Geo-blocking and the conflict of laws: ships that pass in the night?

On 25 May 2016, the European Commission presented its long-awaited proposal for a regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market (COM[2016] 289 final).

In the Commission's words, "[t]he general objective of this proposal is to give customers better access to goods and services in the Single Market by preventing direct and indirect discrimination by traders artificially segmenting the market based on customers' residence. Customers experience such differences in treatment when purchasing online, but also when travelling to other Member States to buy goods or services. Despite the implementation of the non-discrimination principle in Article 20(2) of Directive 2006/123/EC 3 ("Services Directive"), customers still face refusals to sell and different conditions, when buying goods or services across borders. This is mainly due to uncertainty over what constitutes objective criteria that justify differences in the way traders treat customers. In order to remedy this problem, traders and customers should have more clarity about the situations in which differences in treatment based on residence are not justifiable. This proposal prohibits the blocking of access to websites and other online interfaces and the rerouting of customers from one country version to another. It furthermore prohibits discrimination against customers in four specific cases of the sale of goods and services and does not allow the circumventing of such a ban on discrimination in passive sales agreements. Both consumers and businesses as end users of goods or services are affected by such practices and should therefore benefit from the rules set out in this proposal. Transactions where goods or services are purchased by a business for resale should, however, be excluded in order to allow traders to set up their distribution systems in compliance with European competition law."

From a conflicts perspective, the question that is most interesting is how the prevention of geo-blocking and similar techniques will relate to the "directed-activity"-criterion that the European legislature has used both in the Rome I Regulation (Article 6(1)(b)) and in the Brussels I (recast) Regulation (Article 17(1)(c)). In a series of cases starting with the *Alpenhof* decision of 2011

(ECLI:EU:C:2010:740) the CJEU has developed a formula for determining the direction of a trader's activity by focusing on its subjective intention to deliver goods or services to consumers in a certain country, i.e. that it "should be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them." If standard techniques of geo-blocking or the use of different sets of general conditions of access to their goods or services are now banned as discriminatory, how will this affect the test developed by the CJEU; in other word, is it reasonable to infer that a trader has actually been "minded to conclude a contract" and consented to being sued in the state of the consumer's domicile if the trader has no legal option *not* to offer goods or services to the customer? The drafters have noticed this obvious problem and inserted a pertinent clause into Article 1 no. 5 of the proposal, which reads:

"This Regulation shall not affect acts of Union law concerning judicial cooperation in civil matters. Compliance with this Regulation shall not be construed as implying that a trader directs his or her activities to the Member State where the consumer has the habitual residence or domicile within the meaning of point (b) of Article 6(1) of Regulation (EC) No 593/2008 and point (c) of Article 17(1) of Regulation (EU) 1215/2012."

In light of the highly controversial experience with similar reservations – it suffices to think of Article 1(4) of the E-Commerce Directive (2000/31/EC) or Recital 10 of the recently withdrawn CESL proposal (COM[2011]635 final) –, I have doubts whether the separation between the two areas of law will work as smoothly as the Commission seems to imagine: if a trader is legally *coerced* to serve consumers in a certain state, any test aimed at determining his or her "state of mind" to do so necessarily becomes moot – which, on the other hand, may be a good opportunity for the CJEU to rethink its frequently criticized approach. Considering the (non-)treatment of Recitals 24 and 25 of the Rome I Regulation in *Emrek* (ECLI:EU:C:2013:666), however, I am inclined not too expect much deference from the Court to interpretative guidance provided by the European legislators…

General Principles of European Private International Law (book)

Many thanks to Dr Eva Lein, Herbert Smith Freehills Senior Research Fellow in Private International Law, British Institute of International and Comparative Law, who has shared this information and provided the link below.

Are there general principles of European conflict of laws? Looking at the myriad of EU regulations in the area, one may well doubt it. And this explains why a new book edited by Stefan Leible is so topical. It addresses themes and concepts that reoccur across different conflicts regulations, but so far have not yet come under detailed scrutiny as to whether they follow a coherent approach. Among them are the usual suspects such as preliminary questions, characterisation, *renvoi*, party autonomy, the determination of habitual residence and the application of overriding mandatory rules, to name but a few. They are complemented by broader topics such as the role of recognition as a substitute for conflict of laws and economic efficiency in European private international law. The idea of treating those themes in one volume chimes with Leible's idea of a ‚Rome 0' Regulation, which he has expounded earlier together with Michael Müller (14 (2012/13) Yearbook of Private International Law 137). The book is a logical follow-up on this proposal. It analyses issue by issue whether there is indeed enough material that deserves to be treated in a 'General Part' of European private international law. The authors of the book are well-known experts in the field, such as Peter Mankowski, Heinz-Peter Mansel and Jan von Hein. The only criticism one may level is that they are almost exclusively from Germany. It would be interesting to see how lawyers from other countries react to the – quite Germanic – idea of an '*Allgemeiner Teil*' for the European conflict of laws.

Find the table of contents here.

The Proposed Revision of the Posting Directive (paper)

Veerle Van Den Eeckhout has written a working paper version of an article on the Proposed Revision of the Posting Directive. The working paper, in Dutch, is entitled "Toepasselijk arbeidsrecht bij langdurige detachering volgens het voorstel tot wijziging van de Detacheringsrichtlijn. Enkele beschouwingen vanuit Ipr-perspectief bij het voorstel tot wijziging van de Detacheringsrichtlijn" (in English: "The Law Applicable to Long-Term Postings According to the Proposal for a Directive Amending the Posting Directive. Some Reflections from a Private International Law Perspective on the Proposal for a Directive Amending the Posting Directive").

In this contribution, the author formulates some reflections from the perspective of Private International Law on the proposal for a revision of the Posting Directive, focusing on the issue of the law applicable to long-term postings.

You can download Prof. Van Den Eeckhout's paper here.

Out now: Matthias Weller (ed.), Europäisches Kollisionsrecht (2016)

Professor Dr. Matthias Weller, European Business Law School-University of Wiesbaden (Germany), has edited and co-authored a new volume on European Conflict of Laws (in German): Europäisches Kollisionsrecht (Nomos; Baden-Baden, 2016). The volume contains contributions by Weller himself (on the general principles of European private international law), by Dr. Carl Friedrich Nordmeier (on Rome I, marital property and succession) and by Dr. David Bittmann (on Rome II and III as well as on the Maintenance Regulation and the

Hague Protocol). The Book provides the reader with a survey on the current state of the art in European choice of law that is both up-to-date and analytical. Weller's introduction in particular offers a fascinating treatment of the emerging general part of European PIL. Highly recommended!

For further information, click here.

Thöne on the abolition of Exequatur in the European Union

Meik Thöne has authored a book on the abolition of exequatur proceedings under the new Brussels I-Regulation ("Die Abschaffung des Exequaturverfahrens und die EuGVVO", Mohr Siebeck, 2016, IX + 289 pages). The volume is forthcoming in German. A German abstract is available on the publisher's website.

EUPILLAR conference on Cross-Border Litigation Conference, London, 16-17 June

The "Cross-Border Litigation in Europe" conference is organised by the Centre for Business Law and Practice, University of Leeds, and the Centre for Private

International Law, the University of Aberdeen. The conference is being held within the framework of a research project which is funded by the European Commission Civil Justice Programme.

The event will take place in the London School of Economics (New Academic Building, Lincoln's Inn Field) on Thursday 16th June and Friday 17th June 2016.

The research study aims to consider whether the Member States' courts and the CJEU can appropriately deal with the cross-border issues arising under the current EU Civil Justice framework. The project, which is coordinated by Professor Paul Beaumont from the University of Aberdeen, involves Dr Katarina Trimmings and Dr Burcu Yuksel from the University of Aberdeen, Dr Mihail Danov from the University of Leeds (UK), Prof. Dr. Stefania Bariatti from the University of Milan (Italy), Prof. Dr. Jan von Hein from the University of Freiburg (Germany), Prof. Dr. Carmen Otero from Complutense University of Madrid (Spain), Prof. Dr. Thalia Kruger from the University of Antwerp (Belgium), Dr Agnieszka Frackowiak-Adamska from the University of Wroclaw (Poland).

This conference is free to attend, but prior registration is required.

Programme

16th June 2016
9:00 am – 9:30 am
Paul Beaumont (Aberdeen), Mihail Danov (Leeds), Katarina Trimmings (Aberdeen) and Burcu Yuksel (Aberdeen) Evaluating the Effectiveness of the EU Civil Justice Framework: Research Objectives and Preliminary Research Findings from Great Britain

9:30 am – 11:00 am – **Cross-Border Civil and Commercial Disputes: Legislative Framework**
Chair: Paul Beaumont (Aberdeen)
1) Sophia Tang (Newcastle), Cross-Border Contractual Disputes: The Legislative Framework and Court Practice
2) Michael Wilderspin (European Commission, Legal Services), Cross-Border Non-Contractual Disputes: The Legislative Framework and Court Practice
3) Jon Fitchen (Aberdeen), The Unharmonised Procedural Rules: Is there a case

for further harmonisation at EU level?
4) Stephen Dnes (Dundee), Economic considerations of the cross-border litigation pattern

15-minute break

11.15 am – 12.30 pm – **Cross-Border Civil and Commercial Disputes: Practical Aspects**
Chair: Mihail Danov (Leeds)
1) Peter Hurst (39 Essex Chambers), Litigation Costs: Cross-Border Disputes in England and Wales
2) Susan Dunn (Harbour), Litigation Funders and Cross-Border Disputes
3) Craig Pollack (King & Wood Mallesons), Cross-Border Contractual Disputes: Litigants' Strategies and Settlement Dynamics
4) Jon Lawrence (Freshfields), Cross-Border Competition Law Damages Actions: Litigants' Strategies and Settlement Dynamics

Lunch (12.30 pm – 1.30 pm)

1.30 pm – 3.00 pm – **Cross-Border Family Disputes**
Chair: Thalia Kruger (Antwerp)
1) Paul Beaumont (Aberdeen), Brussels IIa recast – a comment on the Commission's Proposal from a member of the Commission's Expert Group
2) Elizabeth Hicks (Irwin Mitchell), Litigants' strategies and settlement dynamics in cross-border matrimonial disputes
3) Marcus Scott-Manderson QC (4 Paper Buildings), Cross-Border Disputes Involving Children: A View from the English Bar
4) Lara Walker (Sussex), Maintenance and child support: PIL Aspects
5) Rachael Kelsey (SKO), Arbitration and ADR: Cross-Border Family Law Disputes

15-minute break

3.15 pm – 4.45 pm – **National Reports: Cross-Border Litigation in Europe**
Chair: Stefania Bariatti (Milan)
1) Professor Bea Verschraegen (Universität Wien) and Florian Heindler, Preliminary Research Findings from Austria
2) Dr Teodora Tsenova and Dr Anton Petrov, Preliminary Research Findings from Bulgaria
3) Doc. Dr. Ivana Kunda, Preliminary Research Findings from Croatia

4) Professor JUDr Monika Pauknerová, Jiri Grygar and Marta Zavadilová, Preliminary Research Findings from Czech Republic
5) Professor Nikitas Hatzimihail (University of Cyprus), Preliminary Research Findings from Cyprus
6) Professor Peter Arnt Nielsen (Copenhagen Business School), Preliminary Research Findings from Denmark

15-minute break

5.00 pm – 6.15 pm – **National Reports: Cross-Border Litigation in Europe**
Chair: Jan von Hein (Freiburg)
1) Maarja Torga (University of Tartu), Preliminary Research Findings from Estonia
2) Gustaf Möller (Krogerus) Preliminary Research Findings from Finland
3) Professor Horatia Muir Watt (Science Po), Professor Jeremy Heymann (Lyon) and Professor Laurence Usunier (Cergy-Pontoise), Preliminary Research Findings from France
4) Aspasia Archontaki and Paata Simsive, Preliminary Research Findings from Greece
5) Dr Csongor Nagy (University of Szeged), Preliminary Research Findings from Hungary

7.00 pm – 10.30 pm *Dinner (by invite only)* – Old Court Room, Lincoln's Inn
Speech by Lord Justice Vos (Court of Appeal and President of the European Network of Councils for the Judiciary), The Effect of the European Networks of Councils for the Judiciary (ENCJ) on Cross-Border Dispute Resolution

17th June 2016
8.30 am – 10:00 am – **National Reports: Cross-Border Litigation in Europe**
Chair: Carmen Otero (Madrid)
1) Maebh Harding (Warwick), Preliminary Research Findings from Ireland
2) Dr Irena Kucina (Ministry of Justice, Latvia), Preliminary Research Findings from Latvia
3) Kristina Praneviciene, Preliminary Research Findings from Lithuania
4) Céline Camara (Max Planck Istitute), Preliminary Research Findings from Luxembourg

5) Clement Mifsud-Bonnici, Preliminary Research Findings from Malta
6) Professor Aukje van Hoek (Universiteit van Amsterdam), Preliminary Research Findings from the Netherlands

15-minute break

10.15 am – 11.30 am – **National Reports: Cross-Border Litigation in Europe**
Chair: Agnieszka Frackowiak-Adamska (Wroclaw)
1) Professor Elsa Oliveira (Universidade de Lisboa), Preliminary Research Findings from Portugal
2) Dr Ileana Smeureanu (Jones Day, Paris), Lucian Ilie (Lazareff Le Bars) and Ema Dobre (CJEU) Preliminary Research Findings from Romania
3) Doc JUDr M. Duris, JUDr M Vozaryova, Dr M Burdova, Preliminary Research Findings from Slovakia
4) Professor Suzana Kraljic, Preliminary Research Findings from Slovenia
5) Professor Michael Bogdan and Ulf Maunsbach, Preliminary Research Findings from Sweden

15-minute break

11.45 am – 1.00 pm – **National Reports: Cross-Border Litigation in Europe**
Chair: Alex Layton QC
1) Thalia Kruger (Antwerp) and Eline Ulrix (Antwerp), Preliminary Research Findings from Belgium
2) Jan Von Hein (Freiburg), Preliminary Research Findings from Germany
3) Stefania Bariatti (Milan), Preliminary Research Findings from Italy
4) Agnieszka Frackowiak-Adamska, Agnieszka Guzewicz and ?ukasz Petelski (Wroclaw), Preliminary Research Findings from Poland
5) Carmen Otero (Madrid), Preliminary Research Findings from Spain

Lunch (1.00 pm – 2.00 pm)

2.00 pm – 3.30 pm – **Shaping the development of the EU PIL Framework**
Chair: Paul Beaumont (Aberdeen)
1) Jacek Garstka (EU Commission, DG Justice), Drafting Legislative Instruments in a Diverse Union 2) Pascale Hecker (Référendaire, CJEU), Cross-Border Litigation: Challenges for EU Judiciary
3) Lady Justice Black (Head of International Family Justice), International Family Justice: Challenges in an EU context

4) Paul Torremans (Nottingham), Cross-Border IP Disputes: Specific Issues and Solutions

15-minute break

3.45 pm – 4:30 pm – **The way the EU PIL framework is shaping the litigants' strategies in a cross-border context**
Chair: Mihail Danov (Leeds)
1) Alex Layton QC (20 Essex Chambers), Cross-Border Civil and Commercial Disputes: PIL issues – a view from the English Bar
2) Christopher Wagstaffe QC (29 Bedford Row), Cross-Border Matrimonial Disputes: PIL issues – a view from the English Bar
3) Sophie Eyre (Bird & Bird), Remedies and Recoveries in a Cross-Border Context

4:30 – 5:30 pm – **The Way Forward: The research partners' views**
1) Thalia Kruger (Antwerp) and Eline Ulrix (Antwerp), Preliminary Views from Belgium
2) Jan Von Hein (Freiburg), Preliminary Views from Germany
3) Stefania Bariatti (Milan), Preliminary Views from Italy
4) Agnieszka Frackowiak-Adamska, Agnieszka Guzewicz and ?ukasz Petelski (Wroclaw), Preliminary Views from Poland
5) Carmen Otero (Madrid), Preliminary Views from Spain
6) Paul Beaumont (Aberdeen), Mihail Danov (Leeds), Katarina Trimmings (Aberdeen) and Burcu Yuksel, Addressing the Challenges: Is there a case for Reform?

Avotinš v. Latvia: Presumption of Equivalent Protection not Rebutted

The much awaited decision Avotinš v. Latvia of the Grand Chamber of the ECtHR was finally delivered yesterday. The decision can be found here. A video of the

delivery is also available.

The European Court of Human Rights held by a majority that there had been no violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights. The Court reiterated that, when applying European Union law, the Contracting States remained bound by the obligations they had entered into on acceding to the European Convention on Human Rights. Those obligations were to be assessed in the light of the presumption of equivalent protection established by the Court in the *Bosphorus* judgment and developed in the *Michaud* judgment. The Court did not consider that the protection of fundamental rights had been manifestly deficient such that the presumption of equivalent protection was rebutted in the case at hand.

While at first sight the decision comes as a relief for all those who have been holding breath, fearing the worst after the CJEU Opinion 2/13, a careful reading (immediately undertaken by the academia: the exchange of emails has already started here in Luxembourg) reveals some potential points of friction. Following the advice of both Patrick Kinsch and Christian Kohler I would like to draw your attention in particular to para. 113-116.

Judge Lemmens and Judge Briede expressed a joint concurring opinion and Judge Sajó expressed a dissenting opinion, all three annexed to the judgment.

Full Movement beyond Control and the Law – Research Project – 2016 – 2021

Prof. Jean-Sylvestre Bergé, of Lyon, is the leading researcher of the long-term, multidisciplinary and comparative (and certainly challenging!) project giving title to this post. A summary of the project, which is funded by the Institut Universitaire de France, is provided below. More information can be found here; for an ssrn publication explaining the project click here.

Summary of the Research Project

The purpose of the research is to bring into the law a new legal concept in order to deal with the phenomenon called « full movement beyond control ».

Movement : persons (individuals or legal entities), goods (tangible or intangible, and more widely, services and capital) move within territories and between different territories. This movement has reached unprecedented dimension in recent times (notably for migrant, data, waste, capital) : the speed, diversity and often significant volume of flow have reached levels as yet unparalleled. *Full* : the movement of persons, goods, services and capital has a « full » dimension in that it engages the attention and action of all the public and private operators (States, companies, citizens) at local, national or international level, who contribute to the phenomenon in whole or in part, voluntarily or involuntarily. *Beyond control* : movement has an « uncontrollable » dimension in the sense that in specific or short-term situations, like those of crisis, operators, and particularly those with responsibility for such movement, do not have full control over it.

This movement beyond control results in the creation of positive and negative, legal and illegal channels within a particular sphere, making it almost possible for the operators to work together to contain it. Full movement beyond control is experiencing a paradoxical surge. More often than not, its existence is denied by those who claim to have the power to control it. However, it is putting existing frontiers at risk while simultaneously creating new ones. It is often backed up by a public whose collective conscience is shaped by a hope that regaining control is still a possibility.

By employing a multidisciplinary (Social sciences – Sciences) and comparative (Europe, Brazil, Canada) approach, this research project seeks to identify a new legal concept capable of specific legal treatment and competent to take in hand the particular issues raised by the phenomenon and the legitimate expectations it may create.

New Study on the Evidentiary Effects of Authentic Instruments & Succession

The evidentiary effects of authentic acts in the Member States of the European Union, in the context of successions

This study was conducted in 25 EU Member States, under the coordination of the Centre for Private International Law at the University Aberdeen. It additionally includes input from the notariats of the CNUE. It sets out the typical domestic types of authentic instruments (and their usual evidentiary effects) arising in successions in the 22 Member States of origin (that allow their creation) and also deals with the ways in which they may interact with Art 59 of Regulation 650/2012 in each of the 25 Member States considered as Member States addressed. The authors looked at the meaning of 'acceptance' and the meaning of public policy in the context of Art 59 650/2012. They made various suggestions for improvements in best practice and for various legislative reforms of the Succession Regulation.

The **abstract** reads:

The EU Succession Regulation (Regulation 650/2012) allows for cross-border circulation of authentic instruments in a matter of succession. Authentic instruments are documents created by authorised authorities which benefit from certain evidential advantages. As this Regulation does not harmonise Member State substantive laws or procedures concerning succession the laws relating to the domestic evidentiary effects of succession authentic instruments remain diverse. Article 59 of the Succession Regulation requires the Member States party to the Regulation to give succession authentic instruments the evidentiary effects they would enjoy in their Member State of origin. The only limits on this obligation being public policy or the irreconcilability of the authentic instrument with a court decision, court settlement or another authentic instrument. This study, which was commissioned by the Policy Department for Citizen's Rights and Constitutional Affairs of the European Parliament upon request of the Committee on Legal Affairs, provides an information resource for legal practitioners

concerning the evidentiary effects of succession authentic instruments in the 25 Member States bound by the Succession Regulation. It also makes recommendations for best practice.

Full study available here (in English, but it is being translated into French and German).

The EU General Data Protection Regulation: a look at the provisions that deal specifically with cross-border situations

This post has been written by Martina Mantovani.

On 4 May 2016, Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation, or GDPR) was published on the Official Journal. It shall apply as of 25 May 2018.

Adopted on the basis of Article 16(2) TFEU, the Regulation is the core element of the Commission's Data protection reform package, which also includes a Directive for the protection of personal data with regard to the processing by criminal law enforcement authorities.

The new measure aims at modernising the legislative framework for data protection, so as to allow both businesses and citizens to seize the opportunities of the Digital Single Market.

First and foremost, businesses will benefit from a simplified legal landscape, as the detailed and uniform provisions laid down by the GDPR, which are directly applicable throughout the EU, will overcome most of the difficulties experienced with the divergent national implementations of Directive 95/46/EC, and with the

rather complex conflict-of-law provision which appeared in Article 4 of the Directive.

Nevertheless, some coordination will still be required between the laws of the various Member States, since the new regime does not entirely rule out the relevance of national provisions. As stated in Recitals 8 and 10, the GDPR 'provides a margin of manoeuvre for Member States' to restrict or specify its rules. For example, Member States are allowed to specify or introduce further conditions for the processing depending, *inter alia*, on the nature of the data concerned (Recital 53 refers, in particular, to genetic, biometric, or health-related data).

Secondly, the new Regulation marks a significant extension of the extraterritorial application of EU data protection law, with the express intent of leveling the playing field between European businesses and non-EU established companies operatig in the Single Market. In delimiting the territorial scope of application of the new rules, Article 3 of the GDPR borrows on the case-law of the Court of Justice regarding Article 4 of Directive 96/45/EC. Pursuant to Article 3(1), the Regulation applies to any processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, 'regardless of whether the processing itself takes place within the Union or not' (along the lines of the *Google Spain* case).

Moreover, Article 3(2) refers to the targeting, by non-EU established controllers and processors, of individuals 'who are in the Union', for the purposes of offering goods or services to such subjects or monitoring their behaviours. This connecting factor, further specified by Recital 23 in keeping with the findings of the Court of Justice in *Weltimmo,* is somehow more specific than the former 'equipment/means' criteria set out by the Directive (cfr. Opinion 8/2010 of the Working Party on the Protection of Individuals with regard to the processing of personal data, on applicable law).

One of the key innovations brought along by the GDPR is the so-called one-stop-shop mechanism. The idea, in essence, is that where a data controller or processor processes information relating to individuals in more than one Member State, a supervisory authority in one EU Member State should be in charge of controlling the controller's or processor's activities, with the assistance and oversight of the corresponding authorities of the other Member States concerned

(Article 52). It remains to be seen whether the watered down version which in the end found its way into the final text of the Regulation will effectively deliver the cutting of red tape promised to businesses.

The other goal of the GDPR is to provide individuals with a stronger control on their personal data, so as to restore consumers' trust in the digital economy. To this end, the new legislative framework updates some of the basic principles set out by Directive 95/46/EC — which are believed to 'remain sound' (Recital 9) — and devises some new ones, in order to further buttress the position of data subjects with respect to their own data.

The power of individuals to access and control their personal data is strengthened, *inter alia,* by the introduction of a 'right to be forgotten' (Article 17) and a right to data portability, aimed at facilitating the transmission of personal data between service providers (Article 20). The data subject additionally acquires a right to be notified, 'without undue delay' of any personal data breach which may result in 'a high risk to [his or her] rights and freedoms' (Article 33).

The effective protection of natural persons in relation to the processing of personal data also depends on the availability of adequate remedies in case of infringement. The Regulation acknowledges that the infringement of the rules on the processing of personal data may result in physical, material or non-material damage, 'of varying likelihood or severity' (Recital 75). The two-track system has been maintained, whereby the data subject is entitled to lodge a complaint against the data controller or processor either with the competente courts (Article 79) or with the competent supervisory authority (Article 77). Furthermore, pursuant to Article 78, any legally binding decision of a supervisory authority concerning the position of a data subject — or the lack of thereof — may be appealed before the courts of the Member State where the supervisory authority is established.

The GDPR additionally sets forth an embryonic procedural regime for proceedings in connection with the alleged infringement of data protection legislation.

In the first place, it introduces two unprecedented special rules of jurisdiction, the application of which should not be prejudiced, as stated in Recital 147, by 'general jurisdiction rules such as those of Regulation (EU) No 1215/2012', ie, the

Brussels I*a* Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (by the way, the primacy of the GDPR over Brussels I*a* could equally be asserted under Article 67 of the latter Regulation). Article 79 of the GDPR provides that the data subject who considers that his or her rights under the Regulation have been infringed, may choose to bring proceedings before the courts of the Member State where the controller or processor has an establishment or, alternatively, before the courts of the Member State where the data subject himself or herself resides, unless the controller is a public authority of a Member State acting in the exercise of its public powers. Article 82(6) clarifies that the courts of the same Member State have jurisdiction over actions for compensation of the damage suffered as a result of the said infringements.

Article 81 of the GDPR deals with *lis pendens*. If proceedings concerning the same activities are already pending before a court in another Member State, any court other than the one first seised has the discretion (not the obligation) to stay its proceedings. The same court may also decide to decline jurisdiction in favour of the court first seized, provided that the latter court has jurisdiction over the proceedings in question and its law permits the consolidation of related proceedings.

Finally, the Regulation includes a provision concerning the recognition and enforcement of 'any judgment of a court or tribunal and any decision of an administrative authority of a third country requiring a controller or processor to transfer or disclose personal data'. Pursuant to Article 48, such judgments or decisions may be recognised or enforced solely on the basis of an international agreement, such as a mutual legal assistance treaty, in force between the requesting third country and the Union or a Member State..

This provision mirrors the stance recently taken by some Member States and their representatives in connection to an important cross-border dispute, where a similar question had arisen, which was in fact the object of different solutions on the two sides of the Atlantic.

In fact, in the light of the approach taken by US law enforcement authorities, search warrants seeking access to personal data stored in European data centres are regarded as a form of compelled disclosure, akin to a subpoena, requiring the recipient of the order to turn over information within its control, irrespective of

the place in which data is effectively stored. What matters is the sheer existence of personal jurisdiction over the data controller, that is the ISP who receives the warrant, which would enable criminal prosecutors to unilaterally order seizure of the data stored abroad, without necessarily seeking cooperation thorough official channels such as Mutual Legal Assistance Treaties.

Article 48 of the Regulation (EU) 2016/679 may accordingly be read as the EU counter-reaction to these law enforcement claims.