European Commission: Experts' Group on the Recognition of Parenthood between EU Member States

The European Commission (EC) has issued a call for experts to join an Experts' Group on the Recognition of Parenthood between the Member States of the European Union (EU).

Families are increasingly mobile as they move and travel between the Member States of the EU. Yet, given the differences in Member States' substantive and conflict of laws rules on parenthood, families may face obstacles in having the parenthood of their children recognised when crossing borders within the Union.

The EC is preparing a legislative initiative on the recognition of parenthood between the Member States of the European Union. The goal of this initiative is to ensure that children will maintain their rights in cross-border situations, in particular where families travel or move within the Union.

In this context, the EC seeks **experts to advise it in the preparation of this legislative initiative**. Experts must have proven and relevant competence and experience at EU and / or international level in areas relevant to the recognition of parenthood between EU Member States. In particular, the members of the Expert Group must be experts in one or more of the following areas:

- private international law on family matters;
- Member States' law, and comparative law, on the establishment and recognition of parenthood;
- Union case law on free movement, name and nationality;
- fundamental rights and related case law, in particular under the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR) on or affecting parenthood and nationality; and / or
- the rights of the child and related case law.

The members of the Expert Group will be appointed in their personal capacity to

represent the public interest. The call is not limited to experts with the nationality of one of the EU Member States.

The call for experts will run **until 23 April 2021.** Details about the call can be found at the following here.

this information was provided by Ms Lenka Vysoka, EC.

Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (II): The proposed Art. 6a; Art. 7 is dead, long live Article 7?

Eduardo Álvarez-Armas is Lecturer in Law at Brunel University London and Affiliated Researcher at the Université Catholique de Louvain. He has kindly provided us with his thoughts on recent proposals for amending the Rome II Regulation. This is the second part of his contribution; a first one on the law applicable to strategic lawsuits against public participation can be found here.

Over the last few months, the European Parliament´s draft report on corporate due diligence and corporate accountability (2020/2129(INL)) and the proposal for an EU Directive contained therein have gathered a substantial amount of attention (see, amongst others, blog entries by Geert Van Calster, Giesela Rühl, Jan von Hein, Bastian Brunk and Chris Thomale). As the debate is far from being exhausted, I would like to contribute my two cents thereto with some further (non-exhaustive and brief) considerations which will be limited to three selected aspects of the proposal´s choice-of-law dimension.

1. **A welcome but not unique initiative (Comparison with the UN draft**

Treaty)

Neither Article 6a of Rome II nor the proposal for an EU Directive are isolated initiatives. A so-called draft Treaty on Business and Human Rights ("*Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*") is currently being prepared by an *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, established in 2014 by the United Nation´s Human Rights Council. Just like it is the case with the EP´s proposal, the 2nd revised UN draft Treaty (dated 6th August 2020) (for comments on the applicable law aspects of the 1st revised draft, see Claire Bright´s note for the BIICL here) contains provisions on international jurisdiction (Article 9, "*Adjudicative Jurisdiction*") and choice of law (Article 11, "*Applicable law*").

Paragraph 1 of the latter establishes the *lex fori* as applicable for "*all matters of substance* […] *not specifically regulated*" by the instrument (as well as, quite naturally, for procedural issues). Then paragraph 2 establishes that "*all matters of substance regarding human rights law relevant to claims before the competent court may, upon the request of the victim of a business-related human rights abuse or its representatives, be governed by the law of another State where: a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or b) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled*".

In turn, the proposed Article 6a of Rome II establishes that: "[…] *the law applicable to a non-contractual obligation arising out of the damage sustained shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred or on the law of the country in which the parent company has its domicile or, where it does not have a domicile in a Member State, the law of the country where it operates.*" (The proposed text follows the suggestions made in pp. 112 ff of the 2019 Study requested by the DROI committee (European Parliament) on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries.)

Putting aside the fact that the material scopes of the EP's and the UN's draft instruments bear differences, the EP´s proposal features a more ambitious choice-of-law approach, which likely reflects the EU´s condition as a "Regional integration organization", and the (likely) bigger degree of private-international-law convergence possible within such framework. Whichever the reasons, the EP´s approach is to be welcomed in at least two senses.

The first sense regards the clarity of victim choice-of-law empowerment. While in the UN proposal the victim is allowed to "*request*" that a given law governs "*all matters of substance regarding human rights law relevant to claims before the competent court*", in the EP´s proposal the choice of the applicable law unequivocally and explicitly belongs to the victim (the "*person seeking compensation for damage*"). A cynical reading of the UN proposal could lead to considering that the prerogative of establishing the applicable law remains with the relevant court, as the fact that the victim may request something does not necessarily mean that the request ought to be granted (Note that paragraph 1 uses "*shall*" while paragraph 2 uses "*may*"). Furthermore, the UN proposal contains a dangerous opening to *renvoi*, which would undermine the victim´s empowerment (and, to a certain degree, foreseeability). Therefore, if the goal of the UN´s provision is to provide for *favor laesi*, a much more explicit language in the sense of conferring the choice-of-law prerogative to the victim would be welcomed.

2. **A more ambitious initiative (The "domicile of the parent" connection, and larger victim choice)**

A second sense in which the EP´s choice-of-law approach is to be welcomed is its bold stance in trying to overcome some classic "business & human rights" conundrums by including an ambitious connecting factor, the domicile of the parent company, amongst the possibilities the victim can choose from. Indeed, I personally find this insertion in suggested Art. 6a Rome II very satisfying from a substantive justice (*favor laesi*) point of view: inserting that very connecting factor in Art. 7 Rome II (environmental torts) is one of the main *de lege ferenda* suggestions I considered in my PhD dissertation (*Private International Environmental Litigation before EU Courts: Choice of Law as a Tool of Environmental Global Governance*, Université Catholique de Louvain & Universidad de Granada, 2017. An edited and updated version will be published in 2021 in Hart´s "Studies in Private International Law"), in order to correct some of

the shortcomings of the latter. While not being the ultimate solution for all the various hurdles victims may face in transnational human-rights or environmental litigation, in terms of content-orientedness this connecting factor is a great addition that addresses the core of the policy debate on "business & human rights". Consequently, I politely dissent with Chris Thomale´s assertion that this connecting factor "*has no convincing rationale*". Moreover, I equally dissent from the contention that a choice between the *lex loci damni* and the *lex loci delicti commissi* is already possible via "*a purposive reading of Art. 4 para 1 and 3 Rome II*". For reasons I have explained elsewhere, I do not share this optimistic reading of Art. 4 as being capable of filling the transnational human-rights gap in Rome II. And even supposing that such interpretation was correct, as draft Art. 6a would make explicit what is contended that can be read into Art. 4, it would significantly increase legal certainty for victims and tortfeasors alike (as otherwise some courts could potentially interpret the latter Article as suggested, while others would not).

Precisely, avoiding a decrease in applicable-law foreseeability seems to be (amongst other concerns) one of the reasons behind Jan von Hein´s suggestion in this very blog that Art. 6a´s opening of victim´s choice to four different legal systems is excessive, and that not only it should be reduced to two, but that the domicile of the parent should be replaced by its "habitual residence". Possibly the latter is contended not only to respond to systemic coherence with the remainder of Rome II, but also to narrow down options: in Rome II the "habitual residence" of a legal person corresponds only with its "*place of central administration*"; in Brussels I bis its "domicile" corresponds with either "*statutory seat*", "*central administration*" or "*principal place of business*" at the claimant´s choice. Notwithstanding the merits in system-alignment terms of this proposal, arguably, substantive policy rationales (*favor laesi*) ought to take precedence over pure systemic private-international-law considerations. This makes all the more sense if one transposes, *mutatis mutandis*, a classic opinion by P.A. Nielsen on the three domiciles of a corporation under the "Brussels" regime to the choice-of-law realm: "*shopping possibilities are only available because the defendant has decided to organise its business in this way. It therefore seems reasonable to let that organisational structure have* […] *consequences*" (P. A. NIELSEN, "Behind and beyond Brussels I – An Insider´s View", *in* P. DEMARET, I. GOVAERE & D. HANF [eds.], *30 years of European Legal Studies at the College of Europe [Liber Professorum 1973-74 – 2003-04]*, Cahiers du Collège d´Europe Nº2, Brussels,

P.I.E.-Peter Lang, 2005, pp. 241-243).

And even beyond this, at the risk of being overly simplistic, in many instances, complying with four different potentially applicable laws is, actually, in alleged overregulation terms, a "false conflict": it simply entails complying only with the most stringent/restrictive one amongst the four of them (compliance with X+30 entails compliance with X+20, X+10 and X). Without entering into further details, suffice it to say that, while ascertaining these questions *ex post facto* may be difficult for victim´s counsel, it should be less difficult *ex ante* for corporate counsel, leading to prevention.

3. **A perfectible initiative (tension with Article 7 Rome II)**

Personally, the first point that immediately got my attention as soon as I heard about the content of the EP report´s (even before reading it) was the Article 6a *versus* Article 7 Rome II scope-delimitation problem already sketched by Geert Van Calster: when is an environmental tort a human-rights violation too, and when is it not? Should the insertion of Art. 6a crystallize, and Art. 7 remain unchanged, this question is likely to become very contentious, if anything due to the wider range of choices given by the draft Art. 6a, and could potentially end before the CJEU.

What distinguishes say *Mines de Potasse* (which would generally be thought of as "common" environmental-tort situation) from say *Milieudefensie v. Shell* 2008 (which would typically fall within the "Business & Human Rights" realm and not to be confused with the 2019 *Milieudefensie v. Shell* climate-change litigation) or *Lluiya v. RWE* (as climate-change litigation finds itself increasingly connected to human-rights considerations)? Is it the geographical location of tortious result either inside or outside the EU? (When environmental torts arise outside the EU from the actions of EU corporations there tends to be little hesitation to assert that we are facing a human-rights tort). Or should we split apart situations involving environmental damage *stricto sensu* (pure ecological damage) from those involving environmental damage *lato sensu* (damage to human life, health and property), considering only the former as coming within Art. 7 and only the latter as coming within Art. 6a? Should we, alternatively, introduce a *ratione personae* distinction, considering that environmental torts caused by corporations of a certain size or operating over a certain geographical scope come within Art. 6a, while environmental torts caused by legal persons falling below the said

threshold (or, rarely, by individuals) come within Art. 7?

Overall, how should we draw the boundaries between an environmental occurrence that qualifies as a human-rights violation and one that does not in order to distinguish Art. 6a situations from Art. 7 situations? The answer is simple: we should not. We should consider every single instance of environmental tort a human-rights-relevant scenario and amend Rome II accordingly.

While the discussion is too broad and complex to be treated in depth here, and certainly overflows the realm of private international law, suffice it to say that (putting aside the limited environmental relevance of the Charter of Fundamental Rights of the EU) outside the system of the European Convention of Human Rights (ECHR) there are clear developments towards the recognition of a human right to a healthy or "satisfactory" environment. This is already the case within the systems of the American Convention on Human Rights (Art. 11 of the Additional Protocol to the Convention in the area of Economic, Social and Cultural Rights) and the African Charter on Human and People´s Rights (Art. 24). It is equally the case as well in certain countries, where the recognition of a fundamental/constitutional right at a domestic level along the same lines is also present. And, moreover, even within the ECHR system, while no human right to a healthy environment exists as such, the case-law of the European Court of Human Rights has recognized environmental dimensions to other rights (Arts. 2 and 8 ECHR, notably). It may therefore be argued that, even under the current legal context, all environmental torts are, to a bigger or lesser extent, human-rights relevant and (save those rare instances where they may be caused by an individual) "business-related".

Ultimately, if any objection could exist nowadays, if/when the ECHR system does evolve towards a broader recognition of a right to a healthy environment, there would be absolutely no reason to maintain an Art. 6a *versus* Art. 7 distinction. Thus, in order to avoid opening a characterization can of worms, it would be appropriate to get "ahead of the curve" in legislative terms and, accordingly, use the proposed Art. 6a text as an all-encompassing new Art. 7.

There may be ways to try to (artificially) delineate the scopes of Articles 7 and 6a in order to preserve a certain *effet utile* to the current Art. 7, such as those suggested above (geographical location of the tortious result, size or nature of the tortfeasor, type of environmental damage involved), or even on the basis of

whether situations at stake “trigger” any of the environmental dimensions of ECHR-enshrined rights. But, all in all, I would argue towards using the proposed text as a new Art. 7 which would comprise both non-environmentally-related human-rights torts and, comprehensively, all environmental torts.

Art. 7 is dead, long live Article 7.

Insights into ERA Seminar on Privacy and Data Protection with a Specific Focus on “Balance between Data Retention for Law Enforcement Purposes and Right to Privacy” (Conference Report)

This report has been prepared by Priyanka Jain*, a researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg.*

Introduction:

On 9-11 December 2020, ERA – the Academy of European Law – organized an online seminar on “Privacy and Data Protection: Recent ECtHR & CJEU Case Law”. The core of the seminar was to provide an update on the case law

developed by the European Court of Human Rights (ECtHR) and by the Court of Justice of the European Union (CJEU) with relevance for privacy and data protection law since 2019. The key issues discussed were the distinction between the right to privacy and data protection in the jurisprudence of the ECtHR and CJEU, the impact of the jurisprudence on international data transfers, notions of 'essence of fundamental rights' 'personal data processing', 'valid consent' and so on.

Day 1: Personal Data Protection and right to privacy

Gloria González Fuster (Research Professor, Vrije Universiteit Brussel (VUB), Brussels) presented on the essence of the fundamental rights to privacy and data protection in the existing legal framework with a specific focus on the European Convention on Human Rights (Art. 8 of ECHR) and the Charter of Fundamental Rights of the EU (Art. 7, Art. 8)

Article 8 of the Convention (ECHR) guarantees the right to respect private and family life. In contrast, Art 52(1) EU Charter recognizes the respect for the essence of the rights and freedoms guaranteed by the Charter. Both are similar, but not identical. This can be validated from the following points:

- As per Art 8 (2) ECHR – there shall be no interference with the exercise of this right except such as in accordance with the law, whereas Art 52 (1) states that any limitation to the exercise of right and freedoms recognized by the Charter must be provided for by law.
- The Art 8 (2) ECHR stresses the necessity in a democratic society to exercise such an interference, whereas Art 52(1) of the EU Charter is subject to the principle of proportionality.
- Respect for the essence of rights and freedoms is mentioned in Art 52 (1) but not mentioned in Art 8 (2).
- Also, Art 8 (2) states that the interference to the right must be only

> allowed in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others. At the same time, Article 52 (1) states that any limitations to rights must meet objectives of general interest recognized by the Union or the need to protect others' rights and freedoms.

In the Joined Cases C?293/12 and C?594/12, *Digital Rights Ireland*; the Court addressed the interferences to the rights guaranteed under Articles 7 and 8 caused by the Data Retention Directive. An assessment was carried out as to whether the interferences to the Charter rights were justified as per Article 52(1) of the Charter. In order to be justified, three conditions under Article 52(1) must be fulfilled. The interference must be provided for by law, and there must be respect for the essence of the rights, and it must be subject to the principle of proportionality. Certain limitations to the exercise of such interference/ infringement must be genuinely necessary to meet objectives of general interest. The Directive does not permit the acquisition of data and requires the Member States to ensure that 'appropriate technical and organizational measures are adopted against accidental or unlawful destruction, accidental loss or alteration of data' and thus, respects the essence of the right to privacy and data protection. The Directive also satisfied the objective of general interest as the main aim of the Directive was to fight against serious crime, and it was also proportional to its aim of need for data retention to fight against serious crimes. However, even though the Directive satisfied these three criteria, it did not set out clear safeguards for protecting the retained data, and therefore it was held to be invalid.

It is pertinent to note here that the ECHR does not contain any express requirement to protect the 'essence' of fundamental rights, whereas the Charter does. However, with regard to Art 8 of the ECHR, it aims to prohibit interference or destruction of any rights or freedoms with respect for private and family life. This can be possibly interpreted so as to protect the essence of the fundamental right of private and family life. This is because a prohibition of the destruction of any right would mean affecting the core of the right or compromising the essence

of the right.

Gloria, also examined Article 7 of the Charter, which guarantees a right to respect for private and family life, home and communications, and Article 8, which not only distinguishes data protection from privacy but also lays down some specific guarantees in paragraphs 2 and 3, namely that personal data must be processed fairly for specified purposes. She analyzed these Charter provisions concerning the Regulation (EU) 2016/679 (GDPR). GDPR creates three-fold provisions by imposing obligations on the data controllers, providing rights to data subjects, and creating provision for supervision by data protection authorities.

She also addressed the balance between the right to privacy and the processing of personal data of an individual on one hand and the right to information of the public on the other. Concerning this, she highlighted the interesting decision in C-131/12, *Google Spain*, wherein it was stated that an interference with a right guaranteed under Article 7 and 8 of the Charter could be justified depending on the nature and sensitivity of the information at issue and with regard to the potential interest of the internet users in having access to that information. A fair balance must be sought between the two rights. This may also depend on the role played by the data subject in public.

It was also discussed in the judgments C-507/17, *Google v CNIL*; and Case C-136/17 that a data subject should have a "right to be forgotten" where the retention of such data infringes the Directive 95/46 and the GDPR. However, the further retention of the personal data shall only be lawful where it is necessary for exercising the right of freedom of expression and information. The ruling was on the geographical reach of a right to be forgotten. It was held that it is not applicable beyond the EU, meaning that Google or other search engine operators are not under an obligation to apply the 'right to be forgotten' globally.

In the next half of the day, Roland Klages, Legal Secretary, Chambers of First Advocate General Szpunar, Court of Justice of the European Union, Luxembourg, presented on the topic: "The concept of consent to the processing of personal data". He started with a brief introduction of GDPR and stated that there is no judgment on GDPR alone as it has been introduced and implemented recently, but

there are judgments based on the interpretation of Directive 95/46 and the GDPR simultaneously. He commented on the composition of the ECJ, which sits in the panel of 3,5, 15 (Grand Chamber), or 27 (Plenum) judges. The Grand Chamber comprises a President, vice-president, 3 presidents of a 5th chamber, rapporteur, another 9 judges, appointed based on re-established lists (see Article 27 ECJ RP).

He discussed the following cases in detail:

C – 673/17 (*Planet49*): Article 6(1) (a) GDPR states that the processing of data is lawful only if the data subject has given consent to the processing of personal data for one or more specific purposes. "Consent" of the data subject means any freely given, specific, informed, and unambiguous indication of the data subject's wishes by which he or she, by a statement or by clear affirmative action, signifies agreement to the processing of personal data relating to him or her.[1] This clearly indicates that consent is valid only if it comes from the active behavior of the user as it indicates the wishes of the data subjects. A consent given in the form of a pre-selected checkbox on a website does not amount to active behavior. It also does not fulfill the requirement of unambiguity. Another important aspect of the ruling was that it does not matter if the information stored or retrieved consists of personal data or not. Article 5(3) of Directive 2002/58/ EC (Directive on privacy and electronic communications)protects the user from interference with their private sphere, regardless of whether or not that interference involves personal or other data. Hence, in this case, the storage of cookies at issue amounts to the processing of personal data. Further, it is also important that the user is able to determine the consequence of the consent given and is well informed. However, in this case, the question of whether consent is deemed to be freely given if it is agreed to sell data as consideration for participation in a lottery is left unanswered.

Similarly, in case C -61/19 (Orange Romania), it was held that a data subject must, by active behavior, give his or her consent to the processing of his or her personal data, and it is upto the data controller, i.e., Orange România to prove this. The case concerns contracts containing a clause stating that the data subject

has been informed about the collection and storage of a copy of his or her identification document with the identification function and has consented thereto. He also discussed other cases such as case C-496/17, Deutsche Post, and C- 507/17, Google (discussed earlier), demonstrating that consent is a central concept to GDPR.

Day 2: "Retention of personal data for law enforcement purposes."

On the next day, Kirill Belogubets, Magister Juris (Oxford University), case lawyer at the Registry of the European Court of Human Rights (ECtHR), started with a presentation on the topic**:**

"Retention of personal data for combating crime."

Kirill Belogubets discussed the case of *PN v. Germany*. No. 74440/17 regarding the processing of personal identification of data in the context of criminal proceedings. In this case, a German citizen was suspected of buying a stolen bicycle. Authorities collected an extensive amount of data such as photographs, fingerprints, palm prints, and suspect descriptions. It must be noted here that with regard to the right to respect for private life under Article 8 of the ECHR, the interference must be justified and fulfill the test of proportionality, legitimacy, and necessity. The authorities expounded on the likelihood that the offender may offend again. Therefore, in the interest of national security, public security, and prevention of disorder and criminal offenses, it is essential to collect and store data to enable tracing of future offenses and protect the rights of future potential victims. Thus, the collection and storage of data in the present case struck a fair balance between the competing public and private interests and therefore fell within the respondent State's margin of appreciation.

With respect to margin of appreciation, the case of *Gaughran v. The United Kingdom*, no. 45245/15was also discussed. This case pertains to the period of retention of DNA profiles, fingerprints, and photographs for use in pending proceedings. The Court considered storing important data such as DNA samples only of those convicted of recordable offences, namely an offense that is punishable by a term of imprisonment. Having said that, there was a need for the State to ensure that certain safeguards were present and effective, especially in the nature of judicial review for the convicted person whose biometric data and photographs were retained indefinitely.

However, it has been highlighted that the legal framework on the retention of DNA material was not very precise. It does not specifically relate to data regarding DNA profiles and there is no specific time limit for the retention of DNA data. Similarly, the applicant has no avenue to seek deletion because of the absence of continued necessity, age, personality, or time elapsed. This has been laid down in the case of *Trajkovski and Chipovski v. North Macedonia*, nos. 53205/13 and 63320/13.

Mass Collection and Retention of Communications data

In the next half, Anna Buchta, Head of Unit "Policy & Consultation", European Data Protection Supervisor, Brussels brought the discussion on Article 7 and 8 of the Charter and Article 8 of the Convention along with the concept of 'essence' of fundamental rights, back to the table. With regard to this discussion, she described the case C-362/14 *Maximilian Schrems v DPC*, which highlights that 'any legislation permitting the public authorities to have access on a generalized basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter.' In this context, EU member states must recognize the confidentiality of communication as a distinct legal right. In this case, it was the first time where a Directive was invalidated due to non-confirmation with the ECHR. It was laid down that the safe harbor principles issued under the Commission Decision 2000/520, **pursuant to** Directive 95/46/EC does not comply with its Article 25(6), which ensures a level of

protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order. The Decision 2000/520 does not state that the United States, infact, 'ensures' an adequate level of protection by reason of its domestic law or its international commitments.

Traffic and Location data

She also commented on the indefinite retention of data, which might lead to a feeling of constant surveillance leading to interference with freedom of expression in light of CJEU cases C-203/15 and C-698/15 *Sverige and Watson*. In these cases, the Court agreed that under Article 15(1) of the Directive 2002/58 / EC, data retention could be justified to combat serious crime, national security, protecting the constitutional, social, economic, or political situation of the country and preventing terrorism. However, this must only be done if it is limited to what is strictly necessary, regarding categories of data, means of communication affected, persons concerned, and retention period. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the transmission of a communication without prejudice to paragraphs 2, 3, and 5 of this Article 6 and Article 15(1) of the Directive. This was reiterated in C-623/17 *Privacy International.* It must be noted here that these data can be retained only if there is evidence that these data constitute an identifiable link, at least an indirect one, to criminal activities. Data with regard to the geographical location again requires objective factors. It must be retained if there exists a risk of criminal activities in such areas. These locations may correspond to places that are vulnerable to the commission of serious offenses, for instance, areas that receive a large number of people, such as airports, train stations, toll-booth areas, etc.

The Court differentiated between generalized and targeted retention of data. Real-time collection and indeterminate storage of **electronic communications surveillance involving** traffic and location data of specific individuals constitute targeted retention. In this context, the case of C?511/18, C?512/18 and C?520/18,

La Quadrature du Net and Others were also relied upon, with a focus on the following findings:

Targeted real-time collection of traffic and location data by electronic communication providers that concerns exclusively one or more persons constitutes a serious interference that is allowed where:

- Real-time collection of traffic and location data is limited to persons in respect of whom there is a valid reason to suspect that they are directly or indirectly involved in terrorist activities. With regard to persons falling outside of that category, they may only be the subject of non-real-time access.
- A court or an administrative authority must pass an order after prior review, allowing such real-time collection. This must be authorized only within the limits of what is strictly necessary. In cases of duly justified urgency, the review must take place within a short time.
- A decision authorizing the real-time collection of traffic and location data must be based on objective criteria provided for in the national legislation, which must clearly define the circumstances and conditions under which such collection may be authorized.
- The competent national authorities undertaking real-time collection of traffic and location data must notify the persons concerned, in accordance with the applicable national procedures.

Last but not least, the EU Commission as well as the CJEU have started looking at the national laws of data retention and specifically inclined to define national security in manner so as to increase their own role in the area. However, data retention schemes are divergent across the Member States. It is essential to create clearer and more precise rules at the European level to enable the Courts to develop the best ways to strike a balance between the interactions of privacy rights with the need to tackle serious crime. The different legal rules in the area of data retention restricted cooperation between competent authorities in cross-border cases and affected law enforcement efforts. For instance, some Member States have specified retention periods, whereas some do not, a fact from which

conflict-of-laws problems may arise. While some Member States for example Luxembourg precisely define 'access to data', there are Member States, which do not. This was pointed out by the EU Council in the conclusion of the data retention reflection process in May 2019, wherein it was emphasized that there is a need for a harmonised framework for data retention at EU level to remedy the fragmentation of national data retention practices.

Day 3: Data Protection in the Global Data Economy

The discussion of the third day started with a presentation by Professor Herwig Hofmann, Professor of European and Transnational Public Law, the University of Luxembourg on the well-known *Schrems*cases namely, C-362/14, *Schrems I*; C-498/16, *Schrems vs Facebook;* and C-311/18, *Schrems II;*which involves transatlantic data transfer and violation of Article 7 and 8 of the Charter. In the clash between the right to privacy of the EU and surveillance of the US, the CJEU was convinced that *any* privacy agreements could not keep the personal data of EU citizens safe from surveillance in the US, so long as it is processed in the US under the country's current laws. The guidelines in the US for mass surveillance did not fit in the EU. Therefore, privacy shield could not be maintained.

He also highlighted that international trade in today's times involves the operation of standard contractual terms created to transfer data from one point to another. Every company uses a cloud service for the storage of data, which amounts to its processing. It is inevitable to ensure transparency from cloud services. The companies using cloud services must require transparency from cloud services and confirm how the cloud service will use the data, where would the data be stored or transferred.

In the last panel of the seminar Jörg Wimmers, Partner at TaylorWessing, Hamburg, spoke about the balance between **Data protection and copyright.**

The case discussed in detail was C-264/19 *Constantin Film Verleih GmbH***,** which was about the prosecution of the user who unlawfully uploaded a film on

YouTube, i.e., without the copyright holder's permission. In this regard, it was held that the operator of the website is bound only to provide information about the postal address of the infringer and not the IP address, email addresses, and telephone numbers. The usual meaning of the term 'address' under the Directive 2004/48 (Directive on the enforcement of Intellectual Property rights) refers only to the postal address, i.e., the place of a given person's permanent address or habitual residence. In this context, he also commented on the extent of the right to information guaranteed under Article 8 of the said Directive 2004/48. This was done by highlighting various cases, namely, C-580/13, *Coty* and C-516/17, *Spiegel Online*, noting that Article 8 does not refer to that user's email address and phone number, or to the IP address used for uploading those files or that used when the user last accessed his account. However, Article 8 seeks to reconcile the right to information of the rightholder/ intellectual property holder and the user's right to privacy.

Conclusion:

To conclude, the online seminar was a total package with regard to providing a compilation of recent cases of the ECtHR and CJEU on data protection and the right to privacy. A plethora of subjects, such as the balance between data protection and intellectual property rights, privacy and data retention, and respect for the essence of fundamental rights to privacy, were discussed in detail. The data retention provision established by the new Directive on Privacy and Electronic Communications may be an exception to the general rule of data protection, but in the current world of Internet Service providers and telecommunication companies, it may not be easy to ensure that these companies store all data of their subscribers. Also, it is important to ensure that data retained for the purpose of crime prevention does not fall into the hands of cybercriminals, thereby making their jobs easier.

[1] Article 4 No.11 GDPR

The CJEU Shrems cases – Personal Data Protection and International Trade Regulation

Carmen Otero García-Castrillón, Complutense University of Madrid, has kindly provided us with her thoughts on personal data protection and international trade regulation. An extended version of this post will appear as a contribution to the results of the Spanish Research Project lead by E. Rodríguez Pineau and E. Torralba Mendiola "Protección transfronteriza de la transmisión de datos personales a la luz del nuevo Reglamento europeo: problemas prácticos de aplicación" (PGC2018-096456-B-I00).

The regulatory scenario

1. In digital commerce times, it seems self-evident that personal data protection and international trade in goods and services are intrinsically connected. Within this internet related environment personal data can be accessed, retrieved, processed and stored in a number of different countries. In this context, the legal certainty for economic actors, and even the materialisation or continuation of commercial transactions requires taking into consideration both, the international jurisdiction and the applicable law issues on the one hand, and the international trade regulations covering these commercial transactions on the other hand.

Too much personal data protection can excessively restrict international trade, especially in countries with less developed economies for which the internet is considered an essential sustainable development tool. Little protection can prejudice individual fundamental rights and consumers' trust, negatively affecting international trade also. Hence, some kind of balance is needed between the international personal data flux and the protection of these particular data. It must be acknowledged that, summarising, whilst in a number of States personal

data and their protection are fundamental rights (expressly in art. 8 CFREU, and as a part of the right to private and family life in art. 8 ECHR), in others, though placed in the individual's privacy sphere (in the light of art. 12 UDHR), it is basically associated to consumer's rights.

2. The only general international treaty specifically dealing with personal data protection is the Convention 108 + of the Council of Europe, for the protection of individuals with regard to the processing of personal data. The Convention defines personal data as any information relating to an identified or identifiable individual (art. 2.a) without an express and formal recognition of its fundamental right character. The Convention, whose *raison d'etre* was justified for need to avoid that the personal data protection controls interfere with the free international flow of information (Explanatory Report, para. 9), "should not be interpreted as a means to erect non-tariff barriers to international trade" (Explanatory Report, para. 25). Its rules recognise the individual's rights to receive information on the obtaining and the treatment of their data, to be consulted and oppose that treatment, to get the data rectified or eliminated and to count, for all this, with the support of a supervisory authority and judicial and non-judicial mechanisms (arts. 8, 9 and 12). On the basis of these common standards, member States agree not to prohibit or subject to special authorisations the personal data flows as long as the transfer does not imply a serious risk of circumventing them (art. 14). Moreover, the agreed rules can be exempted when it is a "necessary and proportionate" measure "in a democratic society" to protect individual rights and "the rights and fundamental freedoms of others", particularly "freedom of expression" (art. 11). Presently, 55 States are parties to this Convention, including the EU but not the US, that have an observer status.

Along these lines, together with other Recommendations, the OECD produced a set of *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* (11.7.2013; revising the 1980 version). After establishing general principles of action as minimum standards, it was concluded that the international

jurisdiction and the applicable law issues could not be addressed “at that stage” provided the “discussion of different strategies and proposed principles”, the “advent of such rapid changes in technology, and given the non-binding nature of the Guidelines” (Explanatory Memorandum, pp. 63-64).

On another side, the World Trade Organisation (WTO) administers different Agreements multilaterally liberalising international trade in goods and services that count with its own dispute settlement mechanism. In addition, States and, of course, the EU and the US, follow the trade bilateralism trend in which data protection and privacy has begun to be incorporated. Recently, this issue has also been incorporated into the WTO multilateral trade negotiations on e-commerce.

CJEU Schrems’ cases

3. Last 16 July, in *Schrems II* (C-311/18), the CJEU declared the invalidity of the Commission Decision 2016/1250 on the adequacy of the protection provided by the Privacy Shield EU–US, aimed at allowing the personal data transfer to this country according to the EU requirements, then established by Directive 95/46 and, from 25 May 2018, by the Regulation 2016/679 (GDPR). On the contrary, Commission Decision 2010/87 (2016/2297 version) on the authorisation of those transfers through contractual clauses compromising data controllers established in third countries is considered to be in conformity with EU law.

In a nutshell, in order to avoid personal data flows to “data heavens” countries, transfers from the EU to third States are only allowed when there are guarantees of compliance with what the EU considers to be an adequate protective standard. The foreign standard is considered to be adequate if it shows to be substantially equivalent to the EU’s one, as interpreted in the light of the EUCFR (*Schrems II* paras. 94 and 105). To this end, there are two major options. One is obtaining an express Commission adequacy statement (after analysing foreign law or reaching an agreement with the foreign country; art. 45 GDPR). The other is resorting to approved model clauses to be incorporated in contracts with personal data

importers, as long as effective legal remedies for data subjects are available (art. 46.1 and 2.c GDPR). According to the Commission, this second option is the most commonly used (COM/2020/264 final, p. 15).

4. In *Schrems II* the CJEU confirms that, contrary to the Privacy Shield Decision, the US data protection regime is not equivalent to EU's one because it allows public authorities to access and use those data without being subject to the proportionality principle (para. 183; at least in some surveillance programs) and, moreover, without recognising data owners their possibility to act judicially against them (para. 187). It never rains but what it pours since, in 2015, a similar reasoning led to the same conclusion in *Schrems I* (C-362/14, 5.6.15) on the Safe Harbour Decision (2000/520), preceding the Privacy Shield one. Along these lines, another preliminary question on the Privacy Shield Decision is pending in the case *La cuadrature du net,* where, differing from *Schrems II*, its compatibility with the CFREU is expressly questioned (T-738/16). In this realm, it seems relevant noting that the CJEU has recently resolved the *Privacy International* case, where, the non-discriminated capture of personal data and its access by national intelligence and security agencies for security reasons, has been considered contrary to the CFREU unless it is done exceptionally, in extraordinary cases and in a limited way (C-623/17, para. 72). Given the nature of the issue at hand, a similar Decision could be expected in the *La cuadrature du net* case; providing additional reasons on the nullity of the Privacy Shield Decision, since it would also contravene the CFREU. Moreover, all this could eventually have a cascading effect on the Commission's adequacy Decisions regarding other third States (Switzerland, Canada, Argentina, Guernsey, Isle of Man, Jersey, Faeroe Islands, Andorra, Israel, Uruguay, New Zealand and Japan).

5. As to the contractual clauses, beyond confirming the Commission analysis on their adequacy in this case, the CJEU states that it is necessary to evaluate the data access possibilities for the transferred country public authorities according to that country national law (para. 134). At the end

of the day, EU Data Protection authorities have to control the risks of those authorities' actions not conforming with EU standards, as much as the capability of the contractual parties to comply with the contractual clause as such. If the risk exists, the transfers have to be prohibited or suspended (para.135).

6. The EU personal data protection norms are imperative and apply territorially (art. 3 GDPR; Guidelines 3/18 EDPB version 2.1, 7.1.2020 and CJEU C-240/14, *Weltimmo*). Therefore, data "imports" are not regulated and the "exports" are subject to the condition of being done to a country where they receive EU equivalent protection. In the light of CJEU case law, the measures to watch over the preservation of the EU standard are profoundly protective, as could be expected provided the fundamental rights character of personal data protection in the EU (nonetheless, many transfers have already taken place under a Decision now declared to be void).

Hence, once a third country legislation allows its public authorities to access to personal data -even for public or national security interests- without reaching the EU safeguards level, EU Decisions on the adequacy of data transfers to those countries would be contrary to EU law. In similar terms, and despite the recent EDPB Recommendations (01 and 02/20, 10.11.2020), one may wonder how the contracts including those authorised clauses could scape the prohibition since, whatever the efforts the importing parties may do to adapt to the EU requirements (as Microsoft has recently announced regarding transfers to the US; 19.11.2020), they cannot (it is not in their hands) modify nor fully avoid the application of the corresponding national legislation in its own territory.

As a result, the companies aiming to do business in or with the EU, do not only have to adapt to the GRDP, but not to export data and treat and store them in the EU (local facilities). This entails that, beyond the declared personal data international transferability (de-localisation), *de facto*, it seems almost inevitable to "localise" them in the EU to ensure their protection. To illustrate the confusion

created for operators (that have started to see cases been filed against them), it seems enough to point to the EDPB initial reaction that, whilst implementing the *Strategy for EU institutions to comply with "Schrems II" Ruling*, "strongly encourages … to avoid transfers of personal data towards the United States for new processing operations or new contracts with service providers" (Press Release 29.10.2020).

Personal data localisation and international trade regulation

7. There is a number of national systems that, one way or another, require personal data (in general or in especially sensitive areas) localisation. These kinds of measures clearly constitute trade barriers hampering, particularly, international services' trade. Their international conformity relies on the international commitments that, in this case, are to be found in the WTO Agreements as much as in the bilateral trade agreements if existing. The study of this conformity merits attention.

8. From the EU perspective, as an initial general approach it must be acknowledged that, within the WTO, the EU has acquired a number of commitments including specific compromises in trans-border trade services in the data process, telecommunication and (with many singularities) financial sectors. Beyond the possibility of resorting to the allowed exceptions, the "localisation" requirement could eventually be infringing these compromises (particularly, arts. XVI and/or XVII GATS).

Regarding EU bilateral trade agreements, some of the already existing ones and others under negotiation include personal data protection rules, basically in the e-commerce chapters (sometimes also including trade in services and investment). Together with the general free trade endeavour, the agreements recognise the importance of adopting and maintaining measures conforming to the parties' respective laws on personal data protection without agreeing any substantive standard (i.e. Japan, Singapore). At most, parties agree to maintain a dialog and exchange information and experiences (i.e. Canada; in the financial services area

expressly states that personal data transfers have to be in conformity with the law of the State of origin). For the time being, only the Australian and New Zealand negotiating texts expressly recognise the fundamental character of privacy and data protection along with the freedom of the parties to adopt protective measures (international transfers included) with the only obligation to inform each other.

Concluding remarks

9. As the GDPR acknowledges "(F)lows of personal data to and from countries outside the Union and international organisations are necessary for the expansion of international trade and international cooperation. The increase in such flows has raised new challenges and concerns with regard to the protection of personal data." (Recital 101). In facing this challenge, *Schrems II* confirms the unilaterally asserted extraterritoriality of EU personal data protection standards that, beyond its hard and fully realistic enforcement for operators abroad, constitute a trade barrier that could be eventually infringing its WTO Agreements' compromises. Hence, in a digitalised and globally intercommunicated world, the EU personal data protection standards contribute to feeding the debate on trade protectionism. While both the EU and the US try to expand their respective protective models through bilateral trade agreements, multilaterally -among other initiatives involving States and stakeholders, without forgetting the role of technology (*privacy by design*)- it will be very interesting to see how the on-going WTO negotiations on e-commerce cover privacy and personal data protection in international trade data flows.

Frontiers in Civil Justice – An

Online Debriefing

Conference 'Frontiers in Civil Justice' held on 16 and 17 November 2020 (online)

By Jos Hoevenaars & Betül Kas, Erasmus University Rotterdam (postdocs ERC consolidator project Building EU Civil Justice)

As announced earlier on this blog, the Conference Frontiers in Civil Justice organized by the ERC team together with Ilja Tillema of Erasmus School of Law in Rotterdam, took place on 16 and 17 November 2020.

The conference addressed four key issues in civil justice, which require a deeper and renewed reflection in light of their contribution to facilitating access to justice. Those concern the shaping of the interaction between formal and informal justice (panel I), the digitalization of consumer dispute resolution (panel II), the collectivizing and monetizing of civil litigation (panel III) and justice innovation and frontier developments in civil justice (panel IV). Renowned speakers and selected speakers following a call for papers gave their views during the two-day conference that, although set up previously as a blended event with online as well as live attendance at Erasmus University in Rotterdam, was forced to move fully online due to the tightening of Covid-19 measures in the Netherlands.

The Needs and Challenges of Digitizing Justice in Europe (Keynote 1)

The first day of the conference was kicked-off by the keynote speech of **Hrvoje Grubisic** (DG Justice and Consumers, European Commission). Grubisic underlined the necessity of digitalisation in the justice field in order to guarantee Europe's citizens access to justice. The EU's efforts of furthering the employment of digital technologies in the justice area is particularly warranted by the persistent increase in cross-border activities in civil and commercial matters. Grubisic pointed to the importance of the principles contained in the Tallinn ministerial declaration in framing and guiding the Commission's strategy of the digitalisation of justice in the EU. The current COVID-19 crisis has accelerated the Commission's activities. On the basis of its roadmap setting out the need to steer and coordinate the digitalisation of justice at EU level, the Commission plans to publish a communication of its policy priorities by the end of 2020. In

practical terms, the Commission intends to employ a toolbox approach, starting with the identification of cross-border judicial procedures that can be digitised, ascertaining the appropriate IT tools (e.g. e-CODEX based systems) and ensuring funding sources for the Member States.

Shaping the Interaction between Formal and Informal Justice (Panel I)

Subsequently, **Elisabetta Silvestri** (University of Pavia) introduced the first panel dealing with the interaction between formal and informal justice. Silvestri stressed the importance of understanding how formal and informal justice can coexist in a balanced relationship that is able to grant individuals access to justice. According to her, the need for a fruitful cooperation between courts and ADR providers in the best interest of stakeholders became even more pronounced in the current pandemic. The presentation of **Diana Wallis** (Hull University; former ELI president) reflected on the differing nature of formal and informal justice. Wallis traces how the EU has promoted the shift of the delivery of justice away from the nation states' courts to ADR bodies. While the ELI Statement addressed the practicalities of the relationship between private and public justice, the deeper question about how to address the dangers and drawbacks of privatized justice remains unresolved. **Anna Nylund** (The Arctic University of Norway) submitted in her presentation that many ADR processes fail to deliver on their promises of improved access to justice. Nylund sees ADR to be based predominantly on individualistic values, expecting citizens to exercise self-determination, and as such therefore geared towards the highly educated middle class. The gap between theory and practice contributes to the reluctance towards ADR processes in Europe. She therefore proposed a step-by-step approach of re-designing ADR according to context-dependent goals. The following two presentations provided insights into the relationship between formal and informal justice by drawing on the concrete experiences of two national legal systems: **Masood Ahmed** (University of Leicester) presented the experience of the English civil justice system with compulsory ADR. While compulsory ADR has been traditionally dismissed by the English judiciary, a divergent judicial approach has emerged which impliedly obliges the parties to engage with ADR. Ahmed criticises the persistence of the traditional approach and calls upon the courts to fully embrace their case management powers in making ADR orders. **Stefaan Voet (KU Leuven)** reports how informal justice has been introduced by a number of procedural reforms in Belgium. Voet's presentation addresses five

critical issues regarding informal justice processes, namely (1) their possible mandatory nature; (2) their quality; (3) the procedural guarantees offered by them; (4) the enforcement of their outcomes; and (5) the interaction with the formal justice process.

Digitalization of Consumer Dispute Resolution (Panel II)

The second day of the conference started with a panel, chaired by **Burkhard Hess** (Max Planck Institute Luxembourg), focusing on online dispute resolution (ODR) for consumer claims, using case-studies as a starting point to discuss how different types of cODR procedures can contribute to consumers' access to justice. **Martin Ebers** (University of Tartu) presented on the promise and challenge of AI based techniques in cODR and its impact on due process. Giving an overview of current uses of AI in different phases of disputes, from case management and automated anonymisation to data inference and automated decision-making, Ebers laid out the framework for future regulation of the use of AI in European ODR. Subsequently, **Marco Giacalone** (Vrije Universiteit Brussels) used examples from the US, Canada, Australia and Slovakia to zoom in on the concept and application of e-negotiation. Reflecting on the potential of this mode of assisted and automated negotiation in resolving disputes, Giacalone considers EU practices of e-negotiation for consumer dispute resolution as significant yet insufficient, with considerable room for improvement in enhancing consumer access to justice in the EU. **Eline Verhage** (Leiden University) presented on the recent experience of the Dutch Foundation for Consumer Complaints Boards (Geschillencommissies) in responding to the Covid-19 crisis. Presenting very recent data on the move to online hearings she reflected on the impact on the 'voluntariness gap' in these out-of-court alternative dispute schemes, concluding that virtual hearings seem a promising cODR tool for enhancing business participation, due to the increased option and lower costs. Finally, **Emma van Gelder** (Erasmus University Rotterdam) discussed observations from empirical research on Klachtencompas (a free online complaint platform of the Dutch consumer protection organization Consumentenbond) and the in-house dispute resolution platform used by Paypal, to discuss the benefits and drawbacks of these 'first-line' complaint resolution mechanisms. The main point of discussion following the various examples presented during the panel was on the applicability of Article 6 ECHR and Article 47 of the EU Charter, and on the question of how to apply the notions of fair trial and due process to both

certified and uncertified ADR schemes in the EU.

Current Issues in Access to Justice: An English Perspective (Keynote 2)

In the second keynote of the conference, professor **Dame Hazel Genn** (University College London) provided a very timely insight into current developments in the English civil justice system in the context of the Covid-19 pandemic. Bringing together the most recent insights from (some unpublished) rapid reviews of the rush to mostly online justice administration and reflecting on the impact of online courts and tribunals on access to justice especially for those that are in most dire need of legal assistance and resolution. Quite in contrast to previous discussions about the great potential of technological innovations in the areas of small claims and consumer dispute resolution, Professor Genn stressed the need to also look at what we potentially lose in procedural and substantive terms when hearings are undertaken remotely or on paper. Contrasting the great benefits of technology in terms of convenience, economy and efficiency with its downsides apparent in both the experiences of litigants as well as the judiciary, Genn ended on the pertinent question: Are we processing cases or are we doing justice?

Collectivizing & Monetizing Civil Litigation (Panel III)

The third panel chaired by **John Sorabji** (Barrister, 9 St John Street; University College London) turned attention to collective redress via adjudication and, specifically, the funding of civil litigation. **Ianika Tzankova** (Tilburg University) drew lessons for the funding of collective redress in global disputes from the Dutch experience. In particular, Tzankova explored and compared the financing of collective civil litigation on the basis of the Dexia case which was the first major consumer mass claim in the Netherlands and the investor litigation in the Fortis collective action, which resulted in the first global collective settlement that can be considered 'EU-originated'. **Astrid Stadler** (University of Konstanz) explained in her presentation the German situation regarding litigation funding of collective actions. In particular, Stadler presented on how the judiciary dealt with third-party funding arrangements and funding by legal tech companies and SPVs in recent case law. The judiciary's strong aversion against entrepreneurial litigation endangers the effective enforcement of the law. Stadler concluded that third-party funding must be available for representative claimants and should be regulated by the legislator. Complementing Tzankova's presentation, **Ilja Tillema**

(Erasmus University Rotterdam) reflected on the rise of entrepreneurial mass litigation in the Netherlands. Particularly in the last decade, spurred by the potential of large earnings, entrepreneurial parties have started to diversify the Dutch mass litigation landscape. Tillema reflected on the pros and cons of their involvement, presented empirical material of the amount and types of cases in which entrepreneurial parties are involved, and evaluated the way that the legislator and courts have dealt with this development. **Catherine Piché** (Université de Montréal) elucidated Quebec's experience with public forms of financing class litigation. According to Piché, the Canadian province of Quebec's Fonds d'aide aux recours collectifs (the assistance fund for class action lawsuits) serves not only as an effective class litigation funding mechanism, but also as a mandatory independent oversight body. Piché evaluates that financing class actions publicly through assistance by such entities is the most appropriate and effective way to finance class action litigation and could therefore serve as a model for other legal systems.

Innovations in Civil Justice (Panel IV)

Chaired by professor **Alan Uzelac** (University of Zagreb) the final panel brought together speakers following a call for papers. The call invited submissions on topics relating to justice innovation, specifically about the development of initiatives aimed at bringing justice closer to citizens, their relevance for access to justice and the judicial system, and the challenges they may pose for judicial administration, litigants and other stakeholders. The presentation of **Iris van Domselaar** (UvA) kicked off with legal philosophical reflections on civil justice innovations that aim to 'bring justice closer to the citizen', and posed the question to what extent the 'pragmatic turn' in civil justice systems is reconcilable with courts being objective justice-affording institutions, as such setting the scene for the specific examples of innovation and developments that were to follow. **Pietro Ortolani** (Radboud University Nijmegen) & **Catalina Goanta** (Maastricht University) and next **Naomi Appelman** & **Anna van Duin** (UvA) presented to the audience two specific examples that raised divergent questions about the frontier civil justice development playing out in the realm of online social media. The former, by comparatively analyzing reporting systems and underlying procedural rights of users related to content moderation by four social media platforms (Facebook, Twitch, TikTok and Twitter), presented an example where innovation may actually pose a threat to access to justice. While the latter,

reporting on the findings of empirical research on the need for procedural innovation in the Netherlands to quickly take down online content that causes personal harm, presented how innovations in civil justice could contribute to the effective protection of rights in the digital realm. The final topic of this panel was presented by **Nicolas Kyriakides** & **Anna Plevri** (University of Nicosia) who, taking Zuckerman's predictions on AI's role in guaranteeing access to justice as a starting point, presented their own evaluation on this matter, encouraging further debate on AI's role in adjudication. By elucidating the potential of AI to render the familiar open-court, multi-party process of justice completely unrecognisable, they warned about the potential loss of perceived legitimacy of the justice system as a whole, should AI systematically penetrate the entire justice system.

Although the conference was forced to move fully online, the digital setting did not stifle the interaction with the audience. Through the use of the chat function and live chat moderators the speakers were able to answer questions from the audience in the chat and the chairs were able to open up the floor to members of the audience. This led to lively discussions very much resembling a live setting.

This conference was organised by Erasmus School of Law of Rotterdam University and funded by an ERC consolidator grant from the European Research Council for the project ***'Building EU Civil Justice'****.*

Mutual Trust: Judiciaries under Scrutiny – Recent reactions and preliminary references to the CJEU

from the Netherlands and Germany

I. Introduction: Foundations of Mutual Trust

A crucial element element for running a system of judicial cooperation on the basis of mutual trust is sufficient trust in the participating judiciaries. EU primary law refers to this element in a more general way in that it considers itself to be based on „the rule of law" and also „justice". Article 2 TEU tells us: „The Union is founded on the values of (…) the rule of law (…). These values are common to the Member States in a society in which „(…) justice (…) prevail." Subparagraph 2 of the Preamble of the EU Charter of Fundamental Rights, recognized by the EU as integral part of the Union's foundational principles in Article 6 (1) TEU, confirms: „Conscious of its spiritual and moral heritage, the Union (…) is based on (…) the rule of law. It places the individual at the heart of its activities, by (…) by creating an area of freedom, security and justice". Article 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy and to a fair trial when EU law is „implemented" in the sense of Article 51 of the Charter, as does Article 6(1) European Convention on Human Rights generally.

The Area of Freedom, Security and Justice has indeed become a primary objective of the EU. According to Article 3 (1) TEU, „[t]he Union's aim is to promote peace, its values and the well-being of its peoples." Article 3 (2) TEU further spells out these objectives: „The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". Only in the following subparagraph, in Article 3 (2) Sentence 1 TEU, the original objective of the EU is listed: „The Union shall establish an internal market".

II. No „blind trust" anymore

Based on these fundaments, the CJEU, in its Opinion Opinion 2/13 of 18 December 2014, paras 191 and 192, against the EU's accession to the European Convention on Human Rights, explained: "[t]he principle of mutual trust between the Member States is of fundamental importance in EU law (…). That principle

requires (…) to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (…). Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU". Hence, the Court concluded, at para. 194, that "[i]n so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law". This is why (inter alia) the CJEU held that the accession of the EU to the ECHR would be inadmissible – based on the promise in Article 19(1) Sentences 2 and 3 TEU: „[The CJEU] shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." When it comes to judicial cooperation, these Member States are primarily the Member States of origin, rather than the Member States of destination, unless „systemtic deficiencies" in the Member States of origin occur.

It did not come as a surprise that the European Court of Human Rights rejected the claim made by the European Court of Justice that mutual trust trumps human rights: In *Avoti?š v. Latvia* (ECtHR, judgment of 23 May 2016, Application no. 17502/07), the applicant was defendant in civil default proceedings in Cyprus. The successful claimant sought to get this judgment recognized and enforced in Latvia against the applicant under the Brussels I Regulation. The applicant argued that he had not been properly served with process in the proceedings in Cyprus and hence argued that recognition must be denied according to Article 34 no. 2 Brussels I Regulation. The Latvian courts nevertheless granted recognition and enforcement. Thereupon, the applicant lodged a complaint against Latvia for violating Article 6 (1) ECHR. The ECHR observed, at paras. 113 and 114:

„[T]he Brussels I Regulation is based in part on mutual-recognition mechanisms which themselves are founded on the principle of mutual trust between the member States of the European Union. (…). The Court is mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require. (…). Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms (…)".

The Court further held, in direct response to Opinion 2/13 of the ECJ that „[l]imiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient".

Thus, a court must, under all circumstances, even within the scope of the „Bosphorus presumption" (European Court of Human Rights, judgment of 30 June 2005 – *Bosphorus Hava Yollar? Turizm ve Ticaret Anonim ?irketi v. Ireland* [GC], no. 45036/98, paras. 160-65, ECHR 2005?VI), „[v]erify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights – which, the CJEU has also stressed, must be observed in this context. In this spirit, where the courts of a State which is both a Contracting Party to the Convention and a member State of the European Union are called upon to apply a mutual-recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law". To cut it short: mutual trust does not (fully) trump human rights – "no blind trust" (Koen Lenaerts, La vie après l'avis: Exploring the principle of mutual (yet not blind) trust, Common Market Law Review 54 (2017), pp. 805 et seq.).

III. What does this mean, if a Member State (Poland) undermines the

independence of its judiciary?

This question has been on the table ever since Poland started "reforming" its judiciary, first by changing the maximum age of the judges at the Polish Supreme Court and other courts during running appointments, thereby violating against the principle of irremovability of judges. The Polish law („Artyku?i 37 i 111 ust?p 1 of the Ustawa o S?dzie Najwy?szym [Law on the Supreme Court] of 8 December 2017 [Dz. U. of 2018, heading 5]) entered into force on 3 April 2018, underwent a number of amendments (e.g. Dz. U. of 2018, heading 848 and heading 1045), before it was ultimately set aside (Dz. U. of 2018, heading 2507). The CJEU declared it to infringe Article 19 (1) TEU in its judgment of 24 June 2019, C- 619/18 – *Commission v. Poland*. The Court rightly observed, in paras. 42 et seq.: "[t]he European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them, EU law being based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values. That premiss both entails and justifies the existence of mutual trust between the Member States and, in particular, their courts that those values upon which the European Union is founded, including the rule of law, will be recognised, and therefore that the EU law that implements those values will be respected". Indeed, the principle of irremovability is one central aspect of judicial independence; see e.g. Matthias Weller, Europäische Mindeststandards für Spruchkörper: Zur richterlichen Unabhängigkeit, in Christoph Althammer/Matthias Weller, Europäische Mindeststandards für Spruchkörper, Tübingen 2017, pp. 3 et seq.). Later, and perhaps even more worrying, further steps of the justice "reform" subjected judgments to a disciplinary control by political government authorities, see CJEU, Ordonnance de la Cour (grande chambre), 8 avril 2020, C?791/19 R (not yet available in English; for an English summary see the Press Release of the Court). The European Court of Human Rights is currently stepping in – late, but may be not yet too late. The first communications about filings of cases concerning the independence of Poland's judiciary came up only in 2019. For an overview of these cases and comments see e.g. Adam Bodnar, Commissioner for Human Rights of the Republic of Poland and Professor at the University of the Social Sciences and Humanities in Warsaw, Strasbourg Steps in, Verfassungsblog, 7 July 2020.

IV. What are the other Member States doing?

1. The Netherlands: Suspending cooperation

One of the latest reactions comes from the Netherlands in the context of judicial cooperation in criminal matters, namely in respect to the execution of a European Arrest Warrant under **Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.** In two rulings of 24 March and one of 26 March 2020 (ECLI:NL:RBAMS:2020:1896, 24 March 2020; ECLI:NL:RBAMS:2020:1931, 24 March 2020; ECLI:NL:RBAMS:2020:2008, 26 March 2020) the *Rechtbank* Amsterdam stopped judicial cooperation under this instrument and ordered the prosecutor and the defence to take the entering into force of the latest judicial reforms in Poland into account before deciding to transfer a person to Poland. For a comment on this case line see Petra Bárd, John Morijn, Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part II). Marta Requejo Isidro, on the EAPIL's blog yesterday, rightly asked the question what a decision to reject judicial cooperation in criminal matters would mean in relation to civil matters. For myself, the answer is clear: if the fundaments for mutual trust are substantially put into question (see above on the ongoing actions by the Commission and the proceedings before the CJEU since 2016 – for a summary see here), the Member States may and must react themselves, e.g. by broadening the scope and lowering the standards of proof for public policy violations, see Matthias Weller, Mutual Trust: In search of the future of European Private International Law, Journal of Private International Law 2015, pp. 65, at pp. 99 et seq.).

2. Germany: Pushing standards beyond reasonable degrees

Against these dramatic developments, the decision of the Regional Court of Erfurt, Germany, of 15 June 2020, Case C-276/20, for a preliminary reference about the independence of German judges appears somewhat suprising. After referring a question of interpretation of EU law in relation to the VW Diesel scandal, the referring court added the further, and unrelated question: „Is the referring court an independent and impartial court or tribunal for the purpose of Article 267 TFEU, read in conjunction with the third sentence of Article 19(1) TEU and Article 47(2) of the Charter of Fundamental Rights of the European

Union?“ The referring court criticizes blurring lines between the executive and the judiciary – which is the very issue in Poland. It explained:

„The referring court, a civil court in the Thuringia region of Germany, shares the concerns and doubts of the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany) as to the institutional independence of the German courts and their right of reference pursuant to Article 267 TFEU … . The court refers to the question referred by the Administrative Court, Wiesbaden, on 28 March 2019 and the proceedings pending before the Court of Justice of the European Union (… C-272/19 …). (…). According to the [CJEU's] settled case-law, a court must be able to exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever (see judgment of 16 February 2017, C-503/15, paragraph 36 et seq.). Only then are judges protected from external intervention or pressure liable to jeopardise their independence and influence their decisions. Only that can dispel any reasonable doubt in the mind of an individual seeking justice as to the imperviousness of the courts to external factors and their neutrality with respect to the conflicting interests before them.

The national constitutional situation in Germany and in Thuringia does not meet those standards (see, with regard to the lack of independence of the German prosecution service, judgment of 27 May 2019, C-508/18). It only recognises a functional judicial independence in the key area of judicial activity, which is a personal independence. However, that is not sufficient to protect judges from all forms of external influence. The additional institutional independence of the courts required for that is by no means guaranteed. However, the independence of individual judges is guaranteed by the independence of the judiciary as a whole.

In Thuringia, as in every other federal state in Germany, the executive is responsible for the organisation and administration of the courts and manages their staff and resources. The Ministries of Justice decide on the permanent posts and the number of judges in a court and on the resources of the courts. In addition, judges are appointed and promoted by the Ministers for Justice. The underlying assessment of judges is the responsibility of the ministries and presiding judges who, aside from any judicial activity of their own, must be regarded as part of the executive. The Ministers for Justice and the presiding judges who rank below them administratively and are bound by their instructions

act in practice as gatekeepers. In addition, the presiding judges exercise administrative supervision over all judges.

The formal and informal blurring of numerous functions and staff exchanges between the judiciary and the executive are also typical of Germany and Thuringia. For example, judges may be entrusted with acts of administration of the judiciary. The traditional practice of seconding judges to regional or federal ministries is one particular cause for concern. Seconded judges are often integrated into the ministerial hierarchy for years. It is also not unusual for them to switch back and forth between ministries and courts and even between the status of judge and the status of civil servant.

The judge sitting alone who referred the question has personally been seconded three times (twice to the Thuringia Ministry of Justice and once to the Thuringia State Chancellery).

This exchange of staff between the executive and the judiciary infringes both EU law and the Bangalore Principles of Judicial Conduct applied worldwide (see Commentary on the Bangalore Principles of Judicial Conduct, www.unodc.org, p. 36: '*The movement back and forth between high-level executive and legislative positions and the judiciary promotes the very kind of blurring of functions that the concept of separation of powers intends to avoid.*').

Most importantly, these informal practices sometimes appear to be arbitrary. While the courts guarantee the absence of arbitrariness outwardly, informal practices may expose judges to the threat of arbitrariness and administrative decisionism. Inasmuch as 'expression-of-interest' procedures have been initiated recently, including in Thuringia, as awareness of the problem increases, for example on secondments and trial periods in higher courts or on the management of working groups for trainee lawyers, there is still no justiciability (enforceability).

All this gives the executive the facility to exert undue influence on the judiciary, including indirect, subtle and psychological influence. There is a real risk of 'reward' or 'penalty' for certain decision-making behaviours (see Bundesverfassungsgericht (Federal Constitutional Court, Germany) order of 22 March 2018, 2 BvR 780/16, … , paragraphs 57 and 59)."

The close interlock in Germany between the judiciary and the executive and the

hierarchical structure and institutional dependence of the judiciary are rooted in the authoritarian state of 19th century Germany and in the Nazi principle of the 'führer'. In terms of administrative supervision, the entire German judiciary is based on the president model (which under National Socialism was perverted and abused by applying the principle of the 'führer' to the courts …)."

These submissions appear to go way over the top: mechanisms to incentivise (which inenvitably contain an aspect of indirect sanction) are well-justified in a judiciary supposed to function within reasonable time limits; comparing the voluntary (!) temporary placement of judges in justice ministries or other positions of the government (or, as is regularly the case, in EU institutions), while keeping a life-time tenure under all circumstances (!) can hardly be compared or put into context with methods of the Nazi regime at the time, whereas cutting down currently running periods of judges and disciplinary sanctions in relation to the contents and results of judgments evidently and clearly violate firmly established principles of judicial independence, as well as a direct influence of the government on who is called to which bench. Yet, the German reference illustrates how sensitive the matter of judicial independence is being taken in some Member States – and how far apart the positions within the Member States are. It will be a delicate task of the EU to come to terms with these fundamentally different approaches within the operation of its systems of mutual recognition based on mutual trust. Clear guidance is needed by the CJEU in the judicial dialogue between Luxemburg and the national courts. One recommendation put on the table is to re-include the Member States in its trust management, i.e. the control of compliance with the fundaments of judicial cooperation accordingly; concretely: to re-allow second and additional reviews by the courts of the receiving Member States in respect to judicial acts of a Member State against which the EU has started proceedings for violation of the rule of law in respect to the independence of its judiciary.

Lord Jonathan Mance on the future relationship between the United Kingdom and Europe after Brexit

Nicole Grohmann, a doctoral candidate at the Institute for Comparative and Private International Law, Dept. III, at the University of Freiburg, has kindly provided us with the following report on a recent speech by Lord Jonathan Mance.

On Wednesday, 15 July 2020, the former Deputy President of the Supreme Court of the United Kingdom (UKSC), Lord Jonathan Mance, presented his views on the future relationship between the United Kingdom and Europe after Brexit in an online event hosted by the *Juristische Studiengesellschaft Karlsruhe*. This venerable legal society was founded in 1951; its members are drawn from Germany's Federal Constitutional Court, the Federal Supreme Court, the office of the German Federal Prosecutor, from lawyers admitted to the Federal Supreme Court as well as judges of the Court of Appeals in Karlsruhe and the Administrative Court of Appeals in Mannheim. In addition, the law faculties of the state of Baden-Württemberg (Heidelberg, Freiburg, Tübingen, Mannheim, Konstanz) are corporate members. Due to Corona-induced restrictions, the event took place in the form of a videoconference attended by more than eighty participants.

After a warm welcome by the President of the *Juristische Studiengesellschaft*, Dr. Bettina Brückner (Federal Supreme Court), Lord Mance shared his assessment of Brexit, drawing on his experience as a highly renowned British and internationally active judge and arbitrator. In the virtual presence of judges from the highest German courts as well as numerous German law professors and scholars, Lord Mance elaborated – in impeccable German – on the past and continuing difficulties of English courts dealing with judgments of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) and the future legal struggles caused by the end of the transition period on the withdrawal of the United Kingdom from the European Union on 31 December 2020. Lord Mance's speech was followed by an open discussion regarding the most uncertain political

and legal aspects of Brexit.

In his speech, Lord Mance highlighted the legal difficulties involved in the withdrawal of his country from the European Union. Since Lord Mance himself tends to picture the British as being traditional and generally pragmatic, he named Brexit as a rare example of a rather unpragmatic choice. Especially with regard to the role of the United Kingdom as a global and former naval power, Lord Mance considered Brexit a step backwards. Besides the strong English individualism, which has evolved over the past centuries, the United Kingdom did not only act as an essential balancing factor between the global players in the world, but also within the European Union. Insofar, the upcoming Brexit is a resignation of the United Kingdom from the latter position.

Subsequently, Lord Mance focussed on the role of the European courts, the European Court of Justice and the European Court of Human Rights and their judgments in the discussions leading to Brexit. Both European courts gained strong importance and influence in the UK within the first fifteen years of the 21st century. Especially, the ECtHR is of particular importance for the British legal system since the Human Rights Act 1998 incorporated the European Convention on Human Rights into British law. Lord Mance described the Human Rights Act 1998 as a novelty to the British legal system, which lacks a formal constitution and a designated constitutional court. Apart from the Magna Charta of 1215 and the Bill of Rights of 1689, the British constitutional law is mainly shaped by informal constitutional conventions instead of a written constitution such as the German Basic Law. Following the Human Rights Act 1998 and its fixed catalogue of human rights, the British courts suddenly exercised a stricter control over the British executive, which initially gave rise to criticism. Even though the British courts are not bound by the decisions of the ECtHR following the Human Rights Act 1998, the British participation in the Council of Europe soon started a dialogue between the British courts and the ECtHR on matters of subsidiary and the ECtHR's margin of appreciation. The UK did not regard the growing caseload of the ECtHR favourably. Simultaneously, the amount of law created by the institutions of the European Union increased. Lord Mance stressed the fact that in 1973, when the United Kingdom joined the European Economic Community, the impact of the ECJ's decision of 5 February 1963 in *Van Gend & Loos*, C-26/62, was not taken into account. Only in the 1990s, British lawyers discovered the full extent and the ramifications of the direct application of European Union law. The

binding nature of the ECJ's decisions substantiating said EU law made critics shift their attention from Strasbourg to Luxembourg.

In line with this development, Lord Mance assessed the lack of a constitutional court and a written constitution as the main factor for the British hesitance to accept the activist judicial approach of the ECJ, while pointing out that Brexit would not have been necessary in order to solve these contradictions. The EU's alleged extensive competences, the ECJ's legal activism and the inconsistency of the judgments soon became the primary legal arguments of the Brexiteers for the withdrawal from the EU. Especially the ECJ's teleological approach of reasoning and the political impact of the judgments were mentioned as conflicting with the British cornerstone principles of parliamentary sovereignty and due process. Lord Mance stressed that the so-called *Miller* decisions of the Supreme Court in *R (Miller) v Secretary of State* [2017] UKSC 5 and *R (Miller) v The Prime Minister, Cherry v Advocate General for Scotland* (Miller II) [2019] UKSC 41, dealing with the parliamentary procedure of the withdrawal from the EU, are extraordinary regarding the degree of judicial activism from a British point of view. In general, Lord Mance views British courts to be much more reluctant compared to the German Federal Constitutional Court in making a controversial decision and challenging the competences of the European Union. As a rare exception, Lord Mance named the decision in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, in which the UKSC defended the British constitutional instruments from being abrogated by European law. Indeed, Lord Mance also expressed scepticism towards the jurisprudential approach of the ECJ, because inconsistences and the need of political compromise could endanger the foreseeability and practicability of its decisions. Especially with regard to the recent decision of the German Constitutional Court of 5 May 2020 on the European Central Bank and the Court's approach to *ultra vires*, Lord Mance would have welcomed developing a closer cooperation between the national courts and the ECJ regarding a stricter control of the European institutions. Yet this important decision came too late to change Brexiteers' minds and to have a practical impact on the UK.

Finally, Lord Mance turned to the legal challenges resulting from the upcoming end of the transition period regarding Brexit. The European Union (Withdrawal) Acts 2018 and 2020 lay down the most important rules regarding the application of EU instruments after the exit day on 31 December 2020. In general, most

instruments, such as the Rome Regulations, will be transposed into English domestic law. Yet, Lord Mance detected several discrepancies and uncertainties regarding the scope of application of the interim rules, which he described as excellent bait for lawyers. Especially two aspects mentioned by Lord Mance will be of great importance, even for the remaining Member States: Firstly, the British courts will have the competence to interpret European law, which continues to exist as English domestic law, without the obligation to ask the ECJ for a preliminary ruling according to Art. 267 TFEU. In this regard, Lord Mance pointed out the prospective opportunity to compare the parallel development and interpretation of EU law by the ECJ and the UKSC. Secondly, Lord Mance named the loss of reciprocity guaranteed between the Member States as a significant obstacle to overcome. Today, the United Kingdom has to face the allegation of 'cherry picking' when it comes to the implementation of existing EU instruments and the ratification of new instruments in order to replace EU law, which will no longer be applied due to Brexit. Especially with regard to the judicial cooperation in civil and commercial matters and the recast of the Brussels I Regulation, the United Kingdom is at the verge of forfeiting the benefit of the harmonized recognition and enforcement of the decisions by its courts in other Member States. In this regard, Lord Mance pointed out the drawbacks of the current suggestion for the United Kingdom to join the Lugano Convention, mainly because it offers no protection against so-called torpedo claims, which had been effectively disarmed by the recast of the Brussels I Regulation – a benefit particularly cherished by the UK. Instead, Lord Mance highlighted the option to sign the Hague Convention of 30 June 2005 on Choice of Court Agreements which would allow the simplified enforcement of British decisions in the European Union in the case of a choice of court agreement. Alternatively, Lord Mance proposed the ratification of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments. So far, only Uruguay and Ukraine have signed this new convention. Nevertheless, Lord Mance considers it as a valuable option for the United Kingdom as well, not only due to the alphabetical proximity to the other signatories.

Following his speech, the event concluded with a lively discussion about the problematic legal areas and consequences of Brexit, which shall be summarised briefly. Firstly, the President of the German Supreme Court Bettina Limperg joined Lord Mance in his assessment regarding the problem of jurisprudential inconsistency of the ECJ's decisions. However, like Lord Mance she concluded

that the Brexit could not be justified with this argument. Lord Mance pointed out that in his view the ECJ was used as a pawn in the discussions surrounding the referendum, since the Brexiteers were unable to find any real proof of an overarching competence of the European Union. Secondly, elaborating on the issue of enforceability, Lord Mance added that he considers the need for an alternative to the recast of the Brussels I Regulation for an internationally prominent British court, such as the London Commercial Court, not utterly urgent. From his practical experience, London is chosen as a forum mainly for its legal expertise, as in most cases enforceable assets are either located in London directly or in a third state not governed by EU law. Hence, Brexit does not affect the issue of enforceability either way. Finally, questions from a constitutional perspective were raised regarding the future role of the UKSC and its approach concerning cases touching on former EU law. Lord Mance was certain that the UKSC's role would stay the same regarding its own methodological approach of legal reasoning. Due to the long-standing legal relationship, Lord Mance anticipated that the legal exchange between the European courts, UK courts and other national courts would still be essential and take place in the future.

In sum, the event showed that even though Brexit will legally separate the United Kingdom from the European Union, both will still be closely linked for economic and historical reasons. As Lord Mance emphasized, the UK will continue to work with the remaining EU countries in the Council of Europe, the Hague Conference on PIL and other institutions. Further, the discrepancies in the Withdrawal Acts will occupy lawyers, judges and scholars from all European countries, irrespective of their membership in the European Union. Lastly, the event proved what Lord Mance was hoping to expect: The long-lasting cooperation and friendship between practitioners and academics in the UK and in other Member States, such as Germany, is strong and will not cease after Brexit.

The end of fostering outdated

injustice to children born outside marriage through reparation of Nazi-expatriation acts: Ruling of the German Constitutional Court of 20 May 2020 (2 BvR 2628/18)

Marie-Luisa Loheide is a doctoral candidate at the University of Freiburg who writes her dissertation about the relationship between the status of natural persons in public and private international law. She has kindly provided us with her thoughts on a recent ruling by the German Constitutional Court.

According to Article 116 para. 2 of the German Basic Law *(Grundgesetz – GG)*, every descendant of former German citizens of Jewish faith who have been forcibly displaced and expatriated in a discriminatory manner by the Nazi-regime is entitled to attain German citizenship upon request. This rule has been incorporated in the Basic Law since 1949 as part of its confrontation with the systematic violations of human rights by the Nazi-regime and is therefore meant to provide reparation by restoring the *status quo ante*.

Descendants *("Abkömmlinge")* as referred to in Article 116 para. 2 are children, grandchildren and all future generations without any temporal constraint. Regardless of their parents' choice of citizenship, they have a personal right to naturalisation which is exercised upon request by reactivation of the acquisition of citizenship *iure sanguinis*. This very wide scope is legitimated by the striking injustice done by the Nazi-regime. Yet, according to the settled case law of the Federal Administrative Court, it had been limited by a strict "but-for" test: in order to solely encompass those people affected by this specific injustice. This meant that the descendant must hypothetically have possessed German citizenship according to the applicable citizenship law at the time of its acquisition which is usually the person's birth. To put it more clearly, one had to ask the following hypothetical question: Would the descendant be a German citizen if his or her ancestor had not been expatriated by the Nazis?

Exactly this limiting prerequisite was the crucial point of the matter decided upon by the German Constitutional Court on 20 May 2020. In the underlying case, the hypothetical question described above would have had to be answered in the negative: Until its revocation in 1993, German citizenship law stated that children of an unmarried German father and a mother of other citizenship did not acquire the German citizenship of their father but only that of their mother, contrary to today's principle of *ius sanguinis*-acquisition. As *in casu* the daughter of a forcibly displaced and expatriated former German emigrant of Jewish faith and a US-American mother was born outside marriage in 1967, she was denied the acquisition of the German citizenship. Whereas this was not criticised by the administrative courts seised, the German Constitutional Court in its ruling classified the denial as an obvious violation of the principle of equal treatment of children born within and outside marriage underlying Article 6 para. 5 GG as well as the principle of equal treatment of women and men according to Article 3 para. 2 GG, as alleged by the plaintiff. In its reasoning, the Court emphasised that an exception from the principle of equal treatment of children born outside marriage could only be made if absolutely necessary. This corresponds to the case-law of the European Court of Human Rights on Article 14 of the ECHR that a difference in treatment requires "very weighty reasons". The former non-recognition of the family relationship between an unmarried father and his child, however, did obviously contradict the stated constitutional notion without being justified by opposing constitutional law. Out of two possible interpretations of "descendant" as referred to in Article 116 para. 2 GG the court must have chosen the one that consorts best with the constitution. According to the Constitutional Court, the more generous interpretation of descendant also prevents a perpetuation of the outdated notion of inferiority of children born outside marriage through Article 116 para 2 GG and corresponds to its purpose of reparation.

As the notion of inferiority of children born outside marriage has fortunately vanished, a clarifying judgment was highly overdue and is therefore most welcome. It is not acceptable that outdated notions are carried to the present through a provision of the Basic Law that is meant to provide reparation of Nazi crimes. Especially in post-Brexit times, the question dealt with has become more and more urgent with respect to people reclaiming their German citizenship in order to maintain their Union citizenship and the rights pertaining to it (see here).

In regard to conflicts law, this clarification of a key question of citizenship law is

relevant to the determination as a preliminary issue (incidental question or *Vorfrage)* when nationality is used as a connecting factor. The judgment is likely to lead to more cases of dual citizenship that are subject to the ambiguous conflicts rule of Art. 5 para. 1 sentence 2 EGBGB.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2020: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

E. Schollmeyer: **The effect of the entry in the domestic register is governed by foreign law: Will the new rules on cross-border divisions work?**

One of the most inventive conflict-of-law rules that secondary law of the European Union has come up with, can be discovered at a hidden place in the new Mobility Directive. Article 160q of the Directive assigns the determination of the effective date of a cross-border division to the law of the departure Member State. The provision appears as an attempted clearance of the complicated brushwood of the registration steps of a cross-border division of a company. This article explores whether the clearance has been successful.

F. Fuchs: **Revolution of the International Exchange of Public Documents: the Electronic Apostille**

The Apostille is of utmost importance for the exchange of public documents among different nations. The 118 states currently having acceded to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents issue, altogether, several millions of Apostilles per year in order to certify the authenticity of public documents emanating from their territory. Some years ago, the electronic Apostille was implemented, which allows

states to issue their Apostilles as an electronic document. Interested parties may verify the authenticity of such an electronic document via electronic registers which are accessible on the internet. Whereas Germany has not yet acceded to that new system, 38 other jurisdictions already have done so.

G. Mäsch: **Third Time Lucky? The ECJ decides (again) on the place of jurisdiction for cartel damages claims**

In three decisions now the ECJ has dealt with the question of where the "place of the causal event" and the "place where the damage occurred" are to be located in order to determine, based on the ubiquity principle enshrined in Article 7(2) of the Brussels Ibis Regulation, the place of jurisdiction for antitrust damages (tort) claims. In this paper the overall picture resulting from the ECJ decisions in CDC Hydrogen Peroxides, flyLAL-Lithuanian Airlines and now Tibor-Trans is analysed. The place of the "conclusion" of a cartel favoured by the ECJ to determine the place of the causal event is not only unsuitable in the case of infringements of Art. 102 TFEU (abuse of a dominant market position), but also in cases of infringement of Art. 101 TFEU (prohibition of cartels). The same criticism applies to the ECJ's localisation of the place where the damage occurred at the place where the competition is impaired and the victim of the cartel or the abuse of the dominant market position (claimant) sustained the financial loss. In this paper it is suggested to dock the place of the causal event to the actual seat(s) of the cartel offender(s) and the place where the damage occurred exclusively to the affected market.

J. Kleinschmidt: **Jurisdiction of a German court to issue a national certificate of succession ('Erbschein') is subject to the European Succession Regulation**

The European Succession Regulation provides little guidance as to the relationship between the novel European Certificate of Succession and existing national certificates. In a case concerning a German "Erbschein", the CJEU has now clarified an important aspect of this relationship by holding that jurisdiction of a Member State court to issue a national certificate is subject to the harmonised rules contained in Art. 4 et seq. ESR. This decision deserves approval because it serves to avoid, as far as possible, the difficult problems ensuing from the existence of conflicting certificates from different Member States. It remains, however, an open question whether the decision can be extended to national

certificates issued by notaries.

K. Thorn/K. Varón Romero: **The Qualification of the Lump-Sum Compensation for Gains in the Event of Death Pursuant to Section 1371 (1) of the German Civil Code (BGB) in Accordance with the Regulation (EU) No. 650/2012**

In "Mahnkopf" the CJEU had to decide whether the material scope of application of the Regulation (EU) No. 650/2012 of the European Parliament and of 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 also covers national provisions which, like Section 1371 (1) of the German Civil Code (BGB), grant the surviving spouse a lump-sum compensation for gains after the death of the other spouse by increasing his or her inheritance. Hence, this was a question of the qualification of Section 1371 (1) BGB, which had been discussed controversially in Germany for a long time and had only been clarified on a national level in 2015. The CJEU decided in favour of a qualification under inheritance law at the level of Union law, and thus took a view which contradicts that of the Federal Court of Justice (BGH) for national conflict of laws. The authors agree with the result of the CJEU but criticise the methodical approach to the implementation of the functional qualification. The article identifies the new questions and problems that will now have to be clarified by the German courts as a result of the CJEU decision and in this context analyses two recent decisions of Higher Regional Courts. The authors note that in the context of Section 1371 (1) BGB, the question of the (temporal) scope of application of the Regulation is likely to become more important in the future, asotherwise, in their opinion, the BGH case law will still have to be considered. Accordingly, in the opinion of the authors, for future German jurisdiction much will depend on whether the BGH adapts its previous case law to that of the CJEU.

P. Mankowski: **Recognition and free circulation of names 'unlawfully' acquired in other Member States of the EU**

The PIL of names is one of the strongholds of the recognition principle. The touchstone is whether names "unlawfully" acquired in other Member States of the EU must also be recognised. A true recognition principle implies that any kind of révision au fond is interdicted. Yet any check on the "lawfulness" or

“unlawfulness” of acquiring a certain name abroad amounts to nothing else than a révision au fond.

M. Gernert: **Termination of contracts of Iranian business relations due to US sanctions and a possible violation of the EU Blocking Regulation and § 7 AWV**

US secondary sanctions are intended to subject European economic operators to the further tightened US sanctions regime against Iran. In contrast, the socalled Blocking Regulation of the European Union is intended to protect European companies from such extraterritorial regulations and prohibits to comply with certain sanctions. In view of the great importance of the US market and the intended uncertainty in the enforcement of US sanctions, many European companies react by terminating contracts with Iranian business partners in order to rule out any risk of high penalties by US authorities. This article examines if and to what extent the Blocking Regulation and § 7 AWV influence the effectiveness of such terminations.

B. Rentsch: **Cross-border enforcement of provisional measures – lex fori as a default rule**

Titles from provisional measures are automatically recognised and enforced under the Brussels I-Regulations. In consequence, different laws will apply to a title’s enforceability (country of the rendering of the provisional measure) and ist actual enforcement (country where the title is supposed to take effect). This sharp divide falls short of acknowledging that questions of enforceability and the actual conditions of enforcement are closely entangled in preliminary measure proceedings, especially the enforcement deadline under Sec. 929 para. 2 of the German Code of Civil Procedure (ZPO). The European Court of Justice, in its decision C-379/17 (Societ Immobiliare Al Bosco Srl) refrained from creating a specific Conflicts Rule for preliminary measures and ruled that the deadline falls within the scope of actual enforcement. This entails new practical problems, especially with regard to calculating the deadline when foreign titles are involved.

A. Spickhoff: **“Communication torts” and jurisdiction at the place of action**

Communication torts in more recent times are mostly discussed as “internet torts”. Typically, such torts will be multi-state torts. In contrast, the current case of the Austrian Supreme Court concerns the localisation of individual

communication torts. The locus delicti commissi in such cases has been concretised by the Austrian Supreme Court according to general principles of jurisdiction. The locus delicti commissi, which is characterised by a falling apart of the place of action and place of effect, is located at the place of action as well as at the place of effect. In the event of individual communication torts, the place of effect is located at the victim's place of stay during the phone call or the message arrival. The place of action has to be located at the sending location. On the other hand, in case of claims against individual third parties, the place of effect is located at the residence of the receiver. The Austrian Supreme Court remitted the case to the lower court for establishing the relevant facts for jurisdiction in respect of the denial of the plaintiff's claim. However, the court did not problematise the question of so-called "double-relevant facts". The European Court of Justice, in line with the judicial practice in Austria and Germany, has accepted a judicial review of the facts on jurisdiction only with respect to their conclusiveness.

R. Rodriguez/P. Gubler: **Recognition of a UK Solvent Scheme of Arrangement in Switzerland and under the Lugano Conventions**

In recent years, various European companies have made use of the ability to restructure their debts using a UK solvent scheme of arrangement, even those not having their seat in the UK. The conditions and applicable jurisdictional framework under which the scheme of arrangement can be recognised in jurisdictions outside the UK are controversial. In Switzerland doctrine and jurisprudence on the issue are particularly scarce. This article aims to clarify the applicable rules of international civil procedural law as well as the requirements for recognition of a scheme of arrangement in Switzerland. It is held that recognition should be generally granted, either according to the 2007 Lugano Convention or, in a possible "no-deal Brexit" scenario, according to the national rules of private international law, or possibly even the 1988 Lugano Convention.

T. Helms: **Foreign surrogate motherhood and the limits of its recognition under Art. 8 ECHR**

On request of the French Court of Cassation the Grand Chamber of the European Court of Human Rights has given an advisory opinion on the recognition of the legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and its intended mother who is not genetically

linked to the child. It held that Art. 8 ECHR requires that domestic law provides a possibility of recognition of a legal parent-child relationship with the intended mother. But it falls within states' margin of appreciation to choose the means by which to permit this recognition, the possibility to adopt the child may satisfy these requirements.

A few thoughts on the Guide to Good Practice on the grave-risk exception (Art. 13(1)(b)) under the Child Abduction Convention, through the lens of human rights (Part I)

Written by Mayela Celis – The comments below are based on the author's doctoral thesis entitled "The Child Abduction Convention – four decades of evolutive interpretation" at UNED

As mentioned in a previous post, after many years in the making, the *Guide to Good Practice on the grave-risk exception (Article 13(1)(b)) under the Child Abduction Convention* (grave-risk exception Guide or Guide) has been published. Please refer to our previous posts here and here. This Guide to Good Practice deals with a very controversial topic indeed. The finalisation and approval of this Guide is without a doubt a milestone and thus, this Guide will be of great benefit to users.

For ease of reference, I include the relevant provision dealt with in the Guide. Article 13(1)(b) of the Child Abduction Convention sets out the following: "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of

the child if the person, institution or other body which opposes its return establishes that – […] b) there is a ***grave risk*** that his or her return would expose the child to ***physical or psychological harm*** or otherwise place the child in an ***intolerable situation***. […]" (our emphasis).

The comments on the grave-risk exception Guide will be divided into two posts. In the present post, I will analyse the Guide exclusively through the lens of human rights. In the second post, I will comment on some specific legal issues of the Guide but will also touch upon on some aspects of human rights law. These posts reflect only my personal opinion. Given the controversial nature of this topic, there might be other different and valid opinions out there so please bear that in mind.

At the outset, it should be noted that this Guide is only advisory in nature and thus nothing in the Guide may be construed as binding upon Contracting Parties to the 1980 Convention (and any other HCCH Convention) and their courts (paras 7 and 8 of the Guide) Therefore, courts have enough leeway to supplement it and take on board what they see fit.

Human rights law is gaining importance every day, also in private international law cases. However, apart from some fleeting references to the United Nations Convention on the Rights of the Child (pp. 16 and 56), there are no references to human rights case law in the Guide. Indeed, the increasing number of judgments of the European Court of Human Rights (ECtHR) is not mentioned in the Guide, even though dozens of these judgments have dealt with the grave-risk exception (Art. 13(1)(b)) of the Child Abduction Convention); thus there appears to be an "elephant in the room". We will try to respond in this post to the following questions: what has been the contribution of the ECtHR on this topic and what are the possible consequences of the absence of references to human rights case law in the Guide.

In this regard, I refer readers to our previous post regarding the interaction of human rights and the Child Abduction Convention here and my article entitled: The controversial role of the ECtHR in the interpretation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, with special reference to *Neulinger and Shuruk v. Switzerland* and *X v. Latvia* (in Spanish only but with abstracts in English and Portuguese in the Anuario Colombiano de Derecho Internacional). To view it, click on "*Ver artículo* –

descargar artículo", currently pre-print version, published online in March 2020.

Before going into the substance of this post, it is perhaps important to clarify why the case law of the ECtHR in child abduction matters is of such great importance in Europe and beyond, perhaps for the benefit of our non-European readers. First, in addition to being binding upon ***47 States*** party to the European Convention on Human Rights, *which represent about half of the total number of Contracting Parties to the Child Abduction Convention (45%)*, the case law of the *ECtHR not only applies to child abduction cases between European States*. It will also apply, for example, if the requested State in child abduction proceedings is a party to the European Convention on Human Rights and the requesting State is not. Indeed, the geographical location of the requesting State and whether it is a party to the European Convention on Human Rights are not relevant. See for example, *Neulinger and Shuruk v. Switzerland* (Application No. 41615/07), Grand Chamber, where the requesting State was Israel, and *X v. Latvia* (Application No. 27853/09), Grand Chamber, where the requesting State was Australia, both of which are not a party to the European Convention. Secondly, not only European citizens can launch proceedings before the ECtHR. All of this is nicely summarised in Article 1 of the European Convention on Human Rights, which sets out that "The High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention" (our emphasis).

In *X v. Latvia*, the Grand Chamber of the ECtHR has established a legal standard in the handling of child abduction cases where the 13(1)(b) exception has been raised (and indeed other exceptions of the Child Abduction Convention such as Articles 12, 13(1)(a), 13(2) and 20), which is the following:

"106. The Court [ECtHR] considers that a harmonious interpretation of the European Convention and the Hague Convention (see paragraph 94 above) can be achieved provided that the following two conditions are observed. Firstly, ***the factors*** capable of constituting an exception to the child's immediate return in application of ***Articles 12, 13 and 20 of the Hague Convention***, particularly where they are raised by one of the parties to the proceedings, ***must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point***, in order to enable the Court to verify that those questions have been effectively examined. Secondly, ***these factors must be evaluated in the light of Article 8 of the Convention***

(see *Neulinger and Shuruk*, cited above, § 133)." (our empahsis)

[…]

"118. As to the need to comply with the short time-limits laid down by the Hague Convention and referred to by the Riga Regional Court in its reasoning (see paragraph 25 above), the Court reiterates that while Article 11 of the Hague Convention does indeed provide that the judicial authorities must act expeditiously, this does not exonerate them from the duty to undertake an ***effective examination*** of allegations made by a party on the basis of one of the exceptions expressly provided for, namely Article 13 (b) in this case." (our emphasis)

In addition, the ECtHR indicates that domestic courts must conduct "meaningful checks" to determine whether a grave risk exists (paragraph 116 of *X v. Latvia*), and to do so a court may obtain evidence on its own motion if for example, this is allowed under its internal law.

Importantly, this case also underlines the need to secure "tangible" measures of protection for the return of the child (paragraph 108 of *X v. Latvia*).

Moreover, there are *at least two issues in the Guide* that could have benefited from a human rights analysis, namely the incarceration of (mainly) the abducting mother upon returning the child to the State of habitual residence and the separation of siblings.

With regard to the first issue, it should be noted that the fact that the mother will be ***incarcerated upon returning the child*** to the State of habitual residence could have serious consequences for the child. The Guide has correctly explained the different ways in which such an outcome could be avoided. However, the Guide concludes with the following: "*The fact that the charges or the warrant cannot be withdrawn is generally not sufficient to engage the grave risk exception*" (paragraph 67).

In my view, where *objective* reasons have been raised by the mother to refuse to return to the State of habitual residence, such as incarceration, there should be a human rights analysis in the light of Article 8 of the European Convention on Human Rights. While there might be some cases where incarceration may not be sufficient to refuse a return, there might be other cases where this would place

the taking parent and the child in grave risk of harm or intolerable situation. By way of example, objective reasons for not returning could include a long incarceration or a disproportionate sanction, the fact the other parent cannot take care of the child upon the incarceration of the other parent, the inability to contest custody while imprisoned, etc. According to the ECtHR, an analysis should be undertaken as to whether these actions are necessary in a "democratic society". Accordingly, the decision of the mother not to return based on a whim should not be considered seriously. See, for example, the ECtHR cases, *Neuliger and Shuruk v. Switzerland* (Application No. 41615/07), Grand Chamber (as clarified by X v. Latvia (Application No. 27853/09), Grand Chamber)), and *B. c. Belgique* (Requête No. 4320/11). Arresting and handcuffing the mother at the airport has undoubtedly a tremendous impact on children; so all efforts should be geared via judicial co-operation and direct judicial communications to make sure that charges are dropped as mentioned in the Guide (first part of paragraph 67 of the Guide).

As regards the second scenario, it is important to note that the ***separation of siblings when one of them has successfully objected to being return under Article 13(2) of the Child Abduction Convention*** may inflict harm on the children and may be difficult to enforce. The Guide noted that every child should be considered individually and concluded that "*Consequently, the separation of the siblings resulting from the non-return of one child (regardless of the legal basis for the non-return) does not usually result in a grave risk determination for the other child*" (paragraph 74).

According to article 12 of the UN Convention on the Rights of the Child, the views of the child should be given due weight in accordance with the age and maturity of the child. By ordering the return of usually the younger sibling(s) and forcing the mother to make a choice between returning with one child and staying with the child who objected, a judge could not be giving enough weight to the views of the child objecting to being returned. This is especially the case when we are dealing with full siblings and all are subject to return proceedings. In my view, and given that the reason for not returning are the views, in particular, of the older child, this should be factored in when the judge exercises his or her discretion. See, for example, the ECtHR case, *M.K. c. Grèce* (Requête n° 51312/16). Obviously, if the separation of siblings is due to the action of the mother by not wanting to return, then a separation of the siblings would most

likely not be a ground for refusing the return.

The underlying basis of the above is that the Child Abduction Convention is for the protection of children and not to vindicate the position of adults who are immersed in a legal battle or to merely sanction the abductor.

The standard in *X v. Latvia* should be kept in mind when dealing with international child abduction cases. Given that the grave-risk exception Guide is silent on this, practitioners would need to ***supplement the Guide with relevant literature and case law on human rights*** if they are dealing with a case in Europe. Practitioners outside Europe having a child abduction case which is being resolved in Europe may need to do the same in order to know what their possibilities of success and options are.

In this day and age, and as mentioned by the honorable Eduardo Vio Grossi, judge of the Inter-American Court of Human Rights, in a recent virtual forum ("Challenges to Inter-American Law"), the focus should not only be on sanctioning States for violations of human rights but we should assist States in not getting sanctioned by providing the necessary guidance and if possible, paving the way.