liability for non-implementation of directives.

In its resolution of 4 February 2014 on the Commission's 29th annual report on monitoring the application of EU law, the European Parliament notes that "the Commission's power and duty to oversee the application of EU law and, inter alia, to launch infringement procedures against a Member State that has failed to fulfil an obligation under the Treaties, is a cornerstone of the Union legal order and as such is consistent with the concept of a Union based on the rule of law", but deplores that the Commission "has neither the policy nor the resources to systematically identify and enforce all cases of non-implementation".¹¹

In order to palliate this fundamental problem and, more broadly, the issue of improper or even non-application of EU law by the Member States, a decentralised system of control of the application of EU law and of enforcement of Union rights by national judges is all the more relevant. The Court of Justice, as supreme guardian of the Treaties, has contributed to shaping such system in a number of ways.

COM(2012)746 final; European Parliament, Resolution of 14 September 2011 on better legislation, subsidiarity and proportionality and smart regulation (2011/2029(INI)), OJ C 51 E, 22.02.2013, p.87.

¹⁰ Communication from the Commission of 25 July 2001, "European Governance – A White Paper", COM(2001)428 final, OJ C 287, 12.10.2001, p. 1.

¹¹ European Parliament Resolution of 4.2.2014 on the 29th annual report on monitoring the application of EU law (2011), 2013/2119(INI), conclusions 1 and 7.

2.1.1. Direct effect – vertical and horizontal

The Court of Justice has provided the basis for the role and responsibility of national judges as first judges of EU law through the principle of direct effect.¹²

According to this principle, provisions of binding EU law can be invoked and relied upon by individuals before national courts. The EU Treaties, international agreements, regulations and decisions are in principle binding *per se*, whereas directives in the first instance only bind Member States and can be invoked by individuals only under specific conditions¹³. The principle implies that these legal acts become part of the national legal systems as soon as they enter into force. National judges perform an essential task in concretely integrating them into their own legal system. This task has proved to be particularly challenging for judges coming from a dualist legal tradition. According to this tradition, the incorporation of international law into the national legal order does not happen automatically – as it is the case with the monist legal tradition – but requires a specific national implementation measure. As according to the long-standing jurisprudence of the Court of Justice since *Van Gend & Loos* EU law distinguishes itself from international law in this respect, its proper incorporation into the realm of national law does not require any specific implementation measure, but in revenge presupposes that national judges know the specificities of EU law and have the skills necessary to apply it.

On the one hand, enabling Union citizens to vindicate the rights they derive from EU law in national courts can be considered as a democratic advancement, even more so considering their limited standing before the Court of Justice.¹⁴ On the other hand, even if the principle appears rather straightforward at first sight, its concrete application by national judges can be quite tricky due to the sheer number of legal instruments potentially concerned and the complexity of the Court of Justice's case-law on the scope of application of this principle.

If Treaty provisions, regulations and international agreements are capable of producing both vertical direct effect, i.e. in the framework of an action against the State, and horizontal direct effect, i.e. in the framework of an action between private parties, directives and decisions can only produce vertical direct effect. These limitations can be explained by the very nature of these legal instruments. A decision is only addressed to a specific party, individual or national authority. As a directive only binds the Member States as to the result to be achieved but leaves them the choice of form and methods to be employed,¹⁵ its legal effect in the national realm is usually conditional on its transposition into national law by the Member States. Failure by a State to transpose a directive within the binding deadline would thus deprive individuals of the enjoyment of the rights granted to them by that directive. This would contravene the principle of equal and uniform application of EU law across the Union. To remedy this situation and to palliate the factual and political limits of action for infringement at EU level¹⁶, the Court of Justice has acknowledged the principle of vertical direct effect of directives once the deadline for their implementation has passed. However, the Court categorically excludes attributing horizontal direct effect to directives once the deadline for their implementation has expired, essentially because no private person can be held liable for the State's failure to

¹² As early as in *Van Gend en Loos*, Case 26/62, Judgment of the Court of 5.2.1963.

¹³ Treaty provisions, international agreements and directives (under further specific conditions) are however only justiciable if they are sufficiently clear, precise and unconditional (see CJEU judgments referred to below).

¹⁴ Cf. Article 263 TFEU.

¹⁵ Article 288 TFEU.

¹⁶ Besides the capacity limits referred to by the European Parliament (see fn. 10 above), infringement proceedings also depend on a discretionary (political) decision by the Commission.

implement. The Court has however developed other legal mechanisms to mitigate the negative impact which the absence of a horizontal direct effect¹⁷ may have on the rights of the citizen.

One of these compensatory mechanisms is the broad obligation on national courts to interpret national law, as far as possible, in conformity with directives after the time limit of their implementation has expired (the so-called indirect effect).¹⁸ Second, during the period between the adoption of a directive and the expiration of the time limit for its transposition, all State institutions, including courts, must refrain from adopting any measure or interpretation which might seriously compromise the result prescribed by the directive. Third, a directive can in certain cases be legally invoked in proceedings between private parties as long as the directive at stake does not in itself impose a legal obligation on one of the parties. This is the so-called incident effect.¹⁹ Fourth, a general principle of EU law that covers the same ground as a directive can bind private parties.²⁰ Fifth and finally, where a regulation refers to a directive and makes compliance with the directive conditional on receipt of benefits under the regulation, this can bind private parties.²¹

2.1.2. Primacy

With the principle of primacy established by its judgment *Costa vs. ENEL* as early as 1964²², the Court of Justice has endowed national judges with the mission (and the competence) to review the compatibility of national law with EU law. According to this principle, all provisions of binding EU law have primacy over all national legal instruments. In case of conflict between a national rule and an EU rule, national judges have to set aside the conflicting national rule and give full effect to the EU rule at stake. This principle contributes to the effective and uniform application of EU law. It obviously requires from national judges a sound knowledge of EU law and the necessary skills to perform this compatibility check appropriately.

The application of the principle of primacy has raised some resistance by certain national courts, essentially in relation to constitutional provisions, due to either some national procedural constraints or to their understanding of their role as guardian of their own legal (constitutional) order.²³ Only the ongoing judicial dialogue among the courts of Europe and a better acquaintance with EU law can eventually ease such resistance.

¹⁷ Case 152/84, Judgment of the Court of 26.2.1986, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*; Case C-91/92, Judgment of the Court of 14.7.1994, *Paola Faccini Dori v Recre Srl*.

¹⁸ Case 14/83, Judgment of the Court of 10.4.1984, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen*; Case C-106/89, Judgment of the Court of 13.11.1990, *Marleasing SA v La Comercial Internacional de Alimentacion SA*.

¹⁹ Case C-194/94 *Marleasing* (fn. 17); Case C-443/98, Judgment of the Court of 26.9.2000, *Unilever Italia SpA v Central Food SpA*.

²⁰ Case C-144/04, Judgment of the Court of 22.11.2005, *Werner Mangold v Rüdiger Helm*.

²¹ Cases C-37 and 58/06, Judgment of Court of 17.1.2008, *Viamex Agrar Handels GmbH and Zuchtvieh-Kontor GmbH v Hauptzollamt Hamburg-Jonas*.

²² Case 6/64, Judgment of the Court of 15.7.1964, *Flaminio Costa v E.N.E.L.*

²³ For an overview on the problem and practice in some Member States see Saiz Arnaiz, A., Alcobarro Llivina, C. (eds.), *National Constitutional Identity and European Integration*, Cambridge/Antwerp/Portland 2013; and more recently the study by Besselink, L., Claes, M., Imamovi, S., Reestman, J. H., *National constitutional avenues for further EU integration*, European Parliament, Policy Department C, Brussels 2014, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET%282014%29493046_EN.pdf.

– For the development of the case-law of the German Constitutional Court see Heusel, W., *Preserving national identity: the Bundesverfassungsgericht between national constitutional constraints and an ever closer European Union*, in: Bradley, K., Travers, N., Whelan, A., *Of Courts and Constitutions, Liber Amicorum in Honour of Nial Fennelly*, Oxford and Portland 2014; for the Polish Constitutional Court see Czaplinski, W., *Recent Constitutional Jurisprudence Concerning the European Union: Some Remarks on 2010 Judgments of the Polish Constitutional Court*, in: Heusel (ed.), *A European Law Practitioner, Liber Amicorum*

Direct effect and primacy constitute powerful tools in the hands of national judges in order to ensure the effective application of EU law. Their efficiency is even strengthened by the possibility for national judges to take into account EU law provisions on their own motion (*ex officio*). National courts have the power to do so if they consider that Union law must be applied²⁴ but it is only where the parties have failed to invoke mandatory rules of Union law having direct effect²⁵ that they will be obliged to take into account those rules on their own motion. With power comes responsibility, and this procedural device strengthens even more the need for national judges to have a sound knowledge of EU law.

2.1.3. Remedies

It is also important to stress that the effective application of EU law in national courtrooms and the effectiveness of Union rights in particular ultimately depend on the existence of corresponding remedies. Without a remedy, there is no right.²⁶ We have already referred to the European Parliament's observation that, due to the limits of the infringement procedure existing at EU level, the failure to transpose a directive in due time might not be sanctioned. In order to palliate this deficiency, the Court of Justice has established an innovative new concept to allow individuals to seek a remedy at national level. The failure to transpose a directive in due time exposes the infringing State to an action for damages before the relevant national court.²⁷ The Court of Justice has thus also contributed to the creation of a decentralised system of remedies.

More generally, "in the absence of [EU] rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from [EU] law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by [EU] law (principle of effectiveness)"²⁸. The Court of Justice has even pushed the logic of the effective application of EU law to its end by stating the obligation for national judges to create a new remedy when it is the only possible way to enforce Union rights.²⁹ Thus, while deciding on remedial issues, national judges have to navigate between enforcing the principle of an effective application of EU law and preserving the principle of legal certainty in the application of national rules.³⁰ Lastly, the consecration in Article 19(1) TEU of the duty for Member States to provide sufficient remedies to ensure effective legal protection in the fields covered by Union law might be a precursor of further restrictions

John Toulmin, ERA Forum 12 (2011) suppl. 1, 197 ss., and Wróbel, A., Die Grenzen der europäischen Integration im Lichte jüngerer Entscheidungen des polnischen Verfassungsgerichts, ERA Forum 2013, 491 ss.

²⁴ Joined cases C-87/90, C-88/90, C-89/90, Judgment of the Court of 11.7.1991, A. Verholen and others v Sociale Verzekeringbank Amsterdam.

²⁵ Case C-126/97, Judgment of the Court of 1.6.1999, Eco Swiss China Time Ltd v Benetton International NV.

²⁶ Case C-122/96, Judgment of the Court of 15.10.1987, Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others.

²⁷ Joined cases C-6/90 and C-9/90, Judgment of the Court of 19.11.1991, Andrea Francovich and Danila Bonifazi and others v Italian Republic; Joined cases C-46/93 and C-48/93, Judgment of the Court of 5.3.1996, Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others.

²⁸ Case C-453/99, Judgment of the Court of 20.9.2001, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others. On the principle of equivalence and effectiveness, see also the seminal judgments of the Court of Justice in case 33/76, Judgment of the Court of 16.12.1976, Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland and case 45/76, Judgment of the Court of 16.12.1976, Comet BV v Produktschap voor Siergewassen.

²⁹ Case 432/05, Judgment of the Court of 13.3.2007, Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern.

³⁰ Joined cases C-430/93 and C-431/93, Judgment of the Court of 14.12.1995, Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten; Case C-312/93, Judgment of the Court of 14.12.1995, Peterbroeck, Van Campenhout & Cie SCS v Belgian State.

imposed by the Court of Justice on national procedural and remedial autonomy.³¹ It is vital in this regard for national judges to be aware of the requirements of EU law and their evolution. Life-long learning in this field is thus crucial for national judges to perform their mission as first judges of EU law.

2.2. In particular: The role of the national judge in giving effect to European competition law

KEY FINDINGS

- Reg. 1/2003 introduced a new concept to implement EU competition law by creating important new responsibilities for the national courts.
- In the context of the enforcement of EU competition law by measures of public authorities, national courts play an important role in the legality control of such measures.
- Private enforcement of EU competition law is a major task of national courts, which ensure protection and redress against any violation of competition law by private individuals or undertakings.

A core area of the traditional *acquis* and a cornerstone of classical common market law is the impressive body of EU competition law. Originally the role of national judges was rather limited in this field, as before 1 May 2004 the implementing Regulation 17/62 had established a centralised system of supervision and enforcement which attributed essential competences to EU institutions (Commission and Court of Justice or Tribunal) and left only a marginal role for national courts.³²

This has dramatically changed under the new regime introduced by Council Regulation 1/2003³³ under which the Commission shares the competence to apply Articles 101 and 102 TFEU with national competition authorities (NCA's) and with national courts. Within this framework, a double system of public and private enforcement of competition law has been established where the roles played by these different actors are complementary.

Public enforcement is mainly the task of administrative bodies (the European Commission and the national competition authorities) which have the duty of investigating the facts by carrying out inspections, requesting information and statements, prosecuting, and finally sanctioning with administrative fines an undertaking which is liable to have infringed competition rules. Except for fines, the role of national courts here is limited to the review of the legality of the NCA decision adopted by the public authority.

³¹ On this question, see Lenaerts K., (Vice-President of the Court of Justice), Maselis, I., (Legal Secretary at the Court), and Gutman, K., *EU Procedural Law*, Oxford University Press, 2014, pp. 117-118. See also, for an earlier questioning of the very existence of national judicial procedural autonomy, Kakouris, C., (at the time Judge at the Court of Justice), *Do Member States Possess Judicial Procedural "Autonomy"?* (1997) C.M.L.Rev., p. 1389 et seq.

³² EEC Council Regulation No 17 of 6.2.1962, First Regulation implementing Articles 85 and 86 of the Treaty, OJ P 013, 204-211, 21.2.1962.

³³ Council Regulation (EC) No 1/2003 of 16.12.2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003.

As regards private enforcement of competition law, Regulation 1/2003 gives a prominent role to the national judge. It has introduced a system of cooperation and exchange of information between the Commission, the NCA's and the domestic courts to ensure a consistent application of the common competition rules and to help national judges to adopt their decisions.³⁴ Article 15(1) enables national courts to request the Commission's opinion on specific questions concerning the application of EU competition rules (e.g.: a market definition, the qualification of a practice as an abuse, etc.) and to ask the Commission to give information about the state of proceedings of cases under its investigating powers. However, the Commission cannot deliver an authoritative interpretation of EU law, which can only be given by the Court of Justice. It is therefore not surprising that in some of these cases national courts refer questions to the Court of Justice.³⁵ Finally the Commission has made regular use of the possibility to participate as *amicus curiae* in national court proceedings whenever the coherent application of EU competition law so requires.

As public enforcement bodies do not have any power to award damages, the role played by national courts is crucial in order to ensure protection and redress against any violation of competition law when private individuals or undertakings take their dispute to a domestic court. Even if punitive damages are rarely provided under national law, compensation for loss or loss of profit caused by a contract or by a conduct liable to restrict or distort competition is available before all national courts of the EU.³⁶ Injunctive relief, which exists as a remedy in most of the legal orders, is the most important area of judicial application of competition law in private litigation. In particular interim injunctive relief which is often used to order to cease a harmful anticompetitive conduct is by far the most used in infringement proceedings involving EU competition rules.

When adjudicating these cases, national judges however are still facing a certain number of obstacles which may partly explain why, in practice, and compared with the much greater number of public enforcement cases, relatively few claims are made before civil and commercial domestic courts. The first difficulty identified lies with the weakness or absence of national procedural mechanisms for collecting evidence. A Directive on antitrust damages actions agreed by the European Parliament and the Council in April 2014 will overcome this obstacle and provide for measures in order to facilitate damage claims by victims.³⁷

Secondly, judges often encounter problems in quantifying damages, most of all in complex legal and economic antitrust cases. In order to help national courts in this task, a Communication adopted by the Commission in 2013 offers guidelines on how to evaluate the exact amount of harm suffered by victims in antitrust cases.³⁸ Noteworthy also to mention are the current proposals of the European Commission on collective redress which

³⁴ See Article 11, paragraphs 4 and 6 (prior communication), Article 15, paragraph 1 (possibility for courts to raise questions with the Commission), Article 15, paragraph 3 (possibility for the Commission to intervene as *amicus curiae* in judicial proceedings) and Article 16 (obligation to avoid conflicting judgements or decisions).

³⁵ For more information on the role of the national judge in the preliminary ruling procedure see 2.3 below.

³⁶ On the right to claim damages before national Courts, see the preliminary ruling decision of the Court of Justice of 13.7.2006, Joined Cases C-295/04 to C-298/04 Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others, points 60 to 61.

³⁷ Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, not yet adopted. For more information see the European Parliament's legislative resolution of 17.4.2014 on the proposal at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%20TA%20P7-TA-2014-0451%200%20DOC%20XML%20V0//en>

³⁸ Communication from the Commission on quantifying harm in actions for damages based on breaches of Articles 101 or 102 of the Treaty on the Functioning of the European Union, OJ C 167, 13.6.2013, 19-21.

aim to facilitate the enforcement of rights that all EU citizens have under EU law, including the right to compensation for antitrust harm.³⁹

2.3. The relationship between national judges and the CJEU: Preliminary rulings as a special type of judicial cooperation

KEY FINDINGS

- The preliminary reference procedure institutionalises the relationship between national courts and the CJEU and ensures the uniform application of EU law in a decentralised system of enforcement.
- The practical relevance of the PRP, which currently accounts for almost two thirds of the CJEU's case law, will grow even more with the full jurisdiction of the Court in justice and home affairs as from 1 December 2014.
- Well-conceived preliminary references by national courts are key to make best use of the system and require both a sound knowledge of EU law and procedural skills of national judicial actors.
- Especially the urgent PRP in criminal or family law cases puts the additional responsibility on the national judge to suggest to the Court the answer to the question referred.

The relationship between national judges and the Court of Justice of the European Union is institutionalised through the preliminary reference procedure (PRP).⁴⁰ If national judges are first judges of EU law, their action as such is under the supervision of the Court of Justice which, according to Article 19(1) TEU, is vested with the mission of ensuring that "in the interpretation and application of the Treaties the law is observed." Without supervision, a decentralised system of application of EU law could lead to its dismantling, each national judiciary giving its own interpretation of EU law. At times, the application of EU law in concrete cases will shed light on the ambiguities of certain EU legal provisions or on the incompatibility between a national rule and an EU rule. It can also reveal issues concerning the validity of certain EU law provisions. It is to solve these issues that the PRP has been created. It is based on the principle of sincere cooperation according to which "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties"⁴¹. The PRP is a judge-to-judge procedure which allows national judges to ask the Court of Justice questions when they are in doubt about the interpretation of EU law or the validity of a secondary EU legal act. It is thus central to ensuring that the rule of law is respected consistently across the Union.

In combination with the principles of direct effect and primacy, the PRP ensures the completeness of the Union system of remedies by providing access to justice and legal protection to those who would otherwise have no or limited standing to bring an action directly before the Court of Justice of the European Union. It supplements the action for

³⁹ Commission Recommendation of 11.6.2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, 60–65.

⁴⁰ Art. 267 TFEU.

⁴¹ Art. 4(3) TEU.

annulment of a Union act asserted to be illegal⁴² and the infringement procedure against a Member State for failure to fulfil its Union obligations.⁴³ Compared to other proceedings before the Court of Justice, the PRP actually represents 64 % of the Court's workload⁴⁴ and this percentage seems to be still growing.⁴⁵ These figures are expected to continue their progression as a consequence of the entry into force of the Lisbon Treaty, under the combined effect of three factors: first, the binding effect of the Charter of Fundamental Rights, giving rise to an increased number of claims based on fundamental rights; second, the forthcoming accession of the European Union to the European Convention on Human Rights on the basis of Article 6(2) TEU, which may lead to a shifting of cases from the European Court of Human Rights to the Luxembourg court due to the Strasbourg court's high docket – around 100.000 pending applications;⁴⁶ and third, the expansion of the Court of Justice's jurisdiction in the area of freedom, security and justice.

Concerning this last issue, and more specifically in the field of police and judicial cooperation in criminal matters, the Court of Justice will have full jurisdiction as from 1 December 2014, five years after the entry into force of the Lisbon Treaty.⁴⁷ Every national court will then be entitled to refer a case to the CJEU regardless of whether the Member State has expressly declared to accept this jurisdiction. Moreover, since the entry into force of the Lisbon Treaty on 1 December 2009, making a reference in relation to visa, asylum, immigration, and other policies related to the movement of people has no longer been the limited prerogative of the courts of last resort: the PRP has since been available to every domestic court⁴⁸. This enlargement of the Court's competences in the area of Justice and Home Affairs is probably one of the most dramatic expansions of the fields of jurisdiction of the Court in the history of the Treaties, as they concern areas of law most commonly dealt with by national judges and consequently have a propensity for reference. What is more, asylum law is a relatively new area of EU law and a number of recently adopted recast legislative measures may require further clarifications from the Court of Justice. According to the Court's statistics for 2013, the area of freedom, security and justice is already the field in which a relative majority of preliminary references is made.

The main aim of the cooperation between national judges and the Court of Justice of the EU in the PRP framework is to ensure the uniform application of EU law⁴⁹ in a decentralised system of enforcement. To achieve this, the Court of Justice is formally involved in the national court proceedings by means of the PRP as an interim procedure. The mission of the Court of Justice in this framework is to facilitate national judges in deciding cases that involve EU law by delivering a binding interpretation of the latter as far as this is necessary for the decision of the case: "the duty assigned to the Court by [Article 267 TFEU] is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on

⁴² Art. 263 TFEU.

⁴³ Art. 258 TFEU.

⁴⁴ Court of Justice of the European Union, Annual report 2013.

⁴⁵ Ibid., p. 84: 2010: 61 %; 2011: 61 %; 2012: 63,9 %; 2013: 64,3 %.

⁴⁶ European Court of Human Rights, The European Court of Human Rights in facts and figures 2013, Pending cases 2013, as of 31.12.2013.

⁴⁷ Lisbon Treaty, Art. 10.1 of the Protocol (No 36) on transitional provisions.

⁴⁸ Under the Nice Treaty, in the area of visas, asylum, immigration and other policies related to free movement of persons (Title IV EC) only last-instance courts were entitled to refer cases for a preliminary ruling to the ECJ, Art. 68 EC.

⁴⁹ Case 166/73, Judgment of the Court of 16.1.1974, Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel.

certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute".⁵⁰

As the effect of making a preliminary reference is that the national court suspends its proceedings to wait for the ruling of the Court of Justice, some mechanisms exist to shorten as much as possible the length of the proceedings in the interest of the proper administration of justice, especially in particularly sensitive cases. When the answer to a question referred to the Court is obvious, the Court may at any time decide to rule by reasoned order, thus avoiding unnecessary delays. Moreover, two accelerated procedures faster than the ordinary PRP have been created in order to allow for the speedy handling of cases of exceptional urgency: the expedited procedure of general scope⁵¹ and the urgent preliminary ruling procedure for requests in the area of freedom, security and justice.⁵² A specificity of the latter is that the national judge is requested, in so far as possible, to indicate the answer that he suggests to the question(s) referred. If the aim is to accelerate the Court of Justice's ruling, it also puts an additional responsibility on the national judge's shoulders and it goes without saying that such an answer will only be useful if he has the necessary knowledge of EU law.⁵³

In order to preserve the autonomy and unity of EU law, the Court of Justice accepts to give a preliminary ruling even on matters that do not fall within EU competencies but where there is nevertheless a reference to EU law by national law⁵⁴. Moreover, EU legal provisions and concepts are interpreted in their own, autonomous meaning to avoid having Member States interpreting EU law according to their own legal traditions and standards (which will vary from Member State to Member State).⁵⁵ The unity of EU law thus encompasses interpretative unity. This is another reason why the PRP concept requires a sound command and understanding of EU law by national judges which responds to the specific distribution of tasks between the national judge and the Court of Justice.

The national judge has the monopoly to adjudicate his case. It is his task to compile the case file; to explain the factual and national legal context of the case; to provide the reasons why he considers the reference necessary; and to make a preliminary identification of the issue(s) at stake. He is also free to decide at what stage in the proceedings it is appropriate to refer a question to the Court of Justice, even if the latter has expressed the view that it may be better for the national judge to wait until he has all necessary elements of fact and law in his possession, including the inter partes hearings, before making the reference in order to receive the most helpful answer from the Court. Well-conceived and drafted preliminary references are most useful in this regard. The answer of the Court of Justice, which is binding on the national judge in the case (and provides a binding interpretation of EU law to any other national judge in order to ensure the uniform application of EU law), obliges the national judge to apply the EU provision in the way it has been clarified by the Court; or to disregard it if the Court has declared it invalid. It is worth mentioning in this regard that the Court's ruling has a retroactive effect from the day the interpreted rule entered into force. The understanding is that the Court of Justice only clarifies the meaning of the interpreted rule which should have been understood and

⁵⁰ Case 104/79, Judgment of the Court of 11.3.1980, *Pasquale Foglia v Mariella Novello*.

⁵¹ Rules of Procedure of the Court of Justice of 25.9.2005 (OJ L 265, 29.9.2012), as amended on 18.6.2013 (OJ L 173, 26.6.2013), Art. 105.

⁵² Article 267 TFEU; ECJ Rules of Procedure, Art. 107.

⁵³ It is worth mentioning that a similar requirement may be extended in the future to the ordinary PRP in order to alleviate the workload of the Court of Justice. See House of Lords, European Union Committee, 16th Report of Session 2012-2013, *Workload of the Court of Justice of the European Union: Follow-Up Report*, p. 9.

⁵⁴ Joined cases C-297/88 and C-197/89, Judgment of the Court of 18.10.1990, *Massam Dzodzi v Belgian State*.

⁵⁵ Case 283/81, Judgment of the Court of 6.10.1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*.

applied that same way from the outset, even if the Court of Justice in exceptional circumstances is prepared to mitigate the temporal effect of its ruling.

The Court of Justice, for its part, has the monopoly to review the validity of Union acts. This means that whenever a judge has a relevant doubt about the validity of a Union act he has to apply, he is obliged to refer the question to the Court of Justice.⁵⁶ A competence of national courts to decide on the validity of Union acts would jeopardise the uniform application of EU law, since it might lead to different national courts reaching different conclusions, and thus to the act being applied in some States only.⁵⁷

As far as the mere interpretation of EU law is concerned, in case of doubt every national judge is entitled - but only courts of last resort are obliged - to refer a relevant question to the Court of Justice. There are however two exceptions to this rule: The first is the case of the so-called 'acte clair' where the correct interpretation of EU law is obvious and beyond any reasonable doubt.⁵⁸ In order to make this assessment, the national judge is supposed to consider whether this understanding would also be obvious for the Court of Justice and for judges of other Member States. Such assessment again requires not only a sound knowledge of EU law but also a cooperative spirit with regard to judges from other Member States. – The second exception is the case of the so-called 'acte éclairé',⁵⁹ according to which there is no need to refer a preliminary question if the question raised has already been subject of a preliminary ruling decision. It is worth noting that failure by a national court adjudicating at last instance to seek a preliminary ruling can engage the responsibility of its State. Pursuant to Article 258 TFEU, such failure can lead to an infringement action before the Court of Justice. The Court of Justice has also ruled that, where such infringement thwarts a right conferred on individuals by Union law, individuals "must have the possibility of obtaining redress in the national courts for the damage caused".⁶⁰

As for national courts other than those of last resort, a reference to the Court of Justice is only optional: if the decision of their case depends on the interpretation of EU law, they have to assess the necessity and benefits of such reference, taking also into consideration the time it may take for the Court of Justice to deliver its judgment.

In some cases, the combined effects of the PRP and the principle of primacy may tempt a national judge to ask the Court of Justice to review the compatibility of a specific rule of national law with EU law. In principle, the Court of Justice is not prepared to review such compatibility and will focus on the interpretation of the rule of EU law referred. The Court will then use its power to reframe the question asked by the national judge to transform it into a question of interpretation of EU law. In its decision the Court will give some indirect guidance to the national judge with regard to the compatibility of the national legal rule with the rule of EU law at stake in order to help him decide his case.

Cooperation between national judges and the Court of Justice is thus at the heart of the PRP, which is crucial in order to allow for the effective and uniform application of EU law across the Union. The PRP should hence be one of the main focuses in judicial training in EU law.

⁵⁶ Case C-263/02 P, Judgment of the Court of 1.4.2004, *Commission v Jégo-Quéré & Cie SA*.

⁵⁷ Case 314/85, Judgment of the Court of 22.10.1987, *Foto-Frost v Hauptzollamt Lübeck-Ost*.

⁵⁸ *CILFIT*, see fn. 57.

⁵⁹ Joined cases C-28/62 and 30/62, Judgment of the Court of 27.3.1963, *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v Netherlands Inland Revenue Administration*.

⁶⁰ Case C-224/01, Judgment of the Court of 30.9.2003, *Gerhard Köbler v Republik Österreich*.

3. THE RELATIONSHIP BETWEEN THE NATIONAL JUDICIARIES IN THE EU – JUDICIAL COOPERATION IN THE EUROPEAN AREA OF JUSTICE

The proper enforcement of EU law in the courtrooms of the European Union also requires that the judiciaries in the EU cooperate effectively and efficiently across the borders of their national jurisdictions. The relevance of this cooperation and its legal basis will be taken into consideration in this chapter.

3.1. The area of freedom, security and justice: mutual recognition of judicial decisions and mutual trust between courtrooms

The concept of a European area of freedom, security and justice was first introduced by the Treaty of Amsterdam which transferred the areas of “visas, asylum, immigration and other policies related to free movement of persons” to the EC Treaty and made them subject to classical Community legislation, albeit with certain reservations, “[i]n order to establish progressively an area of freedom, security and justice”⁶¹. The classical concept of judicial cooperation is grounded on the sovereignty principle under which a sovereign State will only commit itself to cooperate with another sovereign State in the framework of pre-established conditions of its own acceptance. Following the entry into force of the Amsterdam Treaty on 1 May 1999, the Tampere European Council in October 1999 adopted a programme to implement this policy. At Tampere it was decided that the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the European Union,⁶² and mutual trust among the judiciaries of the Member States became a crucial point for ensuring and developing the European area of justice.

The Stockholm Programme adopted by the European Council in May 2010 set out the EU’s priorities for the area of freedom, security and justice for the period 2010-14.⁶³ Building on the achievements of its predecessors, the Tampere and Hague Programmes, it aimed to meet future challenges and further strengthen the area of freedom, security and justice with actions focusing on the interests and needs of citizens. It stipulated that access to justice for citizens must be facilitated so that their rights are better enforced within the EU. At the same time, cooperation between judicial authorities and the mutual recognition of court decisions within the EU must be further developed in both civil and criminal cases. To this end, EU countries should make use of e-Justice (information and communication technologies in the field of justice), adopt common minimum rules to approximate criminal and civil law standards, and strengthen mutual trust. The EU must also aim to achieve coherence with the international legal order in order to create a secure legal environment for interacting with non EU-countries.

With the Stockholm Programme coming to an end by 31 December 2014, it was time to adopt new guidelines for the coming years. For the first time this was done under the rules of the Lisbon Treaty which instead of “programmes” speaks of “strategic guidelines” to be adopted by the European Council. At its June 2014 meeting, the European Council adopted

⁶¹ Article 61 EC in the version of the Amsterdam Treaty, OJ C 340/1, 10.11.1997.

⁶² Tampere European Council, 15/16.10.1999, Presidency conclusions, B. A genuine European area of justice, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm.

⁶³ The Stockholm Programme — an open and secure Europe serving and protecting citizens, OJ C 115/1, 4.5.2010.

such "strategic guidelines for legislative and operational planning for the coming years within the area of freedom, security and justice"⁶⁴. The guidelines do not contain an extensive new legislative programme as was the case in the past, but rather pay attention to consolidating what has already been achieved. The guidelines set out the priorities for the Union for the next five years, including to "...improve judicial cooperation among our countries: by building bridges between the different justice systems and traditions; by strengthening common tools, including Eurojust; by mutual recognition of judgments, so that citizens and companies can more easily exercise their rights across the Union"⁶⁵.

The close link between mutual trust among the judges and the members of the legal professions, the respect for the diversity of national systems and the need for minimum standards have again been underlined in the Commission's EU Justice Agenda for 2020 "Strengthening trust, mobility and growth within the Union".⁶⁶

3.2. Civil justice cooperation: commerce, insolvency, family

KEY FINDINGS

- Civil justice instruments on cross-border enforcement of monetary claims are powerful tools to secure cross-border debt recovery which is regarded as the Achilles heel of the internal market.
- In particular the Brussels-I Regulation on jurisdiction and enforcement obliges national judges to communicate with judges from other Member States.
- In family law, ties are increasingly established between nationals and residents of different EU Member States as a consequence of the mobility of citizens and national judges as well as legal practitioners are increasingly confronted with complex cross-border family and parental responsibility cases. In particular in the case of child abduction, courts are requested to communicate directly with each other.

A specific form of judicial cooperation *avant la lettre* was launched in civil and commercial matters as early as in 1968 with the Brussels Convention on jurisdiction and enforcement.⁶⁷ The Brussels Convention already introduced a system of mutual recognition of judicial decisions in civil and commercial matters and even the possibility to refer cases to the Court of Justice for preliminary rulings, even if the enforcement of foreign judgments still required their formal recognition by a court of the executing Member State. The subsequent transformation of judicial cooperation in civil and commercial matters into a Community policy under Title IV of the Amsterdam Treaty allowed to legislate in the form of regulations which the courts of the Member States would be bound to apply directly, a method which has been widely used since 1999. This sub-chapter will look at the most striking examples of which national judges have to be aware today. It will however not deal with the EU instruments regulating conflicts of application of (substantive) law. Such instruments

⁶⁴ European Council Conclusions, 26/27.6.2014, Brussels, 27.6.2014, EUCO 79/14, p.1.

⁶⁵ Ibid., Annex 1, p. 19.

⁶⁶ COM(2014) 144 final of 11.3.2014.

⁶⁷ Convention of 27.9.1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, 1262 UNTS 153; 8 ILM 229 (1969). The jurisdiction of the Court of Justice was established by a separate protocol adopted in 1971.

stipulate which (national) law is to be applied by the national judge in a cross-border case: according to binding European law, the applicable law can well be a foreign legal rule which has to be interpreted and applied by the judge of the forum.⁶⁸

3.2.1. Commerce

500 million consumers and hundreds of thousands of companies (including small, medium-sized and big companies) are located in the EU, all relying on the internal market that many of us take for granted. However, small and medium-sized companies or consumers are very often confronted with difficulties when moving in the single market and in many respects the internal market still lacks completion. In particular, cross-border debt recovery is regarded as the Achilles heel of the internal market as the recovery rate of cross-border debt is only 37 %.⁶⁹ Businesses or citizens might be reluctant to do business in the single market if more than 60 % of debt remains uncovered in a cross-border situation. Justice instruments, and notably civil justice instruments on access to justice and cross-border enforcement of monetary claims, are considered to be powerful tools to address this issue and to eventually strengthen the internal market.

In the area of civil and commercial law, a significant number of legislative instruments has been adopted by the EU during the past fifteen years. In addition to training courses in which judges acquire knowledge and skills to apply these pieces of EU legislation in their daily work, there is a strong need to improve communication between European judges to favour an intense and open dialogue between them. However, strengthening communication requires knowledge on the part of the judges: they have to be aware of the situation in which they have to contact another judge in another Member State. In addition, their ability of working on EU instruments and accessing judicial networks must be developed.

Taking as an example just the well-known “Brussels I”-Regulation on jurisdiction and enforcement,⁷⁰ this instrument includes several provisions which might require procedural contacts and communication with judges from other Member States, for instance

- Articles 22 and 25 Brussels I / Articles 24 and 27 Brussels Ia: declination of jurisdiction in favour of the court that has exclusive jurisdiction;
- Article 26 Brussels I / Article 28 Brussels Ia: staying of proceedings;
- Article 27 Brussels I: lis pendens and declination of jurisdiction in favour of the court first seised. Article 29 Brussels Ia adds the following paragraph: “In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall

⁶⁸ Cf. in particular Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17.6.2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6, 4.7.2008; Regulation (EC) No. 864/2007 of the European Parliament and the Council of 11.7.2007 on the law applicable to non-contractual obligations (Rome II) of , OJ L 199/40, 31.7.2007; Regulation (EC) No. 1259/2010 of the European Parliament and the Council of 20.12.2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343/10, 29.12.2010; also Regulation (EC) No. 650/2012 of the European Parliament and the Council of 4.7.2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201/107, 27.7.2012.

⁶⁹ Viviane Reding, Vice-President of the European Commission, EU Justice Commissioner, Speech 13/1029 of 6 December 2013.

⁷⁰ Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters („Brussels I”); Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition of judgments in civil and commercial matters (“Brussels Ia”).

without delay inform the former court of the date when it was seised in accordance with Article 32”;

- Article 28 Brussels I / Article 30 Brussels Ia: related cases and declination of jurisdiction in favour of the first instance court seised;
- Article 37 Brussels I / Article 38 Brussels Ia: staying of the proceedings for the period during which an ordinary appeal against the judgment has been lodged in the country of origin;
- Article 46 Brussels I: staying of the proceedings of an appellate court on the application of the party against whom enforcement is sought 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 expired yet.

There are many more EU instruments facilitating the cross-border enforcement of consumer rights and business claims which cannot all be mentioned here. National judges dealing with civil justice cases have nevertheless to be able to handle further EU law-based civil justice procedures such as the European Enforcement Order for uncontested claims⁷¹, the European order for payment procedure⁷² and the European Small Claims Procedure⁷³, the two latter currently being subject to revision.⁷⁴

3.2.2. Insolvency

When the assets belonging to an insolvent debtor are situated in different European Union Member States, cross-border insolvency will often give rise to conflicts that need to be resolved by applying Regulation (EC) 1346/2000 on Insolvency Proceedings. The Regulation provides a framework for the handling of insolvency proceedings with cross-border effects. It includes conflict-of-law rules as well as rules on jurisdiction and it deals with the mutual recognition of insolvency proceedings.

The Regulation has already proven a very useful instrument at facilitating cross-border insolvencies within the EU. As to questions of interpretation of the Regulation's substantive provisions, much has been clarified or established through court authorities and scientific commentary. By now, national courts have several years of practical experience with the Regulation. Much, however, remains unresolved and will be the subject of extensive judicial activity in the future.

Principles embedded in the Regulation are mutual trust, cooperation and communication between liquidators and the coordination of concurrent proceedings. However, in practice, you find examples for both the effective coordination of insolvency proceedings and the failure to do so.⁷⁵

⁷¹ Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143/15 of 30 April 2004.

⁷² Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399/1 of 30 December 2006.

⁷³ Regulation (EC) 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199/1 of 31 July 2007.

⁷⁴ Cf. the proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure and Regulation (EC) 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, COM(2013) 794 final of 19 November 2013.

⁷⁵ This concerns the coordination of putative main proceedings and particularly the coordination of main and secondary proceedings, see Hess/Oberhammer/Pfeiffer, European Insolvency Law, The Heidelberg-Luxembourg-

Article 31 of the Insolvency Regulation provides for a duty of liquidators to cooperate and communicate, a position that some courts have extended to include themselves. However, the Regulation does not elaborate on the ways in which this cooperation should function in practice, nor does it include provisions on judicial cooperation between the courts. In order to fill this gap, INSOL Europe published the CoCo Guidelines in 2007⁷⁶ which were taken up by the American Law Institute in 2012 in order to create Global Principles.⁷⁷ Further EU Cross-border Insolvency Court-to-Court Cooperation Guidelines are under preparation.⁷⁸

Effective judicial cooperation is vital for rescuing companies and businesses in cross-border insolvency proceedings. Therefore, the proposal⁷⁹ for the amendment of the Insolvency Regulation includes an explicit duty to cooperate for the courts working in parallel insolvency proceedings either concerning the same debtor (Article 31a)⁸⁰ or relating to two or more members of a group of companies (Article 42b)⁸¹. In addition, Recital 20a adds:

“This Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. Where insolvency

Vienna Report on the Application of Regulation No. 1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JCIV/PR/0049/A4), Munich 2014, cf. chapter 7, especially notes 868 s., 899 and the conclusion in note 917: “Experience with today’s cooperation and communication duties shows that although, in general, the EIR [European Insolvency Regulation] has turned out to be successful also in this respect, there are still practical problems which might call for an improvement of the coordination provisions of the EIR.”

⁷⁶ European Communication and Cooperation Guidelines for Cross-Border Insolvency.

⁷⁷ Global Principles for Cooperation in International Cases including Global Principles for Court-to-Court Communications in International Insolvency Cases.

⁷⁸ In March 2014, a first draft was published: <http://leidenlawblog.nl/articles/cross-border-court-to-court-cooperation-in-insolvency-cases-enters-next-phase>.

⁷⁹ COM(2012) 744 final of 12 December 2012.

⁸⁰ Article 31a: Cooperation and communication between courts

1. In order to facilitate the coordination of main and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending or which has opened such proceedings shall cooperate with any other court before which insolvency proceedings are pending or which has opened such proceedings to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. For this purpose, the courts may, where appropriate, appoint a person or body acting on its instructions.
2. The courts referred to in paragraph 1 may communicate directly with, or to request information or assistance directly from each other provided that such communication is free of charge and respects the procedural rights of the parties to the proceedings and the confidentiality of information.
3. Cooperation may be implemented by any appropriate means, including
 - (a) communication of information by any means considered appropriate by the court;
 - (b) coordination of the administration and supervision of the debtor’s assets and affairs;
 - (c) coordination of the conduct of hearings;
 - (d) coordination in the approval of protocols.

Parliament has taken the view that the duty to cooperate should be put under the reservation that it is “appropriate in order to facilitate the effective administration of the proceedings”, cf. Legislative resolution of 5 February 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM(2012)0744 – C7-0413/2012 – 2012/0360(COD), ordinary legislative procedure: first reading.

⁸¹ Article 42b: Communication and cooperation between courts

1. Where insolvency proceedings relate to two or more members of a group of companies, a court before which a request to open proceedings concerning a member of the group is pending or which has opened such proceedings shall cooperate with any other court before which a request to open proceedings concerning another member of the same group is pending or which has opened such proceedings to the extent such cooperation is appropriate to facilitate the effective administration of the proceedings and is not incompatible with the rules applicable to them. For this purpose, the courts may, where appropriate, appoint a person or body acting on its instructions.
2. The courts referred to in paragraph 1 may communicate directly with each other, or to request information or assistance directly from each other.
3. Cooperation shall take place by any appropriate means, including
 - (a) communication of information by any means considered appropriate by the court provided that such communication shall be free of charge and respect the procedural rights of the parties to the proceedings and the confidentiality of information;
 - (b) coordination of the administration and supervision of the assets and affairs of the members of the group;
 - (c) coordination of the conduct of hearings;
 - (d) coordination in the approval of protocols.

proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated. The various liquidators and the courts involved should therefore be under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor. (...)”

Finally, the European e-Justice Portal since July 2014 has offered a new feature which allows the search in interconnected national insolvency registers of seven Member States;⁸² a feature which will certainly improve the effectiveness of cross-border insolvency proceedings.

3.2.3. Family

Family law touches upon the essence of the daily life of citizens. It is a most sensitive area for citizens as it concerns their private life, their partner and their children, their relationship, their rights and duties towards one another. Family law thus contains complex rules on the membership and contents of personal horizontal and vertical relationships between the parties and in relationship to third parties, and eventually determines one's status.

Family law problems become even more difficult, and sometimes even dramatic (e.g. in the case of a cross-border child abduction), in a cross-border situation when the laws of several countries are touched upon. In cross-border situations, citizens cannot rely on the continuity of their family relationships when changing residence in Europe. The number of cases in which conflict of laws issues are involved is rising continuously. As a consequence of the mobility of citizens between European Union Member States, family ties are increasingly established between nationals and residents of different Member States and national judges as well as legal practitioners are more than ever confronted with complex legal questions arising from cross-border family and parental responsibility cases. A report delivered by the European Commission in April 2014 highlights the legal problems couples face in cross-border disputes.⁸³

Responding to this phenomenon, the amount of legislation existing at EU level is considerable⁸⁴ and likely to be supplemented by further instruments in the near future.⁸⁵ It is therefore essential that judges have a sound knowledge of the existing EU instruments and the skills to apply them in the international setting. This becomes ever more important as direct judicial communication has been proven to be a necessity rather than merely convenient. More specifically, the Brussels II bis Regulation offers a legal framework on direct judicial communication which has to be used by judges in the EU.

Direct cooperation is required in Article 15 of the Brussels II bis Regulation. It states that courts shall cooperate, either directly or through the central authorities, for the purpose of the transfer of jurisdiction. In the Practice Guide (2005) of the European Commission for

⁸² Austria, Czech Republic, Estonia, Germany, Netherlands, Romania, Slovenia; more countries are expected to join at a later stage.

⁸³ COM(2014)225 of 15 April 2014.

⁸⁴ The key regulations on European family law are: Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (“Brussels II bis”); Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations; Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

⁸⁵ Matrimonial property regimes and property consequences of registered partnerships, see COM(2011)126 and 127 final of 16 March 2011.

the application of the Brussels II bis Regulation, the following explanations and specifications are given:

" ➤ How should the judges communicate?"

Article 15 states that the courts shall co-operate, either directly or through the central authorities, for the purpose of the transfer. It may be particularly useful for the judges concerned to communicate to assess whether in the specific case the requirements for a transfer are fulfilled, in particular if it would be in the best interests of the child. If the two judges speak and/or understand a common language, they should not hesitate to contact each other directly by telephone or e-mail. Other forms of modern technology may be useful, e.g. conference calls. If there are language problems, the judges may rely on interpreters. The central authorities will also be able to assist the judges."

Furthermore, direct judicial communication is foreseen in Article 11(6-7) of the Brussels II bis Regulation in case of child abduction. In order to facilitate communication between courts, central authorities can be asked to take the appropriate steps, as it is one of the most important duties of the central authorities to facilitate court-to-court communication (Article 55 lit. c Brussels II bis Regulation).

Judges can rely on useful information and different networks on judicial communication in relation to international child protection, including:

- the e-Justice Portal
- the European Judicial Network in civil and commercial matters to improve judicial cooperation
- the International Hague Network of Judges
- domestic networks of judges specialised on international judicial cooperation.

3.3. Criminal justice cooperation

KEY FINDINGS

- The most prominent and successful instrument of criminal justice cooperation, the European Arrest Warrant, has considerably accelerated surrender procedures but is criticised for being used non-proportionately.
- Gathering foreign evidence in criminal proceedings is still hampered by fragmented mechanisms which the European Evidence Warrant could not improve. The recently adopted European Investigation Order is expected to improve the situation by May 2017.
- The effectiveness of mutual recognition instruments applicable to different phases of a trial (on supervision measures or the enforcement of foreign sentences) suffers from a lack of full implementation by Member States.
- The proposed establishment of an EPPO on the basis of an enhanced cooperation will create specific challenges for national judiciaries both where the EPPO will be a judicial actor in its own right and in Member States which will not participate in the creation of the EPPO.

Judicial cooperation in criminal matters has evolved to a very great extent since it was first introduced by the Treaty of Maastricht in 1992. If the Treaty of Amsterdam (1997) and the European Councils of Tampere (1999), The Hague (2004) and Stockholm (2009) and their respective programmes in the Justice and Home Affairs field all played a landmark role in shaping both areas of cooperation, it is the Treaty of Lisbon that brought the most profound changes to them and also their effect on Member States and their courts. Before the Treaty of Lisbon, a long process of further integration led the Court of Justice in 2005 to deliver the seminal *Pupino* judgment⁸⁶ in which it held that, even though the Treaty excluded that Third Pillar Framework Decisions could have direct effect, these were not prevented from having indirect effect. When it comes to criminal law under the Treaty of Lisbon, framework decisions no longer exist and have been replaced by directives, thus meaning that their direct effect applies to Member States and their courts.

The idea of introducing a system of mutual recognition of decisions and enforcement of judgments in criminal matters, following the system already used in civil matters, had been discussed in the European Union since 1998. Following the Tampere European Council conclusions of October 1999, the Commission in its programme of measures to implement the principle of mutual recognition of decisions in criminal matters noted that the principle is founded on notions of equivalence and trust. Some forms of mutual recognition had already been embodied in the instruments of judicial cooperation adopted before the Maastricht Treaty, in various forums, and subsequently in the European Union framework. Other aspects of mutual recognition have not been addressed in an international context, in particular those concerning pre-trial orders or the taking into account, in producing a court decision, of any foreign criminal judgments, especially in order to assess a person's criminal record and whether he/she is a persistent offender. It remains to be seen whether any further moves in respect to mutual recognition in these areas will be made anytime soon.

⁸⁶ Case C-105/03, Judgment of the Court of 16.6.2005 *Maria Pupino*.

There have even been voices observing that one area of criminal justice cooperation could very well have a (negative) effect on another, e.g. the European Arrest Warrant in relation to pre-trial detention orders and the length of time spent in actual pre-trial detention.⁸⁷

The most recent development also aims to facilitate and enhance the protection granted to victims of crime, or possible victims of crime who move within the EU through a "European Protection Order". Under this order, a victim who is subject to a protection measure (for example in a case of domestic violence) will still be protected when he moves to another Member State. Member States have until 11 January 2015 to comply with the Directive creating the EPO.⁸⁸

The first step in applying the principle of mutual recognition for decisions in criminal matters was made with the Framework Decision on the European Arrest Warrant in 2001 (below 3.2.1). Other instruments followed, for example the Framework Decision regulating the so-called European Evidence Warrant adopted on 18 December 2008 and the Framework Decision of 23 October 2009 on the application of the principle to the decisions on supervision measures as an alternative to provisional detention (see below 3.2.2 and 3.2.4).

The strategic guidelines for legislative and operational planning for the coming years within the area of freedom, security and justice adopted by the European Council in June 2014 set the following goals for criminal justice cooperation in the coming years:

"...continue efforts to strengthen the rights of accused and suspect persons in criminal proceedings; ...reinforce the protection of victims; ...enhance mutual recognition of decisions and judgments in civil and criminal matters; ...reinforce exchanges of information between the authorities of the Member States..."⁸⁹

The core issue throughout the area of European criminal law and its effects on Member States' national legislation and application in the courtrooms in relation to mutual recognition is that of trust. Too often has it happened in the past, and will surely still happen in the foreseeable future, that a judge or prosecutor in one Member State's court was or will not be in favour of sending a prisoner to serve a prison sentence in another, or of exchanging evidence with another Member State's judiciary, for fear that equivalent standards do not apply there. This persisting lack of trust has come to affect some of the mutual recognition instruments, which will be looked at in further detail below, in the past, leading to a less than successful application. The issue of mutual trust remains one that will have to be further addressed during the next five years.

3.3.1. European Arrest Warrant

The European Arrest Warrant (EAW) stands out as the most prominent and probably most successful of the judicial cooperation instruments in criminal justice to date.⁹⁰

⁸⁷ E.g. Fair Trials International reports: "The European Arrest Warrant seven years on – the case for reform", May 2011; and "Stockholm's Sunset: new horizons for justice in Europe", March 2014.

⁸⁸ Directive 2011/99/EU of the European Parliament and of the Council of 13.12.2011 on the European protection order, OJ L 338/2, 21.12.2011.

⁸⁹ See above fn 66, p. 6.

⁹⁰ Council Framework Decision 2002/584/JHA of 13.6.2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18.7.2002; amended by FD 2009/299/JHA of 26.2.2009, OJ L 81/24, 27.3.2009.

The EAW has been designed to replace the traditional extradition system by requiring each national judicial authority (the executing judicial authority) to recognise, with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority). The Council handbook on the practicalities of executing an EAW⁹¹ has helped the Member States' judiciaries in knowing how and when exactly to apply the EAW. Moreover, the Commission publishes regular reports on the implementation of the Council Framework Decision on the EAW. It is apparent from the statistics contained therein that the surrender time has dropped from a one-year average to an average of 14-17 days for requested persons who did consent to their surrender and to 48 days for those surrendered without consent. However, it has also become clear that the EAW is having a detrimental effect on fundamental rights in some cases, especially in relation to the issue of pre-trial detention and the standards within the prisons of certain Member States. Moreover, the use of the instrument by some Member States for small crimes has been heavily criticised by others (as well as the cost factor involved in having to process all of these requests).⁹² The proper and most effective use of the EAW by the Member States' judiciaries is certainly something that will remain a ground for discussion and analysis in the five years to come.

3.3.2. Gathering of Foreign Evidence

In its Action Plan Implementing the Stockholm Programme, the European Commission underlined the need for a new and comprehensive system for obtaining evidence in cross-border cases which would apply the principle of mutual recognition to obtaining certain types of evidence for use in criminal proceedings⁹³. This stressed the importance of the initial Commission proposal on the European Evidence Warrant (EEW), which focused on obtaining objects, documents and data gained under national procedural law measures such as production orders and search and seizure orders. It also covered information already contained in police or judicial records, such as records of criminal conviction. The Framework Decision on the EEW adopted in 2008 did not, however, address initiating the taking of evidence (in whatever manner) from suspects, defendants, witnesses or victims, as the idea was to address these issues in a further proposal.⁹⁴

The "European Investigation Order (EIO)" in criminal matters was initiated by several Member States in 2010. Following the new legislative system established by the Lisbon Treaty, it was proposed in the form of a directive. The concept was that the EIO should cover, as far as possible, all types of evidence and replace all existing instruments in the area and would form a major step in the field of mutual recognition in criminal matters in the EU. The Directive was eventually adopted on 3 April 2014 and will have to be implemented by Member States by 22 May 2017.⁹⁵

Although Member States should have fully implemented the EEW Framework Decision by January 2011, it has so far not been a widely used tool in criminal justice cooperation. The mechanisms developed with regard to gathering foreign evidence in the EU have been criticised for being fragmented and complicated. The limited scope of the adopted

⁹¹ European Handbook on how to issue a European arrest warrant, Council doc. 17195/1/10 REV 1. 17.12.2010.

⁹² Cf. only Sir John Thomas, then Lord Justice of Appeal of England and Wales, *The principle of mutual recognition – success or failure?*, ERA Forum (2013), 585-588.

⁹³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20.4.2010 – Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme [COM(2010) 171 final, p. 5.

⁹⁴ Council Framework Decision 2008/978/JHA of 18.12.2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OL L 350/72, 30.12.2008.

Framework Decision on the execution of orders freezing property or evidence⁹⁶ under which the transfer of evidence is still subject to the rules of mutual legal assistance as well as its reluctant implementation by the Member States has resulted in many practitioners not seeing added value in the use of the instrument and thus continuing to apply the traditional ways of mutual legal assistance.⁹⁷ An even more critical approach has been taken with regard to the Framework Decision on the EEW. Its limited scope only covering evidence that already exists, as well as speculations among practitioners and some Member States about the likely adoption of either a second Evidence Warrant instrument or a single comprehensive document covering all types of evidence has caused legislators to place its implementation low on their agendas and practitioners to prefer using the traditional procedures of mutual legal assistance. This is an issue that surely must be addressed in the current legislative period. The EIO is a step in the right direction in countering this issue, seeing that it covers a much wider range than the EEW, but it remains to be seen how the Member States will proceed with its application.

3.3.3. Freezing and Confiscation of Proceeds of Crime

A new proposal was presented on a Directive on the freezing and confiscation of proceeds of crime in the EU by the Council and the European Parliament in March 2012 and adopted on 3 April 2014.⁹⁸ Its aim is to simplify the existing legislation applicable to extended confiscations and promoting the use of non-conviction based confiscations. Its implementation will surely have to be monitored in the current legislative period and its effectiveness in confiscating assets of criminals further analysed.

3.3.4. Enforcement of Foreign Criminal Sentences

In this field several instruments have been implemented in the past, all with varying degrees of success. The latest EU instruments adopted are the Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU⁹⁹ and the Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions¹⁰⁰. Adopted in November 2008, these Framework Decisions should have been implemented by Member States into their national legislation by 5 and 6 December 2011, respectively, but still have not by all¹⁰¹.

⁹⁵ Directive 2014/41/EU of the European Parliament and of the Council of 3.4.2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, 1.5.2014.

⁹⁶ Council Framework Decision 2003/577/JHA of 22.7.2003 on the execution in the European Union of orders freezing property or evidence, OJ L196/45, 2.8.2003.

⁹⁷ Cf. for example Council note 16921/10 of 7.12.2010 on the Implementation of the Framework Decision of the Council of the European Union of 22.7.2003 (2003/577/JHA) on the execution in the European Union of orders freezing property or evidence.

⁹⁸ Directive 2014/42/EU of the European Parliament and of the Council of 3.4.2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127/39, 29.4.2014.

⁹⁹ Council Framework Decision 2008/909/JHA of 27.11.2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327/27, 5.12.2008; amended by FD 2009/299/JHA of 26.2.2009, OJ L 81/24, 27.3.2009.

¹⁰⁰ Council Framework Decision 2008/947/JHA of 27.11.2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337/102, 16.12.2008, amended by FD 2009/299/JHA of 26.2.2009, OJ L 81/24, 27.3.2009.

¹⁰¹ According to the European Organisation of Prison and Correctional Services (Europris), by 17.10.2013 seventeen Member States had implemented FD 2008/909 (A, B, CZ, DK, FI, F, HR, H, I, L, LV, M, NL, PL, RO, SK, UK), thirteen had implemented FD 2008/947 (A, B, BG, CZ, DK, FI, HR, H, LV, NL, PL, RO, SK) and only eleven FD 2009/829 (A, CZ, DK, FI, HR, H, LV, NL, PL, RO, SK), see <http://www.europris.org/state-of-play-eu->

Furthermore, mutual recognition instruments also apply to other phases of a trial. In the pre-trial phase, the Framework Decision on the application of mutual recognition to decisions on supervision measures as an alternative to provisional detention,¹⁰² the "European Supervision Order" (ESO), which was adopted in October 2009, lays down rules according to which one Member State recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention, monitors the supervision measures imposed on a natural person and surrenders the person concerned to the issuing state in case of breach of these measures. It should have been implemented by all Member States into their national legislation by 1 December 2012.

Not all of these Framework Decisions have been fully transposed by all Member States. This is a matter that still has to be followed up, as there is a perceived lack of interest in some Member States and their judiciaries in implementing these Framework Decisions and to make full use of them in assisting in criminal judicial cooperation.

3.3.5. Exchanging Criminal Records

At EU level, in 2005, the Council adopted a Decision on the exchange of information extracted from criminal records which defines and extends the obligation of the convicting Member States to transmit notice of convictions to the Member State of nationality of the sentenced person and lays down the framework for a computerised conviction information exchange system. Continuing on this line, in February 2009, the Council adopted a Framework Decision on the organisation and content of the exchange of information extracted from the criminal record between Member States¹⁰³ which lays the ground rules for the mandatory transmission of information on convictions to the country of the person's nationality, as well as for the storage of such information by that country and for the retransmission, upon request, to other Member States. The Framework Decisions should have been implemented into Member States' national legislation by 27 April 2012. Finally, in April 2009, the legal basis for a European Criminal Records Information System (ECRIS) was established.¹⁰⁴ This information system will allow for automated exchange of data between central criminal records and creates an obligation for Member States to use common tables (offences and sanctions) to transmit information on convictions.¹⁰⁵ Although the information system will not allow direct access to the criminal records, it will speed up the transmission of requests and replies. Member States had until 7 April 2012 to ensure that ECRIS is operational. The system itself went online on 27 April 2012.

In addition to these technical means to exchange criminal records, an instrument that once fully implemented will put even more flesh on these bones is the Framework Decision on taking account of convictions in the course of new criminal proceedings.¹⁰⁶ Adopted in 2008, this instrument determines the conditions under which, in the course of criminal proceedings against a person in one Member State, previous convictions handed down against the same person for different facts in other Member States can be taken into

framework-decisions-909-947-829/. Cf. also Commission report on the implementation by the Member States of Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA of 5.2.2014, COM(2014) 57 final.

¹⁰² Council Framework Decision 2009/829/JHA of 23.10.2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294/20, 11.11.2009.

¹⁰³ Council Framework Decision 2009/315/JHA of 26.2.2009 on the organisation and content of the exchange of information extracted from the criminal record between Member State, OJ L 93/23, 7.4.2009.

¹⁰⁴ Council Decision 2009/316/JHA of 6.4.2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, OJ L 93/33, 7.4.2009.

¹⁰⁵ See ECRIS Manual for practitioners, p. 4, <http://db.eurocrim.org/db/en/doc/1702.pdf>.

¹⁰⁶ Council Framework Decision 2008/675/JHA of 24.7.2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220/32, 15.8.2008.

account. Member States had until 15 August 2010 to implement the Framework Decision into their national legislation.

It can be said that the measures that have already been taken, if fully implemented in a uniform manner in all Member States, will eventually, and already have in many cases, lead to a fully functional cross-border exchange of information on criminal records, with the limits set upon the direct access to the criminal records themselves by the framework decisions. Making the transmission of information on criminal convictions mandatory in certain instances will greatly enhance the ease of cross-border exchange of information and thus cooperation in criminal justice matters, aiding the furthering of court cases.

3.3.6. European Public Prosecutor

The Lisbon Treaty provides an express basis for creating the Office of a European Public Prosecutor (EPPO) "from Eurojust" (Article 86 TFEU) and to regulate the EPPO's powers with regard to investigation and prosecution and in particular its standing within the judicial systems of the Member States. If set up at all, these competences will at least cover the investigation and prosecution of criminal acts affecting the financial interests of the EU but may unanimously be extended by the European Council to also cover other serious crimes with a cross-border dimension. There is no need to emphasise that the unprecedented creation of a European prosecution body with proper investigative powers and own procedural rights in Member States' criminal proceedings will add a new dimension to the European area of Justice in which judicial cooperation in criminal matters will no longer be the *domaine réservé* of national judicial institutions. This will create specific challenges not only for those national judiciaries in which the EPPO will enjoy the position of a judicial actor in its own right, but also with regard to the judiciaries of those Member States which do not participate in the creation of the EPPO.

On 17 July 2013 the Commission indeed presented a formal proposal for a Council Regulation setting up the European Public Prosecutor's Office.¹⁰⁷ The proposal has since been under discussion at the level of Council working groups and in numerous conferences. It is for the time being limited to crimes affecting the financial interests of the Union. While its fate may appear uncertain, as many details of the proposed regulation are still controversial (in particular, national Parliaments raised concerns as regards respect for the subsidiarity principle) and its adoption requires unanimity among the participating Member States, it seems already clear that not all Member States will participate but the minimum quorum set by Article 86 (nine participating Member States) appears to be acquired in principle.¹⁰⁸

¹⁰⁷ COM(2013) 534 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0534:FIN:EN:PDF>

¹⁰⁸ The establishment of the EPPO on the basis of Art. 86 TFEU follows insofar the pattern introduced by the Lisbon Treaty for legislating in former third-pillar areas (cf. also Articles 82.3, 83.3, 87.3) as it allows, through the so-called "emergency brake" procedure, to adopt a proposed legislative measure on the basis of a reduced number of participating Member States, i.e. in the framework of a facilitated enhanced cooperation, cf. Art. 86.1: "... In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. ... After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply."

4. THE NEEDS AND CHALLENGES FOR EUROPEAN JUDICIAL TRAINING

4.1. European law training for judges (and other legal professionals)

The compact presentation in chapters 2 and 3 above of the role and responsibility of the national judges in applying and enforcing EU law and in using the instruments of judicial cooperation in the European area of justice has demonstrated how much the efficient application of EU law depends on the corresponding qualification and training of legal professionals. The subtleties of the ever-evolving case-law of the Court of Justice and the intricacies of EU law demonstrate the challenges national judges may encounter in the application of EU law and the importance, for an adequate protection of Union rights, of an EU life-long learning strategy that caters to judges' needs. Without legal practitioners acquiring the specific knowledge and skills to understand, interpret and enforce European law, EU citizens and undertakings can hardly benefit from the rights and chances EU law offers them. However, as the 2011 ERA/EJTN study on judicial training has shown (see 4.3 below), too many judges and prosecutors are still unfamiliar with specific EU law procedures and only have a vague idea of EU law concepts.

It is only on the basis of sound and ongoing training that national judges will be able to give effect to the concepts of direct effect and primacy of EU law. Training of national judges on these fundamental principles is thus a priority in order to ensure the effective application of EU law. The situation is even more worrisome considering that although national judges seem to be aware of the relevance of EU law for their work, the knowledge of how and when to apply EU law, in particular how to use the preliminary reference procedure, is still lacking.¹⁰⁹ Well-trained national judges play a crucial role in the framework of the preliminary reference procedure, as they are in a position to contribute to the development of EU law. National judges are agenda-setters since, by making a reference, they allow the Court of Justice to address issues of EU law that might otherwise be left unresolved: Landmark judgments of the Court of Justice, such as the ones on primacy or direct effect, have been delivered as PRP decisions.

The abundance of EU instruments determining judicial cooperation procedures and tools in civil and criminal matters makes it difficult for national practitioners to have an overview of legislation and the growing case-law of both the Court of Justice and the courts in other Member States. Moreover, as mutual recognition of decisions of other Member States' judicial authorities is a cornerstone of cross-border judicial cooperation in the EU, mutual trust is a core prerequisite for the smooth and effective application of the various instruments: A judge will only be willing to execute or implement a foreign judicial decision without considering its merits if and when he is convinced that it was adopted on the basis of equivalent standards of fair play and respect for the rule of law as in his own jurisdiction. Mutual trust however cannot be ordered, it can only be built by knowing other Member States' judicial systems and by face-to-face encounters with colleagues from these Member States. This can certainly be achieved through bilateral exchanges and international trainings involving several Member States. And finally, mutual understanding requires communication, hence the ability to converse in a common language. Direct judicial communication is particularly relevant in cross-border family cases.

¹⁰⁹ See ERA's study on judicial training in the European Union Member States (below 4.3).

Direct judicial communication can be explored and developed in cross-border seminars and workshops. To give an example: ERA is currently implementing a project in cooperation with, and on behalf of, the European Commission for the development of training modules in the area of judicial cooperation in civil matters.¹¹⁰ The objective of this project is to create self-standing training modules which are accessible by any party or institution interested in organising training in this area of EU Law. The final recipients of the training are thus legal practitioners or members of the judiciary from across the EU. The first two modules that ERA has developed in the framework of this project deal with issues of European family law, namely 'Cross-border divorce and maintenance' and 'Parental responsibility, including child abduction'.

Each module contains an e-learning course providing a basic introduction into the subject matter, a users' pack with all related legislation and jurisprudence and a trainer's pack including not only background material but also a trainer's manual that will assist future trainers to best make use of the training module by presenting the methodological and organisational aspects of the training. The training is organised on the basis of varying training methods, such as face-to-face presentations, practical exercises requiring the active contribution of the participants and IT-supported training, allowing participants to familiarise with available e-justice tools and information available on the e-learning course. By the end of 2014, the two training modules will be made freely available in six languages and approximately 380 legal practitioners will have received a practical training on EU family law.¹¹¹ Training in this field is of utmost importance, as European citizens heavily rely on the work of lawyers and particularly on the decisions of judges. Judges with a sound understanding of the EU instruments for cross-border judicial cooperation are much more European-minded. This is essential as European citizens need and deserve true European judges to decide their cases.

The quality of judicial cooperation in the European area of justice depends on three core factors: the understanding of the EU rules at stake and the professional skills to apply them; the readiness to use them on the basis of mutual trust; and the ability to communicate with colleagues across the border. Targeted initial and continuous training for all judicial actors is the means to develop all three factors.

¹¹⁰ For this project, ERA has been able to secure the partnership of the national judicial training actors from Austria (Federal Ministry for Justice), Finland (Ministry of Justice), Germany (Federal Ministry of Justice), Latvia (Latvian Judicial Training Centre), Poland (National School of Judiciary and Public Prosecution), Romania (Superior Council of the Magistracy) and Slovenia (Judicial Training Centre of the Ministry of Justice). The Judicial Academy of the Czech Republic has joined ERA as a 'supporting institution'.

¹¹¹ Cf. Anastasia Patta, European judicial training: promoting the development of standardised training materials and interactive training methodology, Editorial to ERA Forum 3/2014.

4.2. Judicial training as a European remit

KEY FINDINGS

- EC institutions showed limited ambitions for European judicial training prior to the Amsterdam Treaty, but EP called for the creation of ERA already in 1991.
- Attempts to set up a Judicial Training Network with an EU legal basis in the context of Amsterdam failed after 1999.
- The Commission communications of 2006 and 2011 widened the concept of European judicial training to include the legal professions.
- Four EP resolutions in 2008, 2009 and 2010 called for the creation of a "European Judicial Academy" composed of the EJTN and ERA.

Although for a long time it has been uncontested that the implementation and application of European law is in the first instance a responsibility of the national judge and the national legal practitioner, prior to the Amsterdam Treaty the EU institutions did not demonstrate a strong interest in ensuring a European element in the training of national practitioners. An exception confirming the rule was the European Parliament's 1991 initiative in the context of the completion of the Single Market to set up the Academy of European Law (ERA) in Trier.¹¹² The first EU programme to promote mutual understanding and facilitate cooperation between the judicial authorities of the Member States was only launched in 1996, the Grotius Programme.

In fact, judicial training was first mentioned as a European Union competence by the Lisbon Treaty which came into force in 2009.¹¹³ However, Commission's or individual Member State's initiatives calling for an institutionalisation of judicial training at European level were already launched following the conclusions of the Tampere summit in 1999.¹¹⁴ As early as 14 November 2000 the then French presidency of the Council put forward an official proposal for a Council Decision on the establishment of a "European Judicial Training Network"¹¹⁵ which was intended to be administered and supervised by the Commission. This proposal, which was formulated under the terms of Articles 31 and 34 TEU, required a unanimous decision by the Council which was not achieved, five of the fifteen Member States voting against it. Apart from the fact that the proposal was confined to criminal matters only, judicial circles were particularly critical because, in their view, judicial independence was not compatible with the role foreseen for the Commission.

In December 2001, the European Council in Laeken also called for the creation of a European Judicial Training Network, but without specifying the legal form this should take. The Hague Programme of 2004 contained similar proposals. In its "Communication on the

¹¹² OJ C267/33 of 14.10.1991.

¹¹³ See Articles 81, 82 TFEU.

¹¹⁴ Police training has for years been institutionalised at European level within the framework of CEPOL. However, in March 2013 the Commission presented a proposal to transform CEPOL into a department of Europol (the "Europol Academy") with the mission to "develop into the EU centre of excellence for law enforcement (cross-border) learning" which would if necessary also address prosecutors (Commission Communication "establishing a European Law Enforcement Training Scheme", COM(2013) 172 final, 27.3.2013).

¹¹⁵ Initiative of the French Republic with a view to adopting a Council Decision setting up a European judicial training network, OJ C18/9, 19.1.2001.

future training of the judiciary in the European Union” of 29 June 2006¹¹⁶ the Commission pointed out that “at the present time” the creation of a European Agency would not appear “opportune” (side note 37) and that as an alternative there should be intensified support for existing structures and an expansion of the support programmes. The Stockholm Programme adopted by the European Council in December 2009 (as well as the subsequent Stockholm Action Plan) again emphasised the importance of regular continued training for all legal professions (the judiciary and lawyers in private practice) and particularly encouraged the use of “existing training institutions” to ensure the participation of “a substantive number of professionals” in a European training scheme “by 2015”¹¹⁷. This was further endorsed by the Commission Communication on Judicial Training of 13 September 2011 which called for the training of 700,000 legal practitioners by the year 2020.¹¹⁸ The Communication also expressly excluded the creation of a “monopoly structure” at European level and instead suggested an extension of financing options under the terms of the new financial perspective with a view to supporting training for more than 20,000 legal practitioners a year up to 2020.

The two Commission communications as well as the Stockholm Programme and Action Plan make clear that “judicial training” encompasses not only judges and prosecutors (in some Member States the latter are not considered part of the judiciary), but also lawyers and notaries.¹¹⁹ Similarly, the European Parliament dealt with judicial training in a series of resolutions. Of these, the four most ambitious even proposed a new European architecture of judicial training of which the European Judicial Training Network (EJTN) and ERA would provide the cornerstones. For the first time on 9 July 2008, the European Parliament, by an overwhelming majority, approved the report by Vice-president Diana Wallis on the role of the national judge in the application of Community law, which expressly calls for the creation of a “European Judicial Academy” including EJTN and ERA, and firmly rejects the creation of new parallel structures¹²⁰. On 25 November 2009, this call was renewed by the newly elected Parliament in a resolution in view of the expected Stockholm Programme which was submitted by rapporteurs from three different committees.¹²¹ Third, on 17 June 2010 the Parliament adopted a further resolution in response to the Commission’s Stockholm Action Plan and the reply of Vice President Reding to an oral question from Klaus-Heiner Lehne MEP, on behalf of the Legal Affairs Committee of 10 May 2010. For the first time, Parliament formulated its demand to be consulted **on any** plans for the creation of a body to be set up on the basis of existing structures and networks, in particular EJTN and ERA.¹²² Finally, in its resolution of 23 November 2010 “on civil, commercial and family law aspects as well as aspects of international private law of the Action Plan to implement the Stockholm Programme” the European Parliament reiterated its calls for the

¹¹⁶ See fn. 1.

¹¹⁷ See chapter 1.2.6 „Training“.

¹¹⁸ See fn. 2.

¹¹⁹ All of these have always been core target groups of ERA. Both texts refer expressly to ERA and its expertise and relevance for European judicial training.

¹²⁰ European Parliament resolution of 9 July 2008 on the role of the national judge in the European judicial system, 2007/2027(INI), par. 21: “The European Parliament ... Considers, however, that the time is ripe for a pragmatic institutional solution to the question of judicial training at EU level which makes full use of existing structures whilst avoiding unnecessary duplication of programmes and structures; calls, therefore, for the creation of a European Judicial Academy composed of the EJTN and the Academy of European Law; calls for this institutional solution to take account of relevant experience gained in running the European Police College; ...”

¹²¹ Par. 105, Resolution by the European Parliament of 25 November 2009 on the Commission Communication to Parliament and Council – An area of freedom, security and justice serving the citizen – the Stockholm Programme. The rapporteurs were Luigi Berlinguer (JURI), Juan Fernando López Aguilar (LIBE) and Carlo Casini (AFCO).

¹²² European Parliament resolution of 17 June 2010 on Judicial Training (Stockholm Programme).

establishment of a European Judicial Academy including EJTN and ERA.¹²³ Moreover, the European Parliament initiated a pilot project on judicial training in 2011 which the Commission split into four lots dealing with the training of judges and prosecutors (lot 1), the training of lawyers in private practice (lot 2), the training of court staff (lot 3) and the "promotion of cooperation between judicial stakeholders concerned by European judicial training" (lot 4).¹²⁴

4.3. Judicial Training in the EU: A Study for the European Parliament

In 2011, ERA, with the support of the European Judicial Training Network, produced a major study for the European Parliament on the state of judicial training in the European Union.¹²⁵ The study focused on training in EU law but also analysed other aspects, such as the conditions under which training is provided, the methodologies used and the target groups addressed. The study runs to more than 800 pages and covers all (then) 27 EU Member States. It describes the training provided to professional judges (including administrative judges), public prosecutors (including in jurisdictions where they are regarded as separate from the judiciary) as well as court staff who have legal training and who help prepare judgments, make preliminary judicial decisions or play a role in judicial cooperation.

The study contains three main sections:

- Profiles of the judicial training actors at EU level, including organisations specifically established to provide judicial training, organisations that train judges and prosecutors in addition to their core activities and associations of judges that provide training to their members;
- Profiles of the judicial training actors at national level in all 27 Member States of the European Union, including details of how judicial training is organised in each Member State, the staffing and budgetary resources devoted to it, the numbers of judges, prosecutors and court staff trained each year and other key information;

¹²³ European Parliament, Resolution of 23 November 2010 on civil law, commercial law, family law and private international law aspects of the Action Plan Implementing the Stockholm Programme, 2010/2080(INI), par. 13 : "13. Bearing in mind the Stockholm programme's ambitious goal of offering European training schemes to half of the judges, prosecutors, judicial staff and other professionals involved in European cooperation before 2014, and its call for the existing training institutions in particular to be used for this purpose, points out that the Network of the Presidents of the Supreme Judicial Courts, the European Network of the Councils for the Judiciary, the Association of the Councils of State and Supreme Administrative Jurisdictions and the Eurojustice network of European Prosecutors-General, court officers and legal practitioners have a huge amount to offer by coordinating and promoting professional training for the judiciary and mutual understanding of other Member States' legal systems and making it easier to resolve cross-border disputes and problems, and therefore considers that their activities must be facilitated and receive sufficient funding; further considers that this must lead to a fully funded plan for European judicial training drawn up in liaison with the abovementioned judicial networks, while avoiding unnecessary duplication of programmes and structures, and that it should culminate in the creation of a European Judicial Academy composed of the European Judicial Training Network and the Academy of European Law;..." (emphasis added).

¹²⁴ The final reports with regard to the four lots (Tender JUST/2012/JUTR/PR/0064/A4) are available on the EU e-justice portal at <https://e-justice.europa.eu/resultManagement.do?stext=Tender+JUST%2F2012%2FJUTR%2FPR%2F0064%2FA4&itext=Tender+JUST%2F2012%2FJUTR%2FPR%2F0064%2FA4&sco=any&slang=any&spage=25&slmo=anytime&soption=c,n,a.&showPage=1&hval=2b54b047beb7815c1f9ec4ce13bf0ae1>.

¹²⁵ ERA – Academy of European Law, "Judicial training in the European Union Member States", European Parliament, Policy Department C, Brussels 2011, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453198/IPOL-JURI_ET%282011%29453198_EN.pdf and at www.judicialtraining.eu.

- The results of a highly representative survey in which almost 6,000 individual judges and prosecutors (representing 5 % of all judges and prosecutors in the EU) and more than 1,000 other court officials from all EU Member States reported on their knowledge and experience of dealing with EU law, their contacts with foreign judicial authorities, their evaluation of judicial training provision, and other key factors in the creation of a common European judicial culture.

The results of the study were used by the European Parliament in its Resolution of 14 March 2012 and the interim results were cited by the European Commission in its Communication of 13 September 2011. There is no room to reproduce these results in this briefing note; however it is worth recalling a few of its key findings:

- The knowledge of how and when to apply EU law, in particular the use of the preliminary reference procedure, is still lacking: three fifths of judges across the EU said that they do not know how to refer a question to the CJEU at all or that they only know to a minor extent how to do so.
- Judges, prosecutors and court staff are more likely to receive continuous training in other subjects than in EU law. Just over half of judges and prosecutors who responded to the survey (53%) had received continuous training in EU or another Member State's law, but only one third had done so in the last three years (i.e. period in which the Treaty of Lisbon came into force).
- While most judges and prosecutors know at least a little of another EU language, only a relatively small number know it well enough to be able to participate actively in judicial training or to use it professionally.
- The most significant obstacle to participation in continuous judicial training is the organisation of the justice system itself, which inhibits participation in training because the caseload of training participants is not reduced and they are not replaced during their absence.

4.4. European and national providers of judicial training

At European level, the most relevant provider of judicial training is the European Judicial Training Network (EJTN), an association founded in October 2000 by a group of judicial training institutes from the then 15 Member States in conjunction with ERA. Together with its founding members, EJTN comprises judicial training institutes from all 28 Member States today. It offers a wide range of activities, with the exchange programme for judicial authorities as its flagship (which in 2013 was used by 1,280 participants) and training programmes for judges and prosecutors either offered by its members or organised at the level of the network (which in 2013 were altogether attended by 2,594 delegates).¹²⁶

The second most used provider of judicial training at European level is the Academy of European Law (ERA) which was set up in 1992.¹²⁷ It offers training programmes in

¹²⁶ For further information see EJTN's website at www.ejtn.eu. The 2013 statistics are taken from EJTN's Annual Report of Activities (EJTN 2014).

¹²⁷ For further information see ERA's website at www.era.int.

European law for all legal professionals from EU Member States. In 2013, participants in ERA's activities included 1,960 judges and prosecutors.¹²⁸

Judicial training remains a competence and responsibility of the Member States in the first instance. However, the prevailing characteristic is still the enormous diversity of judicial systems and a corresponding heterogeneity of judicial training structures. Judicial training at national level is provided by at least four different types of authorities: Judicial schools, depending on either a body of judicial self-governance (Council of the Judiciary, Supreme Courts) or a state authority; Ministries of Justice; Higher Courts and/or Prosecutors General; autonomous Court administrations. In addition, the concept of the judiciary and its members is not the same in all Member States, as in some countries prosecutors are not considered part of the judiciary whereas other Member States exclude administrative judges from their understanding of the "corps judiciaire".

Staff and other resources as well as financial capacities and budget autonomies of judicial training institutes vary greatly from country to country. Since 2009, the economic and financial crisis has had a growing negative impact on national training budgets and the current austerity policy has vitally hit many of these training institutions.

The need for ongoing judicial training keeping pace with the evolving *acquis* which has been shown above calls for action not only by EU institutions on the basis of Articles 81 and 82 TFEU but also by training providers at all levels and also by the national administrations of justice.

¹²⁸ A comprehensive list of stakeholders in judicial training operating at a European or international level is presented in the final report on lot 4 of the pilot project mentioned in fn 126 above ("Promotion of cooperation between judicial stakeholders concerned by European judicial training", see http://ec.europa.eu/justice/criminal/files/jt_workshop_2014/wojciech_postulski_en.pdf). – Other providers of EU law training at European level, which to a varying extent also address judges and prosecutors, include the College of Europe (www.coleurope.eu), the European Institute of Public Administration (<http://www.eipa.nl/>) and the European University Institute (www.eui.eu).

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MONITORING THE IMPLEMENTATION OF EU LAW: TOOLS AND CHALLENGES

Marta BALLESTEROS¹,
Milieu, Belgium

Abstract

Upon request by the JURI Committee, this paper highlights the need for an EU policy for monitoring and enforcing the implementation of EU law as part of the principle of rule of law in the European Union. It provides information on the different issues of transposition and application of European legislative acts going through the different tools developed by the Commission to ensure compliance with EU law. This issue is recognized as a priority by President-elect Juncker, who has proposed for the first time a new European Commission with a First Vice-President dedicated to a Better Regulation agenda, to guarantee that every Commission legislative proposal respects the principles of subsidiarity and proportionality. A stronger EU policy for monitoring and enforcement of the EU law would then be required to ensure the respect of the rule of law including the effective transposition and application of every legislative measure, once adopted within the framework of the democratic legislative process.

¹ Marta Ballesteros is a Senior Lawyer and Policy Advisor for Milieu responsible for the development and management of projects supporting public sector clients to define effective legal and regulatory frameworks in different areas of EU law including fundamental rights, environmental protection, climate and energy or consumers' rights related to environmental claims. She has more than 20 years of experience monitoring the implementation of EU law and delivering high quality studies and legal analysis including recommendations to EU Institutions. Marta has led several projects in Milieu providing studies on relevant issues such as the implementation and enforcement of EU law, the implementation of children with disabilities rights in 18 EU Member States and a comparative assessment providing recommendations for EU action, the implementation of the European Citizens Initiative, the application of the Environmental Liability Directive for biodiversity damage; legal and regulatory framework for shale gas/unconventional gas at EU or Member States level including Spain. Throughout her career, she has demonstrated strong management and leadership skills undertaking the role of Deputy Director/Programme Director in the WWF EPO, Head of the Save the Children Brussels office or the Head of the ClientEarth Brussels office. Marta holds law degree by the University Autónoma of Madrid with specialisation in human rights law by the Institute of Human Rights in Madrid and in European law and institutions by the Université Catholique de Louvain la Neuve.

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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
CHAP	Complaints Handling – Accueil des Plaignants
EEA	European Economic Area
EFTA	European Free Trade Association
EP	European Parliament
EU	European Union
IMPEL	EU Network for the Implementation and Enforcement of Environmental Law
MEP	Members of the European Parliament
NGO	Non-governmental organisation
RMCEI	Recommendation on Minimum Criteria for Environmental Inspections
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union

DEFINITIONS

This note uses specific terminology which requires definition for the sake of clarity. The following definitions are in line with the TFEU and with the terminology used by the CJEU.

<i>Transposition</i>	The legal or regulatory act(s) by which a piece of EU law is incorporated into the national legal order.
<i>Application</i>	The practical application of the national transposing provisions to a concrete situation or to a number of situations.
<i>Implementation</i>	The general term covering both transposition and application.
<i>Enforcement</i>	The measures taken by public authorities to ensure a correct application of the provisions of EU law. Where EU public authorities take action against a Member State in a specific case, these actions would be considered part of enforcement measures.

EXECUTIVE SUMMARY

Key findings

The problems of implementation and enforcement of EU law have been longstanding. Non-implementation means depriving citizens and businesses of potential benefits derived from the objectives of EU legislation.

Member States and European Commission have a shared responsibility in implementing and enforcing European law which is also recognized by CJEU jurisprudence². The European Parliament also performs a crucial role in ensuring enforcement and implementation of EU law. Petitions and questions received by the EP often trigger Commission's action such as EU Pilot investigations or infringement procedures or proposals for legislation.

The Treaty stipulates no specific means to enforce Member States obligations of implementation of EU law, other than the infringement proceedings specified in Article 258 TFEU. To improve monitoring and reduce the recourse to infringement procedures, additional tools have been developed such as the EU Pilot³ or the modification of Article 260(3) TFEU enabling the CJEU to impose financial penalties directly⁴ for failure to notify the transposing measures. In addition, a range of measures have been put in place to assist Member States with implementation and the Commission to enforce EU law, including correlation tables and conformity checking, scoreboards, guidelines, implementation plans, inspection, package meetings or fitness checks.

The analysis of all those measures shows that the Commission has neither the policy nor the resources to systematically identify and enforce all cases of non-implementation in EU Member States territory.

Transposition of EU law

Monitoring timely transposition is a Commission priority and is considered essential to ensure the effectiveness of European policies⁵. There is a general continuous trend of late transposition in Member States⁶. In 2012 'Late transposition infringements were launched against more than two thirds of the Member States for some directives'⁷. The Commission launched procedures against 24 Member States concerning late transposition of Directive 2010/31/EU on the energy performance of buildings. However, the Commission has noted that once infringement procedures are opened, national measures are usually communicated swiftly⁸ mainly due to the Commission's systematic application of the fast-track financial sanction under Article 260(3) TFEU. In addition, the 2013 report recognises a decrease in the number of infringement procedures for late transposition due to legislative activity of the Union, with a subsequent decrease in the number of directives to be transposed.

² Case C-365/97 Commission v Italy [1999] ECR I-7773, paras. 58-60.

³ Commission Communication "A Europe of results – Applying Community Law", COM (2007) 502 final.

⁴ Detailed guidelines about the application of Art. 260(3) TFEU are contained in Commission Communication "Implementation of Article 260(3) of the Treaty", SEC(2010) 1371.

⁵ 29th Annual Report on monitoring the application of EU Law (2011), COM (2012) 714, p.7. 30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p. 7

⁶ Ballesteros, M., Mehdi, R., Elia Antonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

⁷ "30th Annual Report on Monitoring the Application of EU Law (2012)", p. 8

⁸ Annual Report on monitoring the application of EU Law (2011), COM (2012) 714, p.14.

A major block to transposition is the vagueness of the directives. They lack clarity due to the compromises of the decision making procedure and their complex, technical, subject matter. Other reasons include Member States' legislative procedures or the differences between national authorities and the EU institutions in interpreting and understanding of EU law provisions.

Implementation/compliance promoting tools

'Compliance-promoting' tools are instruments aimed at enhancing timely and accurate implementation of EU legal instruments. There are a number of tools that should be used systematically due to their role and their level of effectiveness such as the correlation tables and conformity-checking studies, the package meetings or the Transposition and Implementation Plans (TIPs). On the other hand, certain tools should only be used on specific conditions taking into account proportionality considerations (some tools may be too cumbersome and imply disproportionate administrative costs). Scoreboards, ex-post evaluation exercises, reporting obligations and the use of Committees and networks should be used only if needed.

EU Pilot and infringement procedure

Most cases are solved before an infringement procedure is initiated under Article 258 TFEU. The EU Pilot is a pre-infringement tool which, according to the Commission Communication "A Europe of Results – Applying Community Law"⁹, aims at correcting problems related to Member State compliance with EU law at an early stage by finding out-of-court settlements through the establishment of a partnership relationship between the European Commission and Member States. It is also meant to reduce the number of infringement procedures, to provide more rapid answers to citizens and businesses and to tighten the handling and management of complaints¹⁰.

The assessment of the EU Pilot's effectiveness shows that the dichotomy in the understanding of its purpose and the ways to achieve it, affects its effectiveness. The need for a close dialogue between Commission and Member States is questioned as it is often translated in long timeframes for dealing with cases. As the rules for dealing with EU Pilot cases or for handling complaints are not legally binding, certain cases take longer than six months providing certain Member States with additional time for non-compliance. This reduces EU Pilot's effectiveness since Member States count on that additional flexibility for not complying with EU law. The adoption of legally binding rules governing the procedure including a clear definition of the role of complainants and all parties is requested.

There are no legal bases in the Treaty for any pre-infringement procedure and, therefore for the EU Pilot. The infringement procedure is the only tool recognised by the Treaties allowing the Commission to carry out its role of Guardian of the Treaties. Article 258 TFEU has developed into an infringement procedure composed of two main phases: the letter of formal notice, where the Commission requests Member State to submit its observations in relation to a presumed breach of EU law, and the reasoned opinion, where the Commission argues that the Member State has failed to comply with EU law and requests it to correct the situation. Prior to the letter of formal notice, a pre-infringement phase takes place through the EU Pilot tool, however, Member States already submit their observations

⁹ Communication from the Commission "A Europe of Results – Applying Community Law", COM (2007) 502 final.

¹⁰ Report from the Commission, EU Pilot Evaluation Report, COM (2010) 70 final, p. 2; Report from the Commission, Second Evaluation Report on EU Pilot, COM (2011) 930 final, p. 2.

during the first step of the infringement procedure, so the EU Pilot is yet another layer in the process.

The sources of EU Pilot cases maybe complaints, petitions by citizens to the European Parliament, questions from Members of the European Parliament, or Commission's own initiative. For example in 2012, 1405 new EU Pilot cases were opened out of which 784 were own initiative by the Commission and 621 complaints¹¹.

Decisions on the pre-infringement phase are taken by the services with no control through a mechanism allowing requests for decisions reviews, decisions during the infringement phase are taken collectively by the college of Commissioners¹².

Several issues are often raised in relation to these decisions and the way of handling complaints. For example, the latest Commission annual report on monitoring the application of EU law in relation to the year 2012 states an "initial assessment of more than 2.800 submissions in 2012, the Commission opened bilateral discussions with the Member State concerned in relation to 621 complaints in order to clarify whether EU rules had been breached. The other 2.238 complaints "have not been further processed because either EU laws were not breached or the Commission lacked competence or the correspondence did not qualify as complaint."¹³ The numbers are surprising.

The lack of complainants' involvement in the EU Pilot and of public access to the documents stored/exchanged within EU Pilot is seen as a main shortcoming of this tool. Access to the EU Pilot data base enabling complainants to participate would make this tool more effective, efficient and transparent. There are examples where the involvement of complainants in the EU Pilot process has increased the effectiveness in solving the problem of breach of EU law in the particular Member State.

The effectiveness of the infringement procedure, in its deterrent effect and capacity as an enforcement tool promoting compliance with EU law, is broadly recognised. However, the Commission maintains its objective to reduce the number of infringements. The latest Commission 2013 annual report on the monitoring of the application of EU law, states that the number of open infringement cases has continued to fall – from nearly 2.900 cases in 2009, to 2.100 cases in 2010 and to 1.775 cases in 2011.

The EP requested to the Commission years ago to make information on infringement cases available to the public. However, the database hosted in the Commission website¹⁴ does not work: the information is incomplete and outdated, it is time-consuming and complex to use due to the limited features of the research tools.

Recommendations

1. The timeliness of transposition of EU legislation could be improved by:

- The use of Regulations should be considered when a legal instrument will regulate issues whose effectiveness requires an immediate effect and therefore timely transposition is crucial.

¹¹ "30th Annual Report on Monitoring the Application of EU Law (2012)", p.10-11

¹² Case C-191/95, Commission v. Germany,[1998] 5449.

¹³ "30th Annual Report on Monitoring the Application of EU Law (2012)", p.10

¹⁴ http://ec.europa.eu/eu_law/infringements/infringements_decisions_en.htm, accessed on 14 March 2013.

- However, Member States should also be required to submit national legislation transposing or implementing Regulations to the Commission for control of compliance. The European Parliament (EP) should control the Commission's monitoring of enforcement of Regulations in the same way as it does with Directives.

2. Compliance promoting tools

- The EP should call for a systematic use of specific compliance promoting tools, namely the conformity checking studies, TIPs and package meetings. The EP should ask for the systematic publication of these documents and the agenda of package meetings and parallel package meetings with complainants and NGOs.
- Following the 2010 Framework Agreement on relations between the EP and the European Commission¹⁵, specifically its para. 44, the compulsory use of correlation tables should be promoted in order to ensure better monitoring of the transposition and application of EU law. The EP should guarantee that the Commission has sufficient resources to ensure they are prepared for all EU legal instruments when they are not provided by Member States.
- The EP should continue its efforts aimed at the adoption of an EU legislative act enabling EU inspections or investigations on EU environmental law as a tool to monitor its implementation and enable the Commission to gather data for taking decisions on EU Pilot or infringement procedures and to provide evidence in cases before the CJEU.

3. EU Pilot and Infringement procedure

- The Commission should ensure legality and legitimacy of the pre-infringement procedure. Legitimacy requires enabling transparency and participation of complainants and EP in the EU Pilot.
- The Commission should draft clear and legally binding rules which provide complainants with access to the arguments considered in the case, enabling them to contribute with information gathered.
- The EP should be systematically involved in the complaint-handling and EU Pilot by receiving through an EP nominated contact point a copy of the letters and complaints that will be the basis of EU Pilot or infringement procedures.
- The Commission should provide the public with a user-friendly database with comprehensive information on infringements.
- Legality can be ensured through the adoption of a legally binding act containing the rules governing the whole pre-infringement and infringement procedure. This act should define the purpose of the EU Pilot, the role of each of the parties and clear time limits defining the moment of the start of EU Pilot procedure, preventing informal discussions or communications between Member States and Commission officials prior to the start of the EU Pilot or before sending the Letter of Formal Notice.
- The Commission should improve the effectiveness of the EU Pilot by introducing an internal review of the services decisions during EU Pilot and by evaluating the success of the EU Pilot on the basis of the problems solved and undesirable impacts avoided, instead of the number of cases closed, currently used.

¹⁵ Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304.

- The EP should ensure the Commission has sufficient resources to enable proper monitoring of the implementation of EU law, efficient management of complaints, the EU Pilot and infringement procedure.
- The EP and the Commission should promote the development of awareness raising campaigns on the complaints system, EU Pilot and infringement procedures enhancing a broader use and facilitating public access to information on EU Pilot cases through the EP website.

1. THE EU IMPLEMENTATION AND ENFORCEMENT POLICY

1.1. Roles and Responsibilities

The problems of implementation and enforcement of EU law have been longstanding. The late or incorrect transposition of directives into national law is a barrier to implementation affecting all EU policies and all EU Member States. Implementation is often subject to human or financial resources, proper knowledge and understanding of the issues at stake and willingness by authorities or key players.

The EU cannot achieve its policy goals defined in the Treaties and secondary legislation if Member States do not apply EU law effectively on the ground. Furthermore, full compliance with EU legislation is essential not only for the sake of efficiency of the internal market but also to strengthen the credibility of the Union¹⁶.

Non-implementation means depriving citizens and businesses of potential benefits derived from the objectives of EU legislation. The adoption by the EU institutions of legislation is a clear recognition that action at EU level is necessary since the impacts, costs and benefits of all legislative proposals are now systematically assessed, including the cost of a failure to act. Non-action over breaches of EU law may have further costs, beyond the economic: e.g. harming citizens' health, putting lives or biodiversity at risk.

Implementation and enforcement is based on the distribution of powers conferred by the Treaties. Member States and European Commission have a shared responsibility in implementing and enforcing European law which is also recognized by CJEU jurisprudence¹⁷.

According to Article 4(3) (sub-paragraph 2) TEU, Member States must implement the Treaty obligations and those arising from secondary legislation. Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. Furthermore Article 4(3) (sub-paragraph 1) TEU requires Member States and the Union, in mutual respect, to assist each other in carrying out tasks which flow from the Treaties.

The role of the Commission, as guardian of the Treaties, is to ensure the correct application of those obligations (Article 17(1) TEU). Moreover, the same article states that the Commission 'shall oversee the application of Union law under the control of the Court of Justice of the European Union'. In the light of these legal bases, the Commission plays the

¹⁶ Commission "White Paper on European Governance", COM (2001) 428 final.

¹⁷ Case C-365/97 Commission v Italy [1999] ECR I-7773, paras. 58-60.

role of supporting and controlling Member State's implementation in two ways: monitoring implementation by Member States and enforcing EU law once a breach has been identified.

The Treaty stipulates no specific means to develop these obligations, other than the infringement proceedings specified in Article 258 TFEU. Over time however, the Commission has developed an EU policy on implementation and enforcement of EU law which is not only based on infringement procedures but includes tools to assist Member States with implementation such as guidelines, implementation plans, networks and committees or monitoring measures such as scoreboards and barometers, inspection, package meetings, fitness checks, legal reviews, and reporting or other tools to accurately assess transposition and implementation of EU legislation by Member States such as the correlation tables, conformity checking studies or the systems of privileged dialogue between the Commission and the Member States under "EU Pilot" established by 2007¹⁸.

In addition the Commission submits annually to the European Parliament and the Council a report on the monitoring of the implementation of EU law (see 1.2.). The statistics and data in those reports, while very useful to understand certain trends, do not give an accurate reflection of the real magnitude of EU law compliance deficit and do not reflect the full extent and cost of EU law breaches for businesses or the economy as a whole. They only represent the most serious breaches or the complaints of the most vocal individuals or entities. In fact, the Commission has neither the policy nor the resources to systematically identify and enforce all cases of non-implementation in EU Member States territory¹⁹.

1.2. The Commission annual report on monitoring the application of EU law: current trends

The Commission 2013 annual report on monitoring the application of EU law assessing the situation in 2012, notes that the number of new infringement procedures over the last years has decreased. While in 2009 the number of infringement procedures was 2.900, in 2010 the number went down to 2.100, to 1.775 in 2011 and finally to 1.343 in 2012²⁰. The most infringement-prone policy areas identified by the Commission in the 2013 Annual report are Environment with 20% of the cases, Transport (15%), Taxation (14%) and Internal Market (13%) which are very similar to the figures regarding the previous year where Environment (17%), Internal Market (15%), Transport (15%) and Taxation (12%) according to the 2012 Annual Report²¹.

On the transposition side, the Commission 2013 Annual Report reiterates²² that reducing late transposition is a priority for the Commission. While the Commission 2012 Annual report highlighted a steady increase in the number of late transposition cases over several years (2011 (1185), 2010 (855), 2009 (531)), the 2013 report announces a decrease in the legislative activity of the Union, with a subsequent decrease in the number of directives to be transposed and thus in the number of infringements for late transposition. The policy areas with more cases of late transposition launched in 2012 were Transport (115

¹⁸ Commission Communication "A Europe of results – Applying Community Law", COM (2007) 502 final. http://ec.europa.eu/eu_law/infringements/application_monitoring_en.htm

¹⁹ Study commissioned by Parliament, Policy Department C, 'Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness', Brussels, 2013, p. 11

²⁰ "30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p. 12

²¹ 29th Annual Report on monitoring the application of EU Law (2011), COM (2012) 714, p. 2 and 3

²² Already stated in the Commission Communication on 'A Europe of results – Applying Community Law', p 9.

procedures), Health and Consumers (108), Environment (63) and Internal Market & Services (53) similar to the areas identified in the annual report for 2011 and for 2010²³.

1.3. The role of the European Parliament in the Enforcement Policy

The European Parliament performs a crucial role in ensuring enforcement and implementation of EU law.

According to Article 14 TEU the European Parliament exercises functions of political control by discussing the Commission's actions in general (Article 233 TFEU) or through the power to table a motion of censure on the Commission activities (Article 234 TFEU). As co-legislator, the European Parliament is active in monitoring the implementation of the acts adopted through the legislative procedures and, therefore, follows closely the Commission's enforcement action to ensure implementation of the EU legislation by, for example, scrutinising the Commission's annual reports on monitoring implementation of EU law and developing relevant parliamentary resolutions²⁴.

It can also request the European Commission, pursuant to Article 225 TFEU, to submit an appropriate legislative proposal on matters which it considers that a Union act is required for the purpose of implementing the Treaties.

Petitions and questions, received by the European Parliament under Article 227 TFEU, often trigger Commission's action such as EU Pilot investigations or infringement procedures against a Member State which may eventually end up before the CJEU or proposals for legislation. As an example, the Commission 2013 annual report on monitoring the application of EU law²⁵ states that on the basis of the petitions from citizens to the European Parliament and questions from MEPs, the Commission initiated in 2012 in the field of environmental policy 22 investigations under the EU Pilot and 2 infringement procedures by sending letters of formal notice under Article 258 TFEU. It also received 7 petitions on regional policy and 4 on health and consumer policies, 3 questions on transport policy, 2 on agriculture policy and 2 on internal market policy.

1.4. The need for a strong enforcement policy at EU level

In acknowledging the existence of application problems, the Commission set up the objective of Better Regulation and pledged to 'attach high priority to the application of law, to identify why difficulties in implementation and enforcement may have arisen and to assess whether the present approach to handling issues of application and enforcement can be improved'²⁶. This priority is restated by President elect J.-C. Juncker who announced on 10 September 2014 for the period 2014-2019 that the First Vice-President ("right-hand of the President") will be in charge of Better Regulation with the intention to 'ensure that every Commission proposal respects the principles of subsidiarity and proportionality, which are at the heart of the Commission's work.'²⁷ Once adopted, the enforcement and implementation of EU legislation becomes the crucial next step.

²³, 28th Annual report on monitoring the application of EU law (2010), COM (2011) 588 Final.

²⁴ http://www.europarl.europa.eu/pdfs/news/expert/infopress/20120522IPR45549/20120522IPR45549_en.pdf,

²⁵ "30th Annual Report on Monitoring the Application of EU Law (2012)", p. 10 and 47, 55, 58, 59 and 60.

²⁶ Commission Communication "A Europe of results – Applying Community Law", COM (2007) 502 final.

²⁷ Commission Memo IP/14/984: http://europa.eu/rapid/press-release_MEMO-14-523_en.htm

The EU policy for implementation and enforcement of EU law is based on several documents²⁸, where the Commission highlights three aims: to resolve implementation and enforcement problems at an early stage; to strengthen implementation tools; and to reduce the recourse to infringement procedures. Improving implementation of EU law was also listed amongst the aims of the 2010 Commission Communication on Smart Regulation²⁹ strengthened with the adoption of the launch of its Regulatory Fitness and Performance Programme (known as REFIT)³⁰.

The implementation of EU law is specifically considered a priority objective in the recently adopted Seventh Environmental Action Programme regulating the Commission action in this policy from January 2014 to 2020³¹ and the 2012 Commission Communication aiming to improve implementation of environmental law³² with increased knowledge and responsiveness at the national level, setting better information systems and better explaining how EU law is implemented and complied with in practice.

The role of citizens in the monitoring and enforcement process is critical as a source of information for the Commission regarding breaches of EU law. 'Individual complaints by businesses and members of the public remain the main source for the detection of breaches of EU law'³³. 'While the Commission in its duty as "Guardian of the Treaties" conducts its own enquiries to detect infringements of EU law, citizens, business and stakeholder organisations make a significant contribution to monitoring by reporting shortcomings in the transposition and/or application of EU law by Member State authorities.'³⁴

Complaints may be sent to the Commission and be the source for the start of pre-infringement or infringement procedures. Complainants' involvement in the EU Pilot procedure or the infringement proceedings is currently limited to being the receptor of information from the Commission. This role is often discussed by NGOs within the framework of the transparency principle, the effectiveness of the system and the Commission's own principles of good governance (openness, participation, accountability, coherence and effectiveness) required for legitimacy of any administrative action, including enforcement measures³⁵.

Furthermore in June 2012 the Commission adopted the Communication updating the previous one from 2002³⁶ regarding the handling of complaints and in particular the

²⁸ Commission Communication "Better monitoring the application of Community Law", COM (2002) 725 final. This Communication derives from the discussion on the White Paper on European Governance COM (2001) 428 final, which focused on improving the quality and monitoring of legislation.

Commission Communication "A Europe of results – Applying Community Law", COM (2007) 502 final.

Commission Communication "Implementing European Environmental Community Law", COM (2008) 773/4 final.

²⁹ Commission Communication "Smart Regulation in the European Union", COM (2010) 543 final.

³⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU regulatory fitness, COM(2012) 746 final (12 December 2012)

³¹ Decision 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet" at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013D1386&from=EN>

³² Communication from the Commission "Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness" COM (2012) 95 final.

³³ European Parliament Report on the 28th annual report on monitoring the application of EU law (2010) (A7-0330/2012), p. 8, pt. 30. This is not a surprise as the Commission Communication "Relations with the complainant in respect of infringements of Community Law", COM (2002) 141 final, pt. 5 that it 'has regularly acknowledged the vital role played by the complainant in detecting infringements of Community law'.

³⁴ "30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, p.9

³⁵ European Parliament, Legitimacy and EU administrative law: Future prospects. Note. Author: Dr Melanie Smith, 2011, p 5.

³⁶ Commission Communication "Relations with the complainant in respect of infringements of Community Law",

relations with the complainant in respect of the application of Union Law³⁷. While acknowledging the crucial role of the complainants in supporting the Commission detect infringements of EU law, this Communication sets out non-legally binding rules guiding the adoption of the 'administrative measures when handling complaints and assessing the infringement for the benefit of the complainant'³⁸. For example it establishes under rule 7 that if following the examination of a complaint, subsequently infringement proceedings are launched on the basis of a complaint, the Commission will contact complainants and inform them in writing, of each procedural step (formal notice, reasoned opinion, referral to the Court or closure of the case). Rule 8 requires the Commission to investigate complaints with a view to arrive at a decision to issue a formal notice or to close the case within not more than one year from the date of registration of the complaint. Where this time limit is exceeded, the Commission will inform the complainant in writing, however it would only be upon the complainant's request.

To improve monitoring and reduce the recourse to infringement procedures, the Commission has developed tools such as the EU Pilot³⁹ or the modification of Article 260(3) TFEU which establishes an entirely unprecedented instrument enabling the CJEU to impose financial penalties directly⁴⁰ without the need for a prior court ruling against a Member State for failing to notify the transposing measures. When lodging the case to the CJEU, the Commission may propose the amount of the lump sum or penalty payments which cannot be exceeded when defined in the CJEU judgement together with the due date for payment.

In addition, a range of measures have been put in place to assist Member States with implementation and the Commission to enforce EU law. Those additional measures include correlation tables, conformity checking, scoreboards guidelines, implementation plans, networks and committees, inspection, package meetings, fitness checks or reporting.

1.4.1. The EU Pilot system

The EU Pilot system is the administrative phase prior to the infringement procedure. It is accompanied by an IT platform which enables an exchange of information and documents. At the moment, only the Commission and the relevant Member State have access to that platform and the information exchange between them. It aims to correct problems at an early stage, reducing infringement procedures; to provide more rapid answers to citizens; and to tighten up the management of existing procedures. The system replaces the cumbersome 'pre-258 letter procedure' passing through the Permanent Representations of Member States. Started in April 2008 in a few Member States, it now operates in all of them.

Under this system, a Member State has ten weeks to answer a request for information concerning a potential breach of EU law or to adopt the necessary measures to comply with it. Within ten weeks the European Commission decides whether to close the case or to open an infringement procedure. However, as there are no mandatory rules regulating this procedure, informal discussions between the Commission and Member States may still

COM (2002) 141 final, pt. 5 states that it 'has regularly acknowledged the vital role played by the complainant in detecting infringements of Community law'.

³⁷ COM (2012) 154 final, Communication from the Commission "Updating the handling of relations with the complainant in respect of the application of Union law" adopted on 2.4.2012.

³⁸ COM (2012) 154 final, adopted on 2.4.2012, p.2

³⁹ Commission Communication "A Europe of results – Applying Community Law", COM (2007) 502 final.

⁴⁰ Detailed guidelines about the application of Art. 260(3) TFEU are contained in Commission Communication "Implementation of Article 260(3) of the Treaty", SEC(2010) 1371.

happen before sending a letter of formal notice or even before the start of the EU Pilot itself. More information on the EU Pilot system is found in section 4 of this note.

1.4.2. The infringement procedure

The formal infringement procedure is one of the cornerstones of the mechanism which enables the Union to guarantee that the common rules set by EU law are respected by the Member States. In this respect, it indeed reflects the specificity of the Union's legal system⁴¹ enabling the Union to ensure that obligations of States are fulfilled⁴². This procedure leads to the judicial review of Member State infringements in order to obtain the effective termination of them. The legal basis for any infringement procedure brought by the Commission against a Member State lies in Article 258 of the TFEU and is structured according to the following steps:

- If the Commission considers that a Member State has failed to fulfil an obligation under the Treaty, it may send a letter of formal notice for Member State's observations;
- When the Commission is not satisfied with the response, it will deliver a reasoned opinion stating the breaches of EU law and asking the Member State to act upon it;
- Should the Member State concerned not comply with EU law within the period laid down in the reasoned opinion, the Commission may decide to bring the matter before the CJEU seeking to declare the infringement and impose, if required, financial sanctions.

The litigation procedure is based on Article 260 of the TFEU under which, if the CJEU finds that a Member State has failed to fulfil an obligation under the Treaties, it will request from that Member State to take the necessary measures to comply with the judgment of the Court.

⁴¹ Case C-304/02, *Commission of the European Communities v French Republic*, [2005] ECR I-06263.

⁴² Case C-20/59, *Government of the Italian Republic v High Authority of the European Coal and Steel Community*, [1960] ECR 325.

2. TRANSPOSITION OF EU LAW

2.1. Trends

Transposition into national legislation of EU directives is mandatory. According to Article 288 TFEU, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. According to Article 291 of the TFEU, Member States shall adopt all measures of national law necessary to implement legally binding Union acts. Framework Decisions in the area of judicial cooperation in criminal justice matters have been fully assimilated to directives from the entry into force of the Lisbon Treaty and their legal effects are maintained until they are amended or repealed in implementation of the Treaties⁴³.

The deadline for transposition set in the directives usually ranges between one and five years from the date of its adoption or publication. Once a State joins the Union, it must prove that it has the ability to implement effectively the obligations under the EU acquis. During the negotiation process preceding accession, conditions and timing of the adoption, implementation and enforcement of EU legislative acts are agreed and listed specifically in protocols annexed to the Accession Treaty.

The analysis carried for the EP in 2013⁴⁴ shows that there is a general continuous trend of late transposition in Member States which is confirmed by the Commission 2013 Annual report on the monitoring of the application of EU law⁴⁵ by stating that in 2012 'Late transposition infringements were launched against more than two thirds of the Member States for some directives'. It also reports that the Commission launched procedures against 24 Member States concerning late transposition of Directive 2010/31/EU on the energy performance of buildings.

The 2013 annual report has identified the four policy areas where the most late transposition infringements were launched in 2012 being: transport (115 procedures), health & consumers (108), environment (63) and internal market & services (53).

Monitoring timely transposition is a Commission priority and is considered essential to ensure the effectiveness of European policies⁴⁶. Late transposition infringements have steadily increased for the past three years. However, the Commission has noted that once infringement procedures are opened, national measures are usually communicated swiftly⁴⁷. The fear of fines improves compliance. Officials from Commission and Member States acknowledged during the interviews for the 2013 study for the EP on implementation of EU law⁴⁸ that the potential fines imposed under Article 260(3) TFEU at the start of the procedure have acted as an incentive for Member States to establish systems enabling to transpose directives within the deadlines laid down by the legislator. Indeed the Commission is applying systematically this fast-track provision and only in 2012 the

⁴³ Article 9 of the Protocol to the Lisbon Treaty on Transitional Provisions

⁴⁴ Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

⁴⁵ "30th Annual Report on Monitoring the Application of EU Law (2012)", p. 8

⁴⁶ 29th Annual Report on monitoring the application of EU Law (2011), COM (2012) 714, p.7. 30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p. 7

⁴⁷ Annual Report on monitoring the application of EU Law (2011), COM (2012) 714, p.14.

⁴⁸ Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

Commission referred a number of late transposition infringements to the Court with a request for financial sanctions under Article 260(3) TFEU. Twelve Member States were involved in 35 such decisions in 2012: Poland (10 cases), Slovenia (5), the Netherlands, Finland (4 each), Belgium, Cyprus (3 each), Germany, Bulgaria, Slovakia, Luxembourg, Portugal and Hungary (one each). The proposed daily penalty ranged from € 6,000 to € 315,030. Lump sum payments were not requested.⁴⁹

A major block to transposition is the vagueness of the directives. About 80% of officials interviewed under the above-mentioned study⁵⁰, both at EU and Member State level, considered that the provisions of EU law are not clear. They lack clarity due to the compromises of the decision making procedure and their complex, technical, subject matter. Member States' officials justified delayed transposition by referring to the legislative procedure to be followed (i.e. the extent of changes required and the speed of national legislative process). Another key reason for delay seems to be the differences in the interpretation and understanding of EU law provisions between national authorities and the EU institutions. It can therefore be concluded that, while the Member States' administrative structure or legislative procedures should be taken into consideration when setting up transposition deadlines, during the negotiation phase, the EU must improve the clarity of directives and the Commission should develop TIPs to guide Member States.

In the Communication⁵¹ published at the end of 2012, the Commission strengthening its Smart Regulation tools and governance with the launch of its Regulatory Fitness and Performance Programme (known as REFIT) which includes enhanced assistance to Member States in transposing EU directives (including implementation plans).

Generally it is acknowledged that longer transposition deadlines would not contribute to a more accurate transposition of EU legal instruments. Member States' competent authorities have enough time to transpose timely and accurately EU legal instruments. Additionally, they argue Member States have an opportunity to agree on longer transposition deadlines during the negotiation phase.

2.2. European Parliament potential action

Link between the European Parliament and national parliaments

The EP should contribute to the timely and accurate transposition of EU legislation by sharing the expertise gained in the legislative decision making process through pre-established links with national Parliaments.

The use of regulations for immediate effect

In policy areas issues where timely transposition is crucial because the effectiveness of the legal instrument requires an immediate effect (e.g. Internal Market or environment) the adoption of Regulations should be considered. In those cases, the implementation of the

⁴⁹ "30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p. 5

⁵⁰ Ballesteros, M., Mehdi, R., Elia Antonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

⁵¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU regulatory fitness, COM(2012) 746 final (12 December 2012)

Regulations should be enforced at EU level by the Commission, including the conformity of national laws.

Improved enforcement of Regulations

By the end of 2012, the acquis of the EU consisted of 9.576 regulations (2011: approx. 8.900) and 1.989 directives (2011: approx. 1.900) in addition to the primary law (the Treaties)⁵². While regulations are directly applicable in all Member States⁵³ the monitoring of the legislation ensuring proper implementation would improve their enforcement. Member States should also submit it to the Commission for control of compliance.

The EP should ensure that the Commission carries out its role of "guardian of the Treaties" for regulations as well as for directives, by requesting information on this issue in the Commission report on the monitoring of the application of EU law.

Member States' preparation for the adoption of EU legal instruments

Prior to the adoption of new EU legal instruments and during the legislative decision making procedure, Member States should take preparatory steps and ensure internal coordination to determine appropriate transposition deadlines, taking into account their administrative structures and the legislative procedures the proposal might entail. The improved preparation at national level would enable a transposition of the relevant EU obligations without undue delays. This would require specifically that:

- Member States should set up structural coordination and communication channels between the staff in charge of negotiation and those responsible for transposition and implementation of the new EU legislative act. This would require an active role of the negotiator, as the final wording of the legislative text is only made available once the procedure is finalised;
- In cases where the dialogue or conciliation procedures are applied, transparency should improve if the negotiated modifications were made immediately available.

Requesting the systematic development of TIPs identifying risks

After the publication of the EU legal instrument, the Commission should adopt Transposition and Implementation Plans (TIPs) highlighting the provisions where it could be potential risks in transposition or implementation and providing guidance on the understanding of the Directive.

Further, the Commission should hold meetings with Member States to discuss transposition and implementation risks and potential problems. The European Parliament should be invited to participate in those meetings.

Member States should consider the use of systems similar to the Commission Transposition and Implementation Plans (TIP) or impact assessments, once the measure is adopted. These are foresight procedures, helping define what legal instruments may need to be reviewed or created.

⁵² "30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p. 2

⁵³ Article 288 TFEU

3. IMPLEMENTATION/COMPLIANCE PROMOTING TOOLS

'Compliance-promoting' tools are instruments aimed at enhancing timely and accurate implementation of EU legal instruments. The first and, originally, the sole compliance-promoting and enforcement tool envisaged by the Treaty was the infringement proceedings mechanism, currently contained in Article 258 TFEU. Other tools have been developed under different legal bases, such as provisions in secondary EU legal instruments (e.g. referring to committees, correlation tables, etc.), or the general Article 17 TEU (e.g., used as legal basis to introduce conformity-checking studies).

Compliance-promoting tools can be classified according to the phase of the policy cycle in which they are used. Monitoring measures to assess compliance of national measures with EU law are conformity checking studies, scoreboards and barometers, inspection, package meetings, fitness checks, legal reviews, and reporting. Measures to assist Member States with implementation include: guidelines, implementation plans, networks and committees.

An additional compliance promoting tool that could be further strengthened is the Press releases linked to other compliance-promoting tools to increase awareness and political pressure. The use of Scoreboards, for example, should, wherever possible, be combined with press releases to facilitate the political pressure and comparison between Member States. Press releases should not just concern the opening of infringement proceedings, but also other issues of non-compliance such as package meetings and meetings with civil society, if the confidentiality principle is respected.

An interesting remark from the study for the EP on implementation of EU law published in 2013⁵⁴ regarding the compliance-promoting tools was that the best results in promoting compliance can be achieved through a more strategic use of the different compliance-promoting tools and a tailor-made combination for specific legal instruments. The use of compliance-promoting tools should therefore be defined on the basis of a strategic approach taking the characteristics of each EU instrument into account, on a case by case basis according to criteria based on the social and political relevance, economic impact or technical difficulty of each EU instrument. There are a number of tools that should be used systematically due to their role and their level of effectiveness. On the other hand, certain tools should only be used on specific conditions taking into account proportionality considerations (some tools may be too cumbersome and imply disproportionate administrative costs). Scoreboards, ex-post evaluation exercises, reporting obligations and the use of Committees and networks should be used if needed.

The European Commission should annually report on the strategic use and the management of all the compliance promoting tools to the European Parliament.

⁵⁴ Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

3.1. Monitoring measures

3.1.1. Tools to be used more systematically

Conformity checking studies and correlation tables

Conformity checking exercises are tools specific for monitoring the correct transposition of EU law and therefore should be carried out systematically. They assess the effectiveness of transposition and, as a rule, should be disclosed to the public.

Correlation tables present in a systematic manner how each provision of a Directive is transposed into national law. The existence of correlation tables is linked to the prerequisite that Member States communicate the transposing measures of each Directive to the Commission on the basis of the principle of sincere cooperation under Article 4, TEU.

There is currently no legal obligation for Member States to submit correlation tables. Their development has been a longstanding request by the Commission and the European Parliament. In 2003, the Inter-institutional agreement on better law-making⁵⁵, referred officially for the first time to correlation tables. It requested (point 34 of the Agreement) the Council to encourage Member States to draw up by themselves and in the interest of the Union, their own tables illustrating, as far as possible, the correlation between EU directives and the transposition measures. Member States were encouraged to make these tables public. On this basis, the Commission started to introduce in the text of some of the Directives the requirement of the correlation tables. However, the Council would systematically move this requirement on the recitals of the Directives, in order to prevent them from being compulsory and subject to judicial scrutiny.

Given the systematic refusal by Member States to make the submission of correlation tables a mandatory obligation as requested by the Commission and the EP, these two institutions agreed in the 2010 Framework Agreement on relations between the EP and the European Commission⁵⁶ to endeavour to include compulsory correlation tables (para. 44 of the Agreement) in order to ensure better monitoring of the transposition and application of Union law. The Agreement enables the Commission to request them by introducing it in the legislative proposals rather than waiting for the Council to "encourage" Member States.

Correlation tables are generally not publicly available. However, nothing would prevent the Commission from doing it systematically under Article 12 of Access to documents Regulation 1049/2001.

Package meetings

Package meetings between the Commission and individual Member States are a tool to identify ways to solve compliance problems subject to infringement procedures, and to obtain information about specific potential breaches. These meetings are an initiative of the Commission to improve the management of complaints (prior to infringement phase or during the infringement phase) by promoting a more direct dialogue with the representatives of the Member States at national, regional or local level and understand the barriers to compliance. They are organised on ad hoc basis and will cover pre-infringement

⁵⁵ EP, Council, Commission, "Interinstitutional agreement on better law-making", OJ C 321.

⁵⁶ Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304.

or infringement cases at any stage (before or after Letter of Formal Notice or Reasoned opinion) on a specific policy concerning the specific Member State.

Package meetings between the Commission and the Member States should be encouraged and made more systematic. To increase transparency, the agenda of the meetings (of parts thereof) should be made public. Furthermore, the European Parliament should be invited to the meetings or, at least, notified of their occurrence. Meetings between the Commission and the relevant complainants or NGOs should be held before and after package meetings, to share relevant information on existing cases.

3.2. Measures to assist with implementation

3.2.1. Tools to be used more systematically

Implementation guidelines discussed with stakeholders and EP

Commission Guidelines are non-legally binding documents usually adopted as Commission Communications. The importance of the guidelines was also recognised in the TFEU as the Treaty itself calls for adoption of various guidelines on different occasions⁵⁷ (e.g. Article 5 TFEU). They are also developed when secondary law provisions request them. In general, they aim at ensuring a harmonised approach and at clarifying the Commission position on the interpretation and implementation requirements of specific directives' provisions which could guide the enforcement measures that the Commission might take.

The use of guidelines in technically complex areas should be encouraged. The Commission guidelines provide for the interpretation of a directive's provisions and ensure a harmonised implementation. Currently, the Guidelines are discussed only with Member States. They should also be discussed with stakeholders and the EP.

Commission Transposition and Implementation Plans (TIPs)

Transposition and Implementation Plans (TIPs) are also prepared by the Commission to assist Member States in the transposition and implementation of Directives. According to the Commission, TIPs identify all main risks for the timely and correct implementation of a new Directive and the appropriate actions to counter those risks. TIPs help Commission and Member States to anticipate challenges in the context of a specific piece of legislation. A strict definition of TIPs is not provided and they may include variations of different tools such as checklists, guidelines, and scoreboards.

Developing TIPs on the side of the Commission is part of the Commission's 'Smart Regulation' approach. Since 2008, risk-based Transposition Implementation Plans⁵⁸ are systematically prepared for all new important environmental directives, for example the Industrial Emissions Directive⁵⁹. Furthermore, the Commission now requires TIPs to be developed in every Directive on health and consumer protection.

⁵⁷ According to Article 5 TFEU, the Union is required to define guidelines for coordination of economic and employment policies.

⁵⁸ Transposition Implementation Plan is an inventory and planning of proactive measures tool to be taken during the transposition period in order to ensure timely and complete transposition and proper application of a directive with a particular focus on provisions likely to pose difficulties.

⁵⁹ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) OJ L 33.

The European Commission should systematically produce TIPs for newly adopted EU legislation, highlighting the possible risks to timely and accurate transposition and potential barriers to application, in order to give an early warning to Member States. TIPs should be made public through the Commission website and be officially sent to national parliaments.

3.3. European Parliament potential action

Request for a compulsory nature of correlation tables

Correlation tables are effective tools to ensure transposition of EU law as recognised by the 2010 Framework Agreement on relations between the EP and the European Commission⁶⁰ to endeavour to include compulsory correlation tables (para. 44 of the Agreement) in order to ensure better monitoring of the transposition and application of Union law. Where Member States communicate the transposing legislation without correlation tables, the Commission should draft them within a certain period of time and make them public in the Commission web site for correction by stakeholders or Member States. Correlation tables submitted by Member States to the Commission should also be made public. The European Parliament should ensure that the Commission has sufficient resources to ensure that correlation tables are carried out for all EU legal instruments and that they are made public.

Improved national inspections and EU level inspections of Environmental infringement cases

National inspections are required by law in relation to the compliance with standards or limit values in permits or licenses derived from law. They should be promoted given their deterrent effect. Currently, the only instrument at EU level providing for common rules on environmental inspections at national level and strengthening implementation of environmental legislation is the Recommendation providing Minimum Criteria for Environmental Inspections (RMCEI)⁶¹. However, according to Article 288 of the TFEU Recommendations do not have a binding force. Disparities in the application of the RMCEI have been spotted at national level, given Member States' different concepts of inspections, or interpretations of the criteria established in the RMCEI. According to the EP 2008 Resolution⁶², the problems of implementation of the RMCEI makes it impossible to have a high level of (environmental) protection throughout the EU and creates an uneven level playing field, which may lead to distortions in competition. The European Parliament could revisit this issue and request the harmonisation required for effective implementation.

In relation to the EU level inspection, the Commission is currently entitled to examine compliance on the ground through inspections in a few areas. The 28th Annual Commission report on application of EU law refers to these areas, for example, the collection of the Union's own resources from VAT, which is the responsibility of the budget services assisted by experts from the taxation field. It also refers to food safety, animal health and welfare requirements which can be checked on the spot by the Food and Veterinary Office (FVO) of the Commission.

⁶⁰ Framework Agreement on relations between the European Parliament and the European Commission, OJ L 304.

⁶¹ Recommendation of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States [2001] OJ L 118.

⁶² EP Resolution on the Review of Recommendation 2001/331/EC providing for Minimum Criteria for Environmental Inspections in the Member States, TA (2008) 0568, 20 November 2008.

Furthermore, the 30th Annual Report on monitoring the application of EU law refers to inspections under the maritime sector⁶³. Specialised EU agencies in cooperation with the Commission maritime and air transport services inspect safety and security in the maritime and aviation sector. Nuclear installations are also subject to periodic inspections by the Commission service⁶⁴.

The need for further monitoring/inspections/investigation powers at EU level (i.e. by the Commission)⁶⁵ in the environmental policy is often under discussion. According information made available to the public in 2013⁶⁶, the Commission plans to propose a new horizontal binding instrument on environmental inspections, after the full impact assessment has been carried out, later this year. Discussions refer to the need for a legislative act to provide for the Commission investigation powers on the implementation of EU environmental law and related infringement procedures. The role of the European Environmental Agency (EEA) to support the Commission in carrying out these inspections was discussed during the adoption of the Regulation establishing the EEA.

The EU level inspections should be a tool to monitor implementation of EU law and to complement the EU Pilot and infringement procedures, ensuring the Commission obtains the necessary data to decide on open cases and to provide evidence in cases before the CJEU.

The EP should continue to work towards the adoption of an EU legislative act enabling EU inspections on environmental legislation and revisit its 1990 call for the EEA to support the Commission in carrying out this inspection role⁶⁷.

4. EU PILOT AND INFRIINGEMENT PROCEDURE

CHAP and the EU Pilot are pre-infringement tools designed for enhancing the existing enforcement system of transposition and application of EU rules. CHAP is understood as an internal Commission data base with no external impact and is, therefore, not subject to the assessment.

Most cases are solved before an infringement procedure is initiated under Article 258 TFEU. The EU Pilot is a pre-infringement tool which, according to the Commission Communication "A Europe of Results – Applying Community Law"⁶⁸, aims at correcting problems related to Member State compliance with EU law at an early stage by finding out-of-court settlements through the establishment of a partnership relationship between the European Commission and Member States. It is also meant to reduce the number of infringement procedures, to provide more rapid answers to citizens and businesses and to tighten the handling and management of complaints. This objective has been confirmed in the subsequent annual reports produced by the Commission assessing the EU Pilot, where it is considered as a tool providing quicker and better answers to questions and solutions to problems for citizens and businesses⁶⁹.

⁶³ "30th Annual Report on Monitoring the Application of EU Law (2012)", p. 58

⁶⁴ 28th Annual Report on Monitoring the Application of EU Law (2010), p. 9.

⁶⁵ Communication from the Commission "Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness" COM (2012) 95 final, 7.3.2012.

⁶⁶ http://ec.europa.eu/environment/resource_efficiency/haveyoursay/current_consultations/framework_en.htm, accessed on 12 March 2013.

⁶⁷ Art. 20 of the Regulation 1210/90 on the establishment of the EEA

⁶⁸ Communication from the Commission "A Europe of Results – Applying Community Law", COM (2007) 502 final.

⁶⁹ Report from the Commission, EU Pilot Evaluation Report, COM (2010) 70 final, p. 2; Report from the

In some instances it has been defined as a 'tool for dialogue and problem-solving with the Member States'⁷⁰. Therefore it constitutes a prior phase to a possible infringement procedure, allowing a systematic, flexible and informal cooperation between the Commission and Member States through bilateral discussions whenever shortcomings in the transposition and/or application of EU law by Member State authorities are detected.

It replaces the cumbersome 'pre-258 letter procedure' through the Permanent Representations of Member States with a more structured and clear system. However, the assessment of this tool shows flaws in terms of the effectiveness to achieve its objectives, its transparency and its efficiency. Furthermore, its legitimacy and legal basis are questioned.

There are no legal bases in the Treaty for any pre-infringement procedure and, therefore for the EU Pilot. However, the Commission is, indeed, granted with the competence to follow an (infringement) procedure prior to taking the Member State to the Court. Under Article 258, if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, within the respect of its discretionary power it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. The opportunity to submit observations is already granted by the first step of the infringement procedure, the Letter of Formal Notice asking for Member States views prior to the reasoned opinion mentioned in Article 258 TFEU. If the State concerned does not comply with the EU law within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

The sources of EU Pilot cases maybe complaints, petitions by citizens to the European Parliament, questions from Members of the European Parliament, or Commission's own initiative. For example in 2012, 1405 new EU Pilot cases were opened out of which 784 were own initiative by the Commission and 621 complaints⁷¹.

Under the EU Pilot system, any natural or legal person⁷² may lodge a complaint with the Commission against a Member State for any measure or practice that might not be compatible with a provision or principle of EU law⁷³. As long as the complaint is submitted in writing (by letter, fax, e-mail) in one of the official languages of the Union and satisfies the requirements set out in point 3 of the Communication on "Updating the handling of relations with the complainant in respect of the application of Union law"⁷⁴, there are no further requirements which must be satisfied⁷⁵. There is no need for the complainant to prove having a formal interest in bringing proceedings or being individually and directly concerned by the alleged breach of EU law⁷⁶, as it is required for legal standing before the Court according to Article 263 TFEU.

By granting anyone the right to send a complaint or enquiry to the Commission through the webmail of the 'Europa' website or by e-mail or regular post, the EU implements the

Commission, Second Evaluation Report on EU Pilot, COM (2011) 930 final, p. 2.

⁷⁰ 28th Annual Report on Monitoring the Application of EU Law (2010), COM(2011) 588 final, p. 2.

⁷¹ "30th Annual Report on Monitoring the Application of EU Law (2012)", p.10-11

⁷² Commission Communication "Updating the handling of relations with the complainant in respect of the application of Union law", COM (2012) 154 final, p. 4, pt. 1.

⁷³ "Updating the handling of relations with the complainant in respect of the application of Union law", p. 4, pt. 2; http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm.

⁷⁴ "Updating the handling of relations with the complainant in respect of the application of Union law", p. 4-5.

⁷⁵ Even though the Commission recommends complainants to use the standard complaint form as published in the Official Journal of the European Union and available at the following address: http://ec.europa.eu/eu_law/your_rights/your_rights_forms_en.htm.

⁷⁶ "Updating the handling of relations with the complainant in respect of the application of Union law", p. 4, pt. 2

requirements of participatory democracy stated in the Treaty of Lisbon, according to which '[e]very citizen shall have the right to participate in the democratic life of the Union'⁷⁷. Putting these requirements into practice is even more relevant in light of the fact that, as the European Parliament noted, '[i]ndividual complaints by businesses and members of the public remain the main source for the detection of breaches of European Union law'⁷⁸.

However, several issues are often raised in relation to the handling of the complaints from the involvement of complainants in the EU Pilot process to the decision making process on the follow up given to each of them. For example, the latest Commission annual report on monitoring the application of EU law in relation to the year 2012 states that 3141 new complaints were registered but 2.859 processed⁷⁹. It is not clear what happened with the difference. Furthermore, following an "initial assessment of more than 2.800 submissions in 2012, the Commission opened bilateral discussions with the Member State concerned in relation to 621 complaints in order to clarify whether EU rules had been breached. The other 2.238 complaints "have not been further processed because either EU laws were not breached or the Commission lacked competence or the correspondence did not qualify as complaint."⁸⁰ The numbers are surprising.

The infringement procedure is the only tool recognised by the Treaties allowing the Commission to carry out its role of Guardian of the Treaties. The legal basis for any infringement procedure brought by the Commission against a Member State lies in Article 258 TFEU. This provision recognises the Commission's power to deliver a reasoned opinion if it considers that a Member State has failed to fulfil an obligation under the Treaties, and after giving the State concerned the opportunity to submit its observations. This article has translated into the two main phases of the infringement procedure: the letter of formal notice, where the Commission requests the Member State to submit its observations in relation to certain facts and legal arguments regarding a presumed breach of EU law, and the reasoned opinion, where the Commission argues that the Member State has failed to comply with EU law and requests it to correct the situation. Prior to the letter of formal notice, a pre-infringement phase takes place through the EU Pilot tool, where a dialogue and solution is sought.

Decisions during the infringement phase are taken collectively by the college of Commissioners⁸¹, while decisions on the pre-infringement phase are taken by the services with no control through a mechanism allowing requests for decisions reviews.

The effectiveness of the infringement procedure, in its deterrent effect and capacity as an enforcement tool promoting compliance with EU law, is broadly recognised. However, the Commission maintains its objective to reduce the number of infringements. The latest Commission 2013 annual report on the monitoring of the application of EU law, states that the number of open infringement cases has continued to fall – from nearly 2.900 cases in 2009, to 2.100 cases in 2010 and to 1.775 cases in 2011⁸².

⁷⁷ Article 10 (3) TEU.

⁷⁸ European Parliament Report on the 28th annual report on monitoring the application of EU law (2010) (A7-0330/2012), p. 8, pt. 30. The Commission Communication "Relations with the complainant in respect of infringements of Community Law", COM (2002) 141 final, pt. 5 stated that it 'has regularly acknowledged the vital role played by the complainant in detecting infringements of Community law'.

⁷⁹ "30th Annual Report on Monitoring the Application of EU Law (2012)", p.10

⁸⁰ "30th Annual Report on Monitoring the Application of EU Law (2012)", p.10

⁸¹ Case C-191/95, Commission v. Germany, [1998] 5449.

⁸² "30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p.12

Key problems of the infringement procedure identified include too long periods for taking decisions on the different steps, lack of legally binding rules governing the procedure (roles and timeframes) and the general lack of information on the status of the cases, arguments and reasons behind decisions.

4.1. Effectiveness, Transparency and Efficiency

Effectiveness

The assessment of the EU Pilot's effectiveness shows a dichotomy in the understanding of its purpose and the ways to achieve it. The views of the EU and Member State officials and those of the stakeholders interviewed differ.

In general, the EU Pilot is considered by EU and Member States officials an efficient instrument for the purpose of strengthening the relations between the EU and the Member States and reducing the number of infringement procedures. Its effectiveness is seen as being part of a partnership approach, built on the pillars of mutual trust and confidentiality in the discussions between the Commission and national authorities. The first two reports of EU Pilot measure its success on the number of cases closed and the consequent decrease of the infringement cases⁸³. Commission officials stressed that, while the number of complaints has remained stable since the introduction of the Pilot, the number of infringements has decreased.

Furthermore the 29th Report on monitoring the application of EU law published in 2012, stated that 'EU Pilot dialogue facilitates speedy resolutions of problems'⁸⁴ and that 'Commission works in partnership with the Member States to try to solve in an efficient and satisfactory manner, problems and complaints from citizens, business, NGOs and other stakeholders, concerning the application of EU law before starting formal infringement procedures'⁸⁵. However, the latest Commission Report on monitoring the application of EU law published in 2013 reconfirm that the EU Pilot is a Commission initiative aimed at responding to questions and identifying solutions to problems related to the application of EU law⁸⁶. The key objective is solving problems of application of EU law.

Stakeholders interviewed within the framework of the study for the European Parliament published in 2013⁸⁷ expressed their expectations that this tool provide solutions to the problems caused by breaches of EU law. The EU Pilot is not considered an effective tool in this regard. The need for a close dialogue between Commission and Member States is questioned and the adoption of clear legally binding rules governing the procedure including a clear definition of the role of all parties including the complainant is requested. Moreover, this close relationship is often translated in long timeframes for dealing with cases. As the rules for dealing with EU Pilot cases or for handling complaints are not legally binding, certain cases take longer than six months providing certain Member States with additional time for non-compliance. This reduces EU Pilot's effectiveness since Member States count on that additional flexibility for not complying with EU law.

⁸³ Report from the Commission "EU Pilot Evaluation Report", COM(2010) 70 final, 3.3.2010, p. 6 p.; Report from the Commission "Second Evaluation Report on EU Pilot", COM(2011) 930 final, 21.12.2011, p. 7.

⁸⁴ "29th Annual Report on Monitoring the Application of EU Law (2011)", COM(2012) 714 final, p. 10.

⁸⁵ "29th Annual Report on Monitoring the Application of EU Law (2011)", COM(2012) 714 final, p. 2.

⁸⁶ "30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, p.10

⁸⁷ Ballesteros, M., Mehdi, R., Elia Antonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

In addition access to the EU Pilot data base enabling complainants to participate would make this tool more effective, efficient and transparent. There are examples where the involvement of complainants in the EU Pilot process has increased the effectiveness in solving the problem of breach of EU law in the particular Member State.

Examples

Swedish law offers complainants a privileged participation in the dialogue between the Commission and Member State authorities and thus a better integration of their points of view. Stakeholders follow up the correspondence between the Commission and the government in ongoing cases and draft its own response.

In Italy and in Hungary, national databases have been created⁸⁸ and are partly accessible by the public.

In the UK, the Clean Air London (CAL) organisation, which submitted a complaint to the Commission in January 2012 received the response directly from DEFRA with a copy to the Commission. The possibility for the stakeholder to interact with the Commission and the Member State during the process was perceived as extremely satisfactory and strengthening the effectiveness of the tool.

In addition, the number of cases closed as a measure of success, is criticized. However it seems the Commission is starting to tackle this concern and the latest annual report⁸⁹ highlights that 1175 files were closed during 2012 due to satisfactory response by the Member States which is a 68.34 % resolution rate representing a 4.16% decrease from the 2011 rate of 72.5 %. In addition, 334 EU Pilot cases were closed by launching infringement proceedings.

The deterrent effect of the **infringement procedure** is beyond any doubt. However, improvement of its effectiveness could be reached by increased involvement of complainants in the procedure defined through clear and legally binding rules providing access to information on the arguments under discussion by the Commission and the Member States and motivation of decisions.

Transparency and access to information

The lack of complainants' involvement in the EU Pilot and of public access to the documents stored/exchanged within EU Pilot is seen as a main shortcoming of this tool. The lack of transparency of the EU Pilot was raised by Member State officials regarding the Commission's reasons when considering Member State's answers as satisfactory or not. There is an apparent contradiction between the sophisticated character of the tool and the opacity of its information⁹⁰.

⁸⁸ The EU Policies Department within the Italian Prime Minister's Office has created the database 'Eurlnfra' with a public area where it is possible to find the main data relating to infringement procedures. In Hungary, there exists also a database which allows to follow this Member State's obligations related to the implementation of directives (deadlines, legal acts to be modified, responsible Ministry: <http://iogharmonizacio.gov.hu/>)

⁸⁹ "30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p.11

⁹⁰ Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

Transparency issues are linked to discussions on the role of the complainants in the EU Pilot. In general, the complainants are not involved during the EU Pilot and do not receive information on the exchange of letters between the Commission and the Member States. They do not have access to the information in the EU Pilot database or to the case file. There is no public access to the information on the status of the case or to documents of the case apart from some formal answers and letters from the Commission informing complainants about the case being processed in the EU Pilot, asking permission to disclose his or her identity or about the closure of the case. Under the transparency principle, complainants should be involved in the pre-infringement procedure with similar information rights as the national authority. Some Member States provide access to information in the EU Pilot by involving complainants in the procedure.

The conceptual understanding of the purpose of the EU Pilot is behind the different positions on the transparency of this tool. Public authorities argue that allowing complainants or other European institutions access to the EU Pilot database would result in changing the purpose of the tool in a way that would jeopardize its objective of reaching solutions to the breaches of EU law. Furthermore, some officials consider that enhanced participation of complainants in the pre-infringement procedure would weaken the Commission's main role in EU Pilot, which is considered to be engaging in a constructive dialogue with Member States in order to find solutions to problems related to the implementation of EU law. The importance of preserving the Commission's discretionary power in deciding actions during the infringement procedures is argued to justify the maintenance of the EU Pilot as it is, without complainants' access to documents. It enables the parties to negotiate compromise solutions which are politically and legally acceptable.

However, no argument has been made proving that participation of complainants would weaken the possibility for finding solutions to breaches of EU law. On the contrary, the examples of participation of NGOs in the process show that the complainant's involvement strengthened the effectiveness of the EU Pilot. The dialogue-based and preliminary nature of the EU Pilot, prior to the infringement procedure, makes very exceptional any situation where the complainants' participation could affect the litigation phase or the Commission's decision-making power prior to potential Court proceedings.

Access to the EU Pilot data base was also denied to this Project Team which had to limit its source of information on infringement to the use of the database with information on the status of infringements⁹¹ hosted in the Commission website. However, the results of this project show that the use of this database is time-consuming and complex due to the limited features of the research tools. Furthermore, the information is incomplete and outdated. The EP request to the Commission to make information on infringement cases available should be revisited and a formal request for full and up-to-date information should be put forward.

While the discretionary power of the Commission to decide on the opening and closure of pre-infringement and infringement procedures⁹² needs to be preserved, the exercise of it does not seem incompatible with an improved access to the data base on infringements and a legally binding regulatory framework for handling complaints and infringement procedure providing increased involvement of the complainants and access to information on the arguments concerning the case and motivation of decisions. Greater transparency of the infringement procedure can be regulated in respect of the CJEU jurisprudence, taking

⁹¹ http://ec.europa.eu/eu_law/infringements/infringements_decisions_en.htm, accessed on 14 March 2013.

⁹² Communication from the Commission to the Council and the European Parliament "Updating the handling of relations with the complainant in respect of the application of Union law", COM (2012) 154 final, p. 8.

into account the less restrictive approach requiring motivated arguments to justify refusal for access to documents (including those of infringement procedures) under Article 4 of Regulation 1049/2001/EC (See page 69, section 4)⁹³.

Calls for greater transparency of the infringement procedure are also based on some authors' concerns that the confidentiality of the information would lead to situations where '[...] the Commission could fail to resist political interference'⁹⁴. Whenever infringement proceedings are closed, access to Commission documents should be granted. Thus, if the file is closed at the end of the EU Pilot procedure without an infringement proceeding being launched, the situation is similar to the situation of a closed infringement proceeding and the access to Commission documents in this case should be granted.

Efficiency

The Commission considers that, as of today, the EU Pilot satisfies the needs for which it has been created. It refers to it as 'a well-established working method that delivers results for the Commission, the participating Member States and citizens'⁹⁵. Besides, the Commission endeavours to evaluate this working method annually with the assumed intention of enhancing its efficiency⁹⁶.

However, the officials and stakeholders interviewed within the framework of the study for the European Parliament published in 2013⁹⁷ consider that the efficiency of the procedure is being hampered by several factors. These include language barriers that jeopardise an efficient reaction by the Commission and a general lack of resources at the Commission⁹⁸ for processing the files and preparing the cases in an optimum way. The latest Commission decision to eliminate legal units in DG ENV increases the problem. Furthermore, the federal structure of Member States is seen as a barrier which sometimes requires the participation of several authorities causing delays.

Regarding infringement procedures for cases of non-transposition or late transposition assessed within the framework of the study for the European Parliament published in 2013⁹⁹ the information shows that the period for the issuance of a letter of formal notice is unnecessarily too long as the data and information of those cases is clear and action can immediately be taken. No EU Pilot is needed in those cases, as already the Letter of Formal Notice enables Member States to react and/or send observations or justifications. The European Parliament might want to consider asking the Commission to take measures to improve this situation.

⁹³ Joined cases C-39/05 P and C-52/05 P Sweden and Turco v Council [2008] ECR I-4723

⁹⁴ Söderman, 'Le citoyen, l'administration et le droit communautaire', 1998 RMUE, 36, quoted by Prete, Smulders, 'The coming of age of infringement proceedings, CMLR 2010 Volume 47 No. 1, p. 17.

⁹⁵ Report from the Commission "Second Evaluation Report on EU Pilot", COM(2011) 930 final, 21.12.2011, p. 7.

⁹⁶ Report from the Commission "EU Pilot Evaluation Report", COM(2010) 70 final, 3.3.2010, p. 6; Report from the Commission "Second Evaluation Report on EU Pilot", COM(2011) 930 final, 21.12.2011, p. 7.

⁹⁷ Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

⁹⁸ Even though this lack of resources is not a coincidence but Member States contribute to this situation as they refuse to allocate more human and financial resources indispensable for its smooth functioning: R. Mehdi, Institutions européennes, Hachette Supérieur, Paris, 2007, p. 110.

⁹⁹ Ballesteros, M., Mehdi, R., Eliantonio, M., and Petrovic, D., Tools for ensuring implementation and application of EU law and evaluation of their effectiveness, European Parliament – Policy Department C, Brussels, 2013

4.2. The role of the European Parliament: potential actions

1. Legal basis and legitimacy of EU Pilot

The Commission should ensure legitimacy and legality of the pre-infringement procedure. There are no legal bases in the Treaty for a pre-infringement procedure and, therefore, for the EU Pilot. Article 258 TFEU provides the Commission with the competence to follow an infringement procedure prior to taking the Member State to the Court and refers to the reasoned opinion in order to give the State concerned the opportunity to submit its observations. The letter of formal notice prior to the reasoned opinion was already generated in order to provide the opportunity for the Commission and the Member State to dialogue and find solutions prior to the start of the infringement procedure. The current pre-infringement phase, the EU Pilot, is another layer with the same objective.

Recognising the value of the political agreement to develop a pre-infringement phase, the Commission should adopt all the necessary measures to ensure the legitimacy and legality of this tool. Legitimacy can only be ensured by enabling transparency, participation of complainants and EP (see proposals below) in the EU Pilot. Legality can be ensured through the adoption of a legally binding act containing the rules governing the whole pre-infringement and infringement procedure (see proposals below).

2. The role of the EP in the EU Pilot

The EP is the perfect body to be involved in the infringement procedure and receive systematically a copy of all the letters and complaints that will be the basis of EU Pilot or infringement procedures. This early access to the relevant information should enable the EP to be an active partner in the EU Pilot procedure and database and monitor the implementation and enforcement of EU legislation in a more transparent way. The involvement of the EP would improve the effectiveness, transparency and efficiency of the EU Pilot.

Effectiveness

3. Clarification of the purpose of EU Pilot

The purpose of the EU Pilot should be clarified and legally defined through a participatory process that would enable taking into account the views of all parties, including stakeholders and complainants. There is a dichotomy in the understanding of the EU Pilot's purpose which affects the assessment of its effectiveness and the arguments to justify the procedure and its shortcomings for achieving its objectives.

4. Participation of complainants in the EU Pilot

The involvement of complainants in the EU Pilot case with access to the exchange of information between the Commission and the Member State and the possibility to contribute to it would strengthen the EU Pilot's effectiveness for finding solutions.

No examples have been provided by interviewers to justify the general exclusion of complainants from the pre-infringement EU Pilot procedure. Considerations of the EU Pilot as a 'privileged' dialogue between the Commission and Member States or the respect of the discretionary power of the Commission do not seem solid arguments. The limitations recognised by the CJEU, on the access to the documents during the infringement procedure

in preparation of a potential judicial phase are not applicable as this is a pre-infringement phase.

5. Timing of decisions

The effectiveness of the EU Pilot and the infringement procedure depends on the timing of the decisions to start each phase. If there is no clear message that an action against potential infringements would be taken, the risk of lengthy procedures would affect the effectiveness of these tools for solving cases.

Once the complaint is registered, the decision of the start of the EU Pilot should be immediate and not subject to prior informal communications between Commission and Member States.

Decisions for sending a Letter of formal notice should be taken immediately after closure of the EU Pilot, not later than six months of the start of the pre-infringement procedure. It continues providing an opportunity to the Member State to make observations to the Commission.

6. Internal review of decisions within EU Pilot

The effectiveness of the EU Pilot requires an internal decision making process that enables review of services' decisions not subject to publicity. While the discretionary power by the Commission on the steps to be undertaken in the pre-infringement procedure (as well as in the infringement procedure) needs to be respected, the decision-making process prior to infringement procedure, which is carried out at unit level, should be subject to publicity and to internal review (ie. at Director General level).

7. Measures to evaluate the success of EU Pilot

The evaluation of the success of the EU Pilot should be based on the problems solved and the undesirable impacts avoided. The criterion used by the Commission to evaluate the success of EU Pilot (in the first and second reports) is the number of cases closed before going to infringement procedure. The communication to the public of the results of EU Pilot should not focus on an administrative argument related to the number of closed cases. A good example seems to be SOLVIT, where the content of every case is described in the data base and citizens, national authorities and the Commission have access to it.

8. Strategic use of the EU Pilot

The EU Pilot should not be used in unnecessary cases when it is obvious that cooperation between a Member State and the Commission within the EU Pilot will not remedy the problem. In those cases, the letter of formal notice should be sent directly, without engaging the formal pre-infringement procedure.

Establishing criteria according to the complexity of cases on the one hand, and the seriousness of the breach of EU law (e.g. with threat of immediate harm in the areas of Environment or Health) on the other, would improve effectiveness of EU Pilot and infringement procedure in finding solutions. At the moment this criteria are very strict as the Commission considers that only in urgent and exceptional cases, the Commission may

decide to address a letter of formal notice (Article 258 TFEU) to the Member State without prior bilateral discussion¹⁰⁰.

Transparency

9. Transparency through the Commission or the EP website

EP should provide access to the information related to the EU Pilot cases they have access to (according to recommendation 2) by publishing in the website the relevant information concerning the case such as the EU legislation and provisions concerned and legal arguments used by all parties.

10. Access to databases and information on EU Pilot and infringement cases

Complainants should have access to the EU Pilot data base.

The EPs call for the Commission to provide public access to information on infringement cases through a database should be renewed to ensure that the data base is user-friendly, providing comprehensive information on the infringements related to specific EU legislative acts or to a Member State. The Commission should provide more precise and detailed information than those contained in the currently publicly available databases on infringement cases. The information sheets within the current IT system¹⁰¹ should be improved and provide more information on the cases.

11. Access to legal and factual arguments

If access to the EU Pilot data base is not provided to the complainant, access to the legal and factual arguments considered in the EU Pilot should systematically be provided by the Commission to complainants, enabling them to comment on the arguments provided by the Member State.

The Commission, whenever an EU Pilot or an infringement procedure is opened, should provide the Member State concerned with exhaustive and clear motivations in relation to the acceptance or not of their responses on the compliance with EU law.

12. Mandatory rules on participation of complaints

Clear rules on the participation of complainants in the EU Pilot should be adopted through legally binding measures (see below).

Efficiency

13. Sufficient resources

Sufficient resources should be made available to the Commission to enable proper management of complaints, EU Pilot (including preparation of cases and assessments before sending them to Member States) and infringement procedures.

¹⁰⁰ Report from the Commission "30th Annual Report on Monitoring the Application of EU Law (2012)", COM(2013) 726 final, 22.10.2013, p.10

¹⁰¹ These sheets summarize the main content of the complaints and the Commission's requests for information.

The European Parliament as budgetary authority should ensure that the Commission has the necessary resources to ensure the enforcement and monitoring of EU law.

14. Information on EU Pilot and infringement procedure

The European Parliament should lead and promote raising awareness campaigns on the complaints system, EU Pilot and infringement procedures enhancing a broader use. The number of complaints submitted to the Commission is very low compared to the number of EU laws and population rates in the EU¹⁰². This is due to a systemic lack of information on the EU Pilot and infringement procedures, which hinders citizens from playing their vital role in ensuring the effectiveness of EU law. It is worth noting that the citizens' role has been strengthened following the entry into force of the Lisbon Treaty¹⁰³ and it would justify a stronger role in the procedures regarding the implementation of EU law.

15. Clear legally binding procedural rules

The Commission should propose a Regulation governing the rules of the pre-infringement and the infringement procedures. The development of these rules should go through a consultation process prior to the legislative decision making procedure. The legitimacy and legality of the EU Pilot should be ensured by adopting a legally binding Regulation setting out the rules of the pre-infringement and infringement procedure.

Furthermore, the current rules set up in the Commission Communication in 2002, updated in 2012, concerning the handling of relations with the complainant in respect of the application of Union law¹⁰⁴ are not always respected and are not well known by stakeholders. This leads to legal uncertainty of the procedure and the detriment of the EU Pilot effectiveness which does not lead to proper action when no solution to the breach of EU law is found.

These rules should:

- define the purpose of the EU Pilot and should address the form of the complaint, desirable content and evidences needed to ensure effectiveness and efficient use of resources.
- clearly define the role of each of the parties including the Commission, Member States' authorities and the complainants who should be involved in the procedure alongside the European Parliament as described above.
- establish clear time limits defining the moment of the start of EU Pilot procedure, short and precise periods for each procedural phase and for the registration, notifications and adoption of the relevant decisions (e.g. closure of the case).
- deal with the obligation for the administration to state reasons and motivation of decision and the right for every person to have access to her or his file.

¹⁰² From April 2008 – September 2011 a total of 2,121 files were submitted to EU Pilot. Of these, 1,410 files completed the process in EU Pilot: Report from the Commission, EU Pilot Evaluation Report, COM(2010) 70 final, p. 6; Report from the Commission, Second Evaluation Report on EU Pilot, COM(2011) 930 final, p. 5.

¹⁰³ Articles 1(2) and 10(3) TEU on participatory democracy; Articles 41 and 42 of the Charter of Fundamental Rights of the EU (CFREU) on the rights to good administration and of access to documents

¹⁰⁴ Commission Communication to the European Parliament and the European Ombudsman on "Relations with the complainant in respect of infringements of Community law", COM(2002), p. 8; Communication from the Commission to the Council and the European Parliament "Updating the handling of relations with the complainant in respect of the application of Union law", COM(2012) 154 final, p. 8.

- prevent informal discussions between Member States and Commission officials prior to the start of the EU Pilot, which would prolong the start of the infringement procedure even more.

EUROPEAN PRIVATE INTERNATIONAL LAW: THE WAY FORWARD

Prof. Dr. Xandra KRAMER¹
Erasmus University Rotterdam,
Erasmus School of Law, The Netherlands

Abstract

Upon request by the JURI Committee, this note aims to provide the background of European private international law for the purpose of informing on possible courses of action. It clarifies the role of private international law in the EU, discusses past and present policy, describes the existing legislative framework and gaps in the current framework, and maps the policy options for future action.

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¹ Xandra Kramer (www.xandrakramer.eu) is Professor of law and holds a chair in European Civil Procedure at Erasmus School of Law, the Netherlands. She obtained her Ph.D. degree at Leiden University in 2001, and has been a visiting professor at several foreign universities. In 2008 she was appointed Deputy Judge of the District Court Rotterdam. She conducts research and lectures in the area of private international law, international litigation, arbitration, mediation, and European private law, and takes an interest in empirical and policy-related legal research.

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EXECUTIVE SUMMARY

Background

Over the past fifteen years, a widely comprehensive framework of European private international law instruments has been established. However, there are still gaps in the current framework. A study and a briefing note requested by the European Parliament in 2012 identified the gaps and the required additions, and addressed the question of whether a more comprehensive framework or code of private international law was needed, and how this could be achieved. The current paper builds on these works, addressing subsequent developments and expanding on the way forward.

Aims

The aims of this paper are:

- To clarify the role of private international law in the EU, and to provide an overview of past and present policy as well as the legislative framework in force;
- To discuss activities of the European Parliament's past legislature with regard to a European framework of private international law;
- To map and explore possible courses of action, with a view to establishing a more comprehensive framework of European private international law.

Findings

Systemic gaps still exist in relation to property; trusts; agency; corporations; marriage; registered partnerships and similar institutions; names of natural persons; adoption; parentage; and the status and capacity of natural persons. To these may be added the law applicable to privacy and rights relating to personality, and specific rules with regard to collective redress. Apart from these gaps, deficits in European private international law are the fact that the framework is not in all respects coherent; that there are recurring rules; and that rules are scattered over many different sources.

To create a more comprehensive framework, four possible courses of action can be distinguished. These are: 1) an ad hoc completion of the framework; 2) the consolidation of existing instruments; 3) the codification into a more comprehensive framework; and 4) the creation of a European Code of Private International Law (ECPIIL). These policy tracks are not mutually exclusive; they overlap in part, and are complementary. Actions may be pursued simultaneously or consecutively.

For short- and mid-term purposes, a gradual completion of the framework by addressing the most important topics one at a time, starting with non-family law, combined with consolidation and codification measures, is most appropriate and desirable. It is of great importance to reconsider the horizontal coherence between different instruments, among others with regard to the recognition and enforcement of judgments, as well as to the interaction with substantive law directives, Treaty rules, and CJEU and ECtHR case law. Special attention should be paid to the proper implementation and application in the Member States, as well as a proper evaluation of the instruments in legal practice. Once the framework is completed, a more comprehensive and well-grounded framework or code can be considered a viable option.

1. INTRODUCTION

1.1 Aims and scope

This paper was requested by the Committee on Legal Affairs (JURI) of the European Parliament, with the purpose of informing the European Parliament, in particular members of the JURI Committee, on past policy, the current state of affairs, and possible future pathways with regard to private international law. To this end, the paper clarifies the role of private international law for the proper functioning of the European area of freedom, security and justice and highlights past and present policy with regard to private international law. It provides an overview of the instruments in force and pending proposals. It discusses activities of the past legislature with regard to establishing a more comprehensive framework or code of private international law. It explores policy options and outlines possible courses of action for the present legislature (2014-2019).

Private international law encompasses those rules that regulate legal relationships with cross-border elements. These include, for example, contracts between companies located in different Member States, consumers that obtain goods or services from a company situated in another Member State, or tort claims resulting from a car accident involving persons domiciled or habitually resident in different Member States. In the area of family law, it includes marriages and divorces between persons having different nationalities and/or habitual residences, as well as legal consequences arising from the distortion of such relationships, including parental responsibilities, matrimonial property, or maintenance obligations. Traditionally, private international law is concerned with three issues: the law applicable to a legal relationship; the court having jurisdiction in relation to a dispute; and the cross-border recognition and enforcement of a foreign judgment or an authentic instrument (e.g. a notarial deed). A fourth category that may be distinguished consists of 'residual' questions of judicial cooperation, notably the cross-border service of legal documents and the taking of evidence.

The paper will focus primarily, but not exclusively, on the three primary questions of private international law, related to the applicable law, international jurisdiction, and recognition and enforcement. Though other civil procedural instruments, including the service of documents, the taking of evidence, and instruments introducing harmonised procedures, have to a certain extent distinct features, they are an integral part of the civil justice area as covered by Article 81 TFEU, and cannot be disregarded for the present purposes.

1.2 Background and earlier studies

Since the introduction of the competence regarding 'judicial cooperation in civil matters' pursuant to the 1997 Amsterdam Treaty, an extensive EU framework of private international law has been established, and covers a wide range of topics. However, this framework still leaves gaps, and the ad hoc nature of the codification raises questions as to its coherence, efficiency, and transparency.

In 2012, a study requested by the European Parliament's Committee on Legal Affairs was carried out, authored by a group of Dutch experts, in collaboration with experts from across

the EU.² This study aimed to identify the gaps in the existing framework of European private international law, to discuss where additions to this EU framework were required, and to deliberate on the question of whether a more comprehensive framework was needed and, if so, how this could be achieved. In the same year, a briefing note was prepared by the present author for the purpose of an Interparliamentary Committee Meeting on Civil Law and Justice.³ This briefing note presented the main findings of the report, and addressed more specifically the question of whether a European Code of Private International Law was desirable and achievable. To complement this, in 2013 a Cost of Non-Europe report (CoNE) mapping the costs with regard to European Code on Private International Law was published, prepared by the European Added Value Unit.⁴

1.3 Methodology and outline

The present analysis builds largely on and is a follow-up to the above-mentioned 2012 study and briefing note. In the study, a systemic analysis of the gaps in the existing framework was carried out, taking into consideration the primary sources of EU law and case law, as well as several recent national private international law codifications and literature analyses.⁵ The conclusions of the 2012 report as to the required additions and the need for a more comprehensive framework, were based in part on the outcome of discussions with the expert group consisting of experts from different Member States with the aim to assess the common ground for possible future action.⁶

The present paper takes into account legislative developments that have taken place since the conclusion of these earlier studies, as well as recent policy initiatives, case law, and the literature. In addition, a non-systemised informal request by e-mail was made among known private international experts in various Member States as well as a number of experts in the United States with relevant expertise. This was done with the purpose of obtaining input on what is considered important for the further development of EU private international law, with regard to topics to be addressed or to legislative techniques, including the possibility of a code. The input provided by the responding experts was taken into account, and is referenced where relevant.⁷

The current paper addresses the scope and limits of the EU competence and the evolving policy with regard to private international law (Section 2), and provides an overview of the

² Study IP/C/JURI/IC/2012-009, 'A European framework for private international law: current gaps and future perspectives', European Parliament, September 2012. The report was authored by the present author (scientific director), Mr Michiel de Rooij (project leader), Dr Vesna Lasi, Ms Lisette Frohn LL.M., and Dr Richard Blauwhoff. The study was carried out in collaboration with a group of external experts, consisting of Prof. Dr Paul Beaumont (United Kingdom), Dr Agnieszka Frackowiak-Adamska (Poland), Prof. Dr Francisco Garcimartín (Spain), Prof. Dr Jan von Hein (Germany), Prof. Dr Miklos Kiraly (Hungary), and Prof. Dr Ulla Liukkunen (Finland). The study was presented to the JURI Committee of the European Parliament on 17 December 2012.

³ Xandra Kramer, 'Current gaps and future perspectives in European private international law: towards a code on private international law?', Briefing note European Parliament, November 2012. This was presented at the Interparliamentary Committee Meeting 'Do EU citizens enjoy free movement?' by the JURI committee, Brussels, 23 January 2013.

⁴ Blanca Ballester, European Added Value Unit, 'Cost of Non-Europe Report. European Code on Private International Law', report European Parliament, June 2013.

⁵ Study 'A European framework for private international law: current gaps and future perspectives', 2012, p. 13-14.

⁶ The present author supports the main findings of the study, as also expressed in the briefing note (footnote 3).

⁷ These include Prof. Dr Andrew Dickinson (United Kingdom), Dr Agnieszka Frackowiak-Adamska (Poland), Prof. Dr Stéphanie Francq (Belgium), Prof. Dr Francisco Garcimartín (Spain), Prof. Dr Jan von Hein (Germany), Prof. Dr Catherine Kessedjian (France), Stefan Leible (Germany), Prof. Dr Ulla Liukkunen (Finland), Mr Michiel de Rooij (the Netherlands), Prof. Dr Giesela Rühl (Germany), Prof. Dr Symeon Symeonides (United States), and Prof. Dr Geert Van Calster (Belgium).

current legislative framework (Section 3). It discusses the action undertaken by the European Parliament in the past legislature, as well as the outcomes of the earlier studies (Section 4). It maps the various policy options to establish a more comprehensive framework (Section 5), and draws conclusions on the way forward (Section 6).

2. EU COMPETENCE AND EVOLVING POLICY

Traditionally, private international law has been a matter of national law, though it has long been the subject of bilateral and multilateral conventions. In particular, the conventions of the Hague Conference on Private International Law are of importance to the international harmonisation of private international law. From the outset, Europe has taken an interest in private international law, but in the pre-Amsterdam period the competence was limited, and only two intergovernmental conventions were in force. The new competence introduced in Article 65 EC Treaty and subsequent Article 81 Treaty of the Functioning of the European Union (TFEU) was strongly backed up by policy and legislative action.

2.1. Relevance for the Area of Freedom, Security and Justice

The aim of European private international law instruments is to contribute to the constitution of an Area of Freedom, Security, and Justice (AFSJ), as laid down in Article 67(1) TFEU. The relevance of the European instruments currently in force must not be underestimated. They are of great significance to EU citizens, both natural and legal persons, in every legal relation having a cross-border element. These may be consumers purchasing products online from companies seated in another Member State, and companies transacting business with other companies or with consumers domiciled in other Member States. Further examples include the infringement of (EU) intellectual property rights taking place in different countries, or car accidents involving citizens habitually resident in different Member States. The increased mobility of persons has also resulted in a significant number of family relationships and wills and successions having connections with different Member States.

In these cross-border cases, European private international law instruments distribute jurisdiction among the Member States' courts and determine the applicable law, contributing to the legal certainty and foreseeability of the outcome of legal disputes for EU citizens. In the absence of harmonised rules of jurisdiction and the applicable law, domestic private international law rules determine whether a national court accepts jurisdiction and which law it applies.⁸ These domestic rules differ per Member State, and consequently create uncertainty as to which court would have jurisdiction if a dispute were to arise, whereas the applicable law would depend upon the choice of law rules of the court that decides the case, making the outcome of a dispute less predictable. The various instruments containing rules on the recognition and enforcement of judgments rendered in other Member States, and on authentic instruments drawn up in other Member States, support the principle of mutual recognition. They guarantee that a party obtaining a favourable judgment in one Member State can also enforce his rights in the other Member States.

⁸ For a recent and extensive comparative analysis of codifications of private international law, including those of EU Member States, see Symeon C. Symeonides, *Codifying Choice of Law around the World* (Codifying Choice of Law Around the World. An International Comparative Analysis, Oxford University Press 2014).

2.2. EU competence: scope and limits

2.2.1. General competence: Articles 67 and 81 TFEU

Since the Lisbon Treaty, Article 81 TFEU provides the basis for measures on judicial cooperation in civil matters. It is part of the Area of Freedom, Security, and Justice (AFSJ) that was introduced by the Treaty of Amsterdam. The aim of gradually establishing the AFSJ was first expressed in Article 61 EC Treaty. Its successor, Article 67 TFEU, no longer mentions the 'gradual establishment' of such an area, but provides that the Union 'shall constitute an area of freedom, security and justice'. Article 67(4) TFEU states that the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

In accordance with Article 81(1) TFEU, the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. It adds that this may include the adoption of instruments for the approximation of the laws of the Member States. The competence extends to all civil and commercial matters, including family law, though the legislative process for family matters as laid down in Article 81(3) implies limits. Another limit imposed by Article 81(1) TFEU is that measures based on this competence are confined to matters having cross-border implications. For the traditional private international law measures, this is not an impediment since these by nature have to do with cross-border cases, however, this requirement does affect the scope of other instruments on civil justice cooperation.⁹ In addition, Article 81(2) TFEU states that measures shall be adopted particularly when necessary for the proper functioning of the internal market. This requirement was debated in particular with regard to the 'universal' territorial scope of the Rome II Regulation, but was in the end not regarded as an obstacle.¹⁰

Article 81(2) TFEU lists a series of issues on which measures are to be taken. The three traditional private international law questions regarding the applicable law, international jurisdiction, and recognition and enforcement are included in sub (a) and (c) of the Article. Measures of residual private international law issues regard in particular the cross-border service of documents (sub b), and the taking of evidence (sub d). A last category consists of measures that aim to support the general goals of judicial cooperation in civil matters, in particular ensuring effective access to justice (sub e), the elimination of obstacles to the proper functioning of civil proceedings (sub f), the development of alternative dispute resolution mechanisms (sub g) and, on the practical level, judicial training (sub g).

In addition, several sector-specific instruments, based on Article 114 TFEU or its predecessor in the EC Treaty, contain incidental private international law rules, or rules that have an influence on private international law, as well as ones that regard specific procedural issues mentioned in Article 81.

⁹ For this reason, and contrary to what the Commission originally proposed, the Legal Aid Directive (2002/8/EC) and the Mediation directive (2008/52/EC), Regulation 1896/2006 creating a European Order for Payment Procedure and Regulation 861/2007 establishing a European Small Claims Procedure are limited explicitly to cross-border cases.

¹⁰ Article 81(1) TFEU added the words 'in particular' to the text of its predecessor Article 65 EC Treaty, under which the debate on Rome II took place.

2.2.2. Limitations with regard to family law

Article 81(2) TFEU subjects the adoption of measures in the area of judicial cooperation in civil matters to the ordinary legislative procedure.¹¹ However, Article 81(3) makes an exception for family law matters. Pursuant to this provision, measures in the area of family law with cross-border implications are to be established by the Council subject to a special procedure. It is to act unanimously after consulting the European Parliament. This unanimity is, however, not an absolute precondition for family law matters. On the basis of the 'passerelle' clause included in the same provision, the Council, acting unanimously and after consultation with the Parliament, could decide to follow the ordinary legislative procedure with regard to a clearly determined aspect of family law. However, such a decision will not be adopted if it is opposed by national Parliaments within six months. This procedure has not been used as of yet.

As is evidenced by the troublesome legislative procedure regarding the Rome III Regulation on the law applicable to legal separation, this unanimity requirement makes the adoption of measures in this area more difficult. This is also to be taken into account for further activities in this area, or regarding a possible code on private international law. The Rome III Regulation was adopted eventually on the basis of enhanced cooperation pursuant to Articles 326-334 TFEU.¹²

2.3. Evolving policy: from Tampere to post-Stockholm programme

The competence in the area of judicial cooperation in civil matters as of the Treaty of Amsterdam was supported by strong policy impetus. The 1998 Action Plan of the European Commission and the Council signified the reinforcement of judicial cooperation in civil matters as a fundamental stage in the creation of a European judicial area, aiming to facilitate the legal environment of EU citizens. The Tampere Presidency Conclusions of 1999 strongly supported the development of private international law, and endorsed the principle of mutual recognition as the cornerstone of civil justice cooperation.¹³ Important elements of this programme involve improving access to justice and the reduction of intermediate measures for the recognition and enforcement of judgments (abolition of *exequatur*). A series of measures was announced, which have meanwhile been realised.¹⁴ The abolition of *exequatur* has now been achieved in the context of six regulations, most recently with regard to the key instrument for European litigation, the Brussels I Regulation.¹⁵ The 2004 Hague Programme built upon the policy goals set out in the Tampere Programme, adding as a priority measures to ensure the coherence of instruments relating to judicial cooperation in civil matters.¹⁶ The policy of enacting separate instruments for each area entails the risk of incoherence, and may undermine transparency.

¹¹ In accordance with Articles 289 and 294 TFEU.

¹² Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010, L 343/10.

¹³ Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, see in particular nos. 28-39.

¹⁴ See also 'Area of freedom, security and justice: Assessment of the Tampere programme and future orientations', Communication from the Commission to the Council and the Parliament, COM(2004) 401 final.

¹⁵ Regulation 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), OJ 2012, L 351/1.

¹⁶ The Hague Programme: strengthening freedom, security, and justice in the European Union, 13 December 2004, OJ 2005, C 53/1.

The 2009 Stockholm Programme reiterates the importance of access to justice for European citizens, along with the fundamental nature of the right to effective enforcement.¹⁷ It promotes the strengthening of the principle of mutual trust, by establishing minimum procedural standards, and endorses citizens' rights (Union citizenship), inter alia by promoting the full exercise of the right of free movement. In line with the Hague Programme, it emphasises the necessity of increasing coherence and of evaluating existing instruments. In its 2010 Stockholm Action Plan, the Commission underlines the need to effectuate the principle of mutual recognition on the practical level by building trust among judges, legal professionals, businesses, and citizens.¹⁸ This has among other things resulted in the introduction of the e-Justice portal and in training programmes for judges and other practitioners.¹⁹

As a result of the economic crisis, policy and legislative initiatives in recent years have been presented in the context of the 'Justice for Growth' Agenda.²⁰ An example is the ongoing revision of the Insolvency Regulation.²¹ This proposal puts the restructuring and revival of businesses at the forefront, in order to promote economic recovery, growth, higher investment rates, and the preservation of employment as part of the Europe 2020 Strategy.²² In August 2014, the Commission released a tender for a study on the law applicable to companies, mentioning economic growth as one of the aims.²³ As regards instruments of European civil procedure, the focus is on enabling a swift recovery of claims and on reducing related costs. An example of where the policy of stimulating economic recovery and sustainable growth was expressed to underpin legislation is the proposed amendment of the Regulation establishing a European Small Claims Procedure.²⁴

In its Communication of March 2014 regarding the EU Justice Agenda for 2020, the Commission presented what it regards as the three main challenges for the next legislature.²⁵ These are the strengthening of mutual trust ('the bedrock upon which EU justice policy should be built'), the mobility of citizens (freedom of movement), and economic recovery and growth. The Commission seeks to address these by the further consolidation, codification, and completion of EU legislation.²⁶

The European Council's conclusions of June 2014 once again underline the necessity of further enhancing mutual trust as well as highlight the aim of European justice policy to contribute to 'economic growth by helping businesses and consumers to benefit from a reliable business environment'.²⁷ In line with the Commission's Communication, the overall priority is to 'consistently transpose, effectively implement and consolidate the legal

¹⁷ The Stockholm Programme – An open and secure Europe serving and protecting the citizen, OJ 2010, C 115/1.

¹⁸ European Commission, Action Plan Implementing the Stockholm Programme, COM(2010) 171 final.

¹⁹ See inter alia Communication from the Commission, 'Building trust in EU-wide justice – a new dimension to European Judicial training', COM(2011) 551 final.

²⁰ See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union, COM(2014) 144 final, point 2.

²¹ Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings proposal to amend the Insolvency Regulation, COM(2012) 744 final.

²² Commission proposal, p. 3-4.

²³ Tender JUST/2014/JCOO/PR/CIVI/0051: Study on the law applicable to companies with the aim of a possible harmonisation of conflict of law rules on the matter, Brussels, 6 August 2014, p. 6.

²⁴ Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) 861/2007 of 11 July 2007 establishing a European Small Claims Procedure and Council Regulation (EC) 1896/2006 of the European Parliament, and of the Council of 12 December 2006 creating a European order for payment procedure, COM(2013) 794 final.

²⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union, COM(2014) 144 final, see point 3.

²⁶ Communication EU Justice Agenda 2020, point 4.

²⁷ European Council Conclusions 26/27 June 2014, EUCO 79/14, Brussels, 27 June 2014, p. 1.

instruments and policy measures in place'.²⁸ Particularly important for the present purpose are the following elements enlisted in these conclusions: the clarity of EU legislation for citizens and business; effective remedies and use of innovations including the use of e-justice; examination of the reinforcement of rights of persons, in particular children with regard to instruments; the recognition and enforcement of judgments in family law and civil and commercial matters; and the facilitation of cross-border activities and operational cooperation.²⁹

3. OVERVIEW OF THE LEGISLATIVE FRAMEWORK

3.1. Instruments currently in force

Currently, thirteen regulations are in force concerning the core of private international law (i.e. international jurisdiction, the applicable law, and recognition and enforcement). These are the:

- 1) Insolvency Regulation, No 1346/2000 (jurisdiction, applicable law, recognition and enforcement) (amendment proposal pending);³⁰
- 2) Brussels I Regulation, No 44/2001 (jurisdiction, recognition and enforcement), as of 15 January 2015 to be replaced by Regulation No 1215/2012,³¹ as amended by Regulation No 542/2014³² (Recast; Brussels I-bis);
- 3) Regulation creating a European Enforcement Order, No 805/2004;
- 4) Regulation creating a European Order for Payment Procedure, No 1896/2006;
- 5) Regulation establishing a European Small Claims Procedure, No 861/2007 (amendment proposal pending);³³
- 6) Regulation establishing a European Account Preservation Order, No 655/2014 (applicable as of 18 January 2017);
- 7) Rome I Regulation, No 593/2008 (applicable law contractual obligations);
- 8) Rome II Regulation, No 864/2007 (applicable law non-contractual obligations);
- 9) Brussels II-bis Regulation, No 2201/2003 (jurisdiction, recognition and enforcement, legal separation, and parental responsibility);
- 10) Maintenance Regulation, No 4/2009 (jurisdiction, applicable law, recognition and enforcement);
- 11) Rome III Regulation, No 1259/2010 (applicable law divorce; enhanced cooperation);

²⁸ European Council Conclusions 26/27 June 2014, EUCO 79/14, Brussels, 27 June 2014, p. 2.

²⁹ European Council Conclusions 26/27 June 2014, EUCO 79/14, Brussels, 27 June 2014, p. 5-6.

³⁰ Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings proposal to amend the Insolvency Regulation, COM(2012) 744 final.

³¹ Regulation 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), OJ 2012, L 351/1.

³² Regulation (EU) No 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice, OJ 2014, L 163/1.

³³ Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) 861/2007 of 11 July 2007 establishing a European Small Claims Procedure and Council Regulation (EC) 1896/2006 of the European Parliament, and of the Council of 12 December 2006 creating a European order for payment procedure, COM(2013) 794 final.

- 12) Succession Regulation, No 650/2012 (jurisdiction, applicable law, recognition and enforcement) (applicable for successions and wills as of 17 August 2015);
- 13) Regulation on mutual recognition of protection measures in civil matters, No 606/2013 (applicable as of 15 January 2015).

Two regulations that address other key issues of judicial cooperation and that facilitate cross-border litigation in the EU are the:

- 14) Evidence Regulation, No 1206/2001;
- 15) Service Regulation, No 1393/2007.

An important institutional framework is the European Judicial Network in civil and commercial matters (EJN), which was set up in 2001.³⁴

The regulations mentioned under nos. 3, 4, and 5 (European Enforcement Order, Order for Payment, and Small Claims Procedure) may be regarded as ancillary to the Brussels I Regulation, in the sense that they have almost the same substantive scope (civil and commercial matters, excluding family and succession law) and they regulate the enforcement of judgments. They are optionally applicable by choice of the applicant. The European Order for Payment and the Small Claims Regulations not only involve cross-border enforcement but are self-standing European civil procedures for the collection of debts. The recently adopted European Account Preservation Order (no. 6) is also not a classical private international law regulation, as it introduces an autonomous European procedure, but it does include rules of jurisdiction, applicable law, and recognition and enforcement.

The Rome III Regulation (no. 11) is the only one that was not adopted on the basis of Article 81 TFEU. It results from enhanced cooperation pursuant to Articles 326-334 TFEU. It currently applies in 15 Member States, and as of 15 July 2015, it will be applicable in a 16th as well.³⁵

It should be noted that Denmark does not take part in the adoption of measures on the basis of Article 81 TFEU (Protocol 22, TEU/TFEU). On the basis of two parallel agreements, however, Denmark does apply the Brussels I Regulation (no. 2) and the Service Regulation (no. 15). Participation on the part of Ireland and the United Kingdom is dependent on these Member States' decision to opt into such measures (Protocol 21, TEU/TFEU). Ireland takes part in all the regulations mentioned except for the Succession Regulation. The United Kingdom does not participate, and is not bound by the European Account Preservation Order (no. 6) and the Succession Regulation (no. 12).

Additionally, certain sectoral directives contain incidental conflict-of-law rules or scope rules affecting private international rules. There are two directives in place to support judicial co-operation: the Legal Aid Directive (2002/8/EC) and the Mediation directive (2008/52/EC). Interwoven with cross-border dispute resolution are the Directive 2013/11/EU on Consumer Alternative Dispute Resolution (ADR), Regulation No. 524/2013 on Online Dispute Resolution (ODR), and the Recommendation on collective redress.³⁶ These instruments

³⁴ Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, OJ 2001, L 174/25, amended by Council Decision 568/09/EC, OJ 2009, L 168/35.

³⁵ Austria, Belgium, Bulgaria, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia, and Spain. The 16th Member State to join as of 15 July 2015 is Greece.

³⁶ Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539/3.

were adopted not on the basis of Article 81 but on Article 114 TFEU. Contrary to instruments adopted on the basis of Article 81, the ODR Regulation and the Recommendation on collective redress are not confined to cross-border cases.³⁷ In this regard, reference may also be made to the Council Agreement on a Unified Patent Court, based on enhanced cooperation, which includes important rules for European patent litigation, and embeds an exhaustive set of Rules of Procedure.³⁸

The case law of the Court of Justice of the European Union (CJEU) is of utmost importance to the development of EU private international law, and it contributes to the framework through interpretation. Particularly important in this regard is the rich case law on Union citizenship and on the freedom of movement.³⁹ This case law has had a significant impact on national private international law rules in the area of family law, including the law of persons, and corporate law – areas that are currently not regulated by EU private international law rules.

3.2. Hague Conventions

Conventions of the Hague Conference on Private International Law should also be mentioned, as several EU instruments make specific reference to them. Firstly, the Brussels II-bis Regulation makes reference to requirements laid down in the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. Secondly, for the applicable law, the Maintenance Regulation refers to the 2007 Hague protocol on maintenance obligations, and makes the abolition of exequatur dependant on accession to this protocol.

The European Union has meanwhile acceded these two Hague conventions/protocols:

- Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance;
- Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

In 2009, the EU signed the Convention of 30 June 2005 on Choice of Court Agreements, and a proposal to accede this Convention is pending.⁴⁰

3.3. Pending proposals and further actions

Currently, two related private international law proposals are pending. These are:

- Proposal for a Council Regulation on jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes;⁴¹

³⁷ The same goes for the IP Enforcement Directive (2004/48/EC), which contains rules of civil procedure.

³⁸ Regulation (EU) No1257/2012 of the European Parliament and the Council implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ 2012, L 361/1; Council Agreement on a Unified Patent Court, OJ 2013, C 175/1.

³⁹ See also European Commission, 'EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights', 27 October 2010, COM (2010)603; Study 'A European framework for private international law: current gaps and future perspectives' (footnote 1), p. 39-46; Michael Bogdan, *Concise Introduction to EU Private International Law*, Europa Law Publishing 2012, p. 19-28.

⁴⁰ Proposal for a Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, COM (2014) 46.

- Proposal for a Council Regulation on jurisdiction, applicable law, and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.⁴²

In September 2013, the European Parliament adopted resolutions on these proposals, based upon the special procedure of Article 81(3) TFEU (consultation).⁴³

A proposal based on Article 81 TFEU regarding the acceptance of public documents was adopted by the Commission in 2013:

- Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012.⁴⁴

As mentioned in Section 3.1, proposals are pending to amend the Insolvency Regulation and the Regulation establishing the European Small Claims Procedure, which also includes a minor amendment to the Regulation creating a European Order for Payment Procedure. The Brussels II-bis Regulation on matrimonial matters and parental responsibility is currently in the process of being evaluated. The expected proposal to amend this Regulation is expected to be one of the most important dossiers on private international law in the next few years.

4. ACTION OF THE EUROPEAN PARLIAMENT: STUDY IDENTIFYING GAPS AND ESTABLISHING A CODE

4.1. Action undertaken by the past legislature

Since the co-decision procedure was introduced as a result of the Treaty of Nice, the European Parliament has been actively involved in legislative activities in the field of private international law. The past legislature has, on the basis of the ordinary legislative procedure, been involved in the adoption of the Regulation creating a European Account Preservation Order, as well as in the adoption of the Succession Regulation on the footing of Art. 81(3) TFEU.⁴⁵ It has also been very active in the Recast of the Brussels I Regulation. In 2014, a report requested by the JURI Committee regarding the possible application of Brussels I to third countries – a topic that was regarded premature during the recast – was published.⁴⁶ In 2012, the European Parliament adopted an own-initiative resolution on the basis of Article 255 TFEU with regard to the violation of privacy and rights relating to

⁴¹ COM(2011) 126, 16 March 2011.

⁴² COM(2011) 127, 16 March 2011.

⁴³ European Parliament legislative resolution of 10 September 2013 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, P7_TA(2013)0338; European Parliament legislative resolution of 10 September 2013 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, P7_TA(2013)0337.

⁴⁴ COM(2013) 228, 24 April 2013. Report on the proposal for a regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012, 10 January 2014, P7_TA(2014)0054.

⁴⁵ The European Parliament has also adopted resolutions in the consultative procedure on the pending proposals on matrimonial property and registered partnerships (see footnote 42).

⁴⁶ Ilaria Pretelli, Lukas Heckendorn Urscheler (eds.), Andrea Bonomi, Luigi Mari, Gian Paolo Romano, 'Possibility and terms for applying Brussels I Regulation (recast) to extra-EU disputes', Study European Parliament, March 2014.

personality.⁴⁷ These are currently excluded from the scope of the Rome II Regulation. It also took the initiative to call for a study with a view to establishing a more comprehensive framework of private international law, as will be discussed in the next sub-section.

4.2. Study on gaps and a code on private international law

In 2012, the European Parliament requested a study on 'A European Framework for private international law: current gaps and future perspectives'. This study was carried out by a group of Dutch scholars and practitioners, in collaboration with experts from six other Member States.⁴⁸ In the same year, a briefing note was published to present the main findings of this report, and focused in particular on the possible establishment of a European code on private international law, entitled 'Current gaps and future perspectives in private international law: towards a code on private international law?'.⁴⁹ The aims of this study and the briefing note were to:

- Identify existing gaps in the current EU framework of private international law;
- Discuss where additions to this EU framework are required;
- Deliberate on the question of whether a more comprehensive framework – or eventually a European private international law code – was needed and, if so, how this could be achieved.

The results of this study were presented at a meeting of the JURI Committee on 17 December 2012, and at the Interparliamentary Committee Meeting of 23 January 2013. In addition, a cost-analysis as to the gaps was carried out.⁵⁰

4.2.1. Main findings as regards the gaps and required additions

In the 2012 Study, gaps in the existing framework of private international law rules (notably those on international jurisdiction, the applicable law, and recognition and enforcement) were identified in two ways: firstly, by analysing the territorial and material scope as well as the excluded matters of the regulations, and taking into account the conventions of the Hague Conference on Private international Law to which the Member States or the EU as a whole are a party; and secondly, by carrying out a systematic analysis of private international law. This was done on the basis of legal text books from different Member States, recent national codifications, in particular from The Netherlands, Belgium, and Poland, and the framework of the Hague Conference.

The following gaps in the existing regulatory framework were identified: the territorial scope of Brussels I (primarily limited to EU defendants); a lack of coordination between Brussels I and the Insolvency Regulation; status and legal capacity; arbitration; interference by residual national jurisdiction rules, most notably in the Brussels II-bis Regulation; the exception for negotiable instruments in Rome I and Rome II; nuclear damage; the application of foreign law; the law of property; trust; agency; marriage; interspousal relationships; corporations; the names of natural persons; adoption;

⁴⁷ European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170(INI)), P7_TA(2012)0200.

⁴⁸ See footnote 1.

⁴⁹ See footnote 2.

⁵⁰ See footnote 3.

arbitration; parentage; and non-marital registered partnerships, as well as the protection of adults.

These gaps can be divided into three types, resulting from: (1) the willed territorial limitation of EU legislation; (2) the deliberate exclusion of certain topics for various reasons; or (3) the absence of legislation on specific topics. In addition, there may be gaps as a result of the use of open notions, such as 'habitual residence' for natural persons. However, these are considered to be matters of interpretation, which can largely be filled in by case law and doctrine.

An example of the first type of gap is the general limitation of the Brussels I Regulation to, primarily, defendants having domicile in an EU Member State. The Commission proposed to extend the scope in the context of the Recast of this Regulation.⁵¹ However, as a result of the co-decision procedure and the negotiations, the scope was extended only to other defendants and third countries in particular situations.⁵² A further study on this issue requested by the European Parliament was published in 2014.⁵³ The jurisdiction rules of the Maintenance Regulation and of Brussels II-bis are also limited. The rules on recognition and enforcement included in the various regulations are limited to judgments rendered in Member States. The deliberate gaps as mentioned under (2) result either from the existence of specific international conventions or other EU rules (e.g. arbitration and specific insurance contracts under Rome I; nuclear damage under Rome II). In an incidental case, the inability to reach a political compromise resulted in the exclusion of a particular matter. This is notably the case for the violation of privacy and rights relating to personality under Rome II, on which the European Parliament adopted an own-initiative resolution in 2012.⁵⁴ It is desirable that these matters be followed up by the current legislature, particularly with a view to the upcoming evaluation of various regulations.

In the 2012 study and briefing note, it was concluded that the primary legislative concern should focus on the third category, the systematic gaps. These involve generally accepted topics and problems of private international law that are currently not regulated by union instruments. The systematic gaps are the topics that fall systematically outside those of the existing instruments. These gaps are regarded as required additions to the framework, since there is no EU rule that can be applied. This absence of harmonised rules has an immediate effect on citizens and businesses within the EU.

The most important gaps and required additions that have been identified in the area of non-family law concern:

- Property;
- Trusts;
- Agency;
- Corporations.

Gaps in the area of non-family law relate primarily to the applicable law, in view of the wide coverage of the Brussels I Regulation. Some of the designated areas have proven difficult

⁵¹ COM (2010)748 final, 14 December 2010.

⁵² Particularly in relation to consumer and employment contracts, see Article 18(1) and 21(2) Brussels I-bis (recast). In addition, Article 25(1) extends the scope regarding choice of court agreements, and Articles 34 and 35 have introduced discretionary rules on *lis pendens* and related actions with regard to third countries.

⁵³ See footnote 45.

⁵⁴ See footnote 46.

to regulate in the past. This is particularly true for corporations and property. In the 2012 study, it was concluded that, also in view of the developed CJEU case law regarding the right to freedom of movement, the time might be ripe to move forward on the topic of corporate law. In line with this conclusion, the European Commission in August 2014 released a tender for a study on the law applicable to companies, which is likely to be followed up by legislative initiatives within the next few years. As to trusts and agency, reference can be made to the existing Hague Conventions.⁵⁵ However, it should be noted that currently only seven Member States are a party to the Hague Trust Convention, and three Member States take part in the Hague Agency Convention. The lack of interest regarding the first Convention may be explained by the fact that trust is typically a common law figure, but at the same its influence expands to other EU countries. Agency relations are not fully excluded from the Rome I Regulation (see Article 1(2)(g)), but a coherent system might justify further action. In any case, if further initiatives are to be considered on these topics, a close collaboration with the Hague Conference is required.

In the area of family law, the identified gaps and required additions concern:

- Marriage;
- Registered partnerships and similar institutions;
- Names of natural persons;
- Adoption;
- Parentage;
- Protection of adults;
- Status and capacity of natural persons in general.

In the area of law of persons and of family law, the gaps relate not only to the applicable law but also to international jurisdiction and recognition and enforcement. These topics are excluded from the Brussels I Regulation, and not regulated in other specific regulations, such as the Brussels II-bis Regulation. It must be noted that the Rome III Regulation on the law applicable to legal separation is currently limited to 15 Member States, and is therefore not a full harmonisation. In the area of family law, the CJEU case law on freedom of movement and Union citizenship has influenced domestic private international law rules, and has to a limited degree resulted in harmonisation: notably, in the area of name law, regarding the right to a double-barrelled surname composed of the surnames of both the father and the mother in cases of dual nationality or residence in a country where this is not allowed.⁵⁶ Insofar as areas are already covered by conventions of the Hague Conference for some or most of the Member States, such as is the case for inter-country adoption, a close collaboration with the Hague Conference is required.⁵⁷ In relation to the protection of adults, reference can be made to the adoption of Regulation No 606/2013 on mutual recognition of protection measures in civil matters.

⁵⁵ Convention on the Law Applicable to Agency, 1978; Convention on the Law Applicable to Trusts and on their Recognition, 1985.

⁵⁶ CJEU 2 October 2003, Case C-148/02, ECR I-11613 (Garcia Avello); CJEU 14 October 2008, Case C-353/06, ECR I-07639 (Grunkin Paul).

⁵⁷ See the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Reference may also be made to the 1978 Convention on Celebration and Recognition of the Validity of Marriages, though only two Member States (and one third country) have ratified this Convention.

A possible systematic gap that was addressed particularly in the briefing note regards collective redress.⁵⁸ In 2013, the Commission adopted a Recommendation, setting out common principles for collective redress.⁵⁹ The question, however, remains as to whether the current framework of jurisdiction rules and conflict rules of the Brussels I, Rome I, and Rome II Regulations are adequate to address the particularities of collective redress.⁶⁰

Finally, the legislative framework lacks a system of general rules of private international law. Most national codifications contain a general part, including inter alia rules on the application of conflict of law rules and foreign law, public policy, overriding mandatory law, specific connecting factors (e.g. habitual residence), and renvoi. The regulations focus on specific areas of law, and include only incidental general rules. This has resulted in incoherence and the recurrence of rules on general topics. Several general topics of private international law, including the application of conflict of law rules and foreign law, characterisation (qualification) or double nationality are not addressed at all or only incidentally.

4.2.2. Towards a European Code on Private International Law?

The expanding framework of European private international law has also raised the question of whether a more comprehensive framework or code on private international law is needed. In recent years, the topic of such a code and a general part of private international law (referred to as 'Rome 0 Regulation') has attracted academic attention. Several conferences, books, and other publications have been dedicated to this theme.⁶¹ Scholars that have published on this topic often express a positive view with regard to the idea of a code of private international law, though in general experts are reserved as to the feasibility and desirability of establishing such code in the short term.

A preliminary question that arose during discussions with the international expert group for the 2012 study involved what should be understood by a 'code' or 'codification'. This concept differs per Member State, and in a Union with 28 Member States, including common-law countries and mixed systems, its meaning may not be immediately understood or appreciated. Moreover, it should be pointed out that codification in the EU context is different from what is traditionally understood by it in civil law countries. In the Interinstitutional Agreement of 1994,⁶² it is described as 'the procedure for repealing the

⁵⁸ Briefing note (footnote 2), p. 12.

⁵⁹ Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ 2013, L 201/60. See also the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions: Towards a European Horizontal Framework for Collective Redress, COM (2013) 401/2 final.

⁶⁰ See inter alia Astrid Stadler, 'The Commission's Recommendation on common principles of collective redress and private international law issues', *Nederlands International Privaatrecht* 2013, p. 483-488; Xandra Kramer, 'Securities Collective Action and Private International Law Issues in Dutch WCAM Settlements: Global Aspirations and Regional Boundaries', *Global Business & Development Law Journal* 2014, p. 236-279.

⁶¹ See in particular Marc Fallon, Paul Lagarde and Sylvaine Poillot Peruzzetto (eds.), *Quelle architecture pour un code européen de droit international privé?*, Peter Lang, 2011; Stefan Leible and Hannes Unberath (eds.), *Brauchen wir eine Rom 0-Verordnung? Überlegungen zu einem Allgemeinen Teil des europäischen IPR*, Jena 2013; Martin Czepelak, 'Would we like to have a European Code of Private International Law?', *European Review of Private Law* 2010, p. 705-728; Paul Lagarde, 'Embryon de Règlement portant Code européen de droit international privé', *RabelsZ* 2011, p. 671-676; Eva Kieninger, 'Das Europäische IPR vor der Kodifikation?', in: *Festschrift Von Hoffmann, Grenzen überwinden – Prinzipien bewahren*, 2012, p. 184-197; Stefan Leible and Michael Müller, 'A general part for European private international law? The idea of a 'Rome 0 Regulation'', *Yearbook of Private International Law* 2012/2013, p. 137-152; Stefan Leible, 'Auf dem Weg zu einer Rom 0-Verordnung? – Plädoyer für einen Allgemeinen Teil des europäischen IPR', *Festschrift Dieter Martiny*, Mohr Siebeck 2014, p. 429-448.

⁶² Accelerated working method for official codification of legislative texts, Interinstitutional agreement of 20 December 1994, 96/C 102/02.

acts to be codified and replacing them with a single act containing no substantive change to those acts'.

Advantages that are generally, particularly in civil law countries, attributed to a code or codification include the fact that it will benefit systematisation of the law and avoid recurring rules, and, since general provisions apply to all specific areas it increases the transparency and accessibility of the law. Within the expert group, there was no common consensus on whether a genuine European code of private international law was necessary or desirable, and doubt was expressed on whether the Member States would be in favour of a more far-reaching codification. In view of the special position of the United Kingdom and Ireland, and the required unanimity in regard to family law instruments, pushing the idea of a code in the short term might lead to more fragmentation. It was concluded that the best way forward for the short and medium term would be to gradually fill the existing gaps in separate instruments, while a more comprehensive codification or genuine code could be considered as a long-term option.

4.2.3. Connected cost analysis

A Cost of Non-Europe (CoNE) report with regard to the European code on private international law of 2013, building on the expertise of GHK,⁶³ estimated that the costs of the identified gaps was close to 140 million per annum.⁶⁴ Reference is made to the table below, included in the CoNE report.

⁶³ Nick Bozeat, GHK, Research paper on the perspective of having a European Code of Private International Law, 2013.

⁶⁴ See CoNE report 3/2013, p. 7 and Table 2. It explains that the costs have been calculated 'by summing up the volume of the economic activity per sector, then assuming a small percentage of problematic cases (those in which legal assistance is required), even though in reality problematic cases may be more numerous, and finally calculating the cost per problematic case for each one of the identified gaps'.

Table 1: Estimated Cost of Non-Europe per annum (CoNE report, 2013)

Gap	CoNE (€ million)
Legal Capacity	7,5
Incapacity	16,8
Names and forenames	2
Recognition of de facto unions	8,7
Recognition of same-sex marriages	4,2
Parent-child relationships	19,3
Adoption decisions	1,65
Maintenance of de facto unions	13,1
Gifts and trusts	5,6
Moveable and Immovable property	5,56
Agency	14
Privacy	1
Corporations	38,3
Total	137,71

Source: GHK; CoNE report 2013/3, Table 2, p. 7.

Additionally, this report refers to the qualitative benefits of a code, in particular transparency, simplification, legal clarity, certainty, and a reduction in paperwork.⁶⁵

5. MAPPING OPTIONS FOR FUTURE INITIATIVES

5.1. Policy options: completion, consolidation, codification, and modification

For the purpose of advancing European private international law, several courses of action can be distinguished. These may be captured by the terms completion, consolidation, codification, and modification.

Ad hoc completion of the framework. A first option would be to complete the existing framework of regulations gradually, by addressing the identified gaps (Section 4.2.1) one at a time in separate instruments.

⁶⁵ CoNE report 3/2013, p. 10-12.

Consolidation of existing instruments. A second option is to consolidate relating existing instruments into a single instrument without any change to the substance, with the aim of reducing the number of instruments and increasing accessibility.

Codification into a more comprehensive framework. A third option is the further codification of European private international law, through consolidating existing instruments, repealing instruments, aligning the contents of the instruments and taking into account other instruments and case law.⁶⁶

Modification by way of a European Code of Private International Law (ECPIIL). A fourth option, which has also been addressed in earlier studies (Section 4.2), is to take the completion and codification of the legislative framework a step further by establishing a structured framework in a single act (code).

These four policy tracks are not mutually exclusive. In part they overlap and are complementary, and actions may be undertaken simultaneously or consecutively. For example, while completing the framework by filling some or eventually all existing gaps, other instruments may be consolidated. Consolidation and codification are closely related, and none of these three options exclude the possibility that in the longer term a structured framework or code might be considered.

It goes without saying that the European Parliament has an important role to play in each of these options, either as part of the ordinary legislative procedure (Article 81(1) TFEU), by way of its consultative function (Article 81(3) TFEU), or by putting forward own-initiative resolutions (Article 255 TFEU). Further in-depth research may be required on the different aspects of these options, inter alia with relation to the possibilities and usefulness of consolidation and further codification, and the means through which this can be established, as well as the feasibility, possible structure, and contents of a more integrated framework.

5.2. Policy perspective: post-Stockholm programme

In its Communication of March 2014 regarding the EU Justice Agenda for 2020, the Commission seeks to address the main challenges of strengthening of mutual trust, the mobility of citizens, and economic recovery and growth by the further consolidation, codification, and completion of EU legislation.⁶⁷ The Commission underlines that, first and foremost, the progress should be consolidated, with fundamental rights being upheld, and rights granted by EU legislation becoming a reality. To further mutual trust, the Commission provides financial support to training programmes. In addition, it stresses the need to develop information and communication technologies further to make justice more effective. In relation to codification in the area of civil and commercial matters, the Commission states that the EU 'should examine whether codification of the existing instruments could be useful, notably in the area of conflict of laws'.⁶⁸ It is not entirely clear what the Commission means by 'codification' and which instruments it considers belonging to the area of conflict of laws. Nevertheless, it is clear that the Commission believes a more comprehensive legislative framework to be an option.

⁶⁶ The terms 'consolidation' and 'codification' are not always used consistently, and they are in part interchangeable. For the present purposes, it seems useful to present these as separate though related options.

⁶⁷ European Commission, Communication EU Justice Agenda 2020 (footnote 24), point 4. See also Section 2.3.

⁶⁸ Commission Communication EU Justice Agenda 2020 (footnote 24), point 4.2.

In relation to the completion of EU legislation, the Commission does not mention particular initiatives but addresses in general the need to adjust to the dynamics of the mobility of citizens and businesses.⁶⁹ It emphasises that mutual trust requires justice systems to be independent, of a high standard, and efficient. Both parties' procedural rights should be protected, and the need to reinforce procedural rights should be examined, for example in relation to the service of documents and the taking of evidence, and in ensuring the best interests of the child family law matters. More concrete reference is made to removing obstacles to citizenship, for example, in relation to civil status records and family names.

In line with the Commission Communication, the Council Conclusions of June 2014 emphasise the priority of effective implementation and consolidation of the existing measures.⁷⁰ Specific reference is made to the reinforcement of rights of persons, and in particular of children in relation to the recognition and enforcement of judgments.⁷¹ This topic is of particular importance in view of the case law of the CJEU and the European Court of Human Rights (ECtHR) regarding the abolition of *exequatur* and the Brussels II-bis Regulation.⁷²

5.3. Current political and academic debates

The debate concerning the further development of European private international law is complex due to the substance and technicality of the matter, and is intertwined with discussions on EU competence, political feasibility, and the desirability of a more systematic EU intervention. These discussions take place against the background of the speed at which a widely encompassing legislative framework of European private international law has been established over the past fifteen years. It should be understood that these legislative achievements within such a relatively short time are unprecedented. Nearly twenty instruments in the field of private international law and related issues of judicial cooperation have been established, some of which underwent major amendments within five or ten years of their initial adoption. These developments have had a great impact on the existing national codifications and the established case law of the Member States. They have changed the face of private international law and the practice of cross-border litigation.

Private international law is also closely interwoven with substantive law. Particularly in fields of law where social or religious values and certain public policies play a part, the adoption of private international law measures is a long and difficult process. This is evidenced by, among others, the ongoing negotiations on the proposal on property consequences for registered partnerships, where several Member States have questioned the competence, and where discussions regarding the position of same-sex couples have arisen.

It is therefore not surprising that several Member States have become more reserved in the acceptance of new instruments. Reference, for instance, may be made to the position of the United Kingdom and Ireland in relation to recently adopted instruments, to the failure to obtain the required unanimity to adopt the Rome III Regulation on the basis of Article

⁶⁹ Commission Communication EU Justice Agenda 2020 (footnote 24), point 4.3.

⁷⁰ European Council Conclusions 26/27 June 2014, EUCO 79/14, Brussels, 27 June 2014. See also Section 2.3.

⁷¹ European Council Conclusions 26/27 June 2014, EUCO 79/14, Brussels, 27 June 2014, p. 6.

⁷² See in particular CJEU 10 December 2010, Case C-491/10PPU, ECR 2010, I-14247 (Aguirre Zarraga v. Pelz); CJEU 1 July 2010, Case C-211/10 PPU, ECR 2010, I-6673 (Povse v. Alpago); ECtHR 18 June 2013, Appl. No. 3890/11 (Povse v. Austria).

81(3), and to the troublesome negotiations on the currently pending proposals on matrimonial property, and even more so, registered partnerships.⁷³ The recast of the Brussels I Regulation has also led to intensive debates, and the proposed abolition of the public policy exception was not acceptable to the Member States.

Criticism is also voiced regularly in academic debates regarding the ever-expanding legislative framework, the speed at which new proposals are put forward without thorough research or a proper evaluation of existing instruments, and the lack of coherence. The majority of the consulted experts that provided input regarding the present paper expressed doubts as to the desirability and feasibility of a more encompassing codification (code) in the short term;⁷⁴ some even considered any new instrument to be inappropriate for the time being. Some of the experts were particularly sceptical about the idea of a Rome 0 Regulation for lack of political support, a common core, or EU competence, while another expert expressed concerns as to the justification provided by the Commission for proposed instruments.⁷⁵ One expert stressed the need to redefine the function of private international law in an integrated legal area, which differs from that of domestic private international law, as well as the need to study carefully the interaction with EU substantive law and third countries before embarking on new projects.⁷⁶

At the same time, it should be underlined that the academic debate on the development of European private international law is rich and diverse. In 2014, several conferences were organised, dedicated to the boundaries of and coherence in European private international law.⁷⁷ Several academic publications also express explicit support of the idea of a Rome 0 Regulation or a European code.⁷⁸ However, the prevailing view among scholars and other experts is that the process of new law-making should be at a slower pace, in order to allow for well-grounded legislation and evaluation, and to enable Member States and judicial practice to digest it.

5.4. Further exploration of policy options

5.4.1. Gradual completion of the framework

As discussed, recent EU policy documents express support for the completion of the existing legislative framework, though without expanding much on particular topics to address. The findings of the 2012 study identified which gaps exist in the current framework and which additions would be required to fill them (see Section 4.2.1). It is recommended to first complete the framework with regard to non-family law. These fields are the most closely connected to existing instruments, and to the functioning of the internal market, and can be adopted in accordance with the ordinary legislative procedure.

⁷³ Further reference can be made to the resistance met in relation to the proposal to amend the European Small Claims Regulation, and to a lesser extent, the proposal on the acceptance of public documents. See Sections 3.1 and 3.3 for a status overview of adopted instruments and pending proposals.

⁷⁴ See footnote 6. Specific input was given on this point by Andrew Dickinson, Stéphanie Francq, Francisco Garcimartín, Jan von Hein, Symeon Simeonides, and Geert Van Calster. For a careful approach, see inter alia Jan von Hein, *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB, Band 10: Internationales Privatrecht*, EGBGB, Art. 3, paras. 69-74 (sixth edition, 2014, proofs kindly provided by the author).

⁷⁵ On the last point mentioned, see inter alia Geert Van Calster, 'To unity and beyond? The boundaries of European Private International Law and the European *Ius Commune*', in Alain Verbeke et al. (eds.), *Liber Amicorum Walter Pintens*, Intersentia 2012, p. 1459-1485.

⁷⁶ Initial thoughts on these topics were provided to this paper's author by Stéphanie Francq.

⁷⁷ Inter alia a seminar on the 'Boundaries of European Private International Law' (Barcelona) and a conference on 'Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union' (Freiburg).

⁷⁸ See also Section 4.2.2 and footnote 60. Several of the publications listed also express doubts as to the competence.

One of the current priorities should be company law, as was also remarked upon by several of the experts consulted for the present paper. The series of CJEU cases involving free movement have already had an impact on domestic private international law, and did not contribute to consistency in this area.⁷⁹ This topic has already been picked up by the Commission (see Section 3.3). It is recommended to consider the topic of agency in the context of the evaluation of Rome I, taking into account the Hague Agency Convention. Trust is not considered to be a topic that requires immediate attention; reference is made to the possibility of acceding the Hague Trust Convention. The topic of privacy and personality rights will be one of those addressed in the evaluation of Rome II.

Gaps in the area of family law will be difficult to tackle in the short term, as the required unanimity and the differences in substantive law (e.g. with regard to same-sex couples) pose difficulties. The procedure of enhanced cooperation is available, and has the advantage that it enables the establishment of instruments, which will at least harmonise the rules for part of the EU. However, it has rightfully been pointed out that this legislative technique results in a two-speed Europe, and consequently in further fragmentation.⁸⁰ For this reason, it should be applied only as ultimum remedium, where agreement on a highly necessary measure is not feasible. Several topics require special attention in the near future, as was also pointed out by some of the consulted experts. This is especially the case for names of persons and status, as a result of the development of CJEU and ECtHR case law. For some of the gaps identified in the area of family law, Hague Conventions are in place (e.g. adoption), and in any case close collaboration with the Hague Conference is recommended.

A topic mentioned by one of the consulted experts concerns the protection of human rights violations, which has recently also been addressed by the International Law Association (ILA).⁸¹ This ties in with the EU fundamental rights policy and the importance of the EU Charter on Fundamental Rights. Another consulted expert referred to the discussions on transnational collective bargaining and transnational agreements, studies for which have been prepared for the EP Committee on Social Affairs.⁸² These also raise complex questions regarding private international law.

In the area of civil procedure relating to civil and commercial matters, the private international law aspects of collective redress require attention.⁸³ A topic that was triggered particularly by the Brussels I recast is the application to third countries;⁸⁴ this is an issue that would require attention throughout the framework.

5.4.2. Consolidation and codification: the search for coherence

In order to reduce the number of sources, with the aim of increasing the framework's accessibility, transparency, and efficiency, the merging of existing instruments may be

⁷⁹ See Jan von Hein, *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB, Band 10: Internationales Privatrecht*, EGBGB, Art. 3, paras. 90-116 (sixth edition, 2014, proofs kindly provided by author).

⁸⁰ See Katharina Boele-Woelki, 'To be, or not to be: enhanced cooperation in international divorce law within the European Union', *Victoria University Wellington Law Review* 2008-2009, p. 779-792 at 791; Aude Fiorini, 'Which legal basis for family law? The way forward', briefing note European Parliament, November 2012.

⁸¹ Input on this point provided by Catherine Kessedjian. See Resolution No 2 /2012 on International Civil Litigation and the Interests of the Public, adopted at the 75th Conference of the International Law Association, Bulgaria, August 2012. See also the extensive report by ICAR, prepared by Gwynne Skinner, Robert McCorquodale, Olivier De Schutter, Andie Lambe, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business', 2013.

⁸² Input provided by Ulla Liukkunen. See inter alia Werner Eichhorst, Michael J. Kendzia, Barbara Vandeweghe, 'Cross-border collective bargaining and transnational social dialogue', Study European Parliament, June 2011.

⁸³ See also Section 4.2.1 and footnote 59.

⁸⁴ See also Section 4.1; a further report has been requested by the European Parliament.

considered. An obvious example would be the consolidation of the Rome I and Rome II Regulations, which are complementary and interconnected (see e.g. Article 12 Rome II on pre-contractual liability). The advantage would be that in the case where claims are based on both contractual and non-contractual liability, or where there is doubt about the legal basis of the claim, only one source needs to be consulted. Additionally, the recurring provisions on the material scope, choice of law, overriding mandatory rules, renvoi, and public policy can be consolidated. However, it should be noted that there are differences between the two sets of rules on some of these topics. Moreover, there is no indication that in practice these different sources create serious obstacles. The merger of instruments in the area of family law and succession may also be considered. However, this would be more complicated because of the distinct scope and subject matters they cover. Furthermore, not all Member States take part in these instruments. Apart from the legislative and competence issues, putting the different instruments together in one private international law act, possibly complemented by a 'table of contents' by way of a roadmap, without further changes, would not be a substantial improvement.

What appears to be more important is to focus on a horizontal coherence between the different instruments, which may require adaptations regarding the contents. Similar questions are dealt with differently in the various instruments. To some extent this is inherent to the nature of the subject matter, and the differences are often simply the outcome of political compromises. Nevertheless, in the course of evaluating the instruments, the compatibility and effectiveness of the different rules may be (re)considered (e.g. on renvoi, overriding mandatory rules, and multilateral States).

In relation to Rome I and Rome II, the compatibility with substantive law instruments, such as the directives on consumer law and e-commerce, requires attention.⁸⁵ In the area of family law, in particular Rome III, coherence with CJEU case law on EU citizenship is currently required. Another thorny issue where alignment and a fundamental debate is needed regards parental responsibility and child abduction under the Brussels II-bis Regulation in relation to the Hague Child Abduction Convention and the case law of the CJEU and the ECtHR.⁸⁶

A topic that requires thorough deliberation on their internal coherence is the full range of instruments on civil procedure, particularly those containing rules on recognition and enforcement, and autonomous procedure. Two elements will be mentioned. Firstly, the rules on service are scattered over the various instruments that are in general not aligned, while interaction with the Service Regulation is not always self-evident. Secondly, different systems of recognition and enforcement exist, undermining coherence, and to a certain degree compromising the rights of the defendant.⁸⁷ These range from the classical exequatur system to a full abolition of exequatur without the possibility of invoking grounds of refusal, including public policy. The abolition of exequatur is balanced by either minimum

⁸⁵ See also the much debated case CJEU 25 October 2011, Joined Cases C- 509/09 and C- 161/10, ECR 2011, I-10269 (eDate Advertising and Martinez). On this topic, see also Xandra Kramer, 'The Interaction between Rome I and Mandatory EU Private Rules EPIL and EPL: Communicating Vessels?', in: Peter Stone and Y. Farah, Research handbook on European private international law, Elgar (forthcoming 2015).

⁸⁶ The literature is abundant. See inter alia Lara Walker and Paul Beaumont, 'Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice', *Journal of Private International Law* 2011, p. 231-249.

⁸⁷ On the diverging systems and the need to work on the area of recognition and enforcement, see Xandra Kramer, 'Cross-Border Enforcement in the EU: Mutual Trust Versus Fair Trial? Towards Principles of European Civil Procedure?', *International Journal of Procedural Law* 2011, p. 202-230; idem, 'Cross-Border Enforcement and the Brussels I-bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights', *Netherlands International Law Review* 2013, p. 343-373. Further input on the creation of a uniform system of recognition and enforcement was given by one of the consulted experts, Agnieszka Frckowiak-Adamska.

requirements of procedure, specific substantive requirements, or dependency on other requirements. Brussels I-bis (recast) takes a middle position by abolishing the exequatur procedure but retaining the grounds of refusal.

5.4.3. A European Code of Private International Law (ECPIIL)

An advantage that has been attributed to a genuine codification of European private international law is that it would increase coherence, accessibility, and efficiency. By adding a section including general provisions of private international law (in doctrine referred to as 'Rome 0 Regulation'), the framework could be completed. These general provisions would be applicable to all separate areas or sections of such a code, unless provided otherwise, and would avoid a repetition of rules. At the same time, the drafting of such a general section could provide European private international law with a better foundation, as well as guidance regarding the interaction with other areas of EU law, and the application and interpretation of EU private international law. As was already signalled in the 2012 study, and has been observed in scholarly publications, it is questionable whether for the short term there is sufficient political support to justify engaging in such a project. It would require extensive EU and Member State resources, diminish further the relevance of domestic codifications that are founded on standing traditions, and require additional investments on the part of judicial practice and businesses.

If a more encompassing codification or code were considered, the legislative form of a regulation would be most appropriate. The special position of the United Kingdom and Ireland, and other Member States with regard to Rome III, could be resolved by enabling an opt-in or an opt-out regarding the sections of such a code. The entire project could also be placed under the umbrella of enhanced cooperation, thus avoiding competence issues with regard to family law, though with the backlashes of creating a 'different-speed' Europe and considerable fragmentation.

Other obstacles or challenges would be the scope, structure, and contents of such a code. As regards scope, the question is whether such a code should include all three main questions of private international law – several national codifications are limited to the applicable law – as well as provisions regarding cooperation that are part of several regulations (e.g. Brussels II-bis and the Maintenance Regulation). The integration of partially overlapping and partially diverging provisions on, for example, international jurisdiction, recognition and enforcement, choice of law by the parties, and various types of judicial cooperation (including available forms) is extremely complex. It is fundamentally different from a national, 'one-sided' codification. The question would also be whether the instruments regarding various procedural law aspects (service, evidence) and those containing autonomous procedures (and private international law provisions) should be part of such a project. Inherent to the notion of scope is the question regarding the structure of such a code. While domestic codes and acts on private international law usually have a straightforward structure, including general provisions and specific provisions for the different fields of law (often along the structure of the domestic civil code, and sometimes integrated into that code),⁸⁸ this would not be readily transposable to a future ECPIIL.

As regards contents, apart from areas of law that are still not regulated, the desirable general part would pose serious challenges. Reference has already been made to the different approaches in the current regulations to renvoi, overriding mandatory law, and

⁸⁸ See also Symeonides (footnote 7), in particular p. 2-26.

multilateral states, to which the troublesome issue of double nationality can be added.⁸⁹ Another general topic of great importance to the harmonisation of European private international law is the application of conflict rules and foreign law. As of yet, the Member States' diverging approaches to this are hard to reconcile.⁹⁰

6. CONCLUSIONS: THE WAY FORWARD

Over the past 15 years, a wide comprehensive legislative framework of European private international law has been established. Currently, systemic gaps still exist in relation to, in particular, property; trusts; agency; corporations; marriage; registered partnerships and similar institutions; names of natural persons; adoption; parentage; and the status and capacity of natural persons. To these may be added the law applicable to privacy and personality rights, as well as specific rules that adequately address collective redress. General rules of private international law, which are often included as a separate part in national codifications, are also lacking, though incidental rules are included in the various regulations.

Apart from these gaps, deficits in European private international law include the fact that the framework is not coherent in all respects; that there are recurring rules; and that rules are scattered over many different sources, diminishing their accessibility for legal practice and citizens. This has also raised the question as to the desirability of a more integrated framework or a code of European private international law. The 2012 study and briefing note requested by the European Parliament addressed the question of whether such a framework was necessary and desirable. The conclusion was that a gradual approach to filling the gaps was most feasible, while a more comprehensive codification or code could be considered only as a long-term option. A cost-analysis carried out in 2013 concluded that close to 140 million Euro per annum could be saved by completing the framework in accordance with the identified gaps.

For the purpose of advancing European private international law, particularly with the aim of achieving a more comprehensive framework, the current paper distinguishes four possible courses of action. These are: 1) an ad hoc completion of the framework; 2) the consolidation of existing instruments; 3) the codification into a more comprehensive framework; and 4) the creation of a European Code of Private International Law (ECPIL). These policy tracks are not mutually exclusive; they overlap in part, and are complementary. These courses of actions may be pursued simultaneously or consecutively.

In the gradual completion of the legislative framework, non-family topics should be prioritised for reasons of feasibility. The harmonisation of the applicable law and recognition of companies is one of the priorities, and has already been picked up by the Commission. Gaps in the area of family law will be difficult to tackle in the short term, due to the required unanimity and the persisting fundamental differences in the laws of the Member States. In view of the existing Hague Conventions in several fields, collaboration with the Hague Conference on Private International law is required. As a result of CJEU and ECtHR

⁸⁹ As was also remarked upon by the consulted experts Garcimartín and Von Hein. Reference can also be made to the activities of the Groupe européen de droit international privé (GEDIP) in this area. See Marc Fallon, Patrick Kinsch, and Andreas Kohler (eds.), *Le droit international privé européen en construction* (Building European Private International Law. Twenty Years' Work by GEDIP), Intersentia 2011. See also www.gedip-egpil.eu.

⁹⁰ See for an extensive comparative study inter alia Carlos Esplugues, José Luis Iglesias and Guillermo (eds.), *Application of foreign law*, Sellier 2011.

case law, especially the topics of names and status of natural persons have become more pressing.

Consolidation and codification are of particular importance to increase the framework's accessibility and coherence. The simple merging of several instruments, notably Rome I and II, is an option to reduce the number of instruments and to avoid recurring rules. However, it should be noted that the general provisions in both regulations are not identical, and that as yet there is no clear indication that judicial practice is hindered by their co-existence. In the area of family and succession law, consolidation by way of integrating existing instruments is far from easy in view of the different scopes, contents and non-application of certain instruments in several Member States. It is of great importance to reconsider the horizontal coherence between different instruments, among others with regard to the recognition and enforcement of judgments, as well as to the interaction with substantive law directives, Treaty rules, and CJEU and ECtHR case law.

The establishment of a genuine European Code of Private International Law appears not to be feasible in the short term. It is doubtful whether there is currently sufficient political support for such a project. Several more recent instruments and proposals have raised considerable debate, and the required unanimity for family law measures is an obstacle. Enhanced cooperation is an option, but has the backlash of increasing fragmentation in the EU. The creation of a comprehensive framework or code also poses challenges with regard to its scope, structure, and contents. The existing instruments address different questions concerning private international law, ranging from only the applicable law to the inclusion of all three topics relating to private international law as well as general judicial cooperation. To some extent, the instruments also demonstrate a different approach to general topics of private international law (e.g. renvoi, overriding mandatory rules), while other general issues regarding private international law are difficult to regulate for lack of a common core (e.g. dual nationality, application of foreign law).

For short- and mid-term purposes, most appropriate would be to complete the framework gradually by addressing the most important topics one at a time, combined with consolidation and codification measures. An important focus should be the proper implementation and application in the Member States, as well as an evaluation of the effects of the instruments in legal practice. Once the framework is completed, a more comprehensive and well-grounded framework or code can be considered a viable option.

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EUROPEAN INTELLECTUAL PROPERTY LAW: WHAT LIES AHEAD

Prof. Lionel Bently¹,

Centre for Intellectual Property and Information Law at the
University of Cambridge, United Kingdom
and

Alfred Radauer²
Technopolis Group, Austria

Abstract

Upon request by the JURI Committee, this note aims at describing the economic and legal rationale for patents, trade marks, copyrights and trade secrets, the major past developments and outline the issues ahead for the new European Parliament. Apart from instrument-wise views, we discuss also IPR issues in the field of enforcement and international treaties.

¹ Professor Lionel Bently is the Director of the Centre for Intellectual Property and Information Law at the University of Cambridge. He is an expert in all fields of intellectual property law (copyright, designs, trade marks, trade secrets, patents and geographical indications.) He is the co-author of the textbook *Intellectual Property Law* (with Brad Sherman) (3rd ed. OUP, 2008), and has written widely on aspects of UK and European Intellectual Property. He has been heavily involved in policy work at a national and Europe wide level. He was on the UK Copyright Expert Panel of the Strategic Advisory Board on Intellectual Property (2008-10); was part of the "Wittem Group" of Copyright Scholars who worked up a proposed "European Copyright Code" (2005-2010); or wrote a briefing document on issues facing freelance creators in the UK media marketplace for the Creators' Rights Alliance (2002). Furthermore, Lionel also led a team of internationally-rated professors for a project for the World Intellectual Property Organisation On Exclusions from Patentability and Exceptions to Patentee's Rights (2010), presented in October 2010 to the Standing Committee on Patents. He has spoken to the JURI Committee of the European Parliament on the issue of Copyright Term Extension (2008). Prof. Bently is also a qualified barrister, and a door tenant at 11 South Square, Gray's Inn, London.

² Alfred Radauer joined Technopolis Group in 2008, after having worked before (since 1999) at the Austrian Institute for SME Research. He specialised in evaluations and policy studies in an innovation context, and here particularly in IPR. Amongst others, he created several studies such as on how to set up IPR support programmes for SMEs; executed the latest and most profound survey on patent licensing in Europe or on counterfeiting and piracy in an transatlantic context. He has been repeatedly hired to conduct economic background analyses on patents and inventions nominated for the European Inventor Award (organised by the EPO). Currently, he is executing conducting a study on the impact of utility models on innovation in Europe (for the EC, DG IM) as well as an assessment of the costs of a European patent for the EPO. For the European Parliament, Alfred executed two IPR related studies for STOA, one on a future IPR strategy for Europe and one on next steps in European copyright law. Alfred is fluent in German, Romanian (mother tongue) and English (education at the American International School, Vienna) and has a working knowledge of French.

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LIST OF ABBREVIATIONS

European Legislation in the Field of Intellectual Property

Biotech. Dir.	Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions
BMR	Regulation (EU) No. 608/2013 of the European Parliament and of the Council concerning Customs enforcement of intellectual property rights and repealing Council Regulation (EC) 1383/2003, OJ L 181/15 (29 June 2013)
Brussels I Reg.	EC Regulation 44/2001 of 22 December 2000 on Jurisdiction and the recognition and enforcement of Judgments in Civil and Commercial Matters
CDIR	Commission Regulation (EC) No. 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No. 6/2002 on Community designs
CDR	Council Regulation (EC) No. 6/2002 on Community designs
Chip Dir.	Council Directive 87/54/EEC of 16 December 1986 on the legal protection of semiconductor products
CM Dir.	Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72 (20 March 2014)
CPVR	Council Regulation (EC), No. 2100/94 of 27 July 1994 on Community Plant Varieties

CTMIR	Commission Regulation (EC), No. 2869/95 of 13 December 1995, implementing Council Regulation (EC), No. 40/94 on the Community Trade Mark
CTMR	Council Regulation No. 207/2009/EC of 26 February 2009 on the Community Trade Mark (which replaced Council Regulation (EC), No. 40/94 of 20 December 1993 on the Community Trade Mark)
Database Dir.	Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases
Designs Dir.	Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs
Duration Dir.	Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) (repealing and replacing Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights)
Electronic Commerce Dir.	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular Electronic Commerce in the Internal Market
Enforcement Dir.	Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights
Info. Soc. Dir.	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society
MCAD	Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning Misleading and Comparative Advertising (repealing Directive 97/55/EC)
OWD	Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, OJ L 299/5 (27 October 2012)
Related Rights Dir.	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 (codified version (replacing Council Directive 92/100/EEC of 19 November 1992 on rental and lending right and on certain rights related to copyright in the field of intellectual property)

Resale Right Dir.	Directive 2001/83/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art
Satellite Dir.	Council Directive 93/98/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
Software Dir.	Council Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs (codifying Council Directive 91/250/EEC of 14 May 1991)
SPC (MP) Reg.	Council Regulation (EEC), No. 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products
SPC (PPP) Reg.	Council Regulation (EC), No. 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products
TM Dir.	Directive No. 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the Laws of the Member States Relating to Trade Marks (replacing Council
Translation Reg.	Council Regulation (EU) No. 1260/2012 of 17 Dec. 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.
Unitary Patent Reg.	Council Regulation (EU) No. 1257/2012 of 17 Dec. 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection.

International Treaties

Brussels	Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1968
EPC	Convention on the Grant of European Patents, at Munich, 5 October 1973
EPC Revision Act	Act Revising the Convention on the Grant of European Patents (EPC), Munich, 29 November 2000, MR/3/00 Rev. 1e
GATT	General Agreement on Tariffs and Trade
Hague	Geneva Act of the Hague Agreement Concerning the International Deposit of Industrial Designs, 1999

Madrid	Madrid Agreement Concerning the International Registration of Marks of 14 April 1891
Madrid Prot.	Protocol Relating to the Madrid Agreement, adopted at Madrid on 27 June 1989
Rome	International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, Rome, 26 October 1961
TEU	Treaty Establishing the European Union
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights 1994
UPC Agreement	Agreement on a Unified Patent Court C 175/1 (20 June 2013) OJEU 1.
UPOV	International Convention for the Protection of New Varieties of Plants of 2 December 1961 (latest revision 19 March 1991)
WCT	WIPO Copyright Treaty adopted by the Diplomatic Conference on 20 December 1996
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty adopted by the Diplomatic Conference on 20 December 1996
WTO	World Trade Organization

EXECUTIVE SUMMARY

Introduction

This note aims to describe the economic and legal rationale for patents, trade marks, copyrights and trade secrets, the major past developments and outline the issues ahead for the new European Parliament 2014-2019. Apart from instrument-wise views with respect to patents, trade marks, copyrights and trade secrets – chosen for the significance that these instruments are likely to play in the 2014-2019 Parliament – we discuss also IPR issues in the field of enforcement and international treaties.

Intellectual Property Rights (IPR) as a whole

IP law creates exclusive rights in a wide range of things from, amongst others, novels, computer programs, technical inventions to dress designs. However, IPR is not a single body of law. There are different areas, the most typical being copyright law, patent law, the law of designs and trade mark law. The adjective 'intellectual' is regarded as descriptive of the character of some of the material that this area of law regulates, namely some of the products of the human mind or 'intellect'. The designation 'property' is said to describe the form of regulation, that is, primarily the grant of individual exclusive rights that operate in a manner similar to private property rights over tangibles. Neither component is, however, uncontroversial.

There is little doubt, though, that the system of IPR is important for the EU economy. A recent study by the European Patent Office, for example, claims that IPR-intensive industries have generated 26% of all jobs in the EU during the period of 2008 to 2010 and accounted for 39% of EU GDP. Notwithstanding this general significance of IPR, there is a considerable debate as to the extent IPRs support or even inhibit economic development, innovation or freedom of expression. Too strong IPR protection may reinforce the status of incumbent industries and hinder downstream innovation. One important key for successful IPR legislation is therefore the ability to strike the right balance between the interests of right holders, any third parties as well as the general public.

Patents

Patents offer exclusive rights for up to 20 years over inventions that are new and non-obvious technological development, industrially applicable and not part of a list of subject matters that are by definition not patentable. In return for the exclusive rights, inventors have to disclose the secrets behind their inventions and pay application and renewal fees to the patent office. The idea behind the patent is therefore some form of 'social' contract between society and an inventor: The patent acts as an incentive to disclose otherwise secret information, thus making it available for the general public and third parties to generate follow-up innovations ('information function' of the patent system). Eventually, after the 20 year term of patent protection, the formerly secret information is part of the public domain and can be used freely. Within the 20 years where patent protection is granted, the original inventor has, through the monopoly rights provided, a means to recuperate his/her investment made into R&D. The assumption is that such R&D investments would have otherwise not been made.

The European Union has not been involved in the reform of patent law anywhere near as much as it has in relation to trade marks and copyright, primarily because the European Patent Convention has satisfied the commercial needs of industry. There have been many

attempts at establishing a Community-wide patent regime, but these efforts have – until the Parliament of 2009-2014 – come to nought.³ At present, in most E.U. countries, patents can be obtained by two distinct routes. First, inventors can apply directly to national patent offices for patents that only apply in the national territory. Second, a person can apply to the European Patent Office (EPO), which is based in Munich, for a number of national patents. In contrast with the OHIM, which grants European Union wide unitary designs or trade marks, the EPO only grants a series of national patents.

During the Parliament of 2009 - 2014, under the enhanced cooperation procedure, the majority of states agreed a 'unitary patent package', designed to establish and enforce a common unitary patent and introduce common patents courts. The unitary patent package consists of three elements: i) the EU Regulation creating a unitary European patent: Council Regulation (EU) No. 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (the 'Unitary Patent Reg.'), ii) the EU Regulation that deals with the vexed issue of the language to be used in the unitary patent and the corresponding translation requirements: Council Regulation (EU) No. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (the 'Translation Reg.'). Both of these Regulations entered into force in January 2013. The third and final part of the unitary patent package is the Agreement on a Unified Patent Court, signed by 25 participating member states on 19 February 2013 setting up a centralized patent court.

The key development in the Parliament of 2014 - 2019 will be the coming into force of the package. This requires first the required ratifications of the Agreement on the Court, because not until that comes into force will the Regulation allowing for the grant unitary patents come into operation. The Parliament will want to keep a close watch on developments and, if the patent package comes into force, on any initial problems that it encounters.

Trade marks

Trade marks are signs or symbols, usually words or pictures, which when used in trade in connection with particular goods or services indicate the commercial origin of the goods or services. A number of different rationales have been used to justify trade mark protection. While there have been few problems in justifying the protection given to signs and symbols insofar as they operate as indicators of origin (to identify the origin or ownership of goods to which the mark is affixed), or as guarantees of quality (to signify that all goods bearing the mark are of a certain quality), justifying the extensive protection that is currently granted to marks is more disputed.

There were two main actions taken in the past to harmonise registered trade marks in Europe. The Trade Marks Directive (adopted in 1988, and codified two decades later) was designed to approximate those national provisions of law that most directly affect the functioning of the internal market. The Directive therefore harmonized the general 'conditions for obtaining and continuing to hold a registered trade mark' and the rights conferred by a trade mark. The European legislature also adopted a Regulation establishing a Community Trade Mark (soon to be re-christened the 'European trade mark'). Adopted in 1994, this established the Office for Harmonization in the Internal Market (the OHIM) as an agency that could grant trade marks with EU-wide effect. The conditions an applicant must

³ Nevertheless the Union has passed important legislation relating to the duration of patents (via the Supplementary Protection Certificates scheme) and biotechnological inventions.

meet to be granted a trade mark, as well as the rights conferred by such marks, correspond in general to the rules in the Directive, but whereas some matters were left in the Directive to the discretion of Member states, the EU regime was necessarily obliged to adopt particular positions on those issues.

In 2013, two pieces of draft legislation were placed before the European legislature that would modify both the Regulation and Directive in a number of respects. These are: i) European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark, Brussels, 27.3.2013, COM(2013) 161. and ii) Proposal for a Directive of the European Parliament and of the Council to Approximate the Laws of Member States relating to Trade Marks (Recast), COM(2013) 162. The proposed Directive is intended to amend outdated provisions, increase legal certainty and clarify the scope of trade mark rights and limitations. The main goals of the proposal to amend the Regulation include updating the Regulation to accord with the terminology to the Lisbon Treaty, streamlining procedures to apply for and register a European trade mark and increasing legal certainty by clarifying provisions.

The Parliament voted on the various amendments in February 2014. In general it approved the Commission proposals, but made also suggestions for amendments. It is notable that Council proposes a number of similar changes to those proposed by the European Parliament. However, it has not incorporated the EP proposals on exceptions. This is therefore a topic which may need to be considered immediately by the Parliament.

Copyright

'Copyright' is the term used to describe the area of intellectual property law that regulates the creation and use that is made of a range of cultural goods such as books, songs, films, and computer programs. The various objects that are protected by copyright are usually described as 'works'. Copyright protection arises automatically (i.e., without registration or notice) and usually for the benefit of the author (though in many legal systems is assignable).

It is a commonplace amongst intellectual property commentators that the approach taken in common law countries to copyright is distinct from and in many ways in opposition to the approach taken in many continental European, civil law countries, which protect "author's rights". The common law copyright model is said to be primarily concerned with encouraging the production of new works. This is reflected in copyright law's emphasis on economic rights, such as the right to produce copies. In contrast, the civil law "author's rights" model is said to be more concerned with the natural rights of authors in their creations. This is reflected in the fact that the civil law model not only aims to secure the author's economic interests, but also aims to protect works against uses that are prejudicial to an author's spiritual interests (in particular through moral rights).

The existence of copyright in a particular work restricts the uses that can be made of the work. Not everyone thinks that copyright is a good thing. In fact, with the advent of the Internet, there are many who think that copyright unjustifiably impedes the development of new technologies or new application of existing technologies and stifles the public's ability to make the most of the new environment. Others consider that, while some aspects of copyright are justifiable, others are not. Typically the argument is that copyright law has gone too far. In response to these copyright sceptics or critics, four basic arguments are used to support the recognition (and further extension) of copyright: natural rights

arguments, reward arguments, incentive arguments, and arguments from democracy. The first argument refers to the reasoning that copyright protection is granted because it is right and proper to do so. More specifically, it is right to recognize a property right in intellectual productions because such productions emanate from the mind of an individual author. Related to natural rights arguments is the second view that copyright protection is granted because we think it is fair to reward an author for the effort expended in creating a work and giving it to the public. The incentive argument presupposes that the production and public dissemination of cultural objects such as books, music, art, and films is an important and valuable activity. It also presupposes that, without copyright protection, the production and dissemination of cultural objects would not take place at an optimal level because the production costs are high, while dissemination costs are rather low. A fourth justification for copyright is that it strengthens democracy. It does so by self-reliant authorship and robust debate.

In contrast with trade marks where a unitary EU right was created, accompanied by extensive harmonization of substantive law, in copyright a much more incremental approach was adopted. In part this was because national copyright traditions were very different, so that wholesale approximation of copyright law was thought to be impossible. Initially, the focus was on new technologies. This led to the formulation and passage of a series of directives on software, cable and satellite broadcasting, rental and lending rights and 'neighbouring rights', the duration of copyright, databases, the resale royalty right, and copyright in the 'information society'. While each of these directives concerned itself primarily with a specific aspect of copyright (that is, a specific type of subject matter or a specific right), the Directive on copyright in the Information Society concerned a series of rights and exceptions applicable to virtually all copyright works. The body of legal rules harmonized by the directives is often called the 'copyright acquis.'

After these Directives, Matters stalled until 2011, with the Commission increasingly talking about 'soft law', stakeholder dialogues, and 'memoranda of understanding', in preference to legislation. However, since 2011 three very narrow legislative interventions have occurred in relation to term of copyright in sound recordings, 'orphan works' and collective management.

Three legislative developments occurred in the preceding Parliament:

Term Amendment (for Sound Recordings and Performers Whose Performances are Embodied in Such Recordings) (2011)

Orphan Works Directive (2012)

Directive on Collective Management (2014)

In December 2012, the Commission announced that in addition to structured stakeholder dialogue, it would continue its review of the EU framework for copyright with a view to a decision in 2014 on whether to table legislative reform proposals. Various reviews of national law indicate that there is a real appetite in member states for reform, particularly with regard to exceptions. At the end of 2013, the Commission opened up these same questions to consultation. A White Paper is expected in the autumn of 2014.

In the short term, the focus is likely to continue to be on the scope of rights, exceptions and issues of enforcement. These might include clarification of some of the questions that the ECJ has been dealing with, such as hyperlinking and the location of various acts

(reproduction, making available) when they occur on the Internet. In the medium term, questions will need to be addressed on more thorny issues that have long divided the approaches of countries such as the UK from those of France and Germany: moral rights and copyright contracts. These topics will be particularly problematic because these are marked differences between different member states. In the longer term, Parliament will wish to consider the merits of full-scale harmonization and possibly the creation of a unitary European copyright. At present, the Commission consultation asks: "Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?" An academic group of copyright specialists, the Wittem Group, has sought to pave the way for such a development.

Trade Secrets

The term 'trade secret' refers to information that possesses commercial value because of its relative secrecy. That is, the possession of the information by one entity, as opposed to potential competitors, offers the possessor significant commercial advantage. The classic example of a trade secret is a secret recipe or formula for producing a marketable commodity that enables its possessor to produce the commodity more cheaply or makes the product more effective. But trade secrets are not confined to "technical trade secrets" and can include information about the sources of materials, customers, or relate to the administrative or organisational working of businesses themselves.

Empirical evidence suggests that businesses regard 'trade secrets' as important assets and rely heavily on such secrecy as part of their innovation strategies. Empirical surveys, according to a study authored by Arundel, "consistently show that manufacturing firms give secrecy a higher average rating [than patents] as an appropriation method for both product and process innovations."

Interestingly, though, there has been much less exploration of the justifications for offering legal protection of trade secrets than other aspects of intellectual property law. The few analyses indicate five possible justifications: to incentivise the creation of information; to reduce wasted expense on IP protection; to prevent unjust enrichment of one person at the expense of another; to preserve and promote ethical standards of conduct; as well as national economic interests. Arguments against trade secrets include that trade secrets undermine patent law's goal of incentivising disclosure of technical data; they may shield businesses and governments from justified scrutiny; and, eventually, they may endanger employee mobility.

Rules relating to trade secrets vary significantly from one country to another. In England, Scotland and the Republic of Ireland, trade secrets have typically been protected through a combination of contract law, labour law and the doctrine of "breach of confidence." In other European countries, protection of trade secrecy falls within the concept of "unfair competition." In some countries, the primary vehicle for protection of trade secrets has been the criminal law.

In November 2013, the Commission issued a proposal for a Directive based on Article 114 (the Internal Market). It would require Member states to offer protection against the unlawful acquisition, use and disclosure of trade secrets. There are voices, however, that "only a modest amount of harmonization is likely to ensue from implementation of this Directive". The Commission's proposal has been the subject of significant debate in Council, and has been subject to substantial modification.

Other aspects: enforcement and international activity

In the area of enforcement, a centrepiece of European legislation is the Enforcement Directive. With this Directive, the EU has sought to harmonize certain aspects of civil remedial law. The most important developments in relation to enforcement during the Parliament of 2009 - 2014 has been through the Court of Justice. One focus has been "intermediaries", particularly 'online intermediaries', such as service providers whose services support websites featuring infringing material, and those that offer their customers access to websites that themselves are infringing. In addition, the European Union has also adopted measures that regulate the external borders of the Union. The so-called 'Border Measures Regulation' of 2013 repealed and replaced an earlier Regulation from 2003. In 2012, using the European procedure then in place, there were more than 90,000 interceptions of goods, said to have a value of some Euro 1 billion, and the bulk of which (65 per cent) came from China. The most frequently seized goods were cigarettes (30 per cent), but 10 per cent was washing powder and 8 per cent of the goods seized were clothes. According to a recent Communication, the Commission is launching a new Communication on an Action Plan addressing Intellectual Property infringements in the EU.

In terms of international treaties the most high-profile development was the Anti-Counterfeiting Trade Agreement. In February 2012, there were widespread public protests. Ultimately, on 4 July 2012, the European Parliament rejected the ACTA 478 votes to 39, with 165 abstentions. Reflections of the Commission show that a common factor contributing to the failure of ACTA is that public concerns have not been sufficiently taken into account (for example with respect to fitness to the digital economy or impacts on fundamental rights). For the legislative period 2014 – 2019 there are a number of international developments on the table: multilaterally, a new treaty promoted by WIPO in relation to copyrights; some sort of instrument on exceptions to copyright for libraries and archives and educational institutions; and considerations with respect to possible systems of protection for so-called 'traditional cultural expressions', driven by WIPO. At the bilateral level, the EU is in the process of negotiating the so-called Transatlantic Trade and Investment Partnership (TTIP) with the US. The details of this are not yet publicly available, but the Parliament will want to examine this closely also in terms of IP rights. Other negotiations on trade agreements include those with Mercosur, Morocco, Japan, Thailand, and Vietnam. A bilateral agreement dealing with the protection of geographical indications is being mooted with China.

1. INTRODUCTION

1.1. Overview

We describe the economic and legal rationale for patents, trade marks, copyrights and trade secrets, the major past developments and outline the issues ahead for the New Parliament. Apart from instrument-wise views, we discuss also IPR issues in the field of enforcement and international treaties. The methodology for this report was desk review.⁴

The report is structured as follows:

- The remainder of chapter 1 discusses the general notion of IPR and outlines the major developments in Europe.
- Chapters 2, 3, 4 and 5 provide a detailed analysis for patents, trade marks, copyrights and trade secrets, respectively.
- Chapter 6 discusses IPR issues in the field of remedies and enforcement as well as in relation to international activity/international treaties.

1.2. What is Intellectual Property?

Intellectual property law creates exclusive rights in a wide and diverse range of things from novels, computer programs, paintings, films, television broadcasts, and performances, through to dress designs, pharmaceuticals, genetically modified animals and plants. Intellectual property law also creates rights in the various insignia that are applied to goods and services, ranging from NOKIA for mobile phones, to 'VORSPRUNG DURCH TECHNIK' for motor vehicles, and from the leaping horse logo associated with Ferrari motorcars to the colour orange for EASYJET air transport services.

Intellectual property law is not a single homogenous body of law. Rather the term is usually used to describe a number of areas of law, typically including copyright law, patent law, the law of designs and trade mark law, each of which have their own characteristics. The adjective 'intellectual' is regarded as descriptive of the character of some of the material that this area of law regulates, namely some of the products of the human mind or 'intellect'. The designation 'property' is said to describe the form of regulation, that is, primarily the grant of individual exclusive rights that operate in a manner similar to private property rights over tangibles. Neither component is uncontroversial. Certainly, not everything that this field of the law protects can be described as 'intellectual'. Moreover, there are those who question whether, whatever the legislators may say, these rights can really be called 'property rights' as opposed to 'monopolies' or 'rights to exclude'. Others worry that, by referring to these rights as 'property', particular attitudes are engendered that lead to their expansion.

The term 'intellectual property' has only been commonly used in this way for the last thirty or forty years. Nevertheless, in that relatively brief period it has become part of the basic legal vocabulary. Today, there are international treaties relating to 'intellectual property',⁵

⁴ Much of this report is based on material that will appear in L. Bently & B. Sherman, *Intellectual Property Law* (Oxford: OUP, 4th ed. 2014). Our thanks go to Brad Sherman and Oxford University Press for permitting this.

⁵ Most significantly, TRIPs, the Treaty on Trade Related Aspects of Intellectual Property Rights, an Annex to the World Trade Organisation Agreement (1994).

the European Parliament and Council has adopted directives concerning intellectual property and Article 17 of the European Charter of Rights and Freedoms even declares that 'intellectual property shall be protected.'⁶

Although widely deployed, there is little agreement on the precise coverage of the term 'intellectual property'. Most definitions have the character of lists – sometimes exhaustive, sometime open-ended. Nearly all definitions include 'copyright' and 'patents', and most include 'trade marks.' But matters become more difficult when the question becomes, for example, whether the protection granted over trade secrets or undisclosed information (including personal information), counts as 'intellectual property' or is better conceived as part of the regulation of unfair competition generally.

1.3. The Importance of Intellectual Property

There can be little doubt that the regulation of "intellectual property", through the provision of rights and exceptions, is important to the EU economy. A recent European Patent Office and OHIM Study (2013) claims that "IPR intensive industries are shown to have generated almost 26% of all jobs in the EU during the period 2008 2010, with almost 21% in trade mark intensive industries, 12% in design intensive industries, 10% in patent intensive industries, and smaller proportions in copyright intensive and GI intensive industries... Over the same period, IPR intensive industries generated almost 39% of total economic activity (GDP) in the EU, worth €4.7 trillion. They also accounted for most of the EU's trade with the rest of the world, with design intensive, copyright intensive and GI intensive industries generating a trade surplus."⁷

The importance of intellectual property in the EU economy means it is important that the EU legislators take particular care when intervening in this field. They are inevitably faced with a barrage of arguments from different sides. They must be conscious that the protection of intellectual property has a complex relationship with freedom of competition, and, ultimately consumer welfare. In many cases, intellectual property rights limit competition. They do so often in order to incentivise innovation, so as to generate "dynamic" competition. But it is important that intellectual property rights are not so strong that they merely reinforce the status of incumbent industries and inhibit downstream innovation. Similarly, intellectual property rights are important for freedom of expression. Authors are often only able to make financial returns on their expressive output if intellectual property rights secure them exclusivity. But intellectual property rights can often also be used to inhibit the expression of third parties. Freedom to quote from existing copyright works, to parody them, to refer to them through hyperlinking are also critically important for expression. The same is true of research and innovation: IP may be a significant enabler of investment in research, but it is critically important that IP rights do not end up inhibiting innovation. In this respect, it is worth noting a further observation of the European Commission in its Competitiveness Report: "if IPRs are handled too rigidly this raises the transaction costs of knowledge spillovers. For this reason, open access policies and a stronger use of Creative Commons' licences for intellectual copyrights may do more to foster the technological and legal basis of the creative industry

⁶ See Christophe Geiger, 'Intellectual Property Shall Be Protected: Art 17(2) of the Charter of Fundamental Rights of the EU: A Mysterious Provision with an Unclear Scope' [2009] EIPR 113.

⁷ EPO and OHIM, IPR intensive industries contribution to the Economic Performance and Employment in the European Union (2013).

business model.”⁸ Given these tensions, the European legislator is called upon to make critically important judgments about the strength of intellectual property rights and the scope of limitations on them. These judgments are not made any easier by the intense lobbying that now surrounds IPRs. To sum up, legislators in the field of IPR must always make decisions that should strike for the best possible balances between the interests of the various actors involved in the IPR system (i.e., the right holders, third parties and the general public).

1.4. Why Protect Intellectual Property?

Despite the widespread use of the term “intellectual property”, intellectual goods have characteristics that make them different from more familiar resources, such as land or tangibles, that are subject to property rights.

The justifications that have been given for intellectual property tend to fall into one of two general categories. First, commentators often call upon ethical and moral arguments to justify intellectual property rights. For example, it is often said that copyright is justified because the law recognizes authors' natural or human rights over the products of their labour. Similarly, trade mark protection is justified insofar as it prevents third parties from becoming unjustly enriched by ‘reaping where they have not sown’. Viewed in terms of ‘inherent’, ‘human’ or natural rights, ‘intellectual property’ needs to be recognised with other fundamental rights and freedoms, sometimes called ‘intellectual liberties’: the freedom to pursue business, freedom of expression, the right to education and healthcare.

Alternatively, commentators often rely upon instrumental justifications that focus on the fact that intellectual property induces or encourages desirable activities. For example, the patent system is sometimes justified on the basis that it provides inventors with an incentive to invest in research and development of new products, or an incentive to disclose valuable technical information to the public, which would otherwise have remained secret. Similarly, the trade mark system is justified because it encourages traders to manufacture and sell high-quality products. It also encourages them to provide information to the public about those attributes. Instrumental arguments are typically premised on the position that without intellectual property protection there would be under-production of intellectual products. This is because, while such products might be costly to create, once made available to the public they can often be readily copied. This means that (in the absence of rights giving exclusivity) a creator is likely to be undercut by competitors who have not incurred the costs of creation. The inability of the market to guarantee that an investor in research could recoup its investment is sometimes called ‘market failure.’ If intellectual property is justified by reference to these sorts of arguments, the rights that the legislature is justified in granting is the minimum necessary to overcome the market failure.

⁸ European Competitiveness Report (2010). Note also, Communication from the Commission, Trade, growth and intellectual property - Strategy for the protection and enforcement of intellectual property rights in third countries, COM(2014) 389 final, 12, stating that it “is also important to ensure that the IP framework remains flexible enough to facilitate, rather than obstruct, the capacity for digital technology to deliver growth while at the same time stimulating innovation.”

1.5. The EU Activity to Date (in Outline)⁹

In its early years, European intervention in intellectual property law largely came through two avenues. First, the judicial interpretation of the Treaty of Rome produced various doctrines that limited the operation of national intellectual property laws in the European Union. In addition, the Commission also played a role in policing various competition law aspects of the Treaty that had an impact on intellectual property law. However, for the last twenty years or so, most of the important interventions have been legislative in nature. In particular, there have been moves to centralize the administration of intellectual property rights and to harmonize national laws.

Exhaustion of Rights (and Its Limits)

In the 1970s and 1980s, much of the influence of the European Community in the field of intellectual property law was a consequence of the interpretation of (what is now) Articles 34 and 36 TFEU.¹⁰ These two provisions reflect the desire to establish an ‘internal market’, that is a single European market with no internal frontiers or national barriers to trade. To this end, Article 34 TFEU prohibits ‘quantitative restrictions’ on trade and provisions ‘having equivalent effect’.¹¹ While the use of intellectual property rights to prevent the importing of goods from one European Union country into another would be a ‘quantitative restriction’, Article 36 TFEU permits such restrictions where they are necessary to protect industrial and commercial property. This is conditional on the fact that such restrictions do not ‘constitute a means of arbitrary discrimination or a disguised restriction on trade between member states’.

While Articles 34 and 36 TFEU appear to be contradictory, the two provisions were reconciled by permitting the maintenance and use of different national intellectual property laws, while simultaneously limiting the negative effects of the territorial nature of such rights through the so-called ‘doctrine of exhaustion’.¹² This prohibits an intellectual property right owner from utilizing their rights to control the resale, import, or export of any goods that have been placed on the market in the European Union by or with their consent. For example if A, who has acquired a patent in France and the United Kingdom over a particular machine, sells a machine in France, they cannot use their UK patent rights to prevent importing of the machine into the United Kingdom. This is based on the idea that the ‘first sale’ gives the intellectual property owner the reward that constitutes the ‘specific subject matter’¹³ of the right. It is irrelevant that the patentee expressly prohibited the purchaser from reselling the machine or exporting it. This is because it is the consent to first sale that is important.¹⁴ As the doctrine of exhaustion facilitates the ‘parallel

⁹ See C Geiger (ed.), *Constructing European Intellectual Property: Achievements and New Perspectives* (2012); C Seville, *EU Intellectual Property Law and Policy* (2009); G Tritton et al, *Intellectual Property in Europe* (3rd ed, 2008); T Cook, *EU Intellectual Property Law* (2010).

¹⁰ Formerly Arts 28 and 30 EC, and before that Arts 30 and 36 of the Treaty of Rome.

¹¹ Art. 56 TFEU (formerly Art 49 EC and before that Art. 59 of the Treaty) makes similar prohibition on restrictions on freedom to provide services.

¹² In this context, the national and territorial nature of the rights refers to the essential separateness and distinctiveness of each right—for example, the idea that a copyright owner in France and the UK has two separate French and UK copyrights. It was thought to follow from this that consent to distribution in France could in no way affect the exercise of the separate UK copyright. The doctrine of exhaustion does not change the distinctness of the two national rights (so, for example, each might be assigned separately to different persons). Rather, it limits the scope of each national law where the rights are in common control.

¹³ *Ibid*, (defining the specific subject matter of patents and trade marks).

¹⁴ *Dansk Supermarked A/S v. Imerco A/S*, Case C-58/80 [1981] ECR 181.

importation' of goods within the European Union, it operates to minimize price differentials for identical goods between countries in the European Union.¹⁵

While the doctrine of exhaustion has reduced the impact of national intellectual property rights on the completion of the internal market, it has been unable to guarantee that barriers to trade would not arise where national laws differed in terms of substance or duration. Consequently, it soon became apparent that to achieve a fully functioning internal market, some level of harmonization would be necessary.

An Overview of the Progress of Harmonization

European Union involvement with intellectual property can be divided into five stages.

The 1970s: Patents. In the 1970s, the focus of attention was on the establishment of a Community patent system, that is a system in which a single patent would be granted for the whole of the European Union, enforceable in Community patent courts. To this end, in 1975 the Community Patent Convention was agreed to at an intergovernmental level between the (then nine) member states. However, the political will to introduce the scheme never materialized.¹⁶ In part this was because in 1973 a separate instrument for the granting of patents, the European Patent Convention (EPC), had been agreed to between states (a number of which were then outside the EC). As such, there was little urgency to implement the distinct (though linked) Community patent.

The 1980s: Trade Marks. In the 1980s, attention turned to the harmonization of trade mark law. The first part of a two-pronged strategy was to approximate national trade mark laws. This was eventually completed by way of a directive, adopted in 1988.¹⁷ The second prong saw the establishment of a single office that granted Community trade marks, unitary rights, enforceable in the courts of member states designated as Community Trade Mark Courts. The Community trade mark was introduced by way of a Council Regulation, and in 1996 the Office of Harmonization in the Internal Market was established in Alicante, Spain. Following a series of amendments, the Directive and Regulation were codified in 2008 and 2009.

The 1990s: Copyright. At the end of the 1980s, the third wave of harmonization began when the Commission set out to harmonize a number of aspects of copyright law. The need for action arose because the different levels of copyright protection in different member states was seen to constitute a potential barrier to trade.¹⁸ In contrast with the approach taken to trade marks, where a unitary Community right was supplemented by extensive harmonization of national (substantive) law, the European Union passed a series of seven Directives each harmonizing particular aspects of national copyright law (especially relating to areas of technological change). In so doing, the Commission also aimed to set the standard of protection to be given to creators at a 'high level'.¹⁹

From the 1990s: Designs and Plant Varieties. The 1990s also witnessed European Union intervention in relation to a number of the so-called sui generis intellectual property rights. A Community Plant Variety Regulation established a Community Office in Angers, France, to grant unitary Community rights to plant breeders. In contrast to the

¹⁵ *Deutsche Grammophon GmbH v. Metro GmbH*, Case C-78/70 [1971] ECR 487.

¹⁶ [1976] OJ L 17/43.

¹⁷ Trade Marks Directive.

¹⁸ It was also motivated by the prompting of the ECJ, e.g. in *EMI Electrola GmbH v. Patricia Im-und Export*, Case C-341/87 [1989] ECR 79.

strategy in relation to trade marks, no harmonization directive was passed regulating national law.²⁰

A directive was also passed relating to the harmonization of the law relating to designs which was followed by a Regulation introducing a Community Registered Design (to be issued by the Office of Harmonization in the Internal Market), and a Community Unregistered Design Right. The latter, available since April 2002, is the first Europe-wide, unitary right to be granted automatically, rather than after application to an office.

The New millennium: The Unified Patent. Over the last few years there have renewed efforts to introduce a centralised single patent and a centralised patent court in Europe. The so-called 'unitary patent package', consists of a mixture of two new European Union Regulations²¹ (that were adopted using the little used 'enhanced co-operation mechanism'²² and entered into force in January 2013) and the Agreement on a Unified Patent Court, signed on 19 February 2013 (which following the Court of Justice's ruling that a proposal to establish a unified patent was incompatible with EU law is an intergovernmental treaty formed outside of the EU). 25 Countries have expressed an interest in implementing the unitary patent.

1.6. The Basis for Legislation

Article 114 TFEU provides for the adoption of measures for the approximation of the provisions laid down by law in Member States which have as their object the establishment and functioning of the internal market.²³ This occurs under what is now called the ordinary legislative procedure.²⁴ This is the basis for most of the Directives.

Article 352, a residual power in the TFEU relating to the Internal Market, has been used to justify most of the Regulations hitherto adopted which establish unitary rights operative in the European Union (relating to the Community Trade Mark, Designs and Plant Breeders' Rights).²⁵

Article 118 TFEU provides for the adoption of legislation relating to the creation of European Intellectual Property Rights with unitary effect throughout the Union.²⁶ As this power was only introduced into the Treaty in 2009, it has been used for the first time in relation to the establishment of the Unitary Patent.²⁷

The TEU is important for intellectual property rights partly through its provisions recognizing fundamental rights as guaranteed by the European Convention for the

¹⁹ For example, Duration Dir. Recital 10.

²⁰ CPVR.

²¹ Council Regulation (EU) No. 1260/2012 of 17 Dec. 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements; Council Regulation (EU) No. 1257/2012 of 17 Dec. 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection.

²² The general arrangements for enhanced cooperation are laid down by the TEU, Title IV.

²³ Art 114 TFEU (formerly Art. 95 EC and before that Art. 100A of the Treaty).

²⁴ In addition, under Art 115 (ex Art. 94 EC), the Council can issue directives for the approximation of the laws of member states 'as directly affect the establishing and function of the common market'.

²⁵ Art. 352 TFEU (formerly Art 308 EC and before that Art. 235 of the Treaty). In these cases the legislature is not harmonizing, but creating new rights.

²⁶ TFEU, Art 118 mandating action establishing uniform intellectual property rights under the 'ordinary procedure.'

²⁷ Regulation 1257/2012 of 17 Dec 2012 (under the ordinary legislative procedure) and Regulation 1260/2012 (on translations, adopted under the special legislative procedure).

Protection of Human Rights and Fundamental Freedoms (Art. 6, TEU) and on police and judicial cooperation in criminal matters (Arts. 29–30 TEU, formerly Art. K.1).

Another way in which the European Union is involved in intellectual property law is through the role it plays in negotiating and signing treaties. The European Union's treaty powers are now set out in Article 207 TFEU.²⁸ To date the European Union has entered into a number of intellectual property-related treaties. For example, the European Union is now a party to TRIPS (which itself refers to the Berne and Paris Conventions), the Madrid Protocol on international registration of trade marks,²⁹ the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty (which refers to the Rome Convention), and the Hague Agreement on designs.³⁰

The International Framework

The two foundation multilateral arrangements: the Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886. These treaties are supervised by the World Intellectual Property Organization (WIPO), based in Geneva,³¹ which is the main forum for the development of new intellectual property initiatives at an international level.

In 1986, a new round of GATT negotiations begun which included 'Trade-Related Aspects of Intellectual Property Rights' (or TRIPS). These concluded in 1993, and became part of the World Trade Organization agreement signed in Marrakesh in April 1994. The TRIPS Agreement is the first significant agreement to adopt the concept of 'intellectual property' to define its remit (and it has played a critical role in placing the concept of 'intellectual property' at the forefront of policy-making). TRIPS demands substantive protection for 'neighbouring rights' to copyright, trade marks, geographical indications, designs, patents, topographies of integrated circuits, and undisclosed information. As a result of TRIPS being part of the WTO Agreement, if a country fails to bring its laws into line with TRIPS, another member may complain to the WTO and set in motion a so-called 'dispute resolution procedure'.³²

Since TRIPS, intellectual property treaties have continued to be formulated and agreed through WIPO: the 1996 WIPO Copyright Treaty, the 1996 WIPO Performances and Phonograms Treaty, the 2012 Beijing Treaty on Audio-visual performances and the 2013 Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired. Treaties have also been agreed, and come into operation on procedural aspects of trade mark law (the so-called Singapore Treaty of 2009, along with a revision of the leading treaty on designs (the 1999 Geneva Act of the Hague Agreement)).

²⁸ The TRIPS Agreement was entered into by the Community (under implied powers) and member states: Opinion 1/94 [1994] ECR I–5267. However, it has now been held that the whole of the TRIPS Agreement falls within 'common commercial policy' of Art 207 TFEU: *Dalichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v Demo Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, Case C-413/11 (18 July 2013) (CJEU, Gr Ch). As to whether the European Union has exclusive competence in the field of broadcaster's rights, see *European Commission v. Council of the European Union*, Case C-114/12 (pending; AG Opinion, 3 April 2014).

²⁹ Council Decision 2000/278 of 16 Apr. 2000, [2000] OJ L89/6; Council Decision of 27 Oct 2003 approving accession of the European Community to the Protocol relating to the Madrid Agreement Concerning the International Registration of Marks [2003] OJ L 296/1.

³⁰ Council Decision of 18 Dec 2006 Approving accession to the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs OJ L 386/28 (29 Dec 2006).

³¹ WIPO, a specialized agency of the UN, was established by a treaty signed in Stockholm on 14 July 1967.

³² TRIPS Arts 63–64; Understanding on Rules and Procedures Governing the Settlement of Disputes.

Bilateral Agreements

In addition, the EU has entered into a large number of bilateral agreements. These include 'Europe Agreements' with so-called 'candidate countries',³³ 'Euro-Med Association Agreements' with countries of the South and East Mediterranean,³⁴ 'Partnership and Co-operation Agreements' with countries in Eastern Europe and Central Asia,³⁵ and 'Stabilisation and Association Agreements' with Balkan states (such as Albania, though most of these are also candidate or potential candidate countries).³⁶ Typically these agreements require the contracting party to apply to become parties to various intellectual property treaties and sometimes to implement the Community 'acquis' so as to approximate their laws on intellectual property with those of the EU. The EU also enters bilateral agreements with countries outside of the region, such as the Central American Association Agreement of 2012,³⁷ and the Comprehensive Economic and Trade Agreement between the EU and Canada of 2013. Other agreements are limited to particular topics, such as the customs agreement with China.³⁸

2. PATENTS

2.1. What is a Patent?

A patent is an exclusive right over an invention, that is a new and non-obvious technological development, that is granted to an inventor (or his or her assignee) in return for the disclosure of information about that invention. An applicant for a patent is required to disclose their invention so that it can be used (or worked) by a person competent in the specific field, who is referred to as a 'person skilled in the art'. In return, the state (in the guise of a patent office) issues the applicant with a patent that gives exclusive rights to control the use of the invention for a limited period.

While the protection provided by a patent, which is limited to 20 years, is not as long as the protection provided by copyright law or (possibly) trade mark registration, the rights granted are more extensive. The rights granted to the patent owner cover most commercial uses of the patented invention. In addition, the rights will be infringed irrespective of whether or not the defendant copied from the patented invention. In part, the breadth of the patent monopoly is offset by the fact that patents are only granted if an applicant complies with a relatively onerous registration process. Unlike copyright, which arises automatically on creation of the work, patents are only granted after the applicant satisfies the requirements of registration. The granting process imposes a number of limits and safeguards on the types of invention that are patented, the scope of the monopoly granted, and the nature of the information that is disclosed in the patent. A patent application must contain a description of the invention that enables a person skilled in the art to be able to put it into effect. It must also contain "claims" that define the scope of the monopoly precisely by reference to what is said to be new and inventive (or 'non-obvious'). The question of whether claims are valid depends on whether they are limited to material that

³³ Turkey, Iceland, Montenegro, Serbia and Former Yugoslav Republic of Macedonia (with potential candidates being Bosnia and Herzegovina, Albania and Kosovo).

³⁴ e.g. Tunisia, Morocco, Israel, Jordan, Egypt, and Syria.

³⁵ These include Armenia, Georgia, Russia, Moldova, and the Ukraine.

³⁶ EC-Albania Stabilization and Association Agreement, 22 May 2006, esp Arts 70, 73 and Annex V; and most recently with Serbia, (2008) OJ L278, Arts 75 and annex VII.

³⁷ (2012) OJ L 346/3, Title VI (Arts 228 ff) (an elaborate list of undertakings).

³⁸ EU-China Customs Action plan on IPR enforcement for the years 2014-2017.

is new and inventive (from the perspective of the person skilled in the art), and whether the description is sufficient to enable a skilled person to put the claimed invention into effect.

At present, in most E.U. countries, patents can be obtained by two distinct routes. First, inventors can apply directly to national patent offices for patents that only apply in the national territory. Second, a person can apply to the European Patent Office (EPO), which is based in Munich, for a number of national patents. In contrast with the OHIM, which grants European Union wide unitary designs or trade marks, the EPO only grants a series of national patents. The conditions for the grant of patents by the EPO are determined by the European Patent Convention (EPC), agreed in 1973 (and revised in 2000). The membership of the EPC extends beyond the membership of the EU,³⁹ so the EPO also grants patents for non-EU member states. The terms on which members of the EPC grant national patents usually correspond with the terms of the EPC, so the effect of the EPC has been to create a reasonable level of harmonization. However, as EPO grants national patents, enforcement occurs in national courts, and is determined according to national law.

2.2. Why Grant Patents?

Patents, like other intellectual property rights, limit freedoms and impose costs on traders and researchers. If a patent maps directly onto a product, the patent rights may allow for monopolisation of the manufacture and sale of the product. This means the patentee will set the price of the product and be insulated from competition (with consequent losses in terms of consumer welfare). Moreover, in some fields a particular product – such as a mobile phone – might involve hundreds or thousands of patents. The costs involved in working out what licences are required can itself be enormous, even before negotiations begin for such licences (though in some such situation standardisation has proved to be a useful means for simplifying these processes and reducing costs.) There are widely-voiced concerns about the potentially damaging effects of “patent thickets” on the development of new technologies,⁴⁰ and about the problem of “patent trolls”, purchasers of patents who do not make or sell the subject matter of the patent but merely seek to gain remuneration by licensing the patent (‘non-practising entities’).

While commentators have occasionally drawn on natural rights to justify legal mechanisms that grant patents, the most common form of argument has concentrated on the public benefits that flow from the grant of patent monopolies. Sometimes, the public interest in the patent system was said to flow from the disclosure of the invention that occurred on publication of the patent application. That is, the justifications focused on the role that the patent system played in the generation and circulation of technical information. (This is often referred to as the ‘information function’ of the patent system.) In particular it is said that patents act as incentives to individuals or organizations to disclose information that might otherwise have remained secret. Patents also encourage information to be disclosed in a way that is practically useful. At a more general level, the public interest in allowing patents is said to flow from the fact that the numerous patents that have been granted over time constitute a substantive and valuable database of technical

³⁹ It has 38 members and grants patents also on request for two extension states. The non-EU members are Albania, Switzerland, Iceland, Liechtenstein, Monaco, FYR Macedonia, Norway, Serbia, San Marino and Turkey. The extension countries are Bosnia and Herzegovina and Montenegro.

⁴⁰ Discussion began with R Eisenberg and M Hellers, ‘The Tragedy of the AntiCommons in Biomedical Research’, (1998) Harvard Law Review.,

and scientific information. The underpinning assumption is that secrecy is an undesirable mode of protecting technical innovation, and that openness is crucial to the progress of innovation (even if it requires some temporary grant of exclusivity). Patents have also been justified by the fact that they provide an incentive for the production of new inventions. In this conception the underlying purpose of the patent system is the encouragement of improvements and innovation. More specifically, it is said that as patents provide the possibility for inventions to be exploited for a 20-year period, this means that investors will be more willing to fund research and development. In this sense, patents act as a vector that links scientific and technical research with commercial spheres.

2.3. EU Action

The European Union has not been involved in the reform of patent law anywhere near as much as it has in relation to trade marks and copyright, primarily because the European Patent Convention has satisfied the commercial needs of industry. There have been many attempts at establishing a Community-wide patent regime, but these efforts have – until the Parliament of 2009 - 2014 – come to nought. Nevertheless the Union has passed important legislation relating to the duration of patents (via the Supplementary Protection Certificates scheme) and biotechnological inventions.

Supplementary protection certificates seek to restore to patentees the periods of exclusivity which were lost from the patent term as a consequence of delays caused by the need for regulatory approval prior to marketing.⁴¹ SPCs extend patent protection where it has not been possible for the patent proprietor to take full advantage of their patent rights over the period of the grant.⁴² The basic patent can be extended for up to five years by this supplementary right, which is characterized as a right distinct from patents in order to avoid the apparent conflict that would otherwise occur with the term under the European Patent Convention.

The Biotechnology Directive adopted in 1998,⁴³ harmonizes the rules on patentability in Member States and scope of protection conferred on biotechnological inventions. The Administrative Council of the EPO incorporated the Biotechnology Directive into the Implementing Regulations of the EPC, aligning EPC practice with the provisions of the Biotechnology Directive.

An attempt to introduce a proposal for a Directive on the Patentability of Computer-Implemented Inventions, introduced in February 2002 was ultimately rejected by the European Parliament in July 2005.

⁴¹ For example, the Veterinary Medicines Directorate, the European Agency for the Evaluation of Medicinal Products, and the Pesticides Safety Directorate.

⁴² Council Regulation (EEC) No. 1768/2 of 18 Jun. 1992 concerning the creation of a supplementary protection certificate for medicinal products; (1992) OJ L 182/1; Council Regulation (EC) No. 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the creation of a supplementary protection certificate for medicinal products [2009] OJ L 152/1 (the 'SPC (PM) Reg. '); Regulation (EC) No. 1610/96 of the European Parliament and of the Council of 23 Jul. 1996 concerning the creation of a supplementary protection certificate for plant protection products; (1996) OJ L 198/30–35.

⁴³ EC Directive on the Legal Protection of Biotechnological Inventions 98/44/EC of 6 Jul. 1998; (1998) OJ L 213/13.

2.4. The 2009 - 2014 Parliament

During the last European Parliament, under the enhanced cooperation procedure, the majority of states agreed a 'unitary patent package', designed to establish and enforce a common unitary patent and introduce common patents courts. Once the package is in force, it will be possible to obtain a European patent with unitary effect across the 25 participating member states and to litigate in a single court. A European patent with unitary effect will provide uniform protection and have equal effect in all of the participating member states. Like other unitary rights, a unitary patent can be transferred, revoked or lapse only in respect of all participating member states.

The unitary patent package consists of three elements. The first is the EU Regulation creating a unitary European patent: Council Regulation (EU) No. 1257/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (the 'Unitary Patent Reg.'). The second is the EU Regulation that deals with the vexed issue of the language to be used in the unitary patent and the corresponding translation requirements: Council Regulation (EU) No. 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements (the 'Translation Reg.'). Both of these Regulations, which were adopted in December 2012 using the 'enhanced co-operation mechanism', entered into force in January 2013. The third and final part of the unitary patent package is the Agreement on a Unified Patent Court,⁴⁴ signed by 25 participating member states on 19 February 2013 setting up a centralized patent court.

One of the key elements of the unitary patent package is the 'European patent with unitary effect', a single patent – not a bundle of national patents – that provides uniform protection in 25 member states.⁴⁵ The unitary patent will be acquired from and administered by the EPO. When established, the unitary patent will coexist with existing national patents and with classical bundled European patents. This means that applicants for patent protection in Europe will be able to choose between national patents, classic bundled European patents, and unitary patents. Because the EPC dealt primarily with conditions of grant, provision had to be made as to the effect of the grant of a unitary patent. The unitary patent package confers on a patent owner the right to prevent direct and indirect uses of the invention and provides for a series of defences including acts done for private and non-commercial purpose, acts done for experimental purposes, situations in which biological material is used for the purpose of breeding or discovering and developing new plant varieties, the pharmaceutical preparation of medicines, certain on-farm uses of patented plants and animals, and certain uses in relation to patented computer programs (such as decompilation and interoperability).

The translation requirements of the unitary patent will be based on the current procedures within the EPO.⁴⁶ This means that an application for a European patent will need to be filed in either English, French, or German (which are the official languages of the EPO), or, if filed in any other language, translated into one of the official languages. A compensation scheme has been designed to alleviate the translation costs that will inevitably arise where an application is not filed in one of the official languages. Under the scheme, European-based small and medium-sized enterprises (SMEs), natural persons, non-profit organizations, universities, and public research organizations that file an

⁴⁴ [2013] OJ C 175/1 (20 June 2013).

⁴⁵ The Regulation derives from Commission Proposal, COM(2011)021.

application in an official language of the European Union other than English, French, or German will be entitled to reimbursement by the EPO (up to a ceiling) for the cost of translating the application into one of the official languages. The unitary patent specification will be published in one of the three EPO languages and will include a translation of the claims in the other two official languages. Once a unitary European patent has been granted, no further translations will be required.⁴⁷ However, for a transitional period of twelve years, additional translations may be required: where the language of the proceedings at the EPO is French or German, a request for unitary effect will need to be accompanied by a full translation of the specification in English; where the language of proceedings at the EPO is English, the applicant will need to supply a translation in an official language of an EU member state.⁴⁸

Another key part of the unitary patent package is the centralized patent court, which it is hoped will simultaneously reduce litigation costs, unify patent law, and increase certainty.⁴⁹ It is not expected that the unified court will come into effect until early 2015,⁵⁰ at the earliest. The unified patent court will consist of a decentralized court of first instance (CFI), which, in turn, will consist of local, regional, and central divisions located in the member states. The central division of the CFI will be divided between London (responsible for chemical, pharmaceutical, and the life science patents), Munich (responsible for mechanical engineering patents), and Paris (responsible for all other patents). There will also be a Court of Appeal, which will be based in Luxembourg.

The unified patent court will have exclusive jurisdiction over unitary European patents and, after a transitional period of seven years (extendable to 14), all classical bundled European patents. During the transitional period, individuals and companies with bundled European patents will be able to opt out of the jurisdiction of the unified patent court and continue to use national courts for litigation. The unified patent court will also have jurisdiction over infringement and validity actions in relation to supplementary protection certificates. The court will not, however, have jurisdiction over national patents granted by national patent offices.

When the UPC Agreement comes into force, it will be possible to litigate European bundled patents and unitary patents at the unified patent court in single actions covering all relevant states. Infringement actions may be started at the local or regional division in the country in which the alleged infringement occurred or in which the defendant is based. Where the validity of a patent is challenged, the choice of court will be determined on the basis of the way in which the patent is classified under the International Patent Classification (IPC) system. Where a defendant to an infringement action counterclaims that a patent is invalid, the judges at the local or regional division will decide whether to send the whole case (infringement and revocation) to the central division, to send the

⁴⁷ One the key features of the new scheme is that it relies on the free online translation service known as 'Patent Translate'—which the EPO has developed in conjunction with Google to produce machine translations of European patent applications and patents automatically—to ensure that the lack of human translations does not jeopardize the patent system's information function. It is hoped at the time of writing that, by the end of 2014, machine translation of patents will be available for all the languages of the 38 EPO member states, including the 27 EU member states. As the Translation Regulation notes, machine translations will not have any legal effect; they will be used only for information purposes.

⁴⁸ This will ensure that during the transitional period that all unitary patents are available in English, 'which is the language customarily used in the field of international technological research and publications'.

⁴⁹ Although formally an agreement between Member states, Parliament issued a report, dated January 10 2012, on jurisdictional system for patent disputes (2011/2176(INI).

⁵⁰ Under Article 89, the Treaty will come into force 4 months after it has received 13 ratifications, including those of France, Germany and the UK. As of September 10, 2014, Austria, Belgium, Denmark, France and Sweden ratified the agreement.

revocation case to the central division and hear the infringement case separately at the local/regional division, or to hear the entire case at the local/regional division.

The architects of the centralized patent scheme hope that a unified patent court will overcome some of the problems with the existing European patent system, particularly where a party wishes to bring an action in a number of different countries. Given that decisions relating to the infringement or validity of a unitary patent will have uniform effect across all participating member states, parties will no longer need to defend or challenge patents in different national courts. It is hoped that, in this way, the unified patent court will reduce litigation costs. It is also hoped that, because decisions will be heard by a single centralized court rather than (potentially) by a number of different national courts, legal certainty will be improved. It is also hoped that the new centralized regime will reduce the differences that encourage the 'forum shopping' of European bundle patents (such as differences in the level of damages awarded, the speed of the decision making, and different jurisprudence).

Concerns with the unitary patent still remain. Concerns have been raised, for example, about the effect of bifurcation on forum shopping, the training and quality of the judges, and the prohibitive expense of using the unitary patent, particularly for SMEs. There is also a concern that the proliferation in courts with competence to hear patent matters will fragment, rather than consolidate, patent jurisprudence. Within the United Kingdom, there are concerns about the impact that the proposed new system will have upon domestic jurisprudence and, more seriously, about whether it will effectively mark the end of domestic law.

In March 2013, Spain brought actions in the Court of Justice challenging both the Unitary Patent Regulation and the Translation Regulation. Until this matter is resolved, there will be a cloud over the legality of the unitary patent.

2.5. Case-Law of CJEU

Apart from the Unitary Patent Package, there have been a few significant developments at the CJEU. Perhaps the most notable is the *Brustle* decision.⁵¹ Under *Biotech. Dir.*, Art. 6(2)(c), a patent should not be granted for 'uses of human embryos for industrial or commercial purposes'. In *Brustle*, the Court of Justice was called on to consider the fate of a German patent for isolated and purified neural precursor cells produced from human embryonic stem cells (aimed at treating damaged organs). The Court said, the concept of 'human embryo' within the meaning of Article 6(2)(c) of the Directive must be understood in a wide sense, to include any organism that 'is capable of commencing the process of development of a human being'. The Court indicated further that an invention was not patentable where the implementation of the invention requires the destruction of human embryos, even if the claims did not refer to the use of human embryos and any destruction occurred at a stage long before the implementation of the invention, such as where an embryo was 'base material'. Moreover, the Court of Justice gave a broad reading to the concept of 'industrial or commercial purposes', to include use for scientific research. The

⁵¹ Case C-34/10 (10 March 2011) (ECJ, Grand Chamber). There has been considerable jurisprudence on the SPC regime: see e.g. Case C-322/10, *Medeva BV v. Comptroller-General of Patents, Designs and Trade Marks*, [2012] RPC 25 (ECJ); Case C-630/10, *University of Queensland v. Comptroller-General of Patents, Designs, and Trade Marks*, [2011] ECR I-12231; Case C-6/11, *Daiichi Sankyo v. Comptroller General of Patents, Designs and Trade Marks*, (25 November 2011); Case C-130/1 *Neurim Pharmaceuticals (1991) v. The Comptroller-General of Patents*, (19 July 2012) (ECJ); Case C-210/12, *Sumitomo Chemical v. Deutsches Patent-und Markenamt*, (12 October 2013), Case C-484/12 *Georgetown University v. Octrooiencentrum Nederland*, (12 December 2013).

effect of these conclusions was that the invention was excluded from patentability. That result, and the reasoning that led to it, has proved highly controversial and has been the subject of substantial criticism.

2.6. The 2014-2019 Parliament

The key development in the next Parliament will be the coming into force of the package. This requires first the required ratifications of the Agreement on the Court, because not until that comes into force will the Regulation allowing for the grant unitary patents come into operation.

The preparatory committee on the unified patent court has been working to achieve detailed arrangements that will enable the system to come into operation from early 2015.⁵² At its sixth meeting on 8 July 2014, the preparatory committee approved a list of suitable judges. A parallel select committee has been working on rules relating to the unitary patent, in particular financial and legal aspects. It too intends to complete its work in the first semester of 2015. The Parliament will want to keep a close watch on developments and, if the patent package comes into force, on any initial problems that it encounters.

3. TRADE MARKS

3.1. What is a Trade Mark?

Trade marks are signs or symbols, usually words or pictures, which when used in trade in connection with particular goods or services indicate the commercial origin of the goods or services. Classic (or infamous) examples include FERRARI for cars, NOKIA for phones, LEGO for toys, PRESIDENT for butter, the 'golden arches' in the shape of an M for restaurant services, and the 'swoosh' or rounded tick symbol for (Nike) sports clothing.

Trade marks may be protected either through registration, or even in the absence of registration through rules of "unfair competition." In Europe, marks can be registered, either at national (or, in the case of the Benelux, regional offices) or at the European Union's Trade Mark Office currently called the OHIM (in Alicante, Spain). Moreover, in addition to, or in the absence of registration, many Member states protect businesses that use trade marks from having those marks (or similar marks) used by third parties. In many countries, such misuse of trade marks can be prevented by relying on broad rules against "unfair competition law". In the England and Wales, Scotland, Northern Ireland and the Republic of Ireland, there is an equivalent legal action for "passing off."

There is much debate over the appropriate scope of protection of trade marks. Nearly all legal systems offer protection to trade mark owners against the use of the same or a similar trade mark on the same or very similar goods or services where that use is likely to deceive consumers or cause confusion. This form protects what European courts know as the essential function of trade marks, that of indicating origin. But some people argue that trade marks fulfil other functions, and through investment and advertising carry associated values and emotional attributes (for example, that COCA-COLA brings happiness).

⁵² <http://www.unified-patent-court.org/>

These additional functions are particularly said to exist in marks that have a reputation. Some legal systems then offer protection for a mark's "associations" (even where there is no confusion). These forms of protection might be against damage through harmful association, sometimes called "tarnishment" (COCA-COLA as the name of a disinfectant) or against third parties seeking to take advantage of the reputation (for example, by selling t-shirts with an image of COCA-COLA bottle). As explained further below, the European registered trade mark system offers this broader protection to marks with a reputation.

These forms of legal protection underpin the enormous value of "brands", though brand is a rather nebulous, commercial notion, rather than a legal concept. In 2013, the brand valuation agency Interbrand calculated that 100 brands are now worth over US\$3.9 billion each, the most valuable, Apple, Google, and Coca-cola, being worth in the region of \$98, \$93 and \$79 billion each.⁵³

3.2. Why Protect Trade Marks?

In contrast with patent, design rights, and copyright, a trade mark does not normally give exclusive control over the sale of particular goods or services. Rather, it merely provides control over the use of the sign in connection with goods or services. Trade marks do not ordinarily create monopolies.

Nevertheless, protection of trade marks by law imposes certain costs which require justification.⁵⁴ The sorts of costs depend on what trade mark law protects and the breadth of that protection.

Probably the most obvious cost of protecting trade marks that it restricts other people (most importantly other traders) from using the same or a similar sign. Imagine, for example, if trade mark protection existed for common descriptions – such as 'mattresses' for beds. If only one trade could use the term 'mattresses' others would have difficulty even describing what they were trying to sell. Not surprisingly trade mark systems attempt to prevent monopolisation of common descriptive terms – under European law a descriptive would be refused registration (unless it had "acquired distinctiveness" through use), and traders are normally permitted to use descriptive terms descriptively, even where marks that cover them have been protected. However, these problems are not just associated with word marks. As the scope of the subject matter of trade mark rights has expanded so that many shapes and colours are protected as trade marks, in order to avoid infringement a trader may need to be very careful as to the packaging they adopt.

The more readily available exclusive rights, and the broader the scope of those rights, the greater the costs for later market entrants. Given trade mark rights can be acquired by mere registration, the temptation to register large numbers of marks (either because there is a possibility they might be used later, or defensively to ensure other businesses cannot use non-similar, but proximate mark) is often difficult for in house lawyers of big corporation to resist. This impacts later mark entrants, even if they are not trading in the same or a similar field. These new businesses incur costs of developing suitable marks, searching registers, and where necessary negotiating with owners of related marks.

⁵³ See <http://interbrand.com>

⁵⁴ W. Landes and R. Posner, 'The Economics of Trademark Law' (1988) 78 TM Rep 267, 268–9 (referring, inter alia, to the costs of transferring marks, enforcing them, and from the restriction on others from using similar marks).

More expansive trade mark protection, which gives a trade mark holder the ability to control non-trade mark uses or uses of similar marks in relation to dissimilar goods, may even restrict free speech.⁵⁵ To the extent that the law confers power over words and symbols, it places some of the ability to make and control meaning in private hands.

Given these costs, why offer legal protection to trade marks? A number of different rationales have been used to justify trade mark protection. While there have been few problems in justifying the protection given to signs and symbols insofar as they operate as indicators of origin (to identify the origin or ownership of goods to which the mark is affixed), or as guarantees of quality (to signify that all goods bearing the mark are of a certain quality, more problems have arisen in justifying the extensive protection that is currently granted to marks.

The most prevalent of the arguments for the protection of trade signs is that they operate in the public interest insofar as they increase the supply of information to consumers and thereby increase the efficiency of the market. These arguments highlight the fact that trade marks are a shorthand way of communicating information that purchasers need in order to make informed purchasing choices. As long as consumers are able to assume trade marks reliably indicate the source of goods, marks reduce the customer's costs of shopping and making purchasing decisions. When the consumer sees the mark, they can be sure the product has been made by the same producer as other similarly marked items that he or she liked (or disliked) in the past. Trade marks also encourage firms to maintain consistent quality and variety standards and to compete over a wide quality and variety.

The idea that trade mark protection is necessary and desirable to minimise consumer 'search costs' has not gone without criticism. It has been observed that reducing search costs is not an end in itself: more competitive markets are the ultimate goal. Minimization of consumer search costs is only desirable where it serves that goal – where, in European terms, it promotes "undistorted competition." Thus trade mark rights should not, for example, be provided over product shapes if the effect of doing so is to prevent competition (even if search costs are increased for some).⁵⁶

Ethical arguments have also been used to justify the trade mark regime.⁵⁷ The main ethical argument for the protection of trade marks is based on the idea of fairness or justice. In particular, it is said that persons should not be permitted 'to reap where they have not sown'.⁵⁸ More specifically, it is said that by adopting 'someone else's mark, a person is taking advantage of the goodwill generated by the original trade mark owner'.⁵⁹

While classic cases where a trader uses someone else's trade mark on identical goods are clearly objectionable under the principle that a person should not reap where they have not sown, the principle has also been used to justify more extensive protection. For example, it is said that one objection to 'comparative advertising' is that even though it does not confuse consumers, it takes advantage of the reputation that the earlier trader has built up. Similarly, one of the objections which are made to marks being used on dissimilar goods is

⁵⁵ And thus raise issues under the Charter and ECHR Art. 10.

⁵⁶ Aldred, 'The Economic Rationale for Trade Marks: An Economist's Critique', in Bently, David and Ginsburg (eds) (2008), ch 12.

⁵⁷ Dogan & Lemley, 'Trademarks and Consumer Search Costs on the Internet', (2004) 41 Hous LR 777, 799 n 84.

⁵⁸ Also referred to as 'free-riding', the argument can be put, and refuted, in economic terms as well as ethical ones: see R. Burrell and D. Gangjee, 'Because you're worth it: L'Oréal and the prohibition on free riding', (2010) 73 MLR 282-295.

⁵⁹ A. Kamperman Sanders, *Unfair Competition Law: The Protection of Intellectual and Industrial Creativity* (1997).

that it takes advantage of the repute of the earlier mark. 'Reap-sow' arguments thus have the potential to justify very broad protection of trade marks.

Problems arise from such attempts to use the principle that a person should not reap where they have not sown to justify more extensive forms of protection. The first problem is that it is not always easy to determine what the trade mark owner has sown: the mere selection of signs and symbols from the public domain seems a meagre basis on which to found such a claim (especially against a trader who is not aware that a mark may be registered). Also, it is not obvious that the associations that develop in the minds of the public should be regarded as something of value which the trade mark owner alone has nurtured. Second, it is often unclear whether another person is reaping from the cultivated soil of the trade mark owner or has obtained their fruits from the uncultivated commons. Although the causal link can be substantiated in cases of deception and confusion, it is difficult to justify protection where consumers are not 'confused'. Third and more generally, the law does not penalize every case of reaping without sowing (for example, copying an unpatented business idea).⁶⁰ Indeed, copying has been described as the lifeblood of competition. Consequently, members of Parliament should be wary of appealing, as if by instinct, to reap-sow principles.

3.3. European Harmonisation

As disparities in the trade mark laws of individual member states (which gave trade mark owners different rights in different circumstances) were thought to impede the free movement of goods, and freedom to provide services, and to distort competition within the European Union.⁶¹

In response, the Trade Marks Directive (adopted in 1988, and codified two decades later) was designed to approximate 'those national provisions of law which most directly affect the functioning of the internal market'.⁶² The Directive therefore harmonized the general 'conditions for obtaining and continuing to hold a registered trade mark' and the rights conferred by a trade mark.⁶³ These included the definition of registrable trade marks (including a requirement of 'graphic representation'); the grounds on which such marks could be rejected that pertain to the mark itself (so called absolute grounds), such as "descriptiveness" of the goods/service; the grounds on which a mark could be rejected because of the rights of third parties (relative grounds); the scope of the rights and exception (or defences) to infringement.

In certain areas, however, it was decided that harmonization was not necessary. Consequently, member states are given discretion to decide whether to adopt certain of the rules provided for in the Directive. For example, there are certain optional grounds for refusing to register or invalidating a trade mark.⁶⁴ Perhaps the most significant relates to the scope of protection given to marks with a reputation. Under the directive, Member States have the option to give broader protection against uses that damage the distinctiveness of the mark (blurring), tarnishment and uses that take unfair advantage. The Directive also leaves to the member states matters such as the procedure concerning the registration, revocation, and invalidity of trade marks.⁶⁵

⁶⁰ R Burrell and D Gangjee, 'Because', op. cit.

⁶¹ TM Dir., Recital 3.

⁶² TM Dir., Recital 3. Codified as Directive No. 2008/95/EC.

⁶³ Ibid, Recital 7, Arts. 5, 6, and 7.

⁶⁴ TM Dir., Arts. 3(2) and 4(4); Art. 5(2). These optional provisions must be implemented in full or not at all: *Adidas-Salomon AG and Adidas Benelux BV v. Fitnessworld*, Case C-408/01 [2004] 1 CMLR (4) 448, [20] (ECJ).

⁶⁵ TM Dir., Recitals 4-6.

In addition to the Trade Marks Directive, the European legislature also adopted a Regulation establishing a Community Trade Mark (soon to be re-christened the 'European trade mark'). Adopted in 1994, this established the Office for Harmonization in the Internal Market (the OHIM) as an agency that could grant trade marks with EU-wide effect. The conditions an applicant must meet to be granted a trade mark, as well as the rights conferred by such marks, correspond in general to the rules in the Directive, but whereas some matters were left in the Directive to the discretion of Member states, the EU regime was necessarily obliged to adopt particular positions on those issues. Since it opened in 1996, the OHIM has received over 1.3 million trade mark applications, and has registered over a million Community trade marks. A successful application to the OHIM results in the grant of a single trade mark which operates throughout the EU. A person can apply for both a Community Trade Mark and a national registration, and both, if granted, may subsist. The main benefit of the Community system is that it enables traders to protect their marks throughout the Community on the basis of a single application, rather than having to file separate applications in each of the member states.

While there has thus been a large level of 'Europeanization' of registered trade mark law, it is notable that there has been comparatively little activity in relation to unfair competition law (at least so far as it concerns rights of business, as opposed to consumers). The primary exception is a Directive on Misleading and Comparative Advertising, which harmonizes the circumstances where comparative advertising is permissible.⁶⁶ While the Union has adopted a more general Directive on Unfair Competitive Practices, this is restricted to business-to-consumer practices.⁶⁷

Finally, the Union has a number of initiatives dealing with the protection of 'designations of origin' (PDOs) and 'geographical indications' (PGIs) for wines, spirits, agricultural products, and food.

3.4. European Activity 2009-2014

The EU Directive and Regulation have generated a plethora of case-law. Indeed, 40% of the cases in the General Court relate to trade marks, being appeals from the OHIM Boards of Appeal. There have also been a huge number of references from Member States. This case-law has in many cases clarified the interpretation of the Directive and Regulation. Cases in point are the interpretation and application of the definition of trade mark, the absolute grounds (distinctiveness, descriptiveness), as well as relative grounds (concepts of 'reputation', 'similarity' of marks, 'similarity' of goods/services, 'confusion', 'association' and so on). Occasionally, the ECJ's jurisprudence has proved controversial, or lacking in clarity.

The most obvious example of problematic case-law has been the doctrine of "trade mark functions". Under the Directive and Regulation, infringement occurs where a third party uses, in the course of trade, an identical mark in relation to identical goods and services to those for which the sign has been registered. The recitals described such protection as 'absolute.' However, in a series of cases, the Court of Justice held that there would be not

⁶⁶ Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising OJ L 376, 27.12.2006, p. 21.

⁶⁷ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

always be infringement if an identical mark was used for identical goods or services – the use must be liable to damage one of the “functions of the trade mark.”⁶⁸ Initially, the Court of Justice referred to the “essential function” of guaranteeing origin, but, in due course it elaborated further functions, including the communication, advertising and investment functions.⁶⁹ National courts have objected that they do not understand these concepts, which are not referred to in the legislation and lack clarity.

In 2008, a Communication on an Industrial Property Rights Strategy for Europe concluded that it was time for an overall evaluation of the trade mark system in Europe.⁷⁰ A review by a team from the Max Planck Institute in Munich was published in 2010.⁷¹ In its IPR strategy for Europe (2011),⁷² the Commission announced a review of the trade mark system in Europe with a view to modernising the system, both at EU and at national level, by making it more effective, efficient and consistent overall.

In 2013, two pieces of draft legislation were placed before the European legislature that would modify both the Regulation and Directive in a number of respects. These are:

European Commission, Proposal for a Regulation of the EP and of the Council amending Council Regulation (EC) No 207/2009 on the Community trade mark, 27.3.2013, COM(2013) 161.

Proposal for a Directive of the EP and of the Council to Approximate the Laws of Member States relating to Trade Marks (Recast), COM(2013) 162.

Both are subject to the ordinary legislative procedure, (former co-decision).

The proposed Directive is intended to amend outdated provisions, increase legal certainty and clarify the scope of trade mark rights and limitations. One example is the removal of a requirement that marks be represented “graphically” in order to be registered, a requirement that dates from the era when marks were to be published in paper publications, but has the effect of excluding, for example, sound recording as a means of representing trade marks (and thus many sounds cannot be registered). The proposal for a Directive replaces the requirement of graphic representation with one of precise representation. Another example of clarification relates to the Court's jurisprudence on ‘functions’: the Commission proposed to limit infringement in cases of identical marks/identical goods or services to the situation where there is damage to the essential function of the trade mark, that of indicating origin.

The proposal also seeks to achieve greater approximation of national trade mark laws and procedures. Procedural matters had been left to Member states, while some substantive matters were optional. The most significant of these was the option to offer extended protection to registered mark with a reputation, that would enable proprietors to object to specified uses of marks on goods or services that were dissimilar, and thus where it was unlikely there would be any consumer confusion, if there is blurring, tarnishment or free

⁶⁸ Arsenal v. Reed, Case C–206/01 [2002] ECR I–10273, [51]; O₂ (UK) Ltd v. Hutchison 3G UK Ltd, Case C–533/06 [2008] ECR I–4231, [57].

⁶⁹ L'Oréal SA v. Bellure, Case C-487/07 [2009] ECR I-5185, [58] (ECJ 1st Ch); Louis Vuitton v. Google France, Cases 236/08-238/08, [2010] ECR I-2417, [77], [AG95], (CJEU, Gr Ch); Interflora v. Marks & Spencer, Case 323/09 [2011] ECR I-8625 (CJEU, 1st Ch).

⁷⁰ COM(2008) 465 final of 16 July 2008.

⁷¹ Max Planck Institute, Study on the Overall Functioning of the Community Trade Mark System (2010).

⁷² A Single Market for Intellectual Property Rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe - COM(2011) 287.

riding. Most Member states had taken advantage of this optional provision, but the proposed Directive would make this extended protection obligatory.⁷³ The proposal also includes provisions on matters left untouched originally, such as rules on transfers and assignments of marks.⁷⁴

Other proposals are designed to enhance correspondence between national law and law under the Community Trade Mark Regulation. For example, the proposed Directive contains a host of provisions on “collective marks”, a concept that had previously existed at Community level but had no parallel in many national laws.⁷⁵ Many of the proposals relating to procedural rules not only would produce more harmonization amongst national offices, but also correspond with practices at the OHIM. Thus the proposed Directive would limit national office examination to absolute grounds (Art 41), so that relative grounds could only be raised by third parties, as is the case at the OHIM (but not in quite a number of Member States).⁷⁶ The proposal also seeks to improve cooperation between the offices of the Member States and OHIM for the purpose of converging practices and developing common tools, by putting in place a legal basis for this cooperation.⁷⁷

The main goals of the proposal to amend the Regulation include updating the Regulation to accord with the terminology to the Lisbon Treaty, streamlining procedures to apply for and register a European trade mark and increasing legal certainty by clarifying provisions. Good examples of the latter include clarification of the relationship between trade mark infringement and the rules on comparative advertising contained in the MCAD (specifying that a use of a trade mark that does not meet the eight conditions for legitimate comparative infringes).⁷⁸

The European Parliament’s Input

The Committees on International Trade,⁷⁹ on the Internal Market and Consumer Protection,⁸⁰ and namely the Committee on Legal Affairs considered these documents in 2013. The Parliament voted on the various amendments in February 2014. In general it approved the Commission proposals.

Many of the amendments are technical or linguistic. For example, to change the name of the OHIM to the European Union Intellectual Property Agency (in contrast to the omission proposal to call it the European Trade Marks and Designs Agency), or Community Trade Marks to European Union Trade Marks (as opposed the Commission proposal of ‘European Trade Mark’.⁸¹ There are other amendments relating to governance of the Agency, including selection of the Executive Director,⁸² that ensure EP representation on the Agency’s management board,⁸³ and reporting by the Agency to the EP as well as the Commission.⁸⁴

⁷³ Proposed Directive, Arts 5, 10.

⁷⁴ Proposed Directive, Articles 22, 23, 24, 25, 26 and 27.

⁷⁵ Proposed Directive, Articles 28, 30, 31, 32, 33, 34, 35, 36 and 37.

⁷⁶ Proposed Directive, Art 41.

⁷⁷ Proposed Directive, Article 52.

⁷⁸ Explanatory Memorandum, [1.2], 2.

⁷⁹ Opinion, October 7, 2013.

⁸⁰ Opinion, November 7, 2013.

⁸¹ Draft Regulation, EP Amendment 1, 20 (Art 1, point 2), 21 (Art 1, point 3), 22 (Art 1, point 4), 23 (Art 1, point 8); draft directive, EP Amendment 15. For the original Commission view, see Explanatory Memorandum, [5.1], 5.

⁸² Draft regulation, EP Amendment 92.

⁸³ Draft Regulation, EP Amendment 85

⁸⁴ Draft Regulation EP Amendment 94.

Other amendments are procedural. In some areas the European Parliament favoured greater alignment of national procedures with OHIM procedures. However, it also called for greater flexibility in relation to ex officio application of relative grounds.⁸⁵ On fees, the EP proposed that these can only be altered by formal legislative acts,⁸⁶ while the EP also amended the regulation relating to delegated acts.⁸⁷ The EP also had some proposals relating declarations with respect to the intention to cover all goods in a class heading.⁸⁸

The substantive issues identified in the amendments included (i) treatment of absolute grounds in national offices; (ii) the rule relating to infringement in case of identical marks on identical goods; (iii) rules relating to goods in transit; (iv) the scope of exceptions.

Absolute Grounds in Directive

The Commission proposal initially suggested that national offices assess the absolute grounds not merely on the basis of whether the ground would exist in that member state. Rather it should apply if the ground would obtain "in other Members states". This proposal would have aligned the assessment in national offices with those at the OHIM, which applies grounds of refusal if such ground obtained in any part of the Community. A mark that is, for example, offensive in one Member state cannot be registered as a Community Trade mark. A trade mark that is descriptive in one Member State, such as 'Matratzen' for mattresses, would not be registrable in another Member state. The latter was, indeed, an example that had raised doubts when registration was sought in Spain.⁸⁹ Because the average Spanish consumer, unfamiliar with German, did not understand that 'matratzen' meant 'colchones', 'matratzen' was registrable as a mark for mattresses because it was not descriptive. Concerns had been expressed that this might lead to impediments to the free movement of goods (if mattresses originating in Germany and bearing the term 'matratzen' might not be imported into Germany), and might work to the prejudice of German-speaking persons resident in Spain.

Nevertheless, the Parliament objected to the Commission proposal and has proposed the deletion of the provision.⁹⁰ The effect, it seems, will be to restore the position to its current one. The explanation that the EP offered is:

"It would be disproportionate and practically unworkable to require national offices to examine absolute grounds for refusal in all national jurisdictions and languages of the Union. It would further be contrary to the principle of territoriality of rights."⁹¹

⁸⁵ Draft Directive, EP Amendment 12 (recital 34)

⁸⁶ EP Amendments 17 (recital 44a, new), 18 (recital 45), 41 (Art 1, point 43, on Art 47), 111, 113, 114.

⁸⁷ EP Amendment, 110.

⁸⁸ EP Amendments 34, 35, 36. These relate to past understandings that an OHIM registration for nice class headings would cover all goods or services in the class, a position which the Court found unacceptable in the IP Translator decision: Case C-307/10, 'IP Translator' (Judgment of 19 June 2012).

⁸⁹ *Matratzen Concord AG v. Hukla Germany SA*, Case C-421/04, [2006] ECR I-2303.

⁹⁰ Draft Directive, EP Amendment 21 (to Art 4, para 1, point j).

⁹¹ Draft Directive, EP Amendment 22, Justification. One can understand that, if the application of such a rule might raise administrative problems for offices, such a rule might be made a ground of invalidation ex post, rather than requiring application ex ante by the office. Alternatively, consideration could have been given to ensuring that immunity is provided to anyone who trades in goods bearing such signs that are descriptive in any member state.

Doctrine of Foreign Equivalents (in proposed Directive and Regulation)

Article 7(2) of the proposed Regulation,⁹² and Article 4 of the proposed Directive indicated that a ground of objection was available even in cases where “a trade mark in a foreign language or script is translated or transcribed in any script or official language of a Member state.” The effect would have been that a sign that is descriptive in Japanese, would also have been regarded as descriptive for the purposes of the European Union trade mark regime (irrespective of whether it would be descriptive to the “average European consumer” of the good. Such an approach, known often as the “doctrine of foreign equivalents”, is taken in other countries such as the United States.⁹³ It ensures that the first person to apply to protect a foreign term is prevented from gaining exclusive rights to the use of the term for the goods or services which it actually describes to speakers of that language. The rule recognises the importance of ensuring competition between traders of goods in markets for immigrants and speakers on non-EU languages. Given the colonial heritage of many European states, and the numbers of minority languages spoken in the EU, the cultural justification for a rule of this sort would seem to be as strong in the EU as in the US.

The European Parliament amendment deletes the proposed rule in relation both to the proposed Directive and Regulation.⁹⁴ All that remains, after the EP amendment, is that a sign may not be registered under the Regulation (i.e. for European Union Trade Marks) even if the ground on non-registrability applies “in only part of the Union”. If a language is used in a relatively discrete geographically area, then a sign which is excluded (for example as offensive, misleading or descriptive) in that language, might be excluded from a Community registration. But if a small immigrant population is widely dispersed, the sign would not be capable of being rejected.

Infringement in Cases of Double Identity/The ‘Functions’ Analysis

As already noted, the Commission has proposed to replace the Court’s uncertain jurisprudence on “functions”, at least in so far as it relates to infringement where a person uses an identical sign to that which is registered on identical goods/services. The Commission proposal was limit this to damage to the origin function.⁹⁵ The EP amendments delete the requirement of an adverse affect on the “essential function”.⁹⁶ No justification is offered. Whatever the reasons of the Parliament, the amendment does nothing to reduce the state of confusion that surrounds the Court’s existing case-law.⁹⁷

⁹² Draft Regulation, EP Amendment 26 (to Art 7, para 2)

⁹³ See e.g. *Otokoyama Co Ltd v. Wine of Japan Import Inc*, 175 F. 3d 266 (2nd Cir 1999).

⁹⁴ The EP’s explanation for rejection is that “for users there would be little or no added value to have the application examined for obstacles to registration in other territories than the one for which it would be valid for.”

⁹⁵ Thus it proposed that there be infringement where the signs and goods/services are identical “and where such use affects or is liable to affect the functions of the European trade mark to guarantee to consumers the origin of the goods or services” Explanatory Memorandum, [5.3], 8.

⁹⁶ Draft Regulation, EP Amendment 4 (to recital 15), 28 (Art 1 point 12, to Art 90); Draft Directive, EP Amendment 5 (recital 19), Amendment 30 (to article 10)

⁹⁷ But see M Senftleben, ‘Function Theory and International Exhaustion – Why it is Wise to Confine the Double Identity Rule in EU Trademark Law to Cases Affecting the Origin Function’, [2014] EIPR (suggesting that trade mark holders lobbied heavily to have the proposal changed, for fear of its implications for the rules relating to parallel importation from outside the EU.) If that is the reason, it might have been dealt with by a specific rule indicating that such imports can be prohibited, rather than by leaving in place the confusion that the Commission’s proposal sought to remove.

Goods in Transit

According to the ruling of the CJEU in Cases C-446/09 Philips and C-495/09 Nokia merely transporting a product bearing a trade mark through a territory (i.e. where the destination is somewhere else) is not an infringing use.⁹⁸ Such "goods in transit" are only to be regarded as counterfeit once there is a commercial act directed at E.U. consumers, such as sale, offer for sale or advertising.

The Commission proposed to amend the Directive and Regulation, so that goods in transit can be stopped and impounded if their use in the E.U. would be infringing.⁹⁹ The Commission noted that the Philips/Nokia judgment have met with strong criticism from stakeholders as placing an inappropriately high burden of proof on rights holders, and hindering the fight against counterfeiting. The Commission proposed to entitle right holders to prevent third parties from bringing goods, from third countries, bearing without authorization a trade mark which is essentially identical to the trade mark registered in respect of those goods, into the customs territory of the Union, regardless of whether they are released for free circulation.¹⁰⁰

The EP amendments qualify the Commission proposal.¹⁰¹ Where a third party (the owner or transporter of the goods) proves that the final destination is outside the EU, the trade mark proprietor must show that it has a registered trade mark in the destination country.¹⁰² The Parliament also expressed particular concerns over generic medicines.¹⁰³

Defences

The limitations to trade mark rights are currently contained in Article 6 of the Directive and Article 12 of the regulation. This provides an exception for use of one's own name, use of descriptive signs or indications, and use of signs to indicate the intended purpose of the user's goods or service (for example their compatibility with the trade mark owner's products). All three exceptions are subject to the proviso that the use be "in accordance with honest practices in industrial and commercial matters." There are also exceptions developed in the case-law on exhaustion of rights and in sui generis legislation such as the Directive on Misleading and Comparative Advertising. In relation to trade marks with a reputation, the provisions on infringement in Article 5(2) of the Directive and Article 9 of the Regulation indicate that infringement will not be established if a use is "with due cause", and the E.C.J. has begun to elaborate on when there might be "due cause" to use a mark with a reputation.

Article 6 of the Directive had been considered by the Court of Justice on a number of occasions. The Court indicated a relatively broad and flexible interpretation of the defence relating to use of one's own name, such that it might encompass use of a trade name.¹⁰⁴ It

⁹⁸ Philips Electronics v Lucheng Meijing Industrial Co, Nokia v HMRC, Joined Cases C-446/09 and C-495/09 (1 Dec 2011) (CJEU, 1st Ch).

⁹⁹ Proposal for a Directive to approximate the Laws of the Member states relating to Trade Marks (Recast), COM/2013/0162 final, Art 10(5).

¹⁰⁰ Explanatory Memorandum, [5.3], 8.

¹⁰¹ Doubts have been raised as to whether seizing goods in these circumstances is compatible with TRIPs: H Grosse Ruse-Khan, 'A Trade Agreement Creating Barriers to International Trade? ACTA Border Measures and Goods in Transit', (2011) 26 Am U Int LR 645.

¹⁰² Draft Regulation, EP Amendment 5 (to recital 18), 28 (Art 1, point 12, amending Art 9); Draft Directive, EP Amendment 6 (recital 22), Amendment 30 (to article 10(5));

¹⁰³ Draft regulation, Amendment 8 (recital 18c new); Draft Directive, EP Amendment 9 (to new recital 22c). Opinion of the Committee on International Trade (October 7, 2010).

¹⁰⁴ Anheuser-Busch v. Budvar, Case C-245/02 [2004] ECR I-10989 (ECJ, Gr Ch) [75]–[84].

took a narrower view of the descriptiveness exception, indicating that while this not preclude use of a sign as a trade mark,¹⁰⁵ it would not apply in cases where a mark was used as part of presenting an item as a replica (such as by utilising the Opel trade mark on a toy version of an Opel car). The Court also took quite a restrictive view of “necessity”.

In contrast, the Court has not held a consistent position in interpreting the “honest practices” proviso. It has stated that this indicates ‘a duty to act fairly’ towards the trade mark owner.¹⁰⁶ But in one case (concerning compatibility of razor blades with razors under Article 6(c) of the Directive), the Court indicated that there are some minimum conditions that must be met before the defence can come into play.¹⁰⁷ More specifically, the ECJ has indicated that a use will not be in accordance with honest practices if it is done in such a manner that it may give the impression that there is a commercial connection between the reseller and the trade mark proprietor;¹⁰⁸ if the use affects the value of the trade mark by taking unfair advantage of its distinctive character or repute;¹⁰⁹ it discredits or denigrates that mark;¹¹⁰ or if it presents its product as an imitation or replica of the product bearing the trade mark.¹¹¹ These latter factors seem to have been drawn from the Directive on Misleading and Comparative Advertising.

The Commission proposal seeks in part to reverse Court’s case-law, but also in part to codify it. It seeks to reverse it as regards the meaning of “names”, so that the defence is not available for corporate or trade names.¹¹² The Commission significantly proposes to extend the exceptions to include using of “non-distinctive” signs by a third party.

The Commission also proposes to elaborate the condition to the effect that uses must be “in accordance with honest practices in industrial and commercial matters.” Article 14(2) of the regulation indicates that a use is not compliant if it indicates a connection with the trade mark owner or, without due cause, damages the distinctive character or repute of the mark, or takes unfair advantage. On its face, this replicates the conditions for liability as conditions for the availability of the exception (though logically, this would mean the exception had little role). The Commission explained that this “clarifies the conditions under which use of a trade mark is not considered as complying with honest business practices” (emphasis added), but it might be noted that this is in some respects significantly more restrictive than under the existing case-law.

The European Parliament has proposed a number of amendments to the exceptions.¹¹³ Taking a broader view of the range of exceptions, and recognising the importance of fundamental rights (including freedom of expression),¹¹⁴ it proposes to elaborate a number of “referential uses” that fall within that defence. These would include comparative advertising that satisfies the conditions of the Misleading and Comparative Advertising

¹⁰⁵ Gerolsteiner Brunnen, Case C-100/02 [2004] ECR I-691.

¹⁰⁶ BMW v. Deenik, Case C-63/97 [1999] ECR I-905, [61]; Céline Sàrl v. Céline SA, Case C-17/06 [2007] ECR I-7041, [32]; Gerolsteiner Brunnen, Case C-100/02 [2004] ECR I-691, [24]; Anheuser-Busch v. Budvar, Case C-245/02 [2004] ECR I-10989, [82] (ECJ, Gr Ch); Gillette Co v. L.A.-Laboratories Ltd Oy, Case C-228/03 [2005] ECR I-2337, [41]; Portakabin Ltd v. Primakabin BV Case C-558/08, [2010] ECR I-6963, [67] (CJEU, 1st Ch).

¹⁰⁷ Gillette, [42]-[45], [49].

¹⁰⁸ BMW v. Deenik, Case C-63/97 [1999] ECR I-905, [51]; Gillette, [42]; Anheuser-Busch, [83].

¹⁰⁹ BMW, [52]; Gillette [43].

¹¹⁰ Gillette [44].

¹¹¹ Gillette, [45].

¹¹² No evidence has been offered that any harm has arisen from the ECJ’s interpretation of the exception so that it applies to trade names.

¹¹³ Draft Regulation, EP Amendment 29; Draft Directive, EP Amendment 33 (To Article 14, para 1, c).

¹¹⁴ Opinion of the Committee on the Internal Market and Consumer Protection (November 7, 2013), proposed Amendment 3. Freedom of expression is, of course, recognised in the Charter of the European Union, art 11.

Directive,¹¹⁵ as well as advertising the sale of goods in which trade mark rights have been exhausted,¹¹⁶ "putting forward a legitimate alternative" to the goods or services of the trade mark holder,¹¹⁷ as well as uses for the purposes of parody, artistic expression, criticism or comment. By including these as examples of referential uses within Article 14(1)(c) of the (amended) Directive (and Article 12 of the existing Regulation), the Parliament would make these subject to the "honest practices" proviso. Whether the Parliament is conscious that the proviso, in its amended form, adds additional restrictions and so would limit the availability of these defences is unclear.¹¹⁸

A further EP amendment, adding Article 14(2)(a) to the Directive would exempt any use "for a due cause for any non-commercial use of a mark."¹¹⁹ Presumably, this was thought clarificatory, as trade mark infringement only exists where there is "use in the course of trade." The CJEU has stated that a sign is used in the course of trade where it is used 'in the context of commercial activity with a view to economic advantage and not as a private matter'.¹²⁰ Non-commercial uses, therefore, ought to fall outside the scope of trade mark rights, whether or not there is "due cause" for that use. The EP Amendment seems likely to be misleading.

3.5. The 2014 - 2019 Parliament

The legislative resolution at the First Reading in February 2014 called on the Commission to refer the matter to Parliament again if it intended to amend the proposal substantially or replace it with another text.

The Council has also considered these pieces of legislation and on 23 July 2014 reached a Common position.¹²¹ The Council authorised the Italian Presidency to enter negotiations with the European Parliament to ensure swift agreement.

It is notable that Council proposes a number of similar changes to those proposed by the European Parliament. The Common position, for example, adopts the term "European Union Trade Mark", contains a recital relating to the requirements for representation, follows the EP in permitting national offices to examine on relative grounds if they so wish, and removes the rule on formalities for transfer of trade marks.

As to the substantive issues described above, the Council has favoured positions that correspond closely with those of the Parliament in its First Reading.¹²² However, it has

¹¹⁵ This was seen as 'an independent ground of defence' in *O2 Holdings Ltd v. Hutchison 3G Ltd*, Case C-533/06, [2008] ECR I-4231, [AG25].

¹¹⁶ Such freedom is already recognized by the C.J.E.U. under Case C-337/95 *Parfums Christian Dior SA v. Evora BV*, [1997] ECR I-6013, where the Court found that that 'a balance must be struck' between the legitimate interest of the trade mark owner and that of the re-seller, and that if the reseller is merely employing techniques that are customarily used for goods of the kind but not necessarily of the same quality in issue, then an objection to such advertising is only legitimate if it 'seriously damages the reputation of the trade mark'.

¹¹⁷ This was recognised by the C.J.E.U. as an example of a "due cause" for referring to a registered mark with a reputation in *Interflora v. Marks & Spencer*, Case 323/09 [2011] ECR I-8625 (CJEU, 1st Ch).

¹¹⁸ The various conditions that have been inserted to clarify the "honest practices" defence would become additional conditions that any of these other referential uses would have to satisfy.

¹¹⁹ Draft Regulation, Amendment 30; Draft directive, EP Amendment 35

¹²⁰ Case C-206/01 [2002] ECR I-10273, [40]. See also *Google France SARL v. Louis Vuitton Malletier SA*, and Joined Cases C-236/08 to C-238/08 [2010] ECR I-2417, [50] (CJEU, Gr Ch); *Frisdranken Industrie Winters BV v. Red Bull GmbH*, Case C-119/10, [2011] ECR I-0000, [28].

¹²¹ Presidency Compromise Proposal on the Directive: Council Doc 11827/14 (18 July 2014); Presidency Compromise proposal on the Regulation: Council Doc 11826/14 (18 July 2014).

not incorporated the EP proposals on exceptions. This is therefore a topic which may need to be considered immediately by the Parliament.

4. COPYRIGHT

4.1. What is Copyright?

'Copyright' is the term used to describe the area of intellectual property law that regulates the creation and use that is made of a range of cultural goods such as books, songs, films, and computer programs. The various objects that are protected by copyright are usually described as 'works'. Copyright protection arises automatically (i.e., without registration or notice) and usually for the benefit of the author (though in many legal systems is assignable). Various rights are conferred on the owner of copyright, including the right to copy the work and the right to perform the work in public. The rights vested in the owner are limited, notably in that they are not infringed when a person exploits a work that they have created themselves (i.e. independently). The rights given to a copyright owner last for a considerable time: in many cases for 70 years after the death of the author of the work.¹²³

It is a commonplace amongst intellectual property commentators that the approach taken in common law countries to copyright is distinct from and in many ways in opposition to the approach taken in many continental European, civil law countries, which protect "author's rights" (*droit d'auteur*). The common law copyright model is said to be primarily concerned with encouraging the production of new works. This is reflected in copyright law's emphasis on economic rights, such as the right to produce copies. Another factor that is held to typify the copyright model is its relative indifference to authors. This is said to be reflected in the fact that British law presumes that an employer is the first owner of works made by an employee, the paucity of legal restrictions on alienability, and the half-hearted recognition of so-called 'moral rights' (that is, the inalienable rights that protect the author's personal relationship with the work). In contrast, the civil law *droit d'auteur* model is said to be more concerned with the natural rights of authors in their creations. This is reflected in the fact that the civil law model not only aims to secure the author's economic interests, but also aims to protect works against uses that are prejudicial to an author's spiritual interests (in particular through moral rights).

Another distinction between 'copyright' and 'author's rights' is said to have been the inclination to extend protection to subject matter – such as sound recordings, broadcasts and computer programs – that are the result of technical skill, and financial and organisational investment, rather than individual creativity. In British law, these subjects are treated as protected by copyright.¹²⁴ In author's rights systems, since these works are not products of creative authorship, they tend to be protected by so-called 'neighbouring rights' – rights that are neighbours to author's rights. Neighbouring (or entrepreneurial) rights are typically derivative, in the sense that they use or develop existing authorial works; that they are a product of technical and organizational skill rather than authorial skill; and that the rights are initially given, not to the human creator, but to the body or

¹²² Amended Art 10(5). Parliamentarians may be interested in the recent academic statement organised by Professor Martin Senftleben of the VU University of Amsterdam entitled Recommendation on Measures to Safeguard Freedom of Expression and Undistorted Competition in EU Trade Mark Law (September 2014).

¹²³ See Ch. 7.

¹²⁴ Nonetheless an informal distinction has been drawn between two general categories of subject matter authorial works' and 'entrepreneurial works'.

person that was financially and organizationally responsible for the production of the material.

4.2. The Economic Significance of Copyright

According to the European Competitiveness Report 2010,¹²⁵ the creative industries account for 3.0 % of total employment (2008) and 3.3 % of GDP (2006). The number of employees in the creative industries in the EU-27 was 6.7 million in 2008. In terms of exports, creative goods account for 4.3 % of the EU-27's external exports. Between 2000 and 2007, employment in the creative industries grew by an average of 3.5 % per annum, compared to 1 % in the overall EU-27 economy (software consulting and supply accounts for more than half the employment growth in creative industries in the EU-27 in the period 2000–07). This data was referred to by the Commission in July 2011, when focussing more specifically on copyright and the audiovisual sector.¹²⁶

Three caveats are worth making about this type of data.

The first relates to their accuracy or reliability. The basis for these estimates are, of course, not straightforward. Much depends on what is counted as a "copyright industry",¹²⁷ and how value is counted. This is evident from the fact that a study conducted eight years earlier, found that the contribution of the copyright industry was €1.2 trillion, twice the figure mentioned in the 2011 study.¹²⁸ The difference between the figures is explicable by reference to the different methodologies – what is being counted and how. Indeed, one economist has explained that all "revenue derived estimates of the 'value', be it of copyright or the public domain are of dubious validity."¹²⁹

The second caveat is that the "copyright industries" are involved in exploiting many assets other than "copyright". Indeed, some part of what is exploited will be the "public domain" (one need only think of performances of Shakespeare, Mozart or sales of copies of the works of Van Gogh).¹³⁰ Moreover, statistics have been developed in the United States that aggregate the value of industries that rely on copyright exceptions.¹³¹ At 2007 study found that so-called "fair use industries" generated \$4.4 trillion in revenue, accounting for one sixth of total U.S. gross domestic product, and employing more than 17 million workers. In 2010, revised estimates suggested that the total had risen to \$4.7 trillion in revenues and \$2.2 trillion in value added.¹³² Many of the sectors included as "fair use industries" – for example newspaper or software publishers - would also be included in the figures for the value of "cultural" or "copyright industries."

¹²⁵ European Commission, European Competitiveness Report (2010) 166.

¹²⁶ European Commission, Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market, Brussels, 13.7.2011 COM (2011) 427 final, p. 3.

¹²⁷ European Commission, European Competitiveness Report (2010) 165 (adopting UK DCMS definition of 'creative industries' as industries that 'have their origin in individual creativity, skill and talent and have a potential for wealth and job creation through the generation and exploitation of intellectual property.')

¹²⁸ See Media Group, Turku School of Economics and Business Administration, The Contribution of Copyright and Related Rights to the European Economy (2003) ("Turku Study").

¹²⁹ R. Pollock, Paul Stepan, and Mikko Valimäki, 'The Value of the EU Public Domain', n. 71, at http://rufuspollock.org/papers/value_of_the_public_domain_eu.pdf

¹³⁰ R. Pollock, Paul Stepan, and Mikko Valimäki, 'The Value of the EU Public Domain' at http://rufuspollock.org/papers/value_of_the_public_domain_eu.pdf

¹³¹ Thomas Rogers and Andrew Szamoszegi, Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use, (CCIA, 2007).

¹³² Thomas Rogers and Andrew Szamoszegi, Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use, (CCIA: September 2010).

The third caveat is that it is dangerous to assume that the higher these figures the better. This may seem counter-intuitive to politicians. For politicians, more revenues instinctively means more taxes paid and probably more jobs. But the false logic at play here can be readily seen by considering the effect of technological change, eg digitisation, that allows for new, cheaper forms of delivery of copyright-protected materials.¹³³ If this means that some aspects of the existing distribution models become obsolete, overall revenues may alter dramatically in a downward direction. But the numbers of copyright works being produced might still increase, revenues to authors might increase, and costs to consumers decrease. There is a danger that in focussing on revenues we lose sight of what is important: ensuring both creativity and production of new works and competition, so that consumers receive those goods at the most competitive price. Revenue figures then, perhaps, can indicate the importance of copyright industries, but they should not be regarded as indicators of the health or competitiveness of the sector.

Recognising the importance of the creative industries certainly implies that copyright is important: but it does not suggest that stronger or longer copyright will be of benefit to the sector as a whole.

4.3. Why Protect Copyright?

The existence of copyright in a particular work restricts the uses that can be made of the work. Not everyone thinks that copyright is a good thing. In fact, with the advent of the Internet, there are many who think that copyright unjustifiably impedes the development of new technologies or new application of existing technologies and stifles the public's ability to make the most of the new environment. Others consider that, while some aspects of copyright are justifiable, others are not. Typically the argument is that copyright law has gone too far. In response to these copyright sceptics or critics, four basic arguments are used to support the recognition (and further extension) of copyright: natural rights arguments, reward arguments, incentive arguments, and arguments from democracy.

According to natural rights theorists, the reason why copyright protection is granted is not because we think that the public will benefit from copyright. Rather, copyright protection is granted because it is right and proper to do so. More specifically, it is right to recognize a property right in intellectual productions because such productions emanate from the mind of an individual author. For example, a poem is seen as the product of a poet's mind, their intellectual effort and inspiration. As such it should be seen as their property, and copying as equivalent to theft. Copyright is the positive law's realization of this self-evident, ethical precept. However, at this point, natural rights theorists divide as to exactly what it is about origination that entitles an author to protection. Some, particularly those associated with the European traditions, explain that works should be protected because (and insofar as) they are the expressions of each particular author's personality. On the assumption that a work created by an individual reflects the unique nature of them as an individual, the natural rights arguments require that we allow the creator to protect the work (from misattribution, modification, or unauthorized exploitation) because it is an extension of the persona of its creator. A second version of natural right theory, strongly represented in the US literature, has tended to found itself on labour. Drawing on the idea that a person has a natural right over the products of their labour, it is

¹³³ European Competitiveness Report (2010) 163 "the profound ongoing restructuring of the traditional publishing and media industry"

argued that an author has a natural right over the productions of their intellectual labour.

Related to natural rights arguments is the view that copyright protection is granted because we think it is fair to reward an author for the effort expended in creating a work and giving it to the public. Copyright is a legal expression of gratitude to an author for doing more than society expects or feels that they are obliged to do. In a sense, the grant of copyright is similar to the repayment of a debt.

In contrast to the natural rights and reward theories, the third argument for copyright is not based on ideas of what is right or fair to an author or creator. Rather, it is based on an idea of what is good for society or the public in general. The incentive argument presupposes that the production and public dissemination of cultural objects such as books, music, art, and films is an important and valuable activity. It also presupposes that, without copyright protection, the production and dissemination of cultural objects would not take place at an optimal level. The reason for this is that, while works are often very costly to produce, once published they can readily be copied. For example, while a book may take a considerable amount of time and energy to write, once published, it can be reproduced easily and cheaply. Consequently, in the absence of copyright protection, a competitor could reproduce the book without having to recoup the expense of its initial production. In so doing they could undercut the publisher. According to the incentive argument, if the book were not given any legal protection, it would never have been written or published—and the world would have been a commensurably poorer place. The legal protection given by copyright is intended to rectify this 'market failure' by providing incentives that encourage the production and dissemination of works. In short, copyright provides a legal means by which those who invest time and labour in producing cultural and informational goods can not only recoup that investment, but also reap a profit proportional to the popularity of their work.¹³⁴

A fourth justification for copyright is that it strengthens democracy. It does so by self-reliant authorship, and robust debate. Copyright law is a state measure designed to enhance the independent and pluralist character of civil society. Copyright encourages greater production, but also supports creative autonomy and expressive diversity.

4.4. European Activity in Copyright

The desire to harmonize copyright law in Europe arose because differences in national laws relating to copyright and related rights operate to produce barriers to trade within the internal market.¹³⁵ In contrast with trade marks where a unitary EU right was created, accompanied by extensive harmonization of substantive law, in copyright a much more incremental approach was adopted. In part this was because national copyright traditions were very different, so that wholesale approximation of copyright law was thought to be impossible. Initially, the focus was on new technologies.

The subsequent decade witnessed the formulation and passage of a series of directives on software, cable and satellite broadcasting, rental and lending rights and 'neighbouring rights', the duration of copyright, databases, the resale royalty right, and copyright in the 'information society'. While each of these directives

¹³⁴ For recent endorsement at international level, see Marrakesh Treaty, recital 3 ('emphasizing the importance of copyright protection as an incentive and reward for literary and artistic creations').

concerned itself primarily with a specific aspect of copyright (that is, a specific type of subject matter or a specific right), the Directive on copyright in the Information Society concerned a series of rights and exceptions applicable to virtually all copyright works. Consequently, this directive is widely regarded as heralding a shift from 'vertical' harmonization to 'horizontal' harmonization. Matters then stalled until 2011, with the Commission increasingly talking about 'soft law', stakeholder dialogues, and 'memoranda of understanding', in preference to legislation. However, since 2011 three very narrow legislative interventions have occurred in relation to term of copyright in sound recordings, 'orphan works' and collective management. The body of legal rules harmonized by the directives is often called the 'copyright acquis.'

The directives consistently distinguish between two categories of work: 'authorial works' falling under the Berne Convention; and 'related rights' (specifically not 'neighbouring rights') which means various rights of performers, phonogram producers, the producers of the first fixations of films, and broadcasting organizations.

4.5. Activity in 2009-2014

Three legislative developments occurred in the preceding Parliament.

Term Amendment (for Sound Recordings and Performers Whose Performances are Embodied in Such Recordings) (2011)

The Duration Directive was amended in 2011.¹³⁶ The latter amendments arose from concern about the imminent lapse of sound recording copyright in material from the late 1950s and early 1960s, the heyday of rock 'n' roll and the early years of pop. It was argued that it would be unfair if performers, such as Sir Cliff Richard or the French performer Johnny Halliday, were no longer able to gain income from their recordings during their lifetime.

An initial proposal from the Commission suggested an extension of term to 95 years, purportedly to make the position equivalent to that in the United States.¹³⁷ The matter was dealt with by the Committee on Legal affairs, and on 18 February 2009, JURI issued a report proposing certain amendments (that the proposed extension of term also benefit audiovisual performers and that performers whose recording contracts included an advance against royalties be given a "clean slate" in the extended period of protection).¹³⁸ On April 23, 2009, the EP gave the proposal a first reading, though with various amendments including a 70 year – rather than 95 year term.¹³⁹ The proposal then stalled in Council, where a group of countries blocked its adoption. Ultimately, the group fell away and the Directive was enacted in 2011.

¹³⁵ EMI Electrola GmbH v. Patricia Im-und Export, Case C-341/87 [1989] ECR 79.

¹³⁶ Directive 2011/77/EU..

¹³⁷ Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights {SEC(2008) 2287} {SEC(2008) 2288} /* COM/2008/0464 final - COD 2008/0157 */

¹³⁸ EP Doc A6-0070/2009.

¹³⁹ European Parliament legislative resolution of 23 April 2009 on the proposal for a directive of the European Parliament and of the Council amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights (COM(2008)0464 – C6-0281/2008 – 2008/0157(COD))

In addition to extending the term, the Directive has three features designed to protect performers.¹⁴⁰ Firstly, there is a “use it or lose it” obligation on the owner of copyright in the sound recording. More specifically, once 50 years has run the copyright in the sound recording might be determined if a performer decides to terminate an assignment of their property rights therein on the basis that the sound recording is not being exploited. Second, where the term of protection of a sound recording has been extended from 50 to 70 years, performers who were only entitled to be paid a ‘lump sum’ (as might be the case with a so-called session musician who was contracted to contribute to a particular performance), may claim, via a collecting society, a portion of a fund that the producer must pay annually to the society comprising 20% of the ‘gross revenue’ on sales (including Internet downloads). Third for performers who are entitled to royalties, the “clean slate” provision means that the record company cannot make certain deductions from those royalties during the extended term.

Orphan Works Directive (2012)

The Directive on Orphan Works¹⁴¹ is a response to problems faced by cultural institutions in tracing copyright owners of works they wish to include in digitisation projects. An orphan work is one whose copyright owners (parents) either do not exist or cannot be located. The British Library has estimated that 40 per cent of all print works are orphan works.¹⁴² Digital technologies have given rise to new potential uses of such largely forgotten or valueless works, for example in digital archives, but also because they can now be made available profitably to niche markets. Orphan works schemes seek to reduce the heavy costs incurred investigating copyright owners, and immunizing such users from later liability.

Orphan work schemes have been under consideration, in the EU since 2006,¹⁴³ but it was only in May 2011 that the Commission first made its formal proposal.¹⁴⁴ The Legal Affairs Committee (JURI) considered the proposal in detail and drafted a Report seeking 61 amendments. Informal meetings with the Council and the Parliament took place (so-called trilogue) with a view to securing passage at first reading.¹⁴⁵ The Parliament gave the proposal its approval at a legislative resolution on September 13, 2012,¹⁴⁶ and it was formally adopted on October 25, 2012.

The Directive, which is exceedingly narrow in scope, requires Member States to put in place measures that would permit the digitisation and making available of such works by cultural institutions which have been unable to locate copyright owners after having conducted a diligent search. The Directive only applies to certain acts,¹⁴⁷ carried out in relation to a

¹⁴⁰ Directive 2011/77/EU.

¹⁴¹ Directive 2012/28/EU.

¹⁴² Gowers Review, [4.91].

¹⁴³ Commission Recommendation of August 24, 2006 on the digitisation and online accessibility of cultural material and digital preservation (2006/585/EC), OJ L 236/28, (31 Aug 2006) Recital 10. EC (DG Information Society and Media); Commission Decision of 27 February 2006 on setting up a High Level Expert Group on Digital Libraries, OJ L 63, 4.3.2006, p. 25-27; OJ 82, 28.3.2009, p. 9-11; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market (SEC(2007) 1710 (3 Jan 2008) COM(2007) 836 final, [2.1]; Green Paper on Copyright in the Knowledge Economy (2008), COM (2008)466.

¹⁴⁴ Brussels, 24.5.2011, COM(2011) 289 final, 2011/0136 (COD)

¹⁴⁵ TFEU, art 294(4) (“If the Council approves the European Parliament’s position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.”)

¹⁴⁶ European Parliament legislative resolution of 13 September 2012 on the proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works (COM(2011)0289 – C7-0138/2011 – 2011/0136(COD), OJ C 353E, 3.12.2013, p. 322–323.

¹⁴⁷ OWD Art. 6.

limited list of works,¹⁴⁸ by certain institutions (cultural institutions).¹⁴⁹ These organisations are to be permitted to reproduce and make available 'orphan works',¹⁵⁰ that is works in relation to which all or some of the 'rightholders' cannot be identified or located despite a 'diligent search' having been carried out.¹⁵¹ Such a search must be carried out for each and every work by consulting appropriate sources for the category of work in question.¹⁵³ The search is targeted at the country of first publication,¹⁵⁴ but if there is 'evidence to suggest that relevant information on rightholders' is to be found in other countries, sources in such countries 'shall also be consulted'.¹⁵⁵ The details of such searches are to be recorded in a single publicly accessible online database managed by the OHIM. If a work is regarded as orphan in one Member State, then that status should be recognised in other Member States. Should the rightholder re-appear, he or she may bring the orphan status of a work to an end.¹⁵⁶ Indeed the 'reventant' rightholder is entitled to 'fair compensation' for past uses.¹⁵⁷ Although narrow in compass, the Directive is innovative in so far as it provides for 'mutual recognition' of orphan works: once a work is deemed orphan in one Member State it is regarded as orphan elsewhere.¹⁵⁸ The Directive is to be implemented by 29 October 2014.

Directive on Collective Management

In 2012 the Commission issued a proposal for a Directive on collective management of copyright and related rights.¹⁵⁹ This requires Member States to regulate the operation of organisations that manage copyrights collectively on behalf of authors and rightholders. 'Collective management organisations' (or 'collecting societies' as they are usually known), such as the UK's Performing Right Society or Germany's GEMA, operate on behalf of rightholders in issuing licences and collecting and distributing remuneration. The proposal was directed at the governance of these organisations, and was a lengthy, detailed and rather technical document.

On 9 July 2013, the Legal Affairs Committee (JURI) of the European Parliament adopted its report and agreed to start the informal trilogues. Technical meetings took place in mid-September and a number of trilogues were held towards the end of 2013. In February 2014, the Directive was approved in amended form by the European Parliament and adopted.¹⁶⁰ On 26 Feb 2014, the Parliament and Council adopted Directive 2014/26/EU on collective management.¹⁶¹

The Directive obliges Member States to regulate the substantive content of society-member and society-user relations. The Directive begins by articulating an obligation that Member

¹⁴⁸ OWD Art 1(2). Most notably, these do not include stand-alone photographs, and many unpublished works that are not already publicly accessible. The regime extends beyond authorial works to include related rights (phonograms) and also includes unpublished works that are publicly accessible as long as 'it is reasonable to assume that the rightholders would not oppose the uses': Art 1(3).

¹⁴⁹ OWD, Art. 1(1) ('publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations')

¹⁵⁰ OWD, Art 6(1).

¹⁵¹ OWD, Art 2.

¹⁵² OWD, Arts. 2, 3.

¹⁵³ OWD, Art 3(1).

¹⁵⁴ OWD, Art 3(3) ('a diligent search shall be carried out in the Member State of first publication...').

¹⁵⁵ OWD, Art 3(4).

¹⁵⁶ OWD, Art 5.

¹⁵⁷ OWD, Art 6(5). Determined by the laws of the country where the organisation using the work is established.

¹⁵⁸ OWD, Art. 4.

¹⁵⁹ COM (2012) 372 final.

¹⁶⁰ Directive 2014/26/EU of 26 February 2014 (hereafter 'CMD').

¹⁶¹ OJ L 84/72.

States ensure that collecting societies act in the best interest of their members,¹⁶² and that Member States ensure that various rights are conferred on rightholders and members,¹⁶³ and various obligations on societies relating to annual meetings,¹⁶⁴ collection and use of revenue,¹⁶⁵ deductions,¹⁶⁶ and so on. There are requirements as to distribution,¹⁶⁷ annual royalty statements (specifying deductions),¹⁶⁸ internal handling of complaints,¹⁶⁹ and external adjudication of complaints by 'competent authorities'.¹⁷⁰ The Directive states that rightholder shall have the right to terminate the authorisation to manage rights...upon serving reasonable notice not exceeding six months.'¹⁷¹

The 2014 Directive contains a number of provisions that seek to ensure that Societies which enter into reciprocal relations with other Societies are able to ensure that their members interests are secured. Importantly, for example, no deductions (eg for social and cultural purposes) are to be made by any society for fees it collects on behalf of another society under a representation agreement.¹⁷² The Directive also provides that there shall be no discrimination against rightholders whose rights are managed under a representation agreement,¹⁷³ and that monies are distributed 'regularly, diligently and accurately.'¹⁷⁴

The Directive (which is a minimum harmonization instrument) includes provisions that relate to users. These include obligations to conduct negotiations for the licensing of rights 'in good faith',¹⁷⁵ to base licensing on 'objective and non-discriminatory criteria' and for tariffs to reflect the 'economic value of the use of the rights in trade' and 'the service provided by the collective management organisation'.¹⁷⁶ The Directive requires Member States to provide for disputes to be 'submitted to a court, and if appropriate, to an independent and impartial dispute resolution body'.¹⁷⁷ The Directive has a swathe of more detailed provisions relating to multi-territory licensing.

Court of Justice Elaboration of the Acquis

The Court of Justice has been active in responding to references to national courts on the Directives.

One particular area is in relation to digital technologies, where it has recently given decisions on when Internet browsing and hyperlinking require authorisation of the copyright

¹⁶² CMD, Art 4.

¹⁶³ CMD, Art 5(2) (freedom to appoint collecting society from any Member state), (3) (retention of right to licence non-commercial uses), (4)-(6) (termination)

¹⁶⁴ CMD, Art 8.

¹⁶⁵ CMD, Art 11

¹⁶⁶ CMD, Art 12. In some countries there are very strong traditions regarding these funds, often leading to deductions of 10% for social and cultural purposes such as pensions, grants, festival support. The Directive permits collecting societies to make deductions from which to operate 'social, cultural or educational' funds. Such deductions may be approved in the annual general meeting, Art 8(5)(d), but under art 12(4) 'such services shall be provided on fair criteria, in particular, as regards access to and the extent of, those services.'

¹⁶⁷ CMD, Art 13(1). Payments must be made within 9 months of the year end in which they were collected.

¹⁶⁸ CMD, Art 16(b), (c), (e), (f)

¹⁶⁹ CMD, Art 34 (requiring writing and reasons)

¹⁷⁰ CMD, Art 37

¹⁷¹ CMD, Art 5.

¹⁷² CMD, Art 15.

¹⁷³ CMD, Art 14.

¹⁷⁴ CMD, Art 15(2).

¹⁷⁵ CMD, Art 16(1).

¹⁷⁶ CMD, Art 16(2).

¹⁷⁷ CMD, Art 35. The body must have 'expertise in intellectual property law.'

owner.¹⁷⁸ It has also given important rulings on the location of acts of infringement on the internet.¹⁷⁹

Elsewhere the Court has started to build on the framework set out in the directives, reasoning from one Directive to another, to offer up some harmonized norms. The most notable example of this trend relates to the notion of “originality”. The legislature harmonized the originality requirement in an identical manner for computer programs, photographs, and databases, and the Court has gone on to adopt the same standard for all authorial works, namely that works should only be protected where they are their author’s ‘own intellectual creations’.¹⁸⁰ However, not all areas are amenable to judicial harmonization,¹⁸¹ and it is notable that at least one Advocate-General has specifically urged the legislature to pursue ‘a much greater level of harmonization’.¹⁸²

Stakeholder dialogue is thought by the European Commission to offer a more rapid, and indeed practical responses to difficult challenges. The Commission has had a number of recent successes in brokering agreements between stakeholders, for example on behalf of the visually impaired and publishers, as well as between libraries and publishers). In 2013, a series of “stakeholder” dialogues were held on cross-border access and the portability of services; user-generated content and licensing for small-scale users of protected material; facilitating the deposit and online accessibility of films in the EU; and promoting efficient text and data mining for scientific research purposes. Some of the dialogues were reported to have made some progress while others – user-generated content and data mining – reached no consensus. In these areas, there is a wide gulf between what is acceptable to different stakeholders.¹⁸³

4.6. The 2014 -2019 Parliament

In December 2012, the Commission announced that in addition to structured stakeholder dialogue, it would continue its review of the EU framework for copyright with a view to a decision in 2014 on whether to table legislative reform proposals.¹⁸⁴ Various reviews of national law, including the UK’s Hargreaves Review,¹⁸⁵ and an Irish review (chaired by Eoin O’Deil),¹⁸⁶ indicate that there is a real appetite in member states for reform, particularly with regard to exceptions. At the end of 2013, the Commission opened up these same questions to consultation.

Amongst the many issues raised in the consultation are questions relating to the definition of rights (in particular the territorial scope of the making available right), hyperlinking,

¹⁷⁸ Case C-360/13, in *Newspaper Licensing Agency Ltd v Public Relations Consultants Association* (June 2014) (on browsing); Case C-466/12, *Svensson v. Retriever Sverige AB*, (13 Feb 2014), (CJEU, 4th Ch) (on hyperlinking).

¹⁷⁹ Case C-173/11, *Football Dataco Ltd. v. Sportradar GmbH*, [2013] 1 CMLR (29) 903 (18 Oct. 2012) (CJEU, 3rd Ch).

¹⁸⁰ *Software Dir.*, Art. 1(3); *Duration Dir.*, Art. 6, Recital 17; *Database Dir.*, Art. 3(1); Case C-5/08, *Infopaq Int v. Danske Dagblades Forening*, [2009] ECR-I 6569 (4th Ch), [37] (‘copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author’s own intellectual creation.’)

¹⁸¹ In *Joined Cases C-457/11, C-458/11, C-459/11 and 460/11, VG Wort v. KYOCERA Document Solutions Deutschland GmbH*, [AG31] (AG Opinion, 24 Jan 2013), (‘there comes a point at which only the legislature is competent to ensure ... evolution.’)

¹⁸² Case C-521/11, *Amazon.com International Sales Inc v. Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte*, (7 March 2013), [AG6] (AG Mengozzi).

¹⁸³ See *Licences for Europe: Ten Pledges to Bring More Content Online* (pledges to work to make licensing easier).

¹⁸⁴ *Communication on Content in the Digital Single Market COM (IP/12/1394)789 final* (18 Dec. 2012).

¹⁸⁵ Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth. An Independent Report by Professor Ian Hargreaves* (May 2011).

¹⁸⁶ *Modernising Copyright: The Report of the Copyright Review Committee* (Dublin, 2013).

browsing, exhaustion through distribution online, registration, limitations and exception (including text and data mining and user generated content), private copying (and associated levies),¹⁸⁷ term, ensuring appropriate remuneration for authors. Responses to the Consultation were March 2014 and a White Paper is expected in the autumn of 2014.

In the short term, the focus is likely to continue to be on the scope of rights, exceptions and issues of enforcement. These might include clarification of some of the questions that the ECJ has been dealing with, such as hyperlinking and the location of various acts (reproduction, making available) when they occur on the Internet. It will very likely include consideration of the impact of these rules on research (for example, text and data mining) and proposals for new exceptions. There may also be consideration of certain practices that have emerged in enforcing copyright, such as "speculative invoicing". The proposal for a Directive on Trade Secrets (discussed later in this document) includes a provision designed to protect people from unjustified claims. As many of these issues are closely connected with uses on the Internet, Parliament should expect to face a range of fiercely held views.

In the medium term, questions will need to be addressed on more thorny issues that have long divided the approaches of countries such as the UK from those of France and Germany: moral rights and copyright contracts. These topics will be particularly problematic because these are marked differences between different member states. They are also areas of copyright law which are closely intertwined with other areas of national law such as contract law and labour law. As such, reform will invariably be caught up in broader debates.

In the longer term, Parliament will wish to consider the merits of full-scale harmonization and possibly the creation of a unitary European copyright. At present, the Commission consultation asks: "Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?"¹⁸⁸ An academic group of copyright specialists, the Wittem Group, has sought to pave the way for such a development.¹⁸⁹

The new Commission President Juncker stated in his speech of July 15, 2014, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change that "we will need to have the courage to break down national silos in telecoms regulation, in copyright and data protection legislation. To achieve this, I intend to take, within the first six months of my mandate, ambitious legislative steps towards a connected digital single market, notably by swiftly concluding negotiations on common European data protection rules; by adding more ambition to the on-going reform of our telecoms rules; by modernising copyright rules in the light of the digital revolution and changed consumer behaviour; and by modernising and simplifying consumer rules for online and digital purchases."

¹⁸⁷ There has been considerable work already on this issue. See A Vitorino, Recommendations resulting from the Mediation on Private Copying and Reprography Levies (2013), a mediation announced in COM (2011) 287.; E.C., Fair Compensation for Acts of Private Copying (Brussels, 14 Feb 2008).

¹⁸⁸ European Commission, Public Consultation on the Review of the EU Copyright Rules (2013), 36 Q 79.

¹⁸⁹ For 'The Wittem Code', see www.copyrightcode.eu For discussion, see T Dreier, 'The Wittem Project of a European Copyright Code', in C Geiger (ed.), Constructing European Intellectual Property: Achievements and New Perspectives (2012) Ch 13.

5. TRADE SECRETS

5.1. What are Trade Secrets?

The term 'trade secret' refers to information that possesses commercial value because of its relative secrecy. That is, the possession of the information by one entity, as opposed to potential competitors, offers the possessor significant commercial advantage. The classic example of a trade secret is a secret recipe or formula for producing a marketable commodity that enables its possessor to produce the commodity more cheaply or makes the product more effective. But trade secrets are not confined to "technical trade secrets" and can include information about the sources of materials, customers, or relate to the administrative or organisational working of businesses themselves.

Empirical evidence suggests that businesses regard 'trade secrets' as important assets and rely on such secrecy as part of their innovation strategies.¹⁹⁰ According to Anthony Arundel,¹⁹¹ empirical surveys "consistently show that manufacturing firms give secrecy a higher average rating [than patents] as an appropriation method for both product and process innovations." Arundel bases his conclusions from data collected in the 1993 (European) Community Innovation Survey (CIS). Taking a subset of 2,849 respondent businesses that reported that they perform R&D on a continuous basis, Arundel analysed replies to the question 'evaluate the effectiveness of the following methods for maintaining and increasing competitiveness of product [or process] innovations introduced during 1990–1992'. The methods included lead time, secrecy, complexity, patents, and design registration, and the respondents were asked to grade the significance from 'insignificant' to 'crucial' on a five-point scale. Most gave the highest rating to lead time (ie the advantage that comes from being first to the market), but 19.8 per cent rated secrecy as 'crucial' for process innovations, while 16.9 per cent rated secrecy 'crucial' for products. This surpassed the relevant figures for patents, which were 7.3 per cent (process) and 11.2 per cent (products). Recognizing problems with the approach taken in collating these figures, Arundel took the raw data to examine the relative rating of patents and secrecy by each respondent: 44.3 per cent rated secrecy more important than patents, and only 17.5 per cent thought patents were more important than secrets.

5.2. Why Protect Trade Secrets?

There has been much less exploration of the justifications for offering legal protection of trade secrets than other aspects of intellectual property law. Indeed, one of the few sustained analyses conducted in the United States is highly sceptical of whether there is any independent justification for protecting trade secrets. Professor Bob Bone argues that:

"[T]rade secret law is merely a collection of other legal norms—contract, fraud, and the like—united only by the fact that they are used to protect secret information. Neither the fact that a trade secret is information nor the fact that it is a secret provides a convincing reason to impose liability for a

¹⁹⁰ For an overview, see T. Aplin, L. Bently, P. Johnson & S. Malynicz, *Gurry on Breach of Confidence* (Oxford: OUP, 2012) Ch 1.

¹⁹¹ A Arundel, 'The Relative Effectiveness of Patents and Secrecy for Appropriation' (2001) 30 *Research Policy* 611, 612.

non-consensual taking. Trade secret law is in this sense parasitic: it depends on a host theory for normative support.”¹⁹²

Professor Bone, it should be noted, is not saying that trade secrets should not be legally protected. Rather, he is saying that they should not be protected unless there is some other legal wrong – breach of contract, trespass, theft and so on.

Others, however, have identified at least five different arguments for the legal protection of trade secrets:¹⁹³

Incentivizing the creation of information. It is recognised that in the absence of some protection, there will be underinvestment in the creation of valuable intangibles. Patents and copyright operate to correct this market failure, and it may be that trade secret law does so too.¹⁹⁴

Reducing wasted expense on protection. Absent any legal protection of trade secrets, a business that developed, or held, valuable information would take steps to keep competitors from accessing the information. To do so they would likely limit who had access to the information, and invest in security measures. In turn, competitors who suspected that others had valuable information would spend money trying to access it. An ‘arms race’ of defensive and offensive action would ensue, all involving unproductive expenditure. Trade secrets law reduces the level of private “wasted” investment in protecting, and uncovering, existing trade secrets, and, as such, improves overall welfare.¹⁹⁵

To prevent the unjust enrichment of one person at the expense of another. The contention is that it is ethically wrong for one business to gain the information of another—and thus be ‘enriched’—by means which are ‘unfair’ (and hence ‘unjust’). The use of information that has been given in confidence is just such unfair enrichment, as is the acquisition of information that is revealed in breach of contractual or other relations of confidence or by other reprehensible means.

To preserve and promote ethical standards of conduct. It is sometimes said that trade secrets deserve protection in order to uphold standards of ‘business ethics’. The First Restatement of Torts in the United States, for example, explains that trade secret ‘protection is merely against breach of faith and reprehensible means of learning another’s secret’.

National economic interests. The argument is simply that the creation of valuable commercial information underpins the EU’s economy and, if such information is not protected, the economies of other countries will benefit from such information and ultimately become more competitive. This is particularly significant in relation to trade secrets, because it is in relation to knowledge generation (rather than labour costs, mineral or agricultural resources), that the EU retains a ‘comparative advantage’ over other

¹⁹² RG Bone, ‘A New Look at Trade Secret Law: Doctrine in Search of a Justification’ (1998) 86 Cal Law Rev 241, 245.

¹⁹³ For further exploration of these arguments, see T. Aplin, L. Bently, P Johnson & S Malynicz, *Gurry on Breach of Confidence* (Oxford: OUP, 2012) Ch 3.

¹⁹⁴ *Kewanee Oil v Bicorn* 416 US 470, 481 (1974). According to Burger CJ, “Trade secret law will encourage invention in areas where patent law does not reach, and will prompt the independent innovator to proceed with discovery and exploitation of his invention. Competition is fostered and the public is not deprived of the use of valuable, if not quite patentable, invention information; the inventor will know that ... he will be able to recoup his investment with relatively little risk from poachers”.

¹⁹⁵ Landes and Posner, *The Economic Structure of Intellectual Property Law*, 354–71.

countries active in the 'global economy'. Arguments of this sort informed the US Economic Espionage Act (which criminalized misappropriation of trade secrets in US federal law).

These potential reasons need to be set against important harms. Protecting trade secrets, in so far as it offers protection that is preferred to patent law, undermines patent law's goal of incentivising disclosure of technical data. In this respect, it has been recognised that it is important the trade secret law is relatively weak, so that incentives exist, where appropriate, to seek patents. One such "weakness" is provided in many legal systems by ensuring "reverse engineering" is permissible and not regarded as involving violation of trade secrets.

Broad protection of trade secrets may also endanger valuable competition. An important literature from the US has highlighted the importance of employee mobility, and the so-called "technological spillovers" associated with such mobility, in producing competition and innovation amongst hi-technology firms. Indeed, some studies claim that one reason for the emergence of Silicon Valley came from the mobility engendered by legal rules that prohibited so called "restrictive covenants." Similar reasoning applies to protection of trade secrets. Employee mobility can only be assured if broad freedoms are offered to ex-employees to utilise skill and knowledge gained in previous employment. This suggests that only easily identifiable, discrete information of obviously high value, should be capable of protection against ex-employees. A broad and/or vague conception of trade secrecy could facilitate legal actions to harass ex-employees and impede competition.

Moreover, protection of trade secrets involves many of the dangers widely acknowledged with secrecy: it can shield businesses, and indeed governments, from justified scrutiny. Trade secret law, and confidentiality more generally, has been used as a mechanism to cover up wrong-doing, to impede attempts at ensuring that employees are not subject to discrimination (on gender or racial lines),¹⁹⁶ as well as to shield poor decision-making by government (particularly in procurement matters) from scrutiny.

5.3. EU Harmonization Efforts

Rules relating to trade secrets vary significantly from one country to another. In England, Scotland and the Republic of Ireland, trade secrets have typically been protected through a combination of contract law, labour law and the doctrine of "breach of confidence." In other European countries, protection of trade secrecy falls within the concept of "unfair competition."¹⁹⁷ In some countries, the primary vehicle for protection of trade secrets has been the criminal law.¹⁹⁸

The 1994 TRIPS Agreement requires members to afford protection to those who lawfully control 'undisclosed information'. More specifically, Article 39 of TRIPS states that, in the course of providing protection against unfair competition (as required by Article 10bis of the Paris Convention), members shall provide natural and legal persons with the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practice. Article 39 requires information to be protected if it is secret, has commercial value because it is secret, and has been subject to reasonable steps to keep it secret.

¹⁹⁶ Through restrictions on disclosure of information about pay and conditions.

¹⁹⁷ Hogan Lovells International, Study on Trade Secrets and Parasitic Copying (Look-alikes), MARKT/2010/20/D: Report on Trade Secrets for the European Commission (2011), [251]-[252]

¹⁹⁸ Ibid, [254]-[256].

The European Commission has been interested in the topic since 2011, when it put out tenders for a report on the state of the law,¹⁹⁹ followed by a further report on the role of trade secrets for innovation.²⁰⁰ These studies identified widespread variations in the laws of Member States. The Commission is of the view that this impacts on cooperation across borders and. According to the Impact assessment²⁰¹

"Two main problems have been identified:

(1) Sub-optimal incentives for cross-border innovation activities. When trade secrets are under a risk of misappropriation with ineffective legal protection, incentives to undertake innovation activities (including at cross-border scale) are affected

(2) Trade secret-based competitive advantages are at risk (reduced competitiveness): the fragmented legal protection within the EU does not guarantee a comparable scope of protection and level of redress within the Internal Market, thus putting trade-secret based competitive advantages, whether innovation-related or not, at risk and undermining trade secret owners' competitiveness."

In November 2013, the Commission issued a proposal for a Directive.²⁰² The legal basis for the proposed intervention is Article 114 (the Internal Market). The proposal explains:

"The existing national rules offer an uneven level of protection across the EU of trade secrets against misappropriation, which jeopardises the smooth functioning of the Internal Market for information and know-how."²⁰³

One commentator, has observed, however, that "only a modest amount of harmonization is likely to ensue from implementation of this Directive."²⁰⁴ The proposed amendments by the Council would reduce still further the harmonizing effect, raising doubts as to the appropriate legal basis for the proposal.

The Commission proposal would require Member states to offer protection against the unlawful acquisition, use and disclosure of trade secrets. The proposal does not define the type of protection: it does not, for example, require that trade secrets are treated as 'property' or 'intellectual property' or that protection be afforded under the rubric of 'unfair competition'. Rather the Commission proposal requires that various types of 'measures, procedures and remedies' be available in order to prevent, or obtain redress for, the unlawful acquisition, use or disclosure of a trade secret.

¹⁹⁹ Ibid.

²⁰⁰ Baker & Mackenzie, Study on Trade Secrets and Confidential Business Information in the Internal Market, MARKT/2011/128/D (2013).

²⁰¹ Commission Staff Working Document, Executive Summary of the Impact Assessment, Brussels, 28.11.2013 SWD(2013) 472 final, 4. Explanatory Memorandum, COM/2013/0813 final - 2013/0402 (COD), 5.

²⁰² Proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, COM/2013/0813 final - 2013/0402 (COD).

²⁰³ Explanatory Memorandum, COM/2013/0813 final - 2013/0402 (COD), 6.

²⁰⁴ Tanya Aplin, 'A Critical Evaluation of the Proposed EU Trade Secrets Directive', King's College, London, Working Paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2467946

It is proposed to adopt the definition of subject matter utilized in Article 39 of the TRIPs Agreement.²⁰⁵ This, of course, represents a minimum standard in TRIPs, whereas in the context of a harmonizing Directive also defines the limits of Member States law (on this topic).²⁰⁶ In that respect it is worth noting that the definition includes a condition, namely, that 'the information has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.'²⁰⁷

The proposal seeks to define the circumstances when acquisition, use or disclosure is unlawful. Acquisition would be unlawful where the information is acquired by bribery, theft, inducing breach of confidence or 'any other conduct which, under the circumstances, is considered contrary to honest commercial practices.'²⁰⁸ The latter phrase is derived from Article 10bis of the Paris Convention.

There are important safeguards for independent creation and reverse engineering. Under proposed Article 4(1), the acquisition of trade secrets is said to be lawful when obtained by 'independent discovery or creation' or the 'observation, study, disassembly or test of a product or object that has been made available to the public or that it is lawfully in the possession of the acquirer of the information.'²⁰⁹²¹⁰

Moreover, the proposal explicitly deals with products made using trade secrets, which it designates 'infringing goods.' It is intended to provide that 'the conscious and deliberate production, offering or placing on the market of infringing goods' shall be considered an unlawful use of a trade secret. 'Infringing goods' are defined as good 'whose design, quality, manufacturing process or marketing significantly benefits from trade secrets unlawfully acquired, used or disclosed.'²¹¹

The proposed Directive is general in its terms and thus appears applicable to trade secrets held by employees, and ex-employees. Article 3(3) as to when the use of a trade secret should be unlawful seems applicable to employees and ex-employees. Recital 8 states that the definition of a trade secret 'not extend to the knowledge and skills gained by employees in the normal course of their employment and which are known among or accessible to persons within the circles that normally deal with the kind of information in question' Article 4(2)(e), which prevents the use of measures against a person whose acquisition, use or disclosure is 'for the purpose of protecting a legitimate interest' might offer ex-employees some freedom.²¹²

The proposal contains safeguards that would protect the 'public interest' in ensuring certain information is disclosed. More specifically, proposed Article 4(2) states that Member State should ensure that measures to prevent use or disclosure are not available when it is 'for making legitimate use of the right to freedom of expression and information' or 'for the purpose of revealing an applicant's misconduct, wrongdoing or illegal activity,

²⁰⁵ Proposed Dir., Art 2. Note also recital 8 (such definition s and should not extend to the knowledge and skills gained by employees in the normal course of their employment and which are known among or accessible to persons within the circles that normally deal with the kind of information in question).

²⁰⁶ Proposed Dir., Recital 8.

²⁰⁷ Proposed Dir., Art 2(1)(c). The requirement can be traced back to the US Uniform Trade Secrets Act. On this aspect of US law, see especially Bob Bone, 'Trade Secrecy, Innovation and the Requirement of Reasonable Secrecy Precautions', in R. Dreyfuss and K. Strandburg (eds), *The Law and Theory of Trade Secrecy: A Handbook of Contemporary Research* (Edward Elgar, 2012).

²⁰⁸ Proposed Dir, Art 3(2)(f).

²⁰⁹ Proposed Dir, Recital 10.

²¹⁰ Cf. the position under current German law, where reverse engineering may not be permissible.

²¹¹ Proposed Dir, Art 2(4).

²¹² For example, Article 16 of the Charter protects the freedom to conduct a business.

provided that the alleged acquisition, use or disclosure of the trade secret was necessary for such revelation and that the respondent acted in the public interest.²¹³

The proposal would require Member states to offer a whole panoply of civil law procedures and remedies, including measures to keep information secret during litigation,²¹⁴ interim relief,²¹⁵ injunctions,²¹⁶ destruction of infringing good,²¹⁷ and damages.²¹⁸ There is much here that replicates the Enforcement Directive. However two provision are particularly worth noting. First, Article 7 proposes a limitation period of 2 years (shorter than that under the civil law in many Member states). Second, Article 8 empowers the courts to restrict access to information during trial in order to maintain its confidentiality. Most radically, the court might prevent the information from being disclosed to the alleged infringer, but only to his or her legal representative and experts (who would be subject to confidentiality obligations).²¹⁹

The proposed Directive would also require Member states to offer remedies for abusive actions, that is, in cases where actions for misuse of trade secrets are themselves misused.²²⁰ This is a significant proposal, not seen elsewhere in the intellectual property legislation (though consideration might be given to such a general rule).

There is no proposal on criminal sanctions.

5.4. The 2014 - 2019 Parliament

The Commission's proposal has been the subject of significant debate in Council, and has been subject to substantial modification. On 26 May, 2014 the Council adopted its 'general approach'.²²¹

The main amendments promoted by the Council are:

(1) Clarifying that this is a minimum harmonisation of the different civil law regimes, whilst allowing member states to apply stricter rules, albeit with certain safeguards for example in defining lawful acquisition of information (Council General Approach, Article 1);

(2) Redefining the (minimum) circumstances in which acquisition, use or disclosure of trade secrets would be unlawful by removing the requirement of scienter in relation to acquisition, use or disclosure (the proposal refers to 'gross negligence or intention' but in the common approach adopted in Council this is removed) and marketing of infringing goods (the proposal says this is unlawful where 'conscious and deliberate');²²²

²¹³ Recital 12.

²¹⁴ Proposed Dir. Art 8.

²¹⁵ Proposed Dir, Arts 9-10.

²¹⁶ Proposed Dir., Arts 11-12.

²¹⁷ Proposed Dir, Art 11(2)(d), (e), 11(3).

²¹⁸ Proposed Dir, Art 13,

²¹⁹ Proposed Dir. Art 8. In exceptional circumstances, and subject to appropriate justification, the competent judicial authorities may restrict the parties' access to those hearings and order them to be carried out only in the presence of the legal representatives of the parties and authorised experts subject to the confidentiality obligation."

²²⁰ Proposed Dir., Art 6(2).

²²¹ Council Doc 9870/14, May 19, 2014. These amendments are also analysed in Tanya Aplin, 'A Critical Evaluation of the Proposed EU Trade Secrets Directive', King's College, London, Working Paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2467946

²²² Council, General Approach, Art 3(2), (3), (5).

(3) Redefining the circumstances in which acquisition of trade secrets would be unlawful by reducing the examples of conduct which is contrary to honest commercial practices in Article 3(2)

(4) Redefining the circumstances in which acquisition would be lawful, in particular, by narrowing the “reverse engineering” provision in Article 4(1)(b) of the proposal, which states that it is lawful to

“observation, study, disassembly or test of a product or object that has been made available to the public or that it is lawfully in the possession of the acquirer of the information”

by adding the condition that the acquirer must be “free from any legally valid duty to limit the acquisition of the trade secret.”

(5) Adding a new clause stating that acquisition, use and disclosure is lawful “to the extent that [it]...is required or allowed by Union or national law.”²²³

(6) Replacing the Commission proposal for a two year limitation period for claims or bringing actions before courts, with one of six years;²²⁴

(7) Modifying the proposal's the preservation of confidentiality in the course of legal proceedings, to ensure that the rights of the parties involved in a trade secret litigation case are not undermined by allowing for the creation of “confidentiality clubs” but starting that they should include “at least one person from each party, its respective lawyer or representative to the proceedings...”;

(8) Qualifying the right of the trade secret holder to claim damages in relation to employees by permitting Member states to restrict liability for in case of violation of a trade secret if acting without intent.²²⁵

The European Economic and Social Committee issued an opinion on March 24, 2014, in support of the proposal. The rapporteur was Pedro Augusto Almeida Freire.²²⁶ The European Data Protection Supervisor delivered its opinion on March 12, 2014.²²⁷

The Legal Affairs Committee has yet to examine the proposal systematically.²²⁸

²²³ Council, General Approach, Art 4(1)(a).

²²⁴ Council, General Approach, Art 7.

²²⁵ Council, General Approach, Art 13, para 2.

²²⁶ [OJ C/2014/226//48.](https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-12_TRADE_SECRETS_EN.pdf)

²²⁷ https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-12_TRADE_SECRETS_EN.pdf

²²⁸ It was discussed at the meeting of 19 March 2014 and the EP Policy Department provided an in-depth analysis in the meeting of 7 April 2014, EP 493 055.

6. OTHER ASPECTS: ENFORCEMENT, INTERNATIONAL ACTIVITY

There is persistent concern with issues of enforcement of intellectual property rights both within the EU and internationally.

6.1. Private International Law

If infringing goods are made in one country but advertised via the Internet and transmitted (electronically or by post) to another country, where can or must an action be brought? What law is to be applied in such cases?

The European Union has adopted a Regulation governing jurisdiction and recognition of judgments (based on the Brussels Convention of 1968).²²⁹ These are general instruments but with implications for intellectual property rights, particularly given the increasing concerns over cross-border infringement. The EU's 'Rome II' Regulation adopts the principle that the *lex protectionis* is the applicable law in the case of non-contractual actions relating to intellectual property rights.²³⁰

The basic rule of the Brussels Regulation is that a person domiciled in a member state should be sued in the courts of that state.²³¹ Consequently, a British copyright owner must normally bring an action against a French infringer in French courts—the domicile of the claimant and the familiarity of the court with the relevant law being largely irrelevant. There are five qualifications to this basic rule that need to be noted, as follows

- (i) Where the matter involves a tort, a claimant may bring an action in the place where the harmful event occurred.²³²
- (ii) Where there are a number of defendants, an action may be brought in the country in which any one of the defendants is domiciled.²³³
- (iii) An action can be brought in a country other than that of the defendant's domicile if both parties agree.²³⁴
- (iv) In proceedings concerned with the registration or validity of patents, trade mark, designs, or other similar rights required to be deposited or registered, the courts of that state have exclusive jurisdiction.²³⁵
- (v) Different rules apply in relation to preliminary measures.²³⁶

The 2009 - 2014 Parliament saw a number of important cases decided by the CJEU interpreting these provisions jurisdiction (which in turn reflect great uncertainty in the

²²⁹ Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and recognition and enforcement of judgments [2001] OJ L 12/1.

²³⁰ Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L 199/40 (31 July 2007) ('Rome II'), Art. 8. The concept of intellectual property is defined, by example, in Recital 21. A different principle applies to cases of 'unfair competition'.

²³¹ Brussels Reg., Art. 2 (ex Brussels, Art. 2). 6, 4.

²³² Brussels Reg., Art. 2 (ex Brussels, Art. 2).

²³³ Brussels Reg., Art. 5(3).

²³⁴ Brussels Reg., Art. 6(1).

²³⁵ Brussels Reg., Art. 23.

²³⁶ Brussels Reg., Art. 22(4).

²³⁷ Brussels Reg., Art. 31.

courts of Member States). The case-law on both the “place of the harmful event” (for article 5(3)),²³⁷ and co-defendant rules (Article 6(1)) can be said to be in the process of elaboration and at present is anything but coherent.²³⁸ This is not the place to offer further detail, though the topic is one with which the EU legislature needs to be concerned.

6.2. Remedies and enforcement

The EU has sought to harmonize certain aspects of civil remedial law in the Enforcement Directive.²³⁹ The Directive requires that the courts of member states make available certain procedures and remedies: seizure orders,²⁴⁰ disclosure orders,²⁴¹ interim injunctions,²⁴² final injunctions,²⁴³ publicity orders,²⁴⁴ as well as financial remedies.²⁴⁵ The Directive sets out certain standards, in particular ‘proportionality’, that are to be taken into account when applying its provisions.²⁴⁶ The Directive does not deal with criminal liability. Not long after the Enforcement Directive was adopted, a concerted attempt was made to introduce a directive requiring criminal remedies.²⁴⁷ In the face of doubts over competence to legislate in relation to criminal matters, however, the proposal was abandoned. Although criminal sanctions for infringement of IP remains a matter of national law, there is some oversight, in particular via the European Court of Human Rights, to ensure fundamental rights and freedoms are not compromised.²⁴⁸

The most important developments in relation to enforcement during the Parliament of 2009 - 2014 has been through the Court of Justice. One focus has been “intermediaries”, particularly ‘online intermediaries’, such as service providers whose services support websites featuring infringing material, and those that offer their customers access to websites that themselves are infringing.²⁴⁹ Under Article 11 of the Enforcement Directive, member states are required to make provision for right holders ‘to apply for an injunction against intermediaries whose services are used by third parties to infringe an intellectual property right’. A parallel provision, applicable to copyright and related rights can be found in Article 8(3) of the Information Society Directive.²⁵⁰ The rationale is that such intermediaries are often ‘best placed to bring such infringing activities

²³⁷ *Football Dataco Ltd v. Sportradar GmbH*, Case C-173/11 [2013] 1 CMLR 29 (ECJ, Third Chamber) (taking a targeting approach in relation to database right); *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH*, Case C-523/10 (19 April 2012) (ECJ, First Chamber) (for trade marks, place of D’s establishment); *eDate Advertising GmbH v. X*, Case C-509/09 [2011] ECR I-10269 (ECJ, Grand Chamber) (in personality rights cases, place of claimant’s centre of interests); *Pinckney v. KDG Mediatech AG*, Case C-170/12 [2014] FSR (18) 354 (ECJ, Fourth Chamber) (in copyright cases, the country where infringement is said to have occurred necessarily has jurisdiction as place of damage).

²³⁸ *Solvay SA v. Honeywell Fluorine Products Europe BV*, Case C-616/10 (12 July 2012) (ECJ, Third Chamber); *Eva-Maria Painer v. Standard VerlagsGmbH and ors*, Case C-145/10 [2012] ECDR (6) 89, (ECJ, Third Chamber).

²³⁹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 195/16.

²⁴⁰ Enforcement Dir., Art. 7.

²⁴¹ *Ibid.*, Art. 8.

²⁴² *Ibid.*, Art. 9.

²⁴³ *Ibid.*, Art. 11.

²⁴⁴ *Ibid.*, Art. 15.

²⁴⁵ *Ibid.*, Art. 13.

²⁴⁶ *Ibid.*, Art. 3.

²⁴⁷ European Commission, Proposal for a Directive on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights (July 2005) COM(2005) 276 final; Amended Proposal (March 2008) COM(2006) 0168 final.

²⁴⁸ See e.g. *Neij and Kolmisoppi (The Pirate Bay) v. Sweden*, App. No. 40397/12 [2013] ECDR (7) 213 (ECtHR, Fifth Section).

²⁴⁹ *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v. Tele2 Telecommunication GmbH*, Case C-557/07 [2009] ECR I-1227, [46]; *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, Case C-314/12 (27 March 2014) (ECJ, Fourth Chamber).

²⁵⁰ Info. Soc. Dir. Art. 8(3).

to an end'.²⁵¹ There is no need to establish that the intermediary is liable either as a primary or secondary infringer. Member states are free to establish the 'conditions and modalities' of implementation.²⁵²

In *eBay*,²⁵³ the Court of Justice held that trade mark owners could secure, against the operator of an online marketplace by means of which their rights have been infringed, injunctions requiring the operator to take measures to prevent future infringements of those rights. The Court indicated that the precise measures were for national courts to devise using the procedural devices available to them. The Court said that the measures must be 'effective and dissuasive', 'proportionate', and must 'strike a fair balance between the various rights and interests'.²⁵⁴ A similar approach has been taken to intermediaries which facilitate copyright infringements. The Court has held that as long as the Court balances appropriately the rights and freedoms of the parties, an order that an internet service provider block access to particular sites (where infringing material is made available) might be justified.²⁵⁵ It seems conceivable that similar orders might be made against search engines that provide access to infringing sites, perhaps by requiring 'de-indexing'. However, the Court said that it would be inappropriate to grant an injunction that would compel a social networking site to install a filtering system, because orders that require service providers to monitor the activities of their customers are precluded by the e-Commerce Directive,²⁵⁶ and it has been held that this necessarily precludes systems designed to filter copyright material.²⁵⁷

In addition, the European Union has also adopted measures that regulate the external borders of the Union. More specifically, it has put in place mechanisms that ensure that goods that infringe intellectual property rights can be retained by customs authorities when they are introduced into or exported from the Community.²⁵⁸ The so-called 'Border Measures Regulation' of 2013 repealed and replaced an earlier Regulation from 2003.²⁵⁹ In 2012, using the European procedure then in place, there were more than 90,000 interceptions of goods, said to have a value of some Euro 1 billion, and the bulk of which (65 per cent) came from China. The most frequently seized goods were cigarettes (30 per cent), but 10 per cent was washing powder and 8 per cent of the goods seized were clothes.²⁶⁰

The European regulations establish mechanisms that ensure that goods that infringe intellectual property rights, other than travellers' personal luggage,²⁶¹ can be retained by customs authorities when they are introduced into the European Union. The Border Measures Regulation defines 'intellectual property rights' in Article 2(1) to cover goods infringing rights in trade marks, designs, copyright and related rights, geographical

²⁵¹ Info. Soc. Dir., Recital 59.

²⁵² Info.Soc.Dir., Recital 59.

²⁵³ *L'Oréal SA v. eBay International AG*, Case C-324/09 [2011] ECR I–6011, [128]–[143].

²⁵⁴ *Ibid.*, [136]–[143].

²⁵⁵ See *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, Case C-314/12 (27 March 2014) (ECJ, Fourth Chamber).

²⁵⁶ e-Commerce Dir., Art. 15; *Scarlet Extended*, Case C-70/10 [2011] ECR I–11959, [35]; *SABAM v. Netlog NV*, Case C-360/10 (16 February 2012) (ECJ, Third Chamber), [33].

²⁵⁷ *Scarlet Extended*, Case C-70/10 [2011] ECR I–11959, [39]–[40]; *SABAM v. Netlog NV*, Case C-360/10 (16 February 2012) (ECJ, Third Chamber), [37]–[38].

²⁵⁸ Regulation (EU) No. 608/2013 of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No. 1383/2003 [2013] OJ L 81/15 (the 'Border Measures Regulation').

²⁵⁹ *Ibid.*

²⁶⁰ European Commission, Customs Action to Tackle IPR Infringing Goods: Frequently Asked Questions (5 August 2013) IP/13/738.

²⁶¹ BMR, Art. 1(4) (goods of a non-commercial nature contained in a traveller's personal luggage). But goods sent from outside the European Union to a personal address within are liable to seizure if they would be infringing within the Union: *Blomqvist v. Rolex SA*, Case C-98/13 (6 February 2014) (ECJ, Second Chamber).

indications, patents, plant breeders' rights, and supplementary protection certificates, plus national laws of utility models and trade names.²⁶² The Regulation does not apply to parallel imports or overruns.²⁶³

Provisions are made in the Border Measures Regulation for a proactive intellectual property rights holder who gets wind of the fact that goods are going to be imported to make an 'application for Customs action'—that is, the right holder can apply to the relevant customs authorities designated by each member state to detain the goods, should they come into its hands.²⁶⁴ If the customs office comes across goods that it suspects are infringing (within the decision), 'it shall suspend release of the goods or detain them'.²⁶⁵ Right holders are given information necessary to assist them in establishing whether an intellectual property right has been infringed, including the opportunity to inspect the goods and to remove samples for analysis.²⁶⁶

Even if advance warning has not been given, but the relevant authority has sufficient grounds for suspecting that goods are infringing, the Regulation empowers the authority to prevent their transit temporarily.²⁶⁷ The authority will attempt to contact the relevant intellectual property right holder, who must complete the standard application for customs action within four days.

The customs office will not detain the goods indefinitely. Under the newly formulated Regulation, it seems that there are three possible scenarios that might ensue. First, the intellectual property right holder may take no further action. If so, the customs office should release the goods after ten days.²⁶⁸ Second, the intellectual property right holder (or other relevant third party) may commence an action for infringement in the relevant national tribunal (which could be a court or administrative body, depending of national provisions).²⁶⁹ If this occurs, and the right holder informs the authority, detention of the goods can be continued pending the outcome of proceedings.²⁷⁰ However, since that may not be for some time, the owner of the goods has an option of seeking the release of the goods on condition that they provide an appropriate security.²⁷¹ This option, it should be noted, is available only where the allegation is infringement of patent, design, plant breeders' right, utility model, or semi-conductor topography right (and thus not in cases of infringement of copyright, trade marks, or geographical indications). If the goods are found to be infringing at the substantive hearing, the competent authorities are empowered to destroy the goods and to take any measures that deprive the persons concerned of the economic benefits of the transaction.²⁷² Removing trade marks affixed to counterfeit goods is not normally regarded as sufficient.²⁷³

The third scenario is that the goods may be destroyed. Here two procedures are available: a general one; and one concerned with small packages. First, the parties may agree to destruction of the goods without the need for proceedings.²⁷⁴ The second

²⁶² BMR., Art. 2.

²⁶³ BMR, Art. 1(5).

²⁶⁴ BMR, Art. 5. Apparently, in 2012, there were 23,134 such applications.

²⁶⁵ BMR, Art. 17(1). If it fails to detect them, the authority is not liable to the right holder: BMR, Art. 27.

²⁶⁶ BMR, Arts 17(3), (4), 18(5), 19.

²⁶⁷ BMR, Arts 18, 5(3).

²⁶⁸ BMR, Art. 23.

²⁶⁹ *Sintex Trading v. Maksu ja Tolliamet*, Case C-583/12 (9 April 2014) (ECJ, Second Chamber).

²⁷⁰ BMR, Art. 23.

²⁷¹ *Ibid.*

²⁷² BMR, Art. 17.

²⁷³ *Ibid.*

²⁷⁴ BMR, Art 23. Until 1 January 2014, this procedure was optional for member states. It is now mandatory.

procedure for destruction relates to 'small consignments' (that is, posted parcels comprising fewer than three items and weighing under 2 kilos), where the goods are counterfeit or pirated.²⁷⁵ Here, the customs authority may give the declarant or holder notice of its intention to destroy the goods.²⁷⁶ The 'declarant or holder' has ten days in which to respond to such a notice and may agree to destruction, or oppose it, or, in some cases, will 'be deemed to have agreed'.²⁷⁷ Where there is agreement, or deemed agreement, the goods may be destroyed.²⁷⁸

The EU has also established the European Observatory on Infringements of Intellectual Property Rights.

According to a recent Communication, the Commission is launching a new Communication on an Action Plan addressing Intellectual Property infringements in the EU. The Communication states that "non-legislative actions are envisaged in promoting proportionate and equitable IP enforcement measures, and prioritising policy actions to bring more focus, better coordination and streamlining to current policies in protecting IPR."²⁷⁹

International action

Improving "enforcement" of IPRs also involves taking action outside the EU – particularly encouraging third countries to adopt equivalent levels of intellectual property protection, and enforce those standard.

During the Parliament of 2009 - 2014, the EU was involved in agreeing a number of important treaties, both negotiated by WIPO: the Beijing Treaty on Audiovisual Performances, signed in 2012, and the Marrakesh Treaty for the Visually Impaired, signed in 2013.

However, by far the most high-profile development was the Anti-Counterfeiting Trade Agreement. The ACTA was a plurilateral trade agreement, negotiated outside the WTO or WIPO, in secret. The agreement related largely to remedies, and from a European perspective did not go very much beyond what was already in place.²⁸⁰

The agreement was signed in October 2011 by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States. In 2012, 22 countries which are member states of the European Union signed as well.

Elsewhere, criticism of the agreement that had been widespread amongst civil society groups grew into outright opposition. The MEP, Kader Arif (FR, S), resigned his position as rapporteur in January 2012. In February 2012, there were widespread public protests. Ultimately, on 4 July 2012, the European Parliament rejected the ACTA 478 votes to 39, with 165 abstentions. So far, only Japan has ratified ACTA.

²⁷⁵ BMR, Art. 26(6). For the definition of prated or counterfeit goods, see Art. 2(5) and (6). This covers certain infringements of copyright, related rights, and designs, trade marks, and geographical indications.

²⁷⁶ BMR, Art. 26(1).

²⁷⁷ BMR, Art. 26(6).

²⁷⁸ BMR, Art. 26(7). Otherwise, the right holder is informed and, if it takes no action, the goods will be released.

²⁷⁹ Communication from the Commission, Trade, growth and intellectual property - Strategy for the protection and enforcement of intellectual property rights in third countries, COM(2014) 389 final, 13.

²⁸⁰ For a detailed analysis of how it in fact did do so, see Opinion of European Academics, at http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_200111_2.pdf

The Commission has reflected on the experience with ACTA:

"There are different reasons for the failure of these initiatives, but a common thread was a view that public concerns had not been sufficiently taken into account, e.g. whether these rules were fit for a digital economy or the impact these measures might have on fundamental rights as well as what is referred to as 'internet freedoms'." ²⁸¹

6.3. The 2014 -2019 Parliament

A number of further international developments can be expected over the term of the next Parliament.

Multilateral

For over a decade, WIPO has been actively promoting a new treaty in relation to broadcasting organisations. Even though much of the content of the proposed treaty echoes that which was adopted for copyright, sound recordings, and performers in the two 1996 Treaties, one recurring issue has been the best way to deal with internet services which are similar to broadcasting. There had been some hope for a diplomatic conference in 2014. ²⁸²

Second, the Standing Committee has been considering some sort of instrument on exceptions to copyright for libraries and archives and educational institutions.

Third, WIPO has long been involved examining possible systems of protection for so-called 'traditional cultural expressions'. In reflection of the fact that many indigenous cultures do not draw a rigid line between art and science in the way that Western cultures often do, WIPO's activities extend beyond copyright to include patents, trade marks, and other related rights. The work is conducted by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore and considerable progress has been made towards a draft, though it contains so many options (as to what counts as TCE and what protection should be afforded) that it resists summary. ²⁸³ The WIPO General Assembly will decide in September 2014 on whether sufficient progress has been made to warrant convening a Diplomatic Conference. ²⁸⁴

Fourth, longstanding negotiations have been taking place in the WTO over Geographical indications and will continue to be pursued by the EU. ²⁸⁵

Bilaterals

The EU is in the process of negotiating the so-called Transatlantic Trade and Investment Partnership (TTIP) with the US. The details of this are not yet publicly available, but the Parliament will want to examine this closely. It may be interesting to note in this context that a recent study by the European Commission, using a survey of 330 European

²⁸¹ Communication from the Commission, Trade, growth and intellectual property - Strategy for the protection and enforcement of intellectual property rights in third countries, COM(2014) 389 final, 12.

²⁸² There is also a parallel initiative in the Council of Europe. For discussion, see European Commission v. Council of the European Union, Case C-114/12 (3 April 2014), [AG2]-[AG8], [AG122]-[AG139], (AG Sharpston).

²⁸³ The draft provisions on TCEs are contained in WIPO/GRTKF/IC/25/7, July, 2013

²⁸⁴ Assemblies of Member States of WIPO Forty-Third (21st Ordinary) Session, Sept 23 - Oct 2, 2013.

²⁸⁵ Communication, Trade, growth and intellectual property, COM(2014) 389 final, 14.

businesses, indicated that North America is by far the most important trading partner region for Europe for patent licenses.²⁸⁶ Other negotiations on trade agreements include those with Mercosur, Morocco, Japan, Thailand, and Vietnam. A bilateral agreement dealing with the protection of geographical indications is being mooted with China.²⁸⁷

²⁸⁶ Radauer and Dudenbostel, 'PATLICE Survey – Survey on patent licensing activities by patenting firms' (2013), European Commission, Brussels, <http://ec.europa.eu/research/innovation-union/pdf/patllice-survey.pdf>

²⁸⁷ Ibid 15.

REGULATING ROBOTICS: A CHALLENGE FOR EUROPE

Dr. Andrea BERTOLINI¹
and
Prof. Erica PALMERINI²
Scuola Superiore Sant'Anna, Pisa, Italy

Abstract

Upon request by the JURI Committee, this paper aims at offering an analysis of the interplay between regulation and robotics in the European context. Since robotics represents a technological innovation, which will profoundly modify the societal structure, and a strategic market sector, the need for a legal appraisal and intervention emerge. The European Union is called to design a transparent and carefully tailored regulatory environment so as to influence the development of robotic applications in accordance with its core democratic values.

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¹ Andrea Bertolini is a post-doctoral researcher in private law at the Scuola Superiore S. Anna di Studi Universitari e Perfezionamento (SSSA), in Pisa. Dr. Bertolini earned a Ph.D. in private law summa cum laude at SSSA, and a Master in Laws (LL.M.) from Yale Law School (CT-USA). Since 2013 Dr. Bertolini is Adjunct Professor in Private Law at the University of Pisa, Dipartimento di Economia e Management. His research interests range from contract law and torts, to capital markets and technology regulation, in a European and comparative perspective. Dr. Bertolini is an attorney licensed to practice in Italy and New York (NY-USA). He has written chapters 1, 4, 5 (with the exception of sub-chapter 5.1), 6, 7 and 8 of this in-depth analysis.

² Erica Palmerini is Associate Professor of Private Law at the Scuola Superiore Sant'Anna, Pisa, Italy. Scientific coordinator of the EU RoboLaw project, funded within the Seventh Framework Program (G.A. n. 289092), her main research interests are in the fields of law and technology, tort law, medical law. She has written chapters 2, 3, sub-chapter 5.1 and chapter 9 of this in-depth analysis.

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EXECUTIVE SUMMARY

Robotics represents one of the most relevant technological innovations of the current century, a revolution that could impact the economy and society in a twofold sense. On the one hand, those countries that more than others will invest in robotic applications, developing a strong industry in the field, will soon acquire a relevant strategic hedge over latecomers and other players, who nonetheless will be consuming such devices. On the other hand, the advent of these technologies will profoundly modify the societal structure, also – but not only – by reshaping the labour market and subsequent income distribution.

Pursuant to a recent study the application of advanced robotics across health care, manufacturing, and services could generate an economic impact ranging from \$1.7 trillion to 4.5 trillion per year by 2025. A large share of this effect could derive from robotics applied to the healthcare domain, by increasing life quality and expectancy. Automation however will also make some tasks currently performed by humans obsolete, requiring new skills and competences to be developed by future generations seeking employment. The emergence of applications that can be installed on the human body attributing radically new capabilities or pushing existing ones beyond limits deemed today to be natural will question our understanding of what being human means. Driverless vehicles may radically transform our transportation system, and force a change in many habits and preferences we today give for granted.

Robotics thus calls for regulation, in order for it not to be ‘disruptive’ and rather allow its full beneficial potential to be exploited. In particular, despite some scenarios may appear belonging to a distant future, action is already required. Firstly, many applications could be developed in a much shorter time than expected. Secondly, even at the current stage of technological development some policy choices are required that need to be attentively pondered, since they may create some path dependency. Thirdly, other countries are taking action, regulating and in some cases openly favouring the development of robotic technologies and applications.

In deciding if, when, and how to regulate Europe has to adopt a functional perspective. The practical effect of regulation, the incentives it provides need to be very well pondered. Excessively restrictive regulation may in fact only impair the development of a supply side of the economy, impeding research and development of some applications within European countries. However, this would also entail losing the possibility to influence how these technologies shall function and be shaped once they reach the market, eventually even the European market.

Adopting a functional perspective also means to put rights – and fundamental rights as recognized by the European Union – first. On the one hand, this suggests the adoption of a Responsible Research and Innovation approach. On the other hand, it requires that the choice to adopt new regulation shall not mainly depend on the technological aspect of the application considered, such as its ability to operate autonomously or to ‘learn’. Rather, the impact the single application may have on society and fundamental rights shall be guiding the choice.

Robotic applications are in fact very different from one another, ranging from an automated vacuum cleaner – which appears to be quite unproblematic – to a prosthetic limb, a personal robot, a driverless vehicle, a surgical robot and a softbot. Addressing them

unitarily does not appear to be the preferable alternative since differences are often more relevant than similarities.

These applications then need to be considered on a case-by-case basis, identifying the issues they raise, and the way they impact fundamental rights, by fostering them or hindering them in some ways. If this analysis is conducted at a sufficiently early stage regulation could contribute to determine how such devices ought to be conceived for rights to be protected (e.g.: privacy by design).

At the same time, if some technologies are thought to positively enhance existing values policy choices could be adopted in order to favour their emergence and diffusion. Robotics for healthcare represents a perfect case in point.

Through the analysis conducted some issues appear to be recurring for different kinds of robotic applications, which deserve to be addressed: (i) liability rules, (ii) standardization, (iii) the regulation of human enhancement. However, despite the issues may be similar the solutions proposed may vary according to the single kind of applications, in light of the considerations just sketched.

Therefore, if liability rules should be perceived as a tool to possibly provide adequate incentives for the development of a desirable technology, the solution proposed for driverless vehicles is fundamentally based on adjustments of already existing insurance law regimes. For robotics prostheses instead it may suggest the adoption of a no-fault scheme, and for personal robots may even suggest the acknowledgment of the machine as a legal person (like for a corporation).

The use of standards, developed by competent supranational technical bodies such as the European Standard Organizations, is perceived as a viable and to some extent preferable alternative for the regulation of some specific aspects of robotics, in particular safety. The adoption of narrow tailored standards, frequently adjusted to accommodate most relevant technological developments, could ensure that the products that reach the European market are safe, leaving to liability rules the compensation function. Moreover, standardization may also be required so as to provide uniform qualification criteria across Europe to license the use of robotic applications by professionals, for instance in the case of surgical robots.

Finally the extent to which emerging technologies could allow to modify the human body, conferring brand new capabilities or pushing limits today deemed natural forward, is unparalleled. This requires us to reconsider what we understand as being human and to what extent modifying one's body represents the most advanced expression of a right to self-determination of one's own identity or rather may constitute – in some cases – the violation of a principle of human dignity. Methodological considerations are developed suggesting why and how the European Union should start addressing this complex and challenging issue.

1. ROBOTIC AS A STRATEGIC SECTOR FOR THE EUROPEAN MARKET

Robotics represents one of the most relevant technological innovations of the current century³, a revolution⁴ capable of radically modifying existing economies and societies at least in a twofold sense. On the one hand, those countries that more than others will invest in robotic applications, developing a strong industry in the field, will soon acquire a relevant strategic hedge over latecomers and other players, who nonetheless will be consuming such devices⁵. On the other hand, the advent of these technologies will profoundly modify the societal structure, also – but not only – by reshaping the labour market and subsequent income distribution⁶.

Pursuant to a recent study⁷ the application of advanced robotics across health care, manufacturing, and services could generate an economic impact ranging from \$1.7 trillion to 4.5 trillion per year by 2025. Much of the impact - \$800 billion to \$2.6 trillion – could come from improving and extending people's lives, in particular through the use of prostheses and exoskeletons. Thanks to such technologies more than 50 million people with impaired mobility in the developed world (including the elderly and people with disabilities) could restore mobility, improve their life quality and increase their lifespan. Robotics for human augmentation may have an economic impact of \$600 billion to \$2 trillion per year by 2025, preventing deaths, reducing in-patient care time and missed work days. Much of this gain could benefit users directly⁸. Robotic surgery (in particular minimally invasive laparoscopic surgery) is estimated as possibly reducing the number of deaths even as much as by 20% in developed countries (by providing aid to the doctor, autocorrecting movements, and by warning of potential risks), and up to 15% of all surgeries performed in countries with developed health-care systems could make use of these devices.

By 2025, autonomous road vehicles could have a \$200 billion to \$1.9 trillion impact, saving up to 150.000 lives, and reducing CO₂ emissions by 300 million tons, per year⁹.

As per service robots, while it is reasonably foreseeable that personal and household devices meant to perform cleaning and domestic tasks may become sufficiently low cost and therefore widely diffused so that at least 25% (and up to 50%) of the population will be making use of them, commercial service robots may be efficiently used for the care of the elderly and disabled. Overall commercial service robots could take over 4 to 8% of workers tasks by 2025, allowing to free substantial amount of time for more complex and valuable employment of available – human – resources¹⁰.

Finally much work could be automated thanks to industrial robots as well, effectively substituting 15-25% of industrial workers tasks. This data could be of concern for

³ Gates, W. H. (2007). A robot in every home. *Scientific American*.

⁴ Lin, P. (2012). Introduction to Robot Ethics. *Robot Ethics. The Ethical and Social Implications of Robotics*. P. Lin, K. Abney and G. A. Bekey. Cambridge (MA), The MIT Press.

⁵ Manyika, J., M. Chui, J. Bughin, R. Dobbs, P. Bisson and A. Marrs (2013). Disruptive technologies: Advances that will tranform life, business, and the global economy. *McKinsey Global Institute, available at http://www.mckinsey.com/insights/business_technology/disruptive_technologies*, 68

⁶ Ibid., 15-16 and 68.

⁷ The data here provided is all derived from *ibid.*, 68 and 72 ff.

⁸ In particular through a QALY approach the impact per person is estimated as ranging from \$240.000 to \$390.000 (*ibid.*, 74).

⁹ Ibid., 81.

¹⁰ Ibid., 75.

legislators, for the effects high levels of automation could have on the labour market. This issue is nonetheless not novel, and actually presents itself cyclically since the industrial revolution. In particular, despite being clear that the development of robotics will positively impact the economy it is not certain how the increase in wealth will be distributed¹¹. However, different considerations can be made. On the one hand, there is no doubt that robotic technologies will emerge and become diffused in the next years and decades, and there is no way such a phenomenon could be prevented. Instead, those countries that before others will take the initiative and favour the proliferation of a new industry for the development of these technologies, will certainly profit from an increase in internal revenue and workplaces. On the other hand, the reduction of production costs through robotics could trigger an opposite phenomenon to the one observed over the last years. By lowering the demand for low-skilled-low-cost labour, automation could induce large corporations to relocate their production lines in advanced economies¹². Finally, governments and policy makers are in the position to take action and prepare individuals to face the challenges these technologies bring about, in particular by investing in higher education for larger shares of the population¹³.

Overall robotic technologies appear to be a relevant opportunity that at the same time calls for – early, attentive, and effective – regulation on different levels, for it not to become ‘disruptive’¹⁴ and rather allow to exploit its full beneficial potential. At a more general level, a transparent and carefully tailored regulatory environment appears to be a key element for the development of a robotics and autonomous systems market, where products and services can be incubated, tested in real environments and eventually launched¹⁵.

More specifically, the potentially technology-chilling effect of some of the existing and applicable rules needs to be carefully pondered, in order to determine whether the effect attained is actually desirable (and the conclusion may vary according to the specific kind of robotic application considered). Some technologies may indeed raise complex ethical and social issues, that cannot be simplistically overlooked. Yet even in such cases regulation should be attentively designed not to merely impair the development of a supply side of the economy for those specific devices¹⁶, since that would entail reducing the possibility to effectively influence the way that product is conceived, designed, and finally distributed onto the market, including the standards it needs to conform to¹⁷.

Arriving late, not taking timely and adequate action, or lacking a functional approach in this field may represent an extremely costly decision. In the end robots will be out there, in the

¹¹ Ibid., 16.

¹² Ibid., 68

¹³ Ibid. 15

¹⁴ The term is utilized by *ibid.*, *passim*, and suggests that this complex phenomenon needs to be attentively governed.

¹⁵ Recently, within Horizon 2020 a research project was financed by the European Commission – ECHORD ++ – which also aims at developing specialized centers for the testing of robots in safe but real life environments. Similar measures were already adopted in many other industrialized countries including the US and Korea, see *fn.* 15.

¹⁶ Were too stringent rules adopted, raising initial costs for companies operating within a given legal system, competitors, originally operating in other markets and under other regulations, would find themselves at an advantage; most likely they would develop the application nonetheless, and push the companies operating in the more limited legal system outside the market for that technology. Later though the very product may be sold – unless that is expressly prohibited – in the country affected by more stringent regulations, to the sole advantage of those players, who originally managed to enter the market.

¹⁷ The application produced outside the legal system prohibiting its development and use will abide the different standards set forth by the legal system in which it was researched and conceived. Unless the subsequent use is effectively prohibited in the former country – in case a similar prohibition may prove effective and possible to enforce, and society does not put pressure for the diffusion of the same technology despite the original prohibition – its later diffusion will produce the overall effect of imposing the legal system standards – even of normative relevance – which belong to the second, completely frustrating the original regulation's purposes.

market, in the streets, in our homes, but they will adhere to the standards, values, social fabric of those countries, like China or South Korea, that are proactively confronting the economic opportunities offered by the advancements in robotics¹⁸.

These arguments lead us to identify the regulation of robotics as a pressing issue the European Union is called to address without delay, so as to become an active and possibly a leading player at the international level, and influence its emergence through its core democratic values.

Different and relevant policy choices are in fact already required at the current state of technological development, that will to some extent create a path-dependency. Even more a strategic perspective has to be developed to effectively meet the even more relevant challenges that can already be spotted at the horizon.

2. REGULATING ROBOTICS: WHICH ROLE FOR EUROPE?

For robotics to be seen as a valuable opportunity, its advancement need to grow in accordance with the complementary objective which is enshrined in the European legal system, namely that of being an area of freedom, security and justice. The competing goals of protecting consumers and more generally end-users from harm and fostering innovation have therefore to become embedded in the regulatory endeavour and in the innovation process itself. In this respect, the most proactive regulatory system seems to have to combine multiple tools and constructs: legal rules, technical norms and standards, codes of conducts and good practices. These can guarantee certainty, flexibility, accuracy and context-based interpretation.

Different are the elements to be taken into account that play a role in the regulation of robotic technologies, and can guide the choice among the array of available instruments and approaches.

On the one hand, technological innovation, and innovation in robotics is no exception, has an inherently transnational quality, being the result of the cooperation of articulated research teams spread over different jurisdictions. It is by nature a cross-boundary phenomenon that demands to resort to regulatory instruments able to adhere to the not merely national relevance of the activities – research and industrial production - involved.

On the other hand, scientific and technological advancements occur at a fast pace, leading to changes or even abrupt transformations, that cannot be easily captured by conventional legal instruments. A problem often underlined when confronting the relationship between technology and regulation is indeed the law slow pace, in the sense that technological innovation outrun the ability of the regulator to intervene early enough at the emergence of a new product. The problem of regulatory connection¹⁹ exists not only when a new

¹⁸ Korea has since long taken concrete action in order to favour the development of robotic technologies, see the Korean Act No 9014, 28 March 2008 on Intelligent Robots Development and Distribution Promotion Act (IRDDPA), available in an English translation at

http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=17399&type=sogan&key=13, where art. 1 states

'The purpose of this Act is to contribute to the enhancement of the quality of life of citizens and the national economy by establishing and promoting a policy for the sustainable development of the intelligent robot industry to facilitate the development and distribution of intelligent robots and lay down the foundation therefor'.

¹⁹ The concept of 'regulatory connection' and its three phases – 'getting connected', 'staying connected' and 'dealing with disconnection' – are explained and thoroughly discussed in R. Brownsword and M. Goodwin, Law and

technology is emerging and regulators have to face the challenge of "getting connected", but also when the technology is in some way established and widespread, because it simply keeps moving and being transformed. And "staying connected" to technologies that evolve again has a bearing on the normative framework that has to adjust to the intrinsically mutant quality of its object.

Pursuant to these considerations, soft law appears an appropriate option to handle the complexity of technological regulation. Developed by independent agencies, international organizations, non-state actors, it allows taking the transnational character of the phenomenon into account. Consisting of agile and flexible tools, it catches the dynamism inherent in technological innovation, otherwise at odds with long-term legal framing. Said otherwise, in order to escape the constraints of a "hard law" approach, legal systems are thus naturally steered towards 'homeostatic' instruments, capable of adapting themselves to a changing landscape, which cannot always be managed through statutory law.²⁰

Technical delegation to independent bodies is also a tool used to handle matters characterized by a strong technological dimension, in order to keep pace with scientific advancements. Technical and safety norms and standards, that are formulated by administrative or non-governmental agencies, technical standard-setting bodies such as the International Organization for Standardization (ISO) and the European Standard Organizations (henceforth ESOs, such as CEN & CENELEC), and professional associations, have increasingly become a tool for regulation in many science-centred sectors, and exert a decisive influence on the application of the law (for instance, contribute to define the concepts of negligence, due care, therefore have a bearing on the allocation of liability by means of the so-called regulatory compliance defence). Technical delegation to independent bodies which are enabled to register variations, assess the need for amendments and implement those amendments allows for the adjustment of the regulatory system without the need for statutory intervention.

Finally, documents like codes of conduct, that can be adopted on a voluntary basis, not necessarily at the central-national level, but by the operators of a certain sector, are also characterized by a closeness to the context to be regulated that allows to neutralize problems of acceptability.

For these very reasons, if flexible regulation by means of soft law is deemed essential to enable, allow, and accommodate advanced robotic technologies, it does, however, present several relevant drawbacks too. Firstly, soft law does not allow the design of a sound regulatory framework, since it has to be consistent with several legal systems, potentially exhibiting relevant differences with one another. In order to meet this pluralism, it either remains at a very general and uncontroversial level, or provides detailed technical solutions to problems regarding primarily the safety of design and use of robotic products, while leaving ethical concerns and the respect of core values untouched. Nevertheless, this is insufficient to effectively govern complexity. Secondly, harmonization pursued by means of soft law depends on the voluntary compliance of multiple classes of agents, and therefore does not provide the actors involved with a sufficient degree of legal certainty.

the Technologies of the Twenty-First Century. Texts and Materials, Cambridge-New York: Cambridge University Press, 2012, 63 ff, 371 ff.

²⁰ S. Rodotà, Diritto, scienza, tecnologia: modelli e scelte di regolamentazione, in Comandé and Ponzanelli (eds), Scienza e diritto nel prisma del diritto comparato (Torino: Giappichelli, 2004), 397-412, 409.

The need to resort to technical delegation also implies that regulation will acquire a substantially private nature.²¹ Therefore the devolution of technical rule-making to independent agencies or standard-setting bodies ensures the continuous adaptation of norms, but raises doubts about their legitimacy, certainty and accessibility. Combining formal law and technical standards in fact requires the private sector to be included in the legal order; private regulatory bodies will have to comply with the rule of law and promote inclusiveness and participation, but whether they will be able to embrace social and constitutional values (as opposed to self-interest) and give them priority in their regulatory activities can be disputed.

More radically, whether the normative settlement of highly sensitive and potentially risky activities should be delegated to the technical dimension remains questionable. Organisms like ISO usefully develop safety standards for robots, but their activity is mainly directed, and should be, to ensure safety in activities that entail the use of robots. Industries can voluntarily embed in their protocols and products the standards suggested by technical bodies, but issues concerning the impact on fundamental rights deriving from every application to end-users or respect for their other interests not merely related to safety are not included in this form of regulation.

Finally, and more important, less formal and non-mandatory mechanisms do not satisfy a widely perceived need for a general frame of reference – possibly agreed on at an international level – on which technological advance can be grounded, providing sufficient legal certainty to the actors involved. Researchers and manufacturers who work on robotics both at the experimental and at the industrial level claim that they cannot properly appraise the risks and duties entwined in their activities until a clear analysis of the interplay between robotics and regulation has been made and consequent regulatory options are undertaken.

These considerations converge in indicating that a coherent frame agreed at the European level would better serve the purpose of fostering innovation in the robotic domain in Europe, while giving the correspondent market an important competitive push with external markets.

While the reason for the EU assuming a proactive role in the regulation of robotics are clear, different modalities could be deployed in order to provide a sound framework for developments in robotics.

Soft-law tools could be adopted that ensure a coherent, albeit not binding, regulatory environment endowed with supranational relevance. The Nanocode, which has been formulated in the context of nanosciences and nanotechnologies research,²² represents a model that could be reproduced in other sensitive areas. The advantage of such an instrument is that it would offer qualified policy guidance both to the national and regional authorities and to the researchers and other actors operating in the fields of robotics. The not binding status of its rules would be counterbalanced by the benefits that the compliance to it would ensure: any prototype or product designed and manufactured in accordance to the code should be considered both safe and ethically acceptable, thus fit for the circulation within the European market. Adhering to the code could give a competitive advantage in

²¹ F. Cafaggi, *New Foundations of Transnational Private Regulation*, (2011) 38 *Journal of Law and Society* 20-49, at 28 f, has identified technology as a crucial factor in the growth of private transnational regulation.

²² See the Commission Recommendation on a code of conduct for responsible nanosciences and nanotechnologies research, C(2008) 424 final, 7.2.2008, recommending its adoption by "national and regional authorities,

the market, thanks to the inherent quality of the research and industrial work leading to the final product that the conformity to the EU rules guarantees.

More specific issues, such as liability, privacy, safety standards and personnel qualification, in the processes of manufacturing and using robotic technologies could indeed call for an EU intervention that is endowed with binding force. Depending on the issue at stake, the normative ground for intervention would change, but it is possible to identify several cases (that will be discussed in the following sections) where the adoption of an institutional regulatory instrument seems the most appropriate solution, taking into account the worth of a given technology for the European society, the significance of the interests and values it can serve, and at the same time the strong guarantees it has to be endowed with.

Despite Europe being characterized by a framework of overarching principles, shared among all member states, the extremely general character they present requires further action, at the statutory and judiciary level to achieve concrete implementation. A general frame of principles could be accompanied by more specific regulatory instruments that could focus either on distinct technological applications or on clusters of themes, like liability for damages that concern multiple technologies. These instruments would complement the existent legislation that already applies to robotic technologies both at the European and the national level providing a starting basis that could be further implemented.

3. A COMMON FRAMEWORK OF FUNDAMENTAL RIGHTS AND PRINCIPLES: THE WAY TO RESPONSIBLE RESEARCH AND INNOVATION (RRI)

Indeed, the regulation of robotic technologies does not take place in a void: a theoretical framework and a tissue of rules to which many robotic products and applications can be fine-tuned already exist. Nevertheless, the most general legal and ethical environment to be taken into account is given by a common set of overarching principles that are shared in the contemporary European legal order. A common framework of fundamental rights and values exists, that is accepted and acknowledged by all member states and positively affirmed in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.

Human rights are in fact an essential apparatus to deploy in order to promote and guarantee responsible advances in science and technology.

The potential role of a set of overarching principles shared in the European legal order is multi-layered: (i) firstly, it allows to pinpoint the fundamental rights and freedoms that developments in the robotic field may infringe and that, on the contrary, have to be regarded as intangible.

The fundamental rights and principles at stake in the domains affected by robotics can be enumerated: the principles of dignity (Title I of the Charter of Fundamental Rights) equality (Title III), solidarity (Title IV), non-discrimination (art. 21), and justice (Title VI) retain prominent relevance within the value-based structure of the Charter of Fundamental Rights

employers and research funding bodies, researchers, and any individual or civil society organisation involved or interested in N&N research”.

of the European Union. The rights to identity and privacy (artt. 7-8), the rights of the elderly (art. 25), the integration of persons with disabilities (art. 26), the right to healthcare (art. 35), and the right to consumer protection (art. 38) stem from those overarching principles.

On the preventative side, this body of principles obliges to design safeguards and limits in the use of technologies, possibly originally embedded in the technical set-up. Robotic applications have to be devised and designed in such a manner that allows to protect values like human dignity, identity, health and privacy. In case a robot might harm those values and the underlying rights, without being possible to prevent similar negative effects through careful design and users' information, a responsible attitude, that could even be supported by a legal ban or a moratorium, would be that of not producing and deploying it.

But the same values can shed light over novel forms of aggression brought about by robotic technologies that it is possible to counteract by means of especially designed legal rules or inventive interpretation.²³ For instance, the purpose of a constitutional understanding of advances in robotics could entail enlarging the scope of existing fundamental rights in the light of risks of infringements never confronted before.

(ii) Secondly, fundamental rights form an essential apparatus to use as a test-bed for the desirability of robotic applications. More precisely, they can contribute to identify the main goals and achievements expected by advancements in robotic research and industrial applications; thus, to pinpoint priorities and therefore justify rules which favour one application, that responds to values and needs deemed fundamental, over others. Robotic products and services that ensure the fulfilment of fundamental rights should in fact be subject to a favourable regime, in order to create incentives for their development. These anchoring principles could therefore operate not only in a shielding fashion, but in a more proactive and orientating guise, by pointing to innovation in robotics that should be fostered through regulation (see *infra*, §§ 5-7).

Technological advances, together with the economic power of companies and research institutions, are often held responsible for producing knowledge and industrial applications without any concern for the exposure at risk of democratic values and human rights. On the contrary, the concern for the protection of fundamental rights potentially undermined by technological developments has recently become a characteristic feature of European science-making. The regulation of technology, both from a methodological and a substantive point of view, has today to be guided by those principles often summarized in the formula Responsible Research and Innovation (RRI).²⁴ A wide array of disciplines and competences have to be integrated in the analysis, and various stakeholders should participate in the process of identifying and discussing the issues potentially raised by the advent of robotic technologies, in order to let diverse needs, sensibilities, and perspectives emerge.

From the substantive point of view, the two requirements of RRI are ethical acceptability and orientation towards societal needs. Not only do robotic products and applications have to comply with the core values embraced in the European context by the constitutional traditions of Member States and positively affirmed by the Charter on fundamental rights,

²³ See, for instance, M.N. Gasson and B.-J. Koops, *Attacking Human Implants: A New Generation of Cybercrime*, (2013) 5(2) LIT 248-277.

²⁴ See, lately, European Commission, *Options for Strengthening Responsible Research and Innovation*, Luxembourg: Publications Office of the European Union, 2013. Also, R. van Schomberg (2001). *Towards*

but also particular attention should be devoted to those technologies that respond to societal needs, and contribute to achieve normative goals such as equality of opportunities, justice, and solidarity. Such technologies that substantially improve the quality of life of the European citizens, especially the more deprived and vulnerable, may well be favoured through the adoption of concrete legislative measures, and may even be recognized a peculiar legal status.

The question whether fundamental rights are threatened by new technical opportunities purported by robotics has to be considered, but research efforts shall also be devoted to investigate whether an efficient and proactive protection of fundamental rights and liberties proclaimed at the European level requires fostering innovation in robotics by means of especially designed legal rules or inventive interpretation. The latter perspective has led for instance to propose special rules in the context of liability for damages deriving from the use of robotic technologies in the field of healthcare, namely surgical robots, prostheses and care robots (see §7).

4. WHAT ROBOTS ARE: THE IMPOSSIBILITY OF AN ALL-ENCOMPASSING DEFINITION AND HOW INSTEAD ROBOTS DIFFER FROM ONE ANOTHER

Before we proceed to identify the most relevant issues raised by the emergence of these technologies we need to clarify what kind of applications we refer to. In particular, it is important to understand if robots may be defined unitarily and thus addressed as such even in a legal perspective, eventually conceiving the "laws of robots".

The Merriam Webster dictionary defines "robot" as

«1 a: a machine that looks like a human being and performs various complex acts (as walking or talking) of a human being; also: a similar but fictional machine whose lack of capacity for human emotions is often emphasized [...] 2 : a device that automatically performs complicated often repetitive tasks; 3 : a mechanism guided by automatic controls.»²⁵

Such definition is clearly influenced by the literary depiction of robots, and thus incomplete.²⁶ It is incomplete since many applications do not walk or talk and can either be quite simple, such as a vacuum cleaner, or complex like a surgical or industrial robot. Some are then conceived to mimic human emotions or animal behaviours, for the purpose of keeping company to the elderly or children;²⁷ others are being developed to perform operations which entail a certain degree of creativity (softbots) or even provide a first assessment of the medical condition of a patient,²⁸ thus elaborating complicated data in a very different fashion from time to time. Finally, as per the resemblance to human traits, studies show that beyond a given point users find that aspect awkward and unsettling so

Responsible Research and Innovation in the Information and Communication Technologies and Security. Brussels: Directorate General for Research and Innovation, European Commission.

²⁵ The definition can be found at <http://www.merriam-webster.com/dictionary/robot>, last access September 2014.

²⁶ For a taxonomy which takes into account also the different ethical issues raised see Verruggio, G. and F. Operto (2008). *Roboethics: Social and Ethical Implications of Robotics*. *Handbook of Robotics*. B. Siciliano and O. Khatib, Springer., 1151 ff.

²⁷ See PARO <http://www.parorobots.com/> last access September 2014.

²⁸ See WATSON <http://www-03.ibm.com/innovation/us/watson/> last access September 2014.

that designers tend to preserve clear cut signs of the mechanical and artificial nature of the machine for it to be more easily accepted in human environments.²⁹

Common definitions are indeed little descriptive of real robotic applications and to a great extent misleading, since if one had to discriminate what kind of technology qualifies as a robot the offered criterions would induce wrong conclusions in most cases.

Definitions offered by researchers instead are always more precise and narrow tailored to accommodate the specific field of interest of the speaker,³⁰ yet the outcome is fragmented and contradictory if considered together.³¹

Finally, robots cannot either be defined through their ability to autonomously perform a task³². On the one hand, not all robots are autonomous in such sense, on the other hand that only represents one of the possible control mechanisms³³ used when conceiving and designing such machine. Moreover it fails to provide sufficient guidance when attempting to distinguish a robot from other applications, which still operate unattended and eventually interact with human beings (an automatic cash dispenser for instance).

The reason why the term "robot" cannot be defined in a way to include all possible applications which are still considered to belong to the vast family of robotics, is its a-technical nature, both from an engineering and even more from a legal point of view. Being derived from science fiction³⁴ the word solely means labour and more precisely enslaved labour.

The technologies developed and the applications existing are so diverse from one another that maintaining the use of said term may only serve the purpose of synthesis, allowing to indicate an extensive set of objects.

Therefore, rather than a definition, a classification ought to be created, where various criteria are considered such as: (i) embodiment or nature; (ii) level of autonomy; (iii) function; (iv) environment; (v) and human-robot interaction,³⁵ and single applications should then be analysed accordingly.

If then a notion of robot was to be elaborated for merely descriptive—thus neither qualifying nor discriminating—purposes it may be said it is:

a machine, which (i) may be either provided of a physical body, allowing it to interact with the external world, or rather have an intangible nature—such as a software or program—, (ii) which in its functioning is alternatively directly controlled or simply supervised by a human being, or may even act autonomously in order to (iii) perform tasks, which present different degrees of complexity (repetitive or not) and

²⁹ For a minimal and essential reference see Mori, M. (2012). "The Uncanny Valley." *IEEE Robotics & Automation Magazine* (June): 98., translation by Karl F. MacDorman and Norri Kageki of the original 1970 seminal article.

³⁰ For a complete survey see Salvini, P. (2013). Taxonomy of Robotic Technologies. *Robolaw Grant Agreement Number: 289092, D4.1.*, 17.

³¹ See Bekey, G. A. (2012). Current Trends in Robotics: Technology and Ethics. *Robot Ethics. The Ethical and Social Implications of Robotics*. P. Lin, K. Abney and G. A. Bekey. Cambridge (MA), The MIT Press., 17.

³² The one offered in the text is the translation from the Italian «una macchina che svolge autonomamente un lavoro», found in Santosuosso, A., C. Boscarato and F. Caroleo (2012). "Robot e Diritto: una Prima Ricognizione." *La Nuova Giurisprudenza Commentata*: 494., 498.

³³ See Salvini, P. (2013). Taxonomy of Robotic Technologies. *Robolaw Grant Agreement Number: 289092, D4.1.*, 8.

³⁴ apek, K. (1922). *R.U.R. (Rossumovi univerzální roboti)*.

³⁵ See Salvini, P. (2013). Taxonomy of Robotic Technologies. *Robolaw Grant Agreement Number: 289092, D4.1.*, 22 and ff.

may entail the adoption of not predetermined choices among possible alternatives, yet aimed at attaining a result or provide information for further judgment, as so determined by its user, creator or programmer, (iv)including but not limited to the modification of the external environment, and which in so doing may (v)interact and cooperate with humans in various forms and degrees.

The consequence for the purpose of the present analysis is such that we may not unitarily address issues posed by robots³⁶. A driverless vehicle, a robotic prostheses, a surgical robot, a robot companion, a drone, a softbot are all very different from one another. The inherent technical differences of such applications cannot be overlooked without losing insight.

5. FROM "THE LAWS OF ROBOTS" TO A FUNCTIONAL REGULATION OF ROBOTICS

The conclusion that robotic technologies are quite diverse from one another – and so are the issues they raise in an ethical and legal perspective –, together with the fact that no technical aspect alone justifies the adoption of ad-hoc regulation, leads us to conclude that there is no need to develop 'the laws of robots'. The aim of the European Union shall not be the adoption of a unique body of laws – or a code – to address robots as a unitary phenomenon, since there is no one-fits-all solution for these applications and differences are more relevant – at times – than similarities. Indulging in that kind of speculation is a mere science fiction exercise, which does not help the advancement either of the European society as a whole or of its economy.

The most appropriate approach is thus that of a case-by-case analysis, where single classes of applications (e.g. prostheses, driverless vehicles, softbots, and robot companions to name some specific examples) are considered. The specific legal and ethical issues they raise need to be identified, firstly through an analysis in light of the ECHR and other applicable documents and principles.

Only then, a solution may be elaborated in order to favour – or eventually disfavour in case the specific application is deemed highly undesirable – its emergence and specific policy arguments need to be formulated to support that conclusion. To this purpose many other criteria, besides technical aspects, need to be taken into consideration: market failures, the effect on competition, the novelty of the technology, its potential immediate and long term application, dual use, to name a few. For many such aspects the relevance of attentive applied ethics analysis is essential.

To better clarify this concept the case of robotics for healthcare may be considered, where applications, which profoundly differ from one another, still share some relevant common aspects in a functional perspective. In particular, they all contribute to foster the same fundamental values and principles, protecting the person and human life in all its forms and stages.

³⁶ Leroux, C., R. Labruto, C. Boscarato, F. Caroleo, J.-P. Günther, S. Löffler, F. Münch, S. Beck, E. May, H.-S. Corinne, M. De Cock Buning, L. Belder, R. De Bruin, A. Bonarini, M. Matteucci, P. Salvini, B. Schafer, A. Santosuosso and E. Hilgendorf (2012). Suggestion for a Green Paper on Legal Issues in Robotics. Contribution to Deliverable D.3.2.1 on ELS Issues in Robotics., available at http://www.eurobotics-project.eu/cms/upload/PDF/euRobotics_Deliverable_D.3.2.1_ELS_IssuesInRobotics.pdf, last access August 12th 2013, p. 7.

5.1. Robotics for healthcare

Indeed, the various robotic technologies currently researched in the domain of healthcare represent a perfect case in point to exemplify the double-edged role that an approach based on fundamental rights and RRI (see §3) plays with respect to the regulatory endeavour here discussed.

This field should be considered strategic for European intervention in response to the challenges of increasing the quality of healthcare, and offering better treatment to the patients in terms of early diagnostic and effective treatment of diseases; reducing the costs associated with modern medicine; supporting disabled people with technologies that overcome their motor or sensor impairment; confronting the problems brought about by demographic change, with population ageing, increasing demand for healthcare, decreasing availability of care providers, excessive burdens for family carers.

In particular, care and companion robots are being developed for the assistance of the elderly and disabled. Said applications are designed to perform several different functions: from telepresence and monitoring, to assisting in daily activities (ex. in fetching objects, reminding of taking drugs, connecting to family or healthcare professionals), and ultimately facilitating or correcting movements. This type of technology is meant to help them live an independent life and be socially active.

Robotically assisted surgery has been introduced in order to perform operations with more precision, to reach sites into the patient's body without requiring open surgery, while still ensuring the same or greater accuracy in vision and action, overall allowing to reduce post-intervention recovery time.

Advanced prostheses and exoskeletons are meant to improve the quality of life of people with disabilities, by restoring or supporting lost or compromised functions, such as the ability to move or grasp objects, more generally all the tasks that a person without physical impairments is able to perform, ultimately promoting their social inclusion.

The very development of these applications is triggered by policy tendencies and social phenomena widely observed in the socio-economic structure of European countries, that robotic research directly attempts to address. Therefore, precisely because such robotic devices meet qualified social needs – inclusion of vulnerable persons, supply of personal care, in the light of population ageing and demographic change, with expected shortage of (informal and professional) caregivers, better quality in healthcare – and allow to accomplish values we hold dear, they deserve special attention in a legal perspective.

On the other hand, the very same technologies exhibit features that can put some of the fundamental rights they are intended to promote at risk. For instance, the prospect of using assistant robots for the elderly raises several issues related to the ethics of care and generates concern for the emotional implications, and therefore the impact on the identity and privacy of the person, that such devices entail. Bionic prostheses, interfaced with the neural system, promise enormous benefits for people with disabilities, but again can be questioned for their bearing on the right to bodily integrity and to identity, and for creating new forms of vulnerability. More precisely, they open up a far-ranging set of problems, as the new type of human-machine interaction they realize leads to the dilemmas entrenched in human enhancement debate (§9). Data protection and data security in the healthcare scenario also figure as relevant concerns to be taken into account from a human rights

viewpoint, having in mind the great potential for the collection and storage of sensitive data that robotic technologies display.

After sketching such a complex picture, suggesting the expediency of some political and legislative action, it shall be further stressed that European Union is also in the best position possible to directly intervene. These challenges do, in fact, fall quite well within the bundle of competences and sectors of intervention of the EU. The protection of health and the right of access to healthcare represent fundamental rights established in the EU Charter of fundamental rights (art. 35), and art. 168 of the Treaty on the Functioning of the European Union (TFEU) identifies the promotion of public health as a core area for the action of the EU. Therefore the improvement of medical products and procedures, and of safety and efficiency in healthcare delivery are suitable objectives of EU policies to be accomplished also by means of technological progress, in particular robotics. The free flow of goods in the EU market might also be compromised by different regulations in different countries; in the sector of medicines, the Directive 2001/20/EC of the European Parliament and of the Council of 4 April 2001 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the implementation of good clinical practice in the conduct of clinical trials on medicinal products for human use (Directive on clinical trials) has addressed the same problem, providing a common framework that ensures the free marketability of the final products in all member states.

Legal issues in this field are nevertheless considered as one of the most relevant points, that if not carefully and timely considered may hinder innovation. Numerous are the problems that in this perspective need to be addressed, starting with the unsuitability of the actual trial procedures – mainly conceived for testing medicines – for the purpose of experimenting new medical robotic devices. In the healthcare setting, the added vulnerability of patients and the close interaction that is necessary to address their needs, suggests to require that devices abide stricter standards than those set forth for other applications of more general use. Moreover, the (at least partial) autonomy of robots deployed in care tasks increases the risks of unforeseen behaviour, that cannot be properly controlled by an impaired user or in emergency situation. Data protection and data security in the healthcare scenario also figure as relevant concerns to be taken into account while designing a safe environment for robots actions, considering the enormous potential for collecting and storing data – and sensitive data in this case – that robotic technologies display.

To sum up, the healthcare domain, broadly intended, more than others requires regulatory intervention in order to protect fundamental rights. But considering that these types of robotic technologies can be deployed in order to foster fundamental values, regulators should provide the right incentives for their development, which we deem desirable from a constitutional viewpoint. A regulatory approach which is meant to support the development of a truly European market for this kind of products, which respond to societal needs, should aim at overcoming economic constraints that make this sector not sufficiently attractive for private investments and provide greater certainty for innovators.

6. IDENTIFYING RELEVANT ISSUES AND SKETCHING SOME PROPOSALS

By applying the considerations briefly sketched, all kinds of robotic applications can be analysed, in order to determine whether specific issues may be identified that call for some action on the side of the legislator.

However, the questions posed by applications that technologically show some degree of similarity may well be quite different. <The analysis is in fact guided by policy arguments rather than technological considerations.

Indeed, in a functional perspective the same trait or characteristic of the device may be problematic or not: the ability of a vacuum cleaner to operate unattended does not raise the same issues as that of a driverless vehicle. It does neither promise to impact society in a comparable fashion. A driverless vehicle may indeed be perceived as a possible way to reduce – in a medium to long run and if sufficient and effective investments are made – the number of accidents on our streets, favour the mobility of children, elderly and people with disabilities, revolutionize transportation and potentially reshape traffic and the way cities are designed.

At the same time, very different applications, such as driverless vehicles and robotic prosthetic limbs, may give rise to one identical legal issue, namely that of liability – who should be held liable in case the device malfunctions, leading to an accident – and yet require different solutions (see §8).

By analysing a selection of robotic applications, which we researched and discussed within the RoboLaw project, we have identified some major and to some extent recurring legal issues, that deserve particular consideration by the European Union already at this stage of technological development. Such issues, which we will now address more in details providing some examples of analysis and offering some possible solutions, are that of liability (§7); standardization (§8) and human enhancement (§9).

7. LIABILITY RULES AS A TOOL TO INCENTIVIZE SAFETY BUT ALSO SPREAD DESIRABLE TECHNOLOGIES: GENERAL CONSIDERATIONS

Regulation should be tailored in order to balance opposing interests, but also – once desired policies are identified – taking into account the concrete effects and impacts of the rules on the market, not relying entirely on general assumptions and unverified considerations about their presumed – or expected – consequences.

In this perspective some rules are of considerable relevance, namely liability rules.

Liability rules by shifting the cost connected with an undesired and harmful event force the wrongdoer to internalize the consequences on others of his actions and choices. Theoretically the adoption of the correct liability rule should ex ante induce the socially desirable behaviour, in terms of reduction of number of accidents and increase in safety

investments, and ex post ensure recovery of the suffered harm by the single individual involved in the action.

In modern market economies next to traditional tort rules, generally applicable to any individual, product liability – and enterprise liability – rules were progressively adopted in order to provide better protection to consumers. These alternative systems, opting for strict liability (objective or semi-objective) standards, are intended at once (i) to ensure higher investment in products' safety and (ii) ease the consumer's position in grounding his claim against producers.

The European solution, represented by the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (henceforth DPD) , is in this respect not so different from the North American one, as emerging from the Restatement (in particular Rest. 3rd on Torts: Product Liability) .

Although, both the European and North American systems have been criticized for their overall effect. While the increase in safety standards cannot be substantially appreciated such regulations in some cases produce a technology chilling effect. Moreover, by requiring complex litigation – in particular with respect to the design defect of the device – they often raise the costs of compensation (reducing the percentage per euro invested that is used to make the victim of the accident whole) while still leaving a relevant degree of uncertainty on the victim, who subsequently may decide not to sue .

The ineffectiveness of existing liability rules in increasing product safety on one hand, the potential technology-chilling effect they produce on the other hand, lead us to conclude that in this field some reform may be beneficial. The conceivable solutions vary according to the kind of applications considered, and may amount to disentangling the two issues – that of safety and that of compensation –, which are normally addressed unitarily, from one another.

In order to promote clear safety requirements for different kinds of applications the role of ESOs could be emphasized. Independent bodies with the highest technical expertise could be required to provide and frequently update clear ex ante requirements, narrowly tailored for the specific application – or class of applications – (e.g. upper limb prosthesis or exoskeleton). Producers would be bound pursuant to a binding normative act to conform to such standards in order to release their products onto the market (see §8 for a more detailed discussion).

As per the issue of full compensation alternative mechanisms to the one of the DPD can be thought of, ranging from liability exemptions, liability caps, and no-fault compensation schemes (no-fault plans).

The possibility to introduce liability exemptions is already contemplated by art. 16 of the DPD, despite it requiring the introduction of a high liability cap that may substantially reduce the effectiveness of the measure.

Excluding the possibility for users to sue the producer under the DPD or other regulation does not automatically lead to more dangerous products and subsequently an increase in the number of accidents. On the one hand, market forces may provide adequate incentives in competitive markets, in particular because of the effect on reputation, since quality is the most relevant way to secure the loyalty of clients. On the other hand, the provision of high

technical standards for the certification and commercialization of the device provides sufficient guidance to the design of safe products. Such a solution clearly minimizes the technology-chilling effect by allowing the producer to identify and quantify the costs he has to face during the design phase, but leaves the issue of compensation of the victim – be it the user or third party involved in the accident – unresolved. A liability exemption was introduced in the US for commercial aircrafts and recent studies show that there was no increase in the number of accidents, while the regulation allowed an industry, which was about to collapse, to prosper again.

A liability cap instead is a form of ex ante quantification of the maximum amount the harming party – producer – may be called to pay to the victim in case liability is established. It still requires traditional tort rules to be applied in order to first determine whether the defendant is liable and thus required to compensate, and therefore does not represent a radical solution to the above sketched issue of easing the position of the victim in the trial. The predetermination of the amount the producer is required to pay does theoretically provide a higher degree of ex ante certainty, but if fixed too high it is ineffective, if fixed too low it may give rise to problems of undercompensation of the victim.

No-fault plans instead represent an alternative form of compensation, similar to a first party insurance, typically administered through public agencies. Victims can file a claim to a fund and obtain immediate compensation once the circumstances of the accident are ascertained to be those covered by the fund. No fault has to be established, and in the cases here considered even the defectiveness of the product would not have to be proved. Litigation costs would be avoided, compensation would be prompt and certain, despite normally lower in value. The most comprehensive no fault plan is that of New Zealand, but there are some European examples as well in Sweden and France . Those contributing to the fund are those who are bearing the cost of compensation, and could be both private and public players. Normally no-fault plans are deemed creating moral hazard problems. Some of those issues could however be tackled through the combination of other mechanisms (administrative sanctions, criminal liability rules as well as ex ante regulation of safety standards).

Since the possible solutions for the – classes of – applications considered may be different, some brief considerations with respect to each will be now discussed.

7.1. Driverless vehicles

That of liability is possibly the most relevant issue raised by driverless vehicles that could have a clear technology-chilling effect, delaying its emergence³⁷.

Driverless vehicles need to take into account a number of factors: street rules, other vehicles on the road, passers-by both abiding and violating the street code, all in a complex environment. Therefore, while it is conceivable that once technology has sufficiently advanced, and vehicles do not require human intervention and supervision, a strict standard of liability may appear uncontroversial, before such level of sophistication is

³⁷ Broggi, A., A. Zelinsky, M. Parent and C. E. Torpe (2008). Intelligent Vehicles. *Handbook of Robotics*. B. Siciliano and O. Khatib, Springer.; Manyika, J., M. Chui, J. Bughin, R. Dobbs, P. Bisson and A. Marrs (2013). Disruptive technologies: Advances that will transform life, business, and the global economy. *McKinsey Global Institute*, available at http://www.mckinsey.com/insights/business_technology/disruptive_technologies.; Schellekens, M. (2014). Self-Driving Cars. *Guidelines on Regulating Robotics*. E. Palmerini., 59 ff.

acquired the same standard may discourage the very development of that technology, placing too relevant – and too uncertain – a risk on producers³⁸. Even more, during that time, the apportionment of liability between the driver – still to some extent in control or anyhow supervising – and the producer ought to be clarified, as well as the standard of safety the vehicle ought to match in order to be deemed safe³⁹.

These issues are definitely not novel for the law and to some extent closely resemble those that automobiles raised since their first emergence in society. Hence, one may conclude that there is no need to take immediate action. Courts using existing law could case by case determine the required level of care on the side of the driver supervising the vehicle, as well as the level of safety a vehicle is required to ensure in order not to be deemed defectively designed.

However, automated driving could easily represent a break through innovation that may be reasonable to incentivize by creating the most favourable – legal – conditions for its emergence. The number of deaths due to traffic accidents could be dramatically reduced (considering that 97% of current accidents are imputed to human error) by taking man out of the loop. Transportation could be revolutionized even for people, who today encounter greater difficulties in their movements – elderly, children and people with disabilities – having to rely on others for it. Moreover providing incentives to the advancement of such technologies would allow the European car industry to advance and keep the pace if not anticipate its most relevant competitors.

Liability rules could thus be used towards this end. If technical standards were sufficiently narrow tailored, and frequently updated, by competent and independent bodies (such as ESOs and ISO) to ensure adequate levels of safety, the issue of compensation could be addressed through alternative mechanisms.

An EU wide solution⁴⁰ could build onto already existing insurance – and eventually compulsory insurance – mechanisms.

(a) Third Party Insurance

If the owner were legally bound to purchase a third party insurance for the driverless vehicle, the insurance company would bear the economic consequences of the malfunctioning. If we assume that through detailed ex ante technical standards the level of safety reached was equal or higher to the current, then it is even foreseeable that insurance premiums will diminish together with the number of accidents.

Eventually the insurance company may be entitled to act in recourse towards the producer, was the accident a consequence of the malfunctioning of the vehicle⁴¹. That possibility however, would not substantially diminish the technology-chilling effect of current liability

³⁸ Schellekens, M. (2014). Self-Driving Cars. Guidelines on Regulating Robotics. E. Palmerini.

³⁹ Alternatively the same level of safety as that of the average driver may be required, or the highest standard (safer than the best human driver), for a discussion see *ibid.*, 58.

⁴⁰ An EU wide solution is preferable since it is relevant that the users of automated cars can use their cars throughout the EU and are not limited to their own country or a limited number of countries within the EU. Moreover only such a solution would provide the required incentives for the advancement of technology and the development of a market. *Ibid.*, 63.

⁴¹ *Ibid.*, 64 ff.

rules. The insurance company, rather than the single user, would bring the action against the producer⁴².

The policy choice could thus be made to introduce a liability exemption for producers in all cases where the vehicle met the mentioned technical standards (as determined and updated by a supranational independent technical body referred to above) and was accordingly certified.

(b) A first-party insurance or no fault scheme.

Alternatively, the victim of the accident could claim compensation directly to his own insurance or to an ad-hoc established fund. In such cases proving that a given driverless car was involved in the accident would suffice to ground the right to receive compensation for the harm suffered, without the need to establish fault or defect.

Normally the administrative costs associated to such procedures are deemed to be lower since they do not require complex litigation, the award of damages is faster and therefore a higher percentage per euro invested in the system reaches the victim.

Since the party purchasing the insurance or paying a fee to the fund is the one actually bearing the economic consequences of the accident, alternative systems could be conceived where such costs are split between users and producers.

A similar system should be coupled with a liability exemption to deny the single user action against the producer. Safety would be ensured through the mechanisms sketched above.

The two alternatives briefly described could lead to similar outcomes, both in terms of shaping of incentives and ease of compensation of the victim. The choice among them would therefore substantially rest on various policy considerations, also involving which option would be easier to implement.

7.2. Robotic Prostheses

A similar kind of reasoning can be extended to prostheses, where the interaction of brain and machine represents the most complex and relevant aspect, together with the unlimited number of ways in which the artificial limb may be used⁴³.

A robotic prosthesis is in fact controlled through a brain-machine interface that interprets the biological signal generated by the wearer, and translates it into commands to the single motors and actuators that – operating simultaneously – enable the artificial limb to perform the intended movement⁴⁴.

Since a limb follows the wearer in all his day-to-day activities, which cannot be fully anticipated ex ante, the consequences of a possible malfunctioning of the device appear extremely hard to foresee. The same technical failure in a robotic hand for instance could generate extremely diverse outcomes. Was the wearer holding an object it may fall and

⁴² We may discuss whether the insurance company, rather than the single user, is better suited to determine when an action against the producer is actually grounded, and thus the design may be deemed defective, and unreasonably dangerous.

⁴³ See Bertolini, A. (2013). "Robots as products. The case for a realistic analysis of robotic technologies and the law." *Law Innovation and Technology* 5(2).; Salvini, P., M. Controzzi and M. Cempini (2014). *Robotic Prostheses. Guidelines on Regulating Robotics*. E. Palmerini., 109 ff. and citations there included for further reference.

break, thus resulting in property damage; if the wearer was performing a normal but potentially dangerous action (driving⁴⁵) he may injure himself, and in some cases third parties.

By applying an objective standard of liability – such as that emerging from the DPD – the economic consequences of all the negative events described would be borne by the producer. The cost of such liability actions would be hard to foresee given the infinite number of ways the device could be used in, potentially extremely high, and for these very reasons hard to insure as well. That, together with the high research and development costs could discourage the development of an otherwise desirable technology, which could instead dramatically improve the living conditions of people with disabilities.

The adoption of ad-hoc regulation in this field is therefore advisable in a public policy perspective. Even more, the European Union may be required to take action, since a very straightforward claim in this direction is set forth by art. 4 of the UN Convention on the Rights of People with Disabilities (henceforth CRPD), ratified by the EU, together with many single member states, on December 23rd 2010⁴⁶.

Art. 4 CRPD states that:

‘States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake: [...] g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost; [...]’

Indeed such provision may be understood as requiring the adoption of a regulatory framework favourable to the development of robotic prostheses and thus including even alternative liability criteria. Their discrimination – with a more favourable liability regime – would therefore be neither unreasonable nor unjustified.

(a) A No-fault scheme

If safety was better ensured through the adoption of narrow tailored technical standards (see §8), compensation could be more effectively provided through a no-fault scheme, covering all accidents which involved the use of a prosthesis, and were not intentionally caused or due to a completely unrelated causal chain.

The main advantages of such a system would be to: (i) eliminate any risk for the producer to be sued for damages, once the device was certified as being safe (no action would be

⁴⁴ Carpaneto, J. Ibid., 118 ff.

⁴⁵ Christian Kandelbauer an Austrian bilateral amputee, whose arms were replaced by two prostheses by Otto Bock (www.ottobock.com), one of which made use of the biological signal derived from the nervous system, was allowed to drive a car specifically adapted and certified for his needs. Unfortunately he was involved in an accident where he lost his life. Here we are not claiming in any way that the cause of the accident is to be identified with a malfunctioning of the prostheses. Rather, we are using the case as a possible exemplification of what kind of problems may arise, if a similar accident occurred and it was necessary to determine whether it was due to a malfunctioning of the prostheses. For more information, see <http://www.theguardian.com/world/2010/oct/22/christian-kandlbauer-arm-dies-crash>.

⁴⁶ Schulze, M. (2010). *Understanding The UN Convention On The Rights Of Persons With Disabilities*. New York, Handicap International.

granted to the user against the producer); (ii) eliminate the risk for the victim not to be able to provide sufficient evidence of a malfunctioning that indeed occurred.

Producers would be required to contribute to the fund through a tax (or percentage of the resale price of the device), thus internalizing at least part of the cost they may potentially generate. States in some cases may contribute to the fund as an action to subsidize the diffusion of those technologies, which could as well be understood as the implementation of a welfare state policy in favour of people with disabilities.

The positive effects on administrative costs and percentage of compensation awarded to the user, which it may be assumed a similar solution could generate, were already described above when addressing driverless vehicles. A major difference could however be appreciated. Unlike with driverless vehicles the number of potential users of prostheses is limited. For this reason, it is foreseeable that insurance would be hard to obtain in the market. That coupled with the intention to favour the wearer lead us to conclude that a no-fault plan (publicly administered or at least subsidized) is a preferable alternative to a first party insurance.

7.3. Surgical Robots

The liability issue raised by surgical robots is instead partially different from those sketched above. These kind of robotic applications could in some cases be understood as very specialized and advanced surgical instruments, bringing some techniques – such as laparoscopic surgery – a step forward, being less invasive and in some cases allowing to perform otherwise unthinkable procedures.

The liability of surgeons operating with such devices should be kept clearly distinct from that of the producer for its malfunctioning.

(a) Liability of the surgeon

Since these technologies could be effectively used to perform surgeries to patients on a distance (also known as telemedicine)⁴⁷ issues of conflicts of law can be foreseen. It is therefore advisable, at least within the European Union, that a uniform standard of liability is adopted. In this respect a negligence standard is certainly preferable, so as to allow the judge, in the single case, to assess all relevant variables influencing the surgeon's performance.

(b) Liability of the producer

A major risk for the development of surgical robots is represented by a potential tendency to transform all current liability actions brought against surgeons in product liability claims against the producers of the devices. Indeed, the strict liability standard the producer is bound to may be more favourable to the patient than the normal negligence standard than applies to medical doctors. The shift in litigation could however not really correspond to the existence of a design or production defect in the machine, and produce an overall

⁴⁷ The patient and the surgeon may in a foreseeable future be placed in different countries, since the machine which is materially operating could be remotely controlled by a console somewhere else in the world. For a discussion see Azzarri, F. and A. Bertolini (2014). Computer integrated surgical systems. *Guidelines on Regulating Robotics*. E. Palmerini., 98.

technology chilling effect that could be particularly detrimental, impairing the development of a competitive market. Currently, in fact, the market for surgical robots has only but a few players worldwide, and the adoption of more attentively tailored measures could help increase competition (allowing new devices to emerge, lowering prices, improving the quality of the product and service offered to the consumer-patient).

To this end, a possible solution might be to limit the ability of the single patient to sue the producer⁴⁸. The patient could still sue the surgeon for medical malpractice, as well as the hospital for the machine's failure, since the latter decided to employ it for the operation. The hospital may then sue the producer in recourse, were the accident due to a malfunctioning of the robot.

At the same time, it shall be noted that currently existing surgical robots, such as the DaVinci, are capable of recording all commands the machine received during the operation and all the data it acquired. However, this information is normally not directly accessible neither to the hospital nor to the patient, substantially limiting the possibility to obtain necessary evidence to be used in case of litigation against the hospital, surgeon, or producer. It is therefore advisable that regulation is passed imposing this information to be made available to the patient after the intervention took place, upon simple request⁴⁹.

7.4. Personal Care Robots

One relevant use of personal care robots is as assistive aids for the elderly and people with disabilities. The demographic shift, which will be even more serious over the next few decades⁵⁰, will probably focus on these categories, the main target of this field of robotics at least at the beginning. The purpose being to supply continuous assistance and improve the quality of everyday life.

The devices that could be labelled as such may indeed be extremely diverse for the purposes they serve and the abilities they have. A recent project financed within FP7 – Robot-ERA⁵¹ – developed three different kind of platforms: a domestic, a condominium, and an outdoor robots interacting with one another. The first assists the person at home (with the possibility to be remotely controlled by a help or medical centre in case of emergency); the second capable of interacting with the first and third robot in order to receive and deliver goods from the one to the other; the third intended to navigate in the streets, reach for a shop, make a purchase and deliver it to the second. Many more systems can be conceived, and functions attributed to the robots, therefore a detailed analysis of the risks associated with their use cannot, at this stage, be conducted.

It is however possible to foresee two potential issues, respectively concerning the liability of the producer and of the user.

(a) Liability of the producer and the legal personhood of the robot

The multiple scenarios and interactions such robots may be programmed to have may cause some effects to be unforeseeable. This may cause the development risk defence set

⁴⁸ Ibid., 101.

⁴⁹ Ibid., 99 ff.

⁵⁰ Morris et al. (2013). Smart-Home Technologies to Assist Older People to Live Well at Home, Aging Sci.

⁵¹ Seventh Framework Programme (FP7/2007-2013) under grant agreement num. 288899, FP7 - ICT - Challenge 5: ICT for Health, Ageing Well, Inclusion and Governance

forth by art. 7 DPD to be effectively applied, shielding the producer from liability. For this same reason, it may be also anticipated that users will find providing sufficient evidence of the malfunctioning of the machine problematic. To this purpose, it may be advisable to require such robots to be equipped with recording mechanisms (black boxes) so as to identify the inputs it received, the interactions it had, the data it registered and eventually the choices it made in order to perform its task.

Moreover, in some cases a viable solution may be to attribute the robot legal personhood⁵². For merely functional purposes, the robot could be considered a separate entity provided with a given capital with which it could perform its tasks, assume obligations and respond of eventual liabilities. A similar option would not imply recognizing the robot as an autonomous being, because of some intrinsic characteristics. Rather, it would constitute a policy choice similar to that made with corporations, for the purpose of shielding the humans behind the robot by creating a separate entity provided with sufficient economic resources for its operation. The person providing the resources to the robot would be the one ultimately bearing the costs of the damages the robot caused. However, if a fee was paid to the robot for the services it performed, while part of the retribution could be paid to the owner as a dividend, the rest could be used repay eventual damages caused.

Such a solution, if coupled with a share mechanisms, may also favour the circulation of the ownership of robots, and be used to attribute the cash flows generated by the machine. Finally, such solution may be also used to permit to the robot to enter in some transactions for which it was expressly authorized (for instance performing a sale).

It shall however be noticed that some of these results could actually be effectively achieved through insurance mechanisms.

(b) Liability of the user

The more the liability of the producer will be hard to assess the more likely users will purchase first and third party insurance to be shielded from damages deriving from the use of such devices.

This outcome, however, may be deemed undesirable, for it would leave most of the burden on users who, in some cases at least, may be individuals requiring particular protection (such as elderly or disabled). In those cases alternative systems, including no-fault plans may be envisioned as possible solutions. Nonetheless, being the spectrum of possible applications so wide, at the current state of technological development, it is not possible to determine which alternative solution may be preferable and more effective⁵³.

(c) Long term care insurances

While today approximately 10% of the world's population is over the age of sixty, by 2050 this proportion will have more than doubled⁵⁴. The current system of institutionalised care,

⁵² The concept of legal personhood, also known as legal personality, juridical personality, entails the recognition of an entity by the legal system, attributing rights and obligations directly to it. While human beings are provided of legal personality from the moment of their birth, non-human entities may be attributed legal personality, causing them to become legal – or artificial – persons. Typical examples are corporations and non-profit organizations. See Walker, D.M. (1980) *The Oxford Companion to Law*, Oxford: Clarendon Press, under the entry 'Person', 949.

⁵³ See also Nocco, L. (2014). *Care Robots. Guidelines on Regulating Robotics*. E. Palmerini., 187 ff.

⁵⁴ Pollack, M. (2005). *Intelligent Technology for an Aging Population. The Use of AI to Assist Elders with Cognitive Impairment*, 26(2) *AI Magazine*, 9-24.

largely funded through social security systems, as well as personal and family resources, is not financially stable⁵⁵.

Long-term care, entailing assistance with daily tasks such as dressing, bathing, and using the bathroom, may be provided through personal care robots, an alternative to nursing homes, which are often expensive.

Long-term care insurance contracts may provide required financial funding, by paying for the purchase or lease of the robot and related expenses. The costs associated may be spread by providing sufficient incentives – even in the form of tax reliefs – for individuals to enter such contracts at a sufficiently early age⁵⁶. Applying similar solutions may even reduce healthcare costs by preventing unnecessary and lengthy hospitalizations, and would be in line with what the CRPD art. 19, and 31 through 40 requires⁵⁷.

8. STANDARDIZATION

The use of technical standards may prove a useful and to some extent necessary tool for the effective regulation of emerging technologies, in particular robotics. How already anticipated above (§2) the use of delegated legislation, in particular at a supranational level, may be a viable solution for the adoption of standards and criteria, profoundly influenced by technological advancement, which therefore need to be constantly updated by a competent body of experts in order to be sufficiently narrow tailored to be actually meaningful⁵⁸.

The development of this approach was deemed of growing importance also by the European Commission in its Communication to the European Parliament, the Council and the European Economic and Social Committee of 1 June 2011 – A strategic vision for European standards: Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020⁵⁹, where it is stated:

«[...] in the future, European standardization will play a crucial role in a wide variety of areas, wider than today, ranging from supporting European competitiveness, protecting the consumer, improving the accessibility of disabled and elderly people to tackling climate change and the resource efficiency challenge».

Standardization may indeed prove to be the most effective tool in order to ensure the development of safe devices; at the same time, it could also be used to address some relevant professional requirements, thus easing the circulation of professionals across Europe.

⁵⁵ Kapp, M.B. (2001). The Nursing Home Crisis: Views From A Trustee In The Nonprofit Sector. J. Health Care L. & Pol'y, 308.

⁵⁶ Nocco, L. (2014). Care Robots. Guidelines on Regulating Robotics. E. Palmerini., 189 ff.

⁵⁷ Friedman, J.L., & Norman, G.C. (2012). The Norman/Friedman Principle: Equal Rights to Information and Technology Access, 18 Tex. J. on C. L. & C. R. 47.

⁵⁸ See also Zei, A. (2013). Shifting the boundaries or breaking the branches? On some problems arising with the regulation of technology. Law and Technology. The Challenge of Regulating Technological Development. E. Palmerini and E. Stradella. Pisa, Pisa University Press.

⁵⁹ COM (2011) 311 final.

8.1 Product Safety

As mentioned above (§7) existing liability rules do not appear to provide adequate incentives for the design of safe devices. Said otherwise, market mechanisms and other regulations do better serve the purpose of ensuring that only sufficiently safe products reach the European market. Among the latter certainly many European directives, such as the Council Directive of 20 June 1990 on the approximation of the laws of the Member States relating to active implantable medical devices (90/385/EEC) (henceforth AIMDD)⁶⁰, the Council Directive of 14 June 1993 concerning medical devices (henceforth MDD)⁶¹, and Directive 2006/42/EC of the European Parliament and the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC (henceforth MD)⁶², do play a central role.

However, those regulations do still appear quite general in their formulation, and certainly were not narrowly designed to accommodate a single class of applications. The AIMDD for instance covers any medical device ranging from a pace maker to a robotic limb. The MDD instead has an even wider range of application, that extends to include an exoskeleton or orthoses⁶³, as well as surgical gloves. Finally, the MD is as wide as to include in its definition of machinery « an assembly of linked parts or components, at least one of which moves [...] » (art. 2 MD), that alone would encompass most kinds of robots and much more.

These regulations set forth requirements that producers need to abide in order to obtain an EC marking allowing the commercialization of their product. However, the meeting of such requirements does not suffice in excluding liability should an accident later occur involving the use of the device⁶⁴.

Should the EU decide to adopt the perspective here suggested, namely that of disentangling – in some cases – the issue of safety from that of compensation, it would be advisable to further develop technological standards. Currently neither the ISO nor the ESOs have developed specific standards for robotic prostheses. The former instead has recently adopted a standard for personal care robots.

The adoption by supranational and technically competent bodies of narrowly tailored standards, constantly updated according to the best scientific knowledge available, could prove a more efficient solution to address the issue of safety. Unlike a complex legislative procedure, the adoption of technical rules could be simplified, once the impartiality and competence of the body called to intervene is assured. Those standards ought to have a much narrower object than that of existing directives and should allow to differentiate single kinds of applications.

Once the requirements are set sufficiently high, and take into account all the relevant scientific knowledge, it is reasonable to assume that the certification obtained may justify even some forms of liability exemptions or capping as those described above for specific kinds of robotic applications.

⁶⁰ OJ L 189, 20.7.1990, p. 17

⁶¹ OJ L 169, 12.07.1993, p. 1–43

⁶² OJ L 157, 9.6.2006, p. 24

⁶³ For a better understanding of what an orthoses is and how it functions, see Salvini, P. and M. Cempini (2014). Robotic Prostheses. *Guidelines on Regulating Robotics*. E. Palmerini., 113 ff.

⁶⁴ See Bertolini, A. Ibid., 135 ff.

To this end, at a European level, the role of ESOs should be further incentivized, and measures adapted in order to ensure the highest degree of competence, independence, and effectiveness is achieved, while respecting all core European democratic values (see §2).

8.2 Professional requirements: the case of robotic surgery

Through multiple interviews conducted, within the RoboLaw project, with medical doctors and other professionals involved in the use of robotic surgery the issue emerged of the absence of adequate training and certification procedures for surgeons intending to make use of such technologies. Currently any doctor may decide to perform a given operation with a robotic application if that was available in the structures he has access to, irrespective of whether he has acquired any previous experience or training.

In this field however the specificity of the instrument utilized certainly requires ad-hoc training and preparation, which may be deemed necessary in order to grant the highest degree of professional competence, as well as protect the patient's health. Accidents and negative consequences of potential failures of the apparatuses may in fact be limited through training and specialization.

Indeed, it is worth noting that given the high number of lawsuits filed in the US against Intuitive Surgical, Inc. (the producer of the daVinci robot), accusing the company of not properly training the surgeons, the manufacturer, together with the U. S. Department of Defense, identified ten research institutions and hospitals, which are renowned for their experience in operating with the daVinci system (among which EndoCAS⁶⁵), to develop a training protocol called 'Fondamenti di chirurgia robotica' (Foundations of robotic surgery)⁶⁶. This initiative aims at producing an internationally recognized standard of qualification for surgeons intending to make use of robotic devices, as already required since 2009 to surgical trainees specializing in laparoscopy in the United States.

It seems therefore necessary that the European Union defines the minimal professional requirements that the surgeon must show in order to be allowed to use a greatly complex device like a surgical robot. To this purpose, specific training which allows the surgeon to obtain a European certificate of his abilities to perform robotic-assisted operations, after passing a final exam, could be introduced. This procedure, that in the member states could be arranged by the Faculties of Medicine or by University Hospitals, should provide for a certain amount of hours including theoretical lessons, training with the simulator, and participation in computer-assisted interventions. Moreover, the qualified surgeons should periodically attend continuing education courses to renew the validity of their certificate and eventually update it for the use of more advanced devices, over the time developed and acquired by hospitals⁶⁷.

A European regulation on the qualifying certificate for using surgical robots would also promote the free movement of professionals among member states, as well as ensure a more efficient and transparent recognition of professional qualifications, as stated in Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market

⁶⁵ www.endocas.org

⁶⁶ <http://www.unipi.it/index.php/tutte-le-news/item/4449-arriva-la-patente-per-operare-con-il-robot-da-vinci>

⁶⁷ See Azzarri, F. and A. Bertolini (2014). Computer integrated surgical systems. *Guidelines on Regulating Robotics*. E. Palmerini., 95.

Information System Otherwise, should some member state fix specific subjective requirements to perform robotic-assisted operations, the surgeons coming from other member states may not have full access to the profession⁶⁸.

9. REGULATING HUMAN ENHANCEMENT TECHNOLOGIES

Piercing into the debate on human enhancement is a natural outcome of the research on robotic prostheses and, more generally, on body implants, since said technologies not only can restore lost or impaired functions, but can also improve and strengthen them to a degree otherwise not attainable by human beings. A wide range of robotic technologies, such as advanced prosthetics, brain implants, cochlear and retinal implants are being developed in order to help individuals suffering from motor disabilities, blind or deaf people to recover the function and capability they have lost (or were born without). At the same time these technologies have the potential of being used well beyond the restoration of existing human functions, in order to add new capabilities or augment the existing ones and therefore overcome the levels of ordinary human functionality. The convergence of robotics and neuroscience will lead to the development of advanced neuro-prosthetics, and eventually, it is estimated, to the emergence of a culture of techno sapiens, individuals who utilise information technology and neuro-technologies to enhance their capabilities, giving way to a condition of "prosthetic knowledge".⁶⁹ The contested theme of human enhancement therefore comes up. Robotics qualifies in fact as one the most powerful means to achieve the enhancement of the human being (although it can be considered less controversial than others since it does not introduce changes in the human nature that can be passed on to the offspring).

The subject of human enhancement, being extremely broad and rich, can hardly be captured in an adequate way. The reasons that make the theme at the same time complex and evanescent depend on several elements: the discussion is widespread throughout diverse disciplines that confront it from their peculiar angle; it is very fragmented since multiple perspectives open up, depending on the technical mean used to achieve enhancement or the kind of function it impacts on; there are no clear-cut stances that stem from the fundamental principles shared at the European level. "Genetic" and "pharmacological", "cognitive" and "physical", "moral" or "mood" enhancement pose different problems, and a provisional conclusion has been offered exactly in the following terms: 'each kind of enhancement will need to be treated on its own, weighing the benefits of the technology against the costs it may impose, as well as the costs of regulation'.⁷⁰

Another reason that explains the difficulties in offering a comprehensive account of the debate is that it grounds on concepts and assumptions that are not fully defined and continue to be discussed among scholars, engendering further complexities to be dealt with. For one thing, it is coined by a discussion of the ambiguous notion of the "natural" and reposes over a distinction, deep-rooted in the current landscape between therapy and enhancement, often intended as a boundary-marking line. According to this characterization, enhancement is everything that goes beyond the mere restoration of good health or of a given normal functioning. This implies some assumptions: (a) an objective,

⁶⁸ Ibid., 95-96.

⁶⁹ W. Wallach, *From Robots to Techno Sapiens: Ethics, Law and Public Policy in the Developments of Robotics and Neurotechnologies*, 2011 *Law, Innovation and Technology*, 3(2), 185-207.

⁷⁰ H.T. Greely, *Regulating Human Biological Enhancements: Questionable Justifications and International Complications*, *University of Technology Sidney Law Review* 4, 2005.

medically founded concept of health; (b) a scientific notion of normal functioning. But such a narrow explanation does not even cover all those cases in which therapy produces effects that go beyond the mere restoration of good health or normal functioning. Therefore this binomial cannot function properly because it is blurred in itself, reposing, as it does, on concepts of normalcy and disability, health and illness, human functioning and human capacities that are culture-based notions, change over time, and can hardly be defined and distinguished in an uncontroversial fashion. At the same time, this alternative, which permeates the debate, cannot be dismissed if only because for pragmatic reasons: it serves to decide, for instance, whether an intervention should be paid for by a health system or insurance company or not.⁷¹

Secondly, the debate has stalled on unilateral and polarized positions, “transhumanists” v. “bioconservatives” being the most renowned opposition, that is unable to reconcile and mediate among the conflicting groups and then achieve a more reasonable and complex stance onto the ethical and social issues raised by human enhancement technologies.

In order to confront the problem in a regulatory perspective, two methodological points have to be stressed. First of all, we should move past the contemporary discussion on human enhancement and go beyond sterile disputes between its supporters and detractors. This renewed approach should be informed by a broad interpretation of the notion of “human enhancement” in order to include not just the technical interventions themselves, but the social and cultural dimension as well that are entrenched into them. Technologies in fact are not just tools that humans use in order to interact with and experience the surrounding world. They also are means of mediation that shape their world and themselves.⁷²

Secondly, human enhancement affects society at large. Human enhancement technologies feed new hopes and create social expectations, make new tools available both for individuals and society, foster threats and concerns, and present risks, that need to be dealt with in a public discussion and not only in academic or expert circles. Thus it requires public debate and stands in need of regulation. Experts alone are partial actors for a successful decision-making process. Only a public, democratic debate can develop policies, which allow for an ethical use of enhancing technologies that improve the human condition. Law and ethics are mutually involved in shaping the normative stance towards this phenomenon, which cannot be appraised from a purely technological standpoint.

Indeed, the discussion is already developing not only on a theoretical level, but it has invested political institutions that have commissioned reports and studies on the topic, which proves to be a prominent aspect of the current bioethical scenario.⁷³ Several EU funded project investigate the theme in an interdisciplinary manner and engage in the attempt to involve the general public in the reflection about this emerging field.⁷⁴

⁷¹ S. Coenen, M. Schuijff, & M. Smits, *The Politics of Human Enhancement and the European Union*. In J. Savulescu, R. ter Meulen, G. Kahane (eds.), *Enhancing Human Capacities*. Oxford: Wiley Blackwell, 2011, 521-535, at 523.

⁷² F. Battaglia & A. Carnevale (eds.), *Reframing the Debate on Human Enhancement*, Special issue of *Humana.Mente*, vol. 26, May 2014.

⁷³ See British Medical Association, *Boosting your brainpower: ethical aspects of cognitive enhancement*. London: British Medical Association, 2007; Danish Council of Ethics, *Medical Enhancement*. English Summary, Copenhagen, 2011, available at <http://etiskraad.dk/Udgivelser/~media/publications-en/Medical%20enhancement.ashx>; President's Council on Bioethics, *Beyond Therapy. Biotechnology and the Pursuit of Happiness*, 2003; A. Nordmann, *Converging Technologies. Shaping the Future of European Society*, Report of the High Level Expert Group on “Foresighting the New Technology Wave”. Luxembourg: Office for the Official Publications of the European Communities, 2004.

⁷⁴ See, for instance, ENHANCE; EPOCH – Ethics in Public Policy Making: The Case of Human Enhancement; TECHNOLIFE – A transdisciplinary approach to the emerging challenges of novel technologies: Lifeworld and

This extended body of research and literature⁷⁵ and the public discussion that is engendering can uncover all the philosophical and ethical aspects involved and reveal common threads and shared beliefs even between positions commonly considered in radical contrast. Regulators should learn from each rationale and ethical standpoint and eventually intervene in order to clarify the constraints that apply to the phenomenon from a legal point of view and take into account the values and concepts that have a bearing on the issue of human enhancement.

9.1. Human enhancement and the virtues of a common European approach

A common European approach to the topic should be looked for. Firstly, a policy identified at the European level would ensure consistency with the constitutional common framework and with the precautionary principle as broadly embraced in European science society. The values at stake, that represent also relevant objectives of the European institutions' activities, are safety and protection of health of European citizens; individual autonomy and human dignity possibly compromised by the risk of indirect coercion, inherent in the more radical versions of the discourse about human enhancement; justice in the access to human enhancement technologies, and of discrimination towards the enhanced-not. Autonomy and self-determination play an important role, but tend to be presented as the ultimate answer to the problem, in an oversimplified proposition of the complex issues at stake. Since modifying or enhancing our bodies with technology is already possible, and relatively common, changing one's body through technology starts to be conceptualized as a right,⁷⁶ an open possibility that becomes part of the right to freely construct one's identity using all the socially available opportunities, even with recourse to artificial devices, and then have this self-constructed identity recognized externally. This new dimension can thus dilate the scope of the fundamental human rights,⁷⁷ in order to include access to technologies that allow human enhancement.

However, the answer to the problem cannot be confined entirely to the private individual sphere. In a community of rights, any regulatory assessment cannot be tackled from an individualistic point of view; it is not just a question of personal choice, because these issues affect the structure of society and values enshrined in the legal order, such as distributive justice, solidarity and dignity. First, there is the question of how the exercise of the enhanced capacity impacts on the rights of members of the community; secondly, there is the question of whether human enhancement poses any threat to the basic conditions that are deemed essential for an entire community. In fact, as people experiment with more enhancements, this has a bearing on human identity as a whole, since the notion of enhancement relies on our understanding of what it means to be

imaginaries in foresight and ethics; NERRI – Neuro-Enhancement: Responsible Research and Innovation (on the specific theme of neuro-enhancement).

⁷⁵ In addition to the articles and documents cited in the footnotes of this section, see for a general overview S. Coenen, M. Schuijff, M. Smits, P. Klaassen, L. Hennen, M. Rader, & G. Wolbring (2009). Human Enhancement Science and Technology Options Assessment on Human Enhancement, available at https://www.itsa.kit.edu/downloads/etag_coua09a.pdf.

⁷⁶ The California think-tank Institute for the Future has drawn up a legal framework, called Magna Cortica, in order "to create an overarching set of ethical guidelines to shape the developments of brain enhancement technologies" (the text is retrievable at www.openthefuture.com). In this context, a right to self-modification (and cognitive augmentation) has been forged, together with the right to refuse modification (since refusing cognitive augmentation might come to be regarded as irresponsible or controversial).

⁷⁷ S. Rodotà, Of machines and men: the road to identity. Scenes for a discussion, in M. Hildebrandt and A. Rouvroy (eds), *Law, Human Agency and Autonomic Computing. The Philosophy of Law Meets the Philosophy of Technology* (Oxford-New York: Routledge, 2011), 179-198, at 180.

physically or mentally “normal”, while technological advances in prosthetics and exoskeletons could lead us to perceive normalcy and disability in a different way.⁷⁸ When the purpose of being equipped with a technological appliance is not that of restoring lost functions, the procedure does not impinge on a recognized and uncontroversial basis like the fundamental right to health. But even if that were the case, the freedom to opt out from enhancing technologies has to be granted, and therefore alternatives have to be provided. The choice not to be enhanced has a significance that has already been shown by the experience with cochlear implants, that is refused by a certain number of its potential users, because they consider deafness not be a disability, but a difference that is a constitutive part of their identity.

Other overarching principles orienting the discussion are those of equality and non-discrimination towards the enhanced-not, preventing a societal division among natural individuals and augmented ones. Issues of justice in the access to human enhancement technologies also arise, although they are not distinctive of this phenomenon. A utilitarian perspective, that support any innovation veering toward the maximum collective wellbeing, and therefore approves of enhancement almost by definition, appears no more useful or decisive to guide the discourse: first of all because frailty, vulnerability⁷⁹ and dependence⁸⁰, that transhumanists want to transcend⁸¹, is valued in our societies and, according to a certain perspective, is something that makes us better people; secondly because the ultimate goal of invulnerability is not realistically attainable. If enhancing technologies can diminish suffering and disabilities, they will always create new forms of vulnerability⁸², like dependence itself on the biological and technological systems that augment the brain capacities.⁸³

Finally the value of human dignity: this category expresses multifarious meanings, but one of them impinges upon the uniqueness of each person. The individual distinctive identity of each person, where the idea of an intrinsic dignity manifests itself, opposes those interventions that will lead to a reduction of human biological variability, to supersede eccentric features that are deemed to be less than performing, to standardize the human species, be it in the direction of augmenting its biological structure.

A legal understanding and approach agreed at the European level, to sum up, cannot be absent from the discourse on human enhancement technologies, that has to set limits and boundaries if we are to protect fundamental rights and to align technological developments with societal needs and fundamental values.

However, other more pragmatic reasons encourage to adopt a common stance on the topic, and not leave it to a merely national dimension. Apparently the regulation of this field falls outside the direct competence of the European Union as resulting from the Lisbon Treaty; at the same time since the Member States' legislations substantially differ from one another on issues of bioethics, it is reasonably foreseeable that this will also be the case with human enhancement, thus raising multiple questions. European institutions are interested by the impact that diverse regulations may have on the free flow of goods and services between Member States. Human enhancement could be seen as a competitive advantage.

⁷⁸ R. Brownsword, *Regulating Human Enhancement: Things Can Only Get Better?*, (2009) 1 *Law, Innovation and Technology* 125–152.

⁷⁹ Coeckelbergh, M. (2013). *Human Being @ Risk*, Springer.

⁸⁰ MacIntyre, A. (2009). *Dependent Rational Animals. Why Human Beings Need the Virtues*. London, Duckworth.

⁸¹ Bostrom, N. (2005). "The Fable of the Dragon-Tyrant." *Journal of Medical Ethics* 31(5): 273.

⁸² Coeckelbergh, M. (2013). *Human Being @ Risk*, Springer.

⁸³ M. Coeckelbergh, *Vulnerable Cyborgs: Learning to Live with our Dragons*, *Journal of Evolution and Technology*, 22 (2011), 1–9.

Would it be possible to consider it as a service, for the purposes of art. 56 TFEU, and thus permit the advertisement within one member state of those practices which are prohibited there but allowed in another one? ⁸⁴ Would it instead be possible to deny access in one European country to a European citizen, who underwent an enhancement practice prohibited there, that is instead allowed in the member he comes from? May freedom of movement within the European Union (pursuant to art. 45 TFEU and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of [citizens of the Union](#) and their family members to [move and reside freely](#) within the territory of the Member States) ⁸⁵ be used as an argument for the adoption of some fundamental and common principles in this subject matter?⁸⁶ Transnational regulation appears therefore necessary in order to avoid that restrictive regulation or a ban in one country is weakened by a more permissive legislation in competing countries. ⁸⁷

Given the experimental nature of most enhancing technologies, the duty to comply with actual regulation for medical research is also a problem to be afforded within the, equivocal but to some extent inevitable, alternative between therapy and enhancement. The issue here is that while medical devices fall under an established and very rigorous European framework, currently there is no regulation for devices developed for other purposes, like enhancement. Pragmatic reasons, as mentioned above, also underpin this distinction, and policy guidance could support national decisions both at the regulatory and at the more practical level, for instance about appropriate registration of interventions in health institutions, or in case hospital ethical committees will be called to decide on a case-by-case basis.

For these grounds, despite the most relevant issues posed by human enhancement appearing to be remote and lying in the background of more pressing considerations, it is advisable that on the one hand an informed public debate is initiated – as well as further research publicly financed –, and on the other hand that the European Union takes timely measures to develop and adopt clear guidelines in this field, which appear to follow from its policy and regulatory interest and both desirable and appropriate with respect to its competencies and goals. ⁸⁸

⁸⁴ See for instance the decision in *Society for the Protection of Unborn Children (Ireland) Ltd v. Stephen Grogan and Others*, Case C-159/90 [1991] ECR I 4733.

⁸⁵ OJEU, L 158, 30.4.2004, p. 77.

⁸⁶ See also Bertolini, A. (2014). *Robotic Prostheses. Guidelines on Regulating Robotics*. E. Palmerini., 156.

⁸⁷ Greely, 2005, cit.; Coenen, Schuijff & Smits, 2011, cit.

⁸⁸ R. ter Meulen, *Human Enhancement: A Policy Perspective for the European Union*, in T. Boer & R. Fischer (eds.), *Human Enhancement. Scientific, Ethical and Theological Aspects from a European Perspective*. Strasbourg: Church and Society Commission of the Conference of European Churches (CEC), 2013; Coenen, Schuijff & Smits, 2011, cit.

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